

Inter-American Court of Human Rights

Case of the Rural Community of Candela [Petitioner]  
v. The Federation of Clonalia [Respondant]

Case No. 042114/RLJ/0415

2015

(Memorial for Petitioner)

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## A. Preliminaries

### I. Used Abbreviations

|                 |   |
|-----------------|---|
| approx          | approximately   |
| Art             | Article   |
| Case            | Case of the Rural Community of Candela v. The Federation of Clonalia                            |
| CCA             | Climate Change Action   |
| CO <sub>2</sub> | carbon dioxide  |
| Convention      | Inter-American Convention on Human Rights   |
| ECOSOC          | United Nations Economic and Social Council  |
| ECHR            | European Convention for the Protection of Fundamental Rights<br>and Freedoms                    |
| ECtHR           | European Court of Human Rights  |
| et seqq         | <i>and the following</i>  |
| ExCom           | Executive Committee   |
| FM              | Foreign Ministry of the Federation of Clonalia  |
| G2C2            | Global Climate Change Group   |
| GHG             | greenhouse gases  |
| HC              | hypothetical case   |
| IACHR           | Inter-American Commission on Human Rights   |
| IACtHR          | Inter-American Court of Human Rights  |
| ibid            | ibidem  |
| ICCPR           | International Covenant on Civil and Political Rights  |
| JCFAMC          | Joint Committee on Foreign Affairs of the Republic of Marsili and the<br>Federation of Clonalia |
| MEC             | Ministry of Environment of Clonalia   |
| NEC             | National Expert Committee of the Federation of Clonalia   |
| NGO             | non-governmental organization   |
| OAS             | Organization of American States   |
| OHCHR           | Office of the United Nations High Commissioner for Human Rights                                 |
| para            | paragraph   |
| RCC             | Rural Community of Candela  |
| UDHR            | Universal Declaration of Human Rights   |

|        |   |
|--------|---|
| UNFCCC | United Nations Framework Convention on Climate Change |
| UNHCR  | United Nations High Commissioner for Refugees         |

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## B. Legal Report

### I. Facts of the Case<sup>1</sup>

1. The 2014 proposal of G2C2 asserts with a probability of above 95% that climate change is happening, caused by human activity, namely through GHG emissions. According to the report, the sea level in the ocean's average levels will increase by 1.59m by the end of 2030<sup>2</sup>.

2. The Republic of Marsili (hereinafter: "Marsili") is an archipelago in the Pacific Ocean. It gained independence from the Federation of Clonalia (hereinafter: "Clonalia") through a referendum in 1967. The maximum height of Marsili is 2.3m, the country being the territory with the lowest height above sea level. It consists of 16 atolls and, according to the 1987 census, had 317.230 inhabitants. According to the 2014 G2C2 report, Marsili will be fully submerged by 2025<sup>3</sup>. In 2014, about 14.000 of Theodore's<sup>4</sup> inhabitants lived in 16 temporary camps waiting for relocation and approx. 15.000 escaped from the other surrounding islands.

3. By 2013, Theodore has lost about 78km<sup>2</sup> of its surface. 27% of the coastline of the natural territory and 38% of the beaches shrunk below the sea level. Only 120 km<sup>2</sup> are agricultural utilizable, with Marsili being able to provide solely 40% of necessary agricultural products.

4. Currently, 24% of the domestic spending is made for reconstruction and protection measures against climate change effects. There is a decline in public investments observable, including education-, health-, and housing programs. The Marsili government has repeatedly asked the international community for support in dealing with this national misery. Anyhow, all political efforts have been fruitless down to the present day.

5. Clonalia ranks among the richest countries of the world. It is responsible for 21% of the historical GHG emissions and currently emits about 18% of global GHGs<sup>5</sup>.

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<sup>1</sup> Articles without references are such of the American Convention on Human Rights.

<sup>2</sup> §19 HC.

<sup>3</sup> §30 HC.

<sup>4</sup> Main island of the Republic of Marsili.

<sup>5</sup> §21 HC.

6. In October 2013, 23 families escaped from Marsili to Clonalia, seeking decent life. Physical living conditions in Candela, a rural village of Theodore, had become too difficult due to climate change's consequences. In April of 2014 the families filed a petition and requested refugee status under Law 715 of 1989, claiming their life and integrity was at risk. The petition was groundless denied by the Foreign Ministry of Clonalia (hereinafter: "FM") and the detention and expulsion of the families was ordered in March 2014. A proposal delivered by a National Experts Commission<sup>6</sup> on the relation of climate change and migration was shut away. The CCA tried to obtain the text of the NEC proposal but was denied by the FM<sup>7</sup>.

7. CCA appealed the FM's decision. However, the decision was upheld by an administrative judge<sup>8</sup>. The CCA found that there was an exhaustion of all administrative and judicial remedies and therefore decided to go before the Inter-American Commission of Human Rights (hereinafter: "IACHR" or "Commission"), as Marsili is a member of the OAS and has ratified the Convention on May 7, 1984 and has recognized the jurisdiction of the Inter-American Court of Human Rights (hereinafter: "IACtHR" or "the Court") since September 14, 1985.

8. The Commission found the petition admissible and granted precautionary measures as it considers that there are conditions of need and finds that measures would be in accordance with the protection of the petitioners. In December 2014 the IACHR referred the case to the Court for the alleged violation of rights afforded under Articles 5, 7, 8, 13, 15, 21, 22 and 26 of the Convention and Art. 11 of the Protocol of San Salvador.

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<sup>6</sup> hereinafter: „NEC‘.

<sup>7</sup> §59 HC.

<sup>8</sup> §59 HC.

## II. Admissibility of the Petition

**9.** The Honorable Court is competent *ratione personae* to hear this case, pursuant to Articles 62.3 and 63.1 of the Convention, as Clonalia has been a State Party to the Convention since August 1, 1978 and accepted the jurisdiction of the Court on June 28, 1982<sup>9</sup>. The Commission referred the case to the jurisdiction of the Court on December 17, 2014.

**10.** The Court is competent *ratione loci*, in accordance with Art. 29 VCLT. Additionally, the Court has jurisdiction *ratione temporis* according to Articles 62.1 and 62.3. Clonalia has not declared a temporal condition when accepting the Court's jurisdiction. As the alleged violations happened after 1982, the jurisdiction-acceptance date, and were not completed before, the Court also has jurisdiction in this regard.

**11.** The 4<sup>th</sup> instance formula, based on Art. 47(b) of the Convention<sup>10</sup>, is not applicable in the present case. As pointed out by the Commission, the Inter-American System is subsidiary to the states domestic judicial bodies<sup>11</sup>. Anyhow, the Petitioner is not requesting this Honorable Court to examine errors of the domestic law process but merely alleged violations of the Inter-American System's legal documents, for which the Court is the competent authority<sup>12</sup>. Therefore the 4<sup>th</sup> instance formula is not relevant here.

