

TEAM

**V INTER AMERICAN SUSTAINABLE DEVELOPMENT LAW MOOT
COURT COMPETITION, 2015**

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA



CASE NO. 042114/RLJ/0415

THE RURAL COMMUNITY OF CANDELA

(PETITIONER)

v.

THE FEDERATION OF CLONALIA

(DEFENDANT)

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STATEMENT OF FACTS

SITUATION OF REPUBLIC OF MARSILI

Republic of Marsili is an island nation located 280 miles from the Federation of Clonalia, in the Pacific Ocean. It has an area of 358 sq. km, measured from low sea. It gained independence from Clonalia and is now an independent centralized democratic republic. Theodore is the capital of Marsili comprising approx. 80 per cent of the total land area, and consisting of 83 per cent of the population. The unique topography of the island has meant that the maximum height of the entire territory is 2.3 meters, which makes it the country with the lowest height above the sea level. The country's economy is fishing and farming based and exhibits features of extreme poverty.

In 2013, Marsili's main island, accounted for a loss of 78 sq. km of its territory, because of the receding sea line due to rising sea levels, depicting shrinking coastline by 16 km accounting for 27 percent of national territory and 38 percent beaches. The remaining territories of the main land suffer from drastic weather conditions, making it unfit to be used for its major economic purpose, leaving the country in such a state that it cannot meet the demand for basic agricultural products, and has to import about 60 per cent of such produce. The country is also facing a decline in population, losses amounting to almost 50 per cent of the population. The surviving population has faced severe displacement, with almost 10 per cent population living in temporary camps and outskirts, waiting to be relocated. In the other islands, almost 11 per cent of the population is no longer there. This has also resulted in a mass exodus of people of Marsili, especially to Clonalia which resulted in Clonalia imposing visa requirement from February 2011. Marsili has also suffered 47 natural hazards in the past decade, which has meant that the economy of the country had to direct a major portion to the reconstruction; however drastic conditions of weather meant lesser investment in reconstruction programs. The instability due to imbalance has also meant that there are constant riots and revolts, which requires expenditure in military to ensure security, creating more pressure on the already stressed economy. Such existing conditions made the island authorities often seek the international community for help, including asking the UN to help maintain the minimum humanitarian standards in the country, within the temporary camps. The President of Marsili recognized the need to prevent the disappearance of his country to the international community.

The Rural Community of Candela, residing in the most affected area of Marsili, organized a citizen dialogue group which got in contact with the international NGO Climate Change Action (CCA) for resolving the issue. The UN Reports suggested that Marsili being the country with the lowest height above sea level was most prone to get affected by the rising sea levels, caused by climate change, estimating losses of up to 89 per cent of its territory. It further estimated that Marsili will be fully submerged by 2025. Similar results were estimated for other island territories caused by melting glaciers, loss of oceanic and terrestrial natural barriers, and new climatic conditions that are emerging worldwide, putting the life of 62 million people at risk. They further estimated that within the next three decades over 80 per cent of these island territories will be submerged. Pursuant to the posed risk, the President of Marsili devised for a national debate on devising a legal strategy to start programming an organized

exodus of people, after a Commission of Climate Experts concluded that the disappearance of island Marsili is inevitable, and hence the territory is not livable for all legal and political reasons.

GLOBAL CLIMATE CHANGE GROUP REPORTS

Internationally, the factum of Climate Change was being realised, and the United Nations Research exhibited that Climate change was a global phenomena caused by anthropogenic activities, especially emission of Green House Gases. The impact of the same was being realised in the form of rising sea level, loss of ecosystems, melting of glaciers, desertification, etc.

These ramifications resulted in the international community agreeing on the UNFCCC, 1944 aimed at stabilizing the concentration of green house gases at levels preventing anthropogenic interference at national levels. The parties to this convention also agreed on creating a protocol with national emission standard limits being prescribed, and signatories included Clonalia and Marsili. The Kyoto Protocol prescribed reduction of emission of six types of green house gases in an approximate percentage of at least 5 per cent below the existing standards of 1990. This protocol defined standards on two levels of high and low historical aggregates of emissions, and was ratified by Marsili. Clonalia argued that the countries who were not historic emitters assumed no specific reduction commitments even though in the future most countries would produce more GHG emissions, hence not ratifying it, however, it claimed responsibility in a statement to international community to undertake measures to achieve similar or comparable results to those defined in the protocol.

The subsequent reports presented to the UN depicted evidences of catastrophic rise in the atmospheric concentration of green house gases implying an irreversible change in the global climatic conditions, directly attributable to human activities most evidently the use of fossil fuels. The further reports presented depicted an estimated rise in the sea level by 0.58 meters, however the actual rise was more than 1.59 meters in the average level of the oceans, this created a havoc in the international community, especially island nations.

The reports further depicted that the historic emitters were attributable for 53 per cent of the emissions, with Clonalia being the highest emitter contributing for 21 per cent emissions historically, and currently contributing for 18 per cent of total emissions, while the same values for Marsili were 0.4% and 0.3% respectively.

FACTUAL BACKGROUND OF FEDERATION OF CLONALIA

Clonalia has been an historic emitter of GHGs and currently accounts for 41 per cent of emissions, making it the highest emitter of GHGs in the world. Within Clonalia, 5 states initiated action against the Ministry of Environment of Clonalia, alleging that MEC has not taken actions to regulate GHG emissions at the federal level. This involved challenging Article 56 of Law 34 of 1993 that defines the main function of MEC. Their argument has been that when scientific evidence shows that GHGs emissions are directly related to causing climate change, which is indeed leading to generating environmental consequences that put public health and general welfare at risk jeopardising the existing eco systems and posing excessive risks to the inhabitants. This law suit was rejected at the lower court proceedings, and the Supreme Court concluded that the possibility to amend the potential risk to public health or general welfare produced by green house emissions is marginal with this type of partial regulation. It further stated that the public

entity regulates only a fraction of effects of Green House Gases making this a political decision with no real legal effect, and hence the forum to take action is the international political level and not the national judicial level. The Supreme Court also reiterated MEC's statement denying the presence of any causal link between climate change and emissions of green house gases, hence implying that the environmental intervention of the entity not to be required, but the same to be random or discretionary. To this the response of the other party stated that Clonalia is reluctant to regulate the GHG emissions that are causing the climate change, threatening their own nationals and the international community, the failure to act after being presented with clear and convincing evidence is not a discretionary act of the public entity, but a State act and public act, hence accrues international responsibility for the same. Denying the impact on human life is not a solution, but a violation of human rights as it denies the possibility to undertake satisfactory life projects. The failure to act is a form of state intervention.

This was followed by CCA filing a nullity action against the administrative decision of MEC stating that it should not regulate the emission of GHGs. The claim was rejected as it was stated that it was a reiteration of an already decided legal dispute, and hence fell outside the prescribed jurisdiction.

Another international NGO, Amnesty Environmental reported that Clonalia lacks appropriate legal framework to regulate the issue of climate change and inactivity and lack of legal response have been the most notorious of all national legislations.

Parallel to this, Clonalia started oil exploration in coastal zones, resulting in finding its largest oil reserve. This estimated that the oil production in Clonalia could rise from 4 million to 12 million barrels per day in 2016, giving Clonalia energy independence along with the capacity to export 4 million barrels per year beginning from 2016. The President of Clonalia looked at this as the greatest energy transformation of the country in recent decades.

PETITION BY RURAL COMMUNITY OF CANDELA THROUGH CCA

In 2011, CCA decided to represent 52 families of Rural Community of Candela of Marsili. In 2013, a group of 23 families of this community entered Clonalia in an irregular manner without proper immigration records. In 2014, in Clonalia they initiated a petition for recognition of their status as environmental refugees under Law 715 of 1989 (Migration and Asylum Law) under the grounds of disappearance of islands of Marsili, posing risk to life and integrity of these people. Clonalia is party to the Refugee Convention 1951 and the additional protocol of 1967, and the same has been included in the national legislation of Clonalia, further stating that the same shall guarantee protection to any foreign person seeking the status of refugee or seeking asylum. This law explicitly proclaimed that no person seeking such status may be returned to their country of origin, where their life, safety or freedom would be at risk by any of the causes. Denial at border and extradition are considered as forms of return of person.

The Foreign Ministry of Clonalia denied considering the application of these 23 families, they were even denied presenting their reasons for request. The FM stated that the environmental issues should not be mixed with migration issues, hence the application was not a valid application, further stating that hence the administrative procedures should further be aimed at expulsion of these people.

