Team #3

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

THE RURAL COMMUNITY OF CANDELA

Petitioner

v.

THE FEDERATION OF CLONALIA

Respondent

MEMORIAL FOR THE STATE

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IV. STATEMENT OF JURISDICTION

In accordance with Article 62 of the American Convention on Human Rights ("ACHR" or "the Convention"), the Federation of Clonalia ratified the ACHR on August 1, 1978 and accepted the jurisdiction of the Inter-American Court of Human Rights ("IACtHR" or "the Court") on June 28, 1982.[1] The Inter-American Commission on Human Rights ("IACHR" or "the Commission") referred the case to the jurisdiction of the Court on December 17, 2014.[2] All facts being disputed have occurred after the date of ratification.

V. LEGAL ANALYSIS

A. PRELIMINARY OBJECTIONS

1. RIGHT TO A HEALTHY ENVIRONMENT

Lack of Jurisdiction Ratione Materiae

The Court does not have contentious jurisdiction to confer judgments on the violations of treaties that are outside its jurisdiction.[3] Consequently, the Court only has jurisdiction over the Convention and other treaties that have granted it jurisdiction; this may be unlimited or specific.[4] Article 19.6 of the Additional Protocol of San Salvador[5] grants specific jurisdiction to the Court; jurisdiction only over Article 8 (right to unionisation) and Article 13 (right to education) explicitly excluding Article 11 (the right to a healthy environment).

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[1] Hypothetical, para 71
[2] Hypothetical, para 70
[3] *Case of Las Palmeras v Columbia* (Preliminary Objections), Inter-Am. Ct. H.R., Judgment of February 4, 2000, Series C No. 67, 2000, para. 16, resolutions 2 and 3.
[4] *Case of Gonzalez et al. ("Cotton Field") v Mexico* (Preliminary Objections, Merits, Reparations, and Costs), Inter-Am. Ct. H.R., Judgment of November 16, 2009, Series C. No. 205
[5] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), signed at San Salvador, El Salvador on 17 November 1988, the eighteenth regular session of the General Assembly, and entered into force on 16 November 1999.

Further, the Respondent contends that Article 26 of the Convention does not *ipso facto* afford judicial protection to all the ESC rights found in the Protocol of San Salvador. The ACHR is designed primarily to protect civil and political rights[6] and to allow non-justiciable social rights under the Protocol to be 'judiciable' under the Convention would undermine the consent of the parties to the Convention and the Protocol of San Salvador.[7] It must be noted that it is the function of the States Parties to decide what the rights are while the function of the Court is to interpret these rights.[8] For the Court to enforce a right to a healthy environment, under Article 26 of the Convention, which is specifically non-judiciable under the Protocol of San Salvador would amount to a usurpation of its function and an obfuscation of the legal process.

Furthermore, the *pro homine* principle cannot be used as a basis for granting jurisdiction when the literal meaning of a norm does not.[9] The *pro homine* principle must be executed within the confines of the Convention itself. The jurisprudence of the Court as it relates to issues concerning the environment is in keeping with this concept. In *Kawas-Fernandez,*[10] the murder of an environmental activist, contravened the right to life in conjunction with her right to freely associate under the ACHR. The effect of the Court's order was not to enforce a right to a healthy environment by extending the scope of the judiciable rights to be found in the Convention, but to recognize the victim's role as an activist in protecting the environment. Additionally, the cases of *Yanomami Indians*,[11] *Saramaka People*[12] and *Claude Reyes et al.*[13] are all examples of

[6] Abramovich, and Rossi, p. 37 (author's translation; the original in Spanish reads: 'un catálogo completo de derechos sociales que evidentemente los Estados no tuvieron intención de incorporar en el sistema de la Convención, diseñado principalmente para la tutela de derechos civiles y políticos').
[7] Amerasinghe, C., *The Jurisdiction of International Tribunals, Kluwer Law International*, The Hague, 2003, at p. 70.
[8] Ruiz-Chirboga, Oswaldo, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties*, p.176
[9] *Case of Gonzalez et al. ("Cotton Field") v Mexico, supra*, paras. 78–79
[10] *Case of Kawas-Fernández v. Honduras*, (Merits, Reparations and Costs), Inter-Am. Ct.H.R., Judgment of April 3, 2009, Series C. No. 196, para. 148.
[11] *Case of the Yanomami Indians*, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66 doc. 10 rev. 1 at 6.

environmental jurisprudence from the inter-American system where a decision was made on violations of articles of the Convention and not on a violation of a right to a healthy environment. In contrast to the Court's jurisprudence, the Court is being asked to admit a petition founded directly on the right to healthy environment, which is outside the remit of the Court.

Lack of Jurisdiction Ratione Loci

The Convention obliges State Parties to undertake to respect the rights and freedoms of all persons subject to their jurisdiction.[14] The Commission qualified the issue by stating that "While this [jurisdiction] most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad."[15] The European Court takes a similar position that "the jurisdiction of States is normally territorial, but there are three exceptions thereto."[16] The case law of the Commission indicates that States may be considered to have 'effective control' over persons as a result of three distinct types of extraterritorial conduct: 'military occupation,'[17] 'military control'[18] and 'detention.'[19] Therefore, in this case, an obligation on environmental issues is owed to its nationals and not to persons living abroad. This is buttressed by the fact that State Parties to the Protocol are obligated to make annual reports to the Commission on the state of their environment.[20]

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[12] *Case of the* S*aramaka People v Suriname,* Inter-Am. Ct. H.R., Judgment of August 12, 2008, Series C. No. 172
[13] *Case of Claude Reyes et al v Chile*, Inter-Am. Ct. H.R., Judgment of September 19, 2006, Series C. No.151
[14] ACHR, Article 1.1
[15] *Coard et al., (United States),* September 29, 1999, Report No. 109/99, Case No. 10.951.
[16] Cerna, C, *Out Of Bounds? The Approach Of The Inter-American System For The Promotion And Protection Of Human Rights To The Extraterritorial Application Of Human Rights Law*, NYU School of Law (2006), p. 5
[17] *Coard et al, supra*
[18] *Armando Alejandre Jr. et al.,* (Cuba), Inter-Am C.H.R., September 29, 1999, Report No. 86/99, Case No. 11.589
[19] *Rafael Ferrer-Mazorra et al*., (United States) Inter-Am. C.H.R., April 4, 2001, Report No. 51/01, Case No. 9903
[20] Protocol of San Salvador, Article 19

Consequently, the Respondent submits that the petition is thus inadmissible *ratione loci* as a claim to the right to a healthy environment is owed to a State's own citizens and cannot be applied extraterritorially as it does not fall under any of the exceptions.

