

5-31-2015

## Climate Change and Human Rights Litigation in Europe and the Americas

Veronica de la Rosa Jaimes

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### Recommended Citation

Jaimes, Veronica de la Rosa (2015) "Climate Change and Human Rights Litigation in Europe and the Americas," *Seattle Journal of Environmental Law*: Vol. 5: Iss. 1, Article 7.

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# Climate Change and Human Rights Litigation in Europe and the Americas

*Verónica de la Rosa Jaimes*<sup>†</sup>

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## I. INTRODUCTION

The United Nations General Assembly first discussed climate change in 1989.<sup>1</sup> The General Assembly recognized the global character of environmental problems, including climate change, depletion of the ozone layer, transboundary air and water pollution, contamination of the oceans

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1. U.N. Conference on Environment and Development, 85th plen. mtg., U.N. Doc. A/RES/44/228 (Dec. 22, 1989).

and seas, and degradation of land resources, including drought and desertification. The Assembly stated as a major concern the protection of the atmosphere by combating climate change, depletion of the ozone layer, and transboundary air pollution.<sup>2</sup> It also emphasized that poverty and environmental degradation are closely interrelated and require action at each of the national, regional, and global levels.<sup>3</sup> Climate change is a serious and urgent issue because of the risk of damage and potentially irreversible impacts on ecosystems, societies, and economies. The costs of extreme weather events due to climate change, such as floods, rising sea levels, increased temperatures, droughts, storms, food shortages, spread of diseases, loss of housing and shelter, cultural extinction, and reduced biodiversity, are increasing globally. Unfortunately, those with the least resources are most vulnerable.<sup>4</sup>

The purpose of this article is to examine the potential use of regional human rights instruments to support arguments for requiring governments to take action in response to climate change. The act of filing climate change based petitions or complaints in regional fora advances innovative arguments and pushes international law in a new direction. The paper canvasses jurisprudence of the three human rights regional supervisory bodies in Europe and the Americas: the European Court of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights. Part II of the article considers the connection between negative impacts of climate change on human rights. Part III adopts a comparative approach that highlights the differences and similarities between the European Court of Human Rights' (ECHR) case law, and the jurisprudence set forth by the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR). The paper focuses on those human rights that have been recently interpreted as protecting a right to a life and an environment of a particular quality. These rights include the right to life, the right to preservation of health, the right to use and enjoyment of property, the right to enjoy the benefits of culture, the right to private and family life, and the right to public information. Part IV examines two petitions that have been

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2. *Id.* at Preamble.

3. *Id.* at 12(a).

4. Intergovernmental Panel on Climate Change, Fifth Assessment Report on Climate Change 2014: Impacts, Adaptation, and Vulnerability, Working Group II, Summary for Policy Makers: IPCC WGII AR5 (2014), available at [http://ipcc-wg2.gov/AR5/images/uploads/IP\\_CC\\_WG2AR5\\_SPM\\_Approved.pdf](http://ipcc-wg2.gov/AR5/images/uploads/IP_CC_WG2AR5_SPM_Approved.pdf) [hereinafter Fifth Assessment Report on Climate Change 2014]. The Intergovernmental Panel on Climate Change was established by the United Nations Environment Programme and the World Meteorological Organization in 1988 to provide a scientific assessment reports on climate change and its potential impacts.

presented to the Inter-American Commission on Human Rights with an approach to climate change: the *Inuit petition*<sup>5</sup> and the *Athabaskan petition*.<sup>6</sup> Part V concludes with reflections on the extent to which human right claims regarding climate change are preconditioned to succeed.

## II. ADVERSE IMPACTS OF CLIMATE CHANGE ON INDIVIDUALS

Climate change has been defined by the UN Framework Convention on Climate Change (UNFCCC) as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>7</sup> Climate change has negative effects on individuals and on societies on all continents and across the oceans. These impacts have been described by the *Fifth Assessment Report on Climate Change 2014* as the “effects on natural and human systems of extreme weather and climate events and of climate change . . . [that] generally refer to the effects on lives, livelihoods, health, ecosystems, economies, societies, cultures, services, and infrastructure due to the interaction of climate changes.”<sup>8</sup> Amongst the main impacts of climate change, the *Fifth Assessment Report on Climate Change 2014* highlights the following:

- changing precipitation or melting snow and ice are altering hydrological systems, which affects water resources in terms of quantity and quality;
- many terrestrial, freshwater, and marine species have shifted their geographic ranges, seasonal activities, migration patterns, abundances, and species interactions;
- a wide range of regions and crops have been affected negatively, impacts that relate mainly to production aspects of food security;

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5. Inuit Circumpolar Conference, 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 (December 7, 2005), *available at* <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitioni%20cc.pdf> [hereinafter *Inuit Petition*].

6. Arctic Athabaskan Council, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada (Apr. 23, 2013), *available at* [http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf) [hereinafter *Athabaskan Petition*].

7. Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of its Fifth Session art. 1, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38, U.N. Doc. A/AC.237/18 (Part II)/Add.1, 31 ILM 849, 4 (1992), *available at* <http://unfccc.int/resource/docs/a/18p2a01.pdf>.

8. Fifth Assessment Report on Climate Change 2014, *supra* note 4, at 5.

- local changes in temperature and rainfall have altered the distribution of some water-borne illnesses and disease vectors;
- climate-related extremes, such as heat waves, droughts, floods, cyclones, and wildfires, reveal significant vulnerability and exposure of some ecosystems and many human systems; and
- climate-related hazards affect poor people's lives directly through impacts on livelihoods, reduction in crop yields, or destruction of homes, and indirectly through increased food prices and food insecurity.<sup>9</sup>

These current and identified impacts of anthropogenic climate change necessarily connect with core human rights, and imply threats to the human rights of life, health, use and enjoyment of property, affectation of private life, and livelihood and access to benefits of culture, among others. These human rights are enshrined in diverse international conventions and declarations around the globe. In light of the fact that states are not fulfilling their obligations and commitments to mitigate greenhouse gas emissions,<sup>10</sup> the human rights systems that are already in place represent a forum for those who are negatively affected by climate change to receive retribution for harm caused by such emissions. Litigation at the regional level has been used as a resource only recently to argue human rights violations due to climate change, and the outcome remains unclear. The following section assesses the relationship between the negative effects of climate change and human rights through the work of the Inter-American and European systems of human rights.

### III. LINKING CLIMATE CHANGE AND HUMAN RIGHTS THROUGH THE WORK OF THE INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS

Three human rights systems exist to supervise the protection of human rights at a regional level: the Inter-American human rights system, the European human rights system, and the African human rights system. The Inter-American human rights system's jurisdiction extends along the Americas, from Canada to Argentina. The European human rights system jurisdiction extends to all State Parties of the Council of Europe. Finally,

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9. *Id.* at 6-8.

10. LAVANYA RAJAMANI, ET AL., THE ROLE OF COMPLIANCE IN AN EVOLVING CLIMATE REGIME, IN PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME 1-5 (Jutta Brunnee, et al. eds., 2012). Under the Kyoto Protocol to the Framework Convention on Climate Change, state parties committed to reduce greenhouse gas emissions by a certain date. See *Kyoto Protocol: Targets for the first commitment period*, UNITED NATIONS: FRAMEWORK CONVENTION ON CLIMATE CHANGE, available at [http://unfccc.int/kyoto\\_protocol/items/3145.php](http://unfccc.int/kyoto_protocol/items/3145.php) (last visited Nov. 7, 2014) (Countries included in Annex B to the Kyoto Protocol for the first commitment period and their emissions targets).

the African human rights system protects the human rights of the States Parties of the African Continent. The latter will not be analyzed in this paper.

The Inter-American human rights system<sup>11</sup> is based on the work of the Inter-American Commission on Human Rights (IACHR),<sup>12</sup> located in Washington D.C., and the Inter-American Court of Human Rights (IACtHR)<sup>13</sup>, situated in the city of San José, Costa Rica. It has two main legal instruments: the *American Declaration of Rights and Duties of Man*<sup>14</sup> and the *American Convention of Human Rights*.<sup>15</sup> The European human rights system<sup>16</sup> is based on the work of the European Court of Human Rights (ECHR),<sup>17</sup> located in Strasbourg, France, and the European

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11. The Organization of American States came into being in 1948 with the adoption in Bogota, Colombia, of the Charter of the Organization of American States. The Inter-American Human Rights System was developed sixty-five years ago, within the context of the OAS.