In March 2014, FM ordered expulsion of these families, the arrest warrant included children and the elderly, initiating deportation. Being informed of the same, 8 families fled to the Embassy of Marsili

taking refuge there, while others fled. About half were captured and taken to a temporary prison, while deportation proceedings began. The national laws of Clonalia permit that the administrative decisions are subject to appeal before the FM, pursuant to which, appeals were made and the FM reaffirmed the decision by reiterating the arguments already submitted, and then the same was made public.

The same was seen by the Ambassador of Marsili as an act of state of persecution according to the Refugee Convention, to which he further added that it entails international responsibility, as it endangers life of the petitioners, hence justifying giving refuge to the families in the Embassy, until the decision of international bodies.

The resulted political tension in Clonalia meant that the President designated a National Expert Committee (NEC) to propose the possible future link between migration and environmental issues, and answer whether the same is a ground for granting asylum. The committee submitted its proposal directly to the FM, whereby the FM reiterated the previous decisions on grounds of National Security risk. The CCA tried obtaining the text of the proposal but was denied the same by the FM on national security grounds. The NGO appealed the FM's decision, and the decision was upheld stating that the information on migration is directly linked to National Security issues.

After the exhaustion of national remedies before CCA, resort was made to the Inter American Commission on Human Rights on behalf of members of Rural Community of Candela on grounds of violation of their human rights. They stated that Clonalia violated American Convention on Human Rights in conjugation with protocol on San Salvador and the principles of International Refugee Law. CCA further asked the commission to issue precautionary measures to protect the inhabitants of rural community of Candela. They supplemented it by stating that since the failure to act has been a historic constant, hence there is a lack of will on their part to take required actions, which is directly affecting the ability of members of the rural community of Candela to survive and fully enjoy their human rights.

PROCEEDINGS BEFORE THE INTER AMERICAN SYSTEM OF HUMAN RIGHTS

The IACHR granted precautionary measures, and decided to declare the case admissible for the purposes of examining the alleged violations of American Convention and Protocol of San Salvador. It also requested the Court in its decision to demand Clonalia to modify its national laws, establish a policy of assistance to compensate the members of rural community of Candela, and offer part of its territory for the environmental refugees that will have to leave the island that is sinking.

Clonalia answered this by refuting the presence of an obligation to grant asylum under the Inter American System of Human Rights, further stating that the obligations on environmental issues are towards its national citizens and not to persons of other country. It also presented objection on admissibility of the case, by stating that the right to a healthy environment is not judiciable through legal mechanisms here. Also, there is no right of asylum or refugee status, like the petitioners argue. The Commission rejected this preliminary objection, and imposed a series of recommendations to rectify these violations also requesting modifications to the internal legislation of the country to address the issue of climate change. The IACHR further decided to refer the case to Inter American Court of Human Rights, due to a lack of response from Clonalia against the recommendations made by the IACHR. The Court has stated it will hold a public hearing on March 2015 to discuss the points and arguments that the Court will have to consider in its decision.

Clonalia and Marsili have ratified the American Convention and accepted the contentious jurisdiction. The IACHR submitted the case to the Court for the present adjudication.

LEGAL ANALYSIS

STATEMENT OF JURISDICTION

Within the Inter-American Human Rights System, the act of filing an application institutes the proceedings in a contentious case. Once such a tribunal is thereby seized of the matter, no subsequent act of state party to those proceedings can retroactively deprive it of its jurisdiction.¹

Federation of Clonalia ratified the American Convention on Human Rights² on August 1, 1978 and accepted the contentious jurisdiction of the Court on June 28, 1982. The Republic of Marsili ratified the Convention³ on May 7, 1984 and accepted the contentious jurisdiction of the Court on September 14, 1985.⁴ The ratification and acceptance of jurisdiction ensures admissibility of the present application under Article 62 of the Convention.

Article 61(1) of the American Convention on Human Rights states that- the state parties and the Commission shall have the right to submit a case to the Court.⁵ In the present matter, the Commission found the case admissible to the Court for the purposes of examining the alleged violations of American Convention on Human Rights⁶ hence the present matter is admissible under Article 61 of the Convention. Also, the Inter-American Commission on Human Rights also found the case admissible for the purposes of examining the alleged violations under the

¹ Observations of the Inter American Commission on Human Rights concerning the Return of Application in the Case of the Constitutional Court v. Peru (11.760), and the Jurisdiction of the Inter American Court of Human Rights.

² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

³ American Convention on Human Rights, 1969.

⁴ Compromis, ¶ 71.

⁵ Article 61 (1) of the American Convention on Human Rights, 1969.

⁶ Compromis, ¶ 65.

Convention.⁷ The preliminary objection raised to the present petition stating that the ‘right to a healthy environment’ is not judiciable is not valid, as ‘right to a healthy environment’ is a Human Right⁸.

‘The protection of the environment is a vital part of the human right doctrine, for it is a *sine qua non* for various human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.’

As a violation of Human Rights⁹ is admissible in the Inter American Court of Human Rights, hence the present petition is admissible.

This is even supplemented by the fact that on October 15, 2014 in the Report on the Merits of the Case No. 11/24 the Commission rejected the preliminary objection raised by the Federation of Clonalia and imposed a series of recommendations to rectify the violations committed against the rural community of Candela and requested modifications to the internal legislation of the country to address the issue of climate change.¹⁰

EXHAUSTION OF DOMESTIC REMEDIES

Article 46(1) (a) of the Convention¹¹ requires exhaustion of domestic remedies prior to filing a petition with the Inter-American Court.

⁷ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

⁸ *Case Concerning the Gabčíkovo-Nagymaros Project*, [1997] ICJ Reports 7.

⁹ Article 5, 7, 8, 13, 21, 22 and 26 of the Inter American Convention on Human Rights, 1969.

¹⁰ *Compromis* ¶69.

¹¹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

After the non-consideration of refugee application by the Foreign Ministry on February 28, 2014¹² the administrative decision to not grant the refugee status and the order of deportation were appealed by the Climate Change Action (CCA). The decision was reaffirmed reiterating the same arguments.¹³ This followed the President's decision to designate a National Expert Committee (NEC) to study the disputed decision of the FM in the public¹⁴. The FM further concluded that the Committee had given arguments defending the decision already given¹⁵. When the CCA tried to obtain the text of the NEC proposal, it was denied by the FM. This was further appealed to, but the decision was upheld.¹⁶

The CCA found that there was exhaustion of remedies, as both the national legislation on climate change regulation as well as the Foreign Ministry had refused any protection to members of rural community of Candela.¹⁷

As there is an exhaustion of domestic remedies hence the present petition at the Inter American Court is justified.

TIMELINESS OF THE SUBMISSION

Article 46(1) (b) of the American Convention¹⁸ requires the petition to be filed within 'six months from the date on which the party alleging violation of his rights was notified of the final judgment'.

¹² Compromis, ¶52.

¹³ Compromis ¶54.

¹⁴ Compromis, ¶56.

¹⁵ Compromis, ¶58.

¹⁶ Compromis, ¶59.

¹⁷ Compromis, ¶60.

¹⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

In the present matter, the petition filed by CCA is within the permissible time limits of 6 months. The NEC's Report was submitted on July 7, 2014¹⁹, which was further appealed upon and the appeal was upheld.²⁰

By 10 September, 2014 the arguments in the petition filed by CCA had begun²¹, which was within 6 months of being notified of the final judgment.

Hence, the present petition has been filed within the permitted time limit under the American Convention.

¹⁹ Compromis ¶57.

²⁰ Compromis, ¶58.

²¹ Compromis ¶61.

PROCEDURAL ARGUMENTS

PRECAUTIONARY MEASURES

In the present matter, the Precautionary Measures granted by the American Convention on Human Rights would not be complied with if this Court denies the request for Provisional Measures.²² The Commission had granted precautionary measures after considering that there are conditions of need, and finding that the measures would be required for the protection of the Rural Community of Candela.

PROVISIONAL MEASURES

Article 63(2) of the American Convention²³ empowers the Inter-American Court to order provisional remedies in cases of ‘extreme gravity and urgency, and when it becomes necessary to avoid irreparable damage to persons’.