**12.** The Court is competent *ratione materiae* insofar the Petitioner alleges violations of human rights protected under the Convention (Articles Art. 62.1 and 62.3 of the Convention). Articles 5, 7, 8, 13, 21, 22 and 26 of the Convention have been violated.

**13.1** The Respondent has presented a preliminary objection to the case in question. In the preliminary objection, the Respondent argues the Court's lack of jurisdiction *ratione materiae* to hear this case, as to the claimed right to a healthy environment, codified in Art. 11 of the

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<sup>9</sup> §71 HC.

<sup>10</sup> Art. 47 - *The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: [...] b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention.*

<sup>11</sup> IACHR – *Emiliano Castro Tortrino v. Argentina*, Case 11.597, 2 March 1998, §17.

<sup>12</sup> *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of November 21, 2007, Ser. C No. 170, § 22; *„Street Children“ v. Guatemala*, Judgment of September 11, 1997, Ser. C No. 32, §§ 17 *et seq.*

Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights<sup>13</sup>, defined as an autonomous right, was non judiciable through legal mechanisms argued here<sup>14</sup>.

**13.2** Anyhow, Clonalia has, as a ratifying party of the Protocol<sup>15</sup>, committed itself to adopt measures necessary to fully observe the rights codified in it, including Art. 11. Concerning said article, the Commission has stated that only Articles 8 and 13 could be brought to the Commission through individual petition<sup>16</sup>. The Court himself, anyhow, has emphasized his power to interpret other conventions than the Inter-American Convention, presupposing the two conditions that (i) such conventions are ratified by the State and that (ii) the conventions confer competence on the Court or Commission to hear violations of the protected rights<sup>17</sup>. He generally includes the Protocol of San Salvador into this doctrine<sup>18</sup>.

**13.3** The provisions of the Protocol, including Art. 11, cannot be ignored, because otherwise the case would not be analyzed in a complete way. The Court has stated that there is an „*undeniable link between the protection of the environment and the enjoyment of other human rights*“<sup>19</sup>. It has linked Art. 11 to other substantive rights codified in the Convention as, *inter alia*, the right to life (Art. 4)<sup>20</sup>, the freedom of expression (Art. 13)<sup>21</sup>. Thus, it has to fall into consideration before this Tribunal. By filing a complaint that includes the Protocol claim with the Convention, the Petitioner asks the Court to use the Protocol as a tool for its interpretation of Clonalia's violation<sup>22</sup>. Interpreting the scope of its jurisdiction, the Court must consider the changes over time and present-day conditions of modern human rights obligations<sup>23</sup>.

**13.4** After all, the Honorable Court should find that the Protocol of San Salvador is part of

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<sup>13</sup> hereinafter „Protocol of San Salvador“ or „the Protocol“.

<sup>14</sup> § 68 HC.

<sup>15</sup> Clonalia has signed the Protocol in 1996.

<sup>16</sup> IACHR, *Community of La Oroya v. Peru*, Admissibility Report, August 5, 2009, § 54.

<sup>17</sup> *Las Palmeras v. Colombia*, Preliminary Objections, Judgment of February 4, 2000, Ser. C No. 67, § 34

<sup>18</sup> *Baena-Ricardo et al. Case*, Judgment of February 2, 2001, Ser. C No. 72, §§ 97 *et seqq.*

<sup>19</sup> Cf., *pars pro toto*, *Kawas Fernandez v. Honduras*, Judgment of April 3, 2009, Ser. C No. 196, § 148.

<sup>20</sup> *ibid.*, §§147 *et seqq.*

<sup>21</sup> *ibid.*, §155; *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006, Ser. C No. 151, §81.

<sup>22</sup> Cf. Art. 29 ACHR.

<sup>23</sup> *Gómez Paquiyari Brothers v. Peru*, Judgment of July 8, 2004, Ser. C No. 110, §165.

the *corpus iuris* of the Court and accept jurisdiction to hear this case. Even if the Court does not have subject matter jurisdiction over the environmental claim, it has jurisdiction to consider the remaining seven claims in the complaint.

**14.** All domestic remedies have been exhausted<sup>24</sup>.

### III. Clonalia's Responsibility for Violations of the Convention

#### 1. Preliminary Aspects

**15.** It is necessary for the Honorable Court to recognize the dangerous situation of the Rural Community of Candela in order to assess the legal situation of the case. The inhabitants of Candela live in temporary camps under unacceptable conditions on the island of Theodore. The Court itself has emphasized that, although States enjoy a margin of discretion when determining their immigration policies, the goal of such policies should take into account the respect for the human rights of migrants<sup>25</sup>. The Court has identified migrants who are undocumented or in an irregular situation as a group specifically vulnerable as they lack a certain protection of their rights in terms of their miserable situation<sup>26</sup>. With a decrease of almost 50% of Theodore's inhabitants, the issue of environmental refugees cannot be overestimated.

**16.** Marsili is about to disappear, probably until 2025<sup>27</sup>, and in the end a proper solution for all inhabitants has to be found. The Petitioners also want to remind the Honorable Court that there are children among the community members of Candela, who enjoy special protection and rights under international law, especially in the field of migration<sup>28</sup>. Therefore the interpretation of the Convention must be in their favor.

**17.** Clonalia climate policy is not effective. It has failed to take serious and effective

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<sup>24</sup> Cf. Clarifications N° 17.

<sup>25</sup> Cf. *Vélez Loor v. Panama*, Judgment of November 23, 2010, Ser. C No. 218, §97.

<sup>26</sup> *ibid.* §98.

<sup>27</sup> §30 HC.

<sup>28</sup> Cf. IACtHR - Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, Ser. A No. 21, §66.

measures to minimize Clonalia's emissions and has given no indication that it will do so in the foreseeable future. Clonalia alone is responsible for 18% of the world's yearly CO<sub>2</sub>-emissions. Thus, through its failure to take effective action in reducing GHG emissions, Clonalia is directly violating the Petitioners' rights.

**18.** Marsili, on the other side has already lost almost 30% of its national territory, due to climate change reasons. As the world's largest emitter of GHG, Clonalia is in a unique position to lead the global effort to avert global warming. Anyhow, Clonalia has rejected even the Kyoto Protocol. It has consistently denied, distorted, and suppressed scientific evidence of the causes rate<sup>29</sup>, and magnitude of global warming. Despite substantial evidence of human-induced climate change, Clonalia government continues to insist that the science does not yet justify a reduction in GHG emissions<sup>30</sup>.

**19.** In a legal action of five states of Clonalia in 2009, they claimed that the MEC did not take measures to regulate and control GHG-emissions<sup>31</sup>. The Commission followed this opinion and has, in its decision, requested the Court "*demand [...] Clonalia to modify their national laws*" and to "*establish a policy of assistance*"<sup>32</sup>.