12. The IACHR was created in 1959 as an autonomous body of the OAS in Washington D.C. The first seven commissioners were elected the following year. The Charter establishes the IACHR as one of the principal organs of the OAS (article 106) whose function is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in these matters. The commission is endowed with specific powers to analyze the human rights situation in the Americas, to monitor the human rights situation in the Member States, and to make recommendations in order to protect human rights in the region.

13. In 1969, the OAS adopted the American Convention creating the IACtHR. The Court's first hearing was held on June 29-30, 1979 at the OAS's headquarters in Washington, D.C. The IACtHR is an autonomous judicial institution whose objective is to apply and interpret the American Convention. To attain this objective, the Court has two functions: a judicial function, and an advisory function.

14. The American Declaration of the Rights and Duties of Man was adopted the same year as the Charter of the OAS, proclaiming both regional agreements as the fundamental principles of the Organization. O.A.S., Charter, entered into force December 13, 1951, 119 U.N.T.S. 3 and O.A.S., Ninth International Conference of American States, American Declaration on the Rights and Duties of Man, OP OEA/Ser L/V/II 82/Doc 6, rev. 1 (1992) at 17, Preamble [hereinafter American Declaration].

15. In 1969, the American Convention on Human Rights was adopted in San José, Costa Rica. The American Convention provided treaty-level protection to principles previously included in the American Declaration. The American Convention on Human Rights was outfitted with a full complement of economic, social and cultural rights through the Additional Protocol to the American Convention on Human Rights in the Area of economic, social and cultural Rights. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf) [hereinafter American Convention]. See also Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic Social, and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, available at <http://www.oas.org/juridico/english/treaties/a-52.html>, [hereinafter Protocol of San Salvador].

16. The European system began when ten Western European States signed the Statute of the Council of Europe (COE) in 1949. Since then the COE has extent the total memberships to forty-seven member states from Central and Eastern Europe. The Statute of the COE gathers the values, principles and goals of the organization, emphasizing the respect and protection of human rights.

17. Originally two bodies were established to ensure the observance of the commitments undertaken by the European Convention: the European Commission of Human Rights and the

Committee of Social Rights (ECSR).<sup>18</sup> Its two main regional instruments are the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>19</sup> and the *European Social Charter*.<sup>20</sup>

In order to understand the relevance of the role that the European and Inter-American Human Rights systems could play on climate change litigation, it is necessary to focus on two aspects: (1) the extent to which violations to certain human rights could be used to take cases before the supervisory bodies; and (2) the scope of the jurisprudence that could be used towards future claims on this topic.

### A. Right to Life

The right to life is without doubt the paramount of all rights. The rest of the human rights depend on the existence of life itself for their operation. This right is also recognized as preeminent, given that violations can never be remedied. The *American Declaration* establishes in Article I that “every human being has the right to life.”<sup>21</sup> In the same vein, the *American Convention* states that “every person has the right to

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European Court of Human Rights. Additionally, the Committee of Ministers and the Secretary General of the COE played a role in the supervisory mechanism. The European Convention provides for individual complaints and interstate petitions. Protocol 11, which came into force in 1998, abolished the Commission, enlarged the Court, and made it permanent. The protocol allowed individuals to take cases directly to it. Although established on January 21, 1959, when its first members were elected by the Consultative Assembly of the COE, the Court only became a full-time institution in 1998, under Protocol 11. The European Convention provides for individual and interstate petitions. Any state party on the convention or any individual seeking relief from alleged violations of their human rights can lodge directly with the Court based in Strasbourg, France. The system of consider individual complaints “is the hallmark of the European Convention regime”. All final judgments are binding on the respondent State concerned. The responsibility for supervising the execution of the judgments lies within the Committee of Ministers of the COE. HENRY STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 939 (3rd ed. 2008).

18. The mission of the European Committee of Social Rights (ECSR) is to judge that States are in conformity in law and in practice with the provisions of the European Social Charter. In respect to national reports, the Committee adopts conclusions; in regards to collective complaints, it adopts decisions. The ECSR is not authorized to process individual complaints. See *European Committee of Social Rights*, COUNCIL OF EUROPE, available at [http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp) (last visited Nov. 10, 2014).

19. After the COE had been founded, the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and entered into force in 1953. The European Convention guarantees core civil and political rights and it is open to adherence only by members of the COE. The original list of rights and freedoms of the European Convention was later expanded by additional protocols that are binding on the ratifying state. STEINER ET AL., *supra* note 18, at 937. *Convention for the Protection of Human Rights and Fundamental Freedoms* E.T.S. 5; 213 U.N.T.S. 221, COUNCIL OF EUROPE (Nov. 4, 1950), E.T.S. 5; 213 U.N.T.S. 221 available at <http://www1.umn.edu/humanrts/instree/z17euroco.html> [hereinafter European Convention].

20. Council of Europe, *Revised European Social Charter*, May 3, 1996, E.T.S. 163, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> [hereinafter European Charter].

21. *American Declaration*, *supra* note 14, art. I.

have his life respected.”<sup>22</sup> Article 2 of the *European Convention* proclaims that the right to life shall be protected by law.<sup>23</sup> In General Comment No. 6, the United Nations Human Rights Committee (CCHR)<sup>24</sup> has stated that the right to life is “the supreme right from which no derogation is permitted even in time of public emergency,”<sup>25</sup> and noted that the information concerning this right has often been limited to only a few aspects of this right, and that it should not be interpreted this narrowly. The right to life cannot be interpreted in a restrictive manner as its protection will sometimes require states to adopt positive measures.<sup>26</sup> The CCHR has pointed out that the scope of protection of the right to life should be extended to an environmental dimension in order “to increase life expectancy.”<sup>27</sup> Both the European and the Inter-American systems have strengthened the CCHR position.

In *Öneryildiz v. Turkey*,<sup>28</sup> the European Court of Human Rights decided its first environmental case involving loss of life. The ECHR held that the positive obligation to take all appropriate steps to safeguard life entails, above all, a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.<sup>29</sup> This obligation indisputably applies in the particular context of dangerous activities, where special emphasis must be placed on regulations that are geared to the unique features of the activity in question, particularly with regard to the level of the potential risk to human lives. These regulations must govern the establishment, licensing, operation, security, and supervision of the activity. The regulations must also make it compulsory for all those concerned to take

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22. American Convention. *supra* note 15, art. 4.

23. European Convention, *supra* note 19, art. 2.

24. *United Nations Human Rights Committee*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Feb. 13, 2015).

25. Human Rights Comm., General Comment No. 6: Article 6 (Right to Life), 16th Sess., ¶ 1, U.N. Doc. A/37/40 (Apr. 30, 1982), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11).

26. *Id.* ¶ 5.

27. *Id.*; see also Timo Koivurova, et al., *Climate Change and Human Rights*, in 21 CLIMATE CHANGE AND THE LAW, IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 287, 289 (Erkki J. Hollo et al. eds., 2013).

28. Mr. Öneryildiz lived in a slum area of Istanbul built around a rubbish tip under the authority and responsibility of the main City Council. An expert report noted that no measures had been taken to prevent a possible explosion of methane gas from the tip. Two years later there was such an explosion. The refuse erupting from the pile of waste buried eleven houses, including his, and he lost nine members of his family. The applicant’s main argument was that the accident had occurred as a result of negligence on the part of the relevant authorities. *Oneryildiz v. Turkey* (No. 48939/99), Eur. Ct. H.R., 657 (2004) [hereinafter *Oneryildiz*].

29. *Id.* ¶ 80



practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks, while placing particular emphasis on the public's right to information.<sup>30</sup>

In *Budayeva v. Russia*,<sup>31</sup> the European Court of Human Rights reaffirmed the State's obligation to safeguard the lives of those within its jurisdiction, emphasizing that special importance must be placed on regulations. "[Regulations] must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."<sup>32</sup>

The Inter-American Court of Human Rights has also addressed violations of the right to life. In *Yakye Axa v. Paraguay*,<sup>33</sup> the Court emphasized the crucial importance of the right to life given that the realization of the other rights depends on its protection. Essentially this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also "the right that conditions that impede or obstruct access to a decent existence should not be generated."<sup>34</sup> The Court has stressed that States have an obligation to protect and ensure the right to life through generating minimum living conditions that are compatible with the dignity of the human person and by not creating conditions that hinder or impede upon such dignity. States have the 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 a high priority."<sup>35</sup> What's more, in *Sawhoyamaya vs.*

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30. *Id.* ¶ 90.