In the present matter, the islands of Marsili are under a threat of disappearance. This threat is aggravated by extreme weather and crisis conditions existing especially in those areas where the rural community of Candela resides.²⁴ This has entailed on the rural community of Candela, a threat to right to life, the most basic human right guaranteed under the American Convention on Human Rights.²⁵ As there is a situation of extreme gravity²⁶ in the present context, and there is a need to avoid irreparable damage to persons, hence it is humbly submitted to the Honorable Court to kindly admit the present petition.

²² Compromis, ¶ 65.

²³ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

²⁴ Compromis, ¶ 29.

²⁵ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

²⁶ *Matter of Monagas Judicial Confinement Centre* 2009 Order of the Inter-Am. Ct. H.R.

ISSUES RAISED

The Rural Community of Candela respectfully asks the Honorable Court the following-

1. Whether Federation of Clonalia is internationally responsible for violating the International Environmental Law Principles under the Inter American Human Rights system?
2. Whether Federation of Clonalia is internationally responsible for violating the International Refugee Law Principles under the Inter-American Human Rights system?

SUMMARY OF ARGUMENTS

1. FEDERATION OF CLONALIA IS INTERNATIONALLY RESPONSIBLE FOR BREACHING INTERNATIONAL ENVIRONMENTAL LAW.

Activities of Clonalia involving emission standards not in compliance with the agreed mandate under the United Nations Framework Convention on Climate Change violate the international environmental law principles. Being the highest emitter of Green House Gases, Clonalia assumes the international responsibility for the melting polar caps and the caused Global Warming the results of which are catastrophic rise in sea levels. The rising sea levels are further responsible for receding territorial boundaries of island nations like Marsili to such an extent that such island nations are under a threat of disappearance. The duty is especially owed towards Marsili as Marsili is an island nation with the lowest height above the sea level. So, for the caused emissions and the non-regulation of the same, Clonalia is internationally responsible, and owes a duty towards Marsili to compensate for the catastrophic consequences Marsili is suffering.

2. FEDERATION OF CLONALIA IS INTERNATIONALLY RESPONSIBLE FOR THE BREACH OF INTERNATIONAL HUMAN RIGHTS LAW.

Clonalia was under an obligation to ensure compliance with the Refugee Law Principles which mandates that everyone has a right to seek refugee status, which meant that the action of Clonalia involving non-consideration of the Refugee Application of the Rural Community of Candela was unlawful. Further, the basic human rights guaranteed to the aliens entail that they have a right to liberty, judicial protection, and dignity of life. So the activities of Clonalia involving arrest and detention followed by deportation of the members of Rural Community of Clonalia seeking the Refugee status, was violative of the American Convention on Human Rights, 1969; especially because the island of Marsili, their country of origin is in a threat of disappearance, so returning them to the country of origin is placing their fundamental rights at risk. Hence, Clonalia is also responsible for breaching international human rights standards.

ARGUMENTS ON THE MERIT

I. FEDERATION OF CLONALIA IS INTERNATIONALLY RESPONSIBLE FOR VIOLATING THE INTERNATIONAL ENVIRONMENTAL LAW.

1. CLONALIA IS INTERNATIONALLY RESPONSIBLE FOR THE BREACH OF ARTICLE 75 OF THE AMERICAN CONVENTION BY NOT COMPLYING WITH UNFCCC²⁷ OBLIGATIONS.

Federation of Clonalia being a historic emitter of Green House Gases (GHG) currently emits about 41% of GHGs in the world, and is the highest emitter of GHGs.²⁸ This has led to consequences such as islands with low height above the sea level are under a threat of being submerged.²⁹ This direct and proximate link can also be inferred from the intention behind drafting the Convention³⁰ as was established in the *Trial Smelter Case*.³¹

a) Clonalia was under an obligation to comply with the Commitments under Article 4 of the UNFCCC³², which required Clonalia to control its emission levels within permissible limits.³³

Clonalia is internationally responsible for not undertaking measures to achieve similar or comparable results to those defined in Kyoto Protocol with respect to emissions³⁴ despite having claimed the responsibility to achieve similar or comparable standards.

²⁷ United Nations Framework Convention on Climate Change, 1992.

²⁸ Compromis, ¶ 33.

²⁹ MICHAEL B. GERRARD AND GREGORY E. VANNIER, THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 425 (Cambridge University Press 2013)

³⁰ Preamble, UNFCCC 1992.

³¹ *United States v. Canada* 3 RIAA 1907 (1941) p. 1965.

³² Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORIC J. INT'L LAW 6, 5(2008).

³³ Article 14, Vienna Convention on the Law of Treaties, 1969.

³⁴ Compromis, ¶15.

b) Clonalia violated Article 4(2) of UNFCCC by not adopting National Policies³⁵ and taking corresponding measures on reducing GHG emissions.³⁶ Article 2 of the UNFCCC indicates that atmospheric concentrations of GHGs should be stabilized at safe levels, and this is a state responsibility.³⁷ The actions of Clonalia involving repeated inaction towards mitigating its own GHG emissions, at the Lower Courts³⁸ and then at the Supreme Court³⁹ were inconsistent with the obligations towards achieving the objective⁴⁰ of the Convention.⁴¹ The failure to act has been a systematic and historical constant, implying a lack of will by the Federation to take policy and legal measures to reduce or alter their pattern of pollution and GHG emissions, to which they entail an international responsibility.⁴²

This stands in violation of Article 26 of the American Convention⁴³ which requires state parties to ensure compliance with international obligations to ensure progressive development.

c) Article 4(8)⁴⁴ of UNFCCC requires parties to take measures to minimize the impact of emissions. Clonalia violated Article 4(8)⁴⁵ of UNFCCC by not giving full consideration⁴⁶ to the special needs⁴⁷ of the Republic of Marsili, the country with lowest height above sea level. Being

³⁵ WILLIAM C.G. BURNS AND HARI M. OSOFSKY, *ADJUDICATING CLIMATE CHANGE : STATE, NATIONAL AND INTERNATIONAL APPROACHES* 341 (Cambridge University Press)

³⁶ RODA VERHEYEN, *CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION, DUTIES AND STATE RESPONSIBILITY* 56-58 (Elsevier 2004)

³⁷ Article 2, UNFCCC 1992.

³⁸ Compromis, ¶ 38.

³⁹ Compromis, ¶38 and ¶ 39.

⁴⁰ *Supra* 8, at 79; D. Bodansky, *The UN Framework Convention on Climate Change: A Commentary* 18 YJIL 451-558 (1993); Article 2 of UNFCCC, 1992.

⁴¹ Article 4(2) clause (a) of UNFCCC, 1992.

⁴² Compromis, ¶ 64.

⁴³ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

⁴⁴ Along with 3.14 of Kyoto Protocol.

⁴⁵ J. Barnett and S. Dessai *Articles 4.8 and Article 4.9 of UNFCCC: Adverse Effects and the impacts of Response Measures* Climate Policy Volume II Issue III p. 231-39.

⁴⁶ Article 3 (2) of UNFCCC, 1992.

⁴⁷ Possible adverse effects of Sea level rise on islands and coastal areas, particularly low lying coastal areas (22nd December 1989) General Assembly Resolution 44/206.

a country with lowest height above the sea level, it was under a threat of facing adverse effects of climate change⁴⁸.

Under the Vienna Convention on the Law of Treaties,⁴⁹ Clonalia was under an obligation to comply with the incurred obligations under the treaty that it had ratified otherwise it would defeat the object and purpose of the Convention. Hence, Clonalia is internationally responsible for breaching the obligations incurred under the UNFCCC.

The non compliance with the obligations under the Vienna Convention entail an international responsibility under Article 75 of the American Convention on Human Rights, hence Clonalia is internationally responsible for the breach of UNFCCC obligations under Article 75 of the American Convention.

2. CLONALIA VIOLATED ARTICLE 1 AND ARTICLE 24 OF AMERICAN CONVENTION BY BREACHING INT'L ENVIRONMENTAL LAW OBLIGATIONS.

Federation of Clonalia was under an obligation to comply with the General Principles of International Environmental Law⁵⁰ derived from the principles of International Law.⁵¹ These obligations accrue with respect to maintaining emission standards⁵² for the protection of environment.⁵³

⁴⁸ Compromis ¶ 5; Article 1.1 UNFCCC 1992.

⁴⁹ Article 26 and Article 31, Vienna Convention on the Law of Treaties, 1969.

⁵⁰ M. Pallemmaerts, *International Environmental Law from Stockholm to Rio: Back to the Future? In Greening International Law* (ed. Philip Sands) London 1993 pp. 1.