**20.** Apart from mitigation, a focus of human rights litigation has to lay on the state's adaption to climate change causes<sup>33</sup>. Although Clonalia has not ratified the Kyoto-Protocol, it has

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<sup>29</sup> Cf. *infra* margin note 73 *et seqq.* – Violation of Art. 13.

<sup>30</sup> § 39 – MEC: „[...] *The relationship between climate change and emissions of greenhouse gases, by itself, does not prove the imminence or actual presence of any risk to public health or general welfare due to the existence of concentrations of these gases, As such, the causal link is weakened by the lack of empirical evidence and the environmental intervention of the entity is not proven to be required, but as random or discretionary*“.

<sup>31</sup> Clonalia continues its unaccountable energy policy, with depending on fossil fuels such as coal and oil for electricity production. Furthermore, according to the 2014 report submitted by the NGO Amnesty Environmental, Clonalia does „not have an appropriate legal framework to regulate the issue of climate change and the inactivity and lack of legal responses from this State have been the most notorious of all national legislations studied by this organization“ (§42 HC). The NGO CCA has asserted that Clonalia's „failure to act has been a systematic and historical constant, and there is a lack of will by the Federation to take policy and legal measures to reduce or alter their pattern of pollution and greenhouse gas emission“ (§64 HC).

<sup>32</sup> §66 HC.

<sup>33</sup> Hall, Weiss – Avoiding Adaption Apartheid, Yale Jr.Int'l.L. 2012, 309 – 366. This subject has also been addressed by the 1997 Kyoto protocol: Art. 12.8 – *The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaption.*

signed, *inter alia*, the UNFCCC in 1995. It has claimed responsibility in a statement presented to the international community, to undertake domestic measures to achieve similar or comparable results to those defined by the Kyoto-Protocol<sup>34</sup>. Nothing happened after this announcement, affecting the enjoyment of the Candela people's human rights.

**21.** There are several principles of international environmental law that obligate States to take responsibility for the consequences of global warming. Firstly, the “*do no harm*” principle, is the obligation to cause no significant transboundary harm. Some scholars see it as a principle of customary international law<sup>35</sup>. Moreover, it is part of multilateral environmental agreements such as, *inter alia*, the 1992 Rio Declaration on Environment and Development<sup>36</sup>, which was signed and ratified by the Federation of Clonalia in 1998<sup>37</sup>.

**22.** Secondly, the principle of “*common but differentiated responsibility*”, in connection with equity, is well established as a significant international environmental law principle. In this sense, Art. 3 UNFCCC guarantees different treatment between “*developing*” and “*developed*” countries, which is clearly based on different vulnerabilities, national capacities and historical responsibilities. Clonalia that ranks among the richest countries in the world is a signatory country to this treaty. According to its historical and present emissions, it should assume a leading role taking the adequate responsibility for its previous behavior. It must take the adequate responsibility for its previous behavior. For that reason, it is to be treated differently from e.g. the Republic of Marsili, when dealing with the consequences of climate change.

**23.** It is incontrovertible that the whole international community has a common responsibility to protect the global environment. However, scientific evidence<sup>38</sup> shows and Art. 3 of the UNFCCC recognizes that industrial countries as Clonalia bear the primary responsibility for

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<sup>34</sup> §15 HC.

<sup>35</sup> e.g. Brown, Weiss *et al.*, 2006, at 317; Kiss, Shelton, 1991, at 130.

<sup>36</sup> Principle 2. *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*

<sup>37</sup> §72 HC.

<sup>38</sup> *supra* margin note 1.



the establishing of the problem of global warming. This principle is completed by the “polluter pays” principle, also specified in the Rio Declaration<sup>39</sup>. It relies on the customary international law principle that obligates States to “*ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control*”<sup>40</sup>. Clonalia has the highest emissions of any country and is thus the world’s main-polluter.

**24.** State Parties to the ACHR have an obligation to respect rights and freedoms pursuant to Art. 1.1 to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any form of discrimination<sup>41</sup>. Evidence of non-compliance with the right enshrined in Art. 1.1 will be examined in connection with the alleged violations of other substantive rights in relation to the members of Candela.

## **2. Violation of Art. 21 – Right to Property**

**25.** The sinking of Marsili, substantially caused by Clonalia’s emissions, violates the Petitioner’s right to property, codified in Art. 21<sup>42</sup>.

**26.** While the protection of property is not without limits, it is well-settled that a State may only restrict the use and enjoyment of property if such restrictions are: (i) set forth by law; (ii) necessary; (iii) proportional; and (iv) aim to achieve a legitimate objective in a democratic society<sup>43</sup>. The necessity of the restrictions of the right to property depends upon whether they are directed toward satisfying an imperative public interest<sup>44</sup>. To be compatible with the Con-

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<sup>39</sup> Principle 16. *National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*

<sup>40</sup> ICJ - *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, §29.

<sup>41</sup> Art. 1.1 ACHR.

<sup>42</sup> Art. 21 - 1. *Everyone has the right to use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.* - 2. *No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*

<sup>43</sup> *Saramaka People v. Suriname*, Judgment of November 28, 2007, Ser. C No. 172, §127; *Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Ser. C No. 111 §96; *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, Ser. C No. 125, §§144 *et seq.*

<sup>44</sup> *Yakye Axa*, §145.

vention, the restriction must be justified by collective objectives that are so important that they „clearly prevail“ over the necessity of enjoyment of the restricted right. This Court must evaluate, on a case-by-case basis, the merits of prioritizing one right over another<sup>45</sup>.

**27.** Candelas members have been forced to move from the territory they occupied traditionally in the northern area of Theodore. The communal nexus with the territory, in a material and spiritual way, is a fundamental aspect of Candela’s identity. As a result of the forcible removal they live in poverty, being unable to enjoy their cultural traditions. The Court has emphasized the “*all-encompassing relationship*”<sup>46</sup> of a community with its occupied land and reasons that the “*territory is not centered on the individual, but on the community as a whole*”<sup>47</sup>.

**28.** As shown above, Clonalia is the historical and current’s biggest emitter of GHG gases in order to accelerate economic growth. Its interest, the protection of wealth, created at the cost of the others, should not prevail the right to property of Candela-members, which includes an entire regional culture and its goods. Not actively adapting the climate change situation, Clonalia should accept its certain responsibility and make amends for the people of Candela that lost all their property.

### **3. Violation of Art. 22 - the Right to Freedom of Movement**

**29.** The families’ official request of seeking asylum, which was based on domestic legislation, was denied by the FM on February 28, 2014<sup>48</sup>. Furthermore the families were not able to present their individual cases and to be heard before the agency<sup>49</sup>. By denying the request for asylum, Clonalia violated Art. 22.

#### **a. The expulsion-decision was not in accordance with national law (Art. 22.6)**

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<sup>45</sup> *ibid.*, at §146.

<sup>46</sup> *Moiwana Community v. Suriname*, Judgment of June 15, 2005, Ser. C No. 124, § 133.

