

Regional Human Rights Regimes and Environmental Protection:
A Comparison of European and American Human Rights Regimes' Histories, Current
Law, and Opportunities for Development

by

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Abstract

This work reviews the Inter-American and European human rights regimes and their abilities to respond to point-source pollution, climate change, and ecosystem conservation. It begins by reviewing leading human rights theories and the development of the relationship between human rights and the environment. It then focuses on European human rights, both under the ECHR and the CFREU, and highlights the ECHR's ability to respond to instances of point-source-pollution through the right to privacy. The work then looks at the Inter-American human rights regime, its structure, history and ability to respond to environmental challenges. It reviews the regime's tendency to use the right to property to protect the environments of indigenous populations and provides a detailed analysis of the regime's potential ability to respond to climate change based on the recent Athabaskan Petition. Finally this work looks at how environmental protection can be developed within both regimes, comparing their abilities to adapt and progressively interpret each regime's human rights laws. It concludes that the European regime is in a better position to expand its human rights, potentially to the degree of recognizing a right to a healthy environment.

List of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EU	European Union
GHG	Greenhouse Gas
IA	Inter-American
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IRA	Provisional Irish Republican Army
NGO	Nongovernmental Organization
OAS	Organization of American States
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UDP	Unit for Promotion of Democracy
UN	United Nations
UNEP	United Nations Environment Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Chapter 1: Introduction

1.1 Overview

Human activities have a number of unwanted impacts on the natural environment and human rights laws are a potential means for responding to environmental challenges. Pollution, climate change and loss of ecosystems are problems worthy of quick and effective responses; international human rights laws are seen by many as a potentially robust system of laws that could protect the environment.

This research explores this idea and looks at the abilities of the European and Inter-American¹ human rights regimes to respond to point-source pollution, climate change and conservation. This work provides a detailed analysis of the strengths and weaknesses of both of these regimes with regard to their current interpretation of human rights and the environment. It also compares the development of the two regimes in order to illustrate their historic differences and emphasize the potential challenges associated with transferring jurisprudential principles between the regimes.

The structure of this analysis is as follows: first, it provides an introduction to human rights theory to define the foundations of human rights as well as the primary arguments for integrating environmental protection into international human rights. To this end Section 2 of this chapter looks at traditional human rights theory and the theories linking human rights to the environment. Section 3 reviews some of the previous and ongoing efforts to

¹ For clarity, it should be noted that the terms “Inter-American” and “American” are used in this work to refer to the nations of North, South and Central America which are members of the Organization of American States. When reference is to be made to the country of the United States of America, it will be called “the United States” or USA.

formally integrate environmental protection and international human rights, including the recognition of a human right to a healthy environment. Sections 4 and 5 introduce the parameters of the remainder of this work, with Section 4 overviewing the various international human rights regimes and Section 5 describing the environmental challenges of point-source pollution, climate change and ecosystem conservation.

Chapters 2 and 3 begin the analytical chapters of this work and they respectively review the abilities of the European and Inter-American human rights regimes to respond to environmental challenges. Both chapters first outline the histories of the regimes and the development of their human rights. Then, each chapter look at the respective regimes ability to respond to point-source pollution, climate change, and conservation.

Chapter 4 provides a comparative analysis of the two regimes in order to highlight not only opportunities for mirroring jurisprudence between the regimes, but also the major challenges associated with doing so. The chapter addresses the role of the principle of non-intervention in shaping the Inter-American human rights regime and its lingering effect on the regime's workings. It also looks at how early decisions of both regimes' courts influenced participation and foreshadowed their adjudicatory styles. Finally it looks at the tendency of participant nations to comply with the decisions of both regimes. The chapter then describes how these factors complicate the direct transfer of jurisprudential principles between the two regimes, but it goes on to explore avenues for both regimes to independently expand their human rights law in order to provide greater environmental protection.

Chapter 5 concludes and summarizes this work.

1.2 Human rights theory

The overarching purpose of this thesis is to explore the potential abilities of the European and Inter-American human rights regimes to respond to environmental challenges. In order to properly conduct this analysis it is vital to understand what constitutes a human right as human rights theory is not always consistent with human rights law. The following theoretical analysis looks at the main theories underlying human rights; it lays out their purpose and relationship with other laws. It also shows how human rights theories may influence developments in human rights law.

There are multiple competing theories to explain “human rights” and their role in law and society. Unfortunately, modern human rights law is complex and most theories struggle to provide a comprehensive explanation of their presence and function. The two most prominent legal theories, natural law and positivist law, can be applied to human rights and are capable of explaining different aspects of modern human rights law. The following analysis looks at these two competing and conflicting theories and how they shape human rights law.

1.2.1 Natural law, positivist law, and human rights law

Explaining human rights on the basis of either natural law or positivist law is difficult because, while natural law and positivist law. While natural law is commonly cited as the foundation for modern human rights regimes,² it can

² Donald K Anton & Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) at 121; Maurice William Cranston & United Nations General Assembly, *What are human rights?* (Basic Books, 1963) at 1 Cranston states that human rights are simply the modern name for natural rights.

be difficult to apply to modern human rights in practice. Positivist law, can step in to provide a theoretical explanation for modern human rights where natural law falters, but it can simultaneously struggle to explain the special status often given to human rights as being superior to other laws.

Natural law theories interpret law as being based on “a fundamental underlying truth”. This truth provides the foundation and structure for all laws, but what the truth is can vary depending on the natural law theorist. Some theorists, such as Locke, use “God” as the foundation for law, while Bay focuses on “human needs” and Dyke on “the needs of the community”. Natural law theories are often closely associated with religion, particularly Christianity, with their advocates either explicitly or implicitly basing their “fundamental underlying truth” on the Bible. For Locke, natural law and natural rights were founded in his religion such that human rights were effectively granted by God.

Locke introduced one of the first concepts of human rights in his *Second Treatise of Government*.³ He wrote that humans, as creations of God, are God’s property and that human survival is part of God’s will. Since there are certain things humans need for survival, Locke concluded that humans must have God given rights to: life, health, liberty and property. These protections, according to Locke, provide the most basic requirements for survival. He called this the “law of nature” as it was, in his view, the law which would exist in a natural state, devoid of formal government.⁴

Today, Locke’s theory of rights leaves a lot to be desired. First, its explicit reliance on the Christian god as the foundation for rights is broadly incompatible with the modern global religious reality. Furthermore, the four rights listed by Locke are curious choices for being the rights “necessary for survival”. Certainly, life and health are important requirements for human

³ John Locke, *Two Treatises on Government* (R. Butler, 1821).

⁴ *Ibid* at 305.

survival, but so are shelter, water, and food. On the other hand, humans can undoubtedly survive without liberty (slaves and prisoners survive, albeit not particularly well) and humans can also survive without owning property in the modern sense of the term.⁵ Modern urbanites renting tiny apartments, traditional nomadic peoples, those living communally, and many indigenous populations might question that the right to property is one which is necessary for survival.

Modern natural law theorists move away from Locke's explicit religious references to God and rely on "nature", "human nature", or "human needs" as the "underlying truth" which establishes human rights. Christian Bay sees "human needs" as the proper starting point for establishing human rights. He argues that "acknowledgement of a basic human need *ipso facto* establishes human rights"⁶ and he builds on the work of another prominent natural law theorist, Maurice Cranston. Cranston believes that human rights must be: practical, universal, and of paramount importance,⁷ to which Bay adds that they be given the highest-priority legal protection.⁸ According to Bay, human rights exist to meet human needs and conversely, human needs establish human rights.

Arthur Dyck also focuses on human needs as a foundation for human rights but describes needs as those things serving "the moral requisites of community".⁹ He emphasizes that human rights should be based on the moral responsibilities created by our natural tendency to create communities and sustain individuals. Dyck begins with a focus on humanity's propensity

⁵ It should be noted that the interpretation of Locke's right to property is hotly debated by academics, see: Alex Tuckness, "Locke's Political Philosophy" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, spring 2016 ed (2016), but all theories about the meaning of Locke's right to property are based the principle of exclusive ownership.

⁶ Christian Bay, "Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community" (1982) 4:1 Human Rights Quarterly 53 at 61.

⁷ Maurice Cranston, "Are There Any Human Rights?" (1983) 112:4 Daedalus 1 at 13-14.

⁸ Bay, *supra* note 6 at 62.

⁹ Arthur J Dyck, *Rethinking Rights And Responsibilities: The Moral Bonds of Community* (Georgetown University Press, 2005) at 9.

to form communities but also relies on the idea that human beings act with faith that they will have an ultimate vindication of their moral actions.¹⁰ This latter element of Dyck's argument leads back, obviously but not explicitly, to a religious foundation for natural law and human rights. This is not surprising because for many, morality and religion are intertwined, but it does raise issues about the universality of morality and a natural law foundation for human rights.

While specific natural law theories about human rights may have their flaws,¹¹ there are some common descriptors of human rights which can be extracted from most natural law theories. Irrespective of their theoretical foundation, human rights are expected to be universal and inalienable – that is, they apply to all humans regardless of their nationality, social status, wealth, ethnicity, religion, etc. and cannot be taken from people by government or law. In tune with this, human rights should also be prioritized above other laws and given greater legal protection. These three properties of human rights, which stem from natural law, can be found in the majority of the international human rights documents and rhetoric.

In many ways, natural law is appealing and the role of natural law as establishing the foundation for human rights makes sense. As Cranston points out, there is something instinctual about how we feel about unjust laws. We *feel* rather than *think* that laws are unjust and it seems more emotional than logical.¹² People are repulsed by the idea of obeying an unjust law. Natural law theorists point to the German atrocities during World War 2

¹⁰ *Ibid* at 10.

¹¹ As well as the criticisms which can be levied at Locke's theories, the theories of Bay and Dyck also have issues when closely scrutinized. Bay, for instance, follows his theory of 'human need' to eventually argue that every individual has a human right to self-respect, a right to which it would be impossible to provide the high level of legal protection promoted by Bay. Similarly, Dyck's focus on the needs of community eventually leads him to the conclusion that physician-assisted suicide is inherently immoral, a position which may be more of a reflection of his personal religious beliefs than a universal moral truth.

¹² Cranston, *supra* note 7 at 5–6.

as examples of unjust laws - created legally by the German government, these oppressive laws go against our internal morality and natural law.¹³ Furthermore, there is something attractive about Dyck's observation that humans tend to naturally coalesce into community groups: undeniably, social cohesion has been an important factor in our success as a species. Therefore, if we have an innate feeling of what constitutes a just law and we naturally congregate into communities for our shared prosperity, it seems logical that there should be some laws or "rights" which should be guaranteed in order to support communities and uphold our common sense of justice. While such a statement can be attractive in theory, it can be difficult to apply in practice.

First, it is difficult to establish universal concepts of morality and community. Even taking for example arguably the most broadly accepted human right, the right to life; it can be difficult to agree upon a common definition. How the right to life should treat abortion, assisted dying, and capital punishment is the source of major cultural and moral disagreement. Similarly, with regard to Dyck's theory of community, although humans do obviously form community groups, community structures can vary dramatically, including: democracies, communes, monarchies, and semi-democratic republics. A modern, Western audience would likely see an "open democracy" as the "morally correct" community structure; however, history provides evidence that long-lasting and prosperous communities can be established by oligarchical and dictatorial empires. While communities may be a natural part of human nature, the design of these communities, and therefore the human rights necessary to sustain them, can vary greatly.

The second major challenge to natural law theories is determining and defending which rights are established (and not established) by the specific theories. When human rights are based in natural law, that natural law is

¹³ Cranston & Assembly, *supra* note 2 at 16; Cranston, *supra* note 7 at 5.

founded on a singular principle: “human needs” are cited by some¹⁴ and “human survival” by others.¹⁵ However, a ‘need’ is hard to define outside a simplistic ‘survival need;’ i.e. what is strictly required by humans to survive. Defining human rights based on what is necessary for survival would create a narrow definition that could not justify the many modern human rights, such as the rights to privacy, movement, paid holidays, education, etc. Dyck’s assertion that needs include ‘what is necessary for sustained communities’ is no more helpful as ‘community’ then becomes the indefinable term. The challenges posed by defining the terms used by natural law theorists, often lead one to search for a foundation of human rights that does not require a “great underlying truth”. Legal positivism responds to natural law’s shortcoming by providing a theoretical basis where laws (and rights) are created by man and can be explained without any underlying morality or natural guidance.

The theories of legal positivists such as HLA Hart,¹⁶ Raz,¹⁷ Watson, and Lane, are best introduced by Bentham who wrote that rights are “a child of law; from real law come real rights; but from imaginary laws, from ‘law of nature’, come imaginary rights... Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.”¹⁸ Bentham’s basic premise is laws and rights can only be created by man and enforced by man. HLA Hart and Joseph Raz provide a particularly accessible modern view of positivist law, broadly stating that laws are separate from morals and established by man.¹⁹ Laws are guided by “external” aspects

¹⁴ Reginald Herbold Green, “Basic human rights/needs: some problems of categorical translation and unification” (1981) 27 *International Commission of Jurists Review* 53; Bay, *supra* note 6.

¹⁵ Locke, *supra* note 3.

¹⁶ Hart is claimed by Cranston to be a natural law theorist, but Hart is clearly a legal positivist who, at times, challenged other legal positivist theories in favour of his own.

¹⁷ Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

¹⁸ Jeremy Bentham & Sir John Bowring, *Works of Jeremy Bentham* (W. Tait, 1839) at 501.

¹⁹ H L A Hart, “Positivism and the Separation of Law and Morals” (1958) 71:4 *Harvard Law Review* 593.

which outline a rule and how one should conform to it, and “internal” aspects which oblige individuals to conform to rules.²⁰ These “internal” aspects are not necessarily emotional or moral feelings of right or wrong behaviour, but can simply be understood and agreed upon social pressures.²¹

Positivist law treats human rights as though they are identical in quality to all other laws. Sections 2.1 and 3.1 of this work explore how both European and Inter-American human rights were created in response to specific geopolitical pressures and how the States were motivated by desires for cohesion, unity, and stability. Certainly a natural law theorist could argue that “human rights are those laws necessary for geopolitical cohesion, unity, and stability”, but such an approach still fails to account for variations in the regional regimes. One could then argue that human rights protect “regional geopolitical cohesion”, but this would undermine natural law’s appeal of a “fundamental underlying truth”. Positivist law is not emotional or mystical and because of this it can be less attractive. There is something pleasing about the idea that human rights are somehow greater than other laws, but this is denied by positivism. However, as natural law repeatedly fails to supply a clear theory that justifies specific human rights, positivism becomes an attractive alternative.

This work is not intended to determine if Inter-American or European human rights are founded upon or developed under either natural law or positivist legal theories. Its purpose is to determine the practical ability of both regimes to respond to environmental challenges; the underlying legal theories used by those drafting regional human rights documents and those developing the law through jurisprudence are not considered as part of this work. This is in part because these decision-makers do not consistently reference the legal theories upon which their work is based and also because the interest of this

²⁰ H L A Hart, *The Concept of Law (Clarendon Law Series), 2nd Ed.*, 2d ed, Penelope A. Bulloch & Joseph Raz, eds. (Clarendon Press, 1997) at 56.

²¹ *Ibid* at 57–58.

work is on the law's application more so than its underlying principles. A major exception to this is in the discussion of potential development to both the European and Inter-American legal regimes. While it can be difficult to determine which laws have been developed based on a particular legal theory, it is useful to look at potential developments in law to determine if they are compatible with dominant legal theories.

The following section looks closely at many of the modern arguments for the general integration of environmental protection into human rights law.

1.2.2 The theoretical basis for integrating environmental protection into human rights

There are many authors who support the idea that environmental protection should be integrated into international human rights law. They can generally be categorized into one of two groups: pragmatists and idealists. Pragmatists see human rights law as providing environmental conflicts with access to established human rights legislation and resolution mechanisms.²² International human rights agreements are often perceived to have stronger legal protection, more avenues for resolution, and greater public support than international environmental law.²³ International environmental agreements rarely possess strong compliance mechanisms, whereas international human rights frequently have some form of established complaint procedures. At their best, human rights dispute resolution procedures: (1) allow individual victims or nongovernmental organizations (NGOs) to bring claims against national governments; (2) allow claims to be made in the absence of national

²² Jorge Daniel Taillant, "Environmental Advocacy and the Inter-American Human Rights System" in *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona Press, 2003).

²³ *Ibid* at 120.

laws; and, (3) provide redress to those most commonly impacted by environmental degradation such as the disenfranchised or those lacking political influence.²⁴ While it needs to be noted that not all human rights treaties have strong conflict resolution mechanisms, most have some means of highlighting human rights violations and even non-binding findings of violations can exert pressure on States to take action. Human rights law is seen by many as a practical tool for facilitating environmental protection and as environmental protection is incorporated into the international human rights regime it should open new, and in some cases unique, avenues for individuals to challenge a government's environmental laws or a lack thereof.²⁵

Environmental protection can be easily incorporated into human rights law when an individual's human right(s) can only be protected in a way which simultaneously protects the environment. Some forms of environmental degradation are more conducive to this form of integration than others. Where degradation affects a person's life, health or enjoyment of property, a connection can be made relatively easily.²⁶ Similarly, the rights to equality and participation may be affected when environmental damage is unfairly inflicted on marginalized sectors of society.²⁷ This approach can provide environmental protection without requiring alterations or additions to existing human rights agreements.²⁸ A shortcoming of this approach is that the environment is only protected in cases where an individual's human right is violated; "the environment" is not given its own protection.

²⁴ Caroline Dommen, "How Human Rights Norms Can Contribute to Environmental Protection" in *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona Press, 2003); Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998) 11 *Geo Int'l Envtl L Rev* 1 at 3.

²⁵ Dinah Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals" in *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona Press, 2003) at 2.

²⁶ See below, Section 8.1.1

²⁷ Taillant, *supra* note 22 at 122.

²⁸ Shelton, *supra* note 25 at 1.

Environmental protection would not be available in cases where people were not present or where protection cannot be connected to an individual's traditional human right. This is an anthropocentric approach to environmental protection such that the only value of the environment is as it benefits humans.²⁹ In theory, this approach could eventually provide broad environmental protection by developing the idea that humanity is reliant on a clean environment for life and, as there is an established human right to life, there should also be a right to a clean environment. As Gormley proposes, "the right to a pure and clean environment falls within the scope of the right to a mere physical existence,"³⁰ but this rationale is more closely associated with the other major rationale for making the environment a human rights issue: that there is a moral obligation to establish a distinct *right to environment* or *right to a healthy environment*.³¹ This second approach is based in natural law and while it could provide more comprehensive protection, it is a much more ambitious change to the current law.

In contrast to the pragmatists, the idealists rely on what they see as a clear moral obligation to establish a fundamental right to "a healthy environment" which has equal status to other human rights. Authors including Boyd,³² Hayward,³³ Shelton,³⁴ Birnie, and Boyle³⁵ argue that a human right to a healthy environment meets the requirements of all human rights based on a broad interpretation of natural law: the right is universally applicable to all

²⁹ Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 *Stan J Int'l L* 103 at 109; Laurence H Tribe, "Ways Not to Think about Plastic Trees: New Foundations for Environmental Law" (1973) 83 *Yale LJ* 1315.

³⁰ W Paul Gormley, *Human rights and environment: the need for international co-operation* (Sijthoff, 1976) at 42.

³¹ Shelton, *supra* note 29 at 105.

³² David Richard Boyd, *The environmental rights revolution: a global study of constitutions, human rights, and the environment* (UBC Press, 2011) at 22.

³³ Tim Hayward, *Constitutional Environmental Rights* (OUP Oxford, 2004).

³⁴ Shelton, *supra* note 29 at 104.

³⁵ Patricia W Birnie & Alan E Boyle, *International law and the environment* (Clarendon Press, 1992).

humans; it possesses a moral basis, and it serves the dignity of all human beings. Boyd is a particularly strong advocate of this position arguing that we have a moral obligation to integrate environmental protection into human rights, because a human right to a healthy environment carries just as much validity as any other recognized human right.³⁶

Boyd argues that a human right to a healthy environment is a “moral right, one which is ‘universal, inalienable and permanent’”.³⁷ To make this claim, Boyd uses establishes three criteria to determine what constitutes a human right: (i) universal applicability, (ii) a foundation in morality, and (iii) an intention to ensure the dignity of humanity.³⁸ Many authors support the idea that a clean environment is a basic human right, based either explicitly or implicitly on Boyd’s criteria.³⁹ Boyd believes that “[the] right to a healthy environment possesses the essential characteristics of all human rights”.⁴⁰ Following this idea, environmental protection should not be integrated into traditional human rights for pragmatic reasons, instead there is a moral obligation to recognize the right alongside other traditional human rights.

The idea that a right to a healthy environment is a fundamental human right is strengthened by the various international, regional and, national documents which reference it. In his extensive survey of national and international laws, Boyd concludes that “of 193 UN nations, 153 are legally obligated to respect, protect and fulfill the right to a healthy environment, through constitutions, constitutional case law, legislation, regional treaties, and regional court decisions.”⁴¹ That said, the nations which Boyd recognizes as not supporting the right at a national level include: Canada, the United

³⁶ Boyd, *supra* note 32 at 21.

³⁷ *Ibid* at 22.

³⁸ *Ibid* at 21.

³⁹ See Kiss and Alvarez in Romina Picolotti, *Linking Human Rights and the Environment* (University of Arizona Press, 2010).

⁴⁰ Boyd, *supra* note 32 at 21.

⁴¹ *Ibid* at 111–112.

States, China, Japan, Australia, and New Zealand.⁴² This is not to say that these nations do not recognize the right at a provincial, state, or municipal level, but only that it is not found in the national law. The resistance of these nations to adopt a right to a clean or healthy environment undermines the right's status at the level of international law and in comparison to traditional human rights. Boyd dismisses those who challenge the existence of the right to a healthy environment as “in the minority;”⁴³ however, without acceptance from the aforementioned nations, and in the absence of an international treaty, it is difficult to see Boyd as not idealizing the law: describing the law that he wants, not the law as it is.

The moral argument for recognizing a human right to a healthy environment is complicated by the same challenge associated with establishing any moral position – the lack of a specific, shared, human morality. While the advocates for integrating environmental law into human rights law do not openly classify themselves as “pragmatist” or “idealist”, this distinction tends to work well and generally aligns with the overarching human rights theories of “positivist law” and “natural law”. Idealists tend to rely on natural law and a moral obligation as a basis of integration whereas pragmatists tend to simply see laws as tools capable of accomplishing tasks. Again, as with general human rights theory, natural law and the idealists provide the emotionally more compelling argument for human rights integration – one based on morals, but this is also the more difficult justification to implement as a single global morality is likely impossible to define. In contrast, the use of existing human rights law as a tool for facilitating environmental protection is compelling due to its relative ease, but its ability to protect the environment is more limited.

⁴² *Ibid* at 92.

⁴³ *Ibid* at 111.

Chapters 2 and 3 of this work look specifically at the practical application of human rights law to environmental challenges. In all of these cases, the human rights applied were not intended to apply to the environment. The European and Inter-American human rights regimes are two of the most robust and developed rights regimes, but neither has an enforceable human right directed at environmental protection. To understand why this is the case, the following section reviews the history of the relationship between international human rights laws and environmental protection.

1.3 The history of an environmental human right

Historically, human rights have not been easily applied to environmental challenges in large part because the environment was not given consideration in early human rights documents. The environment is not mentioned in any of the United Nations' primary human rights documents: the Universal Declaration of Human Rights,⁴⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁵ or the International Covenant on Civil and Political Rights (ICCPR).⁴⁶ The environment is also not mentioned in the founding documents of the European and Inter-American human rights regimes.⁴⁷ Today, those in favour of incorporating environmental issues into human rights law attribute this historical omission to a lack of appreciation for the importance of environmental issues at the time these documents were drafted. However, others acknowledge the exclusion of rights

⁴⁴ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Sup No 13, UN Docc A/810, (1948) [*UDHR*].

⁴⁵ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [*ICESCR*].

⁴⁶ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [*ICCPR*].

⁴⁷ Whose founding documents are the ECHR and American Declaration, respectively.

relating to the environment could also illustrate an intentional effort to exclude the environment from having the status of a human right.⁴⁸

Today, environmental rights have been incorporated into various regional and international agreements, national constitutions, national laws, and are regularly supported by international courts and tribunals. Environmental rights are growing in importance, but it has been a slow disjointed process. While there have been significant developments since the 1960s, we are far from having an internationally recognized “human right to a healthy environment”.

Efforts to create an internationally recognized environmental right are easily broken down into three time periods: pre-1970, the 70s and 80s, and post-1990.

1.3.1 Prior to 1970

*Silent Spring*⁴⁹ was published in 1962 and has been called the first document to promote a distinct human right to a healthy environment.⁵⁰ 1962 also saw the Council of Europe undertake the first serious review of the impacts of pollution. The European Conference of Local Authorities, a division of the Council, acknowledged “that air pollution has serious effects upon human

⁴⁸ Gormley, *supra* note 30 at 40–1; Boyd, *supra* note 32 at 81; Kerry Kennedy Cuomo, “Keynote Address: Human Rights and the Environment: Common Ground” (1993) 18 Yale J Int’l L 227 at 227.

⁴⁹ Rachel Carson, *Silent Spring* (Houghton Mifflin Harcourt, 2002).

⁵⁰ David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (UBC Press, 2012) at 1. Boyd cites a passage in *Silent Spring* where Carson does not directly mention a right to a healthy environment but argues that the absence in the American Bill of Rights of a right protecting the environment is illustrative of the a lack of awareness of its authors rather than the absence of such a fundamental right.

health, the economy, animals, plants, buildings, etc.”⁵¹ Air pollution was considered a “public danger” and a formal recommendation was made to hold a European Conference on Air Pollution.⁵² The conference, held in 1964, produced a number of recommendations, which, *inter alia*, focused on strengthening the scientific knowledge on air pollution and creating national regulating legislation.⁵³ The Council’s continued work led to the European Conservation Year 1970 which began with the European Conservation Conference. It was here that a recommendation was made for the Council of Europe to be responsible for drafting a Protocol to the European Convention on Human Rights that would guarantee “the right of every individual to a healthy and unspoiled environment.”⁵⁴ This marked the first time such a right was proposed at an international level.

At the global level, the United Nations was working on establishing binding human rights that would build on its Universal Declaration. On December 16, 1966 the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two documents helped to define and give authority to the rights prescribed in the Universal Declaration.

Initially in the negotiation of the ICCPR and the ICESCR they were a singular covenant, but as nations became divided over their support for

⁵¹ *Resolution 27 on the Participation of Local Authorities in the Clean Air Campaign*, European Conference of Local Authorities, 4th Sess (1962) [*Resolution 27 (1962)*].

⁵² *Ibid* at 1–2.

⁵³ *Recommendation 402 on the European Conference on Air Pollution*, Assembly debate on 5th November 1964 (12th Sitting) (see Doc 1827, report of the Social Committee) [*Recommendation 402*].

⁵⁴ *Report on a concerted European preparation of the United Nations Conference on the Environment*, Council of Europe, Parliamentary Assembly, Doc 6600, 1403/15/5/92-2-E (1992) [*Report on a concerted European preparation of the United Nations Conference on the Environment*] Section 3, Part 1(2).

various rights, the covenant was divided in two.⁵⁵ Although divided, the two covenants mirror each other at times including explicit support for state sovereignty, manifested in both covenants with the phrase “[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”⁵⁶ This statement has been attributed to an international reaction to historical colonial exploitation,⁵⁷ but has also been seen as “retarding the development of a philosophy of environmental law.”⁵⁸ Fundamentally, the inclusion of this phrase hampers the development of an international right to a healthy environment, since any such right would likely restrict “a full and free usage of nature,” in order to protect it.

1.3.2 The 70s and 80s

In 1968, through the UN’s Economic and Social Council, the Swedish government proposed that the General Assembly review “the problems of human environment”.⁵⁹ Placing this item on the UN’s agenda eventually resulted in the 1972 United Nations Conference on the Human Environment, more commonly known as the Stockholm Conference. The Stockholm Conference produced the Stockholm Declaration⁶⁰ which outlines 26 principles and the Action Plan with 109 recommendations. During the negotiations, the United States pressed for strong international supervision,

⁵⁵ Richard B Bilder, “Rethinking International Human Rights: Some Basic Questions” (1969) 1969 Wis L Rev 171 at 176.

⁵⁶ See *ICCPR*, *supra* note 46 Art 47; *ICESCR*, *supra* note 45 Art 25.

⁵⁷ Gormley, *supra* note 30 at 36.

⁵⁸ *Ibid.*

⁵⁹ Philippe Sands, Richard Tarasofsky & Mary Weiss, *Documents in international environmental law: principles of international environmental law IIA & IIB* (Manchester University Press ND, 1994) at 7.

⁶⁰ *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, 824 UNTS 216 [*Stockholm Declaration*].

and the Netherlands advocated for a specific right to a clean environment;⁶¹ neither of these was accomplished.

The Stockholm Declaration and Action Plan were a compromise between those countries who wanted to raise public awareness and those who advocated for specific guidelines for future government actions.⁶² The final wording of the declaration, while falling short of providing a human right to a healthy environment, did establish a relationship between human rights and the environment: Proclamation 1 acknowledges that “[both] aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of *basic human rights the right to life itself*.”⁶³ Principle 1 states that “man has the *fundamental right* to freedom, equality and *adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁶⁴ These two statements, particularly Principle 1, are frequently cited as an important first step toward firmly establishing an international human right to a healthy environment.⁶⁵ However, the strength of the rhetoric in Proclamation 1 and Principle 1 is undermined by other problems with the Stockholm Declaration.

The Stockholm Declaration is a weak document for several reasons. First, from a legal perspective, as a “declaration” it is not binding upon signatories: a point which should not be under emphasized. Leading into the conference the Council of Europe advocated recognition of a legal right to a healthy

⁶¹ Gormley, *supra* note 30 at 37.

⁶² Sands, Tarasofsky & Weiss, *supra* note 59 at 7.

⁶³ *Stockholm Declaration*, *supra* note 60 Proclamation 1, emphasis added.

⁶⁴ *Ibid* Principle 1 emphasis added.

⁶⁵ Alexandre Kiss, “The Right to the Conservation of the Environment” in *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona Press, 2003) at 31; Boyd, *supra* note 32 at 13; Marie Soveroski, “Environment Rights versus Environmental Wrongs: Forum over Substance?” (2007) 16:3 *Review of European Community & International Environmental Law* 261 at 108.

environment, therefore the subsequent, non-binding declaration must be seen as a failure.

The Stockholm Declaration was further undermined by the absence of important signatories. The Stockholm Conference was challenged from its inception because the USSR and most of the Eastern Bloc of Socialist States boycotted the conference in response to the “Western nations” effectively blocking the participation of East Germany.⁶⁶ The absence of this large group of globally significant States further reduced the authority of the already non-binding declaration. The Stockholm Convention resulted in the creation of the UN Environment Program (UNEP) and a the Stockholm Declaration, but a proposal to create a Universal Declaration on the Protection and Betterment of the Environment, a document akin to the Universal Declaration of Human Rights, was explicitly rejected.⁶⁷ There was a major gap between “what could have been” and “what was” coming out of Stockholm and it signalled the start of a trend away from the previous European push toward developing a binding right to a healthy environment; toward a softer international approach to environmental rights.

It was not until 1981 that States made further progress toward developing an internationally respected right to a healthy environment. The regional, African Charter on Human and Peoples’ Rights established the first formal right to a healthy environment: “[a]ll people shall have the right to a general satisfactory environment favourable to their development.”⁶⁸ At the time, the African Charter was progressive, not only establishing a right akin to a ‘healthy environment’ but also by allowing claims to be brought against participant nations by other parties, individuals and NGOs.⁶⁹ Any claims of

⁶⁶ Gormley, *supra* note 30 at 121; Sands, Tarasofsky & Weiss, *supra* note 59 at 7.

⁶⁷ Gormley, *supra* note 30 at 40.

⁶⁸ *African Charter on Human and Peoples’ Rights*, 27 June 1981, 1520 UNTS 217 [*Banjul Charter*] Art 24.

⁶⁹ *Ibid* Arts 55-56.

non-compliance were to be reviewed by the African Commission on Human and Peoples' Rights and while this established a decent review procedure, it was limited by the Commission's authority to only produce non-enforceable recommendations.⁷⁰

In the Americas, human rights protections were also expanded to incorporate a right to a healthy environment. In 1988 the Additional Protocol to the American Convention on Human Rights,⁷¹ the San Salvador Protocol, established that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services” and “[t]he States Parties shall promote the protection, preservation, and improvement of the environment”.⁷² The San Salvador Protocol was another important international gesture toward establishing a globally recognized human right to a healthy environment, but its practical application in the Americas was minimal. One shortcoming of the Protocol is participation: only sixteen of the twenty-four parties to the American Convention have ratified it.⁷³ Furthermore, Article 1 restricts the application of the Protocol by specifying that it be implemented in a progressive, rather than immediate, manner⁷⁴ and Article 19.6 prevents individuals from petitioning either the IA Court or the IA Commission from considering cases stemming from the Protocol's right to a healthy environment.⁷⁵ Thus, even though the Protocol appears to create a right to a healthy environment, no time line has been created for the progressive implementation of the right and, even after the right is

⁷⁰ *Ibid* Art 45.

⁷¹ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*, 17 November 1988, 28 ILM 161 [*San Salvador Protocol*].

⁷² *Ibid* Arts 11.1 & 11.2 .

⁷³ *Signatories and Ratifications to A-52: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights “Protocol of San Salvador”*, Accessed 3 March 2017 [<http://www.oas.org/juridico/english/sigs/a-52.htm>].

⁷⁴ *San Salvador Protocol*, *supra* note 71 Art 1.

⁷⁵ *Ibid* Art 19.6 .

implemented, it will not be afforded the same protection as other rights in the American Convention.

At the UN, development of a human right to a healthy environment was not revisited after the 1972 Stockholm Conference until 1987 and the publication of *Our Common Future*, also known as the Bruntland Report.⁷⁶ The Bruntland Report describes the challenges facing a growing global population and the impact of humanity on the environment. It not only outlines the problems caused by environmental degradation, but also provides possible responses and recommendations. Appendix 1 of the Bruntland Report provides a list of proposed legal principles for moving forward with international environmental protection. Principle 1 reiterates the right to a healthy environment such that: “[a]ll human beings have the fundamental right to an environment adequate for their health and well being [sic].”⁷⁷ While the Bruntland Report was not an internationally negotiated document, it was commissioned by the then Secretary-General of the UN, Javier Pérez de Cuéllar,⁷⁸ was formally welcomed by the UN General Assembly.⁷⁹ The publication of the Bruntland Report was an important motivation for the Rio Summit in 1992.⁸⁰

1.3.3 1990 and beyond

Echoing the Stockholm Conference in 1972, the Rio Summit in 1992 began with high expectations. At the time, the summit saw the highest attendance

⁷⁶ *Report of the World Commission on Environment and Development*, A/42/427 UNGAOR, (1987) [*Bruntland Report*].

⁷⁷ *Ibid* Annex 1 Principle 1.

⁷⁸ *Ibid* Chairman’s Forward.

⁷⁹ *Resolution adopted by the General Assembly 42/187. Report of the World Commission on Environment and Development*, A/Res/42/187 UNGAOR, (1987) [*Bruntland Adoption*].

⁸⁰ Soveroski, *supra* note 65 at 263.

of Heads of State to any environmental meeting.⁸¹ Leading into the summit, many were again advocating for the international recognition of a human right to a healthy environment. The US Subcommittee on Human Rights and International Organizations heard impassioned arguments encouraging the US to promote the development of this human right at the summit, but the official US policy preceding the summit was not disclosed.⁸² The UN's Preparatory Committee for the Rio Summit expected the summit to produce multiple documents, including at least one convention which would, *inter alia*, "enshrine certain basic legal principles."⁸³

While there was no specific mention of a right to a healthy environment in the Preparatory Committee's report, the Preparatory Committee had heard many proposals for the inclusion of environmental rights and it is likely that the creation of such a right was on their agenda.⁸⁴ The primary product of the Rio Summit was the Rio Declaration on the Environment and Development:⁸⁵ another non-binding agreement which would informally mark the end of the drive, at least at the UN level, to provide legal recognition for the right to a healthy environment.

At its best, the Rio Declaration provides in Principle 1 that "[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."⁸⁶ Although Soveroski notes that an "entitlement" can "carry the weight of a right", she

⁸¹ *Ibid.*

⁸² *U.S. Policy Toward the 1992 United Nations Conference on Environment and Development: Hearings before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs House of Representatives, One Hundred Second Congress, First Session* (Washington: U.S. Government Printing Office, 1992) at 46, 127.

⁸³ *Brundtland Report*, *supra* note 76 at para 52.

⁸⁴ See Soveroski, *supra* note 65 at 263 who cites: A C Kiss & Dinah Shelton, *International Environmental Law*, 3 edition ed (Ardsley, N.Y.: Martinus Nijhoff, 2004) at 668.

⁸⁵ *Report of the United Nations Conference on Environment and Development: Annex I, Rio Declaration on Environment and Development, A/Conf151/26 UNGAOR*, (1992) [*Rio Declaration*].

⁸⁶ *Ibid* Principle 1.

rightly calls this principle weak.⁸⁷ Its wording is ambiguous and marks a distinct reversal from the explicit recognition of an individual right to a healthy environment found in the Stockholm Declaration. The wording in the Rio Declaration could guarantee a healthy environment, but it could also refer to balancing human health and (economic) productivity with nature – a balance which would not necessarily favour the health of the environment.

The Rio negotiations illustrated the challenge associated with attaining global consensus on ambitious environmental protection. Negotiation began slowly and was delayed by debate over procedure rather than content.⁸⁸ The conference’s Secretary-General intended for the conference to produce an “Earth Charter”, but this was flatly rejected by the G-77 and China as being unbalanced: it was perceived as protecting the environment over the interest of development.⁸⁹ The text reflects the conflict between Western countries and the G-77 and China with many Western countries preferring a shift away from human-centered environmental protection toward the environment having an intrinsic value. The G77 and China argued that Western countries did not understand the challenges associated with poverty and development and their prioritization on “the environment and development” eventually prevailed in Principle 1 of the text.⁹⁰

International support for a human right to a healthy environment has only decreased since the Rio Summit. The 2002 Johannesburg World Summit on Sustainable Development⁹¹ reviewed the relevant progress stemming from Rio and produced a Plan of Implementation which recommended that States “[a]cknowledge the consideration being given to the possible relationship

⁸⁷ Soveroski, *supra* note 65 at 264.

⁸⁸ Jeffrey D Kovar, “Short Guide to the Rio Declaration, A” (1993) 4 *Colo J Int’l Env’tl L & Pol’y* 119 at 121–2.

⁸⁹ *Ibid* at 123.

⁹⁰ *Ibid* at 124.

⁹¹ *Johannesburg Declaration on Sustainable Development*, 4 September 2002, A/CONF199/L1 [*Johannesburg Declaration*].

between environment and human rights, including the right to development.”⁹² This statement was the closest phrasing to a right to a healthy environment to come out of Johannesburg and it is significantly weaker than the Rio Declaration. It is surprising that, even in non-binding rhetoric, there has been such a marked shift away from establishing a human right to a healthy environment at the UN level.

The conflict between States with different environmental and development interests certainly inhibited the development of a right to a healthy environment at the international level; however, at the regional level some progress has been made. During the 2002 Johannesburg negotiations, the European Union once again proposed that any declaration stemming from the negotiations should include a formal acknowledgement of the link between human rights, environmental protection and sustainable development. This did not become part of the Johannesburg Declaration,⁹³ but it did indicate the willingness of regional groups to promote and pursue strong environmental protection.

In the late 1990s and early 2000s, the African Charter was strengthened to incorporate environmental protection into its human rights legislation. First, in 1998, the Protocol establishing the African Court on Human and Peoples’ Rights was opened for signature and the court was established in 2004.⁹⁴ The

⁹² *Plan of Implementation of the World Summit on Sustainable Development*, 4 September 2002, A/CONF199/L1 [*Plan of Implementation of the World Summit on Sustainable Development*] Resolution 2, Annex, para. 152.

⁹³ See Marc Pallemerts, “Proceduralizing Environmental Rights: the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context” in *Human Rights and the Environment: Proceedings of a Geneva Environment Network Roundtable* (Geneva: United Nations Environment Program, 2004) at 15–16.

⁹⁴ *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) [*Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*].

court, unlike the African Commission, can make binding judgements on human rights cases,⁹⁵ but it is weakened by limitations placed on access.⁹⁶

In 2003 the Maputo Protocol expanded the range of human rights protected in Africa, specifically for women. The Maputo Protocol provides the right of women to live in a healthy and sustainable environment and to participate in environment and resource management.⁹⁷ The rights described by the Maputo Protocol are arguably some of the most strongly worded international rights to a healthy environment; however, they have yet to be brought before the African court.

In Europe, the 1990s and 2000s saw a return to a regional focus on establishing a human right to a healthy environment. Europe first pushed for recognition of this right in the 60s and 70s but progress stalled as efforts moved toward establishing the right at the UN level. In 1990, prior to the Rio Summit, the Parliamentary Assembly of the Council of Europe proposed a regional human right to a healthy environment and included it in a draft “text of a European charter and a European convention on the environment and sustainable development”.⁹⁸ This effort stalled and although the Parliamentary Assembly repeatedly advocated for the creation of a right to a healthy environment,⁹⁹ the Committee of Ministers stated in 2010 that it did not consider it advisable to draw up an additional protocol at that time.¹⁰⁰

⁹⁵ *Ibid* Art 30.

⁹⁶ See Section 1.4.2 of this work.

⁹⁷ *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 11 July 2003, 1 Afr Hum Rts LJ 40 [*Maputo Protocol*] Art 18.

⁹⁸ *Formulation of a European charter and a European convention on environmental protection and sustainable development*, Recommendation 1130, Council of Europe (1990) [*PA Rec 1130*], para 6.

⁹⁹ *The challenges posed by climate change*, Recommendation 1883, Council of Europe (2009) [*PA Rec 1883*]; *Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*, Recommendation 1885, Council of Europe (2009) [*PA Rec 1885*].

¹⁰⁰ *Drafting an additional Protocol to the European Convention on Human Rights concerning the right to a healthy environment*, Council of Europe, Parliamentary Assembly, Doc 12298 (2010) [*Drafting Additional Protocol*] Para 9.

While on one level, the Europeans had explicitly rejected the right to a healthy environment, some see the 1998 Aarhus Convention¹⁰¹ as at least partially establishing such a right.¹⁰² The Aarhus Convention was negotiated under the United Nations Economic Commission for Europe and while it is open to “States members of the Economic Commission of Europe as well as States having consultative status with the Economic Commission for Europe”,¹⁰³ all parties to the Convention are either European or Central Asian States.

The preamble of the Aarhus Convention it provides that “every person has the right to live in an environment adequate to his or her health and well-being”. This is a strongly worded right, but as part of the preamble, is non-binding. Article 1 is binding on parties, but is more narrowly worded:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with provisions of this Convention.¹⁰⁴

Article 1 references the right of every person to a healthy environment, but it does not guarantee the right. It only provides the procedural rights to access

¹⁰¹ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 450 [*Aarhus Convention*].

¹⁰² Boyd, *supra* note 32 at pp 86-88; Teall Crossen & Veronique Niessen, “NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?” (2007) 16:3 Review of European Community & International Environmental Law 332 at 333.

¹⁰³ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 450 [*Aarhus Convention*] Article 17.

¹⁰⁴ *Aarhus Convention*, *supra* note 101 Art 1.

information, public participation in decision-making, and access to justice in environmental matters. The Aarhus Convention has been ratified by all EU Member States and the EU itself. It comes close to establishing a human right to a healthy environment in Europe but it falls short of creating a broad, enforceable right.

Finally, the Middle East has also recently moved toward establishing a human right to a healthy environment. The 2004 Arab Charter on Human Rights¹⁰⁵ provides that “[e]very person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States Parties shall take the necessary measures commensurate with their resources to guarantee these rights.”¹⁰⁶ The charter has been ratified by 11 Arab nations,¹⁰⁷ but it lacks a strong enforcement mechanism.¹⁰⁸

Overall, the global support for a human right to a healthy environment is best described as “patchy”. While there was an initial push at the UN level to formalize a right, success arguably peaked with Principle 1 of the Stockholm Declaration and obviously declined at the Rio and Johannesburg Summits. Non-binding declarations have progressively weakened a global recognition of a connection between human rights and the environment. The dilution of this international recognition is striking but it may be most clearly presented by looking at the declarations in reverse order:

¹⁰⁵ *League of Arab States, Arab Charter on Human Rights*, 22 May 2004, 12 International Human Rights Report 893 [*League of Arab States, Arab Charter on Human Rights*].

¹⁰⁶ *Ibid* Art 38.

¹⁰⁷ *Statement ratification of Arab States at the Arab Charter on Human Rights (after updated) [via Google translate]*, Accessed April 2016 [<http://www.lasportal.org/ar/sectors/dep/HumanRightsDep/Pages/Mechanisms.aspx#tab3>].

¹⁰⁸ See Section 1.4.1 of this work.

1. [We should] *acknowledge the consideration* being given to the possible relationship between environment and human rights (Johannesburg).
2. Human beings are *entitled* to a healthy and productive life in harmony with nature (Rio).
3. Man has the *fundamental right* to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being (Stockholm).

This progression, from acknowledging the consideration of a possible right to declaring a fundamental right, is the order one would normally expect for the recognition of a new right. The UN process has gone in the opposite direction.

Although the Johannesburg Summit took place in 2002 there has been minimal progress made since then at the UN level. Regionally, Europe, the Americas, Africa, and the Middle East have variously progressed toward establishing a human right to a healthy environment. The San Salvador Protocol, Maputo Protocol and Arab Charter on Human Rights all provide strongly worded support for a specific human right to a healthy environment, but none contains a strong compliance mechanism and all lack universal regional support.¹⁰⁹ In Europe, after a strong initial push to establish a human right to a healthy environment, the effort peaked with the preamble of the Aarhus Convention and since then, there has been a reluctance to create a legally binding right.

It should be noted that significant progress has been made at the national level to establish a human right to a healthy environment with the right

¹⁰⁹ Large nations which have not committed to their respective regional documents include: Canada, Chile, the United States, Venezuela, Algeria, Cameroon, Chad, Egypt, Ethiopia, Kenya, Madagascar, Niger, Sudan, and Tunisia.

having been incorporated into many national constitutions and legislation. *The Environmental Rights Revolution* by Boyd provides an extremely thorough review of national laws, constitutions and international agreements and finds that almost all nations recognize that their citizens have a legal right to live in a healthy environment.¹¹⁰ Only fifteen nations do not recognize the right but among them are: Australia, Canada, China, Japan, New Zealand and the United States. It should be noted that Boyd's analysis clearly argues that there *is* or at the very least *should be* a globally recognized human right to a healthy environment and so while Boyd notes that 178 out of 193 nations *recognize* a legal right to a healthy environment,¹¹¹ it is not to say that they all effectively enforce and protect the right.

Given the challenge associated with establishing an enforceable global or regional right to a healthy environment, the emphasis of this work now shifts to the ability of regional human rights regimes to use existing human rights to respond to environmental challenges. Ultimately, this work focuses on the European and Inter-American human rights regimes, but as previously mentioned they are not the only regimes working on environmental protection. The following section outlines the other prominent human rights regimes to provide some background and to distinguish them from the European and Inter-American regimes.

1.4 Regional human rights regimes

To determine where regional human rights law has the greatest potential efficacy, this research focuses on the two most developed regional human

¹¹⁰ Boyd, *supra* note 32 at 92.

¹¹¹ *Ibid.*

rights regimes and their abilities to respond to a broad array of environmental challenges. While the European and Inter-American regimes are the primary focus of this research, it is important to acknowledge the other regimes and briefly explain why they were not chosen for detailed analysis.

1.4.1 The Arab human rights regime

The Arab human rights regime is the most easily distinguished and discounted for the purposes of this work. While the regime does provide one of the few explicit human rights to a healthy environment,¹¹² it lacks a court, commission, or tribunal to facilitate contentious jurisprudence. In its current form the Arab Human Rights Committee is only able to review and comment on triennial human rights reports which are produced by the participant nations themselves.¹¹³ To date, there have been only eight committee responses to these national reports,¹¹⁴ none of which has touched upon environmental issues. As the Arab Human Rights Committee has yet to comment or utilize the right to a healthy environment, it is exceedingly difficult to predict its ability to respond to environmental problems. One option might be to review the regime's ability to protect other human rights and then to suppose that similar protection would be provided to the environment if the issue were to arise, but the regime is so young and the number of committee reports so few, that to do so would require an unreasonable amount of speculation. The Arab regime is simply too new to be

¹¹² *League of Arab States, Arab Charter on Human Rights*, 22 May 2004, 12 International Human Rights Report 893 [*League of Arab States, Arab Charter on Human Rights*] Art 38.

¹¹³ *Ibid* Art 48.

¹¹⁴ Reports are available at <http://www.lasportal.org/ar/humanrights/Committee/Pages/Reports.aspx> (last accessed April 2016)

fairly judged on its ability to respond to environmental issues and is therefore not part of this detailed analysis.

1.4.2 The African human rights regime

The African regime is more developed than the Arab regime: it has a court capable of providing legally binding decisions on petitioners' claims, but it is also a relatively weak and underdeveloped regime.

One of the strengths of the African regime was that it was the first to establish a formal right to a healthy environment. The 1981 Charter on Human and Peoples' Rights (the Banjul Charter), provides that "[a]ll people shall have the right to a general satisfactory environment favourable to their development."¹¹⁵ The Banjul Charter also allows claims to be brought between nations, and by individuals and NGOs.¹¹⁶ These claims are reviewed by the African Commission on Human and Peoples' Rights (African Commission) which gives non-binding decisions.¹¹⁷ Obviously, non-binding decisions are not as desirable for petitioners as legally binding decisions, but this is certainly preferable to the absence of any such mechanism as in the Arab regime.