2. RIGHT TO ASYLUM OR REFUGEE STATUS

No Obligation to Grant Asylum

Article 22.7 of the ACHR asserts that "every person has the right to seek and be granted asylum in a foreign country," and although this confers a right on the individual to be granted asylum, it does not obligate the State Party to grant refugee status to a person who has applied for such status.[21] Alternatively, the correct interpretation of the Convention protects the right to apply for and enjoy asylum. This is in keeping with the principles of sovereignty and territorial integrity as the grant of asylum can be seen as a friendly act of a state.[22] Hence, the individual has "no right to receive asylum inherent in the way the "right" to asylum has been articulated. This right might be seen as merely a right to receive asylum from a state willing to grant it."[23] A State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation.[24] Furthermore, this Court has stated that the individual who seeks refugee status or asylum must satisfy the precepts of the definition of a refugee[25] as articulated by the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"); subject to the discretion of the asylum granting state. While States have a duty to give special care to migrant children, the Court recognizes that not all cases of child migrants

[21] *Case of the Pacheco Tineo Family v. Bolivia*. (Preliminary objections, Merits, Reparations and Costs) Inter-Am. Ct. H.R., Judgment of November 25, 2013. Series C No. 272, para. 129
[22] Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of St. & Gov't, Sept. 10, 1969, art. 2(2), 1001 U.N.T.S. 45 (entered into force June 20, 1974)
[23] Wiessner, S., *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS.L.J. 447 (Dec. 1986)
[24] *Rights and Guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of August 19, 2014. Inter-Am Ct. H.R., Series A No. 21, para 74
[25] *Rights and Guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 *supra*, para 75

reach the level of requiring international protection.[26] It is therefore submitted that the application for asylum status by the Petitioners satisfied the full enjoyment of their right under the Convention. The onus is then on the Petitioners to prove a legal nexus between refugee status and environmental degradation; which does not exist so there is no obligation to grant asylum within the inter-American system to the Petitioners.

No Legal Nexus Between Environmental Law and Refugee Law

The Convention secures the right to asylum as a provision under Article 22, this right is however subjected to municipal legislation or international instruments in the event the individual is being pursued for political offenses or related common crimes.[27] The Refugee Convention defines a refugee as someone with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[28] It is important to note that neither the ACHR nor the Refugee Convention mentions a right to asylum due to environmental degradation. Therefore, it is submitted that environmental refugees, a concept that only emerged decades after the Refugee Convention's adoption, does not fall within its scope. Furthermore, climate change refugees face no persecution in the same way that refugees under the Refugee Convention have.[29] To allow such protection would amount to a redefinition of refugeehood which was painstakingly developed as a response to World War Two and accepted as international custom.[30] Moreover, there is neither extensive and uniform state practice nor

[26] *Rights and Guarantees of children in the context of migration and/or in need of international protection,* Advisory Opinion OC-21/14, *supra*, para 101
[27] ACHR, Article 22.7; *Rights and Guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14, *supra*, para 74
[28] Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 art. 1(A)(2).
[29] Kolmannskog, V. O., *Norwegian Refugee Council,Future Floods Of Refugees: A Comment On Climate Change*, Conflict And Forced Migration 9 (2008), *available at* http://www.nrc.no/arch/_img/9268480.pdf
[30] Boano, C, (Dr.*), Environmentally Displaced People Understanding: The Linkages Between Environmental Change, Livelihoods And Forced Migration*, Refugee Studies Centre (November 2009), p.24

opinio juris sufficient to warrant the expansion outside the Refugee Convention.[31] The 'well-founded fear of persecution' is an indication of the high threshold set by the Refugee Convention in the protection of certain groups, which are said to be identical to which discrimination under human rights standards is prohibited in general international law.[32] It is therefore submitted that the principles of refugee law are unable to accommodate the Petitioners which fall outside the scope of the 'status of the refugee'.

Further, the United Nations Framework Convention on Climate Change (UNFCCC) which was ratified by both Clonalia and the Islands of Marsili, whose object is the phenomenon of climate change and environmental degradation, focuses on inter-state obligation to climate change reduction and makes no linkages between climate change and issues concerning international refugee law. It is also submitted that the UNFCCC is more preventive in nature and less focused on the remedial actions that are needed in a refugee context.[33]

Furthermore, the Federation of Clonalia is not a party to the Cartagena Convention, which arguably expanded the definition of refugee.[34] Therefore there is no justiciable right for environmental refugees without a separate Convention as it cannot be forced within the legal frameworks not designed to handle it.[35] Therefore, the Court lacks jurisdiction *ratione materiae* and the petition is inadmissible before this Court.

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[31] Hailbronner, K., *Non-Refoulement and 'Humanitarian' Refugees*, (1986), 26(4), Virginia J. Intl. Law 875 at 869.
[32] Weis, P., (Dr.), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed With A Commentary*.
[33] Hodgkinson, D, et al., *Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses*, NEW CRITIC, Sept. 2008, at 2*, available at* http://www.ias.uwa.edu.au/new-critic/eight/?a=87815
[34] Clarifications of the Rules and Hypothetical Case, Clarification Answer #19
[35] A Proposal for Climate Change Refugee Convention, Harvard Law Review, vol 33, pg.350

B. MERITS

ARTICLE 4: THE RIGHT TO LIFE

The right to have one's life respected and not deprived arbitrarily shall be protected by law.[36] At the core of the right to life is the protection against arbitrary deprivation of life, where states are to adopt measures to punish criminal acts and prevent arbitrary killings by their own security forces.[37] Particular to the inter-American system, in the cases of forced disappearances, the right extends even further to obligate states to investigate deaths and provide plausible explanation for the whereabouts of detained persons.[38] With the remainder of the right to life being devoted to matters concerning the death penalty, there are no instances where the claim being brought by the Petitioners can fit within the well-established scope of the right. It is submitted that Clonalia has committed no acts of arbitrary killings against the Petitioners and that the loss of land due to climate change is not justiciable under Article 4 of the Convention and so the Commission was correct in not finding a violation of the right to life.[39]