<sup>47</sup> *ibid*; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C No. 79, § 149.

<sup>48</sup> § 52 HC.

<sup>49</sup> *ibid.*

**30.** Clonalia is responsible for the violation of Art. 22.6<sup>50</sup>, violating its own immigration law.

**31.** The FM denied the families' request for asylum. Art. 4 of national Law 715/1989 states that *"no person in such refugee or asylum seeking status, whose application is pending of a final decision, may be returned to their country of origin or another country where their life, safety or freedom would be at risk by any of the causes that led to the recognition, or request of refugee status, as well as any other external conditions that may be taking place in the country of origin"*. The actual migratory status of the families is not relevant for this Court.

**32.** In the present case the right to life and especially to personal freedom of the families is endangered in case they are deported to Theodore. As a matter of fact they cannot return to Candela, because of the simple but drastic reason that it already disappeared due to the consequences of climate change. All members of Candela currently live in temporary camps in Theodore in transitional circumstances. The miserable and unbearable "external conditions" the 23 families are facing in Marsili were indeed the cause for the request of refugee status.

**33.** Thus, the expulsion process commenced by the FM was against the domestic legislation of Clonalia. The expulsion was not decided in accordance with law, in violation of Art. 22.6.

b. Candela community members are "environmental refugees"<sup>51</sup> (Art. 22.7)

**34.** Clonalia is responsible for the violation of 22.7<sup>52</sup> since FM and MEC did not recognize the Petitioner's refugee status and ordered their expulsion to Marsili.

**35.** Actually, displacement due to climate change is a de facto problem currently lacking a de

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<sup>50</sup> Art. 22.6 – *An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.*

<sup>51</sup> It is important to mention that the community-members are not refugees in the conventional way but can be seen as "social group". A social group can be defined as *"a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society"* (See UNHCR handbook, §29). The UNHCR handbook states that: *"The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human right"* (See *ibid*). The 23 families are a part of this social group that already had to leave their homes and property. Candela is the region that is most affected by the loss of the land. But not only these circumstances make them a certain social group on Marsili, as they also share regional similarities and have been always a rural community characterized especially through living together in northern Theodore.

<sup>52</sup> Art. 22.7 - *Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.*

jure solution<sup>56</sup>. In the broadly accepted instrument of international law for dealing with Refugee, the 1951 Convention relating to the Status of Refugees (hereinafter: “CSR”), the narrow definition of refugee restricts its power to help in the times of climate change. The CSR was signed and ratified by Clonalia in 1955. The provisions of said Convention and of its Additional Protocol were incorporated into domestic law through the Immigration Law in 2009<sup>57</sup>. Art. 1A(2) CSR requires a “*well-founded fear of being persecuted*” due to one of the enumerated reasons for the persecution.

**36.** Since this definition came into existence more than 60 years ago<sup>58</sup>, it is indispensable to recognize the new challenges in the world and to admit that the Refugee Convention lacks an appropriate solution. With the scientific progress and thus the proof of existence of climate change the international and regional Human Rights organs should use a progressive interpretation of it. Both this Court as well as the European Court of Human Rights (hereinafter “ECtHR” or “European Court”) have held that “*Human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions*”<sup>59</sup>.

**37.** All attempts of the Marsilian government to address and solve the problem of the sinking islands failed due to the lack of cooperation of the international community, including Clonalia. This shows the inefficiency of solving Candela’s problem on the political stage.

**38.** Agencies as the UNHCR are international institutions that formed directives and authorized rulings to regulate and develop international Refugee law<sup>60</sup>. The UNHCR Handbook asserts that the fear of an asylum-seeker must be proven individually unless there is no emergency reason for a “*group determination*” of the refugee-status<sup>61</sup>. Asylum-seekers must

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<sup>56</sup> Docherty, Giannini – Confronting a Rising Tide, Harv. Envt’l L.R. 2009, at 357.

<sup>57</sup> §50 HC.

<sup>58</sup> However, the scope had been extended in 1967 by the Additional Protocol.

<sup>59</sup> Cf. IACtHR - The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law - October 1, 1999, Ser. A No. 16, §114; for the ECtHR’s consistent case-law see *Tyrer v. UK*, Judgment of April 25, 1978, Ser. A No. 26.

<sup>60</sup> *Pacheco Tineo Family v Bolivia*, Judgment of November 25, 2013, Ser. C No. 272, §143.

<sup>61</sup> Cf. UNHCR Handbook, 2011, §§44 et seqq.

demonstrate they are personally suffering from the persecution from which they are escaping. Of course said fear of persecution has to be objectively justifiable<sup>62</sup>.

**39.** It is very important to examine the surrounding conditions and personal backgrounds of the applicants to assess the reasons for the asylum request. In this case the families of Candela are facing the objective fear of having no opportunity to provide for themselves and being not able to inhabit their properties and houses. Due to the constant and stronger flooding of the island the earth to cultivate food is acidified by salt and thereby useless<sup>63</sup>. Furthermore, the island is losing immense squares of important land that could be used to cultivate food<sup>64</sup>. The inhabitants of Candela have to deal with an extreme worsening of the living conditions, with this having great impact on their enjoyment of human rights.

**40.** With a decrease of almost 50% of Theodore's inhabitants, the issue of environmental refugees can not be overestimated. Due to climate change reasons, Clonalia should guarantee asylum for Candela's families, in accordance with Art. 22.7.

c. Impossible return of the 23 RCC-families (Art. 22.8)

**41.** By ruling the deportation of the 23 families, Clonalia has to be held accountable for the violation of Art. 22.8<sup>72</sup>. Said article contains the in customary international law recognized principle of *non-refoulement*<sup>73</sup>. It contains the right of refugees and asylum-seekers<sup>74</sup> to not be returned to their country of origin if they have to fear a violation of their right to personal freedom or life. As shown, the national legislation of Clonalia provides an even broader scope

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<sup>62</sup> Cf. UNHCR Handbook, 2011, §38.

<sup>63</sup> §23 HC.

<sup>64</sup> *ibid.*

<sup>72</sup> Art. 22.8 – *In no case may an alien be deported or returned to a country, regardless of whether or not it is his country 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.*

<sup>73</sup> Cf. Declaration of the States parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, §4.

<sup>74</sup> Cf. *Pacheco Tineo Family*, §135 and §152.

of *non-refoulement*<sup>75</sup>. The expulsion process by the FM was even against the domestic legislation of Clonalia and therefore unlawfully.