Unfortunately, thorough analysis of the ability of the African regime to respond to environmental issues is limited by a lack of relevant case law. While the opportunity exists to bring environment related cases to the African Commission, only one case has been brought to date. *The Social and Economic Rights Action Center and the Center for Economic and Social*

¹¹⁵ *Banjul Charter*, *supra* note 68 Art 24.

¹¹⁶ *Ibid* Arts 55-56.

¹¹⁷ *Ibid* Art 45.

Rights v Nigeria,¹¹⁸ concerned environmental damage from oil exploitation that negatively impacted the applicants' health.¹¹⁹ The environmental and human health damage was clear and the decision in the case was not controversial: there had been a violation of the applicants' rights to life and health. However, as the case was reviewed by the African Commission, the judgment was non-binding and after finding a violation the decision was limited to "appealing to" and "urging" the Nigerian government to change its policies.¹²⁰

The African regime does have a legally binding court. The African Court on Human and Peoples' Rights was established in 2004, but its utility is limited. The court can make binding judgements on human rights cases,¹²¹ but claims can only be brought between parties to the Protocol. There is an exception which allows NGOs and individuals to bring claims,¹²² but these exceptions require the prior consent of the nation against which the complaint is being brought.¹²³ As of August 2016, only 24 countries had ratified the Protocol establishing the court and of those, only seven had consented to claims from NGOs and individuals.¹²⁴ The African regime is certainly more robust than the Arab regime, but the lack of existing case law especially in relation to environmental issues, means that any discussion on its present ability to respond to environmental challenges would be too heavily based on conjecture.

¹¹⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, No 155/96 [2001] (African Commission on Human and Peoples' Rights).

¹¹⁹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Paras 1-2.

¹²⁰ *Ibid* Para 69.

¹²¹ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, *supra* note 94 Art 30.

¹²² *Ibid* Art 5(3).

¹²³ *Ibid* Art 34(6).

¹²⁴ African Commission on Human and Peoples' Rights, "List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights", online: <<http://www.achpr.org/instruments/court-establishment/ratification/>>.

1.4.3 The United Nations human rights regime

Finally, the human rights regime established by the United Nations differs from all others due to its large membership and the organization's role in promoting international consciousness and development of human rights. Unfortunately it shares the generally weak compliance mechanisms of the Arab and African regimes and lacks a rich jurisprudence on environmental issues.

The Human Rights Committee of the ICCPR provides the UN's only avenue for pursuing environmental protection through human rights. In *E.H.P. v Canada*¹²⁵ the Committee reviewed a claim against the proposed storage of radioactive waste. The decision provided little guidance as to the actual obligations of States with regard to protecting people at risk of environmental hazards due to the case being dismissed without any substantive discussion of the issue. *Bordes and Temeharo v France* also related to nuclear radiation,¹²⁶ but was not significantly more helpful as the committee concluded that the authors were not "victims", ostensibly because they did not die or get sick from the nuclear tests and because they could not prove that there was an imminent threat of death.

In *Apirana Mahuika et al. v New Zealand*,¹²⁷ the ICCPR's Human Rights Committee reviewed a claim that fishing regulations contravened a native group's rights to self-determination, non-discrimination, and minority rights as a culture.¹²⁸ The New Zealand government claimed that the regulations were intended to protect the health of the fishery and applied to both

¹²⁵ *EHP v Canada*, No 67/1980 [1982] .

¹²⁶ *Bordes and Temeharo v France*, No 645/1995 [1996] .

¹²⁷ *Apirana Mahuika et al v New Zealand*, No 547/1993 [2000] .

¹²⁸ *Ibid* Para 1.

commercial and non-commercial fishers. The history of these regulations and the challenges faced by the Maori people in accessing the fishery is complex,¹²⁹ but the Committee ultimately determined that restrictions could be placed on the fishery, even though it was determined to be an essential element of Maori culture.¹³⁰ Restrictions were allowed because members of the minority group had the opportunity to participate in the decision-making process regarding said restrictions.¹³¹ The Committee's decision ostensibly determined that environmental protection, in this case conservation of fish stocks, was in the interests of all members of Maori people by providing sustainable stocks and overrode the cultural rights of the minority Maori population.¹³²

The UN's human rights regime has touched upon environmental issues, but has held back on making progressive judgements or establishing binding human rights to water or a healthy environment. The Human Rights Committee has also heard relatively few cases pertaining to these issues and it is difficult to critique the ability of the Human Rights Committee to respond to environmental challenges using this small sample set.

In contrast to these three regimes, the European and Inter-American regimes have both been used on numerous occasions to provide strong environmental protection using human rights. They both have established human rights courts that are capable of providing legally binding judgments for cases brought by individual petitioners. These courts enjoy comparatively broad participation of the regimes' member states and their jurisprudence (in conjunction with decisions of their respective commissions) is developed enough to allow for trends to become evident.

¹²⁹ *Ibid* Paras 5.1-5.13.

¹³⁰ *Ibid* Para 9.3.

¹³¹ *Ibid* Para 9.5.

¹³² *Apirana Mahuika et al v New Zealand*, No 547/1993 [2000] Para 9.9.

The analysis of these two regimes is sub-divided by their abilities to respond to three specific environmental challenges: point-source pollution, climate change, and conservation. The following briefly introduces what is meant by these terms before engaging in a detailed analysis of the respective regimes.

1.5 The three environmental problems under consideration

Together, point-source pollution, climate change and conservation provide a broad representation of current environmental problems. These three issues vary greatly in their geographic impact, temporal response, and legal complexity. Point-source pollution is localized, but climate change is a global problem. Point-source pollution is commonly responded to after the pollution has occurred whereas ecosystem conservation is often pre-emptive; ideally occurring before environmental damage is done. The following explores these three types of environmental issues to illustrate their differences and outline some of the recent development within international human rights law.

1.5.1 Point-source pollution

Point-source pollution is the most common and familiar form of environmental degradation. The term refers to any pollution which is emitted from a singular identifiable source such as a factory, water treatment plant, power plant, or refinery. The pollution can be in various forms, including chemicals released to the air or water, excessive noise, light or heat. Incidents of point-source pollution often have a clear geographic location, specific timeframe and particular emission, so one can often find a clear path of causation between the pollution and its impact on the environment. These

attributes have made point-source pollution cases the most common form of environmental adjudication in human rights regimes. Cases have arisen from, *inter alia*: long-term factory emissions,¹³³ one-time releases of toxic materials,¹³⁴ and the storage of nuclear materials.¹³⁵ Point-source pollution cases have had a relatively successful track record in the human rights courts, but their localized nature can limit their ability to be catalysts for large-scale environmental protection. Certainly, the combined impact of multiple instances of point-source pollution can create large-scale environmental problems such as poor air quality and contaminated aquifers, but responding to these problems with numerous individual claims can be inefficient and ineffectual. This is why some have sought means to respond to large-scale problems by focusing on the outcome rather than its sources; climate change is probably the best example of this.

1.5.2 Climate change

Climate change is a global problem with potentially greater impacts than traditional point-source pollution.¹³⁶ Unlike point-source pollution, climate change is a global problem and from a legal perspective has complex issues surrounding causation. Certainly, climate change is not the only global environmental challenge: ozone depletion and plastic pollution in the oceans are other obvious examples, but climate change is arguably the most complex and potentially dangerous global environmental problem.

¹³³ *López Ostra v Spain*, [1994] ECHR 16798/90 (European Court of Human Rights).

¹³⁴ *Tatar c Roumanie*, No 67021/01 (27 janvier 2009) (European Court of Human Rights).

¹³⁵ *EHP v Canada*, *supra* note 125.

¹³⁶ See Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014).

There are major challenges to the use of human rights to address climate change impacts, but the perceived strengths of international human rights law has created a strong push to find ways to overcome potential problems. The greatest hurdle in using human rights to address climate change is a difference in how the concept of causation is understood in law and in science. Scientifically, the causal relationship between greenhouse gas (GHG) emissions and climate change is widely accepted and experts are continually gaining confidence in their ability to connect particular climactic occurrences with anthropogenic climate change.¹³⁷ On the other hand, it is more difficult to establish these same causal connections to a degree which satisfies the standard of legal causation. Scientists may be confident that particular weather events are direct impacts of anthropogenic climate change, and these events may negatively impact aspects of an individual's life normally protected by human rights, but this does not necessarily mean that a successful human rights claim exists.

Connecting a specific GHG emissions source with a specific negative climate change impact is difficult scientifically and legally. While all GHG emissions contribute to climate change, it is difficult if not impossible, to attribute a particular emission to a particular negative impact. Human rights cases have been brought to the IA Commission that have attempted to overcome the challenge of establishing causation and they are discussed in Section 3.2 of this work.

1.5.3 Ecosystem conservation

¹³⁷ Core Writing Team, *Climate Change 2007: Synthesis Report*, R.K. Pachauri & Reisinger, A, eds. (Geneva: IPCC, 2007).

Finally, ecosystem conservation, while an obvious environmental issue, differs greatly from point-source pollution and climate change. It is particularly suited to pre-emptive protection rather than after the fact responses. Ecological restoration of land that has been damaged by human activity is time and resource consuming and it is always easier to protect and ecosystem from severe degradation than it is to restore it to its original state. Ideally, conservation occurs before damage is done, protecting the environment and the human rights of individuals present.

International human rights law does not have a strong history of using injunctions to provide the necessary pre-emptive protection of rights and so using human rights to establish ecosystem conservation is a challenging task. While both regimes have dealt with ecosystem conservation, they have taken very different approaches. The European regime has promoted conservation not to protect human rights, but to protect the environment in spite of an individual's established human rights.¹³⁸ In contrast, the Inter-American regime has not dealt directly with conservation, but has decided that indigenous populations have an ability to limit activities on their traditional lands potentially facilitating conservation.¹³⁹

The next two chapters of this work look closely at these two regimes: their early histories, evolutions, and how they both respond to these three types of environmental challenges. The first regime analyzed is the European human rights regime: a regime which is in many ways a more complicated than its Inter-American counterpart.

¹³⁸ *Hamer v Belgium*, No 21861/03 (27 November 2007) (European Court of Human Rights).

¹³⁹ See *Saramaka People v Suriname*, Judgement of November 28, 2007, Inter-Am Ct HR, (Ser C) No 172 (2007) ; *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of June 27, 2012, Inter-Am Ct HR (Ser C) No 245 (2012) and more generally Section 13 of this work.

Chapter 2: European Human Rights

The European human rights regime differs greatly from other regional human rights regimes as it is composed of two distinct human rights bodies; each with separate organizations, founding documents, and tribunals. This chapter looks at the development of the two European regimes, their relationship, conflict, and their abilities to respond to environmental challenges. While there is significant overlap of the rights protected by each body, the two have very different histories. On one hand, the Council of Europe is the institution which oversees the application of one of the oldest and most authoritative regional human rights documents: the European Convention on Human Rights (the ECHR).¹⁴⁰ On the other hand, the European Union oversees the relatively recent Charter of Fundamental Rights of the European Union (the CFREU).¹⁴¹ The presence of these two human rights bodies provides exceptionally comprehensive human rights protection in Europe, but there is a lack of clarity over the jurisdiction and authority of the bodies' courts and this has the potential for conflict and unclear law.

Prior to analyzing the application of European human rights law to environmental challenges, it is vital to understand the designs and capabilities of the two European human rights bodies. To do this, Section 2.1 reviews the history of the institutions: the Council of Europe and the European Union and Section 2.2 looks at the development of human rights within these institutions. Sections 2.3, 2.4 and 2.5 analyze the abilities of the comparatively robust rights under the ECHR to address point-source pollution, climate change, and conservation. Finally, Section 2.6 looks at the

¹⁴⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 [ECHR].

¹⁴¹ *Charter of Fundamental Rights of the European Union*, [2000] OJ, C364/1 [CFREU].

relatively new rights under the CFREU and their potential ability to respond to these environmental challenges.

2.1 The development of European human rights institutions

Regional human rights in Europe are complicated. The main source of this complication is the relationship between the Council of Europe and the European Union and the jurisdictional overlap of their two main human rights documents: the ECHR and the CFREU. While today, both the CoE and EU have strong human rights documents with corresponding courts, the path taken by these two institutions to protect human rights could not have been more different. From its inception the CoE was focused on human rights protection whereas the EU's initial focus was on economic integration. The CoE drafted the ECHR in 1950 and it came into effect in 1953. In contrast, the CFREU was initially drafted in 2000 and it came into effect in 2009.

The following is a short introduction to European human rights development. It explains why Europe has two distinct human rights documents and courts and it aims to clarify the relevant differences between the Council of Europe and the European Union.

2.1.1 European political action after World War II

At the end of the World War II European politicians and policymakers pursued two different paths to unify Europe and prevent another conflict.

Interestingly, rather than one approach gaining favour and the other being discarded, both approaches were successfully implemented in parallel.¹⁴²

In the early 1950s, the Council of Europe and the European Coal and Steel Community (which would later become the European Union) were created to provide solidarity and stability to Europe. Today, the two organizations can be difficult to distinguish due to their similar names, geography, membership, mandates, institutions, and their identical flags and anthems; however, when they were created, the two organizations were absolutely and fundamentally distinct.

2.1.1.1 Development of the Council of Europe

Sir Winston Churchill is frequently credited as pioneering the idea of the Council of Europe.¹⁴³ In his 1943 “Broadcast to the nation”¹⁴⁴ and his 1946 “Zurich Speech”,¹⁴⁵ Churchill called for a ‘Council of Europe’, which he likened to a “United States of Europe”. Two years later, a conference was held in The Hague to discuss the proposed council and it was concluded that an economic and political union should be created in which European nations would give up some of their sovereign rights to facilitate regional cohesion.¹⁴⁶

¹⁴² Successful in terms of growth, participation and, so far, preventing another war in Europe.

¹⁴³ Birte Wassenberg, *History of the Council of Europe* (Council of Europe, 2013) at 13; European Commission, “Winston Churchill: calling for a United States of Europe” Last accessed April 1, 2016, available at <http://europa.eu/about-eu/eu-history/founding-fathers/pdf/winston_churchill_en.pdf>.

¹⁴⁴ Winston Churchill, *Speech to the nation* (London: BBC, 1943) An excerpt of the speech can be found here <https://www.coe.int/t/dgal/dit/ilcd/Archives/selection/Churchill/Default_en.asp>.

¹⁴⁵ Winston Churchill, (University of Zurich, 1946).

¹⁴⁶ “Political Resolution of the Hague Congress (7–10 May 1948)”, online: *cvce.eu* <http://www.cvce.eu/en/obj/political_resolution_of_the_hague_congress_7_10_may_1948-en-15869906-97dd-4c54-ad85-a19f2115728b.html> Resolutions 1 and 3.

The parties called for the immediate drafting of a Charter of Human Rights and the establishment of a court to guarantee said rights.¹⁴⁷

The Council of Europe was formally created by the Treaty of London in 1949.¹⁴⁸ Its aim was to forge European unity by facilitating new regional treaties that reflected the common ideas and morals of Europeans.¹⁴⁹ Treaties would pertain to economic, social, and cultural issues as well as science, law, and human rights. They would be drafted by the CoE and nations would commit to them in accordance with international treaty law. The role of the CoE was not to govern its members, but to highlight commonality between its members and to facilitate cooperation through established international treaty law.

From its inception, the CoE had a broad mandate and it has successfully established treaties on many topics including: human rights,¹⁵⁰ education,¹⁵¹ intellectual property¹⁵², transportation,¹⁵³ adoption,¹⁵⁴ animal welfare,¹⁵⁵ and sports.¹⁵⁶ All CoE treaties are independent documents and vary in enforceability and membership. Some treaties, such as the ECHR, have been

¹⁴⁷ *Ibid* Resolutions 9 - 13.

¹⁴⁸ *Statute of the Council of Europe*, 5 May 1949, Eur TS 001 [*Treaty of London*].

¹⁴⁹ *Ibid* Art 1.

¹⁵⁰ *ECHR*, *supra* note 140.

¹⁵¹ *European Convention on the Equivalence of Diplomas Leading to Admission to Universities*, 11 December 1953, Eur TS 15 [*European Convention on the Equivalence of Diplomas Leading to Admission to Universities*].

¹⁵² *European Convention on the International Classification of Patents for Inventions*, 19 December 1954, Eur TS 17 [*European Convention on the International Classification of Patents for Inventions*]; *Convention on the Unification of Certain Points of Substantive Law on Patents for Invention*, 27 December 1963, Eur TS 47 [*Convention on the Unification of Certain Points of Substantive Law on Patents for Invention*].

¹⁵³ *European Convention on the Punishment of Road Traffic Offences*, 30 November 1964, Eur TS 17 [*European Convention on the Punishment of Road Traffic Offences*].

¹⁵⁴ *European Convention on the Adoption of Children*, 24 May 1967, Eur TS 58 [*European Convention on the Adoption of Children*].

¹⁵⁵ *European Convention on the Protection of Animals for Slaughter*, 10 May 1979, Eur TS 102 [*European Convention on the Protection of Animals for Slaughter*]; *European Convention for the Protection of Pet Animals*, 13 November 1987, Eur TS 125 [*European Convention for the Protection of Pet Animals*].

¹⁵⁶ *Anti-Doping Convention*, 16 November 1989, Eur TS 135 [*Anti-Doping Convention*].

ratified by all CoE member states,¹⁵⁷ others, such as the European Social Charter,¹⁵⁸ have only been ratified by a subset of CoE members; others, such as the Anti-Doping Convention, are open to ratification by countries which are not CoE members.¹⁵⁹

Organizationally, the CoE is divided into four main institutions: the Committee of Ministers, the Parliamentary Assembly,¹⁶⁰ the Congress of the Council of Europe, and the Secretariat. While each of these institutions has its own functions, the roles of the Committee of Ministers from the Parliamentary Assembly are most important for this work as they have the greatest impact on human rights law and its development.

The Committee of Ministers and the Parliamentary Assembly are the CoE's decision-making and deliberative bodies, respectively. The Committee of Ministers determines all matters relating to the internal working of the CoE¹⁶¹ and, importantly, decides when to open new conventions and Protocols for signature.¹⁶² The Parliamentary Assembly's role is to debate and make formal recommendations to the Committee of Ministers on which conventions and protocols to adopt.¹⁶³ As this work reviews the development of European human rights as proposed by both the Parliamentary Assembly and the

¹⁵⁷ Membership in the CoE is actually contingent upon ratification of the ECHR see *Resolution 1031 on the honouring of commitments entered into by Member States when joining the Council of Europe*, Resolution 1031, Council of Europe (2009) [*Parliamentary Assembly Res 1031*], para 9.

¹⁵⁸ *European Social Charter*, 26 February 1965, 529 UNTS 89 [*European Social Charter*].

¹⁵⁹ *Anti-Doping Convention*, *supra* note 156 Art 14.

¹⁶⁰ Referred to as the Consultative Assembly in the Treaty of London, but currently known as the Parliamentary Assembly.

¹⁶¹ The Committee of Ministers consists of the Foreign Affairs Ministers of each of the CoE's Member States and each has one vote.¹⁶¹ In contrast, the Parliamentary Assembly (Parliamentary Assembly) is made up of national MPs from the CoE Member States,¹⁶¹ in ratios roughly based on their population size. Article 16 except those relating to the functioning of the Parliamentary Assembly

¹⁶² *Treaty of London*, *supra* note 148 Art 15.

¹⁶³ *Ibid* Art 22. Recommendations contain proposals addressed to the Committee of Ministers, which would need to be implemented by governments. The Parliamentary Assembly can also publish Resolutions which (i) embody decisions on questions within its own authority, or (ii) express a view for which it alone is responsible. See <<http://website-pace.net/web/apce/documents>>.

Committee of Ministers, it is important to understand that the authority of these bodies is not equal.

Since 1949 the CoE has created over 200 regional agreements and amendments to these agreements. It began with a 10 Party membership which has since expanded to 47 European nations.¹⁶⁴ It includes all 28 members of the European Union as well as various European principalities; Eastern European nations; Russia, Turkey, Iceland, Norway, and Switzerland.¹⁶⁵ The large membership of the CoE reflects its general endorsement among European nations, but the design of the CoE has always differed significantly from the “United States of Europe” originally proposed by Churchill.

The CoE is not a supranational institution: it does not establish the economic and political union proposed at the original conference in The Hague. It is incapable of independently creating laws which bind its members. It can draft treaties, but these still need to be signed and ratified independently by its member states.

Churchill’s rhetoric in 1946 and 1948 resulted in greater European cooperation, but it did not create a supranational union that could be likened to a ‘United States of Europe’. However, the idea of European economic integration remained popular and was taken up by Robert Schuman. Schuman also sought European stability through economic interdependence¹⁶⁶ and his proposals eventually resulted in the modern European Union.

¹⁶⁴ “Signatures and ratifications of the Statute of the Council of Europe”, online: *Treaty Office* <<http://www.coe.int/web/conventions/full-list>>.

¹⁶⁵ *Ibid.*

¹⁶⁶ Robert Schuman, *Schuman Declaration* (Paris, 1950).

2.1.1.2 Development of the European Union

The modern EU began as the European Coal and Steel Community (ECSC) in 1951 with a relatively narrow mandate and membership.¹⁶⁷ It was based on the Schuman Declaration of 1950 which proposed a federation of Europe to facilitate European stability.¹⁶⁸ The declaration proposed bringing together German and French coal and steel production, under the common regulation of a “High Authority” which would regulate the industry and possess the independent authority to bind national governments.¹⁶⁹ The establishing Treaty of Paris created “an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts”.¹⁷⁰ Four nations¹⁷¹ joined France and Germany in unifying their coal and steel production under an independent, external executive body thereby creating the world’s first supranational authority.¹⁷²

The ECSC expanded in membership and mandate ultimately forming the modern European Union. The mandate has gradual moved from a common coal and steel market to a single common market for all European products and services. It includes a common currency and unrestricted movement of labour. Many modern EU rights have developed from a relatively small number of labour rights provided in the original ECSC treaty.¹⁷³ Initially, the ECSC provided labour rights and European Human rights were provided for

¹⁶⁷ *Treaty establishing the European Coal and Steel Community*, 18 April 1951, 261 UNTS 140 [*Treaty of Paris*].

¹⁶⁸ Schuman, *supra* note 166.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Treaty of Paris*, *supra* note 167 Preamble.

¹⁷¹ Belgium, Luxemburg, the Netherlands, and Italy

¹⁷² Iris Glockner & Berthold Rittberger, “The European Coal and Steel Community (ECSC) and the European Defence Community (EDC) Treaties” in Finn Laursen, ed, *Designing the European Union: From Paris to Lisbon* (Basingstoke: Palgrave Macmillan, 2012) 16 at 16.

¹⁷³ *Treaty of Paris*, *supra* note 167 Article 3(e) provides that the institutions of the Community shall “ promote the improvement of the living and working conditions of the labor force in each of the industries under its jurisdiction so as to make possible the equalization of such conditions in an upward direction”.

by the CoE; however, as the EU's mandate grew, so did a need for it to properly address human rights.

The EU was forced to address human rights when it became apparent that EU laws could be in conflict with fundamental human rights. The European Court of Justice (herein the ECJ) had to resolve instances where EU law conflicted with human rights – a particular challenge when all EU members are equally bound to EU law and the ECHR. The EU has attempted to define its interpretation of human rights and its relationship to the ECHR, but its efforts have arguably only served to complicate the situation.¹⁷⁴

2.2 Human rights in Europe

The foundations of the ECHR and the CFREU are very different: from its inception, the CoE was intended to establish binding international human rights in Europe. In contrast, the ECSC was an economic agreement and not expressly concerned with human rights. It was only through the gradual expansion of the ECSC to the modern EU that human rights began to be incorporated into EU law: first through jurisprudence and then by legislation. At the same time as the EU was gradually weaving human rights into its law, the ECHR was expanding its membership and its concept of human rights. Importantly for this work, much of the recent area of expansion has revolved around the recognition of a human right to a healthy environment.

2.2.1 Development of human rights under the Council of Europe

¹⁷⁴ See Section 2.2.3 of this work

The ECHR was drafted in the shadow and influence of the UN's Universal Declaration of Human Rights.¹⁷⁵ The texts are similar, but easily distinguished by the ECHR's creation of a court to review human rights violations and provide binding decisions on the member states.¹⁷⁶ The European Court of Human Rights (herein the European Court) was established in 1959.

The original text of the ECHR has been amended by 16 Protocols, 8 of which are currently in effect. Protocols 2, 3, 5, 8, 9 and 10 were replaced in 1998 by Protocol 11 which, along with Protocol 14, alter the procedure by which claims are brought to the court.¹⁷⁷ Protocols 1, 4, 6, 7, 12, and 13 are substantive alterations to the ECHR that create new rights. Of the protocols, the First Protocol has had the largest actual impact on protecting the environment: entering into force 1954, it expanded the right to property to establish that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions".¹⁷⁸ A new protocol has also been proposed on a number of occasions, one which would establish a right to a healthy environment, and it has a potential for even greater environmental protection.¹⁷⁹

In 1990, prior to the global Rio Summit, the CoE's Parliamentary Assembly proposed the creation of a European convention on the environment and sustainable development.¹⁸⁰ The draft convention specified that "every person has the fundamental right to an environment and living conditions

¹⁷⁵ *Universal Declaration of Human Rights*, GA Res 217(III) UNGAOR, 3d Sess, Sup No 13, UN Docc A/810, (1948) [*UDHR*].

¹⁷⁶ *ECHR*, *supra* note 140 Art 19.

¹⁷⁷ Protocols 15 and 16 also alter the way in which the ECHR functions, but neither has so far entered into force.

¹⁷⁸ Its application is explored in Section 8.1.1 of this work.

¹⁷⁹ *Future action to be taken by the Council of Europe in the field of environmental protection*, Recommendation 1431, Council of Europe (1999) [*PA Rec 1431*]; *Environment and human rights*, Recommendation 1614, Council of Europe (2003) [*PA Rec 1614*]; *PA Rec 1885*, *supra* note 99.

¹⁸⁰ *PA Rec 1130*, *supra* note 98.

conductive to his good health, well-being and full development of the human personality.”¹⁸¹ Similarly, Article 2 provided that “[e]very European and every Contracting European State has an equivalent duty to preserve and protect the environment in the interests of the health and well-being of all people inside and outside Europe, for the benefit of present and future generations”.¹⁸²

The draft convention was extensive with 18 Articles concerning, *inter alia*: sustainable development, industrial development, energy production, land-usage, and waste management.¹⁸³ The Committee of Ministers reviewed the Parliamentary Assembly’s draft convention, but decided to postpone consideration until after the 1992 Earth Summit in Rio de Janeiro.¹⁸⁴ Unfortunately, it does not appear that the Committee of Ministers explicitly returned to consider the draft convention after the summit in Rio.

The Parliamentary Assembly revisited an environmental right 1999 when it first asked the Committee of Ministers to examine the feasibility of drafting a protocol to the ECHR establishing the right of individuals to a healthy and viable environment.¹⁸⁵ It did so again in 2003, recommending that the CoE establish safeguards against arbitrary environmental degradation.¹⁸⁶ To support this position the Parliamentary Assembly noted that many European countries had already added the principle of environmental protection to their constitutions.¹⁸⁷ The Parliamentary Assembly also recommended that governments of member states “recognize a human right to a healthy, viable

¹⁸¹ *Ibid*, para 6.

¹⁸² *Ibid*, para 7.

¹⁸³ *PA Rec 1130*, *supra* note 98 see paras 7, 8, 9, 10, and 21 respectively.

¹⁸⁴ *On the formulation of a European charter and a European convention on environmental protection and sustainable development - Parliamentary Assembly Recommendation 1130 (1990)*, CM/AS(91)Rec1130-final, Council of Europe (11 April 1991) [*Council of Ministers on Recommendation 1130*], para 6.

¹⁸⁵ *PA Rec 1431*, *supra* note 179 at 11(ii)(b).

¹⁸⁶ *PA Rec 1614*, *supra* note 179, para 4.

¹⁸⁷ *Ibid*, para 7.

and decent environment which includes the objective obligation for states to protect the environment”.¹⁸⁸

In 2009 the Parliamentary Assembly once again recommended that the Committee of Ministers draft an additional protocol to the ECHR concerning the right to a healthy environment.¹⁸⁹ The Recommendation reminds the Committee of Ministers of the Stockholm Declaration’s Principle 1: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.¹⁹⁰ It also argues that society and individuals have a responsibility to pass on a healthy and viable environment to future generations, in accordance with the principle of solidarity between generations.¹⁹¹

The Committee of Ministers did not formally reply to all of the Parliamentary Assembly’s Recommendations to establish a right to a healthy environment, however it did reply to the 2009 recommendation in 2010. It stated that it recognized the importance of a healthy, viable and decent environment and that it considers it relevant to the protection of human rights,¹⁹² but it refused to draw up an additional protocol to that effect.¹⁹³ In the Committee of Ministers’ opinion, the ECHR already indirectly contributes to the protection of the environment through existing rights and the interpretation of the evolving case law of the European Court.¹⁹⁴

The Committee of Ministers’ 2010 comments acknowledge that the environment is an important human rights issue and deserving protection,

¹⁸⁸ *Ibid*, para 9(ii).

¹⁸⁹ *PA Rec 1885*, *supra* note 99.

¹⁹⁰ *Ibid* at (5).

¹⁹¹ *Ibid* at at (9).

¹⁹² *Committee of Ministers reply to “The challenges posed by climate change” - Parliamentary Assembly Recommendation 1883 and “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment” - Parliamentary Assembly Recommendation 1885 (2009)*, CM/AS(2010)Rec1883-1885 final, Council of Europe (18 June 2010) [*CM Reply to PA Recs 1883-1885*], para 7.

¹⁹³ *Ibid*, para 9.

¹⁹⁴ *Ibid*.

but there is no need to legislate in this area. The Committee of Ministers believes that the judiciary has shown itself capable of creatively interpreting the existing law in order to provide the necessary protection. In general, it is uncommon for a legislative body to defer the creation of laws to the judiciary, especially in an area where it believes protection is necessary. What may be more likely, and this is speculation, is that the Committee of Ministers publically wants to appear in support of environmental protection, but privately certain CoE member states are resistant to the formal establishment of a right.

While legislative efforts to recognize a right to a healthy environment appear to have stalled in the CoE, a 2009 decision by the European Court of Human Rights may have established a partial right to a healthy environment as part of the culmination of its evolving case law.¹⁹⁵

2.2.2 Development of human rights and the EU

The EU has taken a long time to establish its own human rights document. In some ways this is not surprising as (i) the ECSC was not concerned with human rights; (ii) the ECSC's gradual development into the modern EU meant that human rights issues were initially infrequent and easily resolved; and (iii) for legal and political reasons, the EU was unable to simply rely on the ECHR as a basis for its human rights.

In the beginning, the ECSC was an organization almost singularly designed to facilitate economic integration. While its treaty did include a section on the protection of workers' rights, the ECSC was established at the same time as ECHR and, with all members of the ECSC also party to the ECHR, there was

¹⁹⁵ This idea is discussed in detail in Section 17 of this work and is based on the recent case: *Tatar c Roumanie*, *supra* note 134.

no need for the ECSC to duplicate the work of the ECHR. Initially, the ECSC had a modest aim of improving working conditions and living standards of steel workers,¹⁹⁶ but as the ECSC expanded into the modern EU, these aims also expanded to include protecting people's rights¹⁹⁷ and the environment.¹⁹⁸

The first indication the human rights would necessarily become an issue for EU law arose when an applicant forced the ECJ to consider the relationship between EU law and other sources of law. In 1964, the ECJ ruled that EU treaty law could not be overridden by domestic legal provisions.¹⁹⁹ The case did not comment on the relationship between EU treaty law and international treaty law, but if EU law superseded national law, it was clear that the ECJ would eventually have to address whether or not it similarly superseded international human rights law.

In *Handelsgesellschaft*,²⁰⁰ an EU law was challenged against German Basic Law,²⁰¹ in particular, the “principles of freedom of action and disposition, of economic liberty and of proportionality”.²⁰² The case arose from an EU mandated export license and the applicant's claim that it violated their fundamental right under the German Constitution. While this aspect of German Basic Law might not be considered a fundamental human right, German Basic Law protects other human rights, such as the rights to life,²⁰³

¹⁹⁶ *Treaty of Paris*, *supra* note 167 Article 3(e).

¹⁹⁷ *Consolidated versions of the Treaty on European Union*, 26 October 2012, Official Journal C 326 [TEU] Article 10.

¹⁹⁸ *Ibid* Article 11.

¹⁹⁹ *Flaminio Costa v ENEL*, [1964] Case 6-64 ECLI:EU:C:1964:66 (Court of Justice of the European Union) at 549.

²⁰⁰ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] Case 11-70 ECLI:EU:C:1970:114 (Court of Justice of the European Union).

²⁰¹ The *Grundgesetz für die Bundesrepublik Deutschland* is the source of German Basic Law and can be thought of as the German Constitution, although the word Constitution is not used. It covers many topics, but Section 1 guarantees many of the same human rights found in the ECHR.

²⁰² *Handelsgesellschaft*, *supra* note 200 at 1128.

²⁰³ Deutscher Bundestag, *Basic Law for the Federal Republic of Germany*, translated by Christian Tomuschat, David Currie, & Donald Kommers (2014) Article 2(2).

equality before the law,²⁰⁴ and other freedoms found in the ECHR. The decision of the ECJ was to distinguish human rights from other law and acknowledge that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice... and must be ensured within the framework of the structure and objectives of the [EU]”.²⁰⁵

Handelsgesellschaft incorporated human rights into EU law while remaining vague as to precisely what was meant by “fundamental rights”. In subsequent cases, the ECJ referenced various rights, including the right to property ownership;²⁰⁶ the inviolability of commercial premises;²⁰⁷ and the ECHR in general,²⁰⁸ but the ECJ consistently stated that national human rights documents and the ECHR only provided “guidelines” for EU law.²⁰⁹ Where national laws conflicted with EU law, the ECJ would, when necessary, review the law based on both EU law and its compatibility with the ECHR,²¹⁰ but the ECJ made it clear that the ECHR would not be used as a definitive source of EU human rights.²¹¹

The result was that EU law protected human rights, but neither applicants nor the ECJ knew precisely which human rights were afforded protection. What rights would the ECJ consider “fundamental rights”? Faced with this

²⁰⁴ *Ibid* Article 3.

²⁰⁵ *Handelsgesellschaft*, *supra* note 200 at 1134.

²⁰⁶ *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] Case C-4/73 ECLI:EU:C:1989:51 (Court of Justice of the European Union) at 501.

²⁰⁷ *Hoechst AG v Commission of the European Communities*, [1989] Cases 46/87 and 227/88 ECLI:EU:C:1989:337 (Court of Justice of the European Union), para 19.

²⁰⁸ *Nold*, *supra* note 206 at 507.

²⁰⁹ *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister of Transport, Energy and Communications and others*, [1996] Case C-84/95 ECLI:EU:C:1996:312 (Court of Justice of the European Union) at 507; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] Case C-260/89 ECLI:EU:C:1991:254 (Court of Justice of the European Union), para 41.

²¹⁰ *Elliniki Radiophonia*, *supra* note 209, para 42.

²¹¹ As illustrated by the rights in *Hoechst* and *Handelsgesellschaft*, being considered fundamental rights by the ECJ, but not included in the ECHR

lack of legal certainty, it was only a matter of time before EU legislators acted to formally enshrine human rights into EU law.

In 1996, the ECJ considered the possibility of the EU becoming a party to the ECHR,²¹² but the ECJ determined that without an express or implied power, the EU did not have the competence to enter international agreements in the field of human rights.²¹³ With the ECJ's decision, two streams of action became available to the EU: pass legislation to provide the EU explicit legal competence to accede to the ECHR or establish its own human rights document. Unfortunately, the EU chose to do both simultaneously and this has resulted in a very complex legal regime.

Efforts to establish an EU human rights document were nearly completed in 2000 with the inclusion of the Charter of Fundamental Rights of the European Union in the European Constitution in 2000.²¹⁴ However, the European Constitution was never ratified and did not come into force. In 2009 the Lisbon Treaty came into effect and it made specific reference to the CFREU giving it legal authority. At the same time, the EU pursued efforts to accede to the ECHR.

The end result of this is an extremely complex system of human rights in Europe. The CFREU and ECHR exist in parallel and both apply to all 28 EU Member States. The EU itself is in the process of also joining the ECHR at which point its institutions it will be bound by these two human rights documents and potentially two human rights courts: the ECJ and the European Court of Human Rights. This complex relationship is further explored below.

²¹² *Opinion 2/94*, [1996] ECR I-1759 (Court of Justice of the European Union), paras 27–30.

²¹³ *Ibid.*

²¹⁴ *Treaty Establishing a Constitution for Europe*, 16 December 2004, Not entered into force, Official Journal C 310 [*Treaty Establishing a Constitution for Europe*].

2.2.3 The relationship between the CFREU and the ECHR

Europe has two legally binding international human rights documents with similar rights and overlapping membership. They have different courts and each court has valid claim to legal supremacy. While this sounds like a situation rife with legal conflicts, there was an opportunity for legislators to design two human rights systems which functioned in tandem and did not have overlapping mandates; unfortunately while they came very close to achieving this, unresolved conflicts remain.

There are two aspects to consider when reviewing the jurisdictional overlap of the ECHR and the CFREU. One is the current conflicts that exist because the CFREU is designed with explicit authority over areas of law to which the ECHR already has authority. The other is the potential conflict which will arise when the EU accedes to the ECHR: specifically, how will authority be split between the European Court and the ECJ? The following looks at both of these conflicts in turn.

2.2.3.1 The current conflicts of authority between CFREU and the ECHR

Textually, the CFREU and the ECHR are similar, but are not identical: most notably, the CFREU contains a right to environmental protection not present in the ECHR.²¹⁵ The jurisdiction of the courts overseeing the two documents is also different: the European Court of Human Rights only settles disputes

²¹⁵ *CFREU*, *supra* note 141 Article 37.

arising from the ECHR,²¹⁶ whereas the ECJ's considers cases arising from all EU Treaties.²¹⁷

These authoritative conflicts are most apparent in the application of each document. The ECHR's application is broad: it applies to any action taken by its member states. The European Court cannot review EU law or the actions of EU institutions, because the EU is not a party to the ECHR; however, EU Member States are bound to the ECHR and are responsible for implementing EU legislation in ways which conform to the ECHR.²¹⁸ In contrast, the CFREU only applies to EU law and EU institutions;²¹⁹ it does not apply to the national laws of EU Member States.

These jurisdictional distinctions almost create a perfect division of authority: national actions of EU Member States must comply with the ECHR and the EU as an institution must adhere to the CFREU. This clear division is unfortunately undone by both courts having simultaneous authority over EU Member States' implementation of EU law.²²⁰

The ECJ has yet to review a case questioning if an EU Member State's implementation of an EU law conforms with the CFREU, but its authority to do so is specified by Article 51(1): "The provisions of this Charter are addressed... to the member states only when they are implementing Union Law".²²¹

In 1999, the European Court made it clear that it would also review the implementation of EU law.²²² It determined that even though the EU itself was not a signatory to the ECHR, EU Member States were responsible for

²¹⁶ *ECHR*, *supra* note 140 Art. 19.

²¹⁷ *TEU*, *supra* note 197 Article 267.

²¹⁸ *Matthews v The United Kingdom*, No 24833/94 (18 February 1999) (European Court of Human Rights), para 32.

²¹⁹ *CFREU*, *supra* note 141 Article 51.

²²⁰ *Matthews v The United Kingdom*, *supra* note 218; *CFREU*, *supra* note 141 Article 51(1).

²²¹ *CFREU*, *supra* note 141 Article 51(1).

²²² *Matthews v The United Kingdom*, *supra* note 218.

implementing EU legislation in compliance with the ECHR. The European Court of Human Rights stated that, even though EU Member States could transfer competencies to the EU, they remained responsible for the way laws made under those competencies were implemented.²²³

The relationship between the ECJ and the European Court of Human Rights was brought into focus by the *Bosphorus* cases in which the same issue was brought to both the ECJ and the European Court. The case arose when Irish authorities impounded a Turkish operated airplane, because of the plane's Yugoslavian ownership and an EU regulation²²⁴ that imposed UN sanctions on Yugoslavia.²²⁵

The Turkish airline took their case first to the ECJ and claimed that the actions of the Irish government were inconsistent with the purpose of the sanctions.²²⁶ The airline was renting the plane from a Yugoslavian firm, but money was paid into a frozen account and therefore, they applicants argued it was not benefitting anyone in Yugoslavia.²²⁷ The ECJ disagreed and determined that impounding the airplane was justified as a sanction against Yugoslavia.²²⁸

The *Bosphorus* case was then brought to the European Court of Human Rights where the applicants argued that impounding the plane violated the operators' Protocol 1 Article 1 right to property.²²⁹ The applicants claimed that the Irish authorities had discretion over the application of the EU Regulation, wrongly applied that discretion, and as a result, violated their

²²³ *Ibid*, para 32.

²²⁴ *Council Regulation (EEC) No. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 26 April 1993, OJ L 102, 2841993 [*Council Regulation on Yugoslavia*].

²²⁵ *United Nations Security Council Resolution 820*, 17 April 1993, S/RES/820 [*United Nations Security Council Resolution 820*], para 21.

²²⁶ *Bosphorus ECJ*, *supra* note 209.

²²⁷ *Ibid*, para 3.

²²⁸ *Ibid*, para 26.

²²⁹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, No 45036/98 (30 June 2005) (European Court of Human Rights).

property rights.²³⁰ First, the European Court of Human Rights held that application of the EU Regulation did not allow for any discretion by the Irish Authorities.²³¹ Then it considered if impounding the airplane was nevertheless a violation of the applicants' property rights.

In its decision, the European Court of Human Rights introduced a new component to European human rights law, the doctrine of equivalent protection: where an organization (in this case the EU) provides equivalent protection to human rights to that of the ECHR, the presumption is that a member of that organization (in this case Ireland), has not violated the ECHR when it does no more than implement the legal obligations applied to it by the organization.²³² The court went on to say that this presumption could be rebutted on a case-by-case basis if it is shown that protection of the ECHR is manifestly deficient.²³³ It did not find the EU's approach to be "manifestly deficient" in the *Bosphorus* case²³⁴ and relied on equivalent protection to reach the same conclusion as the ECJ.²³⁵

The doctrine of equivalent protection allows the European Court of Human Rights to defer a significant amount of authority to the EU and the ECJ, while retaining its claim on ultimate judicial authority. In *Bosphorus*, the European Court of Human Rights also made reference to the need for "international cooperation", presumably a specific reference to cooperation between itself and the ECJ. It also stated that the value of such cooperation would be outweighed by any possible violation of the ECHR, at which point its own authority would be supreme.²³⁶

²³⁰ *Ibid*, para 107.

²³¹ *Ibid*, para 110.

²³² *Ibid*, para 156.

²³³ *Ibid*.

²³⁴ *Ibid*, para 166.

²³⁵ *Ibid*, para 165.

²³⁶ *Ibid*, para 156.

In *Matthews* and *Bosphorus* the European Court of Human Rights illustrated its willingness to exert authority over both EU law and ECJ rulings, but the European Court of Human Rights' jurisdiction over EU law is limited to EU Member State's implementation of EU laws. Until the EU becomes party to the ECHR, human rights violations by EU institutions, such as the European Parliament or the European Commission, can only be considered by the ECJ.

The ECJ currently considers human rights cases based on the CFREU, but as early as 1969, the ECJ recognized that “fundamental human rights [are] enshrined in the general principles of Community law and protected by the [ECJ]”.²³⁷ Unfortunately, prior to the entry into force of the CFREU, it was unclear which rights would be protected by the ECJ.

In *Nold*,²³⁸ the ECJ stated that fundamental human rights “form an integral part of the general principles of law” and in determining which rights to protect, the ECJ would “draw inspiration” from the constitutional traditions common to EU Member States, and from international human rights treaties on which the member states have collaborated or to which they are signatories.²³⁹ While the ECJ did not specifically mention the ECHR, it clearly fit this description. It was not until 1989 that the ECJ made specific reference to the ECHR stating that it was “of particular significance” when reviewing human rights cases.²⁴⁰

Prior to the entry into force of the CFREU, European human rights adjudication was not only split between two jurisdictions with two

²³⁷ *Erich Stauder v City of Ulm*, [1969] Case 29/69 ECLI:EU:C:1969:57 (Court of Justice of the European Union), para 7 it is important to note that what was then known as “Community law” would now be called “EU law”; also see *Handelsgesellschaft*, *supra* note 200, para 4.

²³⁸ *Nold*, *supra* note 206 at 491.

²³⁹ *Ibid* at 507.

²⁴⁰ *Hoechst*, *supra* note 207 the case depended on whether or not the applicant could rely on, inter alia, Article 8 of the ECHR, the right to private and family life, as a means for protecting the business from search by EU regulatory authorities. The applicant's claim was unsuccessful.

independent courts, but there was no clarity as to the rights protected by the ECJ. The European Court based human rights explicitly on the ECHR, but the ECJ could rely on the ECHR, other international agreements, and national constitutions.

There were two obvious problems with the law at the time. One was that two independent courts allowed the same right to be interpreted and protected differently depending on whether the right was violated by an EU Member State or an EU institution. The other was that while the ECJ had clearly begun adjudicating human rights cases, neither the ECJ nor EU legislators were willing to specify what constituted a human right within the European Union.²⁴¹ Both of these problems could have been overcome by either the EU becoming a formal party to the ECHR or the drafting of a well-defined human rights document for the European Union. EU accession to the ECHR could have made the European Court of Human Rights superior to the ECJ and provided the EU with a definitive list of well-established human rights. The other option would be for the EU to create its own human rights document, thereby providing a clear list of rights while retaining the ECJ's independence.²⁴² However, rather than taking either of these options, the EU has committed to simultaneously doing both and it has resulted in significant legal conflicts.

The Lisbon Treaty established an EU specific human rights document, the CFREU.²⁴³ It clarifies the human rights to be applied to EU institutions and EU law (a competency already claimed by the ECHR as per *Matthews* and *Bosphorus*). At the same time, the Lisbon Treaty also committed the EU to accede to the ECHR.

²⁴¹ Early attempts at specifying EU rights had been made (see *Treaty Establishing a Constitution for Europe*, *supra* note 214.) but they had failed to become binding.

²⁴² Under this option it is important to note that the EU should not exert its authority over the implementation of EU law as this is an area already under the competence of the European Court.

²⁴³ *CFREU*, *supra* note 141.

In response to the ECJ's 1996 opinion that the EU did not have the mandate to become party to the ECHR,²⁴⁴ the Lisbon Treaty explicitly gave the EU the necessary authority.²⁴⁵ Parallel actions were also conducted at the CoE with the passage of Protocol 14 of the ECHR,²⁴⁶ to allow the EU to accede to the ECHR.²⁴⁷ The EU has made efforts to establish a path to accession to the ECHR, but a recent decision of the ECJ has disrupted this process.²⁴⁸

2.2.3.2 Judicial authority and jurisdiction prior to accession

Currently, where EU Member States are accused of implementing EU law in a way which violates both the ECHR and the CFREU, it is unclear if applicants should bring their claim to either the European Court or the ECJ, or both.

Technically, there is nothing preventing individuals from bringing a case to both courts in hopes of eventually receiving a favourable decision.²⁴⁹ This is a major problem for legal clarity and coherence: if both courts hear the same issue, is either court bound by the other, and is one court superior to the other?

With regard to the binding authority of the courts on each other, there are generally two schools of thought: either the ECJ is bound by the European

²⁴⁴ *Opinion 2/94*, *supra* note 212, paras 27–30.

²⁴⁵ *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, Official Journal of the European Union (C 306/1) [*Lisbon Treaty*] Art 6(2).

²⁴⁶ *Protocol No. 14 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention*, 13 May 2004, 1 June 2010, CETS 194 [*Protocol 14*].

²⁴⁷ *Ibid* Article 17.

²⁴⁸ *Opinion 2/13*, [2014] not yet published (Court of Justice of the European Union).

²⁴⁹ Presumably going to the ECJ first to avoid “higher court” arguments at the European Court and then hoping for a “manifestly deficient” ruling, relying on the European Court of Human Rights’ interpretation of *Bosphorus*.

Court, or it is not.²⁵⁰ Lenaerts and Smijter rely on CFREU Article 52(3) as to establish the superior status of the European Court; it states that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.²⁵¹

Lenaerts and Smijter go on to say that, therefore, the decisions of the European Court are binding upon the ECJ as it is the European Court which interprets the meaning of the ECHR.²⁵²

Lock takes the opposite position. First, he points out that during the drafting of the CFREU there were unsuccessful attempts to specifically reference the European Court's case law and this illustrates the drafters' ultimate decision not to bind the ECJ by the European Court.²⁵³ Second, Lock points out that making the ECJ bound by the European Court would be "alien to European Union law" since it would introduce the common law principle of *stare decisis* to EU law.²⁵⁴ "Had such a shift been wanted," he writes, "an express provision would surely have been included in the EU Charter."²⁵⁵

While the intentions of the EU's drafters may be well documented, international treaties are not interpreted based on the drafters' intention, but "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty".²⁵⁶ Furthermore, Lock's position that the two courts

²⁵⁰ There is no support for the idea that the European Court would be bound by the ECJ.

²⁵¹ *CFREU*, *supra* note 141 Article 52(3).

²⁵² Koen Lenaerts & Eddy de Smijter, "Charter and the Role of the European Courts, The" (2001) 8 Maastricht J Eur & Comp L 90 at 99.