31. This case concerned events between July 18-25, 2000, when a mudslide led to a catastrophe in the Russian town of Tyрмауз; it threatened the applicants' lives and caused eight deaths, among them the husband of one of the applicants. The applicants stated that the national authorities were responsible for the death of Mr. Budayeva, for putting their lives at risk, and for the destruction of their property, as a result of the authorities' failure to mitigate the consequences of the mudslide, and that no effective domestic remedy was provided to them in this respect. *Budayeva and Others v. Russia*, App. No. 15339/02, 21166/02, 20058/02, 11673/02 & 15343/02, 103 Eur. Ct. H.R. (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85436> [hereinafter *Budayeva*].

32. *Id.* ¶ 132.

33. In this case Paraguay did not ensure the ancestral property rights of the Yakye Axa Indigenous Community because a Community's land claim had been processed since 1993 with no satisfactory solution. This made it impossible for the Community to own and possess their territory, keeping them in a vulnerable situation in terms of food and medical and public health care, as well as constantly threatening the survival of the members of the Community. *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005) [hereinafter *Yakye Axa*].

34. *Id.*

35. *Id.* ¶ 162.

*Paraguay*,<sup>36</sup> the IACtHR held that states must adopt the necessary measures to create an adequate statutory framework to discourage any threat to the right to life.<sup>37</sup>

In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority, which could be reasonably expected to prevent or avoid such risk.<sup>38</sup>

In *Xákmok*,<sup>39</sup> the IACtHR declared that Paraguay violated the right to life because it failed to take the required positive measures, within its powers, that could reasonably be expected to prevent or to avoid the risk to life.<sup>40</sup> In the same vein, in *Sarayaku*,<sup>41</sup> the Court held that Ecuador was responsible for having put at grave risk the rights to life and physical integrity of the Sarayaku People.<sup>42</sup>

The European Court of Human Rights and the Inter-American Court of Human Rights have been progressively acknowledging situations where

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36. In this case, Paraguay had not ensured the ancestral property right of the Sawhoyamaxa Community, as in their claim for territorial rights was pending since 1991 and was not satisfactorily resolved to that date. This barred the Community from title to and possession of their lands, and has implied keeping it in a state of nutritional, medical, and health vulnerability, which constantly threatened their survival and integrity. *Sawhoyamaxa Indigenous Community v Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 146 (Mar. 29, 2006)* [hereinafter *Sawhoyamaxa*].

37. *Id.* ¶ 153.

38. *Id.* ¶ 155. The IACtHR is inspired by the ECHR judgment in *Oneryildiz*. *Oneryildiz, supra* note 28.

39. This case relates to Paraguay's international responsibility for the failure to ensure the right of the Xákmok Kásek indigenous community to their ancestral property because the actions concerning the territorial claims of the community were being processed since 1990 and were not decided satisfactorily, making it impossible for the Community to access the property and take possession of their territory, but, also, keeping the Community in a vulnerable situation with regard to food, medicine, and sanitation that continuously threatened the community's integrity and the survival of its members. *Case of the Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 234 (Aug. 24, 2010)* [hereinafter *Xákmok*].

40. *Id.* ¶ 234.

41. This case concerns the granting by Ecuador of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Sarayaku People without previously consulting them or obtaining their consent. Thus, the company began the exploration phase, and even introduced high-powered explosives in several places on indigenous territory, creating an alleged situation of risk for the population because, for a time, this prevented them from seeking means of subsistence and limited their rights to freedom of movement and to cultural expression. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No 245, ¶ 23 (Jun. 27, 2012)* [hereinafter *Sarayaku*].

42. *Id.* ¶ 249.

environmental damage or destruction, due to lack of protection or regulations from governments, may seriously threaten human life. It is undeniable that events that are the product of anthropogenic climate change, such as floods, rising sea levels, increased temperatures, droughts, storms, food shortages, spread of diseases, and loss of housing and shelter, are likely to lead to the direct loss of life.<sup>43</sup> *The Fifth Assessment Report on Climate Change 2014* is predicting with high confidence the risk of death due to storm surges and coastal flooding, as well as the risk of mortality and morbidity during periods of extreme heat, particularly for vulnerable urban populations.<sup>44</sup> Both human rights systems have also recognized the positive obligation of the states to protect human lives. It is also worth mentioning that both Courts have extended the scope of the states' duty to create legislative and administrative frameworks to provide effective protection against threats to the right to life. It could further be implied that generating adequate regulations for the purpose of governing those industrial activities where environmental degradation could impact the fulfillment of the right to a decent life is an additional implied duty or responsibility. In the same vein, by creating and enforcing regulations to mitigate climate change, governments will protect the right to life.

### *B. Right to Preservation of Health*

The *American Declaration* enshrines in its Article XI the right to the preservation of health and well-being.<sup>45</sup> Article 10 of the *Protocol of San Salvador* states that “[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”<sup>46</sup> The *European Social Charter* establishes in Article 11 that the contracting parties shall undertake, either directly or in cooperation with public or private organizations, appropriate measures to ensure the effective exercise of the right to protection of health.<sup>47</sup> In the General Comment No. 14, the UN Committee on Economic Social and Cultural Rights (CESCR) interprets the right to health as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the

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43. See Simon Caney, *Climate Change, Human Rights and Moral Thresholds*, in HUMAN RIGHTS AND CLIMATE CHANGE 76 (Stephen Humphreys, ed., 2010). Koivurova et al., *supra* note 27, at 295.

44. Fifth Assessment Report on Climate Change 2014, *supra* note 4, at 12.

45. “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” *American Declaration*, *supra* note 14, art. XI.

46. *Protocol of San Salvador*, *supra* note 15, art. 10.

47. Council of Europe, *European Social Charter*, October 18, 1961, E.T.S. 35 [hereinafter *European Social Charter*].

realization of the highest attainable standard of health.”<sup>48</sup> The CESCR also recognizes that the inclusive character of the right to health extends to the determinants of health: access to safe and potable water, and an adequate supply of safe food, housing, and healthy environmental conditions, among others.<sup>49</sup> The World Health Organization considers health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>50</sup>

The Organization of American States recognizes the close link between health and the environment through the *Protocol of San Salvador*, and extends the scope of the right to health by including the right to a healthy environment in Article 11. The protocol stipulates this provision as the obligation of the states to “promote the protection, preservation, and improvement of the environment.”<sup>51</sup>

Notwithstanding the fact that the European system does not expressly recognize the right to a healthy environment, the European Committee of Social Rights (ECSR) held in *Marangopoulos v. Greece*<sup>52</sup> that Greece had failed to comply with its positive obligations under Article 11 of the European Social Charter. The Committee reasoned that in most areas of the country where lignite was mined, no appropriate measures had been taken and no appropriate strategy had been developed to combat public health risks. This seminal case is considered to be one of the most important decisions of the ECSR,<sup>53</sup> as it “places the right to a healthy environment in the mainstream of human rights.”<sup>54</sup> The ECSR held that the measures under the right to protection of health “should be designed,

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48. Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2000/4, ¶ 9 (Aug. 11, 2000), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en).

49. *Id.* ¶ 11.

50. World Health Organization (WHO), *Constitution*, Preamble, Off. Rec. of WHO, no. 2 at 100 (July 22, 1946), available at [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf).

51. However, Article 11 has been weakened because Article 19 of the Protocol states that only progressive measures are needed to be taken by state parties to ensure due respect for the rights set in the Protocol, and due to the fact that violations to these rights cannot give rise to an individual petition. Therefore, none of the IACtHR decisions have directly addressed the right to a healthy environment. DAVID R. BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA’S CONSTITUTION* 133-136 (UBC Press & Wesley Pue eds., 2012).

52. *Marangopoulos Foundation for Human Rights v. Greece*, Eur. Committee of Social Rights, 30/2005, Dec., 6, 2006 [hereinafter *Marangopoulos*].