Furthermore, the debate on whether environmental degradation and climate change can amount to a violation of the right to life; is founded on whether the causal link can be substantiated. This is noteworthy in the decisions of this Court where environmental violations have been described as positive acts that factually infringe upon a people. In the *Yanomami case*, the Brazilian government built a highway through the lands of the indigenous peoples, causing non-indigenous people to bring contagious diseases that claimed actual lives.[40] Here, the Court equated the lives claimed by the diseases to the positive acts of arbitrary deprivation of life by the state; the causal

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[36] ACHR: Article 4.1
[37] UNHRC, CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, para 3
[38] *Case of Vélasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R., Judgment of July 29, 1988, Series C. No. 4, para 149
[39] Clarifications of the Rules and Hypothetical Case, Clarification Answer #16
[40] *Case of the Yanomami Indians*, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66 doc. 10 rev. 1 at 6, (1985)

link is not questionable. The case of the *Circumpolar of Inuit v United States* had a very similar claim as the facts of the current case. The petitioners were claiming a violation of Article 1 of the UDHR as to their right to life due to the melting ice in the Artic. They claimed it was the emissions of the US that were contributing to climate change that in turn caused the glaciers to melt and effect sea level rising and the destruction of their communities.[41] The Commission rejected the claim on an evidential basis, stating that the claims could not be substantiated. The OHCHR consequently stated in its 2009 report that it is "virtually impossible to disentangle the complex causal relationships" linking emissions from a particular source to a particular effect and climate change is often only one of many contributing factors to severe weather events.[42] Therefore, as in this case, "the causal link is weakened by the lack of empirical evidence"[43] as such, the claim cannot be substantiated under the scope of the right to life.

It is acknowledged that the Court has also interpreted Article 4 of the Convention, in conjunction with Articles 1.1 (duty to guarantee) and Article 29, so as to develop a concept of 'dignified existence.' When Article 4 is considered in conjunction with Article 1.1 of the Convention, a positive obligation is placed on State Parties to take all appropriate measures[44] to protect and preserve the right to life.[45] The Court in keeping with the *pro homine* principle, stated that, "the State has a duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes

[41] Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, at 35–67, 94 (submitted by Sheila Watt Cloutier) (Dec. 7, 2005), http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf
[42] Knox, J., *Human Rights Principles and Climate Change*, p. 8
[43] Hypothetical, para 39
[44] *Case of the Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R., Judgment of January 31, 2006, Series C No.140, para. 120.
[45] *Case of the "Street Children" (Villagrán-Morales et al.)*, Inter-Am. Ct. H.R., Judgment of November 19 1999, Series C. No. 63, paras. 144-146.

a high priority."[46] Ergo, the State Parties have to protect the vulnerable groups that are subject to their jurisdiction.

Thus far the Court has only used the developing concept of 'dignified existence' to protect indigenous peoples, tribal groups and street children. The Petitioners neither identify as tribal nor indigenous;[47] and cannot be said to satisfy the criterion to be afforded such protection. In addition, the Court has held that a state cannot be held responsible for every situation that poses a risk to the right to life. The state must be "aware of the real and imminent risk to the victim, and there are reasonable opportunities to prevent or avert the violation."[48] With the varying projections of sea level rise issued by the G2C2: the 2007 predictions were significantly revised in 2014, Clonalia could not have appreciated the risk to the Petitioners as the 'correct assimilations' which showed the real danger to Marsili were only recently published nor is the island in immediate danger of being covered. Additionally, considering the duty of Clonalia to its citizens, to implement social and economic policies to ensure their well-being it would be unreasonable, disproportionate and burdensome on Clonalia to also be responsible for the well-being of the citizens of the Islands of Marsili.

It is therefore submitted that Article 4 was not violated as the Petitioners' claim lacks legal causation, along with the fact that the Petitioners are not recognized as indigenous or tribal and the risk to the Islands of Marsili could not have been appreciated by Clonalia.

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[46] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Series C. No. 125, Judgment of 17 June 2005, para. 162.

[47] Clarifications of the Rules and Hypothetical Case, Clarification Answer #31

[48] *Case of Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of March 29, 2006, Series C No. 146, paras 123 and 155

ARTICLE 5: THE RIGHT TO HUMANE TREATMENT

The right to humane treatment affords for the respect of a person's physical, mental and moral integrity.[49] This right is however subject to the parameters outlined by Article 5 of the ACHR and the Court. In the *Neira Algeria Case*, the Court stated, "In essence [the right] refers to the rule that nobody should be subjected to torture or to cruel, inhuman and degrading treatment or punishment and that all persons deprived of their liberty should be treated with respect…"[50] The right is therefore not applicable to each time a person who feels their integrity is not respected (as in the common English understanding), but correctly refers to treatment while in detention.

The Court has indicated that "prolonged isolation and compulsory incommunicado are…cruel and inhuman treatment, which harm the physical and moral integrity of the individual and the right to respect for the inherent dignity of the human person."[51] There is no evidence to suggest that the detained families were subject to any inhuman treatment while awaiting deportation.

Article 5.3 posits that punishment shall not be extended to any person other than the criminal.[52] Thus, criminal liability ought to be established by law so as to afford the accused the basic protection from arbitrary detention. The Court has stated that detention without any criminal liability is an infringement of the right to humane treatment. [53] In the current situation, the detained families, obtained entry into Clonalia illegally; without the visa requirement.[54] Furthermore, the families were only detained after their petition for asylum was denied by the Foreign Ministry in its capacity as a migration tribunal.[55]

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[49] ACHR, Article 5.1
[50] *Case of Neira Algeria et. al v. Peru*, Inter-Am. Ct. H.R., Judgement of January 19, 1995, Series C. No. 20
[51] *Case of Lori Berenson Mejía v. Perú*, (Merits, Reparations and Costs), Inter-Am. Ct. H.R. Judgment of November 25, 2004, Series C. No. 119, para. 103.
[52] ACHR, Article 5.3
[53] *Garcia v. Peru*, Case 11.006, Report No. 1/95, Inter-Am. C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 102 (1995)
[54] Hypothetical, paras 47 and 25
[55] Hypothetical, paras 52 and 53

The right to humane treatment also protects the basic requirements to uphold the dignity of the detained; however, states have historically had the sole discretion of dealing with illegal immigrants.[56] Therefore, once the immigrants are deemed illegal by the legislation of the receiving territory, then the state has the discretion to act accordingly in the protection of national security and threats against the political, social and economic welfare of its citizens.[57] Since the detention was established and carried out by the immigration laws of Clonalia then the dignity of the Petitioners were not compromised. It is therefore submitted that the detention of the Petitioners, given its legal justification, cannot be said to have violated Article 5.