**42.** Moreover, Marsili has to provide a protection to its nationals, but if it is unwilling or unable to protect the applicants this can be qualified as some form of persecution. The government of Marsili is unable to protect its population from suffering under the consequences of the changing living conditions. Due to the increasing natural hazards (flooding, landslides in urban areas, hurricanes, typhoons, rainfalls) public investment goes mainly into reconstruction programs and is supporting national security forces, as Marsili has to deal with constant riots and revolts<sup>76</sup>. The destruction of the cultural existence by specific environmental disasters can amount to persecution<sup>77</sup>. Candela as a social group is therefore in serious danger of persecution, possibly affecting the member's rights to life and personal freedom.

d. The collective expulsion of Candela community is prohibited (Art 22.9)

**43.** As none of the referred group of asylum-seekers was heard individually before the FM and their request was rather denied as a group, the Respondent has to be made responsible for the violation of Art.22.9. This article prohibits collective mass expulsion of asylum-seekers.

**44.** It is important to mention that many international human rights treaties are prohibiting collective expulsions in a similar way to the American Convention<sup>78</sup>. This Court considers a collective expulsion as a decision that is not based on an objective analysis of each individual case which leads incessantly into arbitrariness<sup>79 80 81</sup>. The IACtHR itself disposed certain

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<sup>75</sup> Cf Art. 4 of Law 715/1989 – *supra* margin note 31.

<sup>76</sup> §26 HC.

<sup>77</sup> Cf. *Kozoll - Poisoning the Well*, Colorado Jr.Int'l.Env'tl.L.Pol. 2004, at 284.

<sup>78</sup> Cf. *inter alia* Protocol 4 to the ECHR, Art. 4: *Collective expulsion of aliens is prohibited*.

<sup>79</sup> Cf. *Nadege Dorzema et al. v Dominican Republic*, Judgment of October 24, 2012, §171.

<sup>80</sup> The ECtHR denies decision on collective expulsion of a group “*except where such measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group*” (See ECtHR, *Andric v. Sweden*, Judgment of February 23, 1999, No. 45917/99, §1; *Conka v. Belgium*, Judgment of February 5, 2002, No. 51564/99, §59).

<sup>81</sup> Furthermore the Office of the United Nations High Commissioner for Human Rights (hereinafter OHCHR) states in its report on the rights of the non-citizen that the expulsion-procedure has to “*afford sufficient guarantees demonstrating that the personal circumstances of each of those non-citizens concerned has been genuinely and individually taken into account*” (See OHCHR - *The Rights of Non-citizens*, 2006, at 218).

guarantees that have to be followed initiating an expulsion: “[...] ii) *In case of an unfavorable decision, the alien must be entitled to have his or her case reviewed by the competent authority and appear before this authority for that purpose, and iii) The eventual expulsion may only take effect following a reasoned decision in keeping with the law that is duly notified*”<sup>85</sup>.

**45.** The 23 families could not present individually their circumstances to the FM, especially after receiving the negative decision. They were treated as a group by the FM. The decision made by the agency was thus not reasoned enough to lead to the expulsion of all 23 families as the next step. All in all this represents a collective expulsion for the purpose of Art. 22.9.

#### **4. Violation of Art. 8 – Right to a Fair Trial**

**46.** By not assuring certain rights to a fair trial at different stages of the expulsion process, Clonalia violated Art. 8.1<sup>86</sup>. It refers to a series of requirements that must be observed at all procedural stages to ensure that the individual is able to defend his rights adequately in relation to any decision of the State, taken by any public authority, including the administrative ones<sup>87</sup> („*due process of law*”<sup>88</sup>). This right is explicitly to be granted to migrants, too<sup>89</sup>. States thus have to ensure certain guarantees to examine the request of asylum in a proper way<sup>90 91</sup>.

**47.** The ECtHR is denouncing the lack of guaranteeing due process of law to asylum-seekers in the application proceeding, “[...] particularly when it came to assessing the risk they would

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<sup>85</sup> Cf. *Nadege Dorzema*, §175.

<sup>86</sup> Art. 8.1 – *Every person has the right to hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.*

<sup>87</sup> *Pacheco Tineo Family*, §130; *Constitutional Court v. Peru*, Judgment of January 31, 2001, Ser. C No. 71, §69; *Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Ser. C No. 227, §115.

<sup>88</sup> *Baena Ricardo et al. v. Panama*, Judgment of February 2, 2001, Ser. C No. 72, §124.

<sup>89</sup> *Vélez Loor*, §143.

<sup>90</sup> This obligation of the State must be analyzed in relation to the principles established in Art. 8 and Art. 25 of the Convention.

<sup>91</sup> In the understanding of international law the procedure has to be fair and efficient – Cf. ExCom UNHCR. Conclusions adopted by the Executive Committee for the international protection of refugees. No. 71 (1993), §i. These standards were also set up in the Declaration of 2001 by the Parties of the CSR – Cf. Declaration of the States parties to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, operative §6.

run if they were returned to their country”<sup>92</sup>. The State’s obligation is to provide predictable proceedings with objective decision-making. In accordance with this, the Court set up guidelines that have to be considered by the States while examining asylum-requests: “[...] b) *The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority, and requires a personal interview*; c) *The decisions adopted by the competent organs must be duly and expressly founded*; [...] f) *The appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded*”<sup>93</sup>.

**48.** But instead, in the present case, the administrative authorities in charge did not even assess the intrinsic value of the Petitioners’ arguments concerning their fear of returning to the island of Theodore. The FM decided, in a summary manner and without a hearing, that it would not consider their request for asylum. The families were unable to present their case to the FM, nor their reasons for their request in a personal interview. The FM found that environmental issues cannot *and should not be mixed with migration issues*. As such, the request would not be thoroughly addressed, but be ruled out because of the absence of valid application, and therefore, the immigration authorities should activate the administrative procedures aimed at the expulsion of people involved in the process.

**49.** Irrespective of whether the request for asylum has been substantiated, the relevant point here is that the FM did not accord the Petitioners the opportunity to state the reasons for their entry into Clonalia and their reasons for requesting asylum and, consequently, whether reasons existed that endangered their human rights enjoyment in Marsili. That way, the FM did not even consider or assess the possibility that the asylum request was substantiated.

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<sup>92</sup> ECtHR, *Gebremedhin v. France* (No. 25389/05), Judgment of 26 April 2007, §62.

<sup>93</sup> *Pacheco Tineo Family*, §159



**50.** For meeting the requirements of an ‘independent and impartial’ tribunal<sup>94</sup> (Art. 8.1), the Court has stated that *„it must be ensured that the judge is free from any prejudices and that no doubts whatsoever may be cast on the exercise of jurisdictional functions“*<sup>95</sup>. When taking measures, States must respect the migrant’s human rights, in compliance with the obligation to ensure to all persons subject to the State’s jurisdiction, the exercise and enjoyment of these rights, without any discrimination based on their nationality or any other reason<sup>96</sup>.

**51.** In fact, the FM did not act impartial because it was partisan by the political circumstances. Already in 2011, Clonalia restricted the visa requirements for the Marsilian population in order to control future immigration. This discloses distinct negative stance on Marsilian migrants. On March 5, 2014, the detention of the families was ordered by the FM, including elderly and children. The warrant, an administrative decision, was issued in order to start the process of deporting the families back to Marsili, without assessing the families’ arguments. These proceedings were contrary to ACHR statements.