53. BOYD, *supra* note 51 at 139-140.

54. Mirja Trilsch, *European Committee of Social Rights: The right to a healthy environment*, 7 INT’L J. CONST. L. 529, 534 (2009).

in the light of current knowledge, to remove the causes of ill-health resulting from environmental threats such as pollution.”<sup>55</sup>

Regarding the Inter-American system, the Inter-American Court of Human Rights considered in *Yakye Axa* the fact that Paraguay did not guarantee the communal property rights of the members of the Yakye Axa Community, and the negative effect this lack of guarantee had on the rights of members of the community to a decent life. It deprived them of the possibility of access to their traditional means of subsistence, as well as the right of use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.<sup>56</sup> Moreover, in its judgment, the Court quotes the CESCR General Comment No. 14, stating that “the health of individuals is often linked to the health of society as a whole.”<sup>57</sup> It also emphasized that any detriment to the right to health has a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity.<sup>58</sup>

As to the right to preservation of health, two significant aspects should be highlighted. First, both human rights systems have recognized that there is a direct link between environment and health, and addressed the impacts when environmental degradation had harmed human health. Second, as in the right to life, both acknowledge the positive obligation of states to protect the right to the preservation of health. The *Fifth Assessment Report on Climate Change 2014* predicts with high confidence risks of injury, ill-health, and coastal and inland flooding caused by rising sea-levels.<sup>59</sup> On the other hand, Arctic warming and melting<sup>60</sup> worsens water quality in areas of permafrost melt, increasing the likelihood of disease and injury due to dangerous conditions.<sup>61</sup> Adding to these problems the psychological distress that comes with them. These compounding effects could represent a direct violation to the right to the preservation of health. Thus, the creation and enforcement of policies and regulations to mitigate greenhouse gas emissions and to adapt to the negative effects of climate change is a path to protect the health of

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55. Marangopoulos, *supra* note 52, ¶ 202.

56. *Yakye Axa*, *supra* note 33, ¶ 168.

57. European Social Charter, *supra* note 47, ¶ 27.

58. *Yakye Axa*, *supra* note 34, ¶ 1674.

59. Fifth Assessment Report on Climate Change 2014, *supra* note 4, at 12.

60. IPCC, FIFTH ASSESSMENT REPORT ON CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, WORKING GROUP I, SUMMARY FOR POLICY MAKERS, WGI AR5, 5 (2013), available at <http://www.climatechange2013.org/spm> [hereinafter Fifth Assessment Report on Climate Change 2013].

61. Athabaskan petition, *supra* note 6, at 5.

hundreds of peoples that will be subject to potential harm in the near future.

### *C. Right to Use and Enjoyment of Property*

In the Inter-American System of human rights, the right to property is included in the *American Declaration*. Article XXIII states that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>62</sup> The *American Convention* comprises in this right the use and enjoyment of one’s property, which may be subordinate to the interest of society. It also stresses that “[n]o 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>63</sup> The European human rights system recognizes the right to property in Article 1 of Protocol 1 to the *European Convention*: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>64</sup>

In its case law, the European Court of Human Rights has established its own definition of the term possession. For example, in *Beyeler v. Italy*,<sup>65</sup> the ECHR held that “the concept of ‘possessions’ . . . has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions.’”<sup>66</sup> In *Dogan v. Turkey*,<sup>67</sup> the

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62. American Declaration, *supra* note 14.

63. American Convention, *supra* note 15, art. 21.

64. Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (No. 155), ETS 9, art. 1 (Mar. 20, 1952), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>.

65. In this case, the applicant contended that the Italian authorities had expropriated a Van Gogh painting of which he claimed to be the lawful owner. *Beyeler v. Italy*, Eur. Ct. H.R., 33202/96 (2000).

66. *Id.* ¶ 100. See also, *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands*, Eur. Ct. H.R. 15375/89, ¶ 53 (1995), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57918#{"itemid":\["001-57918"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57918#{). See also *Matos e Silva, Lda., and Others v. Portugal*, Eur. Ct. H.R. 15777/89, ¶ 75 (1996), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58417#{"fulltext":\["Matos e Silva","Lda.", "and Others v. Portugal"\],"itemid":\["001-58063"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58417#{).

67. In this case, the applicants complained of their forced eviction from their homes in Boydas, a village in the Hozat district in Tunceli province, and of the refusal of the Turkish authorities to allow them to return. The Court ruled that the denial of access to Boydas village should be regarded as an interference with the applicants’ right to the peaceful enjoyment of their possessions. Case of *Dogan*

ECHR not only reaffirms the definition of the term “possessions” but also presents a thorough discussion about the scope of the right to property. The Court considered that it is not as relevant to decide whether or not the applicants have rights of property under domestic law, notwithstanding the absence of title deeds, as it is to determine whether the overall economic activities carried out by the applicants constituted “possessions” under the protection afforded by the right to protection of property.<sup>68</sup> In this regard, the Court noted that although the applicants “did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter.”<sup>69</sup> Therefore, the applicants “had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.”<sup>70</sup> The ECHR emphasized that all of these economic resources and the revenue that the applicants derived from them may qualify as “possessions” for the right to the protection of property.

The Inter-American System has mostly dealt with cases involving the right to property and the protection of natural resources regarding indigenous and ancestral lands. The case of *Awat Tingni v. Nicaragua*<sup>71</sup> gave rise to the first decision that protected human rights of first nations and indigenous peoples; in particular, the right to property. In that case, the IACtHR determined certain specifications on the concept of property in indigenous lands:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own terri-

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and Others v. Turkey, Reports of Judgments and Decisions 2004-VI Eur.Ct.H.R., 8803-8811/02, 8813/02 and 8815-8819/02, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61854> [hereinafter Dogan].

68. *Id.* ¶ 139.

69. *Id.*

70. *Id.*

71. In this case the petitioners alleged that Nicaragua failed to demarcate communal land, to protect the indigenous people's right to own their ancestral land and natural resources. The Court ruled that Nicaragua had violated the right of the members of the Mayagna Awat Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled. *Mayagna (Sumo) Awat Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug 31, 2001)* [hereinafter *Awat Tingni*].

tory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>72</sup>

In *Yakye Axa*, the Inter-American Court of Human Rights ratified the rights of the members of the indigenous communities in the context of communal ownership.<sup>73</sup> In *Sawhoyamaya*, the IACtHR once again confirmed the ties to culture and communal property, and stated that the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element derived from them, must be secured under the right to property.<sup>74</sup>

The Inter-American Court of Human Rights has extended the scope of the right to property with regards to the use of the natural resources that are necessary for the survival of indigenous peoples. In *Saramaka*<sup>75</sup> and *Sarayaku*, the Court held that the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if this right was not connected to the natural resources that lie on and within the land.<sup>76</sup> Resources allow them to maintain their way of living and ensure their survival through their traditional activities.<sup>77</sup> The Court has established that in order to determine the existence of a relationship between indigenous peoples and communities, and their traditional lands:

- that this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances; and
- that the relationship with the land must be possible.<sup>78</sup>

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72. *Id.* ¶ 149.

73. *Yakye Axa*, *supra* note 33, ¶¶ 123-156.

74. *Sawhoyamaya*, *supra* note 36, ¶ 189.

75. This case deals with violations by Suriname to the Saramaka people, a tribal community living in the Upper Suriname River region, due to the fact that Suriname did not adopt effective measures to recognize their right to the use and enjoyment of the territory they have occupied and used in accordance with their communal traditions. *The Saramaka People v. Suriname, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 141 (Nov. 28, 2007) [hereinafter *Saramaka*].

76. *Id.* ¶¶ 141-142. *Sarayaku*, *supra* note 41.

77. *Sarayaku*, *supra* note 41, ¶ 147.

78. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence, such as seasonal or nomadic hunting, fishing or gathering; or use of natural resources



Another relevant case related to the right to property is *Mary and Carrie Dann v. United States*,<sup>79</sup> where the IACHR held that in the context of indigenous human rights, the right to property includes:

[t]he right to legal recognition of indigenous varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>80</sup>

A key element in this case is compensation when the property is irrevocably lost.

In the same vein, the Inter-American Commission on Human Rights deemed in *Mayan Toledo*,<sup>81</sup> the seminal case regarding the right to property, that this right has been recognized as one of the rights having a collective aspect in the sense that it can only be properly ensured through

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associated with their customs or other elements characteristic of their culture. The second element implies that Community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands. *Id.* ¶¶ 147-148; See also Sawhoyamaya, *supra* note 36, ¶ 132. Xákmok, *supra* note 49, ¶ 113.

79. *Mary and Carrie Dann*, sisters and citizens of the United States and members of the Western Shoshone indigenous people, lived on a ranch in rural Nevada, which is part of the ancestral territory of the Western Shoshone people. The Danns were in possession and use of these lands. The State interfered with the use and occupation of their ancestral lands by affirming to have appropriated the lands as federal property, by physically removing the Dann's livestock from the lands, and by acquiescing in gold prospecting activities within their traditional territory. The IAHRC found that the State had failed to ensure the Dann's right to property. It was the first time an international body had formally recognized that the U.S. has violated the rights of American indigenous peoples. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. 1 860, ¶¶ 130, 74 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm> [hereinafter *Mary Dann*].