ARTICLE 7: FREEDOM TO PERSONAL LIBERTY

The right to personal liberty seeks to protect the integrity of the individual from a wide range of abuses and deals in some detail with aspects of due process; the remaining provisions are similar to those of Article 8.[58] The article does not forbid restrictions on personal liberty but requires that any such restriction be established by law and afford due process. This is closely linked to Article 5 as both articles safeguard the integrity and legality behind a state detention.[59]

In keeping with this protection of personal liberty, there must be no arbitrary arrest or imprisonment.[60] The Court interpreted this to mean "that no person can be subjected to detention or imprisonment for reasons and by methods that—even if classified as lawful—can be deemed incompatible with respect for the individual's fundamental rights by virtue of being, *inter alia*, unreasonable, unpredictable, or disproportionate."[61] It must be noted that the detention of the Petitioners is in keeping with the provisions set forth by local legislation; as a result the FM's

[56] IACHR, Report No. 51-01, *Case 9903 Rafael Ferrer-Mazorra et al. (United States),* April 4, 2001, para. 177
[57] IACHR, Report No. 19-02, *Petition 12.379 Mario Alfredo Lares-Reyes*, Vera Allen Frost and Samuel Segura (United States), February 27, 2002, para. 38
[58] ACHR, Article 27.2; Davidson, S, *The Inter-American Human Rights System* (Dartmouth, 1997) p 275
[59] *Democracy and Human Rights in Venezuala (2009), Chap IV: The Right to Life, to Humane Treatment and Personal Liberty and Security*. para 851
[60] ACHR, Article 7.3
[61] *Case of Gangaram Panday*, Inter-Am. Ct. H.R., Judgment of January 21, 1994, Series C No. 16, para 47

rejection of refugee status and consequent detention was legal. Further, it cannot be said that the detention and deportation of illegal immigrants was unreasonable and disproportionate. The State also acted in accordance with Article 7.4 as the families were informed of the reason for their detention; that it was in anticipation of the deportation to the Islands of Marsili.

ARTICLE 13: FREEDOM OF THOUGHT AND EXPRESSION

Article 13 recognizes a broad right to freedom of thought and expression; not just the expression of one's thoughts but to "seek, receive and impart information."[62] As a result, it is said that the right to receive information becomes a corollary right to the freedom of expression.[63] This principle has been developed in keeping with the notion of the right to know truth; it provides certain safeguards that are definite to a democratic society.[64] However, as with many rights, the right to the freedom of thought and expression and consequently the right to receive information are subject to certain restrictions.[65] The Court has noted that restrictions to Article 13 must be "established by law to ensure that they are not at the discretion of public authorities…respond to a purpose allowed by the American Convention [and]…necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest."[66]

The FM was unable to release the specific findings of the NEC as to do so would "jeopardize the national security, territorial integrity, the civilian population and the social and diplomatic stability of the country."[67] Domestic legislation grants the FM this discretion[68] as well as Article 13.2b of the ACHR. The requirement that the restriction must be necessary in a democratic society, speaks to the proportionality of the action. The Court has found that, "restrictions upon

[62] ACHR, Article 13
[63] Treaty Interpretation by the Inter American Court of Human Rights Expansionism, 595, downloaded from ejil.oxfordjounals.org at New York University on December 2, 2010
[64] *IACHR Annual Report of the Special Rapporteur for Freedom of Expression 2003* , ch. IV, 14.
[65] ACHR, Article 13.2b
[66] *Case of Claude Reyes et al v Chile*, *supra*, paras 89-91
[67] Hypothetical para 58
[68] Clarification of the Rules and Hypothetical Case, Clarification Answer #7

human rights must be proportionate to the interest which justifies it, and must be narrowly tailored to this legitimate objective."[69] The Court also maintained that within the framework of the ACHR there are restrictions on the exercise of certain rights and freedoms that can be justified on the ground that they assure public order or conditions that assure the normal and harmonious functioning of institutions.[70] Considering the restriction of information from 23 families, in comparison to the security of the civilian population and social stability of Clonalia, this is deemed to be proportional so as to ensure the normal and harmonious functioning of the institutions of Clonalia. Furthermore, issues of national security are of particular worth given that the Islands of Marsili, of which the families are citizens, has been prone to constant riots and revolts in recent times.[71] Additionally, the Petitioners entered Clonalia illegally while others fled after the notice of order of detention was given; already showing a propensity towards ignoring the laws of the land. The State's duty to ensure the security of its nationals therefore justifies the imposition of the restriction on the Petitioners' right to receive information. In addition, the Petitioners were informed of the reason for the restriction of the information and were afforded 'general conclusions' as to the NEC report.[72] Therefore, the Federation of Clonalia adopted the 'least restrictive' means in restricting their right to information.

Furthermore, the Petitioners were afforded judicial recourse to review the rejection of their request for the full NEC report[73] where upon appeal by the CCA, an administrative judge upheld the decision of the FM.[74]

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[69] Inter-Am.Ct.H.R., Advisory Opinion No.6, OC-6/86, of May 9, 1986, para.46 (citing *The Sunday Times* (ECHR)).
[70] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. Series A No. 5, para. 64
[71] Hypothetical, para 26
[72] *Case of Claude Reyes et al v Chile*, *supra*
[73] *Report of the Special Rapporteur for Freedom of Expression 2003*, Inter-Am. C.H.R.,ch. IV, 3, *available at* http://www.cidh.org/relatoria/showarticle.asp?artID=139&lID=1
[74] Hypothetical, para 59