²⁵³ Tobias Lock, "EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg" (2010) 35 European Law Review 777 at 385.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid* at 386.

²⁵⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [*Vienna Convention*] Article 31.

should be treated as equals²⁵⁷ creates an obvious lack of legal certainty: there would be two distinct and equal courts, capable of reaching different, equally valid, decisions on the same issue: an applicant could receive two conflicting judgements and be unable to rely on either.

To clarify the relationship between the two courts, the EU and the CoE have been working to establish the parameters by which the EU would formally accede to the ECHR and define the roles of the two courts.

On April 5, 2013, the CoE published the Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (herein Draft Accession Agreement).²⁵⁸ If its conditions are implemented, it would serve to remove the aforementioned problems of legal certainty. Unfortunately, a recent review of the Draft Accession Agreement by the ECJ rejected it as incompatible with EU law.²⁵⁹

2.2.3.3 The Particulars of the EU Accession to the ECHR

In a speech preceding negotiations of the Draft Accession Agreement, Jörg Polakiewicz, the Director General of Human Rights and Rule of Law at the CoE, reiterated the challenges and importance of finalizing the EU's accession to the ECHR.²⁶⁰ In it he cited “internal differences between the EU

²⁵⁷ Lock, *supra* note 253 at 386.

²⁵⁸ *Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final Report to the CDDH*, 47+1(2013)008, Council of Europe (Strasbourg, 5 April 2013) [*Draft Accession Agreement*].

²⁵⁹ *Opinion 2/13*, *supra* note 248.

²⁶⁰ Jörg Polakiewicz, *EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?* (Oxford Brookes University, 2013).

Member States”²⁶¹ that delayed the EU’s accession and went on to say that “[d]espite being an obligation under article 6(2) TEU, the merits and rationale for EU accession are still being questioned [within the EU], pointing to a lack of preparation, a ‘myriad of problems’ or, even worse, unbridgeable incompatibilities between the EU legal system and the Strasbourg protection mechanism”. In light of these challenges it is unsurprising that the Draft Accession Agreement took five years to prepare. Upon completion of the Draft Agreement, EU legislators chose to request the ECJ to review the compatibility of the Draft Accession Agreement with EU law.²⁶²

The Draft Accession Agreement was negotiated and facilitated by the *ad hoc* group “47 + 1”. While its title refers to the 47 CoE member states plus the European Union, it actually consisted of only 14 members: 7 from EU Member States and 7 from non-EU members of the CoE.²⁶³

One task of the Draft Accession Agreement was to specify the necessary minor technical changes of relevant treaties to accommodate the EU’s accession, but its larger task was to detail how the EU would ultimately interact with the European Court of Human Rights. Perhaps unsurprisingly, the Draft Accession Agreement proposed that European Court of Human Rights decisions would be binding on the EU’s institutions including the ECJ.²⁶⁴ The ECJ would only retain a narrow ability to review human rights cases pertaining to the ECHR.²⁶⁵

²⁶¹ *Ibid* at 1.

²⁶² *TEU*, *supra* note 197 Article 218(11) creates an option for the ECJ to review the compatibility of a new agreement with the EU Treaties. This review is not mandatory, but if the ECJ determines a conflict the agreement cannot proceed without amendment.

²⁶³ *Draft Accession Agreement*, *supra* note 258, para 2.

²⁶⁴ *Draft Accession Agreement*, *supra* note 258 Annex V paragraph 26.

²⁶⁵ The ECJ would still be the singular interpreter of rights provided exclusively by the CFREU.

As in all ECHR cases, applicants must exhaust all of their domestic remedies before bringing a claim to the European Court.²⁶⁶ The Draft Accession Agreement retains this principle and would allow applicants to bring potential rights violations to the ECJ for a preliminary ruling on the validity of EU law. The ECJ would not consider the specific act or omission, but would have the opportunity to determine if the EU law was invalid because it violated the ECHR, or for any other reason.²⁶⁷ Where the ECJ found the law to be valid, applicants could then bring their case to the European Court which would not be bound by the ECJ preliminary decision.²⁶⁸

The Draft Accession Agreement clarified the would-be relationship between the European Court and the ECJ: the ECJ would determine if EU laws are valid and compliant with the ECHR. Where the ECJ finds laws valid, the European Court would then have the opportunity to review the ECJ and provide its own decision which would bind the ECJ. This would give the European Court ultimate authority over the majority of the human rights cases in Europe,²⁶⁹ over EU law, and the ECJ. This makes sense, as noted by Jörg Polakiewicz, “it is the EU which seeks accession to the ECHR and not the other way around”.²⁷⁰ Under the Draft Accession Agreement the EU would be treated as a sovereign nation joining the ECHR so it is unsurprising that European Court would have authority over the EU’s court.²⁷¹

Finally, it should be noted that under the Draft Accession Agreement, EU accession would not give the European Court decisions the authority to quash ECJ decisions or render EU law invalid. European Court decisions would simply place the EU under an obligation to find a way be compliant with the

²⁶⁶ *ECHR*, *supra* note 140 Article 35.

²⁶⁷ *Draft Accession Agreement*, *supra* note 258 Annex V paragraphs 65 & 66.

²⁶⁸ *Ibid* Annex V paragraphs 67 & 68.

²⁶⁹ Aside from those cases arising out of rights exclusively found in the CFREU

²⁷⁰ Polakiewicz, *supra* note 260 at 2.

²⁷¹ *Ibid* at 5.

ECHR.²⁷² The EU, as with all parties to the ECHR, will have a “measure of discretion” in how they choose to apply European Court of Human Right’s decisions.²⁷³

Unfortunately, the state of EU accession is currently unclear. In Opinion 2/13,²⁷⁴ the ECJ set out to see if EU accession to the ECHR, as described by the Draft Accession Agreement, was compatible with EU law.²⁷⁵ Much of the opinion is devoted to describing the ECHR and the Draft Accession Agreement and because of this it has been criticized for failing to provide a detailed analysis of the law.²⁷⁶ Ultimately though, the ECJ was explicit about the Draft Accession Agreement’s incompatibility with EU law.²⁷⁷

The Treaty of Lisbon established that the EU law regulating the EU’s accession to the ECHR would be set out by Article 6(2) and Protocol No. 8 of the Consolidated Treaty of the European Union. Protocol No. 8 specifies that accession “shall make provision for preserving the specific characteristics of the Union and Union law”²⁷⁸ and this clause serves as the basis for the ECJ’s decision in Opinion 2/13. The ECJ stated EU law prohibits the EU from entering any international agreement which adversely affects the autonomy of the EU legal order.²⁷⁹ It went on to say that ECHR decision-making bodies must not have the effect of binding the EU and its institutions.²⁸⁰ Under these conditions not only is the Draft Accession Agreement incompatible with

²⁷² *Draft Accession Agreement*, *supra* note 258 Article 46(1).

²⁷³ Polakiewicz, *supra* note 260 at 12.

²⁷⁴ *Opinion 2/13*, *supra* note 248.

²⁷⁵ *Ibid*, para 1.

²⁷⁶ Adam Lazowski & Ramses A Wessel, “When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR” (2015) 16 German LJ 179 at 185.

²⁷⁷ *Opinion 2/13*, *supra* note 248, para 258.

²⁷⁸ *TEU*, *supra* note 197 Protocol No. 8.

²⁷⁹ *Opinion 2/13*, *supra* note 248, para 184.

²⁸⁰ *Ibid*, para 185.

EU law (as the European Court would bind the EU and its institutions), but it becomes difficult to imagine any path for EU accession.²⁸¹

With Opinion 2/13, the ECJ clearly intends to retain final authority over human rights issues and EU law. On one hand, it is understandable that the ECJ judges do not want their work second-guessed by judges who come from non-EU nations, but at the same time, the purpose of the ECHR and its court is to review the decisions of its member states' courts. The laws and acts of all parties to the ECHR are scrutinized by the European Court in a way which second-guesses national courts – this is exactly what makes human rights under the ECHR so robust.

The ECJ's reaction to the EU's decision to accede to the ECHR is not surprising, but it is disappointing. In one of the few peer-reviewed papers on Opinion 2/13, Lazowski and Ramses estimate that the court's opinion has effectively blocked EU accession for years.²⁸² In reviewing the ECJ's decision, it is clear that it relied on three conflicting points: (i) Protocol No. 8 that requires accession to preserve the specific characteristics of Union law; (ii) the EU law which prohibits the EU from entering an international agreement which adversely affects the autonomy of the EU legal order; and (iii) the aspects of the Draft Accession Agreement that would make the ECJ bound by European Court decisions. What needs to be recognized is that the ECJ was not bound to interpret these three points as necessarily factual and conflicting: the EU law which “prohibits the EU from entering an international agreement which adversely affects the autonomy of the EU legal order” is not based in treaty, but is a law created by the ECJ.²⁸³

²⁸¹ Lazowski & Wessel, *supra* note 276 at 189.

²⁸² *Ibid* at 210.

²⁸³ *Opinion 2/13*, *supra* note 248, para 183; the ECJ explicitly states that the EU law in question is a declaration of the ECJ itself and the court only cites its own opinions to support the law.

The ECJ's relied on its own law to determine that the parameters of the Draft Accession Agreement were incompatible with EU law. In theory, this means that the court could reverse itself at any time by reinterpreting its own law to allow limitations to be placed on the autonomy of the EU legal order. There is a strong argument for the court to do this as the Treaty of Lisbon and the Draft Accession Agreement clearly illustrate of the explicit intention of EU Member States – their legislators and negotiators knowingly committed to accede to the ECHR and therefore be bound by its court. This does raise the question as to why EU legislators opted to seek the ECJ's opinion on accession since they must have known that the ECJ could derail the accession process. Without an internal knowledge of the accession process it is difficult to speculate as to why the opinion of the ECJ was sought in this case, but it has led to the ECJ's disregarding the intention of the EU Member States by relying on its own law to safeguard its own authority. Frustratingly, it also leaves European human rights law lacking clarity and certainty.

EU accession to the ECHR is now in an awkward and unclear place. The Draft Accession Agreement created a workable blueprint for accession, but it was rejected by the ECJ and there is no clear path forward. This leaves Europe with two courts, both claiming final authority over human rights law and the division between the two courts appears to be increasing.

When the CFREU gained binding legal status, the ECJ clearly shifted away from its previous tendency to consider the ECHR and European Court of Human Rights decisions when reviewing human rights cases.²⁸⁴ According to an analysis by Gráinne de Búrca, there were 122 ECJ cases heard between December 2009 and September 2012 which mentioned the CFREU, but only

²⁸⁴ Polakiewicz, *supra* note 260 at 3–5.

10 of those mentioned the ECHR and/or European Court case law.²⁸⁵ While it may seem obvious that the ECJ would base its human rights decisions on the EU's human rights document, failure to interpret the CFREU in a way that is consistent with the European Court's interpretation of the ECHR ultimately risks weakening human rights in Europe as the law becomes more fragmented and less clear: "the mere existence of two different texts to be interpreted by two different courts operating in very different contexts is not conducive to legal certainty".²⁸⁶

The current state of European human rights law means that any analysis of the European human rights regime must consider both the rights under the ECHR and those under the CFREU independently, however due to the much higher volume of case law arising from the ECHR, it is useful to consider the ECHR first and then review the CFREU.

2.3 The ECHR and point-source pollution

Of the three environmental challenges considered in this work, point-source pollution has the largest volume of existing case law. While the ECHR provides no specific environmental rights, applicants have successfully used other rights to bring cases arising from polluting activities to both the European Commission on Human Rights²⁸⁷ and the European Court of Human Rights. It should be noted that in many of the early cases, the applicants' focus was not aimed at reducing pollution, but in every case

²⁸⁵ G De Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013) 20:2 MJ 168 at 174–5.

²⁸⁶ Polakiewicz, *supra* note 260 at 4.

²⁸⁷ Prior to ECHR Protocol 11 entering into force, individuals had to bring potential human rights violations to the European Commission on Human Rights and, if the Commission determined that the claim was valid, the Commission would then bring the case to the European Court of Human Rights on the individual's behalf. Protocol 11 allows individuals to directly petition the European Court.

discussed herein, there was a potential for a reduction in point-source if claims were successful.

A variety of ECHR rights have been used in attempts to resolve environmental issues. Early claims were based on noise and nuisance. In these cases, air traffic disturbed local residents who argued that it constituted a violation of their privacy and property rights. Although many of these initial cases were unsuccessful, they broadened the idea of what could constitute a violation of the right to privacy and allowed future claims to rely on the right to directly and indirectly reduce pollution. The progression of these cases is discussed in detail in the following section of this work.

The ECHR right to life has also been frequently cited in cases relating to environmental quality and pollution. The right has been narrowly applied under the ECHR, but it has been useful in cases where people have died or there is a significant risk of death due to poor environmental conditions. The cases discussed in Section 2.3.2 are instances where applicants had a strong claim that their right to life has been violated and adequate remedy would likely depend on improving the environment by reducing or eliminating pollution.

2.3.1 Point-source pollution and the rights to privacy and property under the ECHR

ECHR property rights are found in Article 8 and Article 1 of Protocol 1: Article 8 provides the right to respect for private and family life and Article 1 of Protocol 1 to the peaceful enjoyment of possessions.²⁸⁸ Although they do not make specific reference to the environment, they have been interpreted by

²⁸⁸ *ECHR*, *supra* note 140 Art. 8 and Art. 1 of the First Protocol.

the European Court to provide some protection to both human health and the environment.

The first property rights cases argued that noise, specifically noise emanating from government regulated activities such as airports, violated individuals' right to peaceful enjoyment of their home and property. While these early applicants were more interested in reducing air traffic in order to eliminate noise, rather than to eliminate pollution from airplane emissions, these cases established a basis for future pollution cases.

*Arrondelle v The United Kingdom*²⁸⁹ and *Baggs v The United Kingdom*,²⁹⁰ were two of the first noise cases, but both were resolved by way of “friendly settlements” allowing the UK government to maintain that no violation occurred, and avoiding the case being reviewed by the European Court of Human Rights. *Rayner v the UK* was the first claim of a noise violation to progress to the European Commission of Human Rights. The applicant's arguments were rebuked by the European Commission of Human Rights which determined that the applicant's Article 8 right had been violated, but that it was justified as being in the economic interest of the country.²⁹¹ In regard to Article 1 of the First Protocol, the IA Commission stated that it too had not been violated and that it did “not, in principle, guarantee the right to the peaceful enjoyment of possessions in a pleasant environment.”²⁹² The case eventually proceeded to the European Court of Human Rights because of a potential violation of their right to effective remedy.²⁹³

The European Commission of Human Rights' decision in *Rayner* was an obvious setback to environmental protection efforts, since “environment”

²⁸⁹ *Arrondelle v The United Kingdom*, [1980] 19 DR 186 .

²⁹⁰ *Baggs v The United Kingdom*, [1985] 44 DR 13 (European Commission of Human Rights).

²⁹¹ *Rayner v The United Kingdom*, (1986) 47 DR 5 (European Commission of Human Rights) at 12.

²⁹² *Ibid* at 14.

²⁹³ *Ibid* at 15.

could be interpreted widely to include both noise pollution and chemical pollution. However, this position was altered four years later when the case came before the European Court of Human Rights in *Powell and Rayner v UK*.²⁹⁴ The court's decision opened the door for all cases which link pollution and the right to privacy as it concluded that noise from the aircraft did adversely affect the applicants' enjoyment of their nearby homes and was potentially a violation of their Article 8 right.²⁹⁵

The claim of the applicants in *Powell and Rayner* ultimately failed as the court also determined that the potential violation could be justified. The noise did adversely affect the enjoyment of their property, but it only constituted a potential violation of the ECHR and the court said that the State enjoys a "margin of appreciation" with regard to its application of Article 8. This meant that the law requires a "fair balance" between an individual's rights and society's interest.²⁹⁶ The applicants' claim was rejected on the basis that their privacy interests were outweighed by the airport's importance to the nation's economic well-being.²⁹⁷ Although the applicants were unsuccessful, the court's reasoning in *Powell and Rayner* became the basis for many applicants in subsequent cases.

The applicants in *López-Ostra v Spain*²⁹⁸ and *Guerra and Others v Italy*,²⁹⁹ successfully used their ECHR privacy right to protect their health, and consequently the local environment.

In *López-Ostra*, a waste treatment plant produced fumes which caused health problems for many of the town's residents. Efforts to reduce the impact of the plant were unsuccessful and it continued to endanger the

²⁹⁴ *Powell and Rayner v The United Kingdom*, [1990] ECHR 9310/81 .

²⁹⁵ *Powell and Rayner v The United Kingdom*, [1990] ECHR 9310/81 Para 40.

²⁹⁶ *Ibid* Para 41.

²⁹⁷ *Ibid* Para 41.

²⁹⁸ *López Ostra v Spain*, [1994] ECHR 16798/90 .

²⁹⁹ *Guerra and Others v Italy*, [1998] Rep 1998-I .

applicant's health,³⁰⁰ so the applicant claimed that the operation of the plant violated her Article 8 right.³⁰¹ The court agreed, stating 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."³⁰² The court reiterated the concepts of a "fair balance" and a "margin of appreciation,"³⁰³ but, due to the severity of the damage caused by the plant, and the government's inaction,³⁰⁴ it determined that the government had failed to properly balance society's interests against those of the applicant.³⁰⁵

In *Guerra and Others v Italy*, the court confirmed 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". The court's decision in *Guerra* melded the right to privacy with a right to health and a right to the peaceful enjoyment of their property. The case was based on pollution which emanated from a local chemical plant and, because of its proximity to the applicants' community, was considered "high risk" under Italian law. The factory had several accidental chemical releases, including a major explosion which hospitalized 150 people. The court determined that the Italian authorities had not taken adequate steps to protect the applicants' Article 8 right which, according to the court, required states to ensure that the right is not violated by government actions. It also creates a positive obligation on States to protect individuals from third party violations.³⁰⁶

³⁰⁰ *López Ostra v Spain*, *supra* note 298 Paras 6-9.

³⁰¹ *Ibid* Para 30.

³⁰² *Ibid* Para 51.

³⁰³ *Ibid* Para 51.

³⁰⁴ *Ibid* Paras 52-56.

³⁰⁵ *Ibid* Para 57.

³⁰⁶ *Guerra and Others v Italy*, [1998] Rep 1998-I (European Court of Human Rights), para 58.

Recently the European Court of Human Rights has expanded the right to privacy to include protection of health, particularly where the applicants' health is negatively impacted by environmental pollution. In *Fadeyeva v Russia*,³⁰⁷ *Giacomelli v Italy*,³⁰⁸ and *Dubetska v Ukraine*,³⁰⁹ applicants successfully argued that emissions from neighbouring industrial facilities damaged their health in a way that violated their Article 8 right. An important component of each of the cases was that, even though the facility in question was a private operation, the governments were aware of the health problems caused by pollution and failed to take adequate action.

It is also important to note that none of these applicants voluntarily moved to the pollution in question. In *Dubetska* and *Giacomelli* the applicants' residences predated the presence of the polluting facilities. In *Fadeyeva* the applicant moved to her home after the plant was in operation, but her home was provided by the government and located within a zone known to be dangerous to human health.³¹⁰

In each of the cases, the court's decisions relied on a determination that the severity of the health and environment risks posed by the facilities outweighed their legitimate economic benefits. Furthermore, the long-term failure of authorities to properly respond to the known health impacts illustrated a failure to achieve a fair balance between individuals and society. These cases illustrated how polluting industries can be challenged under ECHR property rights as well as the willingness of the European Court of Human Rights to broadly interpret the ECHR. These cases effectively established a "right to health" even though that right is not explicitly contained in the ECHR.

³⁰⁷ *Fadeyeva v Russia*, No 55723/00 [2005] .

³⁰⁸ *Giacomelli v Italy*, No 59909/00 [2006] .

³⁰⁹ *Dubetska and Others v Ukraine*, No 30499/03 (10 February 2011) .

³¹⁰ *Fadeyeva v Russia*, No 55723/00 [2005] (European Court of Human Rights), para 12.

Most recently, *Tatar v Romania*,³¹¹ illustrated a further progression of the European Court of Human Rights' interpretation of rights. It was the first time the court applied the "Precautionary Principle" to an environmental judgement and aspects of the decision may be used in the future to significantly expand environmental protection in Europe using the ECHR's right to privacy.

In *Tatar*, the applicants argued that the release of cyanide-contaminated tailings from a nearby gold mine violated their right to life (Article 2) and their Article 8 right. It is important to note that the court acknowledged that the applicants could not conclusively link the environmental concentrations of sodium cyanide to the applicants' health problems.³¹² Crucially, after recognizing the lack of a causal link, the court went on to say:

that despite the absence of a causal likelihood in this case, the existence of a serious and substantial risk to the health and welfare of the applicants posed to the State a positive obligation to take reasonable and appropriate measures able to protect the rights of respect for their private life and their home, and more generally, to the enjoyment of a healthy and protected environment.³¹³

The court not only made it clear that the State failed to meet its duties, but in its decision it expanded ECHR law by using the Precautionary Principle to establish a duty in the absence of "a sufficiently established causal link". The court defined the Precautionary Principle, but without an official English translation of the case it can only be paraphrased as "the lack of current scientific certainty cannot justify the State in delaying the adoption of effective and proportionate measures to prevent a risk of serious and

³¹¹ *Tatar c Roumanie*, No 67021/01 (27 janvier 2009) .

³¹² *Tatar c Roumanie*, *supra* note 134, para 106.

³¹³ *Ibid*, para 107 translation provided by Google Translate (the case is only available in French).

irreversible damage to the environment.”³¹⁴ The use of the Precautionary Principle by the European Court of Human Rights certainly lowers the threshold for future pollution cases as it allows applicants to have a successful case without having to prove an incontrovertible or even statistically probable³¹⁵ link between a pollutant and damage to their health.

The other potentially major development in *Tatar* stems from the emphasis the court placed the pollution’s negative impact on the environment as something additional to its impact on human health. The court made references to “a healthy and protected environment”, “the risk of serious and irreversible damage to the environment”, and “the health and environmental consequences of the ecological accident”.³¹⁶ This separation of “health” and “the environment” may be indicative of the court’s increasing willingness to recognize a value in protecting the environment, potentially with the creation of a right to a healthy environment. The court has not considered an Article 8/point-source pollution case since *Tatar* so it has not had the opportunity to elaborate on its decision or clarify the value it places on protecting the environment from pollutants. That said, Section 4.4.2 of this work provides further analysis of *Tatar* and considers how the European Court of Human Rights could develop its reasoning in *Tatar* to expand and strengthen European human rights law.

2.3.2 Point-source pollution and the right to life under the ECHR

ECHR Article 2, the right to life, has had far fewer environmental applications than the right to privacy, but the relative lack of case law has

³¹⁴ *Ibid*, para II(B)(h) based on Google Translate and edited for grammar.

³¹⁵ See *ibid*, paras 105–6 where the court notes that it would have considered statistical evidence had it been available.

³¹⁶ *Ibid*, para 107, 109, 112, and 122.

not prevented the European Court of Human Rights from placing serious obligations on States to ensure individuals' safety in many cases with the side effect of potentially reducing point-source pollution.

Only one case has come before the European Court that has linked man-made pollution with the right to life: *Onerildiz v Turkey*.³¹⁷ In the case, the court determined that the State could be accountable for deaths caused by an explosion at a garbage dump in part because the dump had not complied with national safety regulations.³¹⁸ The court held that the right to life imposes a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.³¹⁹ It also emphasized that this obligation is particularly relevant when it pertains to industrial activities which are dangerous by nature.³²⁰

Murillo Saldias v Spain,³²¹ and *Budayeva v Russia*,³²² also link the right to life with the environment, but these cases arise from natural disasters rather than man-made pollution.

Murillo Saldías was the first case where an individual argued that a State had failed to meet its obligations under the right to life because of a failure to protect the applicants from a natural disaster. The facts of the case illustrated how the Spanish Government had failed to prevent numerous deaths resulting from floods caused by rain. Ultimately the applicants' claims

³¹⁷ *Onerildiz v Turkey*, No 48939/99 [2004] (European Court of Human Rights).

³¹⁸ *Onerildiz v Turkey*, No 48939/99 [2004]. The Turkish authorities were aware that people were illegally living in close proximity to the dump and that the dump did not comply with national safety regulations.

³¹⁹ *Ibid* Para 71.

³²⁰ *Ibid* Para 71.

³²¹ *Murillo Saldías and Others v Spain*, No 76973/01 (28 November 2006) (European Court of Human Rights).

³²² *Budayeva and Others v Russia*, No 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (20 March 2008) (European Court of Human Rights).

were found inadmissible,³²³ but the court did not question the ability of applicants to claim that their Article 2 right had been violated by a government's failure to protect them from a natural disaster. The Spanish government had argued that the claim was inadmissible because (i) the victims had already received compensation, (ii) they had failed to exhaust national remedies, and (iii) the flood was the result of an unpredictable natural disaster.³²⁴ In its decision, the court did not comment on the application of Article 2 to natural disasters so it was unclear whether or not the State had been under any obligation.

Budayeva built on *Murillo Saldías* and clarified the obligation of States to protect human life from natural disasters. The case was based in the town of Tyrnauz, a town affected by mudslides which occurred roughly every year and were caused by natural fluctuations in the flow of nearby rivers.³²⁵ To protect the town's residents, the Russian government built a mud retention collector in 1965 and a dam in 1999.³²⁶ Soon after its completion, the dam was severely damaged and in 2000 a series of mudslides resulted in the death of eight people.³²⁷ Between the 1999 damage and the 2000 mudslides, the Russian authorities were warned about the potential risks to the townspeople, but adequate steps were not taken.

The court determined that the Russian government failed to provide adequate protection against the risk of mudslides. It stated that Article 2 places a positive obligation on States "to take regulatory measures and to adequately inform the public about any life-threatening emergency".³²⁸

³²³ *Murillo Saldías and Others v Spain*, *supra* note 321, para D(1) & D(2) the first applicant had been compensated by the State and was therefore not a victim and the remaining applicants had failed to exhaust their domestic remedies.

³²⁴ *Ibid*, s LAW (b)(i).

³²⁵ *Budayeva and Others v Russia*, *supra* note 322, paras 13–15.

³²⁶ *Ibid*, paras 16–17.

³²⁷ *Ibid*, paras 26–33 eight people were reported dead and nineteen others were reported missing.

³²⁸ *Ibid*, para 131.

Budayeva established that, given an adequately recognized risk to human life, national governments are required to protect their citizens from natural disasters.

The European Court of Human Rights has established an obligation on States to undertake practical measures to ensure the effective protection of individuals whose lives might be endangered by the inherent risks of dangerous activities.³²⁹ Under certain circumstances these obligations could be used to respond to point-source pollution problems, but few point-source pollution problems pose a real threat of loss of life.

It is important to recognize the potential utility of the ECHR right to life as part of this work in order to provide a comprehensive look at the ECHR's ability to respond to point-source pollution. That said, the ECHR right to privacy and the associated right to a healthy home environment likely provide a more accessible means for protecting the environment. *López-Ostra* established that severe pollution can create an obligation even in the absence of serious endangerment of health³³⁰ and under *Tatar* an obligation existed because of a serious and substantial risk to health.³³¹ In practice it seems likely that in circumstances where applicants could claim "a life threatening emergency" they could have pre-emptively established a State obligation using their ECHR right to privacy.

It is not unreasonable to expect that most situations which pose a risk to an applicant's life also pose a risk to their health and in many cases that risk to health existed prior to the risk to his or her life. In general, the ECHR right to privacy is a better tool for responding to point-source pollution, but right to life does provide an additional avenue for environmental protection and it

³²⁹ *Ibid*, para 132.

³³⁰ *López Ostra v Spain*, *supra* note 298 Para 51.

³³¹ *Tatar c Roumanie*, *supra* note 134, para 107 translation provided by Google Translate (the case is only available in French).

may provide an avenue for addressing climate change through the ECHR as discussed in the following Section of this work.

2.4 The ECHR and climate change

To date, neither of the European Court of Human Rights nor the ECJ has considered a case arising from the intersection of climate change and human rights. This is not to say that climate change has been ignored by their related parent institutions: the CoE and EU have both documented the impacts of climate change on human rights and both courts have emphasized the importance of general environmental protection in their decisions.

The European Court of Human Rights has not specifically mentioned climate change, but it has made multiple references to the general role of the environment in protecting human rights. Furthermore, the CoE has published a number of documents linking climate change and human rights. These documents, along with the accessibility and authority of the European Court make it a particularly attractive place to bring a claim related to climate change.

2.4.1 The Council of Europe, defining human rights, and climate change

Both the CoE's Parliamentary Assembly and Committee of Ministers have explicitly connected climate change to potential human rights violations. Unfortunately, many of the connections they draw are between climate change and a human rights that are not recognized by the ECHR and have no legal authority. These documents have not only complicated what is meant by

the term “human right,” but also exaggerate the potential for ECHR human rights law to be able to effectively respond to climate change.

The Parliamentary Assembly’s Resolution, *Challenges posed by climate change*,³³² asserts that climate change will “consign the poorest 40%... to a grim future, further jeopardising their right to life, and their access to water, to food, to good health, to gainful livelihood, and to decent housing and security.”³³³ This was echoed by the Committee of Ministers’ comment that “[c]limate change will have a direct impact on basic rights such as life, food, property, adequate housing, health and water, but it will also indirectly raise questions of equality, non-discrimination, access to information, access to justice, etc.”³³⁴ While both bodies connect substantive human rights protected under the ECHR to climate change, they confuse the issue by also connecting rights with no legal protection, such as the rights to water, food and housing.

It is important to make the distinction here between protected rights and “aspirational rights.” Advocates for using human rights law to respond to environmental challenges, in particular climate change, often conflate the human rights that have actual legal protection and “human rights” which do not have the same protection. For the purpose of this work the term “aspirational rights” is used to refer to rights that are not yet universally recognized and protected; they include the right to a healthy environment, the right to clean water, the right to health, and others.

Certainly, in the absence of legal duties, non-binding human rights rhetoric can draw attention to climate change and provide an impetus for authorities

³³² *PA Rec 1883*, *supra* note 99.

³³³ *Ibid*, para 10.

³³⁴ *Meeting of the Steering Committee for Human Rights*, Committee of Ministers(2010)4, Council of Europe (24 February 2010) [*CDDH 1077 Meeting*] Comments by the CDDH on Recommendation 1883 (2009) “The challenges posed by climate change” and on Recommendation 1885 (2009) “Drafting an additional Protocol to the European Convention on Human Rights concerning the right to a healthy environment” para 6.

to take action,³³⁵ but the focus of this work is on the ability of human rights law to address environmental issues, not the influence of human rights rhetoric. Furthermore, the Parliamentary Assembly and the Committee of Ministers have not indicated that any of the aspirational rights they connect to climate change are likely to be added to the ECHR and given explicit protection in the future. Ultimately there is no reason for this work to consider the ability of these aspirational rights to respond to climate change; the focus here is on hard ECHR law and on this basis the most relevant ECHR rights are the rights to life and privacy.

2.4.2 The ECHR right to privacy and climate change

Section 2.3.1 of this work established how the European Court of Human Rights has recently interpreted the ECHR right to privacy in ways which create a right to health, adopt the Precautionary Principle, and connect environmental health to human health.³³⁶

Combined, these factors might appear to perfectly position the court to use the Precautionary Principle to link climate change to human rights through the right to privacy, health, environmental health and the predicted impacts of climate change.

For example, one might argue that the science on climate change, specifically its potential impact on human health,³³⁷ is sufficient to invoke the Precautionary Principle using the right to privacy; i.e. “the science predicts

³³⁵ John H Knox, “Linking Human Rights and Climate Change at the United Nations” (2009) 33:2 Harvard Environmental Law Review 477 at 166.

³³⁶ *Tatar c Roumanie*, *supra* note 134; *Fadeyeva v Russia*, *supra* note 310; *Moreno Gómez v Spain*, No 4143/02 [2004] (European Court of Human Rights).

³³⁷ M L Parry et al, eds, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom: Cambridge University Press, 2007), ch 8.

that climate change will have a negative effect on people's health³³⁸ and therefore, following the Precautionary Principle,³³⁹ national governments are obligated to protect their populations by mitigating climate change". However, linking these legal concepts is difficult in practice and bringing any sort of climate change related case to the European Court of Human Rights is rife with challenges. An applicant interested in using the ECHR to respond to climate change would also have to consider the remedies offered by the court since a climate change related victory would not necessarily result in a meaningful response to the causes or impacts of climate change.

The challenges of using ECHR privacy and property rights to respond to climate change are significant. Even under ideal circumstances, it would be difficult to use these rights to bring a strong case.

In *Öneryildiz v Turkey* and *Budayeva v Russia* two sets of applicants in similar circumstances received very different outcomes regarding their right to property under Article 1 of the First Protocol. In both cases the State failed to protect the lives and property of people for whom the State had an obligation to protect. In *Öneryildiz* the State operated a garbage dump where a landslide occurred that killed the applicant's relatives and engulfing the applicant's dwelling.³⁴⁰ In *Budayeva* the State's failure to maintain a dam allowed a series of mudslides to severely damage the town of Tyrnauz and kill eight people.³⁴¹ In its review of the applicant's Article 1 of the First Protocol claim in *Budayeva*, the European Court of Human Rights distinguished itself from its previous decision in *Öneryildiz*. In *Öneryildiz* the State was found to be under an obligation to do everything in its power to protect the applicant's property interest and the State's failure to do so

³³⁸ *Ibid.*

³³⁹ As established in *Tatar c Roumanie*, *supra* note 134.

³⁴⁰ *Oneryildiz v Turkey*, *supra* note 317, paras 18, 23.

³⁴¹ *Budayeva and Others v Russia*, *supra* note 322, paras 26–33.

resulted in a violation of the applicant's right.³⁴² In contrast, the court determined in *Budayeva* that the Russia was not under the same obligation, specifically because the hazard was not "of a man-made nature".³⁴³ The court drew a distinction between the positive obligations placed on States in relation to the right to life and the right to property:

While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives.³⁴⁴

The basis for the court's distinction was the difference between events occurring "under the responsibility of public authorities" and "natural disasters".

While the impacts of anthropogenic climate change can be seen as resulting from greenhouse gas emissions that are under the responsibility of public authorities, it seems more likely that the European Court of Human Rights will perceive them as natural disasters as they relate to the right to property. The court referred to the situation in *Öneriyildiz* as a dangerous activity of a man-made nature³⁴⁵ and it is easy to see how an obligation can be established in the vicinity of a waste treatment facility. In contrast, many of the activities which contribute to climate change are not inherently dangerous and the

³⁴² *Öneriyildiz v Turkey*, *supra* note 317, paras 135–38.

³⁴³ *Budayeva and Others v Russia*, *supra* note 322 at 174–5.

³⁴⁴ *Ibid*, para 175.

³⁴⁵ *Ibid*, paras 173–4.

court may be more likely to treat its impacts as natural disasters rather than liken them to the situation in *Öneryildiz*. In both *Budayeva* and *Öneryildiz* the State was aware of the risks posed to the applicants.

Russia was aware of the risk posed by mudslides yet the court distinguished the impacts of a natural disaster from a man-made hazard. On this basis it seems unlikely that the predictability of climate change's impacts will have an effect on an applicant's claim under Article 1 of the First Protocol. States may be aware of the potential risks of climate change, but the activities that cause climate change, even if hazardous, are difficult to connect to specific climate change impacts. Section 2.3.4 of this work discusses how an applicant may be able to use *Budayeva* to invoke a right to life claim relating to climate change, but pursuing a property right claim seems unlikely.

Under certain circumstances an applicant may be able to bring a climate change related claim based on their right to privacy, specifically if an impact of climate change poses a serious and substantial risk to their health. Under *Tatar* the existence of a serious and substantial risk to the health establishes a positive obligation on the State to take reasonable and appropriate measures to protect their private life and health.³⁴⁶ While impacts of anthropogenic climate change are certainly capable of posing serious risks to peoples' health, it seems unlikely that the European Court of Human Rights will apply the right to privacy to the impacts of climate change.

Claims based on the ECHR rights to privacy and property face a number of obstacles. Primary among them are the caveats added to these rights which allow them to be limited if it is in the public interest,³⁴⁷ or for the economic well-being of the country.³⁴⁸ While there is strong evidence that, in the long-term, unmitigated climate change is not in the best economic or social

³⁴⁶ *Tatar c Roumanie*, *supra* note 134, para 107.

³⁴⁷ *ECHR*, *supra* note 140 Article 1 of the First Protocol.

³⁴⁸ *Ibid* Article 8(2).

interest,³⁴⁹ nations can make short-term gains by exploiting the low-cost, high carbon fuels, which cause climate change, but can facilitate economic growth.

There are limits on how heavily a nation can rely on an economic argument as a basis for infringing upon an individual's rights. In *Fadeyeva*, Russia argued that the steel plant was necessary to the region's economy and therefore justified a violation of the resident's right to privacy.³⁵⁰ The court agreed that the steel plant was important for the regional economy, but on the facts of the case, determined that the government had failed to strike a fair balance between the applicant's interests and society's.³⁵¹ The plant in question was the largest iron smelter in Russia and employed 60,000 people. The smelter caused the air quality around the applicant's home to be particularly poor with the levels of dust, carbon disulphide, and formaldehyde being many time higher than the official "maximum permissible level" established by the Russian government.³⁵² The applicant could not establish a causal link between the environmental pollution and her personal health,³⁵³ but it was established that the environmental situation in the area caused a general increase in the morbidity rate of the city's residents.³⁵⁴ The court concluded that, even if it were the case that the pollution did not cause any quantifiable harm to the applicant's health, it inevitably made the applicant more vulnerable to various illnesses and it adversely affected her quality of life at home.³⁵⁵

The court chose to balance the rights of the applicant against the economic interests of a national industry and a regional economy in such a way as to

³⁴⁹ See Nicholas Herbert Stern & Great Britain Treasury, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007).

³⁵⁰ *Fadeyeva v Russia*, *supra* note 310.

³⁵¹ *Ibid*, para 101.

³⁵² *Ibid*, para 83.

³⁵³ *Ibid*, para 80.

³⁵⁴ *Ibid*, para 85.

³⁵⁵ *Ibid*, para 88.

prioritize the right of the individual. In a theoretical climate change case, the court may similarly need to balance the national economy against individual property or privacy right, but there is reason to believe that there is a significant difference between the situation in *Fadeyeva* and a potential climate change case. In *Fadeyeva*, the applicant could be appeased by simply relocating her from the pollution zone.³⁵⁶ Depending on the scope of the damage caused by climate change it may be more difficult/costly to relocate a large affected population.

There are two other challenges facing a climate change claim: causation and preventability. The UN's Office of the High Commissioner for Human Rights acknowledges that it is nearly impossible to connect historical GHG emissions to any specific climate change impact.³⁵⁷ On this basis, it becomes very difficult to prove in court that the damage suffered by an applicant was the result of climate change. Ultimately, this shortcoming could be overcome either by developments in the science which persuasively link emissions to specific events or a change in the way the law recognizes causation. While science and law are constantly developing, establishing legal causation remains a real challenge for any current climate change case before the European Court of Human Rights.

Global climate change is caused by the cumulative greenhouse gas emissions from every nation: no country is uniquely responsible and no country has zero emissions. The role of multiple actors in causing climate change makes it very difficult to link a single State's emissions to climate change and then to a specific impact that damages an applicant's property or violates their right to privacy. The European Court of Human Rights has considered cases with

³⁵⁶ *Ibid*, para 57 The applicant sought relocation in the case she previously brought before the Russian Supreme Court .

³⁵⁷ *Report of the Office of the High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, A/HRC/10/61 UN Human Rights Council, 15 January 2009 [*Report on Climate Change and Human Rights*], para 70.

multiple actors and cumulative effect and it has tended to divide responsibility between actors, rather than absolve all actors of responsibility.

The court has considered numerous cases arising from damage attributable to multiple actors, but it has not established a clear mechanism for attributing liability.³⁵⁸ Rather than define a clear policy, the court has preferred a flexible approach stating:

It is not the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.³⁵⁹

This gives the court considerable discretion in the way it resolves such cases, but it does little to provide legal certainty.

Some indication of how the European Court of Human Rights might deal with the combined contributions to climate change may come from the existing case law involving multiple actors, but the details of these cases differ greatly from any potential climate change case. None of the existing case law deals with environmental issues and the court has yet to consider a situation where one or more of the multiple actors are nations not party to the ECHR.

³⁵⁸ Maarten den Heijer, "Shared Responsibility Before The European Court of Human Rights" (2013) 60:3 *Netherlands International Law Review* 411 at 438.

³⁵⁹ *Varnava and others v Turkey*, [2009] (Applications nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (European Court of Human Rights), para 224.

In the leading case *Ilaşcu*,³⁶⁰ Russia and Moldova were both found to have violated the applicant’s rights to torture³⁶¹ and liberty.³⁶² The court awarded pecuniary and non-pecuniary damages and divided financial responsibility between the two nations based on its determination of the severity of each nation’s breach.³⁶³

In “multiple actors” cases the European Court of Human Rights tends to isolate the distinct acts which contribute to an injury and, even where injury is indivisible, divide responsibility based on the magnitude of each nation’s violation.³⁶⁴ While it has yet to consider a multiple actor case arising from property rights, if the court were to employ such a strategy in the case of climate change it is unlikely to have the desired outcome for an applicant.

If the European Court of Human Rights was to follow its general decision-making trend and apply it to a climate change case there is a good chance that respondent nation(s) would only be held accountable for the portion of the damage corresponding to that nation’s contribution to global GHG emissions.

The division of climate change liability based on GHG emissions would certainly produce an unsatisfactory judgment for an applicant as he or she could only hope to recover a small fraction of their losses. Individually, each party to the ECHR is responsible for a very small contribution to global greenhouse gas emissions. In 2010 Russia had the highest individual contribution of only 5.2% of global emissions.³⁶⁵ As such, a successful claim against Russia might only result in compensation for 5.2% of the applicant’s

³⁶⁰ *Ilaşcu and others v Moldova and Russia*, [2004] (Applications no 48787/99) (European Court of Human Rights).

³⁶¹ *ECHR*, *supra* note 140 Article 3.

³⁶² *Ibid* Article 5.

³⁶³ *Ilaşcu*, *supra* note 360, paras 484–90.

³⁶⁴ *den Heijer*, *supra* note 358 at 416; see *Ilaşcu*, *supra* note 360; *Rantsev v Cyprus and Russia*, No 25965/04 (7 January 2010) (European Court of Human Rights).

³⁶⁵ *CAIT Climate Data Explorer* (Washington, DC: World Resources Institute, 2015).

damages. Even if a successful claim was brought simultaneously against all parties to the ECHR this would still only amount to a small fraction of the damages since, in 2010 the ECHR nations combined accounted for less than 20% of global GHG emissions.³⁶⁶

This is not to say that the European Court of Human Rights would necessarily divide compensation by proportional contribution. The court established in *Ilascu* that it would not commit itself to dividing responsibility based on proportion of damages; rather it has committed itself to the principle of “equity”. In response to a climate change related rights violation, the court could determine that an equitable outcome places full financial responsibility on a single nation thereby allowing an applicant to receive full compensation for his or her damages. In this best case scenario, an applicant might overcome the challenges of causation and establish damage which cannot be justified for economic or social reasons, and having established a rights violation, might receive financial compensation. However, even then, there still remains a lingering question: what is the goal of an applicant bringing a climate change case to the European Court of Human Rights?

If an applicant were to bring a case for their own personal satisfaction, simply aiming to attain financial compensation for his or her loss, then under the right circumstances, it might be possible to do so using the ECHR. A successful ECHR case could also signal to States that there is a potential liability associated with a failure to address climate change and it may influence increased national action. However, applicants who seek a means of legally compelling States to prevent or adapt to climate change may be disappointed.

³⁶⁶ *Ibid.*

2.4.3 Limitations on using the European Court of Human Rights to mitigate climate change

Section 2.4.2 of this work showed how, under ideal circumstances, an applicant may be able to bring a successful claim under the ECHR arising from the impacts of climate change. Unfortunately, the ECHR is incapable of providing applicants with a means to force States to engage in efforts to mitigate or prevent of climate change. At best, the ECHR may be able to help provide a level of relief to some of those impacted by its effects.

As a regional document, the ECHR is incapable of adequately responding to a global problem such as climate change. Even if all parties to the ECHR were obligated to eliminate their greenhouse gas emissions, it would account for less than 20% of the global total. The UN's Special Rapporteur on human rights and the environment has argued that human rights can encourage States to engage in broader international efforts and establish a global agreement to reduce global emissions,³⁶⁷ but (a) the EU has already taken a lead role in international climate change negotiations, and (b) State sovereignty allows nations to determine their own balance of issues such as public health, climate change, greenhouse gas emissions, pollution, and economics – irrespective of European pressures. In the end, the ECHR and its member states are incapable of forcing non-members to take action to prevent climate change. ECHR member states can try to promote climate change mitigation, but there is no guarantee of success.

Furthermore, even if the European Court of Human Rights were to determine that a party to the ECHR violated an applicant's human rights by failing to limit emissions, the court is unable to compel the State to subsequently reduce those emissions. The authority of the court is limited to

³⁶⁷ Knox, *supra* note 335 at 196.

determining if a State's actions comply with the ECHR; the court can award damages to successful applicants,³⁶⁸ but "it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention."³⁶⁹ This means that a rights violation arising from climate change could be resolved to the satisfaction of the court simply by payment of financial compensation.

A State held responsible for damage, or potential damage, due to climate change would almost certainly look for the lowest cost means of absolving themselves from existing and future responsibility. In situations where there are limited applicants, this will almost certainly be in the form of paying damages or facilitating relocation; having to pay damages to a few applicants would almost certainly be less expensive than implementing efforts to prevent climate change. Similarly, in a situation with the potential for a large number of applicants and massive damages, a government may still find it economically preferable to pay extensive damages, adaptation, or relocation costs rather than choosing to alter its economy by reducing GHGs. Even if a State were to prefer resolving the source of the problem, rather than just paying compensation, no European State accounts for an adequate percentage of global emissions to unilaterally prevent the progression of climate change.

The ECHR cannot force a State to reduce its emissions and even if it could, the cumulative emissions reduction of all ECHR member states is unable to halt climate change. The ECHR has little to no ability to shape international climate change policy. At best it might be useful for providing those impacted by climate change some level of compensation: Section 2.4.2 outlined how

³⁶⁸ *ECHR*, *supra* note 140 Article 41.

³⁶⁹ *Guerra and Others v Italy*, *supra* note 306, para 74.

that might be possible based on the rights to privacy and property; Section 2.4.4 looks at the potential application of the right to life.

2.4.4 The ECHR and the right to life

In *Budayeva v Russia* the European Court of Human Rights established that member states have an obligation to undertake practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks of dangerous activities.³⁷⁰ This ruling may be uniquely applicable to the risks associated with climate change because of the unusual source of the risk in that case.

In its judgement, the court determined Article 2, the right to life, places a positive obligation on States “to take regulatory measures and to adequately inform the public about any life-threatening emergency”.³⁷¹ Given an adequately established risk to human life, States are required to protect their citizens from natural disasters. This may have opened a door for climate change litigation.

Using *Budayeva*, an applicant may be able to use the right to life to bring a climate change related case to the European Court that would avoid one of the main challenges associated with many climate change cases: establishing causation. When evoking the rights to privacy and property, an applicant must show that the State was responsible for the damage in question. If climate change is the cause of a property violation, then the applicant traditionally needs to show that the State caused the climate change which in turn caused the damage. The practical challenge of establishing causation in

³⁷⁰ *Budayeva and Others v Russia*, *supra* note 322, para 132.

³⁷¹ *Ibid*, para 131.

regard to climate change is generally considered the biggest challenge facing a successful climate change case.³⁷²

Budayeva shows that a State can be responsible for an Article 2 violation caused by predictable natural phenomena. There is no need to show that the event that caused the damage was caused by a State's action. Instead, an applicant need only show that there was a known risk and that the State did not take adequate measures to mitigate it. In this way, States could be obligated to protect individuals from the impacts of climate change even if the State has not contributed to climate change itself.

Unfortunately, in conjunction with this broad obligation to protect human life from potential risks, the court granted States a wide margin of appreciation in how they meet this obligation.³⁷³ States have especially broad discretion when risks arise from meteorological events beyond human control.³⁷⁴ The European Court of Human Rights has made it clear that it will not place authorities under an impossible or disproportionate burden that fails to take into account operational choices and priorities of resources.³⁷⁵ The strength of this obligation is also dependent on the imminence of the natural hazard, its identifiability, its frequency, and if it affects an area developed for human habitation or use.³⁷⁶ Therefore, while an obligation exists, the lengths to which a State must go to meet it vary greatly depending on the nature of the particular risk.

³⁷² Sara C Aminzadeh, "Moral Imperative: The Human Rights Implications of Climate Change, A" (2006) 30 *Hastings Int'l & Comp L Rev* 231 at 233; Bradford C Mank, "Standing and Global Warming: Is Injury to All Injury to None" (2005) 35 *Env'tl L* 1 at 6; Siobhan McInerney-Lankford, "Climate Change and Human Rights: An Introduction to Legal Issues" (2009) 33 *Harv Env'tl L Rev* 431 at 433; Edward Cameron, "Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach" (2009) 38 *Ga J Int'l & Comp L* 673 at 706.

³⁷³ *Budayeva and Others v Russia*, *supra* note 322, para 135.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*, para 137.