80. *Id.* at 130

81. The *Mayan Toledo* people claimed that the rights to the lands that they had traditionally used and occupied had been violated by Belize granting logging and oil concessions in and otherwise failing to adequately protect those lands, failing to recognize and secure the territorial rights of the Maya people in those lands, and failing to afford the Maya people judicial protection of their rights and interests in the lands due to delays in court proceedings instituted by them. They argued that these actions negatively impacted the natural environment upon which the Maya people depended for subsistence, have jeopardized the Maya people and their culture, and threatened to cause further damage in the future. *Maya Indigenous Communities of the Toledo District v. Belize*, Admissibility, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00 (Oct. 5, 2000) [hereinafter *Maya Toledo*].

its guarantee to an indigenous community as a whole.<sup>82</sup> The commission also emphasized that the resources of the land are integral components of the physical and cultural survival of the indigenous communities, and that property rights of indigenous peoples “are not defined exclusively by entitlements within a state’s formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.”<sup>83</sup>

It follows from this analysis that the European Court of Human Rights extended the scope of the right to property to the concept of possessions in order to include it in the spectrum of economic resources and revenues of the land that someone owns. While the Inter-American System emphasizes the linkage between land, culture, spiritual life, and economic survival, as well as the strong collective aspect that this implies. These notions are closely related to the *Fifth Assessment Report on Climate Change 2014* and its predictions of the risk of loss of rural livelihoods, particularly for people in the agricultural industry in semi-arid regions, in low-lying coastal zones, and still-developing small-island states.<sup>84</sup> At the same time, Arctic warming and melting<sup>85</sup> compromises the land itself. Severe floods, melting permafrost, and landslides are destroying waterways, riverbanks, roads, and houses,<sup>86</sup> directly affecting the right to use and enjoyment of property. The Inter-American Commission on Human Rights and both the Inter-American and European Courts of Human Rights can play a significant role in the enforcement of regulations regarding climate change mitigation.

#### *D. Right to Enjoy the Benefits of the Culture*

The *American Declaration* enshrines the right to the benefits of the culture, stating that “[e]very person has the right to take part in the cultural life of the community.”<sup>87</sup> Article 14 of the *Protocol of San Salvador* also

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82. *Id.* ¶ 113.

83. *Id.* ¶ 117. It is worth mentioning that the Commission has previously observed that respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property: “From the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives”. IACHR, Fourth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.83, Doc. 16 rev. (1993).

84. Fifth Assessment Report Climate on Change 2014, *supra* note 4, at 12.

85. Intergovernmental Panel on Climate Change, Fifth Assessment Report on Climate Change 2013: The Physical science basis, working group I, Summary for policy makers, IPCC WGI AR5 (2013), available at [http://www.climatechange2013.org/images/report/WG1AR5\\_SPM\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf) [hereinafter Fifth Assessment Report on Climate Change 2013].

86. Athabaskan Petition, *supra* note 6, at 7.

87. American Declaration, *supra* note 14, art. XIII.

recognizes the right to benefits of the culture, stating that it is the right of everyone “[t]o take part in the cultural and artistic life of the community.”<sup>88</sup> The European human rights system does not include this right either in the Convention or in the Social Charter. In General Comment No. 21, the UN Committee on Economic Social and Cultural Rights points out that to ensure the right to take part in cultural life the state party must practice abstention; i.e., non-interference with the exercise of cultural practices and access to cultural goods and services.<sup>89</sup> The state party must also take positive action that warrants preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.<sup>90</sup> The comment stresses the importance of this right to indigenous peoples who will have the right to the full enjoyment of their culture,<sup>91</sup> collectively or as individuals.<sup>92</sup>

The Inter-American Commission on Human Rights has established that lands traditionally used and occupied by indigenous communities play a central role in their physical, cultural, and spiritual vitality.<sup>93</sup> The Inter-American system had emphasized the “special relationship between indigenous and tribal peoples and their territories.”<sup>94</sup> Particularly, the Commission recognizes that “the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.”<sup>95</sup> Their lands represent a cultural bond of collective memory, and this relationship must be internationally protected.<sup>96</sup> The

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88. Protocol of San Salvador, *supra* note 15, at art. 14.

89. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), ¶6, E/C.12/GC/21 (Dec. 21, 2009), available at <http://www.refworld.org/docid/4ed35bae2.html>.

90. *Id.*

91. The CESCR considers that culture encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing, and shelter, and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social, and political life of individuals, groups of individuals, and communities. *Id.* ¶ 13.

92. *Id.* ¶ 6.

93. Maya Toledo, *supra* note 81, ¶ 155.

94. Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, Inter-Am. Comm’n H.R., OEA/Ser L/V/II Doc. 56/09, ¶ 55-57 (Dec. 30, 2009) [hereinafter Indigenous and Tribal Peoples’ Rights].

95. Maya Toledo, *supra* note 81, ¶ 114.

96. Indigenous and Tribal Peoples’ Rights, *supra* note 94, ¶ 78.

IACHR has acknowledged that “the right to culture includes distinctive forms and modalities of using territories such as traditional fishing, hunting, and gathering as essential elements of indigenous culture.”<sup>97</sup>

The Inter-American Court of Human Rights has established close ties between the culture of indigenous peoples and their traditional or ancestral lands in numerous cases. In *Yakye Axa*, the IACtHR held that the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein. This is due not only because their traditional territories and resources therein constitute their main means of subsistence, but also because they are part of their worldview and their religiosity; therefore, they are part of their cultural identity. Therefore, activities that depend on natural resources, such as hunting, fishing, and gathering, are essential components of their culture.<sup>98</sup> States must take into account that indigenous land encompasses a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a condition to preserve their cultural heritage for their own development and to carry out their life aspirations.<sup>99</sup> In *Xákmok*, the IACtHR held that in the case of indigenous tribes or peoples, the traditional possession of their lands and the cultural patterns that arise from this close relationship form part of their identity. Such identity uniquely contributes to the collective perception they have as a group, their *cosmovisión*, their collective imagination, and the relationship with the land where they live their lives.<sup>100</sup>

A key concept of the Inter-American jurisprudence concerns the rights of future generations. Climate change adversely affects indigenous peoples’ ability to transmit cultural knowledge to future generations. Knowledge developed over millennia about traditional lands, weather, ecology, and the use of natural resources is fundamental to indigenous peoples as it “provides a basis for the elders to educate the younger generation in traditional ways of life, kinship and bonding.”<sup>101</sup> The ability

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97. In *Mary Dann v. USA*, the Commission considers general international legal principles applicable in the context of indigenous human rights to include the use and enjoyment of territories and property. As well, in the same case, the Commission states: “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people.” *Mary and Carrie Dann*, *supra* note 79, ¶ 130 & ¶74.

98. *Yakye Axa*, *supra* note 33, ¶¶ 135-140.

99. *Id.* ¶ 146.

100. *Xákmok Kásek*, *supra* note 39, ¶ 175.

101. *Athabaskan Petition*, *supra* note 6, at 8.

to pass knowledge from one generation to the next is crucial for indigenous peoples' cultural survival.

### *E. Right to Private and Family Life*

The United Nations Human Rights Committee pointed out in General Comment No. 16 that the right to privacy requires the state to adopt legislative and other measures to give effect to the prohibition against such interferences as well as to the protection of this right.<sup>102</sup> In the Inter-American system, the right to protection of private and family life is included in the *American Declaration* as follows: "Every person has the right to the protection of the law against abusive attacks upon . . . his private and family life."<sup>103</sup> The *American Convention* stipulates that no one may be the object of arbitrary or abusive interference with his private life, family or home, and everyone has the right to the protection of the law against such interference.<sup>104</sup> The *European Convention* enshrines in Article 8 the right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>105</sup>

In the landmark case *Lopez Ostra v. Spain*,<sup>106</sup> the European Court of Human Rights ruled that a failure by the State to control industrial

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102. U.N.H.R. Comm., General Comment No. 16, art. 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation, Apr. 8, 1988, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), ¶ 1, available at: <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)>.