ARTICLE 22: FREEDOM OF MOVEMENT AND RESIDENCE

Illegal Migrants

The Commission has found that Article 22 does not protect aliens from being removed or extradited in accordance with legal proceedings and due process guarantees.[75] The rights guaranteed by Article 22 provide protection for aliens who are lawfully in a country[76] but "States have not yet accepted a right to immigrate and to remain wherever one happens to be…[i]nstead, the States, in their great majority, pursue the protection of their frontiers and controlling migration fluxes and as such, sanction the illegal migrants,"[77] thus, it can be garnered that individuals who are in a country in violation of the immigration laws have no right to movement and residence there. State sovereignty also gives States the ability to define their immigration laws and policies, and therefore, decide legally on the entry, stay and removal of foreigners within their borders.[78] "In the view of States, there isn't a human right to immigrate and remain wherever one is; the control of migratory entries added to the procedures of deportations and expulsions; are subject to their own sovereign criteria."[79]

While the principle of *non-refoulement* constitutes the cornerstone of the international protection of refugees and asylum seekers, for this principle to apply, the 'refugee's' life or freedom must be threatened on account of his race, religion, nationality, membership of a particular social

[75] IACHR, Report No. 2/92, *Case 10.289 Sheik Kadir Sahib Tajudeen (Costa Rica)*, February 4, 1992.
[76] ACHR, Article 22.6
[77] Inter-Am. Ct. H.R., *Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic (Dominican Republic)*, Order of August 18, 2000, Concurring opinion Judge Cancado Trindade, para. 8
[78] *Case of Vélez Loor v. Panama*. (Preliminary Objections, Merits, Reparations and Costs.) Inter-Am. Ct. H.R., Judgment of November 23, 2010. Series C No. 218, para. 97; *Case of the Pacheco Tineo Family v. Bolivia*. (Preliminary objections, Merits, Reparations and Costs) Inter-Am. Ct. H.R., Judgment of November 25, 2013. Series C No. 272, para. 129;
Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003, Inter-Am. Ct. H.R., Series A No. 18, para. 168;
Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014, *supra,* para 39
[79] *Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, supra*, para. 8

group or political opinion.[80] Although this principle is reinforced in the inter-American system by the Cartagena Declaration which extends it to cover circumstances which have seriously disturbed public order, Clonalia has not ratified the Cartagena Declaration[81] and as such is only bound by the five grounds previously mentioned. Even though this principle not only applies to those persons whose status has not yet been determined but also to any alien by the extension of the principle in *Pacheco Tineo Family v. Bolivia*, once as an adequate analysis of their request has been conducted these persons may be expelled.[82] Furthermore, this principle is not absolute as Article 33.2 of the Refugee Convention provides that the benefit of the *non-refoulement* principle may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is. The Respondent submits that the principle of *non-refoulement* was not breached as deportation proceedings began after the Petitioners' request was analyzed and refused by the FM as well as they represented a threat to the national security of Clonalia and their life or freedom would not be threatened by one of the aforementioned grounds if they were expelled.

The Court has also made it clear that restrictions to Article 22 are possible where they are proportionate to a legitimate aim pursued in a democratic society.[83] Clonalia implemented visa requirements to all nationals of Marsili as a measure to control future migration[84] which it is entitled to do to protect its territorial sovereignty and is a legitimate limitation in the interests of its citizens. Despite this visa requirement the Petitioners entered illegally. The Respondent submits that by deporting the families, the State would be acting within the limits of Article 22.

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[80] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14, *supra*, para 209

[81] Clarifications of the Rules and Hypothetical Case, Clarification Answer #19

[82] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14, *supra*, para 210

[83] *Case of Ricardo Canese v. Paraguay*, (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of August 31, 2004, Series C. No. 111, para. 133.

[84] Hypothetical, para 25

No right to refugee status for environmental reasons

Petitions under the Refugee Convention are restricted to individual political refugees who flee their countries because of state-led persecution, and thus do not cover 'climate refugees.'[85] "Often courts and tribunals apply a restrictive test to this aspect of persecution"[86] and based on the definition of a refugee set out in the Refugee Convention, "unless it is assumed that 'nature' or the 'environment' can be the persecutor who persons are fleeing from, the term 'refugee' should not be used to describe those forced to migrate, either in part or entirely, by environmental factors."[87] Any expansion of the definition in the Refugee Convention would lead to a devaluation of the current protection for 'Convention refugees.'[88] There is no obligation to grant refugee status to persons whose country is being destroyed by natural disasters and to allow this kind of refugee means that Clonalia would be forced to grant everyone the same status. There are 62 million people who inhabit islands who may become submerged due to the effects of climate change and if Clonalia had to grant refugee status to all 62 million then that would result in an undue strain on the resources of the State.[89] Therefore, "giving refugee status to 'environmental refugees' would not only distort the definition and strain the desperately scarce

[85] McGregor, J. 1994. *Climate Change and Involuntary Migration: Implications for Food Security*. *Food Policy* 19 (2): p, 126.; Black, R., 2001. *Environmental refugees: myth or reality?* New Issues in Refugee Research, Working Paper 34

[86] Westra, L., *Environmental Justice and the Rights of Ecological Refugees*, (Earthscan, London, 2009), p. 28

[87] Refugee Studies Centre, *Environmentally displaced people: Understanding the linkages between environmental change, livelihoods and forced migration*, November 1, 2008, p. 9; Renauld et al. *Control, Adapt or Flee: How to Face Environmental Migration*, InterSections, UNU-EHS, no. 5/2007, www.ehs.unu.edu/file.php?id=259; Keane, D. (2004) *Environmental Causes and Consequences of Migration: A Search for the Meaning of 'Environmental Refugees'"*, Georgetown International Environmental Law Review

[88] Kibreab, G., (1997) *Environmental causes and impact of refugee movements: a critique of the current debate"*, Disasters 21(1), pp. 20-38; McGregor, J.A. (1993) *Refugees and the Environment* in Black R., Robinson, V., eds. *Geography and Refugees: Patterns and Processes of Change* (London: Belhaven Press) pp. 159-170

[89] Note hypothetical para 31.

resources of the international refugee regime"[90] but this large-scale migration would also do damage to Clonalia where all these refugees want to relocate to.[91]

"Often the line between asylum seeker and 'illegal immigrant' is fine, as many are fleeing economic disadvantage."[92] The Court indicated that it is relevant to distinguish between those who immigrate in search of opportunities to improve their standard of living from those who require a form of international protection, but not limited to protection for refugees and asylum seekers.[93] Therefore, the "Refugee Convention does not apply to 'those who shelter from conditions of general armed violence', natural disaster[94] or 'simply bad economic conditions.'"[95] The Islands of Marsili is a country with high levels of extreme poverty with about 35% of the population living on a dollar a day and about 70% of the population living on less than two dollars a day.[96] The Respondent submits that the Petitioners were illegal economic migrants and as such had no right to freedom of movement and residence in Clonalia under Article 22 of the ACHR. The failures of the families to adhere to the visa requirements shows that they had no intentions of going through official channels[97] as it took the Petitioners three months to apply for refugee status after their illegal arrival during in which time they engaged in further illegal activities. The Petitioners were instead fleeing the poverty and social problems present in Marsili.