In *Budayeva*, the risk was that mudslides would potentially kill residents of the town of Tyrnauz. The risk was known and the Russian authorities attempted to mitigate the risk by building a dam. In 2000 the dam was in disrepair and it failed to protect the townspeople. In its decision, the court considered a variety of protection options open to the Russian government and found that the authorities took almost no steps to protect citizens: the authorities ignored recommendations to implement a warning system for impending mudslides;³⁷⁷ they failed to adequately inform the population once an evacuation order was put into effect;³⁷⁸ and they failed to maintain the dam, the only risk reducing measure they had put into effect.³⁷⁹ The court concluded: “in exercising their discretion as to the choice of measures required to comply with their positive obligation, the authorities ended up by [sic] taking no measures at all up to the day of the disaster”.³⁸⁰

In *Budayeva* the Russian authorities were incapable of preventing mudslides and it was not reasonable to reasonably relocate the town. While a functional dam might have been the best way to provide protection to Tyrnauz’s residents, it appears that the court would have considered the State’s obligation fulfilled if it had undertaken one or more of the less ambitious actions such as providing an early warning system. On this basis, the European Court of Human Rights is likely to similarly grant a State a wide range of options to comply with any obligation to protect lives at risks from the impacts of climate change.

While climate change is projected to have a wide array of environmental impacts, few pose an obvious and immediate risk to human life. Increased temperatures leading to heat waves and crop failures could cause loss of life, but it would be difficult to associate a death during a heat wave to a State’s

³⁷⁷ *Ibid*, para 154.

³⁷⁸ *Ibid*, para 153.

³⁷⁹ *Ibid*, para 156.

³⁸⁰ *Ibid*.

failure to meet its Article 2 obligation. Even if heat waves were predictable, severe and recurring – so as to make them a serious and predictable risk to life – a State would likely fulfill its obligation under *Budayeva* by implementing relatively simple measures to protect human life.

The European Human Rights Court will not impose an impossible or disproportionate burden on States. During a heat wave capable of significantly endangering human life, an obligation to guarantee the protection of all human life is disproportionate, if not impossible. A national authority would likely meet its Article 2 obligation under *Budayeva* through campaigns informing the public of the best ways to protect themselves from the heat.³⁸¹

In the case of a crop failure due to climate change or, taken to its most extreme, a famine, it would only be a very irresponsible government that fails to meet an Article 2 obligation. A widespread famine would be a major challenge for any government, immediately placing them under a heavy burden. If a governing authority rejected aid, grossly or intentionally mismanaged relief, ignored the problem, or in some other way failed to act in the best interests of its citizens, the court might find a violation of Article 2. However, such circumstances are difficult to imagine. During a famine, where citizens' lives were at risk, any reasonable government would be expected to take some action to protect its citizens. As long as the government in question took action in good faith, even if people were to die in the famine, the court is likely to determine that the State complied with its obligation to take positive action.

While *Budayeva* establishes that a national authority is required to protect its citizens from the risk of death from natural disasters, *Budayeva* was itself an extreme case of government inaction in face of a clear risk. Mudslides

³⁸¹ In *ibid*, paras 155–6 the court appears to say that a functional early warning system could have been sufficient for meeting their obligation.

were known to be common and very dangerous, so much so that the authorities built a dam. The dam was not maintained and no other protections were in place. While the ruling might allow a climate change case to be brought without an applicant having to prove that the authorities caused climate change, a successful case would still have to illustrate that the risk was significant, known, and importantly, not addressed by local authorities. One hopes that in situations where the impacts of climate change risk human life and are known in advance, States will act in the best interests of their citizens and an applicant would not have to invoke the Article 2 obligation under *Budayeva*.

Ultimately, the preceding analysis has shown that the ECHR has a limited capacity to respond to climate change. It will be difficult to bring any climate change related case to the European Court of Human Rights. Cases based on the rights to privacy and property will have to overcome the challenge of proving causation and the complexity of multiple actors. Cases based on the right to life will have to overcome establishing that risks to life were foreseeable yet ignored. Under either set of circumstances, an applicant will be unable to compel States to actually address the causes of climate change and have little to no hope of slowing the progress of climate change using the ECHR. The best case scenario is that an applicant receives compensation for losses due to climate change, certainly this would not be an insignificant victory for an applicant who has suffered damage, but it means that the ECHR is not the right avenue for those wishing to actually slow or reverse the progress of global climate change.

2.5 The ECHR and ecosystem conservation

Ecosystem conservation has a decidedly different relationship to human rights than point-source pollution and climate change. The ECHR does not provide a general protection of the environment and conservation is frequently based on protecting nature for its own sake. For conservation to be most effective it cannot only occur in situations where a failure to conserve an ecosystem would place human lives or health at risk: there is value in conserving ecosystems in areas where people do not live.

While the ECHR does not formally provide a right to a protected environment or any rights particularly aimed at conservation, it is clear that the European Court of Human Rights takes conservation very seriously and there is a path to protect ecosystems under the ECHR.

In 1991, a new type of property law case was brought to the European Court of Human Rights. In *Fredin v Sweden*,³⁸² the applicants were landowners who argued that the Swedish government's order to halt their gravel pit operations violated their rights under Article 1 of the First Protocol. They argued that the State violated their property rights by removing their right to use their property as they intended. The applicants owned a gravel pit which had a complicated history of land amalgamations and property and permit transfers, the details of which are unnecessarily complex for this work. To understand the court's decision it is important to know that the applicants were initially granted their license in 1963, but they did not begin gravel extraction until 1980.³⁸³ Under a Swedish law passed in 1973, the government granted itself the authority to revoke existing permits: this authority would not enter into effect until 1983, but would apply to permits granted prior to 1973.³⁸⁴ The applicants challenged the Swedish government's decision to revoke their permit in accordance with the 1973 law. The European Court of Human Rights determined that the State's decision fell

³⁸² *Fredin v Sweden (No 1)*, No 12033/86 [1991] .

³⁸³ *Ibid* Para 15.

³⁸⁴ *Ibid* Para 35.

within the margin of appreciation or “fair balance” established in *Powell and Rayner*³⁸⁵ and it concluded that the State’s choice to favour of conservation by closing the gravel pit was a justifiable violation of the owner’s property rights.³⁸⁶

Environmental protection was again prioritized over an individual’s property rights in *Pine Valley Developments Ltd and others v Ireland*.³⁸⁷ In the case, the applicants purchased property which had been granted outline planning permission, but required subsequent approvals for ultimate development of the site.³⁸⁸ Comprehensive planning permission was refused by the County Council, granted on appeal to the High Court but then nullified by the Supreme Court. The applicants then sold the land for less than 10% of their original purchase price and brought an action against the Irish Government claiming that the Supreme Court’s decision violated Article 1 of the First Protocol.³⁸⁹ The European Court of Human Rights concluded that the Supreme Court’s decision did constitute an interference with the applicants’ rights since the initial planning permission gave the applicants a legitimate expectation of being able to carry out the proposed development.³⁹⁰ However, the court went on to say that the interference could be allowed in accordance with the second paragraph of Article 1 of the First Protocol which permits such interference if it is clearly a legitimate aim “in accordance with the general interest”.³⁹¹ The court noted that the nullification of the planning permission was for the purpose of protecting the environment which, in the court’s view, was one such legitimate aim.³⁹²

³⁸⁵ *Ibid* Para 51.

³⁸⁶ *Ibid*.

³⁸⁷ *Pine Valley Development Ltd and Others v Ireland*, No 12742/87 [1991] .

³⁸⁸ *Ibid* Para 9.

³⁸⁹ *Ibid* Para 50.

³⁹⁰ *Ibid* Para 51.

³⁹¹ *Ibid* Para 57.

³⁹² *Ibid* Para 57.

The line distinguishing acceptable government actions to protect the environment and actions which fail to properly balance individual and social goals was illustrated again by *Matos e Silva v Portugal*.³⁹³ Here, the applicants complained that government measures to establish a nature reserve, part of which encompassed the applicants' land, violated, *inter alia*, the applicants' Article 1 of Protocol No. 1 rights.³⁹⁴ The European Court of Human Rights held that the measures did amount to an interference restricting the applicants' ability to farm, fish farm, produce salt, build on the land, or sell the land.³⁹⁵ However, the court again conceded that the government's measures, which intended to protect the environment, pursued the public interest and so could have been considered a fair balance between individual and social interests.³⁹⁶ However, when the court closely considered the time the Portuguese government took to implement the nature reserve, it determined that almost no progress had been made in the 13 years since the limitations were placed on the applicants' land. On this basis the court determined that the government had failed to reach a fair balance and held the Portuguese government in violation of the applicants' rights.³⁹⁷

In *Kyrtatos v Greece*,³⁹⁸ the applicants argued that urban development near their house negatively affected their life to the point where it constituted a violation of their Article 8 right to property. The majority of the case hinged on the illegality of the development, the Greek authority's failure to act on the illegality and the resulting violation of the applicants' Article 6(1) right to trial within a reasonable time. The European Court of Human Rights also considered the applicants' claim with respect to Article 8. The court held that, while the urban development did do significant damage to the environment,

³⁹³ *Matos e Silva Lda and Others v Portugal*, Reports 1996-IV; 12 EHRR 391 [1996] .

³⁹⁴ *Ibid* Para 54.

³⁹⁵ *Ibid* Para 79.

³⁹⁶ *Ibid* Para 88.

³⁹⁷ *Ibid* Para 92.

³⁹⁸ *Kyrtatos v Greece*, No 41666/98 [2003] .

including reducing the scenic beauty of the area, it did not have a harmful effect on the applicants' private or family life. It was simply a general deterioration of the environment and therefore was not covered by Article 8.³⁹⁹ *Krytatos v Greece* appeared to shut the door on cases dealing with pure environmental damage, a reversal of cases such as *Fredin* and *Pine Valley* which placed value on pure environmental protection. At the time, it could have been said that a government's action to protect the environment, such as that in *Fredin* and *Pine Valley* could override an individual's property rights but an individual could not argue environmental protection as part of their property right. However, the recent case of *Hamer v Belgium*⁴⁰⁰ has blurred this distinction.

In *Hamer v Belgium*, the European Court of Human Rights referred to the *Krytatos* decision and conceded that the ECHR is not specifically designed to provide general protection to the environment, but the court went on to make a strong statement about the value the ECHR places on the environment: “[f]inancial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard.”⁴⁰¹ In its judgment, the court determined that the Belgian authorities had struck a fair balance when they interfered with the applicant's Article 8 right to “possession” in favour of a purely environmental aim of preserving a forest.⁴⁰² This rationale follows *Fredin* and *Pine Valley*, prioritizing government initiatives to protect the environment over an individual's rights and in this way was not revolutionary.

The decision in *Hamer* does have a major impact on ECHR law and the relationship between environmental protection considerations and ECHR

³⁹⁹ *Ibid* Para 52.

⁴⁰⁰ *Hamer v Belgium*, No 21861/03 (27 November 2007) .

⁴⁰¹ *Ibid* Para 79.

⁴⁰² *Ibid* Para 77.

rights: environmental protection is not necessarily overridden by the right to ownership, financial imperatives, and other fundamental rights. The use of the phrase “financial imperative” is important as it denotes something more than a “financial interest” thereby giving the environment a theoretically higher level of protection. Although the court has yet to elaborate on which other fundamental rights can also be overridden by environmental protection, it has made it obvious that environmental protection can be prioritized over the right to property as well as other human rights.

In *Hamer*, the court also noted that the prioritization of environmental protection over human rights was not dependent on domestic legislation. It said that environmental protection can be given priority “in particular when the State has legislated in this regard,” but it did not say that legislation was necessary. The implication is that even in the absence of State legislation, environmental protection considerations can take precedence over both fundamental rights and economic imperatives. This should open the door to individuals such as the applicants in *Krytatos*, to argue that, even in the absence of legislation, environmental protection should take priority over development.

Although the ECHR does not provide an explicit right to environmental protection, the European Court of Human Rights has made it clear through its jurisprudence that it will prioritize conservation over established human rights. *Hamer* implies that the court is willing to do this even in situations where the State lacks conservation legislation. The court will have to expand on its decision on *Hamer* in order to provide applicants with a better understanding of which rights can be overridden by environmental protection, but even without elaboration *Hamer* adds strength to the idea that the European Court of Human Rights is on the verge of significantly expanding environmental protection through the ECHR. This potential expansion is discussed in detail in Section 4.4.2 of this work.

2.6 The CFREU and the environment

The comparatively recent entry into force of the CFREU means that it does not have the volume and depth of established case law of the ECHR and the ECJ has yet to considered any cases dealing with point-source pollution, climate change, or conservation. This somewhat restricts an analysis of the CFREU's ability to resolve environmental challenges and therefore any discussion of the potential ability of the CFREU to provide environmental protection will necessarily be more speculative and less grounded in established case law.

Sections 2.2.2 and 2.2.3 of this work discussed the development of human rights under the ECJ and that court's relationship with the ECHR and the CFREU. Prior to the entry into effect of the CFREU, the ECJ had shown a reasonable willingness to consider the ECHR and decisions of the European Court of Human Rights when adjudicating on human rights issues, but with its own human rights document the ECJ has since shifted away from the ECHR.⁴⁰³ Some have speculated that the ECJ's rejection of the Draft Accession Agreement was done in part to allow the ECJ to distinguish its human rights jurisprudence from that of the European Court of Human Rights⁴⁰⁴ and therefore (i) it may be unwise to expect that the ECJ will interpret the CFREU in the same way as the European Court of Human Rights has interpreted the ECHR and (ii) the ECJ may offer new and unique opportunities for progressive environmental litigation.

There are two means by which the CFREU might be used to respond to point-source pollution. The first might be through the CFREU's specific right to

⁴⁰³ De Búrca, *supra* note 285 at 174–5.

⁴⁰⁴ Lazowski & Wessel, *supra* note 276 at 190.

environmental protection⁴⁰⁵ – a right not contained in the ECHR. The other could be through the same sorts of protections provided by the ECHR: specifically under the rights to life, privacy and health.

The CFREU is textually very similar to the ECHR, but whereas the ECHR does not mention “the environment” and efforts to include a reference have so far failed,⁴⁰⁶ the CFREU does provide a right to environmental protection in Article 37.

2.6.1 Point-source pollution and CFREU Article 37

CFREU Article 37, the right to environmental protection, states that:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principles of sustainable development.

While this right is arguably preferable to no right to environmental protection, the loose language of the right illustrates the “significant challenges” the drafters encountered when defining the right during the CFREU’s negotiations.⁴⁰⁷ The result is that Article 37 is a principle, rather than a subjective right and it cannot be invoked directly by individuals.⁴⁰⁸ Article 37 only applies when authorities fail to meet its principles when

⁴⁰⁵ *CFREU*, *supra* note 141 Article 37.

⁴⁰⁶ See Section 7.1 of this work.

⁴⁰⁷ Richard Bellamy & Justus Schönlaue, “The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights” in Claudio Corradetti, ed, *Philosophical Dimensions of Human Rights* (Springer Netherlands, 2012) 231 at 231–252.

⁴⁰⁸ *Commission Communication on the Charter of Fundamental Rights of the European Union*, Commission of the European Communities, 13 September 2000, COM(2000) 559 final [*Communication on the CFREU*], para 25.

exercising their legislative or executive functions.⁴⁰⁹ A stronger right could not attain the necessary consensus during the drafting.⁴¹⁰

While the CFREU initially seems progressive for its inclusion of an environmental right, the right is essentially empty as it does not give applicants the ability to bring a claim based on environmental degradation. In order to invoke Article 37, it would have to be shown that EU legislators failed to integrate a high level of environmental protection into their policies.⁴¹¹ There may be some room for debate as to what constitutes a “high” level of environmental protection, and there may be specific policy areas where environmental protection is not prioritized above political or economic interests. However, finding enforceable instances of a failure to meet obligations under Article 37 would be difficult since it is a policy of the ECJ to give the legislative bodies of the EU a wide margin of discretion in situations involving complex political and economic choices.⁴¹²

This is not to say that the ECJ has shown an unwillingness to support environmental protection. The ECJ previously prioritized environmental protection over protection of the common market even before the CFREU came into effect.

In 2001 the ECJ referenced Article 130r(2) of the Maastricht Treaty as partial justification for finding a potentially discriminatory and restrictive

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid*, para 23.

⁴¹¹ *Ibid*, para 25 During the drafting of the CFREU, the Commission of the European Communities (now the European Commission) stated that the right cannot be invoked by individuals directly, but its principles could be enforced against the EU or national authorities in their performance of their legislative or executive functions.

⁴¹² Francis Jacobs, “The Role of the European Court of Justice in the Protection of the Environment” (2006) 18:2 J Environmental Law 185 at 195; *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] Cases C-68/94 and C-30/95 ECLI:EU:C:1998:148 (Court of Justice of the European Union), paras 223 & 224; *Tetra Laval BV v Commission of the European Communities*, [2002] Case T-5/02 ECLI:EU:T:2002:264 (Court of Justice of the European Union).

national environmental initiative⁴¹³ compatible with EU law.⁴¹⁴ Article 130r(2) stated, *inter alia*, that “Community policy on the environment shall aim at a high level of protection...” and that “[e]nvironmental protection requirements must be integrated into the definition and implementation of other Community policies”.⁴¹⁵

Article 130r(2) is no longer part of the Consolidated Treaty of the European Union, but its language is echoed and arguably strengthened by Article 37 of the CFREU. The ECJ will have opportunity to use Article 37 to justify environmental initiatives, but it will be much more difficult to use the right to obligate States to take action where environmental protection is lacking.

The European Commission has made it clear that Article 37 is “enforceable”,⁴¹⁶ but as it cannot be invoked by individuals. It appears that it is the responsibility of the European Commission to bring claims under Article 37 against States or EU bodies. Unfortunately, Article 37 is worded in such a way that violations worthy of the European Commission’s intervention seem unlikely: in general the EU does a reasonable job of integrating environmental protection into its policies.

The utility of Article 37 will more likely be useful as a means of justifying environmental legislation which would otherwise be in conflict with other EU laws or principles – just as Article 130r(2) was used in 2001. Ultimately, Article 37 was not designed to provide individuals with a strong environmental right and it is unlikely to be invoked in the ECJ as a means of obligating a State or body of the EU to reduce point-source pollution.

⁴¹³ Jacobs, *supra* note 412 at 190–3.

⁴¹⁴ *PreussenElektra AG v Schleswag AG*, [2001] Case C-379/98 ECLI:EU:C:2001:160 (Court of Justice of the European Union), para 76.

⁴¹⁵ *Treaty of Maastricht on European Union*, 1 December 1992, Official Journal of the European Union (C 191) [*Maastricht Treaty*] Article 130r.

⁴¹⁶ *Communication on the CFREU*, *supra* note 408, para 25.

2.6.2 Point-source pollution and the rights to life, privacy, property, and health

If the CFREU is to be used to reduce point-source pollution the best opportunities are likely to come from its rights to life, privacy, and property – which are nearly identical to those of the ECHR – and its unique right to health.

The CFREU rights to life, privacy, and property are similar to, but distinguishable from, those found in the ECHR. In the CFREU, Article 1 establishes the right to life which differs from the ECHR right only in that it prohibits the death penalty.⁴¹⁷ CFREU Article 7 provides a right to private and family life and is worded almost identically to Article 8(1) of the ECHR. Article 17 provides a very similar right to property as Article 1 of the First Protocol, but whereas the ECHR places limits on property rights within the rights themselves,⁴¹⁸ the CFREU uses Article 52 to define how all rights of the CFREU can be limited “if they are necessary and genuinely meet objectives of general interest”.⁴¹⁹

Unlike the ECHR, the CFREU has a specific right to health. Article 35 provides that “[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.” This right is akin to Article 37 so right to health only establishes guarantees pertaining to EU policies and activities and individuals are unable to invoke

⁴¹⁷ The death penalty was abolished under the ECHR by *Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, 28 April 1983, ETS No 114 [*ECHR Protocol No. 6*].

⁴¹⁸ *ECHR*, *supra* note 140 Article 8(2) and the second paragraph of Article 1 of the First Protocol.

⁴¹⁹ *CFREU*, *supra* note 141 Article 52(1).

it directly.⁴²⁰ It does not provide any protection, *per se*, to a person's health and even if a person's health deteriorates due to an EU policy they would be unable to invoke Article 35. As with the right to environmental protection, the CFREU's right to health is unlikely to provide a mechanism for responding to any type of environmental degradation or pollution.

In contrast to the CFREU's environment and health rights, the rights to life, privacy, and property are objective rights which applicants could invoke, potentially in situations of environmental damage from pollution. Unfortunately, there is insufficient ECJ case law dealing with either right to provide a real indication of the court's interpretation of either right.

Only three ECJ cases reference the right to life, but none of them substantively review the right itself.⁴²¹ Similarly, the few ECJ cases that reference the right to property provide little indication of how the court might interpret property rights as they relate to environmental damage or pollution. The ECJ has only considered the right to property and environmental protection in two cases: *Križan and Others*⁴²² and *Arcelor v Parliament and Council*,⁴²³ but they only provide limited insight into how the CFREU right to property could be applied to point-source pollution.

⁴²⁰ *Communication on the CFREU*, *supra* note 408, para 25 the Commission did not actually reference the Right to health, but as its language is identical to that of Article 37 the same principle applies. It should also be noted that Article 35 actually has two components, the first is a right to healthcare and that aspect of the right probably could be invoked by individuals.

⁴²¹ *Bundesrepublik Deutschland v Y and Z*, [2012] Case C-71/11 and C-99/11 ECLI:EU:C:2012:518 (Court of Justice of the European Union) is an asylum case; *Baris Akyüz*, [2012] Case C-467/10 ECLI:EU:C:2012:112 (Court of Justice of the European Union); *Wolfgang Hofmann v Freistaat Bayern*, [2012] Case C-419/10 ECLI:EU:C:2012:240 (Court of Justice of the European Union) are both transport cases, each case makes a very tangential reference to the right to life.

⁴²² *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, [2013] Case C-416/10 ECLI:EU:C:2013:8 (Court of Justice of the European Union).

⁴²³ *Arcelor SA v European Parliament and Council of the European Union*, [2010] Case T-16/04 ECLI:EU:T:2010:54 (Court of Justice of the European Union).

In *Križan*, the applicants argued, *inter alia*, that their fundamental property rights had been violated by a national court decision to revoke their permit to build a landfill.⁴²⁴ The Slovenian court had come to its decision because the initial permit was granted in a way which failed to follow the laws governing public participation and environmental impact assessment.⁴²⁵ The applicants argued that their fundamental right to property superseded requirements for public participation and environmental assessments established by EU law.⁴²⁶ The ECJ disagreed, stating that the CFREU property right is not absolute and can be restricted if it is in the general interest and to do so would not impair the very substance the right guaranteed.⁴²⁷ The ECJ specifically acknowledged that protection of the environment is an objective capable of justifying the restriction of property rights.⁴²⁸

In *Arcelor v Parliament and Council* the ECJ simply repeated its point in *Križan*.⁴²⁹

The ECJ has yet to consider a case where pollution has potentially violated an applicant's rights and until it does so it is difficult to predict how the court will act. Certainly there will be expectations that the ECJ would follow the decisions of the European Court of Human Rights, but the ECJ is not obligated to do so and has recently shown a willingness to distinguish itself from the other court.

One area of ECJ jurisprudence could help illustrate how the court might interpret human rights as they pertain to point-source pollution: the ECJ cases dealing with environmental protection and the EU's open market. The European Union is founded on the creation of a common market and

⁴²⁴ *Križan*, *supra* note 422, para 41.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid*, para 111.

⁴²⁷ *Ibid*, para 113.

⁴²⁸ *Ibid*, para 114.

⁴²⁹ *Arcelor SA*, *supra* note 423, para 153.

therefore any instances where the ECJ is willing to prioritize environmental protection over protecting the market may be indicative of the ECJ's overall support of environmental protection. *Walloon Waste*,⁴³⁰ *Dusseldorp*,⁴³¹ and *Aher-Waggon*,⁴³² are three cases where the ECJ illustrated its willingness to prioritize environmental protection over the free movement of goods within the EU.

Francis Jacobs, the Advocate General in *Dusseldorp* and *Aher-Waggon*, has written about the controversy surrounding the ECJ's decisions in these cases.⁴³³ The court's analysis in these cases was not always detailed, but the decisions themselves do seem reasonable, and more importantly, they illustrate the importance the ECJ places on environmental protection.

In *Walloon Waste* a Belgian law banned the importation of waste into the Belgian region of Wallonia. The concern was that the ban violated Article 30 of the EEC,⁴³⁴ which prohibited restrictions on importation of goods between member states.⁴³⁵ The ECJ first had to establish that non-recyclable waste was a "good", which it did,⁴³⁶ and then, having determined that an Article 30 violation had occurred,⁴³⁷ it looked to see if it could be justified by then Article 36 of the EEC treaty.

Article 36 of the EEC treaty, allowed quantitative restrictions on trade if they were for, *inter alia*, the protection of human or animal life or health, as well as the preservation of plant life. The ECJ agreed with the Belgian

⁴³⁰ *Commission of the European Communities v Kingdom of Belgium*, [1992] Case C-2/90 ECLI:EU:C:1992:310 (Court of Justice of the European Union).

⁴³¹ *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, [1998] Case C-203/96 I-04075 (Court of Justice of the European Union).

⁴³² *Aher-Waggon GmbH v Bundesrepublik Deutschland*, [1998] Case C-389/96 ECLI:EU:C:1998:357 (Court of Justice of the European Union).

⁴³³ Jacobs, *supra* note 412.

⁴³⁴ The Article can now be found as Article 34 of *TEU*, *supra* note 197.

⁴³⁵ *Treaty establishing the European Economic Community*, 25 March 1957, 298 UNTS 11 [*EEC Treaty*] Article 30, currently Article 34 of; *TEU*, *supra* note 197.

⁴³⁶ *Walloon Waste*, *supra* note 430, para 47.

⁴³⁷ *Ibid*, para 48.

government that the free movement of waste constituted a threat to the environment and, as such, its restriction could be justified under Article 36 on grounds of protection of health and the environment.⁴³⁸

Dusseldorp also dealt with the transfer of waste. Here, Dutch authorities restricted the export of waste for recovery: dangerous waste could only be exported to nations with a disposal technique superior to Netherlands' or, if the Netherlands lacked necessary capacity, to nations with comparable techniques.⁴³⁹ Part of the Netherlands' rationale for the restriction was a need to provide their waste recovery industry with an adequate quantity of waste so it would have an adequate economy of scale to afford to recycle the waste in the most environmentally friendly manner.⁴⁴⁰ The ECJ seized on this aspect of the Dutch argument and determined that the object and effect of this legislation was to restrict exports and provide an economic advantage to national industry;⁴⁴¹ this made it incompatible with EU law. However, in its decision the court alluded to the fact that such a restriction could be justified on environmental grounds if it was not specifically designed to provide an economic advantage.⁴⁴²

Finally, in *Aher-Waggon*, German authorities enacted legislation which restricted the new registration of airplanes with noise levels above 69dB(A). This was a more stringent noise limit than set by the EU standard of 72dB(A) and it meant that planes which had been registered in other EU Member States could not necessarily be registered in Germany.⁴⁴³ Furthermore, because it only pertained to new registrations, many German planes registered before the legislation took effect exceeded the 69dB(A) standard,

⁴³⁸ *Ibid*, paras 50 & 51; *EEC Treaty*, *supra* note 435 Article 36; *TEU*, *supra* note 197 Article 36, allowing restrictions for protection of health and life of humans, animals and/or plants.

⁴³⁹ *Dusseldorp*, *supra* note 431, para 12.

⁴⁴⁰ *Ibid*, para 43.

⁴⁴¹ *Ibid*, para 44 in violation of ; *Maastricht Treaty*, *supra* note 415 Article 34.

⁴⁴² *Dusseldorp*, *supra* note 431, para 44.

⁴⁴³ *Aher-Waggon*, *supra* note 432, para 8.

but identical planes could not be imported into Germany from other member states.⁴⁴⁴ The ECJ noted (a) that the EU legislation only set a minimum noise standard which could be surpassed by member states,⁴⁴⁵ (b) that the German law did restrict inter-community trade,⁴⁴⁶ and (c) the restriction could be justified on the basis of protecting public health and environmental protection.⁴⁴⁷

Jacobs is critical of these three decisions and argues that, in an effort to support environmental initiatives, the ECJ avoided important analysis of the cases and oversimplified EU law. His argument begins from the *Danish Bottles*⁴⁴⁸ case, in which the ECJ established that protection of the environment was an essential objective of the EU and that it could be used to justify restrictions on the free movement of goods.⁴⁴⁹ Jacobs notes that *Danish Bottles* established “environmental protection” as distinct from the Article 36 language of “protection of human or animal life or health [and] the preservation of plant life”.⁴⁵⁰ *Danish Bottles* allowed “environmental protection” to justify trade restrictions as a “mandatory requirement”⁴⁵¹ and as such, it could only be used where restrictions are (a) applied to domestic and imported products without distinction (non-discriminatory); (b) necessary in order to satisfy one of the “mandatory requirements”; and (c) proportionate to the aim in view.⁴⁵²

In his criticism of *Walloon Waste*, Jacobs relies on the language of the last paragraph of the ECJ’s decision:

⁴⁴⁴ *Ibid*, para 10.

⁴⁴⁵ *Ibid*, para 15.

⁴⁴⁶ *Ibid*, para 18.

⁴⁴⁷ *Ibid*, para 19.

⁴⁴⁸ *Commission of the European Communities v Kingdom of Denmark*, [1988] Case 302/86 ECLI:EU:C:1988:421 (Court of Justice of the European Union).

⁴⁴⁹ *Ibid*, para 8.

⁴⁵⁰ Jacobs, *supra* note 412 at 188.

⁴⁵¹ See *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] Case C-120/78 ECLI:EU:C:1979:42 (Court of Justice of the European Union).

⁴⁵² *Danish Bottles*, *supra* note 448, para 6.

Thus, where free movement of waste constitutes a threat to the environment, the adoption of temporary measures, such as those at issue in the present case, is not prohibited by the directives in question nor is it contrary to the rules of the Treaty.⁴⁵³

He argues that the language used by the court means that the ECJ must have employed the “mandatory requirement” justification to allow the trade restriction. But, he argues, the trade restriction created in *Walloon Waste* was discriminatory and that the court’s methods of finding it non-discriminatory were unconvincing.⁴⁵⁴ As such, the mandatory requirement justification should not apply, (the first requirement set out in *Danish Bottles* is that it only applies to non-discriminatory restrictions) so Jacobs concludes that the ECJ improperly applied the law in order to favour an environmental initiative.⁴⁵⁵

With regard to *Dusseldorp*, Jacobs points out that the court again considers the potential use of mandatory requirements to justify a discriminatory restriction of exports.⁴⁵⁶ While the court ultimately determined that the export restriction was too connected to economic principles, it did state that the measure might be justified by a mandatory requirement.⁴⁵⁷ However, the court does not appear to even consider if the measure is discriminatory or not – Jacobs argues that it is discriminatory – and therefore the court has implicitly stated that “in the case of the mandatory requirement of environmental protection, the discriminatory nature of the measures is of no relevance.”⁴⁵⁸

⁴⁵³ *Walloon Waste*, *supra* note 430, paras 50 & 51.

⁴⁵⁴ Jacobs, *supra* note 412 at 189.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid* at 190.

⁴⁵⁷ *Dusseldorp*, *supra* note 431, para 43 the court uses the term “imperative requirement” rather than “mandatory requirement”, but it is clear that they give it the same meaning.

⁴⁵⁸ Jacobs, *supra* note 412 at 190.

Finally, on *Aher-Waggon*, Jacobs again argues that the ECJ justified a discriminatory measure by using the mandatory requirement for environmental protection.⁴⁵⁹ The measure, in his opinion, directly discriminates between domestic aircraft and imported aircraft,⁴⁶⁰ but in their decision the ECJ determined that the measure could be justified without considering whether or not it was discriminatory. The ECJ simply states that the legislation at issue restricts intra-Community trade,⁴⁶¹ but that it can be justified by considerations of public health and environmental protection.⁴⁶² The only other thing the ECJ takes into account when assessing the measure is whether or not it is proportionate to the objectives pursued and that those objectives are not attainable by measures less restrictive to trade.⁴⁶³

Jacobs' analysis of these three cases is logical. In all three cases the ECJ appears to bend its own rules pertaining to "mandatory requirements" in order to find trade-restrictive, yet environment beneficial, measures compliant with EU rules. Jacobs summarizes his position on these cases with mixed opinions: while he supports the environmental initiatives, he criticises the courts for failing to provide adequate legal certainty.⁴⁶⁴

Jacob's observations on these cases may be simply overlooking a tacit shift in how the ECJ deals with mandatory requirements and environmental protection. Perhaps the ECJ has decided that "environmental protection" is itself a justification for a discriminatory trade restriction. On the other hand and to Jacob's point, it would also be helpful if the court would make its rationale explicit, but at the moment and for the purpose of this work this lack of legal certainty may actually be of benefit. While it is clear that the ECJ is willing to prioritize environmental protection over trade, it is not clear

⁴⁵⁹ *Ibid* at 191.

⁴⁶⁰ *Ibid* at 190.

⁴⁶¹ *Aher-Waggon*, *supra* note 432, para 18.

⁴⁶² *Ibid*, para 19.

⁴⁶³ *Ibid*, para 20.

⁴⁶⁴ Jacobs, *supra* note 412 at 192.

exactly when and how it is prepared to do so. *Walloon Waste*, *Dusseldorp*, and *Aher-Waggon* show the ECJ bending its own rules, but not being explicit in how it goes about this. New litigation should be able to exploit this lack of clarity and expand the law, and environmental protection, until the court provides clearer parameters of the extent of the law's applicability. More importantly, the ECJ's willingness to expand the law here may be indicative of a willingness to progressively interpret human rights law where it deals with the environment.

There are many uncertainties as to how the ECJ will deal with interactions between the CFREU and point-source pollution. It could follow the European Court of Human Rights and expand the rights to privacy, property, and the right to life to provide some response to point-source pollution. It could also go further than the European Court of Human Rights and follow its tendency to give a very high priority to environmental protection. On the other hand, the ECJ could go in an entirely opposite direction and interpret the CFREU narrowly on the basis that the drafters' inclusion of the relatively weak right to environmental protection indicates their lack of intention to incorporate environmental protection into other human rights areas. Ultimately, we will only know the court's position on these issues as cases come forward.

One certain aspect of the CFREU's potential for responding to point-source pollution is its overall limited utility due to the document's limited application. The CFREU only applies to the activities of European Union institutions, and implementation of EU law by Member States.⁴⁶⁵ These limitations will limit the opportunities for the CFREU to apply to interactions of human rights and point-source pollution. While there are certainly conditions under which pollution could be attributed to an activity of an EU institution, this will likely account for a very small number of instances.

⁴⁶⁵ *CFREU*, *supra* note 141 Article 51(1).

Under the CFREU, the ECJ also has authority over human rights violations which arise from the implementation of EU law,⁴⁶⁶ but the European Court of Human Rights has also claimed competency here.⁴⁶⁷ From the perspective of a potential applicant the legal landscape in Europe is currently very interesting. Confronted with a potential human rights violation brought on by the national implementation of an EU law an applicant would first attempt to resolve the issue nationally, then at the ECJ, then at the European Court of Human Rights. Depending on the given facts, the applicant could begin this process with a reasonable expectation of how the European Court of Human Rights might rule, but due to the lack of case law they may have little idea of how the ECJ might rule. The applicant could hope for a favourable decision from the ECJ and it could provide greater environmental protection than the European Court of Human Rights. If the applicant does not receive the desired outcome in the ECJ they elevate the case to the European Court of Human Rights,⁴⁶⁸ but if the State disagreed with the ECJ's reasoning they could not similarly elevate the case. A State cannot challenge the ECJ's interpretation of human rights as long as the EU is not a party to the ECHR.

Today, the CFREU does not provide clear tools for addressing point-source pollution. The CFREU rights to health and a healthy environment are subjective rights and cannot be invoked by individuals. The rights to life, privacy, and property have the potential for being interpreted by the ECJ in the same way as they have been by the European Court of Human Rights, but the ECJ has yet to interpret or elaborate on these rights. The ECJ has illustrated a willingness to prioritize environmental protection above aspects of the European common market and this may support the notion that it will progressively interpret human right to provide environmental protection.

⁴⁶⁶ *Ibid* Article 51(1).

⁴⁶⁷ *Matthews v The United Kingdom*, *supra* note 218.

⁴⁶⁸ As the applicants did in the *Bosphorus* cases

However, the wider jurisdiction and arguably more authoritative status of the European Court of Human Rights generally makes the ECHR a more useful mechanism for addressing point-source pollution.

2.6.3 Climate change and the CFREU

Unfortunately, the CFREU provides no clear mechanism for responding to climate change. As discussed in Section 11.2, there are four rights under the CFREU which might apply to environmental issues, but the rights to health and environment cannot be invoked by individuals and are therefore difficult to apply in practice. The ECJ has illustrated a willingness to support environmental protection, but it has given no indication as to how it will interpret the rights to life, privacy, and property – specifically if they will be applied to the environment as they are under the ECHR.

Climate change certainly poses major risks for the European Union and its citizens, but it is unlikely that the European Commission would invoke either Article 35 (health) or Article 37 (environment) for an EU institution or Member State's failure to address climate change. Both articles mandate that high levels of protection be provided to both human health and environmental protection, but it will be difficult to find an EU law which relates to the causes of climate change and fails to provide protection to health or the environment. Even if such a situation were to be found, the likelihood of a successful case is small as the ECJ traditionally gives

legislators a wide discretion in situations involving complex political and economic choices.⁴⁶⁹

Furthermore, it should also be noted that the protection of the environment under Article 37 is to be “in accordance with the principles of sustainable development”. The EU’s defined sustainable development in the Consolidated Version of the Treaty of the European Union, such that “[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”.⁴⁷⁰ The need to balance economic, social, and environmental interests further weakens the potential application of Article 37 – any claim that an EU institution or Member State failed to provide a high level of environmental protection could be countered with a claim that the decision-makers were balancing the environment against the economy or social interests.

It will be difficult if not impossible to apply Article 37 to climate change. This leaves the CFREU rights to life, privacy, and property as the only potential means of using the CFREU to respond to climate change. Unfortunately, without a clear indication as to how the ECJ will interpret these specific rights, the best basis for predicting its approach to a human rights case pertaining to climate change is to look at its case law dealing with climate change even though it does not relate to human rights.

⁴⁶⁹ Jacobs, *supra* note 412 at 195; Also see *SCPA and EMC v Commission*, *supra* note 412 at 223 & 224; *Tetra Laval*, *supra* note 412, para 20; *Chalkor AE Epexergasias Metallon v European Commission*, [2010] Case T-21/05 ECLI:EU:T:2010:205 (Court of Justice of the European Union).

⁴⁷⁰ *TEU*, *supra* note 197 Article 3.

In *PreussenElektra*⁴⁷¹ the ECJ showed its willingness to prioritize an initiative aimed at mitigating climate change over a general principle of the common market. The case stemmed from a German law requiring electricity supply companies to purchase locally produced, renewably sourced, electricity at an artificially inflated rate.⁴⁷² The ECJ acknowledged that the German law conferred certain economic advantages to specific producers⁴⁷³ and the case hinged on whether or not the law's potential for harming intra-Community trade could be justified under Article 30 of the EC Treaty.⁴⁷⁴

Article 30 of the EC Treaty (now Article 36 TFEU) allows restrictions to be placed on the import and export of goods if it is justified. Justification can be based on a variety of reasons including “the protection of health and life of humans, animals or plants”.⁴⁷⁵ In its decision, the ECJ noted that “the use of renewable energy sources... is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat”.⁴⁷⁶ The court added that Article 130r(2) of the EC Treaty (now reflected in Article 37 of the CFREU) required that environmental protection be integrated into the implementation of all Community policies.⁴⁷⁷ Based on these factors, the ECJ concluded that the law in question could be justified under Article 30 of the EC Treaty.

⁴⁷¹ *PreussenElektra*, *supra* note 414.

⁴⁷² *Ibid*, paras 6–8.

⁴⁷³ *Ibid*, para 54.

⁴⁷⁴ A violation of Article – now Article 34 *Consolidated versions of the Treaty on the Functioning of the European Union*, 26 October 2012, Official Journal C 326 [TFEU] Article 34.

⁴⁷⁵ *Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community*, 24 December 2002, OJ C 325/01 [EC Treaty] Article 30.

⁴⁷⁶ *PreussenElektra*, *supra* note 414, para 73.

⁴⁷⁷ *Ibid*, para 76.

The ECJ built on its decision in *PreussenElektra* in the recent case of *Ålands vindkraft AB v Energimyndigheten*.⁴⁷⁸ Here the court again had to consider a national law which limited access to an EU Member State's electricity market with the intent of promoting renewable energy and combatting climate change. Swedish law established that electricity suppliers and certain consumers were required to purchase a specific quantity of certified renewable energy. The certification was done by the Swedish government and only electricity installations located in Sweden could be certified.⁴⁷⁹ The court acknowledged that the Swedish law had the effect of restricting imports,⁴⁸⁰ but its usefulness for protecting the environment and the life of humans, animals and plants⁴⁸¹ allowed it to be justified as protecting the environment.⁴⁸²

In *PreussenElektra* and *Ålands vindkraft*, the ECJ closely connected efforts to combat climate change with environmental protection in general and, importantly, allowed these efforts to qualify under Article 36 TFEU as a justification for restricting imports and exports between EU Member States. Unrestricted imports and exports are a fundamental principle of the European Union so anything capable of their restriction must also be of significant importance. Article 36 TFEU does not mention environmental protection as a specific justification, only “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. While climate change is certainly capable of impacting one or more

⁴⁷⁸ *Ålands vindkraft AB v Energimyndigheten*, [2014] Case C-573/12 ECLI:EU:C:2014:2037 (Court of Justice of the European Union).

⁴⁷⁹ *Ibid*, paras 11–15.

⁴⁸⁰ *Ibid*, paras 65–70.

⁴⁸¹ *Ibid*, paras 79 & 80.

⁴⁸² *Ibid*, para 119 in its decision the court also verified that the law was proportional - that it was “appropriate and necessary” for environmental protection, but a detailed analysis of this is unnecessary for the purpose of this work.

of these issues, the ECJ has yet to clarify the precise relationship between the “environmental protection” and the justification of discriminatory measures.⁴⁸³

Advocate General Bot gave opinions in both *Ålands vindkraft* and the subsequent similar case of *Essent*.⁴⁸⁴ In his *Essent* Opinion, he advocated for the ECJ to clarify the ability for environmental protection to act as a justification for measures that impede the free movement of goods.⁴⁸⁵ He noted that the “environmental protection” is not explicitly provided as a justification under Article 36 TFEU and recommended that the court provide a clear formal recognition of an applicant’s ability to potentially rely on environmental protection as a justification for discriminatory measures.⁴⁸⁶

The court did not provide clarity in *Essent* and has yet to do so in any other case.⁴⁸⁷ While this reduces legal certainty, it allows EU Member States to legislate with a focus on combating climate change, confident that the ECJ appears to be broadly sympathetic to the idea that reducing greenhouse gas emissions can be a justification for otherwise discriminatory measures.

There is no clear path for an applicant to use the ECJ to oblige a State to either engage in point-source pollution reduction or climate change prevention, but the ECJ has made it clear that both environmental protection and emissions reductions are priorities of the EU. National actions which prioritize environmental protection or climate change mitigation over the free movement of goods have a reasonable chance of being justified by the ECJ

⁴⁸³ Dörte Fouquet & Angela Guarrata, “Judgment of 1st July 2014 in *Ålands Vindkraft AB v. Energimyndigheten*” Renewable Energy L & Pol at 58.

⁴⁸⁴ *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, [2014] Cases C-204/13 and C-208/12 ECLI:EU:C:2014:2192 (Court of Justice of the European Union).

⁴⁸⁵ *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (Opinion of AG)*, [2014] Cases C-204/13 and C-208/12 ECLI:EU:C:2013:294 (Court of Justice of the European Union), para 92.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Fouquet & Guarrata, *supra* note 483 at 58.

and the ECJ has left itself space to further interpret the role of environmental protection. The ECJ has shown a tendency to focus on environmental protection in spite of EU law, just as the European Court of Human Rights has facilitated conservation in spite of explicit human rights.

With respect to conservation, the ECJ has yet to consider a case where conservation intersects with human rights, but there is reason to believe that the ECJ could also prioritize environmental protection over explicit CFREU rights.

2.6.4 The EU and ecosystem conservation

While conservation is not explicitly provided for by the CFREU, it is possible that conservation could be prioritized above explicit human rights protections, similar to the practice of the European Court of Human Rights. In *Hamer* it became clear that conservation could be prioritized over certain fundamental ECHR rights, including the right to property.⁴⁸⁸ Article 52 of the CFREU allows limitations to be placed on any right “if they are necessary and genuinely meet objectives of general interest recognized by the Union”.⁴⁸⁹ At the same time, the European Commission and ECJ have made it clear that conservation is a high priority for the EU.

Two EU Directives provide “the cornerstone for Europe’s nature conservation policy”,⁴⁹⁰ the Birds Directive⁴⁹¹ and the Habitats Directive.⁴⁹² The ECJ has

⁴⁸⁸ *Hamer v Belgium*, *supra* note 400 Para 79.

⁴⁸⁹ *CFREU*, *supra* note 141 Article 52(1).

⁴⁹⁰ European Commission, *Natura 2000 Conservation in Partnership*, updated 2009 ed (Luxembourg: Office for Official Publications of the European Communities, 2009) at 3.

⁴⁹¹ *Directive of the European Parliament and the Council on the conservation of wild birds*, 30 November 2009, 2009/147/EC [*Birds Directive*].

⁴⁹² *Council Directive on the conservation of natural habitats and of wild fauna and flora*, 21 May 1992, 92/43/EEC [*Habitats Directive*].

considered the application of these two directives on multiple occasions and routinely prioritized conservation principles over other interests.

Article 52 of the CFREU allows limitations to be placed on all rights. The emphasis the European Commission and ECJ have placed on the conservation directives establish a strong argument for their being part of the objectives and general interests of the EU and this will likely allow the ECJ to, within reason,⁴⁹³ limit CFREU rights in favour of ecosystem conservation.

In *Lappel Bank* the ECJ held that the designation of conservation areas under the Birds Directive could not be based on economic considerations.⁴⁹⁴ The court later extended this to the Habitats Directive stating clearly that “a Member State may not take account of economic, social and cultural requirements or regional and local characteristics... when selecting and defining the boundaries of the sites”.⁴⁹⁵ The ECJ has also established a high threshold for projects which may impact sites established under the Habitats Directive such that impact assessments must be conducted “if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site”.⁴⁹⁶ This standard has been likened to the Precautionary Principle and makes it very difficult to pursue projects in the proximity of conservation areas.⁴⁹⁷

⁴⁹³ Limitations on rights allowed by Article 52(1) are also subject to the principle of proportionality.

⁴⁹⁴ *Regina v Secretary of State for the Environment*, [1996] Case C-44/95 ECLI:EU:C:1996:297 (Court of Justice of the European Union), paras 40 & 41.

⁴⁹⁵ *The Queen v Secretary of State for the Environment, Transport and the Regions*, [2000] Case C-371/99 ECLI:EU:C:2000:600 (Court of Justice of the European Union), para 25.

⁴⁹⁶ *Waddenvereniging and Vogelsbeschermingvereniging*, [2004] Case C-127/02 ECLI:EU:C:2004:482 (Court of Justice of the European Union), para 25.

⁴⁹⁷ Andrew L R Jackson, “Renewable energy vs. biodiversity: Policy conflicts and the future of nature conservation” (2011) 21:4 *Global Environmental Change* 1195 at 1198; the ECJ has said that project can only proceed if “where no reasonable scientific doubt remains as to the absence of [adverse] effects” *Waddenzee*, *supra* note 496, para 59 or if it meets the conditions of Habitats Directive Article 6(4): absence of alternative solutions and imperative reasons of overriding public interest.

The ECJ has not yet considered the balance of conservation and CFREU rights, but there is an opportunity for the court to apply Article 52 to any given right in order to prioritize conservation. Certainly this likelihood is higher in conservation areas which fall under the Birds or Habitats Directives as they are particularly important components of EU law and would certainly fall under “general interests recognized by the Union”. It is also likely that the ECJ would extend such protection to areas which are not formally protected under the Directives, but the court sees as worthy of formal classification.⁴⁹⁸

What remains unclear is how the court will respond to small-scale conservation actions which do not meet the standards for protected areas under the Birds and Habitats Directives. The focus of both Directives is on the protection of particularly vulnerable and threatened species and habitats,⁴⁹⁹ so how would the ECJ treat conservation efforts which protect a “common” ecosystem? In *Hamer*, the European Court of Human Rights did not emphasize the uniqueness of the conservation area in question and there is no reason why the ECJ would need to either. The European Commission has made it clear that conservation is a priority of the Union and the ECJ has emphasized conservation and environmental protection in multiple cases. Together these factors establish a general interest recognized by the Union and should allow conservation efforts to outweigh CFREU rights.

In conclusion, European human rights can clearly be divided between actual protection and potential protection. Rights under the ECHR are relatively well defined and, while possessing potential for development, can be clearly

⁴⁹⁸ The court has found states in violation of their obligations for failing to classify and protect areas which should be protected by the Directives, see *Commission of the European Communities v French Republic*, [2000] Case C-374/98 ECLI:EU:C:2000:670 (Court of Justice of the European Union); *Bund Naturschutz in Bayern eV, Johann Märkl and Others, Angelika Graubner-Riedelsheimer and Others, Friederike Nischwitz and Others v Freistaad Bayern*, [2006] Case C-244/05 ECLI:EU:C:2006:579 (Court of Justice of the European Union), para 37.