**52.** Clonalia did not ensure certain guarantees of due process of law and violated Art. 8.1.

## **5. Violation of Art. 7 - Right to Personal Liberty<sup>97</sup>**

**53.** Clonalia has violated Art. 7 of the Convention by detaining members of the community of Candela<sup>98</sup>. About half of the 32 families were apprehended and taken to a temporary prison, where they are down to the present day waiting for the honorable Court’s decision<sup>99</sup>.

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<sup>94</sup> The European Court has emphasized, that the fundamental feature of a ‘tribunal’, as mentioned in Art. 6 of the European Convention, is the ‘independence of the executive and of the parties of the case’ (ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of June 18, 1971, Ser. A No. 12, §78). The Honorable Court, anyhow, does not generally exclude administrative authorities from exercising judicial functions and taking decisions. Still, it has emphasized, that the ‘administration’s intervention in such cases has insurmountable limits, first and foremost the need to respect human rights, making it necessary for its conduct to be regulated’ (Vélez Loor, §141; Baena Ricardo, §126).

<sup>95</sup> The IACtHR stated that ‘it must be ensured that the judge or court hearing a case does so based on the utmost objectivity. Furthermore, the independence of the Judiciary from the other State powers is essential for the exercise of judicial functions. The impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy’. *Palamara Iribarne v. Chile*, Judgment of November 22, 2005, Ser. C No. 135, §§145 et seq.

<sup>96</sup> *Pacheco Tineo Family*, §129.

<sup>97</sup> Any violation of Articles 7.2 – 7.7 necessarily entails a violation of Art. 7.1 ACHR (*Chaparro Álvarez*, §54; *Nadege Dorzema*, §125).

**54.** According to the IACtHR, Art. 7 of the Convention protects exclusively the right to physical liberty and covers physical conducts that presuppose the actual presence of the holder of the right that are normally expressed in physical movement<sup>100</sup>. Liberty, so the Court, is supposed to always be the rule, and the limitation or restriction always the exception<sup>101</sup>.

**55.** To the fact that the families were immigrants, the Court has emphasized their special, vulnerable situation in relation to potential or actual violations of human rights<sup>102</sup>. As to prove findings, the community-members were detained without previously being able to present neither their case nor the reasons for their request to the FM, the entity in charge of migration issues<sup>103</sup>. The measures to restrict the families' personal liberty were not related to the commission of a criminal offense, but to their migratory status<sup>104</sup>.

a. Candela's families have been subjected to arbitrary arrest (Art. 7.3 ACHR)

**56.** The right not to be deprived of liberty in an arbitrary way, codified in Art. 7.3 of the Convention, has been violated. Pursuant to Art. 7.3 of the Convention, no one may be subject to arrest or imprisonment for reasons or methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual<sup>105</sup>.

**57.** *In casu*, the authorities did not keep the families detained for bringing them before a judge (or other officer authorized by law to exercise judicial power) or to formulate charges against them in keeping with the domestic norms. The arrests were not made in order to carry out a procedure capable of determining the circumstances and legal status of the detainees, which means that they were detentions for unlawful purposes and, consequently, arbitrary<sup>106</sup>.

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<sup>98</sup> The FM of Clonalia, on March 5, 2014, ordered the detention of Candela families, including elderly and children, due to Law 715/1989 (Cf. Clarification N°28).

<sup>99</sup> Cf. Clarification N°40.

<sup>100</sup> Chaparro Álvarez, §53.

<sup>101</sup> *ibid.*

<sup>102</sup> Vélez Loor, §98.

<sup>103</sup> §52 HC.

<sup>104</sup> Cf. Vélez Loor, §106.

<sup>105</sup> *Gangaram-Panday v. Suriname*, Judgment of January 21, 1994, Ser. C No. 16, §47.

<sup>106</sup> Cf. *Nadege Dorzema*, §134.

58. Furthermore, as the Court has established, immigration policies based on the obligatory detention of irregular migrants will always be arbitrary in the sense of Art. 7.3 if no competent authority verifies in each specific case, by an individualized evaluation, the possibility of using less restrictive measures that may be effective to achieve these purposes<sup>107</sup>.

59. In conclusion, Clonalia breached the right to personal liberty of Candela's families, as stated in Art. 7.3 of the Convention.

b. Candela's families have not been brought before a judge (Art. 7.5 ACHR)

60. Clonalia has violated Art. 7.5 with respect to the detention of the families by not having brought them before a judge or a competent judicial authority. The Court has established that the American Convention, unlike the European Convention, does not set a limit on the exercise of the guarantee in Art. 7.5 of the Convention based on the reasons or circumstances under which the person has been arrested or detained<sup>108</sup>. Therefore, persons detained due to migration issues also fall within the scope of Art. 7.5.

61. As demonstrated before<sup>109</sup>, the families were not brought before a judge, who would exercise judicial control over the terms and conditions of the arrest<sup>110</sup>. Therefore no effective judicial control was exercised over the arrest made in violation of Art. 7.5 of the Convention.

c. Candela's families could not contest the lawfulness of the arrest (Art. 7.6 ACHR)

62. The guarantee to contest the lawfulness of the arrest, codified in Art. 7.6 of the Convention, has been violated<sup>111 112</sup>. As stated by this Honorable Court, the formal existence of a remedy is not sufficient to exonerate a State of its responsibilities. It held that „*the analysis by*

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<sup>107</sup> Vélez Loor, §171; Pacheco Tineo Family, §131.

<sup>108</sup> Vélez Loor, §107.

<sup>109</sup> *supra* B.III.2 – Violation of Art. 8.1.

<sup>110</sup> Cf. Vélez Loor, §102.

<sup>111</sup> The Court has highlighted the great importance of Art. 7.6, that „*protects the right of the person deprived of liberty to recourse to a judge, irrespective of the observance of his other rights and of the judicial activity in his specific case, which implies that the person detained effectively exercises this right, in the assumption that he can do so, and that the State effectively provides this recourse and rules on it.*“ (Yvon Neptune v. Haiti, Judgment of May 6, 2008, Ser. C No. 180, §114).

<sup>112</sup> In the Chaparro Álvarez Case, the Court stated that „*the authority who must decide on the lawfulness of the arrest or detention must be a judge or court*“, and cannot be a political figure (Chaparro Álvarez, §128).

*the competent authority of a judicial recourse that debates the legality of the imprisonment cannot be reduced to a mere formality, instead it must examine the reasons invoked by the claimant and make express statements regarding the same, according to the parameters established by the [...] Convention*<sup>113</sup>.