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[90] Suhrke, A. (1994) *Environmental degradation and population flows*. Journal of International Affairs, 47(2), p. 492
[91] Hypothetical para 25; Clarification of the Hypothetical and Rules Answer #11
[92] Joseph, S. and McBeth, A., *Research Handbook on International Human Rights Law*, (Edward Elgar Publishing, USA, 2010) p. 219
[93] *Rights and Guarantees of Children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14, *supra*, para 82
[94] Goodwin-Gill, G. S. (1996) *The Refugee in International Law* (second edition), Clarendon Press, Oxford, UK, p3.
[95] Aleinikoff, T., *State Centred Refugee Law: From Resettlement to Containment* (1992) 14 *Michigan Journal of International Law* 120; Hathaway, J., *A Reconsideration of the Underlying Premise of Refugee Law*? (1990) 31 *Harvard International Law Journal* 129, argued that neither a humanitarian nor a human rights approach was an adequate approach in itself to the refugee 'problem'.
[96] Hypothetical, para 7
[97] Clarifications of the Rules and Hypothetical Case, Clarification Answers #13, 24 and 26

Therefore, based on the aforementioned it is submitted that the State has not breached Article 22 of the ACHR.

ARTICLE 26: PROGRESSIVE DEVELOPMENT

The scope of Article 26 is still debatable and some approaches consider that the emphasis on the progressive development of the rights guaranteed deprives them of justiciability and Article 26 should be understood solely as setting programmatic objectives and the understanding of the progressivity clause should be as a "non-justiciability standard."[98] Similarly, Héctor Gros Espiell, in his criticism of the express non-inclusion of each one of the ESC rights in the Convention, noted that "the mistake was in failing to understand that the economic, social and cultural standards of the Protocol of Buenos Aires…did not have the purpose of ensuring human rights, but rather of establishing guidelines for the conduct of States on economic, social and cultural matters."[99] There is therefore difficulty in deriving rights from standards that set public policy objectives. Judge Manuel Ventura Robles also considers that the jurisprudence of the Court has made mention of these rights as they arise from violation of other rights such as civil and political rights.[100]

Further, the Court has also rejected 'the request to rule on the progressive development of economic, social and cultural rights in Peru.'[101] There is also debate as to the obligations that are derived from Article 26 and Judge Cecilia Medina has maintained that "given that Articles 2 and 26 overlap (in the sense that both establish the duty to take measures) it would seem that they

[98] Cavallaro, J. and Schaffer, E., *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas* in *Hastings Law Journal*, No. 217, 2005, pp. 225-227; 267-269.
[99] Gros Espiell, H, *Los derechos económicos, sociales y culturales en el Sistema Interamericano*, San José, Asociación Libro Libre, 1986, p. 114.
[100] Ventura Robles, Manuel*, Jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de derechos económicos, sociales y culturales*, in Revista IIDH, No. 40, San José, IIDH, 2004, pp. 91; 130.
[101] *Case of the Five Pensioners v. Peru,* (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of February 28, 2003, Series C. No. 98, para 147

were intended to establish different obligations."[102] The Court has rejected the justiciability of some rights such as the right to social security in the context of Article 26.[103] The most famous attempt to bring a climate claim to a human rights tribunal – the petition brought by the Inuit people to the Commission – was found inadmissible.[104] It is therefore submitted that while the right to progressive development as guaranteed by Article 26 of the Convention may be justiciable, it does not include a right to the protection from the effects of climate change.

Furthermore, "States have some discretion to strike a balance between protecting human rights from climate change and pursuing other legitimate social interests."[105] The Respondent submits that coupled with the lack of empirical evidence to support the climatic consequences of greenhouse emissions, Clonalia was entitled to continue with its oil production and economic activities in the best interests of its society. The aim of achieving stability of energy sources for the country is indeed a legitimate aim as a country's primary duty of care is towards its own citizens. The continued exploitation of oil in the country's exclusive economic zone as well as the other industrial activities, create wealth, which could increase the opportunities for a greater number of citizens to enjoy various social rights, such as the right to work, among others. There is also no evidence that the right to the environment is being affected with respect to its overall population as only five of the thirty-four states have complained and is not necessarily representative of the general situation in the country. Therefore, it is submitted that the Federation of Clonalia was not in violation of Article 26.

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[102] Medina Quiroga, C., *Las obligaciones de los Estados bajo la Convención Americana de Derechos Humanos*, in The Inter-American Court of Human Rights. Un cuarto de siglo *1979-2004*, San José, IACtHR, 2005, pp. 227-228.
[103] *Case of the Five Pensioners v. Peru,* (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of February 28, 2003, Series C No. 98, para 147
[104] Knox, J., *Human Rights Principles and Climate Change*, p. 1
[105] Knox, J., *Human Rights Principles and Climate Change*, p. 8

ARTICLE 11: RIGHT TO A HEALTHY ENVIRONMENT

If the Court finds that the right to a healthy environment is indirectly justiciable through Article 26 of the ACHR, the Respondent submits that the progressive development of these rights was not infringed upon. The Federation of Clonalia's obligation on environmental issues is to its own citizens and not to the citizens of other countries. In the cases that the Commission has granted precautionary measures to protect the right to a healthy environment it has been from internal and not trans-boundary pollution.[106] Similarly, the decisions of the Court regarding the right to a healthy environment have been regarding internal issues and not trans-boundary matters.[107]

Thus a balancing act of the interests of the few individuals affected verses the entire population must be done. In the *Saramaka case,*[108] the Court reasoned that protecting "the interest of the society" as a whole by ensuring its economic and social development could be a legitimate aim that may result in the limitation of a right. The Respondent therefore submits that Clonalia was not in violation of the right to a healthy environment.