⁴⁹⁹ European Commission, *supra* note 490 at 4.

applied to certain environmental challenges. The ECHR rights to privacy and life provide established mechanisms to respond to point-source pollution, in particular in situations where the pollution places the applicant's health at risk. These rights, in particular the right to life, may be applicable to climate change, but using the ECHR to force States to respond to climate change will be challenging. Finally, the European Court of Human Rights has also made it clear that it places a high priority on ecosystem conservation, so much so as to prioritize it over fundamental ECHR rights. In contrast, the rights under the CFREU are hypothetical when it comes to their application to environmental problems. The ECJ has illustrated the value it places on environmental protection, but it has also illustrated a willingness to distance itself from the ECHR and the decisions of the European Court of Human Rights. The ECJ has the potential to interpret the CFREU rights to life, privacy, and property in line with the ECHR rights and there are indications that it may provide even greater environmental protection than the ECHR. The ECJ and the EU similarly place a lot of emphasis on the importance of climate change mitigation and ecosystem conservation and the ECJ could interpret the CFREU in line with these principles. At the same time, there are still many questions surrounding the actual utility of the CFREU as a means of responding to environmental challenges; these questions will only be answered as cases proceed before the ECJ.

The next chapter echoes this chapter and looks at the Inter-American human rights regime, its history, development and its ability to respond to the same environmental challenges.

Chapter 3: Inter-American Human Rights

Inter-American human rights are founded upon the world's oldest international human rights document. It provides citizens from Canada to Argentina with varying levels of human rights protection. These rights contrast greatly with European human rights in terms of their founding principles, historical application, and functional mechanisms, but these differences notwithstanding, the Inter-American human rights regime offers significant opportunities to respond to environmental challenges. This analysis will review the history of the Inter-American human rights regime, its primary documents, and its present and potential ability to respond to environmental challenges.

This work begins by outlining the development of the Organization of American States, the body responsible for creating and overseeing the Inter-American Human Rights Regime. Then it looks at two attempts within the regime to use Inter-American human rights to respond to climate change. Finally, as there is significant overlap between point-source pollution and conservation within the regime, these two topics will be considered together.

3.1 The Organization of American States

The OAS is the body which currently oversees the Inter-American Human Rights regime. Although its role is relatively easily defined today, it has a complex history rooted in conflict filled regional relations.

There are a variety of points in time which experts have cited as laying the foundation of the OAS and the Inter-American human rights regime,

including: the Congress of Panama, organized by Simon Bolivar in 1826;⁵⁰⁰ the First International Conference of American States, held in Washington DC in 1889;⁵⁰¹ the Inter-American Conference on Problems of War and Peace in 1945;⁵⁰² and the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the American Republics in 1959.⁵⁰³ However, while the creation of the Intern-American human rights regime can be traced back to multiple sources, a review of the regime's history reveals the tremendous impact the United States of America has had on all aspects of the regimes creation and function.⁵⁰⁴ Therefore any review of the modern regime must first acknowledge the role of the United States in the Americas.

On December 2nd, 1823, President James Monroe presented what would become one of the most long-standing principles of United States foreign policy: the Monroe Doctrine.⁵⁰⁵ At the heart of the doctrine was the principle that the United States would treat any European attempts at expanding or reclaiming colonies in the Western-hemisphere as an act of aggression toward

⁵⁰⁰ David A Rikard, "End to Unilateral U.S. Action in Latin America: A Call for Expanding the Role of the O.A.S., An" (1987) 14 Syracuse J Int'l L & Com 273 at 277 Rikard attributes the genesis for the Inter-American system to the principles set out by Simon Bolivar and the 1926 Congress of Panama.

⁵⁰¹ *Ibid* at 278 "The Inter-American system, as it is today, began to take shape in 1889"; The OAS traces its own history to this meeting, see: OAS, "OAS - Organization of American States: Democracy for peace, security, and development", (1 August 2009), online: <http://www.oas.org/en/about/our_history.asp>.

⁵⁰² Robert K Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights" (2009) 31:4 Human Rights Quarterly 856 at 858 Goldman cites this meeting as the one which began to shape a regional human rights regime in the wake of World War II.

⁵⁰³ Jose A Cabranes, "The Protection of Human Rights by the Organization of American States" (1968) 62:4 The American Journal of International Law 889 at 893 Cabranes argues that it was not until 1959 that the OAS truly began to create a regional human rights regime.

⁵⁰⁴ Jack Donnelly, "International human rights: regime analysis" (1986) 40:3 International Organization 599 at 625 Donnelly states that the Inter-American human rights system is "probably best understood" in terms of the influential authority of the United States over the regime.

⁵⁰⁵ *Message of President James Monroe at the commencement of the first session of the 18th Congress (The Monroe Doctrine), 12/02/1823*, Presidential Messages of the 18th Congress, ca 12/02/1823 - ca 03/03/1825 (U, 1823).

the United States itself.⁵⁰⁶ Although the doctrine did not make any reference to the United States' intention to influence the national practices of other states in the Western-hemisphere,⁵⁰⁷ the declaration has been used on many occasions as a justification for regional intervention.

The Monroe Doctrine was presented at a time when Latin America was in a particular state of flux. Spain had recently lost control over many of its former territories including Argentina,⁵⁰⁸ Gran Colombia,⁵⁰⁹ Peru,⁵¹⁰ and Mexico.⁵¹¹ In the wake of this, the United States moved to create diplomatic relations with these new governments with the intention of establishing trade. The United States was partly concerned that if it did not act Britain or France might move to seize parts of newly independent Latin America.⁵¹² There was a perceived value associated with trade opportunities presented by the newly independent Latin nations and so the Monroe Doctrine, while potentially appearing altruistic, was primarily based on economics: by preventing European intrusion in the Americas, the United States would be able to maximize its trade opportunities, and influence, in the region.⁵¹³

From the introduction of the Monroe Doctrine to the creation of the OAS, the United States frequently intervened in the affairs of its regional neighbours

⁵⁰⁶ *Ibid.* "With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintain it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States."

⁵⁰⁷ Elihu Root, "The Real Monroe Doctrine" (1914) 8:3 *The American Journal of International Law* 427 at 434.

⁵⁰⁸ Argentina became independent in 1816

⁵⁰⁹ Gran Colombia became independent in 1819 and included modern-day Colombia, Venezuela, Ecuador, Panama, Northern Peru, Western Guyana and Northwest Brazil

⁵¹⁰ Peru became independent in 1821

⁵¹¹ Mexico achieved independence in 1821

⁵¹² Mark T Gilderhus, "The Monroe Doctrine: Meanings and Implications" (2006) 36:1 *Presidential Studies Quarterly* 5 at 7.

⁵¹³ *Ibid.*

and its interventions became major concerns for Latin American States.⁵¹⁴ The USA helped Cuba gain independence from Spain,⁵¹⁵ but also forced independent Cuba to allow the US to unilaterally intervene in Cuban affairs.⁵¹⁶ The United States used this authority in 1906 to invade Cuba, create a provisional government, and retain control over the nation until 1909. In 1903, the US entered Colombian affairs when it explicitly supported Panamanian independence (Panama was previously a department of Colombia) in order to gain control over the proposed Panama canal. The United States helped Panama separate from Colombia and Panama gave the United States complete control over the Panama Canal Zone. From 1912 to 1933, United States Marines occupied Nicaragua, in part to protect US citizens during a time of political instability, but also to protect its interests in a proposed Nicaraguan canal to connect the Atlantic and Pacific oceans. The United States also occupied Haiti from 1915 to 1934 and the Dominican Republic from 1916 to 1924.

The United States would substantially change its foreign policy in 1933 with the “Good Neighbor Policy” which reversed previous international policy in favour of non-intervention, specifically: “[t]he definite policy of the United States... is one opposed to armed intervention”.⁵¹⁷ It was under the Good Neighbor Policy that the US would end its occupations in Nicaragua and Haiti and renounce its authority over Cuban affairs.

⁵¹⁴ Henry Wells, “Institutional Framework of Inter-American Relations, The” (1983) 13 Cal W Int’l LJ 223.

⁵¹⁵ *Treaty of Peace between the United States of America and the Kingdom of Spain*, 10 December 1898, General Records of the United States Government 1778-2006, RG 11 [*Treaty of Paris 1898*] which ended the Spanish-American War. In the treaty, Spain surrendered control of Cuba and ceded Puerto Rico, Guam and the Philippines to the United States.

⁵¹⁶ *Treaty Between the United States and the Republic of Cuba Embodying the Provisions Defining Their Future Relations as Contained in the Act of Congress Approved March 2, 1901*, 22 May 1903, General Records of the United States Government 1778-2006, RG 11 [*Platt Amendment*].

⁵¹⁷ Alan McPherson, *Encyclopedia of U.S. Military Interventions in Latin America* [2 volumes] (ABC-CLIO, 2013) at 236.

At the time of proposing the Good Neighbor Policy, the United States also began to increase its emphasis on increased cooperation among all Western-hemisphere nations. President Franklin Roosevelt, who established the Good Neighbor Policy, is credited with organizing the Seventh International Conference of American States in 1933.⁵¹⁸ It was here that the participants ratified the Convention on the Rights and Duties of States,⁵¹⁹ which specifies in Article 8 that “[n]o state has the right to intervene in internal or external affairs of another”. Article 8 would become known as “the principle of non-intervention” and it was repeated three years later with a protocol stating that the parties “declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the parties”.⁵²⁰

The principle of non-intervention had been favoured by Latin American nations prior to 1933 as principle primarily directed against the acts of the United States;⁵²¹ however it was not until the US adopted the Good Neighbor Policy that the principle could be integrated into Inter-American relations. The principle of non-intervention was adopted into Inter-American relations before the creation of the modern OAS and it would permeate the OAS and its human rights.

⁵¹⁸ See Charles G Fenwick, “The Inter-American Conference for the Maintenance of Peace” (1937) 31:2 *The American Journal of International Law* 201 at 201; Special to THE NEW YORK TIMES, “LEAGUE OF NATIONS IN AMERICAS URGED BY 3 LATIN STATES: This Is One of Suggestions in the 17 Favorable Replies to Roosevelt’s Parley Project. NO NEGATIVES RECEIVED Proposal Is Also Made That All the American States Become Parties to Monroe Doctrine. LEAGUE OF NATIONS IN AMERICAS URGED”, *New York Times* (13 April 1936), online: <<http://search.proquest.com.ezproxy.library.dal.ca/docview/101608923/abstract/95D93AB28DD64E34PQ/1?accountid=10406>>.

⁵¹⁹ *Montevideo Convention on the Rights and Duties of States*, Seventh International Conference of the American States (Signed 26 December 1933) [*Montevideo Convention on the Rights and Duties of States*] Article 8.

⁵²⁰ “Additional Protocol Relative to Non-Intervention” (1937) 31:2 *The American Journal of International Law* 57 Article 1.

⁵²¹ Wells, *supra* note 514 at 230.

The Ninth International Conference of American States fundamentally changed the cooperative dynamic that had existed in the Americas since the first Conference of American States. Held in 1948, it established a treaty to strengthen cooperation and solidify a cooperative organization. Prior to the Ninth Conference, all activities of the “International Union of American Republics”, (the modern OAS), were based on individual resolutions.⁵²² Multiple narrow resolutions had been preferred over a singular broad treaty and cooperation consisted only of an assortment of non-binding recommendations, which were easy to alter and append.⁵²³ This piecemeal strategy suffered from complexity, uncertainty, confusion, a vague definition of competencies, and inadequate financial support.⁵²⁴ The Ninth International Conference of the American States set out to solve these problems through reorganization.⁵²⁵

The Ninth Conference overhauled the interaction of American States by creating a singular Charter of the Organization of American States.⁵²⁶ The charter has subsequently been amended by four protocols; each requiring ratification by two-thirds of OAS members and applying only to those members which have ratified the protocols.⁵²⁷ In broad terms, the Charter is designed to (i) outline the principles by which its members will interact;⁵²⁸ (ii) establish the various organs and financing mechanisms which facilitate the principles outlined in (i);⁵²⁹ and (iii) outline various matters of the practical operation and implementation of the OAS.⁵³⁰ Many of the functional aspects of the OAS are not of major importance to this work, save one important

⁵²² Josef L Kunz, “The Bogota Charter of the Organization of American States” (1948) 42:3 The American Journal of International Law 568 at 568.

⁵²³ *Ibid.*

⁵²⁴ *Ibid* at 569.

⁵²⁵ *Ibid* at 570.

⁵²⁶ *Charter of the Organization of American States*, 13 December 1951, 119 UNTS 3 [*Bogota Charter*].

⁵²⁷ *Ibid* Article 140.

⁵²⁸ *Ibid* Articles 1-3, 10-52.

⁵²⁹ *Ibid* Articles 53 - 130.

⁵³⁰ *Ibid* Articles 131 to 146.

exception: as with previous Inter-American documents, the Charter places heavy emphasis on the principle of non-intervention:

Article 19

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Article 20

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Article 21

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

It is important to recognize the importance the Inter-American nations place on non-intervention because it has a major impact on the design and function of Inter-American human rights. The OAS initially created a regional human rights regime which lacked a clear ability to interfere with national activities, including human rights violations. The Inter-American human rights regime has since developed a relatively effectual mechanism for protecting human rights, but to do so it has had to overcome numerous challenges.

3.1.1 Human rights under the OAS

At the Ninth International Conference of American States, along with signing OAS Charter, participants also signed the American Declaration of the Rights and Duties of Man:⁵³¹ the world's first international human rights document.⁵³² Framing the document as a declaration, the participant nations were able to outwardly support regional human rights using a non-binding document that was technically incapable of holding the parties accountable. It would not be until 1960, with the creation of the Inter-American Commission on Human Rights (the IA Commission), that the OAS would establish a mechanism to provide a means of ensuring any party accountability for protecting Inter-American human rights.

The IA Commission on Human Rights was initially created as an independent institution of the OAS with a relatively limited mandate and authority.⁵³³ The purpose of the IA Commission was to promote respect, and raise awareness, of human rights within the region.⁵³⁴ To accomplish this, the IA Commission had the authority to “make recommendations to Governments of the member states in general”; “to prepare such studies and reports as it considers advisable”; and “to urge the Governments of member states to supply it with information on the measures adopted by them in matters of human rights”.⁵³⁵

The IA Commission was quick to make the most of its limited powers. At its seventh meeting, the IA Commission determined that its authority to “make recommendations to Governments of the member states in general” allowed it

⁵³¹ *American Declaration of the Rights and Duties of Man*, April 1948, 43 AJIL Supp 133 [American Declaration].

⁵³² Goldman, *supra* note 502 at 859.

⁵³³ *Statute of the Inter-American Commission on Human Rights*, 26 Sept 1960, OEA/SerL/V/II [Statute of the Inter-American Commission on Human Rights].

⁵³⁴ *Ibid* Article 9.

⁵³⁵ *Ibid* Article 9.

to make both general statements about the status of human rights in the Americas as well as general recommendations to individual each member states.⁵³⁶ Although the IA Commission was initially designed as a “study and reporting body”, a human rights crisis in the Dominican Republic in 1965 saw the IA Commission actively operating an *in situ* humanitarian operation – monitoring the rights of prisoners, investigating reported human rights abuses, and facilitating mediation between conflicting groups.⁵³⁷ This marked a shift for the IA Commission from a studying and reporting body to “one with [a] far broader action range than ever anticipated by its creators”.⁵³⁸ The OAS clearly approved of the IA Commission’s expanded actions in the Dominican Republic⁵³⁹ and its authority was formally expanded in 1965,⁵⁴⁰ 1967,⁵⁴¹ and 1979.⁵⁴²

The modern role of the IA Commission represents one tier of a multi-tiered human rights regime. While the foundation of the Inter-American human

⁵³⁶ See *Report on the work accomplished during the first session*, Inter-American Commission on Human Rights 14 March 1961, OEA/SerL/V/II1 Doc 32 [*Report on the work accomplished during the first session*]“Competence of the Commission”.

⁵³⁷ Cabranes, *supra* note 503 at 895.

⁵³⁸ *Ibid* at 896; *The Inter-American Commission on Human Rights in the Dominican Republic, June 1965 to 1966, prepared for the Hammarskjold Forum on the Dominican Crisis*, Inter-American Commission on Human Rights 2 May 1966, OEA/SerL/V/II14 Doc 13 [*The Inter-American Commission on Human Rights in the Dominican Republic, June 1965 to 1966, prepared for the Hammarskjold Forum on the Dominican Crisis*].

⁵³⁹ See “Second Special Inter-American Conference” (1966) 60:2 *The American Journal of International Law* 445 at 458 The OAS does not mention the Dominican Republic specifically but does praise the IACommHR’s work and it broadens the IACommHR’s responsibilities in an effort to promote greater respect for human rights.

⁵⁴⁰ note 539 The OAS was given the authority to examine individual petitions and the OAS requested annual reports on the current state of human rights in the Americas.

⁵⁴¹ “Organization of American States: Protocol of Amendment of Charter” (1967) 6 *ILM* 310 Article 51 elevates the IACommHR to one of “the Organs” which accomplish the purposes of the OAS and Article 112 states that the IACommHR is a consultative organ of the OAS whose structure and competence shall be determined by the (at the time unwritten) inter-American convention on human rights.

⁵⁴² *Statute of the Inter-American Commission on Human Rights*, 1 October 1979, OAS Off Rec OEA/SerP/IX02/80, Vol 1 at 88 [*Statute of the Inter-American Commission on Human Rights*].

rights regime is the American Declaration, the American Convention,⁵⁴³ and its protocols provide increasing levels of regional human rights protection with decreasing participation.

The American Convention, which opened for signature in 1969 and came into force in 1978, established binding human rights with an independent court: the IA Court. It also split human rights protection in the Americas between a relatively low level of protection applied to all OAS nations by the American Declaration and a higher level of protection provided to a subset of OAS States party to the American Convention.

The American Convention represented a major step forward in Inter-American human rights protection. The document elaborated on many of the rights present in the American Declaration, it also established new rights and a court capable of determining: if rights had been violated; if compensation was owed; and, in cases where irreparable damage had not yet occurred, if preventative measures were necessary.⁵⁴⁴ The American Convention provided individuals with a stronger mechanism for protecting their human rights as compared to the American Declaration, but this greater protection has come with a significant decrease in State participation.

The OAS has 35 member states and the IA Commission is capable of reviewing their compliance with the human rights found in the American Declaration. These reviews have no legal authority. The American Convention establishes legally binding regional human rights in the Americas, but only 25 OAS member states have ratified the Convention and of those, two have subsequently denounced it.⁵⁴⁵ Of the 23 States currently

⁵⁴³ *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [*American Convention*].

⁵⁴⁴ *Ibid* Article 63.

⁵⁴⁵ *Signatories and Ratifications to B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica"*, Accessed 17 May, 2016 [*Parties to the American Convention*] Trinidad and Tobago denounced it in 1998 and Venezuela in 2012.

committed to the American Convention, only 20 recognize the authority of the IA Court.⁵⁴⁶ This tiered protection continues with the Protocol of San Salvador. The protocol is the most recent and significant addition to the American Convention and it establishes various economic, social, cultural and environmental rights, but has only been ratified by 16 States.⁵⁴⁷ The design of Inter-American human rights is markedly distinct from the ECHR regime, when ECHR protocols enter into force they apply to all parties to the agreement, this is not the case in the Inter-American regime and the result is a regime where progressively fewer nations are willing to commit themselves to increasingly strong human rights protections.

At the broadest tier of the Inter-American regime the IA Commission has numerous powers. It can make recommendations on individual petitions that allege violations by any of the 35 OAS member states of the rights under the American Declaration.⁵⁴⁸ It can request reports from OAS member states on the measures they have taken regarding human rights;⁵⁴⁹ with national consent they can conduct *in situ* observations of human rights compliance;⁵⁵⁰ and in serious and urgent situations, the IA Commission can request that a OAS Member State adopt precautionary measures to prevent irreparable harm to individuals or the subject matter of a pending case.⁵⁵¹

⁵⁴⁶ *Ibid* Dominica, Grenada and Jamaica have all ratified the convention but have not recognized the court. Article 62 of the American Convention requires State parties to formally recognize the authority of the court in order for it to have jurisdiction.

⁵⁴⁷ *Signatories and Ratifications to A-52: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights "Protocol of San Salvador"*, Accessed 1 May 2012 [*Signatories and Ratifications to A-52: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights "Protocol of San Salvador"*].

⁵⁴⁸ *Statute of the Inter-American Commission on Human Rights*, *supra* note 542 Article 20(b).

⁵⁴⁹ *Ibid* Article 18(d).

⁵⁵⁰ *Ibid* Article 18(g).

⁵⁵¹ *Rules of Procedure of the Inter-American Commission of Human Rights*, 1 August 2013 [*Rules of Procedure*] Article 25.

Using these authorities, the IA Commission has received roughly 20,000 individual petitions⁵⁵² including many petitions pertaining to environmental issues. While the IA Commission's recommendations are not legally binding, it is clear that most OAS member states do take the IA Commission's complaints review process seriously. OAS member states (a) consistently mount strong defenses against claims that they have violated an applicant's human rights and (b) member states recently campaigned to reform the IA Commission to restrain its ability to issue its non-binding precautionary measures.⁵⁵³

At the second tier of the Inter-American Regime, 23 nations are currently parties to the American Convention. The American Convention commits a nation to human rights not provided by the American Declaration,⁵⁵⁴ but parties must explicitly recognize the authority of the IA Court if they are willing to be formally bound.⁵⁵⁵ This extra step recalls the principle of non-intervention and its role in Inter-American relations.

Where parties to the American Convention have not recognized the IA Court, individuals, groups, and registered non-governmental agencies can petition the IA Commission to review potential right violations,⁵⁵⁶ but the IA

⁵⁵² *Inter-American Commission on Human Rights Annual Report 2012*, 5 March 2013, OAS Off Rec OEA/SerL/V/II147 Doc 1 [*Inter-American Commission on Human Rights Annual Report 2012*], ch 2(A)(5) In their 2012 report the IACHR stated that it had received almost 20,000 petitions. This number includes petitions claiming violations of both the American Declaration and the ACHR.

⁵⁵³ See Clarinha Glock, "Inter-American Human Rights Reform Faces Deadline" (2013) Inter Press Service News Agency, online: <<http://www.ipsnews.net/2013/03/inter-american-human-rights-system-reform-faces-deadline/>>; *Reform of the Rules of Procedure, Policies and Practices*, Inter-American Commission on Human Rights, Resolution 1/2013 [*Reform of the Rules of Procedure, Policies and Practices*] The changes do not eliminate the authority of the Commission, but it refines its ability to use Precautionary Measures see Page 4.

⁵⁵⁴ Such as a right to humane treatment *American Convention*, *supra* note 543 Article 5.

⁵⁵⁵ *Ibid* Article 62.

⁵⁵⁶ *Ibid* Article 44.

Commission will not accept inter-party petitions without the explicit permission of the State.⁵⁵⁷

The design of the American Convention illustrates OAS member states' historic willingness to accept some intervention by allowing the Commission to review cases brought by their own citizens, but at the same time a wariness of allowing neighbouring nations to interfere in national activities. The scale of this apparent distrust between parties is illustrated by some nations having refused to grant authority to the Commission to hear inter-state cases while at the same time, recognizing the Court's authority to give binding judgments on cases brought by their own citizens.⁵⁵⁸

The 20 OAS nations which have recognized the IA Court have committed themselves to a human rights standard beyond other OAS member states as they are the only States willing to be bound by decisions of an external court. Recognizing the authority of the IA Court is arguably the most significant concession to the principle of non-intervention to be found in the Inter-American human rights regime. Unfortunately, for those groups and individuals whose rights are violated, the procedure for petitioning the court is complex and lengthy and such issues can minimize its ability to meaningfully affect national policies and practice.

Applicants cannot directly petition the IA Court, instead a petitioner brings his or her case to the IA Commission, which then reports on the facts and draws its own conclusions regarding the potential rights violations. These conclusions are given to the petitioners and defending state, but are not published.⁵⁵⁹ Then, if the matter cannot be settled privately between the

⁵⁵⁷ *Ibid* Article 45(1).

⁵⁵⁸ The Dominican Republic, El Salvador and Guatemala fall in this category. See *Signatories to the American Convention on Human Rights "Pact of San Jose, Costa Rica"*, Accessed 26 January 2015 [http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm].

⁵⁵⁹ *American Convention*, *supra* note 543 Article 50(1).

parties, either the State or the IA Commission (on behalf of the petitioner) submits the issue to the IA Court.⁵⁶⁰ If the IA Court subsequently determines that a right has been violated, the IA Court will rule that the aggrieved party is guaranteed the enjoyment of the right in question and, if appropriate, that compensation is paid to the injured party.⁵⁶¹

The IA Court has a second important role which is the power to order “provisional measures” which are akin to the IA Commission’s “precautionary measures”. Here, the IA Court may order that a State take particular actions to avoid irreparable damage to an individual.⁵⁶² If the case is already before the IA Court, provisional measures can be requested by a party or be based on the court’s own motivation.⁵⁶³ If the case has not yet reached the IA Court, provisional measures can be made at the request of the IA Commission.⁵⁶⁴

Finally, at the highest tier of the Inter-American human rights regime, 16 nations have ratified the Protocol of San Salvador.⁵⁶⁵ The protocol is particularly relevant to this work as it contains one of the most strongly worded environmental rights found in international law:

Article 11

Right to a Healthy Environment

⁵⁶⁰ *Ibid* Article 51.

⁵⁶¹ *Ibid* Article 63.

⁵⁶² *Ibid* Article 63(2); Also see Rules of Procedure of the Inter-American Court of Human Rights, published in Dinah Shelton, Paolo Wright-Carozza & Paolo G Carozza, *Regional Protection of Human Rights: Documentary Supplement* (Oxford University Press, 2013) at 344 Article 26.

⁵⁶³ Rules of Procedure of the Inter-American Court of Human Rights, in Shelton, Wright-Carozza & Carozza, *supra* note 562 at 344 Article 26(1).

⁵⁶⁴ Rules of Procedure of the Inter-American Court of Human Rights, in *ibid* Article 26(2).

⁵⁶⁵ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*, 17 November 1988, 28 ILM 161 [*San Salvador Protocol*]; The other protocol is the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OAS Off Rec OEA/SerL/V/II/82 Doc 6 Rev1 at 80 (1992) [*Protocol to the American Convention on Human Rights to Abolish the Death Penalty*], but it has nothing to do with the environment.

1. **Everyone shall have the right to live in a healthy environment and to have access to basic public services.**
2. **The States Parties shall promote the protection, preservation and improvement of the environment.**⁵⁶⁶

Unfortunately, although it appears that Article 11 gives the individual an enforceable right, individuals are incapable of bringing a claim to either the IA Commission or the IA Court because of an explicit restriction placed on Article 11.⁵⁶⁷ The IA Commission maintains the ability to publish observations and recommendations regarding the status of Article 11 in any of the 16 ratifying nations.⁵⁶⁸ In its Country Reports, the IA Commission has criticised various nations for failure to protect the environment,⁵⁶⁹ but it has not referenced Article 11 of the San Salvador protocol. It is not clear that these references are based on Article 11 and as most pertain to the environment and property of indigenous populations, they could easily be based on the right to property under the American Convention – the IA Commission is not specific.

The San Salvador Protocol also provides a right to health.⁵⁷⁰ The right expands on Article 11 of American Declaration which guarantees the preservation of an individual's health and well-being.⁵⁷¹ Unfortunately, like the right to a healthy environment, the right to health in the San Salvador Protocol cannot be invoked by individual petitioners. In contrast to the right to a healthy environment, the right to health under the San Salvador

⁵⁶⁶ *San Salvador Protocol*, *supra* note 565 Article 11.

⁵⁶⁷ *Ibid* Article 19(6) states that only violations of Articles 8(a) and 13 can give rise to individual petitions.

⁵⁶⁸ *Ibid* Article 19(7).

⁵⁶⁹ See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Guatemala: Diversity, Inequality, and Exclusion* (2015), para 13; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Honduras* (2015), para 421; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Colombia: Truth, Justice and Reparation* (2013), paras 652–55.

⁵⁷⁰ *San Salvador Protocol*, *supra* note 565 Article 10.

⁵⁷¹ *American Declaration*, *supra* note 531 Article XI.

Protocol has been referenced specifically by the IA Commission.⁵⁷² IA Commission recommendations based on the right to health are still non-binding, but they illustrate the seriousness with which the IA Commission treats the San Salvador Protocol and indicate a potential willingness of the IA Commission to directly reference the right to a healthy environment in the future. Interestingly, the right to health under the American Declaration has been used successfully to argue for greater environmental protection⁵⁷³ and although the American Convention does not provide an explicit right to health, the IA Commission declared a case admissible on the basis that pollution, which led to a public health crisis, could be characterized as violating numerous American Convention rights.⁵⁷⁴ The role of the right to health is discussed in further detail in Section 3.3.2 of this work.

The complex tiered nature of rights provided by the Inter-American human rights regime are at least in part a result of the regimes storied relationship with the principle of non-intervention.

The transition of the Inter-American regime from one founded on the principle of non-intervention to one which allows a supranational court to intervene in national activities has been lengthy and complicated. Article 19 of the OAS Charter, established that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State”.⁵⁷⁵ If this principle had been followed, it would have been impossible for a supranational human rights regime to be effective. If a State were to violate the human rights of its citizens, Article 19 would prevent other nations from taking any action.

⁵⁷² Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Paraguay* (2001), ch 5 para 44.

⁵⁷³ See *Yanomami v Brasil*, (1985), Inter-Am Comm HR, No 7615, Annual Report of the Inter-American Commission on Human Rights: 1984-85 OEA/SERL/V/II66 .

⁵⁷⁴ See *Community of San Mateo de Huanchor and its members v Peru*, Case 504/03, Report No 69/04, Inter-Am CHR, OEA/SerL/V/II122 Doc 5 rev 1 at 487 (2004) , para 66.

⁵⁷⁵ *Bogota Charter*, *supra* note 526 Article 19.

Fortunately, the OAS member states did agree to the terms of the non-binding American Declaration and then allowed the IA Commission to monitor State's human rights. This ultimately developed toward modern Inter-American regime complete with its legally binding court.

Throughout its history, the Inter-American human rights regime has been used by numerous individuals to pursue environmental initiatives. Given the tiered nature of the regime, one way to divide analysis of these environmental initiatives would be to separate cases into those which fall under American Declaration from those arising under American Convention and the Protocol of San Salvador. However, the IA Commission has shown a tendency to blur the lines between the American Declaration and the American Convention when interpreting these two documents so this is not an ideal means of structuring analysis.

Ultimately, even though tiers exist, many of the OAS member states treat the IA Commission and the IA Court as similar entities. Although decisions of the IA Commission are non-binding, OAS members clearly take their reports and recommendations very seriously.⁵⁷⁶ Member states aggressively defend their human rights records before both the IA Commission and IA Court and while a favourable recommendation from the IA Commission does not guarantee a resolution for an aggrieved party, there is evidence that decisions of the IA Court also may not always result in satisfactory resolutions in practice.⁵⁷⁷

⁵⁷⁶ This is evidenced by (a) the defenses mounted by OAS states where violations are accused; (b) how many cases are resolved by friendly settlements between private opinions being made and potential publications? – if some, evidence of value of Commission reports; and (c) efforts of OAS Member States to limit Commission's authority to grant precautionary measures

⁵⁷⁷ Fernando Basch et al, "Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Decisions, The" (2010) 12 SUR - Int'l J on Hum Rts 9 at 20 According to the report only 29% of the remedies ordered by the Court are totally satisfied.

Overall, even though there are significant differences between the IA Court and the IA Commission, dividing analysis along these lines is not as helpful as division by environmental issue. There is value in analysing similar cases as they are heard by both the IA Commission and the IA Court as it illustrates the overall approach of the Inter-American human rights regime on specific environmental challenges. This analysis begins by looking at climate change, the most complex environmental challenge we face today and one which potentially impacts a variety of rights in both the American Declaration and American Convention. Then it looks simultaneously at point-source pollution and conservation, two frequently overlapping issues within the Americas that have been found in the past to conflict with applicants' rights to property, life and health.

3.2 Inter-American human rights and climate change

Climate change is a pressing global concern, but for those living in Polar Regions temperature increases are predicted to be especially extreme and climate change impacts are expected to include elevated precipitation and the loss of Arctic sea ice⁵⁷⁸ and permafrost.⁵⁷⁹ In response to the threats posed by climate change and the inaction of specific Inter-American States, two Northern indigenous groups have independently petitioned the IA Commission claiming that government inaction has resulted in violations of their human rights. In 2005 the Sheila Watt-Cloutier petitioned the IA Commission on behalf of the Inuit people of the Arctic regions of the United

⁵⁷⁸ Intergovernmental Panel on Climate Change, *supra* note 136 at 12.

⁵⁷⁹ *Ibid* at 13.

States and Canada.⁵⁸⁰ The Inuit Petition claimed that the United States' failure to effectively limit carbon dioxide emissions caused climate change and the impacts of climate change violated a number of the Inuit's human rights. The Inuit Petition was ultimately rejected by the IA Commission, but in 2013 a second petition was filed, this time on behalf of the Arctic Athabaskan Peoples.⁵⁸¹ The pending Athabaskan Petition shares many characteristics with the Inuit Petition; however, some key distinctions may give it a better chance of success before the IA Commission.

It would be difficult to describe the outcome of the 2005 Inuit Petition as anything but a disappointment.⁵⁸² The petitioners submitted a 175 page document outlining how climate change and the United States had violated their human rights, but the IA Commission responded with a two paragraph letter which stated that "the information provided [did] not enable us to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration."⁵⁸³ Following the IA Commission's letter, the petitioners requested that the IA Commission hold a hearing on the linkages between climate change and human rights,⁵⁸⁴ but

⁵⁸⁰ Sheila Watt-Cloutier & 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" (2005), online: <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>>.

⁵⁸¹ The Arctic Peoples of the Arctic Regions of Canada and the United States, "Petition to the Inter American Commission on Human Rights Seeking Relief from Violations of the Rights of the Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada" (2013), online: <http://ablawg.ca/wp-content/uploads/2013/07/Blog_VRJ_Petition_Inter_American_Commission_on_HR_Arctic_Athabaskan_July2013.pdf>.

⁵⁸² Some authors have praised the petition for initiating dialogue and raising awareness of climate change's impact on Inuit (see Osofsky in Randall Abate & Elizabeth Ann Kronk, *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing, 2013) at 335.), but ten years after its rejection there is little indication that that Inuit Petition had any impact on United States' climate change policy or the impact of climate change on the Inuit people.

⁵⁸³ Ariel Dulitzky, "Ref.: Sheila Watt-Cloutier, et al. Petition No. P-1413-05, United States" (2006), online: <<http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>>.

⁵⁸⁴ Hari M Osofsky, "The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights" (2006) 31:2 *American Indian Law Review* 675 at 676.

while multiple groups provided testimony,⁵⁸⁵ the IA Commission never commented on the substance of the hearing.

The mystery surrounding the Inuit Petition is in large part what makes the Athabaskan Petition so compelling: it is similar yet distinct from the Inuit Petition and it will be interesting to see if it results in it receiving a more positive outcome.

Prior to delving into the substance of the two petitions it is important to recognize that if the Athabaskan Petition succeeds where the Inuit Petition failed, it can likely be attributed to: (a) the petitioners more persuasively establishing that the State violated their human rights, (b) there having been a substantive change in the way the IA Commission interprets the law since the Inuit Petition, or (c) a combination of both.

This analysis seeks to determine if either (a) or (b) is true thereby providing the Athabaskan Petition a theoretically better chance at not being rejected by the IA Commission and potentially establishing a human right violation. To do this it first compares the strengths of each petitions' claim that climate change violates their human rights to culture, property, health, and subsistence: the right violations claimed by the Athabaskan Petition.⁵⁸⁶ Second it considers how the petitions connect the actions of the respondent States to climate change highlighting the Athabaskan Petition's potentially pivotal focus on the regional impact of black carbon. Finally it concludes by summarizing the strengths and weaknesses of the Athabaskan Petition, emphasizing some of the practical challenges associated with using Inter-American human rights in this way and points to other efforts to respond to the concerns of the Athabaskan Petition.

⁵⁸⁵ Katherine King, "Climate Change and the Inuit: A Melting of Actions into a Cloudy Mess" (2008) 17 *Se Envtl LJ* 481 at 493.

⁵⁸⁶ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 61.

3.2.1 The Inuit Petition and the Athabaskan Petition

At first glance, the Inuit and Athabaskan Petitions are very similar. In both petitions the respondent nation is a member of the OAS, party to the American Declaration, but not party to the American Convention. The petitions both begin by outlining the history and culture of the affected populations. Then they discuss the causes of climate change, its impacts on the environment and how these impacts violate the petitioners' human rights. Finally, the petitioners provide justification as to why the respondent State is particularly responsible for causing climate change and therefore the violation of their human rights.

It is important to note that this analysis does not question the factual accuracy of the petitioners' claims. The Inuit Petition was rejected during the "Initial Processing" stage of the Inter-American human rights review process.⁵⁸⁷ At this stage the IA Commission only considers if (a) remedies under domestic law have been exhausted; (b) if the petition is manifestly inadmissible based on its facts; and (c) if grounds of the petition exists.⁵⁸⁸ Although the IA Commission did not provide a clear indication as to why the Inuit Petition failed, there is no reason to believe that the IA Commission would reject a petition at the initial processing stage on the basis that it did not believe the petitioners claims or on the basis that it independently checked the petitioner's science and found it lacking.

⁵⁸⁷ Rules of Procedure, Inter-American Commission on Human Rights, published in Shelton, Wright-Carozza & Carozza, *supra* note 562 at 309 Article 29.

⁵⁸⁸ *Regulation of the Inter-American Commission on Human Rights*, 8 June 1990, OAS Off Rec OEA/SerL/V/II82 Doc 6 Rev1 at 103 (1992) [*Regulation of the Inter-American Commission on Human Rights*] Article 34. Note that these regulations were updated in 2013 and inadmissibility is now determined by Articles 30-34.

The minimal justification provided by the IA Commission in its rejection of the Inuit Petition does not imply that it failed for failure to exhaust domestic remedies or because it was manifestly inadmissible and de la Rosa Jaimes' work persuasively establishes why the Athabaskan Petition is unlikely to be rejected on these bases.⁵⁸⁹ Then, assuming the Inuit Petition failed in initial processing because it failed to establish a potential rights violation, it needs to be determined if the content of the Athabaskan Petition more persuasively establishes such a violation.

3.2.3 Climate change's impact on the Inuit and Athabaskan peoples

The Inuit and Athabaskan people are two distinct indigenous groups, but their two petitions highlight their many similarities. Both groups have historically lived in Northern Canada and Alaska and trace their heritage back thousands of years.⁵⁹⁰ They are both indigenous peoples and therefore claim special guarantees for the full exercise of their rights.⁵⁹¹ Both are highly reliant on subsistence hunting and foraging – much of which depends on cold and consistent Arctic weather⁵⁹² and both believe that their culture is intrinsically tied to their traditional hunting methods, diet, territory, and the presence of Arctic snow and ice.⁵⁹³

Due to their close relationship with nature, Arctic warming causes significant challenges for both the Inuit and Athabaskan people. These challenges

⁵⁸⁹ Veronica de la Rosa Jaimes, “Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights, The” (2014) 45 Cal W Int'l LJ 213 at 239–41.

⁵⁹⁰ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 13–14; The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 24.

⁵⁹¹ See *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (2001) Inter-Am Ct HR (Ser C) No 79, paras 148–149 and Section XYZ of this work.

⁵⁹² Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 15; The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 26–7.

⁵⁹³ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 17–8; The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 27.

manifest themselves in a variety of ways which both petitions associate with specific human rights violations, specifically the rights to life, health, property, culture and subsistence. The following looks at each of these rights to independently determine if the Athabaskan Petition establishes any of these violations in a more persuasive way than the Inuit Petition.

3.2.3.1 Climate change and the right to culture

The right to culture under the American Declaration, Article XIII, provides a very narrow right:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

Although it is not immediately apparent that such a right would naturally protect the cultural practices of indigenous groups from environmental changes, both the Inuit and Athabaskan petitions place a lot of emphasis on the fact that climate change violates their right to culture.

The petitioners state that climate change has caused traditional food sources to become less reliable due to changes in animal distribution and health.⁵⁹⁴ Traditional hunting methods are losing their reliability as climate change: reduces the sea ice relied upon by Inuit hunters;⁵⁹⁵ alters the game and travel routes relied upon by the Athabaskans; and increases the severity and frequency of storms making hunting more dangerous.⁵⁹⁶

⁵⁹⁴ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 45; The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 39.

⁵⁹⁵ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 36–7.

⁵⁹⁶ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 46–7.

The inability to practice traditional hunting prevents the Inuit and Athabaskan people from passing their traditional knowledge to future generations: the Inuit are unable to teach the next generation how to make igloos when there is no suitable snow⁵⁹⁷ and Athabaskans cannot teach traditional weather prediction methods as climate change alters weather patterns.⁵⁹⁸ For both groups of petitioners, the concept of culture goes beyond their beliefs, language, and arts and includes the way they interact with the land around them:

As climate change has reduced the capacity to travel, access to game, and safety, the Inuit have been forced to modify their traditional travel and harvest methods, damaging the Inuit culture.⁵⁹⁹

Arctic Athabaskan peoples' cultural identity and spiritual beliefs are founded upon their relationship with the land and are tied to their traditional means of subsistence. Arctic Athabaskan peoples thus rely on the natural environment for their physical and cultural survival. [Climate change] directly degrades the land, snow, ice, waters and biodiversity on which the Arctic Athabaskan peoples rely for culture, property, health and subsistence.⁶⁰⁰

The petitions make numerous references to decisions of the IA Court and IA Commission which link indigenous peoples, their land, and their culture. The Inuit Petition heavily relies on the IA Commission's decisions in *Yanomami v Brazil*⁶⁰¹ and *Belize Maya*;⁶⁰² the Commission's 1997 Report on Ecuador;⁶⁰³ and the IA Court's decision in *Awes Tingni v Nicaragua*.⁶⁰⁴

⁵⁹⁷ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 43.

⁵⁹⁸ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 47–8.

⁵⁹⁹ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 48.

⁶⁰⁰ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 57.

⁶⁰¹ *Yanomami*, *supra* note 573.

⁶⁰² *Maya Indigenous communities of the Toledo district v Belize*, Report No 40/04, Case 12053, Inter-Am CHR, 12 October 2004 .

Yanomami v Brazil is the earliest case cited in the Inuit Petition. The case centered on a highway constructed to facilitate the transportation of resources extracted on one side of the territory of the Yanomami Indians to the other side. Regrettably, construction of the highway displaced Yanomami people;⁶⁰⁵ the highway facilitated the discovery of resources within Yanomami territory, leading to violence between prospectors and Indians;⁶⁰⁶ and it brought non-indigenous people and their diseases to the indigenous population. Many of Yanomami died from influenza, tuberculosis, and various sexually transmitted infections.⁶⁰⁷ The government made some effort to protect the Yanomami people, but was not effective.⁶⁰⁸

The Inuit Petition extracted major points from the IA Commission's decision in *Yanomami*: (i) international law recognizes the right of ethnic groups to special protection of the preservation of their culture⁶⁰⁹ and (ii) it is a priority of the OAS to preserve and strengthen the cultural heritage of ethnic groups and prevent the discrimination of these groups from activities which destroy their cultural identity.⁶¹⁰ The Inuit Petition did not address the fact that the IA Commission did not actually find that their cultural rights had been violated. The IA Commission determined that the Brazilian government's failure to take timely and effective measures on behalf of the Yanomami Indians violated their Article I right to life, liberty, and personal security; their Article VIII right to residence and movement; and their Article XI right

⁶⁰³ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador: Chapter 8* (1997).

⁶⁰⁴ *Awas Tingni*, *supra* note 591.

⁶⁰⁵ *Yanomami*, *supra* note 573, para 2(f).

⁶⁰⁶ *Ibid*, para 10(d).

⁶⁰⁷ *Ibid*, para 3(a).

⁶⁰⁸ *Ibid*, para 10(c).

⁶⁰⁹ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 71; *Yanomami*, *supra* note 573 Considerations Para 7.

⁶¹⁰ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 71 and 75; *Yanomami*, *supra* note 573 Considerations Para 9.

to the preservation of health and to well-being, but not their Article XIII right to culture.⁶¹¹

The IA Commission did not deny that the Yanomami culture had been impacted by the highway construction and its implications. It stated that the physical incursion, introduction of disease, forced displacement, and unauthorized exploitation of their territorial resources had “negative consequences for their culture, traditions, and costumes”,⁶¹² but this did not constitute a violation of their right to culture.

Twelve years after *Yanomami*, the IA Commission again commented on the interaction between the culture of indigenous populations and the environment the 1997 Report on Ecuador. From the report, the Inuit Petition noted that the IA Commission recognized that indigenous populations deserve special protection of their rights.⁶¹³ The petition quoted the 1997 report as saying “indigenous peoples maintain ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.”⁶¹⁴ The Inuit Petition also noted that Ecuadorian indigenous groups had focused on protecting their traditional territories because displacement or damage to those lands, “invariably leads to serious loss of life and the health and damage to cultural identity”.⁶¹⁵

The Inuit petitioners used these comments in support of their own cultural rights, but a closer review of the IA Commission’s statements in the Report on Ecuador reveals that they do not actually relate to the right to culture. Instead, the IA Commission looked at the rights of indigenous Ecuadorians:

⁶¹¹ *Yanomami*, *supra* note 573, para 1.

⁶¹² *Yanomami*, *supra* note 573 Considerations Para 2.

⁶¹³ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 71; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador: Chapter 9* (1997).

⁶¹⁴ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 73.

⁶¹⁵ Inter-American Commission on Human Rights, *supra* note 613.

to equal protection; to freedom from discrimination; to land, resources and property; and to freedom of expression, religion, association and assembly. Certainly, cultural issues are intertwined with these rights, but the IA Commission's only recommendation explicitly related to culture was limited to the provision of multilingual education that adequately reflects the culture of the tribe.⁶¹⁶ While the Report on Ecuador did mention indigenous populations, their traditional land, and their culture, the IA Commission's limited recommendations regarding cultural protection are likely indicative of a narrow interpretation of the right to culture.

Continuing chronologically, the Inuit Petition made significant reference to the 2001 IA Court case: *Awes Tingni v Nicaragua*. Here, the Nicaraguan government granted timber concessions in the tropical forest claimed by the Awes Tingni Community. The applicants' primary argument focused on the importance of the land in question to the indigenous population:

The territory... is vital for their culture, religious and family development, and for their very subsistence, as they carry out hunting activities and they fish, and they also cultivate the land. It is a right of all members of the Community to farm the land, hunt, fish, and gather medicinal plants; however, sale and privatization of those resources are forbidden.⁶¹⁷

[B]y violating the rights of a community to continue to subsist as such and to its reproduction as a unit and identity, a number of basic human rights are violated: the right to culture, to participation, to identity, to survival⁶¹⁸

The Inuit Petitioners took the arguments used in *Awes Tingni* and attempted to similarly argue that “[b]ecause of their close ties to the land and the

⁶¹⁶ *Ibid* at 10.

⁶¹⁷ *Awes Tingni*, *supra* note 591 at 20.

⁶¹⁸ *Ibid* at 26.

environment, protection of the Inuit's human rights necessarily requires protection of the Arctic environment".⁶¹⁹ The Inuit Petitioners quoted *Awasi Tingni* and argued that the case established that a failure to prevent environmental damage to indigenous lands, "caused catastrophic damage" to indigenous peoples because "the possibility of maintaining social unity, of cultural preservation and reproduction, and surviving physically and culturally, depends on the collective, communitarian existences and maintenance of the land."⁶²⁰ However, these quotes did not come from the conclusions of the IA Court in *Awasi Tingni*, but rather from the IA Court's summary of expert witness testimony.⁶²¹ Furthermore, while the applicants in *Awasi Tingni* were successful in arguing that their rights had been violated, the IA Court held that it was the applicants' rights to judicial protection and property which were violated,⁶²² not their right to culture. The IA Court may have acknowledged a link between the culture and property of indigenous peoples, but it did not establish a basis for a violation of the right to culture.

Selective excerpts from these cases would appear to support the Inuit's right to culture and its potential violation. The IA Commission has established: (i) that international law recognizes the right of ethnic groups to special protection of the preservation of their culture⁶²³ and (ii) it is a priority to preserve and strengthen the cultural heritage of ethnic groups and prevent the discrimination of these groups from activities which destroy their cultural identity.⁶²⁴ It also recognized that indigenous populations deserve special protection of their rights and that damage to traditional land "invariably

⁶¹⁹ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 72.

⁶²⁰ *Ibid.*

⁶²¹ *Awasi Tingni*, *supra* note 591 at 39.

⁶²² *Ibid* at 82.

⁶²³ *Yanomami*, *supra* note 573 Considerations Para 7.

⁶²⁴ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 71 and 75; *Yanomami*, *supra* note 573 Considerations Para 9.

leads to serious loss of life and the health and damage to cultural identity”.⁶²⁵ In *Awes Tingni v Nicaragua* the IA Court acknowledged the link between cultural integrity and indigenous communities’ lands as “the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”⁶²⁶ Finally, in *Belize Maya* the IA Commission stated “that interference with indigenous lands necessarily implicates the right to culture.”⁶²⁷

The purpose of the Inuit Petition was to persuade the IA Commission of a rights violation and it is therefore unsurprising that it took persuasive excerpts of these cases, sometimes without complete context;⁶²⁸ however, a close look reveals that none of these cases actually consider a violation of the American Declaration’s right to culture. In these cases the IA Court and the IA Commission acknowledged links among indigenous populations, their property, and their culture, but these links do not mean the applicants’ right to culture has been violated. In fact, neither the Court nor Commission has ever determined that a group’s right to culture has been violated because of environmental damages.