⁵¹ MALCOLM N. SHAW, *INTERNATIONAL LAW* 851 (Cambridge University Press 2008 VI Edition).

⁵² Article 4 UNFCCC 1992.

⁵³ Article 2 UNFCCC 1992.

A. Threat of Irreversible Change

The report of Global Climate Change Group (G2C2)⁵⁴ depicted that the main cause of climate change is human activity, primarily the emission of green house gases⁵⁵; whereby the rising concentrations of CO₂ and other GHGs is causing irreversible change in the global climatic conditions.⁵⁶ Clonalia violated the *Precautionary Principle*⁵⁷ by not taking the due precautions when the threat of irreversible climate change⁵⁸ existed and defying it by stating that there was a lack of scientific evidence.⁵⁹

B. Threat of disappearance of Islands of Marsili

The 2014 Report of G2C2 predicted that Marsili will be fully submerged by 2025⁶⁰. The conduct of Clonalia in violation of International Environmental Law is attributable to causing the threat of disappearance⁶¹ to the islands of Marsili.⁶²

i. Territorial Integrity and Sovereignty

Marsili has already lost 78 square kilometers of land and has accounted for loss of 27 per cent of its territory. The receding coastlines⁶³ and submerging lands are posing a threat to the territorial integrity⁶⁴ and sovereignty⁶⁵ of the Republic of Marsili.⁶⁶

⁵⁴ Report of 2014, G2C2.

⁵⁵ Compromis ¶ 17.

⁵⁶ Intergovernmental Panel on Climate Change Fourth Assessment Report: Climate Change 2007.

⁵⁷ Article 3.3 UNFCCC 1992; Principle 15 of Rio Declaration 1992.

⁵⁸ IPCC TAR SYR (2001), Watson R.T. *Climate Change 2001: Synthesis Report* Third Assessment Report of the IPCC (Cambridge University Press)

⁵⁹ Compromis ¶ 39; Article 3.3 of UNFCCC 1992.

⁶⁰ Compromis ¶ 30.

⁶¹ Preamble, UNFCCC 1992.

⁶² Compromis, ¶ 30.

⁶³ Compromis, ¶ 22.

⁶⁴ Declaration on Principles in International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations, General Assembly Resolution 2625 (XXV).

⁶⁵ Article 2, United Nations Charter; Principle 21 of Stockholm Declaration 1972; Principle 2 of Rio Declaration 1992.

⁶⁶ Compromis, ¶ 22.

The diminishing territory also implies that the ancillary rights, including those of access to Natural Resources within permissible limits (Exclusive Economic Zones)⁶⁷ are also being extinguished, in violation of Permanent Sovereignty over Natural Resources⁶⁸.

The constant flooding and acidification due to increasing salt concentration has made the land of Marsili unfit for food cultivation.⁶⁹ Currently, the country cannot meet the demand for basic agricultural products and has to import 60 per cent of the required produce.⁷⁰

Under Article 1 of the American Convention on Human Rights⁷¹, Clonalia is under an obligation to respect the rights of Marsili without any discrimination.⁷²

The impact of actions of Clonalia is affecting the capacity of Marsili to meet its own demands in such a way that there are catastrophic losses suffered by the island state.⁷³

Also, the responsibility to ensure that the activities within the jurisdiction of one state do not cause damage to the environment of other states⁷⁴ is being breached by the actions of Clonalia.⁷⁵

In the *Island of Palmas Case*⁷⁶ it was held that there is an obligation of all states, to protect the rights of other states in particular their right to integrity and inviolability in peace and war.

In *Corfu Channel*⁷⁷ it was stated that the states are required to not allow its own territory to be used for acts contrary to the rights of other states.

⁶⁷ Article 56 and Article 73 United Nations Convention on Law of Seas, 1982.

⁶⁸ General Assembly Resolution 1803 (XVII) , 1962 on Permanent Sovereignty over Natural Resources.

⁶⁹ Compromis, ¶ 23.

⁷⁰ Compromis, ¶ 23.

⁷¹ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

⁷² Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

⁷³ Compromis, ¶ 24.

⁷⁴ Second part of Principle 21 of Stockholm Declaration 1972 and Principle 2 of Rio Declaration 1992.

⁷⁵ Contention A.1 of the Memorandum.

⁷⁶ 2 RIAA 829 PCA 1928; *Advisory Opinion on the use of Nuclear Weapons* 1996 ICJ Reports 1996 226.

In *Lac Lanoux Arbitration*⁷⁸ it was stated that states are under an obligation to consider the rights and interests of others when exercising its rights.

In the present case, Clonalia was under an obligation to consider the rights of Marsili while exercising its own rights. Clonalia violated the rights of Marsili not only by not controlling its emission standards, but also by further disregarding its needs and involving itself in massive oil exploration, which implied more reliance on burning of fossil fuels for energy production and hence more GHG emissions.⁷⁹ As Clonalia did not consider the same, hence it is internationally responsible for violating Article 1 of the ACHR and its persistent⁸⁰ actions. The actions of Clonalia were also in violation of the principle of Sustainable Development⁸¹ due to its current emission standards⁸² not complying with the international mandate.

ii. Population Displacement

Marsili has accounted for a loss of 50 per cent of population due to adverse climatic conditions faced by it, resulting from the activities of Clonalia. More than 10 per cent of the remaining population is living in temporary camps in the outskirts of Samantha, waiting to be relocated.⁸³ Clonalia's actions resulting in threat to territorial integrity of Marsili is also accountable for loss of population and population displacement.⁸⁴ The loss of population and the further threat created by disappearance of island has meant that the lives of thousands of people is under a risk.

⁷⁷ ICJ Reports 1949, 4 page 22.

⁷⁸ 12 RIAA 281 1957 at 316.

⁷⁹ Compromis, ¶43.

⁸⁰ Compromis, ¶44 and ¶45.

⁸¹ Brundtland Report *Our Common Future* 1987 by the World Commission on Environment and Development; Principle 4 and Principle 1 of Rio Declaration, 1992.

⁸² Contention A.1 of the Memorandum.

⁸³ Compromis ¶24.

⁸⁴ Compromis ¶ 24.

The right to life⁸⁵ of the population is under a grave danger, as the disappearance of island has been estimated to be inevitable.⁸⁶ Hence the actions of Clonalia are attributable to violation of basic human right principles under the American Convention on Human Rights⁸⁷, and for placing the remaining population under a threat of death.

iii. Breach of other international environmental law principles

a. *Co-operation*⁸⁸

Principle 24 of Stockholm declaration proclaims that ‘international matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, on equal footing’. To ensure this common standards have been prescribed to be complied with.⁸⁹ Activities of Clonalia not in compliance with the prescribed emission standards⁹⁰ entail non-cooperation, to which it entails international responsibility.

b. *Prevention*

The ESPOO Convention on the Environmental Impact Assessment in a Transboundary Context⁹¹ mandates the need to develop anticipatory policies of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context.⁹²

⁸⁵ Article 4 of American Convention on Human Rights, 1969.

⁸⁶ Compromis ¶ 32.

⁸⁷ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

⁸⁸ World Charter for Nature, 1982; Principle 7 of Rio Declaration 1992; Article 197 of UN Convention on the Law of the Sea 1982; Article 20(2) of Convention on Bio Diversity, 1992.

⁸⁹ Richard B. Bilder and Daniel M. Bodansky *International Law and the Environment* The American Journal of International Law. Vol 88. No. 2 April 1994 pp. 408-411.

⁹⁰ Compromis ¶ 33.

⁹¹ ESPOO Convention, 1991.

⁹² MICHAEL B. GERRARD AND GREGORY E. VANNIER, *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND CHANGING CLIMATE* (Cambridge University Press 2013)

The preventive approach requires each state to exercise ‘due diligence’, which means to act reasonably and in good faith and regulate public and private activities subject to its jurisdiction or control that are possibly harmful to any part of the environment. This principle does not impose absolute duty to prevent all harms but an obligation on each State to prohibit activities that could cause significant harm to the environment.⁹³

Principle 19 of the Rio Declaration proclaims that ‘states shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant transboundary effects and shall consult with those states at an early stage and in good faith’.⁹⁴

As in the present context, the activities of Clonalia involving GHG emissions were bound to have a transboundary effect⁹⁵ due to their very nature, this meant that Clonalia was under an obligation to ensure that the effect was regulated upon. As relevant steps were not taken by Clonalia to regulate the effect, and adverse consequences were faced by Marsili, hence the responsibility for the same is borne by Clonalia.

iv. Disintegrating Economic Situation

The threat of disappearance of island has been intensified by the worsened environmental conditions of Marsili⁹⁶, which has meant that the basis of economy-fishing and farming⁹⁷ are both facing catastrophic effects.