ARTICLE 21: RIGHT TO PROPERTY

While Article 21 of the ACHR protects the right to property "the attribution of international responsibility to the State for a violation of human rights must be considered in light of the Convention itself."[109] "The very origin of the responsibility of a State arises, therefore, from its non-compliance with the obligations enshrined in Article 1.1 of the Convention"[110] and as such

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[106] *Case of the Community of San Mateo de Haunchor and it's members v. Peru,* Case 504/03, Report No. 69/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 487.

[107] *Case of the* S*aramaka People v Suriname, supra*; *Case 12.053 Maya Indigenous Communities of the Toledo District* v. Belize. Report No 40/04 of October 12, 2004, paras. 144, 147, 148, 153.

[108] *Case of the* S*aramaka People v Suriname, supra*, para 127

[109] *Case of the Mapiripán Massacre v. Colombia*, (Preliminary Objections), Inter-Am. Ct. H.R., Judgment of September 15, 2005, Series C. No. 134.

[110] *Case of the Pueblo Bello Massacre v. Colombia*, (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of January 31, 2006, Series C. No. 140; *Case of the Mapiripán Massacre v. Colombia*, *supra*; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct. H.R. Series A. No. 18, September 17, 2003.

the obligations of a State to respect the right to property must be read in light of Article 1.1. Article 1.1 provides that a State has responsibility for individuals subject to its jurisdiction and thus "States assume obligations towards the individuals subject to their jurisdiction."[111] Furthermore, "the object and purpose of human rights treaties is the protection of the fundamental rights of human beings before their own States…and it is based on that object and purpose that the treaty must be interpreted."[112] The Court has also stated that "positive obligations must be interpreted so as not to impose an impossible or disproportionate burden on the authorities, and as such, not every claimed danger to life can entail for the authorities a Convention requirement to take measures to prevent that danger from materializing."[113]

Consequently, the question arises as to whether or not a State can be held responsibility for violating the right to property of persons not under the jurisdiction of the State or property not within the jurisdiction of the State. "The Commission has treated the American Declaration of the Rights and Duties of Man as if it does contain a 'jurisdiction trigger'"[114] similar to what is present in the Convention.[115] "In the context of human rights law – primarily dealing with the vertical relationship between the state and the individual – the prevailing paradigm is that human rights treaties only govern the relationship between a state and its subjects."[116] Additionally, none of the exceptions previously highlighted apply to the present situation to give extraterritorial effect to the Convention. Thus, it is implicit that the Federation of Clonalia can

[111] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75) Advisory Opinion OC-2/82, 1982 Inter-Am. Ct. H.R. Series A. No. 2, 29 (Sept. 24, 1982); *Case of the Mapiripán Massacre v. Colombia*, *supra*

[112] *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, para 101

[113] *Case of the Pueblo Bello Massacre v. Colombia*, *supra*, para 124; and *Kiliç v. Turkey*, Eur. Ct. H.R., 2000 Application No. 22492/93, Judgment of March 28, paras 62-63.

[114] Wilde, R., *The extraterritorial application of international human rights law on civil and political rights*, Routledge Handbook of International Human Rights Law, Chapter 35, p. 639

[115] *Coard et. al. v US* , *supra*, para 37

[116] Heijer, M. D. (2011), *Europe and Extraterritorial Asylum*, Leiden: Universiteit Lediden, p. 24

only be held liable for violations which occurred within its jurisdiction or for persons subject to its jurisdiction, accordingly, it cannot be held liable for the damage caused to the Petitioners.

Further, the Islands of Marsili were always in danger of disappearing due to its low height above sea level[117] and with the rise in sea levels from climate change being a natural occurrence, Clonalia cannot be held responsible for what is essentially a natural disaster. Furthermore, despite requests made in international forums,[118] the international community has not responded to Marsili's request.[119] Hence, it can be implied that the international community did not feel there was an obligation to help Marsili based on climate change issues.

In relation to the request for a part of the territory of the Federation of Clonalia as compensation,[120] the Respondent submits that this is inconsistent with the remedies provided for in Article 63 of the ACHR. While the organs of the inter-American system have creatively developed the law of reparations within the Americas,[121] the Court is only authorized to order three kinds of reparations: (1) to ensure enjoyment of rights or freedoms, (2) to remedy consequences of violations, and (3) to award fair compensation.[122] Where the Court has awarded compensation it has been in the form of compensatory damages, litigation costs and attorney fees.[123] In cases dealing with restitution, the Court has awarded reinstatement to positions of employment or ownership,[124] it has also ordered a State to assist a victim to return home from

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[117] Hypothetical, para 5. The maximum height of the entire territory is 2.3 meters, making it the country with the lowest height above sea level.
[118] Hypothetical, para 27
[119] Hypothetical, para 28; Clarifications of the Rules and Hypothetical Case, Clarification Answer #6
[120] Hypothetical, para 66
[121] Grossman, D. C., *Reparations in the Inter-American System: A Comparative Approach*, American University Law Review, Vol. 56:6, p. 1376
[122] Cassel, D, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, p. 91
[123] Cassel, D, *supra*, pp. 93-95
[124] *Case of Baena Ricardo et al v. Panama*, (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of February 2, 2001, Series C. No. 72, , para 214

exile abroad[125] as well as restoration of the status quo ante by ordering that victims be relieved of judicially imposed convictions, punishments or penalties.[126] While it is acknowledged that the Court has indicated that indigenous peoples are entitled to their historical lands, this is not the same in this case as the Petitioners are neither a tribal community[127] nor an indigenous community.[128] Additionally, if the Court was to award such a remedy as the Petitioners request then it would be available to all other islands at risk of disappearing and would be tantamount to appropriation and deprivation of the right to property of the persons of Clonalia, in breach of the Convention.