The Athabaskan Petition links the petitioners’ culture to their environment in a very similar way to the Inuit Petition and it fails to establish that climate change impacts Athabaskan culture in any way that is substantively

⁶²⁵ Inter-American Commission on Human Rights, *supra* note 613.

⁶²⁶ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 75; *Awes Tingni*, *supra* note 591, para 149.

⁶²⁷ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 75.

⁶²⁸ A simple example of this is a reference made by the Inuit Petition to the 1997 report on Ecuador. The petition states that in the 1997 report, “the Commission found that ‘indigenous peoples maintain ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.’” However, the complete text of the report reads “*Certain* indigenous peoples maintain ties with their traditional lands...” (emphasis added). While the difference between these two quotes is subtle, and it may be true that the Inuit people are one of one of the indigenous peoples who “maintain ties with their traditional lands” in such a way, the absolutist nature of the quote as phrased by the Inuit Petition does change its tone in such a way as to make the Inuit’s argument appear stronger than it may actually be.

different from the way it impacts Inuit culture. Because of this, if the Athabaskan Petition is to more persuasively establish a violation of their right to culture it will be due to developments in the law since 2005. The Athabaskan Petition cites four cases to tacitly illustrate how the law has developed since the Inuit Petition: *Moiwana v Suriname*,⁶²⁹ *Yakye Axa v Paraguay*,⁶³⁰ *Sawhoyamaya v Paraguay*,⁶³¹ *Saramaka v Suriname*.⁶³² Unfortunately, while all of these cases reference the impact of environmental damage on the indigenous populations' culture, once again these impacts never culminate in violations of the applicants' right to culture.

Certainly, the IA Court did not find violations of the right to culture because the American Convention does not provide a right to culture.⁶³³ This notwithstanding, the Athabaskan Petition relies on the IA Court's repeated recognition of a relationship between the petitioners' land and their culture. In *Moiwana v Suriname* it acknowledged that "in order for the culture to preserve its very identity and integrity, the Moiwana community members must maintain a fluid and multidimensional relationship with their ancestral lands".⁶³⁴ Similarly, in *Yakye Axa* the IA Court stated that "land is closely linked to [the indigenous populations'] oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connections with nature, culinary art, customary law, dress, philosophy

⁶²⁹ *Moiwana Village v Suriname*, Judgement of June 15, 2005, Inter-Am Ct HR, (Ser C) No 145 (2005) .

⁶³⁰ *Yakye Axa Indigenous Community v Paraguay*, Judgement of June 17, 2005, Inter-Am Ct HR (Ser C) No 125 (2005) .

⁶³¹ *Sawhoyamaya Indigenous Community v Paraguay*, Judgement of March 29, 2006, Inter-Am Ct HR, (Ser C) No 146 (2006) .

⁶³² *Saramaka People v Suriname*, *supra* note 139.

⁶³³ The American Convention does not provide a clear right to culture; the closest it comes to establishing cultural rights are provided by Article 16: "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports or other purposes." This could be used to support an individual or group's cultural right, if they were prevented from joining together with others who share their culture, but a right to associate with a particular culture is not the same as a right to participate and maintain traditional cultural practices.

⁶³⁴ *Moiwana Village v Suriname*, *supra* note 629, para 101.

and values”.⁶³⁵ In *Sawhoyamaxa* the IA Court recognized that indigenous people have a special relationship with their traditional lands which can be expressed by “traditional spiritual or ceremonial use or presence; settlements or sporadic cultivation; seasonal cultivation; seasonal or nomadic hunting, fishing or gathering; the use of natural resources connected to their customs; and any other factor characteristic of their culture”.⁶³⁶ Finally, in *Saramaka v Suriname* the IA Court references the idea that indigenous and tribal populations have a special relationship with their territory which “require[s] special measures under international human rights law in order to guarantee their physical and cultural survival”.⁶³⁷

The emphasis the IA Court places on the need to protect indigenous culture and property should not be misconstrued as implying that their right to culture is violated by damage to their land. In all of these cases the IA Court recognized the impacts on the petitioners’ culture as part of the foundation for finding that their property rights had been violated. Ultimately, none of these cases help establish a clear violation of the Athabaskans’ right to culture and the narrow text of Article XIII provides little indication that a right to practice a particular culture exists in the Inter-American regime. It is therefore unlikely that either the Inuit or Athabaskan Petitions establish a violation of the petitioners’ right to culture, but as previously alluded to, the Athabaskan Petition may have a reasonable claim that climate change violates their right to property.

⁶³⁵ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 62; *Yakye Axa*, *supra* note 630, para 154.

⁶³⁶ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 62; *Sawhoyamaxa*, *supra* note 631, para 131.

⁶³⁷ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 62; *Saramaka People v Suriname*, *supra* note 139, para 86.

3.2.3.2 Property rights

Arctic warming has two clear impacts which directly affect the property of both the Inuit and Athabaskan people: it reduces permafrost and it increases rainfall. Permafrost provides the physical foundation for many Inuit and Athabaskan communities as well as important public infrastructure; as it melts, land can shift damaging buildings, roads, railways, pipelines, and runways.⁶³⁸ Melting permafrost also releases the previously frozen water, which can cause flooding and cause buildings to sink into the softened ground.⁶³⁹

The increase in Arctic rainfall also impacts both the Inuit and Athabaskans, albeit in different ways. For the Inuit, the combination of melting sea ice, melting permafrost, and increased coastal rainfall induces coastal erosion: “Storm surges and erosion threaten Inuit homes, camps, communities and cultural sites.”⁶⁴⁰ For the Athabaskans, the increased rainfall combines with the water released by melting permafrost and snow to cause flash floods. Floods can be particularly severe in the winter when rainfall can facilitate snow melt and exacerbate flooding.⁶⁴¹ The Athabaskan Petition cites an event in Alaska where an entire village was destroyed by a flood brought on by a combination of heavy snowfall and record high temperatures.⁶⁴²

The Inuit and Athabaskan petitions take different approaches to establishing violations of their right to property. The Inuit Petition divides the right into two distinct issues: the right to use and enjoy their traditional lands and the right to use and enjoy their personal property. The Athabaskan Petition

⁶³⁸ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 24.

⁶³⁹ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 51.

⁶⁴⁰ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 51–2.

⁶⁴¹ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 33.

⁶⁴² *Ibid* at 33–4.

combines these issues into a singular property right. Rather than break down and compare the Inuit and Athabaskan approaches to property rights, the following only looks at the Athabaskan Petition. As with the right to culture, the Athabaskan Petition builds on the arguments and case law previously cited in the Inuit Petition and is strengthened by the legal developments that have occurred since the Inuit Petition's rejection. The Athabaskan Petition's claim does not require a major re-interpretation of the American Declaration, but does rely on the IA Commission continuing its recent practice of interpreting the American Declaration through both the American Convention and the IA Court's interpretation of the American Convention.

Recall that Canada is not a party to the American Convention so it would be unusual for the IA Commission to apply it to Canada; however, in 2004 the IA Commission explicitly used *Belize Maya*, a case based on the American Convention and decided by the IA Court, to justify its interpretation of the American Declaration's right to property.⁶⁴³ In 2008 the IA Commission elaborated on the relationship between the American Declaration and the American Convention in *Grand Chief Michael Mitchell v Canada*.⁶⁴⁴ Here, the IA Commission stated that the American Declaration should be interpreted and applied in the context of developments in the field of international human rights law, specifically the American Convention "which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration".⁶⁴⁵ The IA Commission went on to clarify "that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of principles of the Declaration".⁶⁴⁶ On this basis, it would

⁶⁴³ *Belize Maya*, *supra* note 602, para 115.

⁶⁴⁴ *Grand Chief Michael Mitchell v Canada*, Report No 61/08, Case 12435, Inter-Am CHR, 25 July 2008 .

⁶⁴⁵ *Ibid*, paras 63–64.

⁶⁴⁶ *Grand Chief Michael Mitchell v Canada*, *supra* note 644 Endnote [50].

appear the Athabaskan petitioners can reasonably expect the IA Commission to interpret the property rights of the American Declaration in the same way as the IA Court has interpreted the property rights in the American Convention.

The Athabaskan petitioners may be able to rely on the well-developed property rights established by the IA Commission and IA Court, but it should be noted that the petition does not share identical characteristics with the majority of indigenous peoples' property rights cases. Most Inter-American property cases are based on the petitioners' physical displacement or on the degradation of their land by *in situ* activities. While the Athabaskan Petition does mention of some specific instances of damage to property, the strongest aspect of the Athabaskan's property right argument is, possibly surprisingly, the impact of climate change on the Athabaskans' culture.

Rather than following previous cases that have focused on severe localized damage, such as the destruction of a forest from logging,⁶⁴⁷ or the toxic contamination of a community's aquifer,⁶⁴⁸ the Athabaskan Petition relies on a cumulative effect of various climate change impacts on their territory and the effect of these impacts on their culture.⁶⁴⁹

⁶⁴⁷ *Awas Tingni*, *supra* note 591 where 62,000 hectares of forest were designated for exploitation.

⁶⁴⁸ See Inter-American Commission on Human Rights, *supra* note 603 where 19 billion gallons of waste water containing arsenic, lead, mercury, etc., was dumped without treatment into aquifers ; and *San Mateo v Peru*, *supra* note 574 where a "toxic sludge" by-product to mining poisoned a local community with heavy metals.

⁶⁴⁹ The Athabaskan Petition does mention certain specific instances of property damage that is caused by climate change and could lead to violations of their property rights, but localized cases of damage are unlikely to address the overall problem of climate change. Where climate change is linked to a specific damage such as a flood or coastal erosion, a potential response could be singularly directed at preventing the issue by erecting protective barriers rather than by addressing the root causes of climate change. Therefore, it is in the best interest of the petition to argue that climate change impacts multiple aspects of their cultural relationship with their land and therefore the violation of their right to property can only be resolved by addressing climate change itself.

The Athabaskan petitioners can rely on the IA Commission’s decision in *Belize Maya* and IA Court’s decision in *Saramaka* to establish a violation of their right to property. From *Belize Maya* the Athabaskan Petition notes that “the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property.”⁶⁵⁰ Similarly, *Saramaka* explicitly establishes that the right to property under the American Convention protects the connection between indigenous communities and the natural resources necessary for their physical and cultural survival.⁶⁵¹ Both *Belize Maya* and *Saramaka* arose from significant localized environmental damage, but the decisions could easily be applied to the Athabaskan Petition.

The Athabaskan Petition illustrates how their ability to use and enjoy their property is impeded by the changes caused by climate change. Along with its impacts on their culture discussed previously in this work, climate change physically alters the land by, *inter alia*, drying wetlands; causing floods, forest fires, and erosion; and melting permafrost.⁶⁵²

Athabaskans’ traditional means of transport, subsistence hunting and gathering, food storage, and construction are all impacted by climate change.⁶⁵³ The Athabaskans have always been dependent on caribou for food, clothing and crafts, but climate change alters caribou habitat and poses risks to the caribou population.⁶⁵⁴ Traditional hunting methods lose their reliability as climate change alters the game migration routes relied upon by the Athabaskans⁶⁵⁵ and increases the severity and frequency of storms

⁶⁵⁰ *Belize Maya*, *supra* note 602, para 140.

⁶⁵¹ *Saramaka People v Suriname*, *supra* note 139, paras 122–3.

⁶⁵² The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 71–2.

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid* at 43–4.

⁶⁵⁵ *Ibid* at 46 Climate change has caused game to move to new regions and a reduction in the depth and predictability lake and river ice have made traditional travel routes more dangerous.

making hunting more dangerous.⁶⁵⁶ As climate change alters the land through flooding, erosion, reduced ice, and increased storms and subsistence hunting and gathering become dangerous, difficult, and ineffective, Athabaskans are forced to shift to non-traditional food sources.⁶⁵⁷

In *Saramaka* the IA Court interpreted the right to property as protecting the resources found in indigenous territories that are traditionally used for the survival of that culture's way of life.⁶⁵⁸ This should clearly apply to the Athabaskans as their traditional way of life is heavily based on subsistence hunting and gathering and climate change alters necessary natural resources they rely upon.

The Inuit Petition predated both the decisions in *Grand Chief Michael Mitchell* and *Saramaka* and these developments in the law should provide the Athabaskan Petition with an objectively stronger argument establishing how climate change violates their right to property. The only caveat to this arises from the fact that the right to property is not absolute and the IA Commission has justified its violation under certain conditions.

Under the American Declaration, all rights are limited by "the just demands of the general welfare".⁶⁵⁹ The IA Commission has clarified this to mean that human rights "are subject to limitations that take into account the rights of others and the interests of all".⁶⁶⁰ From this, there is a potential response to the Athabaskan Petition which would justify a property right violation if the particular causes of climate change were in the best interests of the general population of Canada.

⁶⁵⁶ *Ibid* at 47.

⁶⁵⁷ *Ibid* at 46–7.

⁶⁵⁸ *Saramaka People v Suriname*, *supra* note 139, paras 122–3.

⁶⁵⁹ *American Declaration*, *supra* note 531 Article XXVIII.

⁶⁶⁰ *Grand Chief Michael Mitchell v Canada*, *supra* note 644, para 82.

Unfortunately, at this point in time, there is insufficient information to discuss the strength of this argument in any meaningful way. It is difficult to speculate what sort of societal interests Canada may claim in defense of its climate change policies (although economic interests are likely to play a part). What is clear is that Canada will likely argue that a violation of property rights should be justified in the interest of society just as it successfully did in *Grand Chief Michael Mitchell*.⁶⁶¹

In *Grand Chief Michael Mitchell* the petitioners claimed that their right to culture had been violated by the Canadian government's application of customs duties on goods the petitioners purchased in the United States.⁶⁶² The petitioners argued that their traditional cultural practices include open, duty-free trade, with tribes and merchants that predate the existence of the border between the United States and Canada.⁶⁶³ In response, Canada argued (a) that trade is a general practice of all cultures and therefore the right to trade should not be considered a distinct aspect of the petitioner's culture and is therefore unworthy of protection under Article XIII.⁶⁶⁴ And (b) that the right to culture is subject to reasonable limitations such that even if a right to trade were recognized, it could be limited by reasonable taxes and tariffs if they apply to all cultures without discrimination and benefit the general public.⁶⁶⁵ Ultimately, the IA Commission determined that the right to culture could protect the trade of culturally significant goods,⁶⁶⁶ but the petitioner did not establish that the taxes and tariffs impeded trade in any way.⁶⁶⁷ Importantly, the IA Commission reaffirmed the fact that all human rights are subject to reasonable limitations and must take into account the

⁶⁶¹ *Ibid*, para 59.

⁶⁶² *Ibid* at 4.

⁶⁶³ *Ibid*, paras 25–27.

⁶⁶⁴ *Ibid*, paras 45–47.

⁶⁶⁵ *Ibid*, paras 59–60.

⁶⁶⁶ *Ibid*, para 79.

⁶⁶⁷ *Ibid*, para 81.

interest of all.⁶⁶⁸ *Grand Chief Michael Mitchell* illustrates the IA Commission's willingness to restrict human rights when it is in the best interest of society and Canada's willingness to use that argument as a justification of its actions.

Then, given the IA Commission's previous treatment of the right to property and the described relationship among Athabaskan culture, property and climate change, it seems likely that the Athabaskans have a reasonable claim to the fact that climate change violates their right to property. That said, this does not mean that Canada has violated their property right – the petition still has to establish that the Canadian government is responsible for climate change. This work analyzes the Athabaskan's claim that Canada is responsible for climate change in Section 3.2.5, but prior to that it will consider the other two rights highlighted by the Athabaskan petition: the right to health and the right to subsistence.

3.2.3.2 The rights to health and subsistence

The Athabaskan's rights to health and subsistence can easily be discussed simultaneously as they are both associated with climate change inhibiting the petitioners' ability to maintain traditional hunting and gathering practices. The petitioners claim that climate change affects their health in various ways: by changing their diet, by increasing the potential of physical harm, and by changing their environment so significantly that it affects their mental health. They also argue that their inability to practice traditional hunting and gathering violates their right to subsistence.⁶⁶⁹

⁶⁶⁸ *Ibid*, para 82.

⁶⁶⁹ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 79.

The petitioners emphasize the effect of climate change on the northern environment and ecology, in particular the changes in flora and fauna prevent the Athabaskans from pursuing their traditionally self-reliant subsistence lifestyle.⁶⁷⁰ Unfortunately for the petitioners, the American Declaration does not contain any right to subsistence. The petition attempts to argue that a right to subsistence exists based on its presence in other international human rights documents⁶⁷¹ and references made by the IA Court to the issue of subsistence,⁶⁷² but these are unlikely to be adequate foundations for the recognition of a new right.

The IA Court has referenced the role of subsistence hunting and gathering as part of both indigenous peoples' relationship with their traditional lands and as a means of protecting their health, but these references have been directly connected to violations of the petitioners' rights to property and health, not a right to subsistence. These references, even in conjunction with the presence of a right to subsistence in third-party human rights documents are unlikely to be a persuasive reason for the IA Commission to recognize a new human right to subsistence. For one, the IA Commission does not have a history of recognizing rights not found in the American Declaration and two, the Athabaskan subsistence claims can easily be addressed as part of their right to health, or potentially their right to property. Ultimately, there is no compelling reason to consider it as an independent right violation.

The petition also argues that climate change alters the Athabaskan's environment in ways which are detrimental to the Athabaskan's health: it causes actual harm and increases the risk of potential harm. First, it inhibits

⁶⁷⁰ *Ibid* at 79–82.

⁶⁷¹ Specifically *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [ICESCR] Part 1 Article 1(2); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR] Part 1 Article 1(2); *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007) [UNDRIP] Article 20.

⁶⁷² See *Xákmok Kásek Indigenous Community v Paraguay*, Judgement of August 24, 2010, Inter-Am Ct HR (Ser C) No 214 (2010) ; *Yakye Axa*, *supra* note 630.

the Athabaskan's ability to maintain their healthy traditional diet. Climate change forces game animals into new, more distant regions; reduces herd health and population; alters the distribution and variety of the flora consumed as food and medicine; and increases the dangers associated with hunting and gathering practices.⁶⁷³ Unable to maintain their traditional diet, Athabaskans shift to a less healthy diet of processed foods which increases their risk of cancer, obesity, cardiovascular disease and diabetes.⁶⁷⁴ They also claim that their health is endangered by the overall increase in average temperature associated with climate change allows new organisms to move into Athabaskan territory bringing new pathogens, including: wildlife diseases such as brain worm in deer; transferrable diseases such as Lyme disease and rabies; and food-borne contamination causing intestinal disorders and illness.⁶⁷⁵ Climate change also makes hunting and travelling more likely to result in physical harm due to; *inter alia*, severe, unpredictable weather; unstable ice; and landslides.⁶⁷⁶ Finally, The petitioners also warn that climate change could have a negative impact on mental health because of the stress caused by: unpredictable weather, destruction of culturally significant sites, and an overall loss of culture.⁶⁷⁷

To establish how the impact of climate change on the Athabaskan's health constitutes a violation of their right to health, the Athabaskan Petition relies heavily on *Yanomami* and the 1997 Report on Ecuador. The decision to cite these cases is unsurprising as they both link the right to health with environmental degradation; however, the type of harm cited in the Athabaskan Petition is a distinct from the harms suffered in the relied upon cases and the IA Commission may this significant.

⁶⁷³ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 48–9.

⁶⁷⁴ *Ibid* at 75.

⁶⁷⁵ *Ibid* at 76.

⁶⁷⁶ *Ibid* at 76–7.

⁶⁷⁷ *Ibid* at 77.

Many of the Athabaskan petitioners' references to violations of their right to health are based on increases in risk to their health rather than specific instances of harm. The Athabaskan petitioners cite increases in potential harm when travelling or hunting due to dangerous conditions⁶⁷⁸ and the increased risk of exposure to disease due to the northward migration of pathogens,⁶⁷⁹ but increased risk is very different from actual harm. In *Yanomami* and the 1997 Report on Ecuador the petitioners were subject to specific instances of violence, disease, and health problems.⁶⁸⁰ Injuries associated with Arctic hunting and travel cannot be wholly attributed to climate change as these are inherently dangerous activities – the effects of climate change may increase the potential for injury, but the IA Court and IA Commission have not given any indication that they are willing to treat incremental increases in risk to health the same as actual damage to health. Similarly, neither the IA Commission nor the IA Court has considered a case where environmental changes create a potential for new disease. The IA Commission is certainly at liberty to consider a not-yet-violated right,⁶⁸¹ but an incremental risk to health does not establish a strong basis for finding a violation of the right to health.

The Athabaskan Petition's strongest argument in support of a violation of their right to health likely arises from the impact climate change has on their diet. The petitioners argue that climate change prohibits them from maintaining their traditional subsistence diet, resulting in a measureable increase in disease.⁶⁸² An important component of this argument is that the high cost of healthy "store-bought" food prevents Athabaskan's from

⁶⁷⁸ *Ibid* at 76.

⁶⁷⁹ *Ibid*.

⁶⁸⁰ *Yanomami*, *supra* note 573; Inter-American Commission on Human Rights, *supra* note 603 at 7.

⁶⁸¹ As evidenced by its ability to grant precautionary measures.

⁶⁸² The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 75.

consuming a healthy diet in the absence of traditional food sources.⁶⁸³ Although not cited by the petition, this situation is comparable to the one in the 2010 case *Xákmok v Paraguay* in which an indigenous population was similarly restricted from pursuing traditional hunting, fishing and gathering.⁶⁸⁴ These restrictions resulted in a poor quality diet that was also limited by the population's inadequate purchasing power.⁶⁸⁵ While the American Convention does not possess a right to health, the IA Court in *Xákmok* determined that the situation constituted a violation of the group's right to life under Article 4(1) of the Convention.⁶⁸⁶

The biggest distinction between the situation in *Xákmok* and the Athabaskan Petition is that the indigenous group in *Xákmok* was physically prevented from practicing their subsistence diet,⁶⁸⁷ whereas climate change simply makes the Athabaskan subsistence diet more difficult to maintain. Ultimately, this would seem like a minor distinction as the outcome is the same: an inferior diet with associated health problems. Unfortunately for the Athabaskan Petition, it did not claim a violation of their right to life and it did not explicitly draw parallels between the violation of their rights to health and the decision in *Xákmok*. It is unlikely that the IA Commission will draw these connections for them.

Finally, the Athabaskan Petition argues that climate change will have a negative effect on the petitioners' mental health. Specifically, the petition states that "[e]lders' inability to accurately predict the weather, loss of culturally significant sites like cemeteries, more dangerous travel conditions, possibility of damage to homes, and shrinking of habitat that is vital for subsistence are all sources of cultural and psychological stress for

⁶⁸³ *Ibid* at 49.

⁶⁸⁴ *Xákmok Kásek Indigenous Community v Paraguay*, *supra* note 672, paras 74 & 75.

⁶⁸⁵ *Ibid*, para 197.

⁶⁸⁶ *Ibid*, paras 215 & 217.

⁶⁸⁷ *Ibid*, paras 74–75 The indigenous community lived on private property and the owner restricted their activities.

Athabaskan peoples”.⁶⁸⁸ The petition does not go into detail on the gravity and impact of the social and mental stress placed on the Athabaskans, but it clearly argues that this violates their health: “weather related hazards can cause social and mental stress, even trauma, for those who must relocate”.⁶⁸⁹

Pursuing a mental health claim is a novel approach by the Athabaskan Petition. The American Declaration does not mention mental health, but it does not explicitly exclude it from consideration. The American Convention does guarantee every person the right to have his physical, mental, and moral integrity respected,⁶⁹⁰ but this right is incorporated into the right to humane treatment, not the right to health, and it pertains more to the government’s treatment of detainees than it does to the general protection of mental health. In order to find an explicit reference to mental health the IA Commission would have to interpret the American Declaration using the San Salvador Protocol to the American Convention. It provides 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”.⁶⁹¹ The use of the protocol to interpret health under the American Declaration so as to include mental health is not unreasonable as it would follow the principle the IA Commission established in *Grand Chief Michael Mitchell*.⁶⁹² Unfortunately for the petitioners, even if the IA Commission were to determine that mental health was included within the American Declaration’s right to health, the right is relatively narrow. Article XI provides that:

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and

⁶⁸⁸ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 77.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *American Convention*, *supra* note 543 Article 5(1).

⁶⁹¹ *San Salvador Protocol*, *supra* note 565 Article 10(1).

⁶⁹² *Grand Chief Michael Mitchell v Canada*, *supra* note 644, paras 63–64.

medical care, to the extent permitted by public and community resources.⁶⁹³

While it would not seem unreasonable to interpret this as including protection of mental health, it would be a larger step to interpret the right as providing a general right to health as provided by the San Salvador Protocol.

In *Yanomami* the IA Commission appears to give the right to health a very broad interpretation. The IA Commission does not discuss the right in detail and it appears to simply apply the right as one which gives a general right to the preservation of health and well-being. Certainly the IA Commission could interpret the right to health in the same way for the Athabaskan petitioners and in such a situation the petitioners may have a persuasive claim that climate change violates their right to health. However, *Yanomami* was decided over thirty years ago and since then the IA Commission has shifted away from recognizing this broad right to health and has shown a tendency to subsume potential violations of the right to health in environmental cases within a broad violation of the right to property.⁶⁹⁴

Overall, it is difficult to see how the Athabaskan petition establishes a persuasive violation of their rights to health or subsistence. Certainly such a finding is possible, but it would require the IA Commission to interpret the American Declaration in creative ways or ways contrary to its recent methods. It is much more likely that if the IA Commission were to consider a potential human rights violation arising from the Athabaskan Petition it would avoid addressing the complexities associated with interpreting the right to health, the right to culture, or the right to right to subsistence, and

⁶⁹³ *American Declaration*, *supra* note 531.

⁶⁹⁴ *Belize Maya*, *supra* note 602, paras 154–6.

would combine all of these rights claims into a violation of the petitioners' right to property, exactly as it did in *Belize Maya*.⁶⁹⁵

3.2.4 The Commission's practice of combining claims

In *Belize Maya* the IA Commission stated that “the right to property under the American Declaration must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources”.⁶⁹⁶ It went on to say that “the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality” and while the IA Commission recognized that the petitioners' rights to, *inter alia*, life, health, and religious freedom,⁶⁹⁷ it did not discuss or analyse these violations independently. Instead it explicitly combined all of these claims into a broad violation their right to property.⁶⁹⁸ It seems likely that the IA Commission would do the same with the Athabaskan Petition.

The petitioners in *Belize Maya* argued that their rights were violated in ways very similar to those of the Athabaskans and the root cause of these violations was an externally induced change in their environment. *Belize Maya* was based on the effect of logging activities on important water supplies, plant, and animal life and the impacts of those activities negatively impacted the petitioners' subsistence based lifestyle, traditional cultural practices, and property rights.⁶⁹⁹

⁶⁹⁵ *Belize Maya*, *supra* note 602.

⁶⁹⁶ *Ibid*, para 115.

⁶⁹⁷ *Ibid*, para 155.

⁶⁹⁸ *Ibid*, para 156.

⁶⁹⁹ *Ibid*, para 31.

The similarities between the Mayan and Athabaskan cases are too strong to support the idea that the IA Commission would ignore its methodology in *Belize Maya* and consider each of the Athabaskans' claims individually. Even if it were to consider these Athabaskans' rights claims independently, their claims of violations of their rights to culture, health and subsistence are uncomfortably weak whereas they have a strong stand-alone property right claim. Although the Athabaskan Petition fails to establish four independent rights violations, it does create a persuasive argument that climate change impacts the Athabaskan people in a variety of ways which combined violate their right to property under the American Declaration.

The Athabaskan Petition establishes a persuasive connection between climate change and the violation of the petitioners human right to property; the following seeks to determine if the petition provides an equally strong connection between State action and climate change.

3.2.5 Black carbon emissions and Canada's role in changing the environment of the Athabaskan people

Even though both the Inuit and Athabaskan petitions deal with climate change, the choice of the Athabaskan Petition to focus on the black carbon as the cause of climate change could fundamentally alter the petitioners' argument by likening it to regional pollution rather than a global issue.

The Inuit Petition focused on the total greenhouse gas emissions of the United States emphasizing anthropogenic carbon dioxide as the primary cause of climate change.⁷⁰⁰ The Inuit Petition acknowledged that climate change is caused by global cumulative emissions, but it singled out the

⁷⁰⁰ Inuit petition pages 4 and 32

United States as the nation responsible for their human rights violations because it had: the highest emissions at the time, the largest proportion of historical global emissions, and because it failed to take adequate actions to curb emissions.⁷⁰¹ The shortcoming of this approach is that it cannot directly attribute specific emissions from the United States to the Inuit's human rights violations. Rather, the United States' emissions, while significant, can only be said to be a contributor to global climate change. In contrast, the Athabaskan Petition focuses solely on Canadian emissions of "black carbon" which, according to the petitioners, have a specific and direct effect on the environment of the Athabaskan people.

Unlike carbon dioxide emissions, which disperse widely and have a global impact, black carbon emissions in the Arctic have a specific and direct impact on Arctic warming. According to the Athabaskan Petition black carbon emissions are "short-lived" climate pollutants which remain in the atmosphere for about one week and then settle to the ground.⁷⁰² Black carbon has a two-fold impact on the climate as it acts as a greenhouse gas while in the atmosphere and it darkens the colour of the snow and ice which it falls upon, increasing their ability to absorb heat and facilitating melting.⁷⁰³ The short-lived nature of black carbon emissions means that immediate emissions reductions could reduce near-term warming in the Arctic.⁷⁰⁴

The petition does not quantify the impact of black carbon on Arctic climate change, but does describe it as "a particularly potent climate change forcer over ice and snow regions"⁷⁰⁵ and it notes that "reducing black carbon along with other short-lived climate pollutants, 'could quickly decrease positive

⁷⁰¹ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580, ch IV(D).

⁷⁰² Athabaskan petition page 9

⁷⁰³ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 16 and 18.

⁷⁰⁴ AP page 14

⁷⁰⁵ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 15.

climate forcing and hence climate warming.”⁷⁰⁶ According to the Athabaskan Petition, Canada’s black carbon emissions cause Arctic warming and, importantly, if it were not for these emissions, there would be less Arctic warming.

As with the Inuit Petition, the Athabaskan Petition connects the actions of the State with the emissions that cause climate change by citing the nation’s failure to regulate and limit those emissions. In this way, the Inuit and Athabaskan Petitions are quite similar. The Inuit Petition argued that United States climate policy made no effort to reduce overall emissions. At the time of the petition, US climate change policy focused only on reducing greenhouse gas intensity⁷⁰⁷ and lacked any policies which would ensure overall emissions reductions.⁷⁰⁸ The Inuit Petition argued that the United States was responsible for climate change because of its historical GHG emissions and its inaction on reducing current and future emissions.

Similarly, the Athabaskan Petition attributes Canada’s responsibility for black carbon emissions with ineffectual regulation. According to the petitioners, the primary sources of black carbon in Canada are: diesel engines, residential heating stoves, agricultural and forest fires and certain industrial facilities.⁷⁰⁹ The existing regulations of black carbon emissions are complex and shared between federal and provincial jurisdictions, and the Athabaskan Petition argues that these regulations are unsatisfactory. It also highlights the fact that Canadian black carbon emissions are expected to increase by 26 per cent above 2005 levels by 2030.⁷¹⁰

⁷⁰⁶ *Ibid* at 18.

⁷⁰⁷ Watt-Cloutier & Inuit Circumpolar Conference, *supra* note 580 at 105. Intensity targets do not guarantee a reduction in gross emissions.

⁷⁰⁸ *Ibid* at 106 US initiatives also pursued research into emissions reducing technology, but as the Inuit Petition points out, these efforts could not guarantee emissions reductions.

⁷⁰⁹ The Arctic Peoples of the Arctic Regions of Canada and the United States, *supra* note 581 at 16.

⁷¹⁰ *Ibid* at 21.

The Athabaskan Petition draws a much closer connection between the action of the State and impact on the petitioners than the Inuit Petition. The Inuit Petition focused on the largest emitter of a global pollutant and argued that said State was responsible for causing the global problem which violated their human rights. In contrast, the Athabaskan Petition focuses on a regional pollutant which causes specific regional warming and that warming violates their human rights. Where the Athabaskan Petition falls short is its ability to connect black-carbon emissions in Canada to actual warming in Canada and this omission may fundamentally undermine the Athabaskan Petition.

Neither the Inuit nor Athabaskan petitions directly connect the emissions occurring in a State to the environmental impacts that violate the human rights of the petitioners. The Athabaskan Petition comes close to this by arguing that Canadian emissions cause Arctic warming, but it does not make it clear that Canadian emissions are uniquely responsible for warming in the Canadian Arctic. The greenhouse gas emissions of the United States certainly contributed to the climate change that negatively impacted the Inuit petitioners, but so did the emissions of many other States around the world. The Athabaskan Petition establishes that Canadian black carbon emissions contribute to the Arctic warming and that Arctic warming violates their human rights, but it does not quantify Canada's impact; distinguish Canada's emissions from emissions of other Arctic States; or establish that Canadian emission cause Canadian warming.

Then, when comparing the rejected Inuit Petition to the pending Athabaskan Petition it is clear that the Athabaskan Petition provides a stronger, but imperfect connection between the State, climate change, and the violation of the petitioners' human rights. The Athabaskan Petition's claim that climate change violates their right to property is more persuasive than the claim made by the Inuit Petition due to developments in Inter-American human

rights law such as the decisions in *Grand Chief Michael Mitchell* and *Saramaka*. The Athabaskans also potentially establish a closer causal relationship between the State's action and a rights violation, but holes remain and the Athabaskan Petition does not draw a direct connection between Canadian emissions and warming in Canada.

The Athabaskan Petition highlights many of the impacts of climate change on Northern peoples and the Commission may ultimately find Canada in violation of one or more of the Athabaskans' human rights. At the same time, it is very possible that the Commission to rejects the Athabaskan Petition exactly as it did the Inuit Petition. If the Commission does not see a connection between Canadian emissions and Canadian warming it could easily conclude that the Athabaskan Petition does not establish that the facts characterize a violation of the rights protected by the American Declaration.

The Athabaskan Petition represents arguably the "best-case" scenario for a successful climate change case under the American Declaration. Certainly, the petitioners' case would be improved by a clear causal connection between the black carbon emissions in Canada and warming in their region, but the petition does present a strong case that climate change itself violates their human rights.

While it may not present a perfect case for Canada's violation of the petitioners' rights, it is not unimaginable that the petition ultimately culminates with the IA Commission determining that the petitioners' rights have been violated. Such an outcome would certainly be an objective success for the petitioners, but it needs to be noted that it would not guarantee Canadian action on black carbon.

The American Declaration is a non-binding and respondent States are under no legal obligation to adopt the IA Commission's Recommendations. The American Convention and Court do provide legally binding human rights, but

Canada and the United States are not party to the American Convention and they do not recognize the authority of the IA Court. States are certainly at liberty to follow any Recommendations from the IA Commission, and the Inuit Petitioners expected that a favourable decision for them would have had “great moral value”,⁷¹¹ but Canada’s reaction to a successful Athabaskan Petition on actual emissions is impossible to predict.

In light of this, it is reassuring to know that action is being taken on reducing Arctic black carbon outside of the Inter-American human rights process. One major effort here was the Arctic Council’s passage of the Framework for Action on Black Carbon and Methane⁷¹² and an Expert Group on Black Carbon and Methane. Although these are a relatively new document and body, it does appear to be a promising mechanism for cooperative efforts to reduce these potent greenhouse gases. The parties to the Framework for Action include all of the nations with territory above the Arctic Circle as well as indigenous groups including the Arctic Athabaskan Council and the Inuit Circumpolar Council. The Framework of Action recognizes the need to limit global average temperature increase to below 2 degrees Celsius and States commit to develop clear inventories of black carbon; enhance actions to reduce national black carbon and methane emissions; and engage in an iterative process designed to continually strengthen national actions and mitigation strategies.⁷¹³

Upon filing the Inuit Petition, Sheila Watt-Cloutier said that it was done “not in a spirit of confrontation – that is not the Inuit way – but as a means of inviting and promoting a dialogue. Our purpose is to educate, not criticize,

⁷¹¹ Watt-Cloutier, *Presentation at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change*.

⁷¹² Arctic Council, *Enhanced Black Carbon and Methane Emissions Reductions an Arctic Council Framework for Action..*

⁷¹³ *Ibid.* (2)

and to inform, not condemn.”⁷¹⁴ While it can be difficult to see how petitioning the IA Commission and accusing a State of violating your fundamental human rights is non-confrontational, it may be that actions such as the Inuit and Athabaskan Petitions helped to compel nations to participate and commit to the Framework of Action. Ultimately, the recent efforts of the Arctic Council appear to be genuinely dialogue based and capable accomplishing some emissions reductions well before the Athabaskan Petition potentially results in a non-binding Recommendation from the IA Commission. Inter-American human rights law certainly has a role in protecting the environment and ensuring people’s rights are protected, but it may not be the best mechanism for getting relief from climate change.

3.3 Point-source pollution and conservation

Point-source pollution and conservation are closely related in Inter-American case law as many cases address both issues simultaneously. Most environment related cases within the Inter-American regime arise from situations where resource exploitation negatively impacts local communities, particularly in ways which disrupt natural ecosystems through deforestation and/or pollution. In these cases it is common for point-source pollution to occur in tandem with a loss of conservation. The regime has only heard one case which was singularly focused on promoting the conservation of an unpopulated area, but it was unsuccessful and the regime does not appear to

⁷¹⁴ Center for International Environmental Law “Inuit File Petition with Inter-American Commission on Human Rights”.

place an intrinsic value on ecosystem conservation.⁷¹⁵ The following analyzes the complex case law of the Inter-American human rights regime that has arisen from various petitioning groups attempting to use their human rights in ways which simultaneously reducing pollution and promote conservation.⁷¹⁶

There are three characteristics of the Inter-American regime's environmental case law that complicate analysis: the role of indigenous groups, the tiered system of rights protection, and the variety of claims. First, it needs to be recognized that indigenous populations have played an important role in the development of Inter-American human rights law and environmental protection.⁷¹⁷ Almost all environment-related cases brought before both the IA Court and IA Commission have been brought indigenous groups and until recently it might have appeared that indigenous people were uniquely suited to bring such claims.

The Inter-American human rights regime clearly gives special consideration to the rights of indigenous groups and this is explored in detail herein. Recently, three cases have arisen which may extend the ability of non-indigenous people to bring environmental claims to the Inter-American regime, but these cases have only been heard on their admissibility and their future is unclear.⁷¹⁸ While the majority of this analysis focuses on cases

⁷¹⁵ In *Metropolitan Nature Reserve v Panama*, Case 11533, Report No 88/03, Inter-Am CHR, OEA/SerL/V/II118 Doc 70 rev 2 at 524 (2003) the petitioners argued that the construction of a road through a nature reserve violated their right to property. The petitioners did not have an interest in the reserve beyond a general interest in its preservation for nature conservation and the IA Commission determined that the claim was inadmissible for a lack of individual victims and for being overly broad. The IA Commission specifically noted that petitions filed for the common good are deemed inadmissible.

⁷¹⁶ Technically, not all of the Inter-American cases deal with both pollution and conservation – most do, but a few only address pollution.

⁷¹⁷ See S James Anaya & Robert A Jr Williams, "Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System, The" (2001) 14 Harv Hum Rts J 33; Jo M Pasqualucci, "Evolution of International Indigenous Rights in the Inter-American Human Rights System, The" (2006) 6 Hum Rts L Rev 281.

⁷¹⁸ See Section 3.3.2 of this work

brought by indigenous groups, it is not clear that they are uniquely capable of using their Inter-American human right to respond to environmental problems, it may simply be that indigenous groups were simply the first to protect the environment using the Inter-American human rights regime.

Second, as discussed in Section 3.1.1 of this work, the Inter-American human rights regime consists of multiple tiers of human rights and human rights protection. Not all members of the OAS have committed to all of the Inter-American human rights documents and this can create different standards of rights protection among OAS members. In theory two identical petitioners, with two identical claims, can find themselves with drastically different outcomes. The implications of the tiered system are not only seen in who rights apply to, but also how rights are applied: for example, the IA Commission can recognize the violation of a petitioner's right to health in a non-binding recommendation, but the IA Court cannot similarly recognize the violation with a binding decision.⁷¹⁹

The tiered nature of the Inter-American regime is further heightened by Article 29(b) of the American Convention which specifies that the American Convention will not be interpreted in any way which restricts the enjoyment of any right if it is established in a stronger form by either national law or international convention. Article 29(b) has been used in numerous decisions of the IA Court and it potentially makes each of the IA Court's decisions unique to each State.⁷²⁰ In its environmental jurisprudence the IA Court has frequently referenced the Indigenous and Tribal Peoples Convention No.

⁷¹⁹ The right is recognized in the American Declaration (Article XI), so its violation can be recognized by both the Commission and the Court, but the Court can only make binding decisions based on the Convention (Article 62). The Protocol of San Salvador also provides a right to health (Article 10), but the Protocol is specific to the fact that only violations of Articles 8 and 13 may be adjudicated by the Court (Article 19(6)).

⁷²⁰ For instance, two identical claims arising in two nations which have equal commitment to Inter-American rights could result in two different outcomes at the IA Court if one of the two nations has a national law which establishes a higher standard of protection than exists in the American Convention.

169,⁷²¹ applying it using both Article 29(b) and an influential human rights document capable of influencing the IA Court's interpretation of Inter-American rights. This analysis discusses the IA Court's application of ILO 169 and the tiered nature of the regime, but must also emphasize that conclusions taken from certain cases may not be applicable to petitioners living in other OAS member states.

The Inter-American environmental case law is also complicated by the practice of petitions concurrently pursuing numerous rights violations. Inter-American petitioners routinely attempt to claim a wide variety of human rights violations arising from environmentally damaging activities. For example in *San Mateo v Peru* the petitioners argued that the State's refusal to remove toxic waste from their land led to violations of their rights enshrined by Articles 4, 5, 7, 8, 11, 16, 17, 19, 21, 22, 23, 24, 25, and 26 of the American Convention.⁷²² While not all petitions cite fourteen different rights violations, the lack of established Inter-American case law causes many petitioners to claim multiple rights violations in hope of a successful claim.⁷²³ This makes it difficult to divide analysis by the rights claimed by the petitioners. That notwithstanding, this analysis is divided in just such a manner, distinguishing claims as they fall within two broad categories: cases which emphasized property rights and those which focused on the petitioners' health. This division is possible because even in cases where multiple rights are cited, the IA Court and IA Commission tend to focus on one right in their decisions. The next section of this work illustrates how the Inter-American case law has made the right to property a comparatively clear and capable right for providing environmental protection. In contrast, Section 3.3.2 looks

⁷²¹ *C169 - Indigenous and Tribal Peoples Convention (No. 169)*, 27 June 1989, 328 UNTS 247 [ILO 169].

⁷²² *San Mateo v Peru*, *supra* note 574, paras 14 & 31.

⁷²³ See Section 14.2 of this work

at the relatively complex abilities of the rights to life, health and privacy to respond to environmental challenges.

3.3.1 The Inter-American right to property

The Inter-American right to property is by far the most frequently cited right in environment cases. The right is present in both the American Declaration (Article XXIII) and American Convention (Article 21) and it has been used by petitioners to establish a duty of national governments to attain permission from indigenous populations before altering traditional lands.

Four important property cases have established State obligations to consult and gain consent: *Awes Tingni*, *Belize Maya*, *Saramaka*, and *Kichwa*. In each of these cases, an indigenous population was subject to their land being altered by government sanctioned activities including deforestation, mining and oil exploration. Based on the right to property, these cases illustrate: (a) the IA Court's use of Article 29(b) and ILO 169; (b) the IA Court's method of responding to cases with potentially multiple related rights violations; and (c) the willingness of the IA Court to extend the reach of Inter-American rights, potentially beyond what was envisaged by the American Convention's drafters.

In *Awes Tingni*, the petitioners argued that the Nicaraguan government violated their property right by failing to formally recognize their ownership of their traditional land and for granting logging concessions on said land.⁷²⁴

The IA Court agreed and stated that:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people

⁷²⁴ *Awes Tingni*, *supra* note 591, para 104.

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.⁷²⁵

The IA Court's emphasis on the strong relationship between indigenous people and their land is important not only because it forms the decision in *Awás Tingni*, but also because it provides a guide for all future indigenous property rights cases.⁷²⁶ In *Awás Tingni* the IA Court determined that the petitioners' right was violated by the "granted concession to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the [traditional lands of the Awás Tingni] which must be delimited, demarcated and titled".⁷²⁷ Importantly, the IA Court did not explicitly require the indigenous population's consent for such interference and the ruling in *Awás Tingni* could be understood to mean that the logging would be allowed, without the consent of the petitioners, as long as it conformed with the State's right to deprive a group or individual of their property as described by Article 21(2) of the American Convention.⁷²⁸ The status of the right to property and the obligation to gain consent was disappointingly unclear.

⁷²⁵ *Ibid*, para 149.

⁷²⁶ The Court and Commission repeatedly emphasize the relationship between indigenous populations and their traditional territory. It is reiterated in all of the cases mentioned in this section as well as three Paraguayan cases somewhat related to the environment: *Yakye Axa*, *supra* note 630; *Sawhoyamaxa*, *supra* note 631; *Xákmok Kásek Indigenous Community v Paraguay*, *supra* note 672. These three cases all deal with indigenous populations attempting to reclaim access to, or rights over, their traditional territory, while there may be potential for the environment to benefit from the indigenous populations' reclamation of land, but it is not clear from the cases and therefore these cases are not addressed in detail in this section.

⁷²⁷ *Awás Tingni*, *supra* note 591, para 153.

⁷²⁸ *American Convention*, *supra* note 543 Article 21(2): No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the case and according to the forms established by law.

Following *Awass Tigni*, the IA Commission heard a similar claim arising from the grant of logging and oil concessions on land traditionally, but informally, held by an indigenous population in Belize.⁷²⁹ Here, the IA Commission expanded on the need for consultation, but unfortunately, did not clarify the issue of consent.

Belize is not a party to the American Convention and so the petitioners claim in *Belize Maya* was based on various rights established by the American Declaration, including: their right to life; right to religious freedom and worship; right to family; right to preservation of health and well-being; and their right to property.⁷³⁰

The IA Commission's decision in *Belize Maya*, while ultimately a non-binding recommendation, was particularly important for two reasons. First, the IA Commission stated that the right to property of indigenous people could encompass numerous issues including the group's physical, cultural and spiritual vitality and their right to equality and therefore the IA Commission was willing to combine all of the petitioners' aforementioned claims into a single property right violation.⁷³¹ Second, upon determining that the petitioners' property right had been violated, the IA Commission specified that "the duty to consult is a fundamental component of the State's obligations in giving effect to the communal property right of the Mayan people".⁷³² This partially clarified the IA Court's ruling in *Awass Tigni* and set the foundation for a binding obligation to consult.

In 2007, *Saramaka v Suriname* provided the IA Court with another opportunity to clarify its position on consultation and consent. Here, the

⁷²⁹ *Belize Maya*, *supra* note 602, para 19.

⁷³⁰ *Ibid*, para 154.

⁷³¹ *Ibid*, paras 155–6.

⁷³² *Ibid*, para 155 The Commission established the duty to consult based on its interpretation of Article XX of the American Declaration and as an implicit component of Article 27 of the ICCPR.

petitioners argued that their property right had been violated by the State's grant of forestry and mining concessions in areas within their traditional territory.⁷³³ The IA Court reiterated its position in *Awes Tigni* and clarified that the right to property, as it applies to indigenous and tribal people,⁷³⁴ requires special measures to guarantee the physical and cultural existence of the group in question.⁷³⁵ It went on to say that there is a need to protect the lands and resources traditionally used by indigenous people to prevent their extinction and that the right to property would be meaningless if indigenous populations did not have control of the natural resources which maintain their way of life.⁷³⁶ The IA Court stated that this control includes natural resources unrelated to the indigenous population's way of life (such as gold), if the extraction of the resource had the potential to disrupt the resources upon which they otherwise rely, such as fresh water.⁷³⁷

Although the IA Court clarified the right of indigenous and tribal populations to control their natural resources, it also allowed the State to pursue resource extraction within traditional lands as long as it undertook three safeguards. First, with any development, investment, exploration, or extraction within Saramaka territory, the State must guarantee the effective participation of the Saramaka people, in a way that conforms to their customs and traditions. Second, the Saramakas must receive a reasonable benefit from any such operation. Third, the State must ensure that no concession will be issued

⁷³³ *Saramaka People v Suriname*, *supra* note 139, para 124.

⁷³⁴ The petitioners in *Saramaka* were a tribal group dating back to the 17th century. The Court determined that the character of the tribal group was akin to an indigenous group and granted them the same right to property. *Ibid*, paras 80–4.

⁷³⁵ *Ibid*, para 86.

⁷³⁶ *Ibid*, paras 121–2.

⁷³⁷ *Ibid*, para 155. Gold was determined not to be a part of Saramakan cultural identity, but there was concern that gold mining could affect other natural resources necessary for Saramakan survival such as fresh waterways.

within Saramaka territory without an independent, and technically capable, environmental and social impact assessment.⁷³⁸

Saramaka significantly elevated the ability of indigenous populations to protect their environment from pollution and facilitate conservation. The ruling prevented government from simply expropriating the traditional lands for resource extraction. It does not give an indigenous population the ability to prohibit all resource extraction, but it emphasizes that any action must have the consent of the population and no action can place the group's survival at risk.