⁹³ S. SHANTHAKUMAR, INTRODUCTION TO ENVIRONMENTAL LAW (Lexis Nexis Butterworths Publication II Edition 2010)

⁹⁴ Rio Declaration, 1992.

⁹⁵ Ceiss Flinterman, Barbara Kwiatkowska and Johan G. Lammers *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* American Journal of International Law, Vol. 82 No. 1 (January 1988) pp. 197-200.

⁹⁶ Compromis ¶26.

Climate change related impacts have a range of implications, both direct and indirect for the effective enjoyment of human rights including inter alia the right to life, the right to adequate food, the right to the highest attainable standard of health (recognized as fundamental right)⁹⁸, the right to adequate housing, the right to self determination and human rights obligations related to access to safe drinking water and sanitation.⁹⁹ Environmental degradation is exacerbating destitution and desperation, causing a negative impact on the realization of basic rights.¹⁰⁰ In *Inuit Petition to the Inter American Court on Human Rights*¹⁰¹ it was stated that-the impacts of climate change, caused by acts and omissions of proponent nation violates the fundamental rights of those affected by the changed conditions. The rights so violated include the right to property, right to preservation of health, right to life, right to physical security along with right to means of subsistence, right to residence, and inviolability of home; and this entails international responsibility.

In the present context the implication of the actions of Clonalia are having disastrous impact on not only the territorial integrity of Clonalia, but also on its basis of survival for Marsili¹⁰². The provision of emission standards is to ensure that equal duty and equal obligations are ensured. So, when one country does not comply with them, it violates the principle of equality by depriving the others of their right to a healthy environment.¹⁰³ Also, the non-compliance breaches the duty to respect the rights of other state parties to the Convention.¹⁰⁴ Hence, actions

⁹⁷ Compromis ¶ 7.

⁹⁸ Preamble of Constitution of World Health Organization, 1948.

⁹⁹ UNHRC Resolution 10/4 (25 March 2009), Reprinted in UN Human Rights Council, Report on its 10th Session, page 65-66, 14 UN Doc A/HRC/10/L.11.

¹⁰⁰ UNHRC Resolution 7/14 (27 March 2008), Reprinted in UN Human Rights Council, Report on its 7th Session, page 39-45, UN Doc A/HRC/7/78.

¹⁰¹ Inter-Am. OEA/Ser.L/V/II.108, Doc. 62 (2000).

¹⁰² Compromis, ¶ 7.

¹⁰³ Paul Baer, *Equity, Green House Gas Emissions and Global Common Resources* Part V, Development and Equity Journal pp. 393-415.

¹⁰⁴ Article 1, American Convention on Human Rights, 1969.

of Clonalia stand in breach of Article 1 and Article 24 of the American Convention on Human Rights.

3. CLONALIA IS INTERNATIONALLY RESPONSIBLE TO COMPENSATE FOR THE LOSSES CAUSED TO MARSILI UNDER ARTICLE 10 OF THE AMERICAN CONVENTION.

The *Polluter Pays Principle*¹⁰⁵ makes the polluter liable to pay compensation and the costs to remedy the environmental harm caused.¹⁰⁶ Article 31¹⁰⁷ of the ILC Draft Articles¹⁰⁸ states that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Article 10¹⁰⁹ of the American Convention on Human Rights¹¹⁰ states that- every person has the right to be compensated in accordance with the law in the event that he has been sentenced by a final judgement through a miscarriage of justice.

In the present matter, as the actions of Clonalia amounted to wrongful act¹¹¹, pursuant to which consequences were being faced by Marsili, to which the actions of Clonalia are attributable, hence there is an injury and a link between the wrongful act and the injury.¹¹²

So, Clonalia is internationally responsible to compensate for the caused miscarriage of justice.

¹⁰⁵ Principle 16 of Rio Declaration 1992.

¹⁰⁶ S. SHANTHAKUMAR, INTRODUCTION TO ENVIRONMENTAL LAW 383 (Lexis Nexis Butterworths Publication II Edition 2010)

¹⁰⁷ Article 31 and Article 34 of ILC Draft Articles on State Responsibility, 2001.

¹⁰⁸ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

¹⁰⁹ Scott Davidson, *Remedies for violations of the American Convention on Human Rights*. The International and Comparative Law Quarterly. Vol. 44 No. 2 (April 1995) pp. 405-414.

¹¹⁰ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

¹¹¹ Contention 1.1 and 1.2 of the Memorandum.

¹¹² JAMES CRAWFORD. THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (Cambridge University Press I Edition 2002)

II. FEDERATION OF CLONALIA IS INTERNATIONALLY RESPONSIBLE FOR VIOLATING THE INTERNATIONAL HUMAN RIGHTS LAW.

1. FEDERATION OF CLONALIA VIOLATED ARTICLE 22 OF THE AMERICAN CONVENTION BY NOT COMPLYING WITH INTERNATIONAL REFUGEE LAW PRINCIPLES.

Article 22 of the American Convention on Human Rights¹¹³ mandates-

“7. Every person has a right to seek and be granted asylum in a foreign country.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

9. The collective expulsion of aliens is prohibited.”

Clonalia was bound by the obligations incurred under the Refugee Convention¹¹⁴ and the other conventions it is signatory to¹¹⁵. Clonalia was under an obligation to ensure that ‘everyone has a right to seek and to enjoy in other Countries, asylum from persecution’.¹¹⁶ Asylum has been regarded as a right of an individual.¹¹⁷ The notion of ‘responsibility to protect’¹¹⁸ includes the responsibility to grant asylum and to open borders to those fleeing persecution.¹¹⁹ So, in the

¹¹³ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹¹⁴ Convention relating to the Status of Refugees of 1951 and Protocol of 1967; Compromis ¶ 50.

¹¹⁵ Compromis ¶ 72.

¹¹⁶ Article 14 (1) of Universal Declaration on Human Rights 1948.

¹¹⁷ Paul Weis *Territorial Asylum* 6 IJIL pp. 173-94 (1966); Barbour and Gorlick, 2008.

¹¹⁸ Brian Barbour and Brian Gorlick, *Embracing the Responsibility to Protect: A Repertoire of Measures including Asylum for Potential Victims* International Journal of Refugee Law Volume 20 Issue 4 533-566.

¹¹⁹ Alice Edwards *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders* 30 MJIL pp. 763-807 (2009).

present context, Clonalia was under an obligation to give asylum to the members of rural community of Candela, fleeing persecution.

Persecution¹²⁰ has not been defined under the Refugee Convention, but encompasses well founded fear to life or freedom, some form of serious harm, or serious violations of civil or human rights.¹²¹ Persecution is sustained or systematic violation of basic human rights demonstrative of a failure of state protection.¹²² The rural community of Candela had its primary location in the northern area of Marsili.¹²³ Its location was such that it was most affected by the loss of territory.¹²⁴

The rural community of Candela was under a ‘well founded fear of persecution’ as the territorial integrity of Marsili was under a threat of disappearance¹²⁵, hence the obligation to give asylum existed on Clonalia. As Clonalia did not comply with this obligation, hence Clonalia violated the Article 22(7) of the American Convention.¹²⁶

A. Clonalia acted unlawfully by denying the status of Refugee to the Rural Community of Candela.

The Rural Community of Candela had a valid claim of the status of Refugees under the Refugee Convention, as the Rural Community of Candela falls under the definition of ‘Refugee’ under the Refugee Convention¹²⁷. All the essentials of the definition of Refugee are met by the Rural Community of Candela-

¹²⁰ Article 33 of the Convention relating to the Status of Refugees, 1951.

¹²¹ JAMES C. HATHAWAY AND MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 1.3 (Cambridge University Press, II Edition, 2014)

¹²² GUY S. GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 36 (Oxford University Press, III Edition, 2007)

¹²³ *Compromis* ¶29.

¹²⁴ *Compromis* ¶ 29.

¹²⁵ Contention 1 of Memorandum.

¹²⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

¹²⁷ Convention relating to the Status of Refugees, 1951.