ARTICLE 8 AND 25: JUDICIAL GUARANTEES AND DUE PROCESS

The State's obligation to provide effective judicial remedies through Article 25[129] is linked with the right to due process guaranteed by Article 8.[130] "Historically, States have been given considerable discretion under international law to control the entry of foreigners into their national territory,"[131] and "the exercise of this control can be an element of the State's obligation to guarantee the safety of its population."[132] As a corollary to this, it has been asserted that "a sovereign State has the right to exclude from its territory aliens whose presence is not in the public interest, is potentially harmful to public safety or threatens the economic, social or

[125] *Case of the 19 Merchants v. Colombia*, (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of July 5, 2004, para 295
[126] *Case of Loayza Tamayo v. Peru*, (Reparations and Costs), Inter-Am. Ct. H.R., Judgment of November 27, 1998, Series C. No. 42, para 192; *Case of Lori Berenson Case of Mejía v. Perú*, *supra*, para 248; *Case of Herrera Ulloa v. Costa Rica*, (Preliminary Objections, Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of July 2, 2004, Series C. No. 107, para 207
[127] Clarification of the Rules and Hypothetical Case, Clarification Answer #31
[128] Clarification of the Rules and Hypothetical Case, Clarification Answer #18
[129] *Case of Baldeón-García v. Peru* (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of April 6, 2006, Series C. No. 147, para 144; *Case of Cantoral-Benavides v. Peru* (Merits), Inter-Am. Ct. H.R., Judgment of August 18, 2000, Series C. No. 69, para 163.
[130] Davidson, S, *The Inter-American Human Rights System, (*Dartmouth, 1997) p. 348.
[131] IACHR, Report No. 51-01, *Case 9903 Rafael Ferrer-Mazorra et al. (United States)*, April 4, 2001, para. 177.
[132] IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (OEA/Ser.L/V/II.106 Doc. 40 rev.), February 28, 2000, paras. 134-142.

political welfare of its citizens."[133] Therefore, according to the Court, "Article 25 establishes, in broad terms, the obligation of States to offer persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights."[134] This provision applies to any person, irrespective of their migratory status.[135]

The Court has held that "due process entails the participation of an independent and impartial judicial body and…that such body acts within the terms of the legally provided procedures to hear and determine the case brought before it."[136] However, the IACHR has specified that "Conferring the power on administrative officials is compatible with international human rights law so long as the requirements of impartiality and accountability are met."[137] Moreover, the IACHR, and acknowledged by the Court[138] has explained that "it is legal for deportation decisions to be made in the administrative sphere and it is not necessary for every administrative deportation decision to be examined *de novo* by a court."[139] Accordingly the Respondent submits that the deportation proceedings being carried out by the FM[140] was in compliance with the ACHR. Also, while States generally determine cases on an individual basis, in situations of a mass influx of persons, in which individual determination of refugee status is generally impractical, there is only a duty to guarantee access to basic humanitarian treatment[141] and given

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[133] IACHR, Report No. 19-02, *Petition 12.379 Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura (United States)*, February 27, 2002, para. 38.
[134] *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and (8) American Convention on Human Rights),* Advisory Opinion OC-9/87 of October 6, 1987, Inter-Am. Ct. H.R., Series A. No. 9, para 23
[135] *Case of Velez Loor v. Pananma supra* para 143
[136] *Case of Lori Berenson Mejía v. Perú*, *supra*
[137] IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, April 16, 2001, para. 99(a).
[138] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion Oc-21/14 of August 19, 2014, para 116
[139] *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, *supra*, para. 99(e); Note Clarifications of the Rules and Hypothetical Case, Clarification Answer #10
[140] Hypothetical, para 52
[141] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion Oc-21/14 of August 19, 2014, para 262

the number and nature of the request for refugee status, the FM was entitled to deal with all applications at the same time.

The Court has stated that the guarantees under international human rights law that govern any immigration proceedings that involve children include: the right to be notified of proceedings and the decision adopted, having the proceedings conducted by specialized officials, the right to be heard and participate, the right to a free translator, effective access to consular authorities, the right to legal assistance, the appointment of a guardian if the child is unaccompanied, the right to appeal the decision, the proceedings must take a reasonable time, and the decision adopted must be in the child's best interest.[142]

The Respondent submits that the right to judicial protection contained in Article 25 of the ACHR was not violated. The Petitioners who themselves brought the proceedings were notified of the decision,[143] the proceedings were conducted by specialized officials,[144] and the Petitioners were afforded the right to present their case.[145] The Petitioners were once a part of the Federation of Clonalia and so would not be in need of a translator and the Petitioners had access to consular authorities and legal assistance.[146] There being no issue of unaccompanied minors, a decision was made within 46 days of the application which was deemed to be an invalid application. In relation to the right of appeal, the bodies of the inter-American system have consistently held that the purpose of Article 8.2h of the Convention is "to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final."[147] The right to an appeal or judicial review guaranteed by Article 8.2h was

[142] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion Oc-21/14 *supra* para 116
[143] Clarification of the Rules and Hypothetical case, Clarification Answer # 20.
[144] Hypothetical para 52
[145] Hypothetical para 48
[146] Hypothetical para 53, and Clarification of the Rules and Hypothetical case, Clarification Answer # 40
[147] *Case of Herrera-Ulloa v. Costa Rica supra* para. 158.

not infringed as the matter was appealed but it was again dismissed for a want of merit. This possibility for appeal was sufficient to fulfill the duty to provide an effective remedy in accordance with the ACHR and the Court has consistently held that the mere fact that a party loses an appeal does not mean that it is a violation of Article 25.[148] The Petitioners would also submit that it would not be in the best interest of the children to separate them from their family. It is therefore submitted that the Petitioners had access to justice and all due process guarantees under the ACHR but their application was simply dismissed because it was unmeritorious.

VI. REQUEST FOR RELIEF

Based on the foregoing submissions, the Respondent respectfully requests that this Honourable Court declare and adjudge that the petition is inadmissible.

In the alternative;

1) That the Federation of Clonalia did not violate Articles 4, 5, 7, 8, 13, 21, 22, 25, 26 of the ACHR;
2) That the Federation of Clonalia did not violate Article 11 of the Additional Protocol of San Salvador;
3) That the Federation of Clonalia requests that the precautionary measures granted by the Commission be lifted;
4) That the Federation of Clonalia is not obliged to offer part of its territory to the Petitioners;
5) That the Federation of Clonalia owes no duty to modify its national laws or to establish a policy of assistance necessary to compensate the members the Petitioners; and
6) That the Petitioners pay the costs of the proceedings.

[148] *Case of Raxcacó-Reyes v. Guatemala* (Merits, Reparations and Costs), Inter-Am. Ct. H.R., Judgment of September 15, 2005, Series C No. 133