The current ability of the right to property to protect the environment of indigenous people is created by combining the ruling in *Saramaka* with the more recent ruling in *Kichwa*. *Kichwa* not only reinforces the decision of *Saramaka*, but goes on to define the rights to consultation arising from the IA Convention's right to property. In the case, Ecuador granted concessions to a third party to engage in oil exploration within the traditional territory of the indigenous Kichwa people.⁷³⁹ These concessions allowed significant deforestation to facilitate the creation of seismic lines, camps and heliports.⁷⁴⁰ They also resulted in the destruction of at least one site of special spiritual significance;⁷⁴¹ and destruction of caves, water sources and underground rivers relied upon by the community for clean drinking water.⁷⁴² The environmental impact of the oil exploration was relatively clear and the indigenous status of the Kichwa people was not challenged by the State. The case hinged on the Ecuador's nationalization of resources, its denial of an overall duty to consult, and its assertion that it had complied with any potential duty to consult.

⁷³⁸ *Ibid*, para 129.

⁷³⁹ *Kichwa*, *supra* note 139, paras 64–5.

⁷⁴⁰ *Ibid*, para 92.

⁷⁴¹ *Ibid*, para 104.

⁷⁴² *Ibid*, para 105.

The State formally gave the Kichwa people title to the land in question in 1992. This included the natural resources on the surface, but, according to the IA Court excluded the “subsoil natural resources [that] are the property of the State, which may exploit them without interference provided that environmental protection standards are observed”.⁷⁴³ In 1996 a contract was signed between the State Oil Company of Ecuador and a private consortium to begin hydrocarbon exploration within Kichwa territory.⁷⁴⁴ The contract required the private group to, *inter alia*, prepare and Environmental Impact Assessment; make every effort to maintain the existing ecological balance; and obtain any necessary permits from third parties which might be necessary to access the area and conduct activities.⁷⁴⁵

The consortium tried on multiple occasions to negotiate access to the Kichwa territory, often using questionable methods such as: directly contacting community members in order to circumvent the community’s internal governance institutions; offering health care in exchange for access; and by intentionally dividing the community, manipulating the leaders, and carrying out defamation campaigns to discredit the leaders and organizations.⁷⁴⁶ The State did not deny the use of these methods, but argued that it was under no obligation to engage in a prior consultation process, or to obtain free informed consent, because the 1996 contract for exploration predated any such obligation.⁷⁴⁷ The State argued that it was not until 1998, when it ratified ILO 169 and adopted its 1998 Constitution,⁷⁴⁸ that it recognized the right of indigenous peoples to political participation in regard to resource extraction.⁷⁴⁹ The State went on to say that, despite the lack of obligation to

⁷⁴³ *Ibid*, paras 61–2.

⁷⁴⁴ *Ibid* at 64.

⁷⁴⁵ *Ibid*, para 67.

⁷⁴⁶ *Ibid*, paras 73 & 75.

⁷⁴⁷ *Ibid*, para 128.

⁷⁴⁸ Both ILO 169 and Ecuador’s 1998 Constitution recognize the right of indigenous people to consultation.

⁷⁴⁹ *Kichwa*, *supra* note 139, para 133.

consult; the private consortium did inform the community of the project, sought its consent, and produced an environmental impact assessment.⁷⁵⁰

The IA Court disagreed with the State's assessment of its obligations, and determined that ILO 169 applied to any impacts and decisions of the oil projects which occurred after the ILO 169 came into force, even if they had been contracted prior to its coming into force. Therefore, as of May 1999,⁷⁵¹ the State was under an obligation to guarantee the prior consultation of the Kichwa people.⁷⁵²

Having established an obligation to consult, the IA Court described what was required to meet this obligation. In doing so the IA Court clearly relies on ILO 169; however, the foundation upon which the IA Court built the obligation for prior consultation is not entirely clear and this lack of clarity may affect the application of the right in future cases.

Initially, it would appear that the IA Court's decision to impose a duty to consult only when ILO 169 came into force in Ecuador, would indicate that the IA Court established this obligation using Convention Article 29(b). Recall that the article requires the IA Court to apply the American Convention in conformity with any related national or international laws which provide a standard of rights protection which exceeds that of the American Convention. Articles 6 and 17 of the ILO 169 establish the right of indigenous populations to free and informed consultation, taken in good faith and with the objective of achieving consent, in situations where there is a potential transmission of land rights.⁷⁵³ When ILO 169 is read in conjunction with the right to property under the American Convention it can establish a right to prior consultation applicable to States party to both documents.

⁷⁵⁰ *Ibid*, para 130.

⁷⁵¹ ILO Convention No. 169 was ratified by Ecuador in 1998, but did not come into force until May 1999.

⁷⁵² *Kichwa*, *supra* note 139, para 179.

⁷⁵³ *ILO 169*, *supra* note 721 Articles 6 & 17.

However, this would not establish a right to prior consultation in the ten OAS member states which are party to the American Convention, but not party to ILO 169. While it is not entirely clear, the IA Court may have artfully avoided this complexity by simultaneously using Article 29(b) to place an obligation on Ecuador in *Kichwa* while also extending that obligation to all parties of the IA Convention.

As part of its description of what constitutes prior consultation, the IA Court makes multiple references to ILO 169, but it does not specifically invoke Article 29(b). While it appears that the IA Court used Article 29(b) to establish a specific obligation for Ecuador,⁷⁵⁴ it may also be the case that the IA Court established the obligation using its other ability to interpret the American Convention taking into account: Inter-American case law and norms; state practice; and, the evolution of international law when establishing the general obligation.⁷⁵⁵

The IA Court appears to consider the obligation to consult part of customary law. Upon consideration of national and international law, the IA Court states that “the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected is an obligation that has been clearly recognized”.⁷⁵⁶ The IA Court does not use the phrase “customary law”, but does call the obligation “a general principle of international law”.⁷⁵⁷ On this basis, it is reasonable to believe that the IA Court currently considers the right to prior consultation as a general component of the American Convention, incorporated within the right to property. The IA Court has described the obligation to consult as one which is obviously based on ILO 169, but it does not appear that the IA Court simply applied ILO 169 to

⁷⁵⁴ *Kichwa*, *supra* note 139, paras 172–3.

⁷⁵⁵ *Ibid*, para 177.

⁷⁵⁶ *Ibid*, paras 164–5.

⁷⁵⁷ *Ibid*, para 164.

Ecuador using Article 29(b). The IA Court does not reference Article 29(b) in its decision and, more importantly, the ultimate standard established by the IA Court actually exceeds that created by ILO 169.⁷⁵⁸

Assuming the obligation to consult defined in *Kichwa* applies to all parties to the American Convention, it builds significantly on the consultations described in *Saramaka*.⁷⁵⁹ First, consultation must be in “good faith” with “the aim of reaching an agreement”; negotiations are not a mere formality and must establish a dialogue between the parties based on trust and respect. Vitally, negotiations must be free from coercion by the State, its agents, or third parties acting with the State’s acquiescence. Furthermore, consultations are incompatible with bribery or intentional division of the indigenous population.⁷⁶⁰ The IA Court also emphasized that this obligation is the sole responsibility of the State and cannot be delegated to third parties.⁷⁶¹ These parameters theoretically guarantee that indigenous populations will have their views considered ahead of any works which may impact their lands, but *Kichwa* did not give indigenous groups the ability to ultimately deny consent and prohibit activity. Unfortunately, the IA Court has yet to really consider what happens if an indigenous population’s denies consent.

The Inter-American right to property can be applied to indigenous populations, in a way which links environmental protection to their traditional land and the environmental conditions necessary for their physical and cultural survival. The Inter-American regime supports

⁷⁵⁸ See Upasana Khatri, “Indigenous Peoples’ Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku V; Ecuador and its Potential to Delegitimize the Belo Monte Dam” (2013) 29:1 American University International Law Review, online:

<<http://digitalcommons.wcl.american.edu/auilr/vol29/iss1/4>> at 206 Who argues that the ILO Convention 169 should be revised to endorse the higher standard set by the *Kichwa* case.

⁷⁵⁹ See *Saramaka People v Suriname*, *supra* note 139, para 133.

⁷⁶⁰ *Kichwa*, *supra* note 139, para 186.

⁷⁶¹ *Ibid*, para 187.

indigenous property claims which protect the forests, waterways, and ecosystems upon which indigenous people rely; however, the IA Court has not established a clear ability of indigenous population to resist all incursions onto their territory.

In *Saramaka* the IA Court referenced this issue and determined that “the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent”.⁷⁶² However, this was only in regard to “large-scale development” or “projects that would have a major impact on Saramaka territory”.⁷⁶³ The IA Court did not distinguish a “large-scale development” from one which does not require consent, but it did make it clear that this distinction exists.⁷⁶⁴ Unfortunately, the need for consent is not discussed in *Kichwa*, so while the issue of consent can potentially limit the ability of indigenous populations to protect the environment using their right to property, its application to small/medium-sized projects is unknown.

What can be taken from the cases relating to the right to prior consultation is the ability of indigenous populations to place some limits on pollution and provide some level of conservation. Activities that have a major impact on the indigenous peoples’ territory require the consent of the indigenous population. This consent must come as part of a very specific framework of consultation established to ensure that the indigenous population is fully informed of the impacts of the development and that consent is freely given. In situations where the proposed activities will have a smaller impact on indigenous territory, consent is not necessarily required, but consultation with the intention of gaining consent is mandatory.

⁷⁶² *Saramaka People v Suriname*, *supra* note 139, para 134.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid*, para 147 The State argues that it did not require consent for a logging concession because it occurred on Saramaka territory devoid of traditional Saramaka sites. The Court determined that consultation was always necessary, but it implied that consent was not necessary required.

The IA Commission and IA Court have yet to consider a case where consent is appropriately sought, but not given. This case will eventually arise and it is likely that the State's responsibility will depend on the efforts taken to minimize the environmental and cultural impacts of the activity as well as the compensation provided to the indigenous group.⁷⁶⁵ There is a chance that the IA Court could eventually grant a broad requirement that all activities within indigenous land require consent in order to conform with the United Nations Declaration on the Rights of Indigenous Peoples,⁷⁶⁶ but this declaration is not a legally binding international document and similar, binding documents such as the ILO 169 do not provide a requirement for consent.⁷⁶⁷ The IA Court's position on consent is already relatively progressive and the lack of discussion on the necessity of consent in *Kichwa* may be indicative of the IA Court's resistance to revisit the issue and solidify its position in *Saramaka*. *Kichwa* hinges on the failure of the State to properly consult and seek the consent of the indigenous population – it does not consider whether or not consent would have been necessary had it been properly sought.

Then, within the Inter-American regime, indigenous populations have the ability to use their human right to property to deny activities on their land, including those which pollute or have a negative impact on conservation as long as those activities are large in scale or will significantly impact their territory. Furthermore, indigenous populations have a potential ability to minimize the impact of smaller projects through consultation and negotiation.

⁷⁶⁵ *Ibid* at 129 & 158 The Court states that the State may restrict the property rights of the Saramakas, but only if it ensures effective participation, benefit sharing, prior environmental and cultural assessments, and the implementation of safeguards to protect the land and natural resources.

⁷⁶⁶ *UNDRIP*, *supra* note 671 Article 32(1) which requires free and informed consent prior to the approval of any project affecting the lands or territories or other resources of indigenous people .

⁷⁶⁷ *ILO 169*, *supra* note 721. Article 6(2) states that consent must be the intention of consultations, but it is not a requirement of action.

Ultimately, the Inter-American human rights regime's repeated emphasis on the importance of protecting the territory of indigenous populations will likely further expand the right to property to give those groups greater authority over the exploitation of natural resources. The IA Court has used the right to property to provide indigenous groups with the ability to prevent certain activities from occurring on their territory, but the emphasis the IA Court has placed on indigenous people's right to property also has a downside. The IA Court has connected the right to property so closely to the need to preserve and protect indigenous peoples' culture and population, that it may unfairly limit the right as it applies to non-indigenous groups. Where an indigenous people has a communal property right, it can prevent the government's large-scale development by withholding consent; however, if a small town or community wants to block regional deforestation or mining due to concerns that it will pollute or deforest areas which they have traditionally enjoyed, they may not have the same strength of claim if they are not formally seen as an "indigenous group". Only recently have non-indigenous groups brought environment related claims before the Inter-American regime – most rely on one or more of their rights to life, health, and privacy, and all have yet to be heard on their merits.

3.3.2 The Inter-American rights to life, health, and privacy

The rights to life and health have been cited in a number of pollution and conservation related cases, but the potential of these rights to actually protect the environment is yet to be known. While the right to life exists in both the American Declaration (Article I) and the American Convention (Article 4), the right to health only exists in the American Declaration. To date, all of the cases combining these rights with environmental protection

have only been considered by the IA Commission.⁷⁶⁸ The ability of these rights to respond to environmental issues is greatly complicated by the relative absence of case law: the rights to life and health have only been cited in four IA Commission cases – and of the four cases only one has been considered on their merits.

The first case to deal with environmental damage and its effect on health was *Yanomami v Brasil* and it remains the only right to health case to be fully analyzed by the IA Commission.⁷⁶⁹ In *Yanomami* the traditional territory of an indigenous population was encroached upon by the Brazilian government's creation of a highway through their property.⁷⁷⁰ The highway and its construction facilitated further incursion into Yanomami territory with non-indigenous people introducing prostitution and disease, and displacing the population from their ancestral lands: disrupting their culture and traditions.⁷⁷¹ The IA Commission determined that the government's failure to "take timely and effective measures on behalf of the Yanomami Indians" resulted in violations the American Declaration's rights to life, liberty and personal security; residence and movement; and the preservation of health and well-being.⁷⁷²

A number of points can be taken from *Yanomami*, but overall the case has not had an overt influence on the Inter-American human rights regime. First, it should be noted that the case was heard in 1985 and the judgment was only 6 pages long (in comparison the IA Court's decision in *Kichwa* was 93

⁷⁶⁸ A number of environmental cases, such as *Kichwa* have components of the rights to life and/or health, but these typically arise from tangential issues to the environmental damage. In *Kichwa*, the petitioners' right to life was violated because the oil exploration company left undetonated explosives buried on Kichwa territory (see Paras 248-9). While clearly a form of pollution, the heart of the environmental claim in *Kichwa* dealt with the petitioners' right to property which encompassed all aspects of the incursion onto their territory. Similarly, in *Awes Tingni* the petitioners claim that their right to life is violated, but the Court subsumes this claim into a broad property right claim (Para 156).

⁷⁶⁹ *Yanomami*, *supra* note 573.

⁷⁷⁰ *Ibid*, para 2(f).

⁷⁷¹ *Yanomami*, *supra* note 573 CONSIDERING Para 2.

⁷⁷² *Ibid* THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RESOLVES Para 1.

pages). While its brevity makes *Yanomami* a relative pleasure to read, it did not allow the IA Commission to elaborate on the subtleties of the rights to life and health. The IA Commission treats *Yanomami* as a clear case of a right violation and this is helpful for its petitioners, but less so for future petitioners because the IA Commission gave no indication of the threshold between an incidental impact on health and a violation of the right to health.

Another shortcoming of *Yanomami* is that the case is fundamentally out of date. If the same facts were to arise today, modern petitioners would be unlikely to pursue the same case as those in *Yanomami*. In 1985 Brazil had not yet ratified the American Convention so the case could not progress to the IA Court and the impact of the highway on the petitioners' health made the right to health established by the American Declaration a clear choice for their petition. However, current Inter-American law should cause modern petitioners to pursue their right to property if confronted with the same facts as *Yanomami*.

If *Yanomami* were to arise today in Brazil, the petitioners should rely on Brazil's commitment to the American Convention and the ILO 169 to follow the IA Court's decisions in *Sarayaku* and *Kichwa* to establish a violation of their right to property. The Yanomami people were not consulted nor did they give consent to the incursion so they would have a strong reason to believe that the IA Court would ultimately find a property right violation. If the facts were to arise in a State not party to the Convention, the petitioners would still be best advised to focus on a violation of their right to property, relying on the IA Commission following *Kichwa's* assertion that it is a general principle of international law that requires consultation of indigenous populations when conducting activities in their territory.⁷⁷³ Certainly, this could be accompanied with a claim that the petitioners' right to health had also been violated, but in light of the volume of Inter-American law

⁷⁷³ *Kichwa*, *supra* note 139, paras 164–5.

supporting indigenous property rights, specifically the IA Commission's decision in *Belize Maya* which stated that "the duty to consult is a fundamental component of the State's obligations",⁷⁷⁴ it would seem irresponsible not to make that the focus of a modern claim based on *Yanomami's* facts.

This logic is emphasized by the IA Commission's recent consideration of the admissibility of the petitioners' claims in *Raposa Serra Do Sol Indigenous Peoples v Brazil*.⁷⁷⁵ In 2010 the IA Commission considered the *Raposa* case and its facts were similar in many ways to those of *Yanomami*. Here, the petitioners were an indigenous population whose land has been incurred upon by non-indigenous people and it led to "frequent incidences of violence and severe environmental degradation affecting the lives and personal integrity of the alleged victims".⁷⁷⁶ These incursions had primarily taken the form of settlers and farmers, particularly rice farmers, whose use of agroindustrial chemicals, alteration of waterways and unauthorized creation of slaughterhouses caused significant environmental damage.⁷⁷⁷ The petitioners cited a number of rights violations arising from both the American Declaration and American Convention including the rights to life, health, and to property. While much of the focus of the IA Commission's assessment appears to be focused on the acts of violence toward the Raposa people,⁷⁷⁸ the IA Commission's decision to admit the case was based on: (1) the violation of the petitioners' right to property due to a failure to demarcate and protect their ancestral territory,⁷⁷⁹ and (2) the violations of the petitioners' rights to

⁷⁷⁴ *Belize Maya*, *supra* note 602, para 155 The Commission established the duty to consult based on its interpretation of Article XX of the American Declaration and as an implicit component of Article 27 of the ICCPR.

⁷⁷⁵ *Raposa Serra Do Sol Indigenous Peoples v Brazil*, Report No 125/10, Petition 250-04, Inter-Am CHR, 23 October 2010 .

⁷⁷⁶ *Ibid*, para 2.

⁷⁷⁷ *Ibid*, para 15.

⁷⁷⁸ *Raposa*, *supra* note 775 See Paras 2, 10, 14 and 34.

⁷⁷⁹ *Ibid*, para 45.

life, personal integrity, and inviolability of the home, arising from the violence incurred by the petitioners.⁷⁸⁰

Although an admissibility case does not assess if a right has actually been violated, the division of rights in *Raposa* emphasizes the right to property as a primary mechanism for environmental protection within the Inter-American regime. The IA Commission notes that the purpose of the petition is the protection of the indigenous peoples' right to property and the petitioners expect that recognition of the right would allow them to remove the non-indigenous population and halt the violence: the cause of the other rights violations.⁷⁸¹

In *Raposa* it is the right to property that has the potential to protect the environment and failure to protect this right results in the physical harm to the indigenous population and the violation of their other rights. The petitioners in *Raposa* argue that large scale development projects occurred on their land without proper prior consultation⁷⁸² and if this can be established the IA Commission is almost certain to find a property right violation following *Saramaka* and *Kichwa*. For the petitioners in *Raposa* this would surely be a welcome outcome. It illustrates how far Inter-American law has come since *Yanomami*, but also illustrates how *Yanomami* should no longer be seen as establishing a relationship between environmental degradation and its impact on the rights to life and health.

The right to health under the American Declaration has been elaborated upon by two other cases that specifically deal with the impact of pollution on the rights to health. These cases are particularly interesting as the petitioners in both cases are not indigenous people.

⁷⁸⁰ *Ibid*, para 46.

⁷⁸¹ *Ibid*, para 34.

⁷⁸² *Ibid*, para 10.

In *San Mateo v Peru* the petitioners are not an exclusively indigenous population⁷⁸³ and it is therefore the first Inter-American case to potentially allow a non-indigenous group to protect their environment using human rights. The case is based on pollution emitted from a field of toxic waste sludge created by a mining operation near the town of San Mateo de Huanchor. The waste constitutes a significant risk for the local population and studies have shown high levels of arsenic and lead in their crops, as well as high levels of lead, cadmium, mercury, arsenic and lead in the population itself.⁷⁸⁴ These toxins have been linked with various impacts on the community including: chronic dermatitis, liver dysfunction, hearing loss and malnutrition;⁷⁸⁵ as well as psychological problems such as: changes in memory, attention, concentration, anxiety, learning impairments, and personality changes.⁷⁸⁶

In 2004 the IA Commission found the petitioners' claim admissible and recognized the potential violation of numerous rights established by the American Convention, including the right to life, the right to humane treatment,⁷⁸⁷ and the right to property.⁷⁸⁸ If the IA Court reaches a decision on the merits of this case, it could establish a new avenue of environmental protection within the Inter-American regime. It seems likely that the petitioners are being wronged in some way by the pollution in San Mateo de Huanchor, but it will be interesting to see which right(s) the IA Court sees as violated and how they are applied to non-indigenous groups.

⁷⁸³ *San Mateo v Peru*, *supra* note 574, para 16.

⁷⁸⁴ *Ibid*, paras 21 & 23.

⁷⁸⁵ *Ibid*, para 24.

⁷⁸⁶ *Ibid*, para 22.

⁷⁸⁷ *American Convention*, *supra* note 543 Article 5(1) "Every person has the right to have his physical, mental and moral integrity respected".

⁷⁸⁸ The case is also deemed admissible on a number of other potential rights violations, but these are associated with the failure of the Peruvian government to properly respond to the pollution, not the pollution itself: for example the petitioners argue that their right to a fair trial was violated by the slowness of the judicial system (Para 27).

If the *San Mateo* case reaches the IA Court, and the IA Court decides to find favourably for the petitioners, it will have to do so using the right to life, humane treatment, or property. In the absence of a right to health in the American Convention, the IA Court has shown a willingness to extend the right to life beyond a binary interpretation of the right. In the IA Commission's assessment of the facts, the toxic sludge has not caused any actual deaths in San Mateo de Huanchor and it is not clear that the chemicals, while harmful, pose a risk of causing death. While this could pose a problem if the right to life was rigidly interpreted, the IA Court already recognized that the right to life encompasses a "right to a decent life". In *Xákmok* the IA Court found a violation of the petitioners' right to life stemming from malnutrition,⁷⁸⁹ but not death, and the IA Court could a similar violation in *San Mateo*.

In contrast, if the IA Court were to find a violation of the right to humane treatment (Article 5), it would be a significant step away from that right's initial purpose. Part 1 of Article 5 establishes that "[e]very person has the right to have his physical, mental, and moral integrity respected", but Parts 2-6 pertain specifically to the treatment of people detained by the State. When the Right to Human Treatment is read as a whole, it does not clearly apply to the situation in *San Mateo*. Finally, the right to property certainly could be used to protect the health of a person or group; however as a non-indigenous group the petitioners may not have the same strength of claim as those in *Awás Tigni*, *Saramaka*, and *Kichwa*.

The case of *Community of La Oroya v Peru*⁷⁹⁰ is very similar to *San Mateo* and while it has also only been heard by the IA Commission on its admissibility, it may shed some light on the future direction of the Inter-American regime's understanding of pollution and health. In *La Oroya* a

⁷⁸⁹ *Xákmok Kásek Indigenous Community v Paraguay*, *supra* note 672, paras 197 & 217.

⁷⁹⁰ *Community of La Oroya v Peru*, Report No 76/09, Petition 1473-06, Inter-Am CHR, 5 August 2009 .

town of non-indigenous people is affected by pollution from a nearby metallurgical complex. The petitioners are exposed to high levels of lead, arsenic, sulphur dioxide, and cadmium.⁷⁹¹ They claim that these toxins cause various health problems within the community including hearing loss, respiratory problems, gastritis, vomiting, diarrhoea, calcium deficiency, cancer, reproductive system damage, and neurological problems.⁷⁹² The petitioners argue that the pollution causes violations of their rights to the right to life, humane treatment, and their Article 11 right to privacy.⁷⁹³ They did not pursue a violation of their right to property.

The petitioners argue that excessive environmental contamination represents an intrusion into their personal and family lives as pollution enters their home, and violates their right to privacy.⁷⁹⁴ This argument clearly echoes decisions of the European Court of Human Rights. Under the ECHR the right to privacy⁷⁹⁵ “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”.⁷⁹⁶ Pollution capable of affecting the health of people in their homes can constitute a violation of the right to privacy in Europe. However, the IA Commission rejected the petitioners’ claim to a privacy right violation in *La Oroya*, simply stating that “the events described would not represent a violation of Article 11 [the right to privacy] of the American Convention.”⁷⁹⁷

⁷⁹¹ *Ibid*, para 11.

⁷⁹² *Ibid*, paras 19–20.

⁷⁹³ *Ibid*, paras 26–8.

⁷⁹⁴ *Ibid*, para 28.

⁷⁹⁵ *ECHR*, *supra* note 140 Article 8.

⁷⁹⁶ *López Ostra v Spain*, *supra* note 133, para 51; Also see *Guerra and Others v Italy*, *supra* note 306, para 60 “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”.

⁷⁹⁷ *Community of La Oroya v Peru*, *supra* note 790.

Then, if the similar cases of *La Oroya* and *San Mateo* are to have similar, favourable decisions for their petitioners their health will need to be protected by either the right to life, or the right to humane treatment.

Then, the recent case of *Mossville Environmental Action Now v United States*⁷⁹⁸ further complicated this issue by placing renewed focus on the right to privacy. In *Mossville* the petitioners are a predominantly African-American community in Louisiana, claimed that the State authorized a disproportionate number of industrial facilities in and around their community. The pollution from these facilities has caused various health problems for the residents including nervous system problems, cardiovascular problems, skin problems, and mental health problems.⁷⁹⁹ Blood tests on residents have shown that the average Mossville residents' blood contained dioxin concentrations three times above the national average and toxic chemicals in the air and water exceed quality standards established by the State of Louisiana.⁸⁰⁰

The United States are not party to the American Convention so the petitioners in *Mossville* based their claim on various violations of the American Declaration. They argued that the pollution, and the particular concentration of polluting facilities within their African-American community constituted violations of their rights to life; equality; private and family life; inviolability of the home; health; and property.⁸⁰¹ Interestingly, the IA Commission decided to only admit the case on two rights: the right to equality and the right to private and family life (the right to privacy). The IA Commission determined that the petitioners had not exhausted domestic remedies with regard to their rights to life and health making those claims

⁷⁹⁸ *Mossville Environmental Action Now v United States*, Report No 43/10, Petition 242-05, Inter-Am CHR, 17 March 2010 .

⁷⁹⁹ *Ibid*, para 10.

⁸⁰⁰ *Ibid*, paras 10 & 11.

⁸⁰¹ *Ibid*, para 2.

inadmissible.⁸⁰² The IA Commission also noted that the petitioners' claims of violations of their property right and right to the inviolability of the home were in support of their claim to a violation of their right to privacy, but not independently argued as unique right violations, therefore they are also inadmissible.⁸⁰³ The State conceded that, based on the presented facts, the petitioners would not be able to bring a discrimination claim to national courts and the IA Commission admitted this claim, but the IA Commission's most surprising decision was to admit the petitioners' privacy claim.

The petitioners in *Mossville* explicitly based their privacy claim on the decisions of the European Court of Human Rights, which the IA Commission summarizes as "a State's failure to prevent a plant from polluting nearby homes violated the right to privacy".⁸⁰⁴ In its decision in *Mossville*, the IA Commission acknowledges that the American Declaration must be considered in the context of international human rights systems and developments in the field of international human rights law.⁸⁰⁵ It also notes, but does not elaborate on, the fact that it stated in *La Oroya* that it did not consider allegations of "excessive environmental contamination represents an intrusion into the personal and family life on individuals" a violation of the Article 11 right to privacy under the American Convention.⁸⁰⁶ Objectively, there is not a significant difference between the right to privacy as established by the American Convention and American Declaration. The IA Commission does not acknowledge any distinction between the two rights to privacy; it simply concedes that the factual and legal allegations in *Mossville* call for an examination on their merits.⁸⁰⁷

⁸⁰² *Ibid*, paras 35–6.

⁸⁰³ *Ibid*, paras 43–4.

⁸⁰⁴ *Ibid*, para 43.

⁸⁰⁵ *Ibid*.

⁸⁰⁶ *Mossville Environmental Action Now v United States*, *supra* note 798 Note 37.

⁸⁰⁷ *Ibid* Note 37.

The admissibility case of *Mossville* came one year after the case of *La Oroya* and six years after *San Mateo* and it may be the case that the IA Commission's opinion on the right to privacy changed in the interim. The petitioners and the IA Commission cite the European Court of Human Right's interpretation of the right to property in *Mossville*, but that interpretation was well established by the time the IA Commission heard *La Oroya* and did not change between *La Oroya* and *Mossville*.

With three similar pending cases, the IA Court and IA Commission will have to clarify the relationship among environmental pollution, health, and privacy, and the right to life. The Inter-American regime has certainly challenged itself to simultaneously resolve *San Mateo*, *La Oroya* and *Mossville*. These similar cases with dissimilar admissible rights not only illustrate avenues for potential development of Inter-American human rights law, but their similarities to European cases invite comparison between the two regimes. While it may be tempting to advocate that the Inter-American regime simply follows the more established European Court of Human Rights, such an approach overlooks significant differences between the two regimes. These differences extend beyond the courts' decisions into the regimes' founding principles, modern structure and their abilities to influence their members.

The next and final chapter of this work explores the points of comparison and contrast that link the Inter-American and European regimes. It seeks to highlight what each regime can take from the other and how each regime should move forward in the future, specifically with regard to human rights and the environment.

Chapter 4: Comparing Regimes

When comparing the jurisprudence of two jurisdictions it is always tempting to compare cases and judicial reasoning in order to conclude that one court's methods or decisions are "better" and should therefore be followed by the other jurisdiction. One can then take the "better" approach, however he or she would like to define "better", and then recommend that the other court reconsider its decisions and follow the court which got it "right". Chapters 2 and 3 of this work detail the environmental jurisprudence of the European and Inter-American human rights regimes and it would be easy to simply choose a criterion for determining preferable outcomes, such as "outcomes which provide greater environmental protection" and pick-and-choose decisions from each regime which best meet the criterion. One could then conclude that these "better" decisions should be followed by the other regime. Unfortunately, such an approach would ignore the major challenges associated with actually implementing a cross-jurisdictional transfer of jurisprudential principles. There are huge differences between these two regimes' capacities, designs and operations which need to be considered before anyone recommends that one court follow the other.

The focus of this chapter is to illustrate the underlying institutional differences between the regimes and illustrate how they potentially affect the regimes' abilities to follow each other's judgments.

Prior to conducting this comparison, it is helpful to recall the division in the European human rights regime between the ECHR and the CFREU. While both establish human rights in Europe, the ECHR is in many ways the more important document with the richer history. Currently, the ECHR covers a wider array of European laws, including national laws and the implementation of EU law, and is applied to a significantly larger number of

European nations. The ECHR is also more naturally comparable to Inter-American human rights as they were both created around the same time, for the explicit purpose of protecting human rights, and have progressed through many of the same political challenges.⁸⁰⁸ Furthermore, depending on the ultimate resolution of the EU's accession to the ECHR, it is foreseeable that the ECHR could become Europe's definitive human rights document with the ultimate arbitrator of human rights being the European Court of Human Rights.⁸⁰⁹ Finally, as discussed in Section 2.6 of this work, the CFREU lacks adequate jurisprudence to truly know how and where it will be applied. On this basis, this chapter focuses its comparison on the European human rights framed under the ECHR to Inter-American rights established by the OAS.

The complex natures of the European and the Inter-American regimes allow for a number of different areas of comparison. This work focuses is on the differences which impact the regimes' abilities to transfer jurisprudence and protect the environment. To do this, Section 4.1 compares the early stages of each regime highlighting the international politics at the time the regimes were formed with a specific focus on the Inter-American principle of non-intervention. This founding principle does not have an equivalent in Europe and its presence has placed the two regimes on very different evolutionary paths. Section 4.2 considers the early application of each human rights regime, specifically the impact early decisions had on participant and non-participant States. This section also looks at the changes to the regimes caused by the American Convention and the entry into force of the European Court of Human rights.

Section 4.3 shifts away from the chronological development of the two regimes and focuses specifically on the challenges the two regimes face with maintaining participation and enforcing compliance. Then, Section 4.4 looks

⁸⁰⁸ Whereas the CFREU was created as part of the pre-existing European Union.

⁸⁰⁹ See Section 7.3 of this work

closely at the potential for judicial transfer and ultimately recommends that one regime is better suited for progressively developing its law to facilitate environmental protection than the other. It also looks at some potential next steps of jurisprudential development in both regimes with the European regime having an opportunity to go further in recognition of environmental rights and the Inter-American regime being in a better position to focus on institutional issues while clarifying its existing law.

4.1 The creation of the European and Inter-American human rights regimes and the principle of non-intervention

The early human rights regimes in Europe and the Americas are similar in many ways: both began at roughly the same time and establishing human rights was one of the main purposes of the new regional organizations.⁸¹⁰ Both the American Declaration and the ECHR aimed to protect a similar set of human rights; both documents received wide regional support; and the creation of both regimes has been associated with the protection of democratic principles from the incursion of other political ideologies.⁸¹¹ Overall though, these similarities are overshadowed by major distinctions between the two regimes. One of the largest distinctions actually predates the creation of these regimes and is rooted in the principle of non-intervention. Non-intervention distinguishes not only the creation of the two regimes, but has continued to influence each regime's development and modern application.

⁸¹⁰ The CoE and the OAS, respectively

⁸¹¹ See Gordon Connell-Smith, "The Organization of American States" (1960) 16:10 *The World Today* 447 at 454; Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics" (2007) 32:1 *Law & Social Inquiry* 137 at 139–141.

Perhaps no issue or principle has had a greater effect on distinguishing the Inter-American regime from its European counterpart than the principle of non-intervention. Section 3.1 of this work introduced how this principle arose in the Americas as a key component of international relations due in part to the tendency of the United States to intervene in regional issues. Initially, the principle was only supported by Latin American States, but it gained broad regional support in 1933, when the United States introduced its “Good Neighbor Policy”.⁸¹²

Prior to 1933, the United States had rejected the principle of non-intervention primarily because of their perceived national interest in intervening in regional affairs. Even as Roosevelt publically supported the Good Neighbor Policy, the United States maintained a military influence or a political role in: Nicaragua, Cuba, Haiti, the Dominican Republic, and Panama.⁸¹³ The United States had a long record of using military force in Latin American nations and it was unsurprising that those nations supported a formal commitment to non-intervention as a means of protecting themselves from the influence of the United States.⁸¹⁴

The principle of non-intervention was formalized, without reservation, at the 1936 Special Inter-American Conference for the Maintenance of Peace and established that “intervention by one State in the internal or external affairs of another State is condemned”.⁸¹⁵ Since then, the principle has permeated both Inter-American relations generally and specifically in regard to human

⁸¹² Gordon Connell-Smith & Royal Institute of International Affairs, *The Inter-American system* (London; New York [etc.]: issued under the auspices of the Royal Institute of International Affairs [by] Oxford U.P., 1966) at 10 In 1890, at the First International Conference of American States, “Latin American countries tried unsuccessfully to persuade the United States not to intervene diplomatically on behalf of her nationals residing in their territories”.

⁸¹³ Wells, *supra* note 514 at 227–230.

⁸¹⁴ *Ibid* at 230–1.

⁸¹⁵ *Report of the Delegation of the United States of America to the Inter-American Conference for the Maintenance of Peace*, (Washington :, 1937) at 228 As part of Appendix 53 “XXVII. Declaration of Principles of Inter-American Solidarity and Co-operation” Section 3(b).

rights. It is a founding principle of the OAS;⁸¹⁶ it was recognized in the 1960s as a particular challenge to efforts to strengthen Inter-American human rights;⁸¹⁷ its application waned in the 80s and 90s with the entry into force of the American Convention; but, it has recently seen an informal resurgence and clearly maintains influence in the modern Inter-American human rights regime.

The principle of non-intervention was prioritized by the Inter-American nations prior to any real discussions on human rights. It was formalized in 1936 as a general policy. It was expanded upon in 1945 at the Special Inter-American Conference for the Maintenance of Peace by the Resolution on the International Protection of the Essential rights of Man. This resolution, contrary to its name did not address what we now consider to be human rights. Instead, it focused on strengthening non-intervention by denouncing the mistreatment of aliens in nations where they lack legal status.⁸¹⁸ It established a basic standard of protection for all people, such that nations could not influence other nations by mistreating each other's nationals.⁸¹⁹ This early inclusion of the principle into regional policy foreshadowed its placement as the founding principle of the OAS and its future influence; as noted by Cabranes:

For at least a decade and a half after the end of the Second World War, the subject of human rights was largely limited to occasional lofty and vague pronouncements, while non-intervention was

⁸¹⁶ *Bogota Charter*, *supra* note 526 Article 3(e).

⁸¹⁷ José A Cabranes, "Human Rights and Non-Intervention in the Inter-American System" (1967) 65:6 Michigan Law Review 1147.

⁸¹⁸ Resolution on the International Protection of the Essential rights of Man in *Report of the delegation of the United States of America to the Inter-American Conference on Problems of War and Peace* □: Mexico City, Mexico, Feb. 21 - Mar. 8, 1945. (Washington: U.S. Govt. Print. Off., 1946) at 108 Preamble.

⁸¹⁹ Cabranes, *supra* note 503 at 892; Also see Myres S McDougal, Harold D Lasswell & Lung-chu Chen, "The Protection of Aliens From Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights" (1976) 70:3 The American Journal of International Law 432.

enshrined in the Charter of the OAS as the operative principle of the Inter-American system.⁸²⁰

Non-intervention is an integral component of the Charter of the OAS. It is mentioned variously in Articles 2(b), 3(e), 15, 17, 20, 21, and most clearly in Article 19 which states that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

As long as OAS members intended to adhere to this expression of the principle of non-intervention, it would make it impossible for the regime to institute strong (enforceable) human rights protection.

In order for a human rights regime to be effective, it needs the authority to admonish nations that violate human rights. An effective human rights regime necessarily interferes with internal affairs of its participant States when they violate human rights. This interference can come in many forms from condemnation, to sanctions, to forcible intervention, but a human rights regime without the authority to intervene, or at least condemn, is the same as not having a regime at all. On this basis it may not be surprising that the American Declaration was greeted with little fanfare at the time it was signed.

While today the American Declaration is lauded for being the world's first international human rights document, it received relatively little attention from those working on Inter-American relations at the time it was drafted. Prior to the Inter-American Commission's actions in Dominican Republic in

⁸²⁰ Cabranes, *supra* note 503 at 893.

1965, the American Declaration and the role of human rights in the Americas was rarely given more than a passing mention.

Laurence Duggan's 1949 book, *The Americas: The Search for Hemisphere Security*,⁸²¹ gives a rare and interesting insight into the early development of human rights.⁸²² He notes that after the Second World War the question arose in the Americas as to how to support democratic institutions and protect fundamental human rights; specifically, should nations intervene where unpopular dictators deny basic human rights? In 1945 the Foreign Minister of Uruguay responded stating that:

Peace is safe only where democratic principles of governments prevail. The basic rights of man are part of these principles. Thus, though once exclusively domestic concerns, they now affect international interests and require international protection. In case of their violating in any American republic, the community of nations should take collective multilateral action to restore full democracy there. Such action is really nothing more than the fulfillment of obligations freely assumed by American republics, all of whom have proclaimed at inter-American conferences their devotion to democracy and the rights of man.⁸²³

The Uruguayan position was supported by Guatemala and Venezuela, which both had new revolutionary governments, as well as Panama and the United

⁸²¹ Laurence Duggan, *The Americas: The Search for Hemisphere Security* (New York: Holt, 1949).

⁸²² *Ibid.* Laurence Duggan was one of the top officials of the United States Department of State's Latin American Division and many insights, such as the Uruguayan proposal on intervention (mentioned below) and the response to it, are unfortunately unreferenced in his book and difficult to trace to primary sources. That said, the book was particularly well received at the time and praised for its comprehensiveness and impartiality, see Arthur P Whitaker, "Review of *The Americas: The Search for Hemisphere Security* by Lawrence Duggan" (1950) 19:2 *Pacific Historical Review* 163; James A Magner, "Review of *The Americas* by Laurence Duggan" (1950) 6:4 *The Americas* 500. There are relatively few works which discussed the creation of Inter-American human rights as they occurred and so some concessions must be made with regard to rigorous reference to primary sources.

⁸²³ Duggan, *supra* note 821 at 203–4.

States.⁸²⁴ However, the Uruguayan proposal was firmly rejected by the other American States. Duggan summarizes the response of these nations as:

The inter-American co-operative community rests on two pillars, the juridical equality of states and nonintervention (sic) in internal and external affairs. Nonintervention was won after bitter experiences and protracted struggles. It must be preserved inviolate. If the intervention of one state is bad, the intervention of all is worse. The United Nations Charter does not sanction intervention for the protection of human rights. Moreover, existing inter-American agreements provide an adequate procedure, namely, consultation and agreement on what to do, to deal with situations which menace peace.⁸²⁵

The majority of Inter-American nations took this position, preferring non-intervention to the protection of human rights, based on the notion that “collective multilateral action” would simply become a euphemism for intervention led and controlled by the United States. At the time, the United States was the dominant industrial and military force in the Americas with a history of intervening in other nations’ affairs when it suited its interests. The Inter-American nations were concerned that the United States would pressure other nations to support its preferred interventions while simultaneously rejecting any attempts of nations to challenge the United States’ own human rights record.⁸²⁶

Duggan points out that the Inter-American nations formally rejected the idea of multilateral intervention with Article 19 of the Charter of the OAS, but does note that the nations did “approve a Declaration describing and affirming [human] rights”.⁸²⁷ He acknowledges that the American

⁸²⁴ *Ibid* at 204.

⁸²⁵ *Ibid* at 205.

⁸²⁶ *Ibid* at 206.

⁸²⁷ *Ibid* at 209.

Declaration indicates that the nations “intend to co-operate in measures for the protection of the basic rights of man”,⁸²⁸ but provides not further discussion on what the American Declaration means, its potential, or its importance. His work provides a detailed discussion of the challenges associated with melding human rights protection with the principle of non-intervention and emphasises the importance Latin American nations placed on non-intervention.⁸²⁹ This conflict between human rights protection and non-intervention would become a reoccurring challenge of the Inter-American human rights regime.

The principle of non-intervention first clashed with the protection of human rights in 1959 at the Fifth Meeting of Foreign Ministers of the American Republics. Here, a main topic of interest was reconciling non-intervention with growing Latin American demands for action to promote representative democracy and human rights protection.⁸³⁰ The new Cuban government (established by Castro’s revolution) and the new Venezuelan government (having recently forced out the military dictator Pérez Jiménez) were both in favour of a general OAS policy to expel dictatorial governments from OAS membership and enforcing human rights by way of intervention.⁸³¹ However, the United States and the majority of Latin nations preferred non-intervention over substantive changes to the role of the OAS.⁸³² Ultimately, the parties settled on the Declaration of Santiago, Chile⁸³³ which simultaneously reiterated the principle of non-intervention and began the process to establish the modern Inter-American human rights regime.

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid* at 203–206.

⁸³⁰ Connell-Smith & Royal Institute of International Affairs, *supra* note 812 at 242; United States Department of State, “Foreign relations of the United States, 1958-1960. American Republics” (1960), online: <<http://digioll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=header&id=FRUS.FRUS195860v05>> at 333.

⁸³¹ State, *supra* note 830 at 330.

⁸³² Connell-Smith & Royal Institute of International Affairs, *supra* note 812 at 424.

⁸³³ “Declaration of Santiago, Chile” (1961) 55:2 *The American Journal of International Law* 537.

The Declaration was accompanied with the Final Report of the Fifth Meeting of Consultation of Ministers of Foreign Affairs. This report recommended the preparation of a subsequent report “on the possibility of establishing adequate procedures to ensure, without constituting intervention in the internal or external affairs of states, strict observance of the principle of non-intervention”.⁸³⁴ As it reiterated the importance of the principle of non-intervention it also recommended the drafting of a Convention on Human Rights and the creation of an Inter-American Court for the Protection of Human Rights.⁸³⁵ It also established the Inter-American Commission on Human Rights and it charged with “furthering respect for such rights”.⁸³⁶

The Final Report of the meeting in Santiago emphasized the principle of non-intervention while providing greater support for human rights. Its recommendations ultimately resulted in the drafting the American Convention; a document which by design seriously challenged the principle of non-intervention. At the same time, the IA Commission independently took action in the Dominican Republic where it unquestionably intervened in domestic issues to protect human rights. This push and pull between strengthening human rights and emphasizing non-intervention was an integral part of the Inter-American regime.

It has been speculated that the creators of the IA Commission never intended it to have the authority to comment on specific State actions.⁸³⁷ After the IA Commission’s humanitarian operation in the Dominican Republic the OAS formally expanded the IA Commission’s authority, but limited its ability to publically renouncing the human rights violations of OAS member states.

⁸³⁴ *Final Report of the Fifth Meeting of Consultation of Ministers of Foreign Affairs*, 12-18 August 1959, 1960, OEA/SerC/115 [*Final Report 1960*] Section VII.

⁸³⁵ *Ibid* Section VIII(I).

⁸³⁶ note 833 Section VIII(II).

⁸³⁷ Cabranes, *supra* note 503 at 894 The formal authority allowing the IA Commission to intervene in specific human rights situations was given to the IA Commission after its self-directed in situ review of human rights in the Dominican Republic.

When the American Convention was initially opened for signature it was clear that it would undermine the OAS principle of non-intervention. The American Convention has garnered a significant level of success, but it has not received adequate support from the OAS nations to overcome the pre-established strength of non-intervention.

Clearly, nations which ratify the American Convention and consent to the IA Court implicitly reject a strict adherence to the principle of non-intervention. The IA Court's role is to judge the actions of the participating nations. In turn, these nations have committed to complying with the IA Court's judgments irrespective of national political, economic, or cultural interests. The IA Court's purpose is to directly intervene with the internal affairs of States; therefore it directly violates the OAS Charter and the principle of non-intervention.⁸³⁸

Perhaps unsurprisingly, the regional division between protecting human rights and the principle of non-intervention meant that the American Convention did not receive immediate support. The San Jose Conference, where the American Convention was signed, was only attended by 19 of the (at the time) 24 OAS member states and only twelve of the attending States signed the Convention.⁸³⁹ The four largest and most influential OAS members, Argentina, Brazil, Mexico and the United States, were notable non-signatories. It took nine years for the treaty to come into effect.⁸⁴⁰ Ultimately, most OAS members ratified the American Convention and recognized the IA

⁸³⁸ The Inter-American Judicial Committee made this point clear in *Comite Juridico Interamericano*, "Estudio Sobre la Relación Jurídica Entre el Respeto de los Derechos Humanos y El Ejercicio de la Democracia" (1959) *Recomendaciones e Informes: documentos oficiales*:v. VI p220-245, online:

<http://www.oas.org/es/sla/cji/docs/Derechos_humanos_democracia_votos_razonados_oct-1959.pdf> where it determined that human rights protection in the Americas could only be established with the creation of a new, comprehensive convention.

⁸³⁹ Thomas Buergenthal, "American Convention on Human Rights: Illusions and Hopes, The" (1971) 21 *Buff L Rev* 121 at 121.

⁸⁴⁰ When Granada became the necessary eleventh ratification as per *American Convention*, *supra* note 543 Article 74(2) in 1978.

Court⁸⁴¹ and, as participation increased, it was accompanied with a general OAS-wide shift away from non-intervention.

By the early 1990s, OAS governments had begun to place a higher priority on maintaining democratic governments than its long-held principles of “sovereignty” and “non-intervention”.⁸⁴² This shift in priorities allowed the OAS to begin intervening in national activities where democracy itself was challenged by unfair elections or coups.⁸⁴³ The OAS’s Unit for Promotion of Democracy (UDP)⁸⁴⁴ began to provide external elections monitoring in the 1990s and electoral monitoring became an important part of the OAS mandate.⁸⁴⁵

Recently the OAS, in conjunction with the US and/or the UN, has intervened numerous times in Latin America to ensure democratic governance⁸⁴⁶ and there is a general acceptance that democracy is an “integral part of a legally binding agreement between states in the Western Hemisphere, which [can] be exogenously enforced without threatening the states’ sovereignty”.⁸⁴⁷ Unfortunately, when it comes to protecting human rights, there are still indications that OAS member states have yet to fully support the IA Commission and IA Court. States have implicitly promoted a return to non-intervention, especially when decisions of the adjudicating bodies conflict with government policies.

⁸⁴¹ Canada and the United States being two very big exceptions to Convention participation.

⁸⁴² Betty Horwitz, *The Transformation of the Organization of American States: A Multilateral Framework for Regional Governance* (Anthem Press, 2011) at 43.

⁸⁴³ Hugo de Zela Martinez, “Organization of American States and its Quest for Democracy in the Americas, The” (2013) 8 *Yale J Int’l Aff* 23 at 28.

⁸⁴⁴ Which is now the Office for the Promotion of Democracy

⁸⁴⁵ Horwitz, *supra* note 842 at 52.

⁸⁴⁶ *Ibid* at 53–56.

⁸⁴⁷ *Ibid* at 55–56.

From June 2011 to March 2013, the OAS underwent a process to reform the IA Commission, calling the effort: “Strengthening the IACHR”.⁸⁴⁸ During the public consultation process, observers cautioned that the proposed reforms would weaken the IA Commission’s ability to protect human rights.⁸⁴⁹ During the reform process, many member states proposed reforms that illustrate the high value they still place on non-intervention, especially where nations feel that human rights are being prioritized above important national interests. Of particular interest among States were efforts to limit the IA Commission’s ability to grant precautionary measures and review the human rights performance of individual nations.⁸⁵⁰

First, with regard to the IA Commission’s ability to grant precautionary measures, Argentina, Brazil, Colombia, Costa Rica, and Mexico all extolled the value of the IA Commission’s precautionary measures while they simultaneously advocated for their restriction.⁸⁵¹

Prior to the reform process, the IA Commission had a wide general authority to grant precautionary measures “to prevent irreparable harm to persons or to the subject matter of the proceedings”.⁸⁵² The reform process altered the IA Commission’s Rules of Procedure to restrict the application of precautionary

⁸⁴⁸ IACHR standing for the “Inter-American Commission on Human Rights”; for more information on the reform process see

<<http://www.oas.org/en/iachr/mandate/strengthening.asp>>

⁸⁴⁹ Carey Biron, “Pan-American Rights Commission ‘Under Threat’ | Inter Press Service”, online: <<http://www.ipsnews.net/2012/11/pan-american-rights-commission-under-threat/>>.