1. There was a **well founded fear of being persecuted**, owing to threatened territorial integrity¹²⁸ because of inevitability of disappearance of islands of Marsili. This was supplemented by the factum of location of the rural community of Candela in the northern region of Marsili, the area most affected by the loss of territory.¹²⁹ As in the country of origin, there was a fear of persecution hence the rural community of Candela was justified in seeking the status of refugees.
2. There was a **valid ground in seeking the status of Refugee**, which is Nationality. Persecution for the reasons of nationality consists of adverse attitudes and measures directed against a national minority and in certain circumstances the fact of belonging to such a minority itself gives rise to a well founded fear of persecution.¹³⁰ The factum of belonging to a community, defined through real or perceived identity, regardless of whether the difference has been legally formalized or not has been recognized to give rise to a notion of Nationality, which can be undertaken as a ground for claiming refugee status.¹³¹ Nationality¹³² has been defined as the link between the state, its people and includes within it, its territory.¹³³ As in the present context, the rural community of Candela shared a common identity and Nationality of Republic of Marsili, along with the fact that the territorial integrity of Marsili was under a threat of disappearance, hence the community shared a common fear of persecution in Marsili on ground of Nationality.
3. The **country of origin was unable to provide protection**. Marsili was not in a state to provide protection to the rural community of Candela, as it was under an inevitable threat of

¹²⁸ Contention 1 of Memorandum.

¹²⁹ Compromis ¶ 29.

¹³⁰ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3.

¹³¹ JAMES HATHAWAY AND MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* (Cambridge University Press, II Edition, 2014)

¹³² D. CAMPBELL AND J. FISHER, *INTERNATIONAL IMMIGRATION AND NATIONALITY LAW* (The Hague-London-Boston 1999)

¹³³ Ruth Donner *The Regulation of Nationality in International Law* American Journal of International Law Vol. 81 No. 4 1987 pp. 970-974.

disappearance.¹³⁴ This is amplified from the fact that the authorities of Marsili were seeking help from the various international forums, and have been asking the international community to help in order to face the constant natural hazards.¹³⁵

Owing to the fact that the rural community of Candela was under a well founded fear of persecution, on grounds of Nationality, along with the fact that the country of origin was not in a state to offer protection, hence the application for claiming refugee status was justified under the Refugee Convention¹³⁶, and as the application was valid, the non consideration of the application¹³⁷ was unlawful, as it violated the rights of members of rural community of Candela to seek refugee status.¹³⁸ Thus, Clonalia acted unlawfully by denying this right to the members of rural community of Candela.

B. Clonalia was bound by the obligations under the American Convention.

As the members of rural community of Candela fell within the definition of Refugee under the Refugee Convention, they were subject to the protection guaranteed under the Refugee Convention.¹³⁹

i. Clonalia violated its duty of *non-refoulement* towards persons in need of protection.

The principle of non refoulement¹⁴⁰ has been given the status of *jus cogens*¹⁴¹ that is, it is a peremptory norm of international law, from which no derogation is possible.¹⁴² This implies that Clonalia was under an obligation to ensure that it did not return or expel a refugee, in any

¹³⁴ Compromis ¶32.

¹³⁵ Compromis ¶27.

¹³⁶ Convention relating to the Protection of Refugees, 1951.

¹³⁷ Compromis ¶52.

¹³⁸ Article 14(1) of Universal Declaration on Human Rights, 1948.

¹³⁹ Compromis ¶50.

¹⁴⁰ Article 33 of the Convention relating to the Protection of Refugees 1951.

¹⁴¹ Article 53, Vienna Convention on the law of Treaties, 1969.

¹⁴² Jean Allian, *The jus cogens nature of Non-Refoulement* Int'l J. Refugee Law (2001) 13 (4): 533-558.

manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. It is a duty of states to ensure that this obligation is complied with.¹⁴³ It is also submitted that a state's most important duty is to ensure that individuals are not forcibly returned to countries where they claim to have a well founded fear of persecution. This protection can be temporary or long term, and it exists independently of the convention as part of customary international law.¹⁴⁴ The principle of non-refoulement is recognized as having the status of a binding rule of general international law.¹⁴⁵ An extension of the principle of *non refoulement* to a wider category of persons who might qualify as refugees, because they are fleeing from persecution¹⁴⁶ but have not yet been determined to be such by the host state¹⁴⁷, can be said to arise on a basis of the Declaration on Territorial Asylum of the United Nations General Assembly, 1967 which provides that- persons entitled to invoke Article 14 of the General Declaration shall not be subjected to rejection at the frontier or expulsion or return to any state where that person may be subjected to persecution.¹⁴⁸ As in the country of origin, the situation exists which would place the right to life of the deported persons under a threat of persecution,

¹⁴³ Patricia Hyndman, *Asylum and Non-Refoulement- Are these obligations owed to Refugees under International Law?* 57 Phil L J 43 (1982).

¹⁴⁴ YOUNG, MARGARET REFUGEE PROTECTION: THE INTERNATIONAL CONTEXT (1992) RESEARCH BRANCH, LIBRARY OF PARLIAMENT (OTTAWA, ONTARIO); *Nicaragua v. United States* 'Military and Para military activities in and against Nicaragua' 1986 ICJ Reports 14; *Colombia v. Peru, Asylum Case* ICJ Reports [1950] at 266.

¹⁴⁵ GUY S. GOODWIN AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (Oxford University Press, III Edition, 2007)

¹⁴⁶ Article 14, Universal Declaration on Human Rights 1948.

¹⁴⁷ *Simsek v. Macphee* (1982) 148 CLR 636; *R. v. Secretary of State for the Home Department*, 1988 AC 953; *Immigration and Naturalization Service v. Cardoza: Fonseca* 94 L Ed 2d 434 (1987).

¹⁴⁸ Oswald K. Seneadza *The Granting of Asylum: A discretionary right or a mandatory right of State?* KNUST Law Journal Vol. 4 2007-008 pp 60-78.

due to the fact that the island is under a threat of disappearance, so, the actions of Clonalia violated Article 22(8) of the American Convention.¹⁴⁹

ii. Clonalia violated the Principle of *non-discrimination*.

Article 1 of the American Convention¹⁵⁰ mandates non-discrimination.¹⁵¹ Article 3¹⁵² justifies that the contracting states shall apply the provisions of the convention without discrimination on grounds of race, religion or country of origin. As the order of expulsion and detention were directed exclusively to the families of rural community of Candela, who shared a common country of origin- Marsili, there was discrimination by Clonalia in treatment of its refugees, pursuant to which there is breach of obligation of non-discrimination.

iii. Clonalia violated Article 5 of the American Convention by issuing the order of expulsion and detention.

Article 31¹⁵³ of the Refugee Convention explicitly prohibits imposition of any form of penalties, by states on refugees (including asylum seekers whose application has not yet been determined)¹⁵⁴ who, coming directly from the territory where their life or freedom is threatened; provided they present themselves¹⁵⁵ to the authorities, and show good cause¹⁵⁶ for their illegal entry or presence. The reason of disappearance of Marsili was presented to the authorities.

¹⁴⁹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁵⁰ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁵¹ SCOTT LECKIE AND ANNE GALLAGHER, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (University of Pennsylvania Press 2011)

¹⁵² Convention relating to the Status of Refugees, 1951.

¹⁵³ Convention relating to the Status of Refugees, 1951.

¹⁵⁴ *Alimas Khaboka v. Secretary of State for the Home Department* [1993] Imm. Ar. 484 UK

¹⁵⁵ *Landgericht (Regional Superior Court) , Munster Federal Republic of Germany* Ref: 20 Dec 1988, LG Munster Ns 39 Js 688/86

¹⁵⁶ *Van Alphen v. The Netherlands* Comm. No. 305 of 1988.

Issuance of an expulsion order¹⁵⁷ and an order of detention¹⁵⁸, were forms of imposition of penalties. The issuance is also is contravention of Article 5 of the American Convention¹⁵⁹ which prohibits cruel, inhuman or degrading punishment. The rationale is to ensure that the punishment should be proportionate to the intensity of allegation involved.¹⁶⁰ There was a presentation of official request based on the Law 715 of 1989 for refugee status¹⁶¹ in good faith¹⁶² and the cause for it was stated as well, under the threat of disappearance of Marsili.¹⁶³ As all the essentials of Article 31¹⁶⁴ were met, the imposition of expulsion order and the order of detention implied unlawful conduct by Clonalia, under Article 5 of the American Convention.¹⁶⁵

iv. Actions of Clonalia, post issuance of order of detention amounted to gross violations of human rights, under a breach of Article 1, Article 4, Article 5, Article 7, Article 8, Article 22 and Article 25 of the American Convention.