**63.** *In casu*, the FM is an administrative agency that has an internal judicial mechanism that operates *similarly* to a lower court proceeding. A judicial decision made by the FM judicial body may be appealed solely within the FM-internal judicial framework. Therefore, the proceedings as practiced by Clonalia are not compatible with Art. 7.6 of the Convention, since they establish that the FM, an administrative authority and itself responsible for ordering the custody, is the authority responsible for deciding whether an arrest is lawful.

**64.** The same applies to the appeal. In accordance with Clonalia's proceedings, but in breach of Art. 7.6, the only judicial control was the response to the appeal raised by the CCA. The FM rejected the recourses filed without ruling on the appeal; instead, it reaffirmed the decision already taken by reiterating the arguments already submitted, drumming into the across-the-board reference to 'national security issues'<sup>114</sup>. It did not dedicate any effort to rethink its defective decision. That way, the appeal is turned into a mere formality with symbolical character and thus cannot be considered an effective judicial remedy in the sense of Art. 7.6.

## **6. Violation of Art. 5 – Right to Humane Treatment**

**65.** Clonalia violated Art. 5 of the Convention<sup>115</sup> by commencing the expulsion process with the intention of sending the families back to Marsili. Moreover, the right to humane treatment was violated by jeopardizing the families' physical and mental integrity and handing them over to obviously degrading and inhumane treatment in the temporary camps.

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<sup>113</sup> *López Álvarez v. Honduras*, Judgment of February 1, 2006, Ser. C No. 141, §96.

<sup>114</sup> §54 HC.

<sup>115</sup> Art. 5 - 1. *Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or torture. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*

**66.** The Court has found that in the context of the State's obligations to guarantee the rights recognized in the Convention, it must refrain from acting in such a way that favors, promotes, fosters or deepens the vulnerability of migrants; in addition, it must adopt, when appropriate, the measures necessary and reasonable to prevent or protect the rights of anyone in that situation<sup>116</sup>. This requirement was not fulfilled by Clonalia.

**67.** The families have been detained in a situation of complete uncertainty with regard to the conditions in the country of their origin and with regard to the result of their request for recognition of refugee status. It is thus reasonable to infer that they suffered anxiety and fear concerning the conditions awaiting them in Marsili and the consequent separation from the other families of the community<sup>117</sup>.

**68.** The European Court has emphasized its flexibility to apply the right to humane treatment<sup>118</sup> in new contexts arising<sup>119</sup>. This Honorable Court should follow this approach and see climate change-related displacement as such a new context.

**69.** Sending the families back to Marsili means to confront them with inhuman and degrading treatment. On Marsili they live in temporary camps where, in general, inconsistent access to food and fresh water are daily problems. The emissions, significantly caused by Clonalia, have caused the climate to change to such an extent that a return to Marsili is no longer reasonable. By its decision to start expulsion proceedings, Clonalia thus intended to expose Candela's families to degrading and inhumane treatment in Theodore. Clonalia, a developed country, has derived substantial economic benefits from its disproportionate GHG emissions. Therefore, in its decision, it has to consider its historical and current responsibility.

**70.** The Candela families' anguish, fear and lack of protection caused by the facts described above constituted a violation of their mental and moral integrity. The expulsion such condi-

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<sup>116</sup> *Vélez Loor*, §207.

<sup>117</sup> Cf. *Pacheco Tineo Family*, §201.

<sup>118</sup> as codified in Art. 5.2 ACHR and Art. 3 ECHR.

<sup>119</sup> ECtHR, *D v. UK*, Judgment of May 2, 1997, No. 30240/96, §49.

tions sufficiently severe as to affect the people's physical and moral integrity failed to strike a fair balance between the people's rights and the interests of Clonalia.

**71.** Moreover, it is important to emphasize that among the detained persons were several children. Similarly to the said afore, given the same circumstances and the special situation of those children, the latter suffer fear and lack of protection during the detention. The Court has stated that the involvement of children as victims of alleged violations of the right to humane treatment requires the application of the highest standard in determining the seriousness of actions<sup>120</sup>. In the case of the right to humane treatment of a child deprived of his or her liberty, the State's obligations are intimately related to quality of life<sup>121</sup>. Therefore, children require special protection because of their physical and emotional development<sup>122</sup>.

**72.** After all, Clonalia is responsible for the violation of Articles 5.1 and 5.2 ACHR.

## **6. Violation of Art. 13 – Freedom of Thought and Expression**

**73.** The State has violated the freedom of thought and expression, codified in Art. 13 ACHR<sup>123</sup>, by attempting to hide information about the certainty and urgency of global warming and not making the NEC's proposal accessible to the CCA. The FM refused to publish the proposal on the possible future links between migration issues, climate change and environmental degradation, which had been submitted to it by the NEC on July 7, 2014<sup>124</sup>.

**74.** Attempts of the CCA to obtain the text of the proposal failed and the FM's original decision was upheld by an administrative judge, reiterating the argument that the information on migration issues were directly linked to national security issues<sup>125</sup>. In this sense, the FM con-

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<sup>120</sup> *Gómez-Paquiyaury Brothers v. Peru*, Judgment of July 8, 2004, Ser. C No. 110, §170.

<sup>121</sup> *Juvenile Reeducation Institute v. Paraguay*, Judgment of September 2, 2004, Ser. C No. 112, §162.

<sup>122</sup> *ibid.*, §147.

<sup>123</sup> Art. 13.1 – *Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.* – provisions in similar language to Art. 13 of the Convention are codified in Art. 19 ICCPR and in Art. 19 UDHR.

<sup>124</sup> §57 HC.

<sup>125</sup> §59 HC

stituted an obstruction for justice to happen and violated not only Art. 13 of the Convention, but also Art. 6 of the UNFCCC, signed by Clonalia in 1995<sup>126</sup>.

**75.** Concerning the freedom of thought and expression as codified in Art. 13, the Court has asserted that this rights includes „*the right of all individuals to request access to State-held information*“<sup>127</sup>. It imposes a positive obligation on the State to provide such information or provide an answer that includes a justification when the State is allowed to restrict access to the information in a specific case<sup>128</sup>. This right is, as stressed by *Burgorgue-Larsen*, „essential for the fight against corrupt practices and bring an end to the stigma of ‚bad administration““<sup>129</sup>. In the *Claude Reyes Case*, the Court has, referring to, *inter alia*, the 1992 Rio Declaration<sup>130</sup>, especially emphasized that information which affects the environment is of particular public importance<sup>131</sup>. Relating to the exceptions from this important positive obligation of the State, the Court has asserted that „*in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures*“<sup>132</sup>. The findings of the proposal are of prime importance for the situation of the Candela-community and for the clearing up of Clonalia’s human rights violations. Therefore, denying CCA access to the text of the NEC proposal based on national security grounds constitutes a violation of the freedom of thought and expression.

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<sup>126</sup> Article 6: Education, Training and Public Awareness. In carrying ou their commitments under Article 4, paragraph 1(i), the Parties shall (a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with the national laws and regulations, and within their respective capacities: [...] (ii) Public access to information on climate change and its effects.