103. American Declaration, *supra* note 14, art. V.

104. American Convention, *supra* note 15, art. 11.

105. European Convention, *supra* note 29, art. 6.

106. The town of Lorca had a heavy concentration of leather industries. Several tanneries there, all belonging to a limited company called SACURSA, had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land twelve meters away from the applicant's home. The plant began to operate in July 1988 without the permit from the municipal authorities required on activities classified as causing nuisance and being unhealthy, noxious and dangerous, and without having followed the procedure for obtaining such a permit. Owing to a malfunction, its start-up released gas fumes, pestilential smells, and contamination, which immediately caused health problems and nuisance to many Lorca people, particularly those living in the applicant's district. The town council evacuated the local residents and relocated them free of charge in the town centre for the

pollution violated Article 8. The Court considered that the State did not succeed in striking a fair balance between the interest of the town's economic well-being—that of having a waste treatment plant—and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The ECHR held that “severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”<sup>107</sup>

In *Guerra v. Italy*,<sup>108</sup> another landmark case, the ECHR held that the respondent State did not fulfill its obligation to secure the applicants' right to respect for their private and family life. The Court reiterated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.<sup>109</sup> This case points to the positive duty of a state to take measures, which would secure the enjoyment of the individual rights to private life.

In *Taskin v. Turkey*,<sup>110</sup> the Turkish authorities failed to comply with a court decision annulling a permit to operate a gold mine on the grounds of the adverse effect on the environment, and subsequently granted a new permit. The European Court of Human Rights held that there was a violation of Article 8 of the *European Convention*. The Court decided that in a case involving state decisions affecting environmental issues, there

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months of July, August, and September 1988. In October, the applicant and her family returned to their flat. *Lopez Ostra v. Spain*, Eur. Ct. H.R. 16798/90 (1994), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57905#{"itemid":\["001-57905"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57905#{) [hereinafter *Lopez Ostra*].

107. *Id.* ¶ 51.

108. The applicants all live in the town of Manfredonia, approximately one kilometer from a chemical factory. The applicants argued that in the course of its production cycle the factory released large quantities of inflammable gas – a process which could have led to explosive chemical reactions, releasing highly toxic substances – and sulfur dioxide, nitric oxide, sodium, ammonia, metal hydrides, benzoic acid and above all, arsenic trioxide. Several accidents due to malfunctioning occurred and because of the factories geographical position, emissions from it into the atmosphere were often channeled to Manfredonia. *Guerra and others v. Italy*, 1998-I Eur. Ct. H.R. (1998), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58135#{"itemid":\["001-58135"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58135#{).

109. *Id.* ¶ 60.

110. The residents of Bergama and the neighbor villages applied to the İzmir Administrative Court requesting judicial review of the Ministry of the Environment's decision to issue a permit. They based their arguments, *inter alia*, on the dangers inherent in the company's use of cyanide to extract the gold, and especially the risks of contamination of the groundwater and destruction of the local flora and fauna. They also criticized the risk posed to human health and safety by that extraction method. The applicants alleged that, as a result of a gold mine's development and operations, they had suffered and continued to suffer the effects of environmental damage; specifically, these included the movement of people and noise pollution caused by the use of machinery and explosives. *Taskin and Others v. Turkey* (No. 46117/99), Eur. Ct. H.R. (2005) [hereinafter *Taskin*].

are two aspects to the inquiry which it may carry out. Firstly, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with the right to respect for private and family life. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual.<sup>111</sup>

In the case of *Giacomelli v. Italy*,<sup>112</sup> the ECHR, confirming the proper inquiry, ruled that there had been a violation to Article 8 of the *European Convention* due to the fact that, for several years, the applicant's right to respect for her home was seriously impaired by the dangerous activities carried out at the plant. Moreover, the Court considered "that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life."<sup>113</sup> The Court also sustained that a home is usually the physically defined area where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect private and family life are not confined to concrete or physical breaches, such as unauthorized entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells, or other forms of interference. A serious breach may result if something prevents an individual from enjoying the amenities of his or her home.<sup>114</sup>

In *Tătar v. Romania*,<sup>115</sup> the European Court of Human Rights held that there was a violation of Article 8 of the *European Convention*. The

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111. *Id.* ¶ 115.

112. In this case, the applicant lived in a house on the outskirts of Brescia, 30 meters away from a plant for the storage and treatment of "special waste" classified as either hazardous or non-hazardous. The applicant lodged three applications for judicial review of the issued licenses. In the meantime, the Lombardy Regional Council had renewed the operating license for the plant for a five-year period. The renewal concerned the treatment of special waste, both hazardous and non-hazardous. *Giacomelli v. Italy*, App. No. 59909/00, Eur. Ct. H.R. (2007), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77785#{"itemid":\["001-77785"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77785#{).

113. *Id.* ¶ 97.

114. *Id.* ¶ 76.

115. In this case, a company obtained a license to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide. Part of its activity was located in the vicinity of the applicants' home. An environmental accident occurred at the site. A United Nations study reported that a dam had breached, releasing about 100,000 m<sup>3</sup> of cyanide-contaminated tailings water into the environment. The Report stated that the company had not halted its operations. After the accident, the applicants filed various administrative complaints concerning the risk incurred by him and his family as a result of the use of sodium cyanide in the extraction process. He also questioned the validity of the company's operating license. Romanian authorities informed him that the company's activities did not constitute a public health hazard and that the same extraction technology was used in other countries. *Tatar v. Romania*, App. No. 67021/01, Eur. Ct. H.R. (2009).

Court observed that pollution could interfere with individuals' private and family life by harming their well-being, and that Romania had a duty to ensure the protection of its citizens by regulating the authorization, setting-up, operation, safety, and monitoring of industrial activities, especially activities that were dangerous for the environment and human health.<sup>116</sup> The ECHR concluded that the Romanian authorities had failed in their duty "to assess, to a satisfactory degree, the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes . . . and more generally their right to enjoy a healthy and protected environment."<sup>117</sup> *Dubetska v. Ukraine*<sup>118</sup> concerned the breach of the right to respect for private and family life as a result of industrial pollution emanating from two State-owned facilities and from Ukraine's failure to regulate hazardous industrial activity.<sup>119</sup> The ECHR ruled that for more than twelve years, the Ukrainian authorities were not able to implement an effective solution for the applicants who were most seriously affected by the pollution. Moreover, Ukraine failed to adduce sufficient explanation for not taking action to either resettle the applicants, or find some other kind of effective solution for their individual burden.<sup>120</sup>

In *Budayeva*, the European Court of Human Rights, regarding the close link between the right to respect for private family life and the right to life, recognized that in the context of dangerous activities, the scope of the positive obligations of the right to life enshrined in the *European Convention* largely overlap with those under the right to respect for private

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116. *Id.* ¶¶ 85-88.

117. *Id.*

118. The applicants were two Ukrainian families who had their residences in close proximity to a coal mine and a coal processing factory in the Ukraine, as well as two spoil heaps created by these industrial facilities. They claimed that their right to respect for private and family life was violated on account of prolonged environmental pollution emanating from a state-owned mine and factory. The applicants asserted that, in addressing their environmental concerns, the State had failed to strike a fair balance between their interests and those of the community, as the authorities have failed either to bring the pollution levels under control or to resettle the applicants into a safer area. The applicants also claimed that they were continuing to suffer from a lack of drinkable water and that some of them had developed chronic health conditions associated with the factory operation, especially with air pollution. Due to these facts, they would not be able to sell houses located in a contaminated area or to find other sources of funding for relocation to a safer community without State support. *Dubetska and Others v. Ukraine* (No. 30499/03), Eur. Ct. H.R. (2011), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103273#{\"itemid\":\[\"001-103273\"\]}>\"](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103273#{\).

119. Furthermore, the applicants stated that not only their houses were located within an area legally considered inappropriate for habitation, but that "there was considerable evidence that the actual air, water, and soil pollution levels in the vicinity of their homes were unsafe and were such as could increase the applicants' vulnerability to pollution-associated diseases." *Id.* ¶ 91.

120. *Id.* ¶ 147.



and family life.<sup>121</sup> Therefore, “the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.”<sup>122</sup>

The right to private and family life is crucial for the protection against environmental harms in the European human rights system. The European Court of Human Rights has interpreted this right broadly. The positive obligations to protect this right can overlap with those of the right to life. The affectation of pollution emanating from industry can be considered a breach of the right to private and family life, especially those activities which imply a danger to the environment and human health. This right also includes respect for the home, including the protection from interferences such as emissions or smells. The ECHR has set precedent regarding a state's obligation to take into account the protection of the several aspects of the right to private and family life, while creating a fair balance between the interest of the community and the enjoyment of this right. The negative effects of climate change represent, in certain cases, a serious inconvenience for private and family life. These effects can harm individuals' and families' well-being, and affect their day-to-day life. These issues were successfully addressed in several previous cases heard by the ECHR.

#### F. Right to Public Information

The *American Convention* acknowledges the right to information in Article 13: “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.”<sup>123</sup> The European Convention in Article 10, paragraph 1 states that the right of freedom of expression “shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>124</sup>

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121. Budayeva, *supra* note 31, ¶ 133. Oneryildiz, *supra* note 28, ¶¶ 90-160.