Article 5 of the American Convention on Human Rights¹⁶⁶ states that every person has the right to have his physical, mental and moral integrity respected. It further states that no one shall be subjected to cruel, inhuman or degrading punishment or treatment.¹⁶⁷

The actions of Clonalia post issuance of order of detention amounted to gross violations of human rights.¹⁶⁸ The very basic obligation of respecting the rights of all persons under Article 1

¹⁵⁷ Compromis, ¶52.

¹⁵⁸ Compromis ¶53.

¹⁵⁹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁶⁰ ANDREW VON HIRSCH AND ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (Oxford University Press 2005)

¹⁶¹ Compromis ¶48.

¹⁶² *R v. Uxbridge Magistrate's Court* [1999] Imm. Ar. 560, U.K.

¹⁶³ Compromis ¶48.

¹⁶⁴ Convention relating to the Status of Refugees, 1951.

¹⁶⁵ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁶⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁶⁷ Article 5(2) of the American Convention on Human Rights, 1969.

of the American Convention¹⁶⁹ is breached as Clonalia's treatment of the members of Rural Community of Candela was inhumane and disproportionate to the intensity of allegation¹⁷⁰. The arrest and deportation of the members of rural community of Candela without specifying reasonable grounds for it violated Article 5 of ACHR.¹⁷¹ This is aggravated by denial of right to fair trial, which mandates-

- Prior notification in detail to the accused of the charges against him.
- Adequate time and means for the preparation of defense.

In *Caballero Delgado and Santana Case*¹⁷² it was stated that the Court has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal, to carry out a series of investigation of violations committed within its jurisdiction, to identify those responsible, to ensure appropriate punishment and towards the victim, adequate compensation.

As the very basic procedural mandates of trial were not complied with, prior to arrest and deportation, hence there is also a breach of right to fair trial guaranteed under Article 8 of the American Convention.¹⁷³ Further, non-access to fair trial implied violation of the right to Judicial Protection as well as the members of the community were subjected to direct arrest and deportation without examining the reasons and checking whether the reasons were just or not.¹⁷⁴

So, Article 25 of the American Convention which guarantees a right to judicial protection is also violated by the actions of Clonalia.

¹⁶⁸ Compromis ¶ 53.

¹⁶⁹ Article 1, American Convention on Human Rights, 1969.

¹⁷⁰ ANDREW VON HIRSCH AND ADREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (Oxford University Press 2005)

¹⁷¹ Compromis ¶ 53.

¹⁷² Inter-Am. Ct. H.R. (Ser. C) No. 22 (1995)

¹⁷³ David Weissbrodt, *Human Rights in Criminal Proceedings*. American Journal of International Law. Vol. 101 No. 3 July 2007. Pp. 701-703.

¹⁷⁴ Pedro Pablo Camargo. *The Right to Judicial Protection: 'Amparo' and other American Remedies for the Protection of Human Rights*. Lawyers of Americas Journal. Vol. 3 No. 2 (June 1971) pp. 191-230.

If the arrest lacks any legal basis or justification against the rights or freedoms guaranteed by UDHR or ICCPR, or if the detention is characterized by total or partial non observance of fair trial guaranteed under the international instruments or if it involves prolonged administrative custody of asylum seekers, refugees, immigrants without administrative or judicial review or remedy, or the detention is discriminatory whether based on birth, nationality or ethnic/social origin, language, religion, or other categories, then the arrest is considered arbitrary.¹⁷⁵

In the present context the factum of detention and arrest lacked legal justification for it. This is evident from the fact that-

- Non consideration of application for determination of Refugee status.¹⁷⁶
- The families were denied the right to present their case, nor their reasons for request of the Refugee status.¹⁷⁷

As there was a lack of legal justification for the arrest, and the detainees were denied the right to justify themselves, the arrest was arbitrary. The factum of arbitrary arrest is in violation of Article 4 of the American Convention which entitles all persons to have the right to life respected.¹⁷⁸ Article 9 of Universal Declaration of Human Rights, 1948 mandates that- no one shall be subjected to arbitrary arrest, detention or exile¹⁷⁹, similarly Article 9(1) of International Covenant on Civil and Political Rights also prevents arrest without specifying grounds

¹⁷⁵ United Nations Human Rights Council Working Group established under Resolution 1991/42 on Arbitrary Detention *Case of Guantanamo Detainees*

¹⁷⁶ Compromis ¶52.

¹⁷⁷ Compromis ¶ 52.

¹⁷⁸ Paul Seighart. *The International Law of Human Rights*. The American Journal of International Law. Vol. 78 No. 2 (April 1984) pp. 534-537.

¹⁷⁹ Premont *United Nations Procedures for the Protection of All persons subjected to any form of Detention or imprisonment* 20 Santa Clara L Rev. 603 (1980); Tauberfield and Tauberfield *Human Rights and the emerging International Constitution* 9 Hofstra L Rev. 475 (1981); Halderman *Advancing Human Rights Through the United Nations* 43 Law and Contemporary Probs.

established under the procedure of law.¹⁸⁰ Article 7 of American Convention on Human Rights¹⁸¹ also mandates that the right to personal liberty includes that no one shall be subject to arbitrary arrest or punishment. It further states that anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.¹⁸²

Expulsion from a state from which asylum is sought is a violation of basic human right¹⁸³ as unless reasonability is not justified, the punishment is not proportionate with the allegation.¹⁸⁴

Article 22(8) of the American Convention on Human Rights¹⁸⁵ provides that no alien shall be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion. The Inter American Court of Human Rights had adopted provisional measures¹⁸⁶ to prevent the threatened collective expulsions of Haitians and Dominicans of Haitian origin (based on nationality) by the Dominican Republic.¹⁸⁷

As the reasons for detention were not told to those detained¹⁸⁸ and involved gross human rights violations, hence actions of Clonalia amounted to breach of the American Convention¹⁸⁹. They

¹⁸⁰ International Covenant on Civil and Political Rights, 1966.

¹⁸¹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969

¹⁸² Article 7(d) of American Convention on Human Rights, 1969.

¹⁸³ Article 7 of ICCPR, 1966; General Recommendation no. 30 of 2004 of Convention on the Elimination of Racial Discrimination, 1963.

¹⁸⁴ ANDREW VON HIRSCH AND ADREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (Oxford University Press 2005)

¹⁸⁵ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁸⁶ Article 63(2) Statute of Inter American Court of Human Rights, 1969.

¹⁸⁷ Inter-Am Ct. H.R. (Ser E) (2000 and 2001).

¹⁸⁸ Hursnt Hannum, Richard B. Lillich, Stephen A. Saltsberg *Materials on International Human Rights and US Criminal Law and Procedure* Vol. 85 No. 2 (April 1991) pp. 414-416.

¹⁸⁹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

stood in violation of basic rights against arbitrary arrest, guaranteed under the UDHR, ICCPR and ACHR, pursuant to which it shall assume international responsibility.

a. Arrest of Children was tantamount to gross violations of human rights by Clonalia.

Article 22(1) of Convention on the Rights of Child¹⁹⁰ states that parties shall take appropriate measures to ensure that children are entitled to receive appropriate protection and humanitarian assistance.¹⁹¹ UNHCR Guidelines on Refugees Children¹⁹² states that minors who are asylum seekers should not be detained. Also, article 37(b)¹⁹³ of the Convention on the Rights of Child prohibits any form of penalties that restricts the right to personal liberty of children.¹⁹⁴

Article 5 of American Convention on Human Rights¹⁹⁵ entitles minors to separate treatment under right to humane treatment. In the present context, the issuance of arrest warrants against the rural community of Candela included the children as well. They were subjected to being captured, then taken to temporary prison, which violated the basic standards of humane treatment¹⁹⁶ guaranteed to the children.¹⁹⁷ Hence, Clonalia is internationally responsible for violating the human rights of children of the Rural Community of Candela under the American Convention.

¹⁹⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

¹⁹¹ Convention on the Rights of Child, 1989; UN Rules for the protection of juveniles deprived of their liberty.

¹⁹² Refugee Children: Guidelines on Protection and Care, UNHCR Geneva 1994.

¹⁹³ Convention on the Rights of Child, 1989.

¹⁹⁴ Farmer Alice, *A commentary on the Committee on the Rights of Child's definition of Non-Refoulement for Children: Broad Protection for fundamental rights* 2008. Fordham Law Review Res Gestae Vol 80. 40-55

¹⁹⁵ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁹⁶ Thomas Hammerberg, *The UN Convention on the Rights of Child- And how to make it work* Human Rights Quarterly Vol. 12 No.1 pp. 97-105.