<sup>127</sup> *Claude Reyes et al. v. Chile*, Judgment of September 19, 2006, Ser. C No. 151, §77.

<sup>128</sup> *ibid.*; *Gomes Lund v. Brazil*, Judgment of November 24, 2010, Ser. C No. 219, §197.

<sup>129</sup> *Burgorgue-Larsen*, The right to the freedom of thought and expression, 2011, at 21.15.

<sup>130</sup> Principle 10. *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities [...]. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

<sup>131</sup> *Claude Reyes*, §81.

<sup>132</sup> *Gomes Lund*, §202.

**76.** Additionally, the decision about the qualification of the information as ‘secretive’ can not be left to a State organ whose members are charged with committing the wrongful acts<sup>133</sup>.

The practice is incompatible with the Rule of Law and with the division of powers – a working system of checks and balances – i.e. for (legitimate) secrets to be outside legal control, that is to say, for the authority to have areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system<sup>134</sup>. For all these reasons, Clonalia’s actions violated Art. 13 of the Convention.

## **8. Violation of Right to Progressive Development under Art. 26 and the Right to a Healthy Environment under Art. 11 of the Protocol**

**77.** Clonalia has violated the right to progressive development (Art. 26 ACHR<sup>137</sup>) in conjunction with the right to a healthy environment (Art. 11 of the Protocol<sup>138</sup>) since there is an undeniable link between human rights and environmental protection. Together they aim to reach the highest quality of life and a life in dignity of all human beings<sup>139</sup>. If the Court does not consider Art. 11, it must consider the violation of Art. 26, as it is an ACHR stated right<sup>140</sup>.

**78.** The importance of social, economic and cultural rights such as Art. 11 of the Protocol should not be underestimated<sup>141</sup>. The Court has stated that there is a strong interdependence between civil and political rights and economic, social and cultural rights<sup>142</sup>. It has empha-

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<sup>133</sup> *ibid.*; *Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, Ser. C No. 101, §181.

<sup>134</sup> *ibid.*

<sup>137</sup> Art. 26 – *The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.*

<sup>138</sup> Art. 11 - 1. *Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.*

<sup>139</sup> Every “failure to preserve a healthy environment has a clear and ever increasing effect on the enjoyment of human rights” - *Spieler*- *The La Oroya Case*, HRB 2010, at 23.

<sup>140</sup> Cf. Art. 1.1 ACHR.

<sup>141</sup> As *Brinks and Gauri* put it, „legalizing demand for [socio-economic] rights might well have averted tens of thousands of deaths and has likely enriched the lives of millions of others“ - *Brinks, Gauri – A New Policy Landscape*, 2008, at 303.

<sup>142</sup> *Acevedo Buendía v. Peru*, Judgment of July 1, 2009, Ser. C No. 198, §101.



sized its ability to examine all alleged violations of the Convention, including those of Art. 26 and distinguished the special emphasis of the Convention on granting the economic, social and cultural rights the maximum protection<sup>143</sup>.

**79.** In the *Five Pensioners Case*<sup>145</sup>, the Court described two dimensions of economic, social and cultural rights: a collective one, that considers the „growing coverage“ of such rights in general<sup>146</sup>, and an individual one, that includes „the right to social security [...] in particular, of the entire population, bearing in mind the imperatives of social equity“<sup>148</sup>. The right to a healthy environment is such a socio-economic right. The Stockholm Declaration specified it as guaranteeing the environmental conditions for living a “life of dignity and well being”<sup>149</sup>.

**80.** In the present case, Candela suffered severe harm from the burden of climate change<sup>150</sup>. Especially the right to property was affected, in the sense that the livelihood of Candela is more and more destroyed<sup>151</sup>. Furthermore, living conditions in Theodore affect the right to humane treatment<sup>152</sup>. A life of dignity and well being became thus impossible.

**81.** Concerning obligations from environmental harm, the Commission stated that “severy environmental pollution may pose a threat to human life and health, and in the appropriate case give an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury”<sup>153</sup>.

**82.** In accordance with Principle 2 of the Rio Declaration, Clonalia is responsible for Candela’s harm<sup>154</sup>. It has taken no measures to deal with climate change and failed to put into place adequate safeguards and mechanisms to prevent environmental damage and also failed to take

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<sup>143</sup> Acevedo Buendía, §§97 et seqq.

<sup>145</sup> *Five Pensioners v. Peru*, Judgment of February 28, 2003, Ser. C No. 98.

<sup>146</sup> The collective dimension requires the State to adopt measures, “especially those of an economic and technical nature – insofar as there are available resources – by legislation or other appropriate means – with a view to achieving progressively the full realization” - Acevedo Buendía, §105.

<sup>148</sup> *Five Pensioners*, §147.

<sup>149</sup> Declaration of the UN Conference on the Human Environment, 1972, Principle 1.

<sup>150</sup> for the effects of climate change on the island of Theodore see *supra* margin notes 2 et seq.

<sup>151</sup> Cf. *supra* margin notes 25 et seqq.

<sup>152</sup> Cf. *supra* margin notes 65 et seqq.

<sup>153</sup> IACHR – Report on the Situation of Human Rights in Ecuador, 1997, at 88.

<sup>154</sup> Principle 2. Cf. *supra* note 36.

measures to deal with the related issue of migration. Its policy did not consider the growing coverage of socio-economic rights, nor was it able to provide the right to social security to the people of Candela. It rather left Candela with a legacy of environmental destruction and social problems, and did not even provide help where it explicitly had the obligation to.

**83.** Concerning the requirement of ‘*international cooperation*’ for the realization of social, economic and cultural rights, contained in Art. 26, it is obvious that Clonalia has failed to appropriately engage on the international stage<sup>155</sup>. Clonalia was incapable of regulating its GHG emissions. Furthermore it refused to contribute to the efforts to internationally establish State’s environmental requirements and even denied the scientific evidence of climate change.

**84.** Ignoring the obligation to promote a healthy environment in such a serious manner is a regressive policy incompatible with Clonalia’s international, responsibility violating the Convention and international law. Therefore a solely approximately “full realization” of the human rights deriving from Art. 26 of the Convention and Art. 11 of the Protocol became impossible.

#### IV. Prayer for Relief

**85.** For the foregoing reasons, the Candela community respectfully request this Honorable Court to adjudge and declare that Clonalia violated Articles 5, 7, 8, 13, 21, 22, and 26 in relation to Art. 1.1 of the Convention and Art. 11 of the Protocol, and the Candela People are entitled to reparations and costs within the Inter-American system.

**86.** Candela therefore asks the IACtHR to order that the State of Clonalia (i) to relocate the inhabitants to lands that are compatible with the continuance of their way of life; and (ii) to pay the costs and expenses incurred by the victims to litigate this case.

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<sup>155</sup> *supra* margin notes 15 *et seqq.*