122. Budayeva, *supra* note 31.

123. American Convention, *supra* note 15. The Inter-American Declaration of Principles on Freedom of Expression also recognizes in Principle 2 that “Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.” *Inter-American Declaration of Principles on Freedom of Expression, Principle 2*, O.A.S., available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132> (last visited Nov. 2014).

124. European Convention, *supra* note 19.

For the ECHR, the scope of protection of this right extends beyond Article 10. In *Budayeva*, the Court held that the right to life should be interpreted as to include a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency:<sup>125</sup>

In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use.<sup>126</sup>

In *Guerra*, the European Court of Human Rights acknowledged Italy's failure to provide the local population with information about risk factors and how to proceed in the event of an accident at a nearby chemical factory.<sup>127</sup> In *Taskin*, the ECHR stated that in cases raising environmental issues, the states must be allowed a wide margin of appreciation, and in order to achieve this, the respect for the right to information is needed. The ECHR went on to say that "[i]t is necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available."<sup>128</sup>

As to the Inter-American System, in *Saramaka*, the Inter-American Court of Human Rights considered that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, Suriname had a duty not only to consult with the Saramaka people, but also "to obtain their free, prior, and informed consent, according to their customs and traditions."<sup>129</sup> In *Sarayaku*, the Court considered as one of the fundamental guarantees ensuring the participation of indigenous peoples and communities in decisions regarding any measure that affects their rights, and, in particular, their right to communal property, related to the recognition of their right to consultation, respecting the particular consultation system of each people

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125. *Budaveya*, *supra* note 31, ¶ 131. *Oneryildiz*, *supra* note 28, ¶¶ 89-118.

126. *Budayeva*, *supra* note 31, ¶ 137.

127. The applicants waited until the production of fertilizers ceased for essential information that would have enabled them to assess the risks they and their families could be exposed to if they continued to live in a town particularly exposed to danger in the event of an accident at the factory. *Guerra*, *supra* note 108, ¶ 60.

128. *Taskin*, *supra* note 110, ¶¶ 116-118.

129. *Saramaka*, *supra* note 75, ¶ 134.

or community.<sup>130</sup> This recognition includes the obligation “to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards,”<sup>131</sup> in order to create channels for sustained, effective, and reliable dialogue with the indigenous communities.

In the same vein, the IACtHR has recognized the states have a duty to engage in effective and informed consultations with indigenous communities concerning the boundaries of their territory and their traditional land use practices and customary land tenure system.<sup>132</sup> The Commission has stated that the duty to consult is a fundamental component of a state’s obligations in giving effect to the communal property right of indigenous peoples in the lands that they have traditionally used and occupied.<sup>133</sup>

Both the European and the Inter-American Courts have recognized the right of individuals to be taken into account throughout the decision-making process when there is the risk that their rights have been affected. In addition, the Inter-American system has developed a vast jurisprudence regarding indigenous peoples’ right to prior informed consultation. It is clear that indigenous peoples are entitled to a process of meaningful consultation when international law supports prior informed consent with respect to large-scale projects to be developed on their traditional lands.<sup>134</sup>

As derived from the previous review, all of these cases suggest that the traditional notions of human rights violations may warrant extension in cases of the negative effects related to anthropogenic climate change, and that these violations could be appropriately addressed in the human rights fora.<sup>135</sup> The Inter-American human rights system has ruled on several cases regarding the effect of environmental degradation on human rights and have set important precedents that could be useful for climate change claims; this is due to the fact that indigenous peoples are certain to be among the most vulnerable populations facing climate change. Meanwhile, the jurisprudence of the ECHR in the area of the environment

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130. Sarayaku, *supra* note 41, ¶¶ 160-165.

131. *Id.* ¶ 166.

132. Maya Toledo, *supra* note 81, ¶ 132.

133. *Id.* ¶ 155.

134. Lillian Aponte Miranda, *Introduction to indigenous peoples’ status and rights under international human right law*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES 39, 57 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013). *See also* UN Econ. & Soc. Council, “An Overview of the Principle of Free, prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices, Workshop on Free, prior, and Informed Consent, UN Doc. PFII/2004/WS.2/8 (Jan. 17, 2005) (prepared by Parshuram Tamang).

135. Fatma Zohra Ksentini, Progress Report Human Rights and the Environment, U.N. Doc. E/CN.4.Sub.2/1992/7, at 25 (July 2, 1992).

is growing and varied. Recent decisions have made it clear that this jurisprudence, far from being settled beyond question, is characterized by a number of significant uncertainties.<sup>136</sup> Nevertheless, in the cases it has analyzed, the ECHR has considered the environment worthy of protection by understanding it as implicit in the rights and freedoms already guaranteed, or by analyzing it as relevant for the general interest.<sup>137</sup>

The next section examines two cases that have applied these frameworks to the specific case of obtaining human rights relief for the acts and omissions of governments that bear international responsibility for harms caused by anthropogenic climate change.

#### IV. CLIMATE CHANGE AND HUMAN RIGHTS CLAIMS PRESENTED BEFORE THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The indigenous peoples of the Arctic, including the Arctic Athabaskan and Inuit peoples, have contributed the least to the accelerated warming and melting of the Arctic through emissions of greenhouse gases, yet they are among the first to face direct environmental, social, and human impacts of climate change. Both the Inuit and the Athabaskan peoples have presented petitions to the Inter-American Human Rights Commission (IAHRC) alleging violation of human rights caused by the effects of climate change. The *Inuit petition* was dismissed, and the *Athabaskan petition* is being reviewed for admission.

##### A. *The Inuit Petition*

In 2005, Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference (ICC), filed a petition to the IACHR on behalf of all Inuit of the Arctic regions of the United States (US) and Canada, seeking relief from violations of human rights resulting from the impacts of global warming and climate change caused by greenhouse gas emissions from the US.<sup>138</sup> The petition was filed with the legal assistance of the Center for International Environmental Law and Earthjustice.<sup>139</sup> The main argument of this claim was that the negative impacts of climate change in the Arctic, caused by US greenhouse gas emissions and climate change policy,

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136. Riccardo Pavoni, *Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights*, in THE ENVIRONMENTAL DIMENSION OF HUMAN RIGHTS (Nov. 11, 2013).

137. DANIEL GARCIA SAN JOSE, LA PROTECTION DE L'ENVIRONNEMENT ET LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME, STRASBOURG 67 (2005).

138. Inuit Petition, *supra* note 5.

139. Sarah Nuffer, *Human Rights Violations and Climate Change: The Last Days of the Inuit People?*, 37 RUTGERS L. REV. 182, 188 (2010) (QL).

violated the fundamental human rights of the Inuit. These negative consequences included “melting permafrost, thinning and ablation of sea ice, receding glaciers, invasion of species of animals not previously seen in the Arctic, increased coastal erosion, longer and warmer summers, and shorter winters.”<sup>140</sup> The petitioners alleged that the US had violated their right to enjoy the benefits of their culture, the right to property, the right to the preservation of health, the right to life, physical integrity and security, the right to their own means of subsistence, and the right to residence, movement, and inviolability of the home.<sup>141</sup>

The petition argued that the Inuit, as resource-dependent people, were severely impacted by the warmer temperatures melting the sea ice and snow on which they had depended for centuries for cultural activities, transportation, and subsistence hunting and fishing. Permafrost thaw and ground slumping had forced Inuit communities to relocate. The loss of ice has threatened agriculture and drinking water supplies, and had made subsistence activities dangerous or in some cases impossible by preventing younger generations from participating in cultural activities and accessing traditional Inuit knowledge. These negative impacts jeopardized the full realization of human rights of the Inuit.<sup>142</sup>

In November 2006, the petition was dismissed through a brief letter response to the Inuit Circumpolar Conference, where the Inter-American Commission on Human Rights concluded that the petition failed to establish “whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”<sup>143</sup> In response to the IACHR communication, the ICC requested a hearing on the potential connection between the effects of global warming and human rights.<sup>144</sup> The IACHR agreed with this petition and convened a hearing that was held on the March 1, 2007.<sup>145</sup> Even though the Inuit petition was dismissed, it is an example of the way indigenous communities are moving forward

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140. The Climate Change Petition by the Inuit Circumpolar Conf. to the Inter-Am. Comm. on H.R., (Dec. 7, 2005) (by Sheila Watt-Cloutier), *available at* <http://mailman.fsr.com/pipermail/vision2020/2007-October/049013.html>.