¹⁹⁷ Guideline VI of UNHCR Guidelines on applicable criteria and standards relating to detention of asylum seekers and alternatives to detention, 1991.

b. Arrest of other persons was tantamount to human rights violations by Clonalia.

Principle III of Principles and Best Practices on the Protection of Persons deprived of Liberty in the Americas¹⁹⁸ states that every person shall have the right to personal liberty and to be protected against any illegal or arbitrary deprivation of liberty. Arbitrary Arrest and arbitrary deprivation of liberty shall be prohibited as they constitute cruel and inhuman treatment hence they violate Article 5 of the American Convention.¹⁹⁹

Guideline 7 of UNHCR guidelines on Detention of Asylum Seekers²⁰⁰ states that given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should proceed any order to detain asylum seekers for vulnerable people, inclusive of elderly persons.

So, the factum of arrest and detention of the members of Rural Community of Candela meant gross violations of human rights by the conduct of Clonalia, to which it shall assume international responsibility.

Article 22(9) of the American Convention on Human Rights²⁰¹ states that the collective expulsion of aliens is prohibited. As Clonalia initiated actions of expulsion of people²⁰², it violated this obligation under Article 22 of the American Convention.

v. The actions of Clonalia in denying the access to the Report of NEC was violative of Article 13 of American Convention.

¹⁹⁸ Basic Documents in the Inter American System of Human Rights, Principles and Best practices on the protection of persons deprived of liberty in the Americas.

¹⁹⁹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

²⁰⁰ Guideline VII of UNHCR Guidelines on applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention, 1999.

²⁰¹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

²⁰² Compromis ¶ 52.

Article 32 of the Convention on the Status of Refugees states- the parties shall not expel a refugee except on grounds of national security or public order.²⁰³

It further mandates that after ‘compelling’ reasons of national security have been justified, the refugee shall be allowed to submit evidence to clear himself²⁰⁴. This shall be further followed by a right to appeal to the refugee and to be represented for the purposes before the competent authority.²⁰⁵ For taking the defense of National Security in expelling the refugees (or asylum seekers) three essentials have to be satisfied²⁰⁶-

- i. **Grave or exceptional circumstances must exist** to justify the existence of a compelling situation.
- ii. The refugee (or asylum seeker) must have been given the **right to justify** himself.
- iii. The right to justify shall include a **right to appeal** and present oneself before a competent authority.

In the present context, as the existence of grave or exceptional circumstances is not justified by Clonalia, nor a right to justify is given hence the basic essentials are not met to take the defense of national security. Moreover, the right to appeal has also not been given²⁰⁷. Hence, the defense of National Security cannot be claimed by Clonalia.

Article 27 of American Declaration on the Rights and duties of Man states that ‘every person has the right, to seek and receive asylum in foreign territory’²⁰⁸ which is being explicitly breached.

²⁰³ Convention relating to the Status of Refugees, 1951.

²⁰⁴ Article 32(2) of the Convention on the Status of Refugees, 1969.

²⁰⁵ Article 32 (2)(b) of the Convention relating to the Status of Refugees, 1951.

²⁰⁶ GUY S. GOODWIN AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (Cambridge University Press 2007)

²⁰⁷ Compromis ¶ 53.

²⁰⁸ Basic Documents in the Inter American System, American Declaration on the Rights and Duties of Man.

It is also in contravention of the right guaranteed to the asylum seekers which mandates that they have a right to know why their application for seeking asylum has been rejected²⁰⁹, then the right to appeal comes into picture. So when there is non consideration of the application, it deprives the refugees of the basic rights guaranteed under the Refugee law.²¹⁰

Article 13 of the American Convention²¹¹ states that everyone has a right to freedom of thought and expression. This right includes the right to seek, receive and impart information regardless of frontiers either orally, or in writing, in print or through any medium of one's choice. Hence the actions of Clonalia denying access to the report of NEC violated the right of members of Rural Community of Candela seeking refugee status, to information regarding why their application was not considered. Moreover, as the defense of National Security was not justified by actions of Clonalia, hence Clonalia violated Article 13 of the American Convention and acted unlawfully.

C. Clonalia is internationally responsible for not implementing the recommendations of American Commission of Human Rights.

Article 33 of the American Convention²¹² recognizes the Inter-American Commission on Human Rights as a competent organ to ensure compliance with the commitments made by the state parties to the American Convention. Complete compliance with the recommendations of the IACHR is essential for ensuring that human rights have full force in the OAS member states and for helping to strengthen the Inter American System for the Protection of Human Rights.²¹³

²⁰⁹ GUY S. GOODWIN GILL, CONVENTION RELATING TO STATUS OF REFUGEES, Geneva 28 July 1951, PROTOCOL RELATING TO THE STATUS OF REFUGEES, New York 31 January 1967.

²¹⁰ Article 14 of Universal Declaration on Human Rights 1958.

²¹¹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

²¹² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

²¹³ IACHR, 'Annual Report 2013 Chapter 3 Section D: Status of Compliance with the Recommendations of IACHR.' Para 35.

So, Clonalia has an obligation towards ensuring compliance with the recommendations issued by the American Commission of Human Rights in good faith.²¹⁴ The Commission, in the present matter has requested the Court to-

- a. Demand the Federation of Clonalia to modify their national laws.
- b. To establish a policy of assistance necessary to compensate the members of the rural community of Candela.
- c. Offer part of its territory for the refugees that will have to leave the island that is sinking.²¹⁵

So it is requested to take action against Clonalia for not complying with the recommendations of the Commission, and subsequently ask Clonalia to implement them.

2. CLONALIA IS INTERNATIONALLY RESPONSIBLE TO COMPENSATE THE RURAL COMMUNITY OF CANDELA FOR ITS WRONGFUL ACTS UNDER ARTICLE 10 OF THE AMERICAN CONVENTION.

Under the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, it is mandated that 'every internationally wrongful act of a State entails international responsibility for it'.²¹⁶ In *Phosphates in Morocco*²¹⁷ it was affirmed that when a state commits internationally wrongful acts against another state, international responsibility is established immediately between the two states.

²¹⁴ Gabe Shawn Verges *Good Faith in International Law*. The American Journal of International Law. Vol. 86 No. 4 (October 1992) pp. 841-844.

²¹⁵ Compromis, ¶ 60.

²¹⁶ Article I and II of International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2000.

²¹⁷ *Phosphates in Morocco, Preliminary Objections*, 1938 PCIJ Series A/B No. 74 p. 1; *S.S. Wimbeldon* 1923 PCIJ Series A No. 1, p. 15; *Factory at Chorzow Case, Jurisdiction* 1927, [1928] PCIJ (ser A) No 17; *Corfu Channel, Merits* ICJ Reports [1949] p. 4.

Article 10 of the American Convention²¹⁸ states that every person has the right to be compensated in accordance with the law in the event he has been sentenced by the final judgment through a miscarriage of justice.

In *Matter of Mery Naranjo et al.*²¹⁹ it was stated that the Court must find evidence that if the fundamental right awarded by the Convention is compromised, protective measures would be required.

So, for the breach of international environmental law obligations²²⁰ and a subsequent breach of international refugee law (along with gross violations of international human rights)²²¹ amounting to internationally wrongful acts, an international responsibility is entailed on Clonalia to compensate the Rural Community of Candela.

²¹⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

²¹⁹ 2011 Order of the Inter Am. Ct. HR.

²²⁰ Contention I, Memorandum.

²²¹ Contention II, Memorandum.

PRAYER FOR RELIEF

In light of the facts stated, issues raised and arguments advanced, the Agents for the Rural Community of Candela respectfully request this Court to adjudge and declare that-

1. *Declare that* Federation of Clonalia is internationally responsible for its actions in not complying with international emission standards and causing the consequential damage to the international community.
2. *Affirm that* members of Rural Community of Candela have a valid refugee status in Clonalia.
3. *Affirm that* members of Rural Community of Candela in Marsili have a valid claim of asylum seekers.
4. *Affirm that* Federation of Clonalia is under a duty to establish a policy of assistance necessary to compensate the members of the rural community of Candela and offer part of its territory for the refugees that will have to leave the island that is sinking.

All of which is respectfully affirmed, and submitted.

Sd/-

Agents for Rural Community of Candela.