141. Inuit Petition, *supra* note 5, at 74-96.

142. *Id.*

143. Letter from Ariel E. Dulitzky, Assist. Exec. Sec., IACHR, to Sheila Watt-Cloutier (Nov. 16, 2006), *available at* <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

144. Letter from Sheila Watt-Cloutier, et. al., to Santiago Canton (Jan. 15, 2007), *available at* [http://www.ciel.org/Publications/IACHR\\_Letter\\_15Jan07.pdf](http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf).

145. Letter from Ariel E. Dulitzky, Assist. Exec. Sec., IACHR, to Sheila Watt-Cloutier (Feb. 1, 2007), *available at* [http://www.earthjustice.org/library/legal\\_docs/inter-american-commission-on-human-rights-inuit-invite.pdf](http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf).

with creative legal arguments premised on the unique connection between indigenous communities and their land and environment.<sup>146</sup>

### *B. The Athabaskan Petition*

On April 23rd, 2013, the Arctic Athabaskan Council (AAC), represented by Earthjustice and Ecojustice Canada, on behalf of all the Athabaskan Peoples of the Arctic regions of Canada and the US, filed a petition with the IACHR. The AAC argues in the petition that Canada's lack of effective federal and provincial regulations for black carbon emissions is accelerating Arctic warming, violating the human rights of Arctic Athabaskan peoples.<sup>147</sup> Rapid arctic warming and melting caused by emissions of black carbon is harming the Arctic Athabaskan peoples, and the AAC requests the IACHR to confirm those harms. Arctic Athabaskan peoples have documented observations of climate change that include increasing number of fires; drying of rivers and lakes; difficulty of river travel due to low water levels; increasing infestation of trees, fewer moose, and fewer porcupines; changes in caribou migration; and permafrost melt.<sup>148</sup> Athabaskan peoples depend on natural resources for their livelihood, contends the petition, and the effects of climate change are felt most acutely by their populations.

The petitioners ask the Inter-American Commission on Human Rights to investigate and declare that Canada's failure to implement adequate measures to reduce black carbon emissions violates the Athabaskan peoples' right to the benefits of their culture,<sup>149</sup> right to property,<sup>150</sup> and right to health<sup>151</sup> enshrined in the American Declaration. The AAC also requests that the IACHR recommend that Canada take actions to implement black carbon emissions reductions measures and to protect the Athabaskan culture and resources from the effects of the accelerated Arctic warming. The Canadian government will have to respond to the Commission after which the Commission will determine the admissibility of the petition. If deemed admissible, the Commission will proceed to review the petition on its merits.

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146. See Elizabeth Ann Kronk & Randall Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L. REV. 133, 119 (2013).

147. Athabaskan petition, *supra* note 6, at 16. For a more detailed analysis of the Athabaskan petition, see Verónica de la Rosa Jaimes, *The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights*, 46 CAL. W. INT'L L.J. (forthcoming).

148. *Id.* at 29-30.

149. *Id.* at 61.

150. *Id.* at 71.

151. *Id.* at 76.

The Athabaskan petition will be confronted by two critical challenges. Firstly, the petitioners will have to prove legally sufficient causation between the harm resulting from climate change and the acts or omissions of the Canadian government. The crucial element to success will be that the petitioners demonstrate how environmental degradation, due to anthropogenic climate change, can violate their human rights. The petitioners must lay out the scientific evidence for the connection between black carbon and climate change in the Arctic, and the vulnerability of the Arctic to projected climate change and its impacts.<sup>152</sup> The ACC states that when black carbon deposits on ice and snow and reduces albedo, the ability of the snow to reflect sunlight, while absorbing sunlight and heating the atmosphere, Arctic warming is accelerated. Thus, due to the nature of black carbon<sup>153</sup> and proximity of the emissions to the Arctic, Canada's emissions of black carbon affect Athabaskan lands the most.

Secondly, the petitioners will need to demonstrate that they have exhausted their domestic remedies. The Inter-American Commission on Human Rights Rules of Procedure require the petitioners to exhaust domestic remedies before submitting a case to its jurisdiction.<sup>154</sup> Nevertheless, the rules provide an exception if "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated."<sup>155</sup> Furthermore, the IACHR has stated that there is a possibility of exemption when it is evident that no action filed regarding that complaint has a reasonable chance of success based on the existing jurisprudence of the highest courts of the state.<sup>156</sup> The ACC alleges that "Canadian law offers Arctic Athabaskan peoples 'no reasonable chance of success' due to the undue burden such challenges would impose, the lack of remedies under Canadian constitutional, statutory and common law"<sup>157</sup> for the human rights at issue

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152. *Id.* at 16-19.

153. Black carbon is the sooty pollution emitted from diesel engines, residential heating stoves, agricultural and forest fires, and some industrial facilities. It is considered a "short lived" climate pollutant as it stays in the atmosphere for only about one week. Athabaskan petition, *supra* note 6, at 16.

154. Organization of American States, *supra* note 15, art. 31. *Rules of Procedure of the Inter-American Commission on Human Rights*, ORGANIZATION OF AMERICAN STATES, arts. 50-51, available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

155. *Id.*

156. Hul'Qumi'Num Treaty Group v. Canada, Admissibility, Inter-Am. Comm'n H.R., Report No 105/09, Petition 592-07, ¶ 41 (2009), available at <http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm>.

157. Athabaskan Petition *supra* note 6, at 83.

in the petition.<sup>158</sup> As previously analyzed in this paper, the Inter-American Commission on Human Rights has issued recommendations on cases related to the right to property, where it recognizes that the right to property protects traditional forms of ownership and cultural survival and rights to land, territories, and resources.<sup>159</sup> Other cases have been taken by the IACHR to the Inter-American Court of Human Rights on behalf of the alleged victims of human rights violations, giving rise to decisions that protect human rights of indigenous peoples, with specific reference to the right to property, due to the close link between indigenous communities and their traditional lands, which they must fully enjoy to preserve and transmit their cultural legacy to future generations.<sup>160</sup> In the past decade the Inter-American jurisprudence has transformed the international legal status of the land and has done this by “taking seriously the property rights of indigenous peoples.”<sup>161</sup> Similarly, the Athabaskan petition is giving the IACHR a second chance to make advancements regarding human rights claims related to the negative effects of anthropogenic climate change.

## V. CONCLUSION

In order for human rights claims regarding climate change’s adverse impacts to succeed in the regional human rights arena, the major evidentiary issue will involve proving that human-induced effects of climate change have resulted in a threat to human rights.<sup>162</sup> In other words, the main challenge is pinpointing the level of certainty and the nature of the evidence necessary to show a causal link between GHG emissions, climate change, and the threat to life, health, or enjoyment to property.

Another fundamental challenge to remedying human rights violations caused by climate change involves economics: the worst effects are predicted to take place in the world’s poorest countries. Despite the fact that these countries’ governments are generally not responsible for creating the conditions leading to climate change, the central fact is that

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158. A similar argument was presented by the Hul’Qumi’Num Treaty Group in a petition admitted in 2009. Hul’Qumi’Num Treaty Group, *supra* note 155, ¶ 33.

159. Maya Toledo, *supra* note 81, ¶ 115.

160. Xákmok, *supra* note 39. Awas Tingni, *supra* note 71. Saramaka, *supra* note 75. Sawhoyamaya, *supra* note 36.

161. Nigel Bankes, *International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples*, 47 ALTA. L. REV. 491 (2010).

162. MEINHARD DOELLE, FROM HOT AIR TO ACTION? CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW 241-242 (2005).



most of the time, effects are not produced in the same places as the causes.<sup>163</sup>

Nevertheless, both the Inter-American and the European human rights systems are well equipped to provide enough protection to those human rights affected by climate change. In addition, both systems provide mutual feedback by interpreting regional human rights instruments in the context of the evolving rules and principles of human rights law in the international community, as reflected in treaties, custom and other sources of international law. “[A]s human right treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to the current living conditions.”<sup>164</sup> Thus, human rights systems are evolving to cover the needs of the communities that will be affected by the key risks associated with climate change, and that have been identified with a level high confidence by the Intergovernmental Panel on Climate Change as affecting human systems in all continents.<sup>165</sup>

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163. STEPHEN HUMPHREYS, CLIMATE CHANGE AND INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE, 29, 38 (Rosemary Rayfuse & Shirley Scott eds., 2012).

164. Awas Tingni, *supra* note 71, ¶ 58.

165. Intergovernmental Panel on Climate Change, *supra* note 4, at 12-22.