⁸⁵⁰ Stephen Vasciannie, “Inter-American Commission on Human Rights: Reform and the Question of Universality, The” (2014) 21 ILSA J Int’l & Comp L 409 at 414–6.

⁸⁵¹ *Compilation of Presentations by Member States on the Topics of the Working Group: Texts Sent to the Secretariat of the Working Group by Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, United States, and Uruguay as of November 4, 2011*, Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHR 7 November 2011, OEA/SerG/GT/SIDH-17/11 rev 1 [*Compilation of Presentations by Member States on the Topics of the Working Group: Texts Sent to the Secretariat of the Working Group by Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, United States, and Uruguay as of November 4, 2011*] at 10–17.

⁸⁵² *Rules of Procedure of the Inter-American Commission of Human Rights*, 13 November 2009 [*Rules of Procedure (Amended in 2013)*] Article 25(1).

measures to issues which “shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition”.⁸⁵³ The reforms go on to define the terms “serious situation”, “urgent situation”, and “irreparable harm”.⁸⁵⁴

While the IA Commission’s precautionary measures have never been legally binding, nations have routinely taken them seriously. One example of this is the Brazilian government’s reaction to the precautionary measure requested in relation to the Belo Monte dam. In April, 2011 the IA Commission used a precautionary measure to request Brazil stop construction of the Belo Monte dam until the project met certain conditions to protect the life and physical integrity of the people of the Xingu River Basin.⁸⁵⁵ In May, 2011 the Brazilian President ordered an immediate cessation of all relations with the OAS and suspended, or threatened to suspend, its annual \$800,000US contribution to the IA Commission.⁸⁵⁶ The precautionary measure was re-evaluated based on further information provided by the State,⁸⁵⁷ and the measure was altered to allow building to continue and request that the

⁸⁵³ *Rules of Procedure*, *supra* note 551 Article 25(1).

⁸⁵⁴ *Ibid* Article 25(2).

⁸⁵⁵ *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10, Annual Report of the Inter-American Commission on Human Rights, Ch 3, Para 32 (2011) .

⁸⁵⁶ See “Dilma retalia OEA por Belo Monte e suspende recursos”, *Folha de SPaulo* (30 April 2011), online: <<http://www1.folha.uol.com.br/fsp/mercado/me3004201117.htm>>; “Brazil furious with Human Rights Commission decision cuts all relations”, online: *MercoPress* <<http://en.mercopress.com/2011/04/30/brazil-furious-with-human-rights-commission-decision-cuts-all-relations>>; “Brazil hits back in anger over giant dam protest”, online: *UPI* <http://www.upi.com/Business_News/Energy-Resources/2011/05/02/Brazil-hits-back-in-anger-over-giant-dam-protest/88101304372349/>; Mari Hayman, “Brazil Breaks Relations With Human Rights Commission Over Belo Monte Dam | Latin America News Dispatch”, online: <<http://latindispatch.com/2011/05/03/brazil-breaks-relations-with-human-rights-commission-over-belo-monte-dam/>> see <http://www1.folha.uol.com.br/mercado/me3004201117.htm> for original article.

⁸⁵⁷ The Brazilian government provided the Commission with a classified 52-page document supporting the creation of the dam in response to the initial precautionary measure CITE and the Secretary-General of the OAS publically advocated for the Commission to review the initial precautionary measure: “Comissão da OEA deve ‘revisar decisão’ sobre Belo Monte, diz secretário-geral - Política”, online: *Estadão* <<http://politica.estadao.com.br/noticias/geral,comissao-da-oea-deve-revisar-decisao-sobre-belo-monte-diz-secretario-geral,714786>>.

Brazilian government undertake actions to protect the Xingu Basin communities.⁸⁵⁸ In response to the first precautionary measure, Brazilian officials called the precautionary measure “precipitous and unwarranted” and complained that it “threatened Brazilian sovereignty”.⁸⁵⁹

The Brazilian authorities did not cite the Belo Monte precautionary measures in their reform communications, but their reaction to the precautionary measure, and the effort made to limit the IA Commission’s authority to grant precautionary measures, are clearly reminiscent of the principle of non-intervention. During the reform process States did not reference or advocate for “non-intervention”, but efforts to limit the authority of the IA Commission were obvious.⁸⁶⁰

Ultimately, it is unsurprising that nations whose interests conflict with their international human rights obligations might take steps to reduce, or eliminate, those international obligations. In retrospect it is somewhat surprising that the Inter-American human rights regime has become so robust having been founded on the principle of non-intervention. In contrast, European diplomacy prior to and during the creation of the ECHR was not hindered by adherence to the principle of non-intervention: European human rights were established specifically in order to facilitate international intervention.

The European political atmosphere prior to the creation of the ECHR was starkly different from what it was present in the Americas. Western Europe did not have a hegemon comparable to the United States in the Americas and therefore there was no effort among nations to protect their national

⁸⁵⁸ *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, *supra* note 855.

⁸⁵⁹ Hayman, *supra* note 856.

⁸⁶⁰ It should be noted that the ultimate impacts of the reforms are still unclear Vasciannie, *supra* note 850 at 416 provides one of the few articles on the reforms and emphasizes the need to wait to see how the reforms actually alter the IA Commission’s actions.

independence from a single overly influential member.⁸⁶¹ The ECHR was initially drafted as a means to halt the spread of Soviet influence, communism, and a potential rise of fascism,⁸⁶² but this is very different from the situation in the Americas. In Europe, there was an effort to establish a human rights regime to protect democracy from external threats, but there was no perceived need to protect ECHR members from one another. Unlike the American Declaration, the ECHR was created with an explicit mechanism to intervene in the interests of national governments.⁸⁶³

While not all European nations immediately adopted the ECHR, the general progression of the ECHR in Europe has been one where human rights have been generally strengthened and participation has gradually increased. The Council of Europe was initially signed by only ten nations,⁸⁶⁴ but within a year there were four more signatories⁸⁶⁵ and all fourteen CoE member states then signed the ECHR when it opened for signature.⁸⁶⁶ France and the UK were notably slow to allow individuals to petition the European Court, but the general trend in Europe has been toward an increased commitment to human rights and international intervention.

France did not ratify the ECHR until 1974 and did not allow individuals to petition the European Court until 1981. The United Kingdom ratified the ECHR in 1951, but did not consent to individual petitions of the court until 1967. In both instances, the delay in recognizing the European Court was related directly to (a) the nations' reluctance to relinquish their ultimate

⁸⁶¹ WW1 and WW2 can be seen as Axis Powers, or maybe just Germany, attempting to exert influence over the other nations in the region, but Germany's losses in both wars deny its status as a hegemon since it was ultimately unable to exert its desired influence.

⁸⁶² Madsen, *supra* note 811 at 140.

⁸⁶³ The ECHR was, from the outset, intended to be a legally binding document with a court to review proposed violations. The Inter-American regime did not have a similar document to the ECHR until the American Convention came into effect.

⁸⁶⁴ Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the United Kingdom

⁸⁶⁵ Germany, Greece, Iceland, and Turkey

⁸⁶⁶ Most of these nations signed the ECHR on November 4, 1950 with the exception of Sweden and Greece which signed on the November 28, 1950.

authority over the interpretation of “civil rights” and (b) both nations had colonies which arguably lacked the human rights protections afforded by the ECHR.⁸⁶⁷ Eventually these issues were overcome and these nations, along with 45 other European nations ratified the ECHR and accepted the jurisdiction of the European Court of Human Rights.

The European human rights system has generally developed toward increasing support of human rights and integration. Participation in the ECHR has steadily increased and there have been no major efforts to weaken its effectiveness. In contrast, the Inter-American regime began with broad regional participation, but as efforts to strengthen human rights progressed, participation was reduced: the Universal Declaration had the highest participation, but it progressively declined through the American Convention and San Salvador Protocol.

The principle of non-intervention had a major impact on the initial design of the Inter-American regime and while it is no longer emphasized as it once was, it clearly maintains an influence in the modern regime. Ultimately, the principle of non-intervention weakens the effectiveness of the Inter-American regime. It implicitly provides an excuse for reduced participation and the pursuit of reforms that undermine the effectiveness of the regime.

The impact of this principle has contributed to a clear disparity in strength of the two regimes. Further contributing to this disparity is the treatment of the earliest cases considered by each of the regimes’ primary adjudicating bodies. Section 4.2 explains how the early decisions of these bodies have negatively impacted early adoption of the regimes.

⁸⁶⁷ See Madsen, *supra* note 811 at 145–6.

4.2 How early decisions of human rights tribunals influenced participation and foreshadowed each regime's adjudicatory style

There many of factors which influence a nation's decision to initially join, and ultimately support, a given human rights regime. National and regional politics can certainly play a role, as can the influence of charismatic leaders, and the design of the regime itself. While Section 4.1 focused on the impact of regional politics, in particular the principle of non-intervention, this section focuses on the effect of the regional adjudicating bodies on national governance and the willingness of States to subject themselves to external scrutiny.

The American Declaration, American Convention and the ECHR protect a similar set of rights. There are slight variations in the language and notable differences in the procedures for bringing a claim, but ultimately both regimes generally set out to protect the same rights. That the regimes share these rights in principle does not, however mean that the same rights are going receive the same protection and interpretation in practice. How the regimes' tribunals interpret the meaning and application of each right has an enormous effect on what it really means for a nation to participate in the regimes.

During the early stages of both the ECHR and the Inter-American regimes, member states and States considering membership would have been watching the regimes' adjudicating bodies closely to see what would constitute a rights violation and how it impacted the State in question. In his 2007 analysis of the development of the European Court of Human Rights, Madsen describes how one of Europe's supreme adjudicating bodies began as

a relatively modest court and in this way gained the support of regional governments.⁸⁶⁸

Madsen cites two early European cases as building regional confidence in the new European human rights regime. One is an inter-state complaint by Greece that the UK government committed human rights violations in Cyprus, which at the time was a British colony.⁸⁶⁹ The other is *Lawless*, an Irish case pertaining to the detention without trial of a suspected member of the Irish Republican Army (IRA).⁸⁷⁰ As two of the earliest disputes brought before the European Commission of Human Rights and the European Court of Human Rights, their outcomes would provide the first indications of the jurisprudential style of the European regime.

In *Greece v the United Kingdom*, the Greek authorities alleged that the British administration authorities in Cyprus had violated numerous human rights of the Cyprian people, including: *inter alia*, torture, arbitrary arrest, and violation of privacy and private property.⁸⁷¹ The application was resolved through a friendly settlement and importantly the European Commission of Human Rights determined that, in response to the friendly settlement, it would refrain from expressing its legal opinion on the initial Greek claims.⁸⁷² While today the decision to refrain from analysing the Greek claims seems normal, Madsen points out that at the time it was a pivotal decision of the European Commission of Human Rights. It illustrated the commission's willingness to defer to national diplomacy over human rights law.⁸⁷³

Following *Cyprus*, the European Commission of Human Rights and European Court heard the *Lawless* case in which an Irish citizen, G.R. Lawless, argued

⁸⁶⁸ Madsen, *supra* note 811.

⁸⁶⁹ *Greece v United Kingdom and Northern Ireland*, No 176/56 (1957) (European Commission of Human Rights).

⁸⁷⁰ *Lawless v Ireland (No 3)*, No 332/57 (1 July 1961) (European Court of Human Rights).

⁸⁷¹ *Cyprus*, *supra* note 869 at 6 paragraph (b).

⁸⁷² *Ibid* at 219.

⁸⁷³ Madsen, *supra* note 811 at 150.

that his arrest violated Article 5 of the ECHR (the right to liberty).⁸⁷⁴ Lawless admitted to being a member of the IRA and had been arrested and detained for five months without trial.⁸⁷⁵ In their analysis of the facts, both the commission and court determined that Lawless' detention had violated his Article 5 right,⁸⁷⁶ but the European Court of Human Rights held that the detention was justified under Article 15 which allows ECHR members to derogate from the ECHR in case of a public emergency which threatens the life of the nation.⁸⁷⁷

In both *Cyprus* and *Lawless*, the adjudicating bodies of the ECHR illustrated their willingness to defer potential findings of human rights violations to the interests of participant nations. In *Cyprus*, the European Commission on Human Rights certainly could have given its opinion on the facts and publically admonished the UK for violating a variety of rights of the Cyprian people. Similarly, the European Court of Human Rights could have determined that being detained for five months without trial went beyond reasonable measures to protect the life of the nation. Instead, these early decisions were generally favourable to national interests.

While it is difficult to be sure of the impact of these early cases on ECHR participation and acceptance, Madsen's argument is persuasive. It seems reasonable to believe that nations cautious of joining a new supra-national regime would be more receptive of an adjudicating body that tended to support national concerns, rather than appearing overly sympathetic to applicant's potential rights violations. In contrast, had the first European human rights cases indicated that the court would establish a relatively low threshold of what constituted a breach of the ECHR, it seems probable that it would have had a chilling effect on membership. Madsen argues that the

⁸⁷⁴ *Lawless*, *supra* note 870 at THE LAW paras 8-9.

⁸⁷⁵ *Ibid*, s IV para 20.

⁸⁷⁶ *Ibid* at THE LAW paras 9 & 15.

⁸⁷⁷ *Ibid* at THE LAW paras 22 & 47.

European human rights regime established itself early as “reliable, respectable, and legally conservative” and this led to its high participation.⁸⁷⁸

In contrast, the Inter-American regime has established itself as having a relatively progressive interpretation of rights, rather than as a conservative institution. If Madsen’s interpretation of impact of early jurisprudence is applied to the Inter-American regime, it can explain how the early cases of the IA Commission may have inhibited participation and the adoption of the American Convention. Many of the early cases brought before the IA Commission illustrated a willingness to strictly enforce the region’s human rights.

The first major action of the IA Commission was to unilaterally strengthen Inter-American human rights. Prior to the IA Commission having the clear authority to conduct *in situ* investigations of national human rights, the IA Commission undertook such investigations.⁸⁷⁹ In its first five years of existence, the IA Commission reported on the human rights situations in Cuba, Haiti and the Dominican Republic. These early reports were based solely on information provided by individual complaints. The States did not contribute to the investigation of rights violations, but rather provided formal responses to the IA Commissions findings.⁸⁸⁰ Writing at the time, Scheman notes that the IA Commission made it clear that it could only weigh the information made available to it and that it made “the unmistakable inference that, should governments choose to supply more complete

⁸⁷⁸ Madsen, *supra* note 811 at 151.

⁸⁷⁹ See Cabranes, *supra* note 503 at 895–6 initially the American Commission was designed as a “study group”, but its mandate quickly grew to where it was “literally on the firing line of human rights”.

⁸⁸⁰ *Informe Sobre la Situación de los Derechos Humanos en la República de Cuba*, 20 March 1962, OEA/SerL/V/II4 doc 2 [*Report on Cuba 1962*], ch 3; *Report of the Inter-American Commission on Human Rights on its Activities in the Dominican Republic*, 28 October 1966, OEA/SerL/V/II15 doc 6 Rev [*Report on the Dominican Republic 1966*], ch 3.

information, the report can serve equally as their forum”.⁸⁸¹ Ultimately, these early reports did not serve as a forum for States; instead they illustrated serious human rights violations.

In 1965 the IA Commission was granted authority to hear and comment on individual petitions, while it took years before any of these cases were heard on their merits, the ultimate outcome of many of these early cases were serious indictments of national human rights records. In 1973 the first cases were decided on their merits. These cases are similar in terms of their procedures, outcomes, the types of rights violated.

Relatively soon after the creation of the IA Commission, the governments of many Inter-American member states shifted from being open democracies to dictatorships.⁸⁸² These dictatorships drove much of the early work of the IA Commission as it considered petitioners claims that their rights had been violated.⁸⁸³ The work of the IA Commission at this time was complicated by the failure of the States in these early cases to provide the IA Commission with requested information necessary for the IA Commission to analyze the cases.

The failure of respondent nations to participate with these early IA Commission cases highlights a number of troubling issues. Overall, it illustrates an unwillingness of nations to participate in the Inter-American human rights regime and to potentially be held accountable for violating the American Declaration. There is also a tacit implication of a rights violation when the States refuse to participate in the IA Commission’s review. It also

⁸⁸¹ L Ronald Scheman, “The Inter-American Commission on Human Rights” (1965) 59:2 *The American Journal of International Law* 335 at 341.

⁸⁸² Such as military dictatorships in Argentina, Brazil, Chile, and Uruguay; as well as hereditary dictatorships in Haiti; Communist dictatorships in Cuba; a dictatorship in Paraguay, and successive military coups in Bolivia and Guatemala.

⁸⁸³ David Padilla, “The Inter-American Commission on Human Rights of the Organization of American States: A Case Study” (1993) 9:1 *American University International Law Review*, online: <<http://digitalcommons.wcl.american.edu/auilr/vol9/iss1/5>> at 97.

implies that the respondent nations might be willing to violate the same rights again. The non-binding nature of the American Declaration and the lack of binding authority of the American Commission allowed participant nations to choose their level of participation because there are no explicit ramifications for non-participation or violating human rights.

The inability of the IA Commission to effectively enforce the American Declaration placed decision makers in the IA Commission in a difficult position. They could strictly interpret the American Declaration on the basis that all human rights violations should be recognized, even if an effective resolution was unlikely. Or, the Commission could take a softer approach to human rights violations in the hopes that narrow interpretations of rights, interpretations which favoured national interests, would increase overall participation with the regime. This latter approach is arguably the one taken by the early decisions of European Court, but unfortunately it is likely that the content of the cases heard by the IA Commission prohibited it from also taking a soft approach to the rights violators.

A notable difference ECHR and Inter-American regimes, which is external to the design and operation of the regimes themselves, is the type of human rights which have been violated in the two regimes. While it would be difficult to empirically rank the seriousness or severity of human rights violations, it is also difficult to dispute that the forced disappearances, long-term detention of political dissidents, and extrajudicial killings, which occurred in the early years of the Inter-American regime, are of a more serious nature to the types of rights violated in the early ECHR cases. Even the political handling of some of the pivotal early cases illustrate a difference in the function of the two regimes: in the ECHR, the UK government acted to resolve the Greek government's claim by way of a friendly settlement; in contrast, in the first five Inter-American cases the respondent nations failed to fully participate in the IA Commission's review.

Due to the severity of the rights violated by nations in the Inter-American regime, the IA Commission had a limited ability to take a soft approach to potential violations. In *Lawless*, the applicant was a self-admitted member of the IRA; a group which specifically intended to carry out acts of violence in order to end British sovereignty in Northern Ireland.⁸⁸⁴ Prior to the detention which served the basis for his ECHR case, Lawless was arrested on two occasions for possession of firearms and possession of documents that outlined guerrilla warfare.⁸⁸⁵ Ultimately, Lawless was detained without trial from 13 July to 11 December 1957;⁸⁸⁶ the European Court determined that his detention was a violation of his human rights, but that it was justified as an emergency measure.⁸⁸⁷ In contrast, the five cases heard by the IA Commission in 1973 were based upon (i) a union leader who was allegedly tortured and murdered by the Brazilian government;⁸⁸⁸ (ii) the mistreatment of Cuban political prisoners including torture and death;⁸⁸⁹ (iii) the arbitrary arrest, disappearance, and possible death of a Haitian citizen;⁸⁹⁰ (iv) the killing of a Nicaraguan family by the National Guard;⁸⁹¹ and (v) the arbitrary arrest and detention without trial (with some detentions lasting over a decade) of Paraguayan citizens.⁸⁹²

Based on the facts presented in these early reports of the European Court of Human Rights and Inter-American Commission there is simply no way to

⁸⁸⁴ *Lawless*, *supra* note 870 at FACTS paras 4-6.

⁸⁸⁵ *Ibid* at FACTS para 19.

⁸⁸⁶ *Ibid* at LAW para 1.

⁸⁸⁷ *Ibid* at THE LAW para 30.

⁸⁸⁸ *Brazil Case 1683*, [1974] OEA/SerL/V/II32, doc3 rev2 (Inter-American Commission on Human Rights).

⁸⁸⁹ *Cuba Case 1604*, [1973] OEA/SerL/V/II30, doc4 rev2 (Inter-American Commission on Human Rights); *Cuba Case 1721*, [1973] OEA/SerL/V/II30, doc5 rev2 (Inter-American Commission on Human Rights); *Cuba Case 1726*, [1973] OEA/SerL/V/II30, doc6 rev2 (Inter-American Commission on Human Rights).

⁸⁹⁰ *Haiti Case 1761*, [1973] OEA/SerL/V/II30, doc9 rev1 (Inter-American Commission on Human Rights).

⁸⁹¹ *Nicaragua Case 1688*, [1972] OEA/SerL/V/II28, doc20 rev1 (Inter-American Commission on Human Rights).

⁸⁹² *Paraguay Case 1741*, [1974] OEA/SerL/V/II32, doc3 rev2 (Inter-American Commission on Human Rights).

compare the gravity of the cases in each regime. There is no way to massage the facts of the Inter-American cases in order to reach a decision that could support the respondent nations - at least no way to do so while providing any substantive support for the principles of the American Declaration. While the European Court of Human Rights was able to gain the support of the European nations by using a “soft touch” in its interpretation of the ECHR, the IA Commission had no ability to do the same.

Again, it is difficult to know the impact these early cases had on the ultimate participation and reception of these two human rights regimes. However, it does not seem unreasonable to speculate that some of the OAS nations which are reluctant to commit to the American Convention are reluctant because they do not want to be subject to the IA Court. That said, parties to the American Convention have illustrated that an initial commitment to the American Convention and the IA Court does not always mean an everlasting commitment. Adding to the differences between these two regimes is the divergence in commitment of the parties to the regimes and the differing levels of compliance to the decisions of the regimes’ adjudicating bodies.

4.3 Participation and compliance

When the American Convention was opened for signature, it was not immediately embraced by all OAS members. At the time, it was speculated that this lack of participation was be attributed to its being too broad and burdensome and that OAS nations were simply unprepared to commit to protecting so many rights at one time.⁸⁹³ None of the “big four” American nations were early adopters of the Convention: Argentina, Brazil, Mexico and

⁸⁹³ Buergenthal, *supra* note 839.

the United States⁸⁹⁴ and those nations maintain an apparent unease with the regime as Argentina, Brazil and Mexico all recently advocated for the reforming and restricting the IA Commission;⁸⁹⁵ the United States has yet to ratify the American Convention. Furthermore, Brazil, along with three other States, have denounced or threatened to denounce the American Convention so clearly there are still those who believe that commitment to the Inter-American regime may be too broad and burdensome.

Recently there has been an increase in nations considering denouncing some aspect of their Inter-American human rights commitments. As mentioned in the Section 4.1, Brazil notably threatened to remove itself from the OAS after the IA Commission's precautionary measure regarding the Belo Monte dam project.⁸⁹⁶ Similarly, in 1999 Peru stated its intention to withdraw from the IA Court, while remaining a party to the American Convention.⁸⁹⁷ At the time, Peru planned to withdraw from the court to avoid several contentious cases,⁸⁹⁸ but the IA Court determined that the American Convention does not permit States to withdraw their recognition of the IA Court.⁸⁹⁹ Peru chose to remain a party to the American Convention and the eventual outcome of the case in question was that the Peruvian government violated various rights of the petitioners.⁹⁰⁰ Unfortunately, unable to withdraw from the IA Court and unwilling to withdraw from the American Convention, the government of Peru simply chose to ignore the IA Court's decisions.⁹⁰¹

⁸⁹⁴ *Ibid* at 121.

⁸⁹⁵ See Section 14.1 of this work

⁸⁹⁶ See Section 15 of this work

⁸⁹⁷ *Case of the Constitutional Court v Peru (Competence)*, Judgement of September 24, 1999, Inter-Am Ct HR, (Ser C) No 55 (1999) , para 27.

⁸⁹⁸ Goldman, *supra* note 502 at 877.

⁸⁹⁹ *Case of the Constitutional Court v Peru (Competence)*, *supra* note 897, para 52.

⁹⁰⁰ *Case of the Constitutional Court v Peru (Merits, Reparations and Costs)*, Judgement of September 24, 1999, Inter-Am Ct HR, (Ser C) No 71 (1999) . In the case, the applicants, three of Peru's Constitutional Court justices, were impeached because they determined that Peru's Constitution prevented the President from running for re-election. The Peruvian President later resigned.

⁹⁰¹ Goldman, *supra* note 502 at 878.

In contrast to Brazil and Peru, two nations, Trinidad and Tobago⁹⁰² and Venezuela,⁹⁰³ went beyond discussing potentially denouncing the American Convention and actually did so in 1998 and 2012, respectively.⁹⁰⁴ First, Trinidad and Tobago renounced its ratification of the American Convention based on the government's desire to apply the death penalty to a number of convicted murderers.⁹⁰⁵ Some of these individuals were in the process of bringing claims of human rights abuses to the IA Court, but the Government of Trinidad and Tobago requested that the IA Commission expedite its procedures to conform to the government's timelines. The IA Commission was unable to meet the timeline set by the government and the State concluded it was "unable to allow the inability of the Commission... to frustrate the implementation of the lawful penalty... in Trinidad and Tobago".⁹⁰⁶ Trinidad and Tobago went on to execute at least three individuals who had ongoing cases before the IA Commission.⁹⁰⁷

Venezuela's denunciation of the American Convention followed an unfavourable decision from the IA Court which held that State authorities violated a prisoner's right to personal integrity and for subjecting the applicant to inhuman and degrading treatment.⁹⁰⁸ The prisoner, Mr. Díaz-

⁹⁰² *Parties to the American Convention*, *supra* note 545 Trinidad and Tobago Denunciation.

⁹⁰³ *Letter to His Excellency Mr. José Miguel Insulza, Secretary General of the OAS, Washington D.C.*, Minister of Popular Power for Foreign Affairs of the Bolivian Republic of Venezuela, 6 September 2012, Caracas available at <http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SGEnglish.pdf> [*Venezuela's letter of denunciation*].

⁹⁰⁴ Strictly speaking the term "denunciation" only means a public condemnation and differs from "renunciation" and "withdrawal"; however, the OAS uses the term "denunciation" to signify an effective withdrawal from the American Convention.

⁹⁰⁵ Natasha Parassram Concepcion, "Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights, The" (2000) 16 Am U Int'l L Rev 847 at 849.

⁹⁰⁶ *Parties to the American Convention*, *supra* note 545 Trinidad and Tobago Denunciation.

⁹⁰⁷ Concepcion, *supra* note 905 at 849; *Annual Report of the Inter-American Commission on Human Rights*, Inter-American Commission on Human Rights 13 April 1999, OEA/SerL/V/II106 Doc 6 rev [*Annual Report of the Inter-American Commission on Human Rights*], ch III(D) para 90.

⁹⁰⁸ *Díaz-Peña v Venezuela*, Judgement of June 26, 2012, Inter-Am Ct HR, (Ser C) No 244 (2012), para 57.

Peña, was convicted by the Venezuelan court for participating in the bombing of the Consulate General of the Republic of Colombia and the Office of International Trade of the Kingdom of Spain.⁹⁰⁹ Prior to his trial, Díaz-Peña was held by the Venezuelan authorities for over two years during which time he was held in conditions the IA Court characterized as “extremely deficient” and lacked access to natural light, ventilation, and sanitary installations.⁹¹⁰ Furthermore, during his detention it was shown that Mr. Díaz-Peña “suffered a serious progressive deterioration in his health and that medical assistance services were not provided opportunely, adequately, and completely”.⁹¹¹

The Venezuelan government did not react well to the IA Court’s decision. The government saw Díaz-Peña as the author of serious terrorist attacks and then President Hugo Chavez accused the IA Court of “supporting terrorism” by deciding in favour of Díaz-Peña.⁹¹² The State cited numerous reasons for withdrawing from the American Convention, including: unfavourable IA Court decisions;⁹¹³ a perception that it had been unfairly singled out by the IA Commission; and a belief that the IA Commission “manipulated international law to hold violators of [Venezuelan] laws blameless and turn them into sham victims of unfounded violations of their human rights”.⁹¹⁴

The withdrawal of Venezuela and Trinidad and Tobago from the American Convention along with threatened withdrawals of Peru and Brazil illustrate the uneasy relationship between the Inter-American human rights regime

⁹⁰⁹ *Ibid*, paras 56 & 87.

⁹¹⁰ *Ibid*, para 140.

⁹¹¹ *Ibid*.

⁹¹² “Venezuela to withdraw from regional human rights court”, online: *BBC News* <<http://www.bbc.com/news/world-latin-america-18978997>>.

⁹¹³ *Venezuela’s letter of denunciation*, *supra* note 903 at 9–10.

⁹¹⁴ *Venezuela’s letter of denunciation*, *supra* note 903 Appendix (section A); It should be noted that some scholars have questioned Venezuela’s legal ability to do actually denounce the American Convention in such a way as to not be bound by it, see: Emercio Jose Aponte Nunez, “International Validity of the Venezuelan Denunciation of the American Convention on Human Rights, The” (2014) 8 *Vienna J on Int’l Const L* 3 However, neither the OAS nor the Inter-American Court appears to be interested in challenging Venezuela’s ability to denounce and effectively withdraw from the American Convention.

and its members. As with the first cases heard by the IA Commission, the human rights violations that precipitated these nations' reactions would have been difficult for the IA Court to ignore. Trinidad and Tobago arguably wanted to execute prisoners without giving them due process. Peru violated the applicants' rights to a fair trial and judicial protection: the applicants, three of Peru's Constitutional Court justices, were impeached because they determined that the Peru's Constitution prevented the President for running for re-election.⁹¹⁵ Venezuela withdrew citing numerous cases in which they were found to have violated individuals' rights to, *inter alia*, inhuman and degrading treatment;⁹¹⁶ freedom of speech;⁹¹⁷ the right to a fair trial and the deprivation of personal liberty.⁹¹⁸ In these cases, the rights violations were not trivial and the IA Court had little ability to ignore these violations in hopes of appeasing these nations in order to maintain their commitment to the American Convention.

The actions of these Inter-American nations illustrate two important distinctions between these two human rights regimes: one is the severity of the rights violations that can occur in the Americas; the other is the relative ease with which a nation can exit the American Convention. Recently the United Kingdom indicated an intention to exit the European human rights regime, but the consequences of this will be decidedly different from the consequences experienced by Trinidad and Tobago and Venezuela.

In 2013 then British Prime Minister, David Cameron, said that Britain may have to pull out of the European Convention on Human Rights in order to

⁹¹⁵ *Case of the Constitutional Court v Peru (Merits, Reparations and Costs)*, *supra* note 900, para 56.

⁹¹⁶ *Díaz-Peña*, *supra* note 908, s IX para 3.

⁹¹⁷ In *Ríos et al v Venezuela*, Judgement of January 2, 2009, Inter-Am Ct HR, (Ser C) No 194 (2009), para 3 the Court found that Venezuela had violated the rights to free speech and human treatment of ten journalists who worked for a private news television station.

⁹¹⁸ *Usón Ramírez v Venezuela*, Judgement of November 20, 2009, Inter-Am Ct HR, (Ser C) No 207 (2009).

extradite foreign criminals.⁹¹⁹ At the time, the government considered a temporary withdrawal from the ECHR to permit the deportation of Abu Qatada.⁹²⁰ Abu Qatada had been convicted *in absentia* in Jordan for conspiracy to cause explosions and the British government wanted to deport Abu Qatada to Jordan for these crimes.⁹²¹ However, the European Court of Human Rights ruled that, because Abu Qatada had a pending retrial in Jordan, which would be based on evidence obtained by torture, the UK would violate Article 6 of the ECHR by knowingly sending the applicant to have an unfair trial.⁹²²

Abu Qatada was ultimately deported after Jordan and the UK signed a treaty agreeing the evidence obtained from torture would not be used against him.⁹²³ However the political damage had already been done and withdrawing from the ECHR has been an explicit component of the government's platform.⁹²⁴ The government's 2015 manifesto said that the UK must "curtail the role of the European Court of Human Rights, so foreign criminals can be more easily deported from Britain".⁹²⁵ A key interest is to

⁹¹⁹ James Kirkup, "Britain may need to withdraw from European Convention on Human Rights, says Cameron", (29 September 2013), online: <<http://www.telegraph.co.uk/news/politics/conservative/10342403/Britain-may-need-to-withdraw-from-European-Convention-on-Human-Rights-says-Cameron.html>>.

⁹²⁰ Hannah Kuchler, Jane Croft & Kiran Stacey, "UK weighs leaving human rights treaty", *Financial Times* (24 April 2013), online: <<http://www.ft.com/cms/s/0/73e4ac7e-acd7-11e2-b27f-00144feabdc0.html>>.

⁹²¹ Press Association, "Abu Qatada deported from UK", online: *the Guardian* <<http://www.theguardian.com/world/2013/jul/07/abu-qatada-deported-from-uk>> "The Government has been trying to deport him to Jordan... for about eight years".

⁹²² *Othman (Abu Qatada) v The United Kingdom*, No 8139/09 (17 January 2012) (European Court of Human Rights) (available on Abu Qatada), para 285.

⁹²³ "Abu Qatada deported from UK to stand trial in Jordan", online: *BBC News* <<http://www.bbc.co.uk/news/uk-23213740>>; Abu Qatada was eventually cleared of all terror charges for "insufficient evidence", see: "Abu Qatada cleared of terror charges", online: *BBC News* <<http://www.bbc.co.uk/news/world-29340656>>.

⁹²⁴ Nicholas Watt & Rowena Mason, "Cameron 'committed to breaking link with European court of human rights'", online: *the Guardian* <<http://www.theguardian.com/law/2015/jun/01/david-cameron-european-court-of-human-rights>>; UK Conservative Party, *The Conservative Party Manifesto*, available at <<https://www.conservatives.com/manifesto>> (2015) at 60.

⁹²⁵ UK Conservative Party, *supra* note 924 at 58.

make the British Supreme Court “the ultimate arbiter of human rights matters in the UK”.⁹²⁶

The UK government has proposed plans to pass a British Bill of Rights which would simultaneously “remain faithful to the basic principles of human rights”, as established by the ECHR,⁹²⁷ while at the same time “break the formal link between the British courts and the European Court of Human Rights”.⁹²⁸ The ECHR can be denounced by member states,⁹²⁹ but, no nation has done so and the exact impact of denunciation is unclear. This lack of clarity comes from the ECHR, unlike the American Convention, being tied to a number of other European organizations.

First, membership in the CoE is clearly dependent on a commitment to the ECHR so it would appear that withdrawing from the ECHR would also mean withdrawal from the Council of Europe.⁹³⁰ While EU membership is not formally contingent on membership in the CoE, EU membership is closely related to membership in the CoE and commitment to the ECHR. EU membership explicitly requires countries to have “achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.⁹³¹ Being party to the ECHR helps to indicate this commitment to respect to human rights. In 2007 the European Commission (the EU body) stated:

In the negotiations for the accession of new Union members, respect for the [ECHR] and the case-law of the European Court of Human Rights is treated as part of the Union *acquis*.

⁹²⁶ *Ibid* at 60.

⁹²⁷ *Ibid* at 73.

⁹²⁸ *Ibid* at 60.

⁹²⁹ *ECHR*, *supra* note 140 Article 58.

⁹³⁰ *PA Res 1031*, *supra* note 157, para 9.

⁹³¹ *European Council in Copenhagen, Conclusions of the Presidency*, 21-22 June 1993, SN 180/1/93 [*Copenhagen Criteria*], s 7(iii).

Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities...⁹³²

It is unclear how the UK could simultaneously withdraw from the ECHR, deport individuals such as Abu Qatada to face unfair trials and/or torture, and maintain the respect for the ECHR and the European Court's case law expected by the European Commission. To this point, a senior UK judge noted that deporting suspects to nations that carry out torture would violate both the ECHR and the UN's Universal Declaration of Human Rights.⁹³³ EU membership is not explicitly contingent on being a member state to the ECHR, but if the UK was to withdraw from the ECHR its human rights record may come under scrutiny from the European Commission.⁹³⁴ Initially, UK suggestions to withdraw from the ECHR might have been a political move to appear tough against terrorism. In April 2016 the Cameron government stated that it was not in favour of withdrawal from the ECHR, but at the same time, Theresa May – the UK's current Prime Minister – was a strong advocate for withdrawal.⁹³⁵ The UK's future participation in either the EU or ECHR is very uncertain, but in either case withdrawal is sure to be complicated and disruptive to the UK and Europe.

⁹³² *Parliamentary questions*, 26 January 2007, OJ C 293, 05/12/2007 [*European Commission on ECHR*].

⁹³³ Owen Bowcott, "Senior judge warns over deportation of terror suspects to torture states", (5 March 2013), online: *the Guardian* <<http://www.theguardian.com/law/2013/mar/05/lord-neuberger-deportation-terror-suspects>>.

⁹³⁴ That said, the recent vote in favour of a "Brexit" throws into question the importance the UK places on appeasing the European Commission. At the time of writing the UK government had not begun formal procedures to withdraw from the EU and it may not do so as the vote was non-binding.

⁹³⁵ Anushka Asthana & Rowena Mason, "UK must leave European convention on human rights, says Theresa May", (25 April 2016), online: *the Guardian* <<http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>>.

The UK helped to build the CoE and draft the ECHR, as a historically influential European power and one of the dominant European economies; it would be strange for the UK to withdraw from the ECHR. It appears to be in the UK's best interest to maintain its participation in the ECHR, CoE and EU. In contrast, the America's largest and third-largest economies (the United States and Canada, respectively) appear to have no major drive toward ratifying the American Convention.

The United States has signed the American Convention,⁹³⁶ Canada has not, and neither nation has come close to ratifying it. It is not precisely clear why these nations have resisted ratification; the United States being in a particularly peculiar position as it took a lead role in drafting the document in such a way as to facilitate US ratification.⁹³⁷ Unfortunately, while both nations are outwardly supportive of the American Convention and the IA Court, neither appears willing to be held accountable to either.

US ratification of the American Convention has not been a recent topic of interest, but work in the 1990s points to why ratification remains unlikely. Ratification of any treaty requires approval of two-thirds of the US Senate and the Senate has a history of being reluctant to act in any way which reduces national sovereignty.⁹³⁸ The United States has ratified very few human rights treaties,⁹³⁹ but these sparse ratifications have been accompanied with reservations that limit the treaties' application. US reservations generally fall into two categories: (i) adherence to a human rights treaty should not alter existing US law or practice and (ii) the US will

⁹³⁶ *Signatories and Ratifications to A-52: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights "Protocol of San Salvador"*, *supra* note 547.

⁹³⁷ Donald T Fox, "American Convention on Human Rights and Prospects for United States Ratification, The" (1973) 3 Hum Rts 243 at 250.

⁹³⁸ Joseph Diab, "United States Ratification of the American Convention on Human Rights" (1992) 2:2 Duke Journal of Comparative & International Law 323.

⁹³⁹ The United States ratified the ICCPR in 1992, but with significant reservations. It has not ratified either of the ICCPR protocols, or the ICESCR.

not submit to the jurisdiction of international courts to decide disputes arising from the application of a human rights treaty.⁹⁴⁰ In practice, these two principles limit the US from committing to the American Convention in any real capacity. The IA Commission has already found the US in violation of various rights under the American Declaration and the nation has been reluctant to alter its laws and practices.⁹⁴¹ Also, ratifying the American Convention without recognizing the authority of the court dramatically undermines the impact of ratification. Although the US government has not explicitly stated that the principle of non-intervention underlies its resistance to ratify the American Convention, national practice certainly implies that non-intervention, or a desire to maintain national sovereignty, is an important component of US policy and limits its willingness to ratify.

In 2003 Canada's Standing Senate Committee on Human Rights published its report on Canada's potential ratification and adherence to the American Convention on Human Rights.⁹⁴² The primary recommendations of the report were that "Canada take all necessary action to ratify the American Convention" and that upon ratification "Canada recognize the jurisdiction of the IACrHR on all matters relating to the interpretation or application of the Convention".⁹⁴³ Unfortunately, the report's justification for why Canada should ratify the American Convention does not persuasively establish advantages for Canada beyond human rights interests. It notes that ratification would strengthen the human rights regime, increase human rights protections for Canadians, improve women's rights regionally,

⁹⁴⁰ Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker" (1995) 89:2 *The American Journal of International Law* 341 at 341.

⁹⁴¹ The United States was found in full compliance in only 1 of 22 Commission Recommendations made in the last eleven years. See *Annual Report 2015*, Inter-American Commission on Human Rights, available at <<http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp>> [*Annual Report 2015*], ch 2(D) page 120.

⁹⁴² Public Works and Government Services Canada Government of Canada, "Enhancing Canada's role in the OAS :: YC32-0/372-4E-PDF - Government of Canada Publications", (1 July 2002), online: <<http://publications.gc.ca/site/eng/397899/publication.html>>.

⁹⁴³ *Ibid* Summary of Recommendations (1) & (2).

stimulate United States participation, and clarify Canada's human rights commitments.⁹⁴⁴ While these are certainly noble reasons for ratification, they are also indicative of how little value there is in ratification: nations have no non-human rights incentive to participate in the American Convention.

In contrast, European nations generally place a high value on participation in the ECHR, CoE and the EU. By joining the EU nations integrate into one of the world's largest economies gaining equal access to the EU Common Market.. It also provides freedom of movement, strengthened rights, and political stability. It is by no means perfect, but Scotland⁹⁴⁵ and Greece⁹⁴⁶ recently made serious efforts to maintain their membership in the EU and seven other States are currently working to gain EU membership.⁹⁴⁷ It seems that most countries would prefer to be in the EU rather than out and this generally binds them to participate in the ECHR. For those nations which are not interested in EU membership, there are other benefits associated with being party to the ECHR.

The Council of Europe does not establish an economic zone and although it has implemented some regional treaties which are not human rights based, its primary role is as a human rights organization.⁹⁴⁸ While it can be difficult to pinpoint exactly why States reduce their own sovereignty in order to join the ECHR, the massive influx of CoE membership after the fall of the Soviet Union provides some indications of the perceived benefits of membership.

⁹⁴⁴ *Ibid*, ch IV (D).

⁹⁴⁵ In 2014 Scotland held a referendum on independence from the UK. A major issue of the debate was whether or not it would be able to regain/retain its membership in the EU. See Sionaidh Douglas-Scott, "How Easily Could an Independent Scotland Join the EU?" (2014) Oxford Legal Studies Research Paper No 46/2014.

⁹⁴⁶ Greece has undergone multiple restructurings and bailouts in order to retain its membership in the EU and the Eurozone. See Helena Smith, "Grexit back on the agenda again as Greek economy unravels", (6 March 2016), online: *the Guardian* <<http://www.theguardian.com/business/2016/mar/06/grexit-back-on-the-agenda-economy-unravels-reforms>>.

⁹⁴⁷ Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.

⁹⁴⁸ See Section 6.6.1 of this work

From 1990 to 2002 around twenty formerly Soviet Bloc nations joined the CoE.⁹⁴⁹ At the time, many of these new democracies had challenging human rights records, but the CoE believed that States could transition into strong, human rights respecting, democracies more quickly if they were included in the CoE rather than isolated.⁹⁵⁰ For these new members, participation in the CoE and ECHR illustrated their shared values and legitimizing their new democratic regimes. It also served to further their ambitions to join other regional groups such as NATO and the EU.⁹⁵¹ Russia also became a member of the CoE at this time, but as it was unlikely to join either NATO or the EU, the benefits of CoE membership included stronger trade ties to Europe, an institutional connection to its former Soviet Bloc partners, and acceptance as a new democracy.⁹⁵² CoE membership also facilitated closer ties with the EU since the European Commission works jointly on numerous programs.⁹⁵³

In contrast, participation in the OAS does not offer similar benefits to its members. There are a few regional trade organizations in the Americas which have similarities to the EU in design,⁹⁵⁴ but there is no single market as there is in Europe and none of the regional organizations are as comprehensive as the EU. Importantly for these purposes, there is no regional economic organization in the Americas whose participation is

⁹⁴⁹ This number varies based on how you count nations. Czechoslovakia joined the Council of Europe in 1991, but it dissolved in 1992 and both the Czech Republic and Slovakia joined the Council of Europe in 1993. Similarly, the nation of Serbia and Montenegro joined in 2003, but with Montenegro's independence in 2006, Serbia remained a member of the CoE and Montenegro officially joined in 2007.

⁹⁵⁰ R Harmsen, "The European Convention on Human Rights after Enlargement" (2001) 5:4 *The International Journal of Human Rights* 18 at 21–22.

⁹⁵¹ Pamela A Jordan, "Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms" (2003) 11:2 *Demokratizatsiya* 281 at 281.

⁹⁵² *Ibid* at 285.

⁹⁵³ See *Memorandum of Understanding between the Council of Europe and the European Union*, 2007, available at <http://www.coe.int/t/der/docs/MoU_EN.pdf> [*Memorandum of Understanding between the Council of Europe and the European Union*].

⁹⁵⁴ LAIA, CARICOM, NAFTA and Mercosur are notable

contingent upon, or even associated with, OAS membership or participation in the Inter-American human rights regime.⁹⁵⁵

Similarly, it cannot be said that nations participate in the OAS in order to illustrate their “Americanness” or validate themselves as a democracy.⁹⁵⁶ Even if OAS participation were highly valued by nations, OAS participation itself would not establish significant human rights protection: CoE participation requires commitment to the ECHR and its binding court; OAS membership is not contingent upon commitment either the American Declaration or American Convention.⁹⁵⁷

The OAS and the CoE do not have the same socio-political role in their two regions and therefore are fundamentally incapable of playing the same role as enforcer of regional human rights. On this basis, it is unsurprising that the ECHR is generally seen as having a higher rate of compliance than the IA Court.⁹⁵⁸ Compliance with human rights regimes is ideologically linked with participation and, based on the preceding analysis, parties have more to gain from participation in the CoE than the OAS. On this basis, one would expect that a reduced pressure to participate in the Inter-American human rights regime would correspond to a lower level of compliance with the decisions of the IA Court and IA Commission. Unfortunately, as analysis moves beyond

⁹⁵⁵ Furthermore, none of the economic organizations in the Americas offer human rights protection.

⁹⁵⁶ Although this was an early purpose of the OAS, see Connell–Smith, *supra* note 811 at 454, there is little to indicate that it plays a role today.

⁹⁵⁷ *Bogota Charter*, *supra* note 526, ch III.

⁹⁵⁸ See Darren Hawkins & Wade Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights” (2010) 6 J Int’l L & Int’l Rel 35; Courtney Hillebrecht, “Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals” (2009) 1:3 J Human Rights Practice 362; Basch et al, *supra* note 577; Cecilia M Bailliet, “Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America” (2013) 31:4 Nordic Journal of Human Rights 477; Alexandra Huneeus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights” (2011) 44 Cornell Int’l LJ 493.

theory to practice, it becomes clear that actually comparing the compliance rates of the Inter-American and ECHR regimes is notoriously difficult.

4.3.1 Comparing compliance

Independently determining and analyzing the true compliance rates to the European Court of Human Rights and the IA Commission and IA Court is a task well beyond the scope of this work and numerous authors have already engaged in this research and illustrated its challenges. Comparing compliance is challenging because: (i) the regimes are very different; (ii) the datasets are huge; and (iii) the concept of “compliance” is itself difficult to define. For these reasons authors working in this field have consistently been forced to limit their analysis in ways which makes accurately comparing the regimes difficult.

When determining the compliance rates of these two regimes, analysts first have to contend with the problem of defining compliance itself. Judgments of the IA Court tend to provide States with a clear list of actions which they are to undertake in order to comply with the court’s decision. Unfortunately, many of these mandated actions are not given strict or obvious time frames so questions naturally arise as to how to categorize compliance if a State acts extremely slowly or, in cases where timeframes are given, acts reasonably quickly, but outside the mandated timeframe.

Another issue is quantifying partial compliance when a State implements a subset of the obligations placed upon it by the IA Court. If a State completes seven out of eight obligations, how does this compare to a State which only completes one out of ten? Both States are neither in full compliance nor complete non-compliance, but they are also not at comparable levels of partial

compliance. Measuring partial compliance becomes even more complicated in Europe since judgments of the European Court of Human Rights do not contain a finite list of actions to be conducted by the States. In Europe, decisions are capable of ordering a specific monetary payment to the applicant, but it is the State which ultimately chooses the means by which it complies with the ECHR.⁹⁵⁹

The CoE's Committee of Ministers is tasked with supervising the execution of European Court of Human Rights judgments,⁹⁶⁰ including satisfaction payments and implementing measures to prevent repeat violations. On one hand, satisfaction payments are relatively easy to track, but as the caseload of the court grows, the ability of the Committee of Ministers to track measures to prevent repeat violations becomes increasingly difficult.⁹⁶¹

Two of the more detailed analyses of compliance with these regimes do conclude that the compliance in Europe is generally higher than to the IA Court, but these conclusions come with caveats. The work of Basch *et al.* looks at the remedies ordered by both the IA Commission and IA Court that arise from violations of the American Convention by States which have explicitly recognized the authority of the court.⁹⁶² Their analysis looks at compliance of each individual order, rather than judgments as a whole and determines that between June 2001 and June 2006, States fully complied with orders 36% of the time, partially complied 14% of the time, and were in complete non-compliance 50% of the time.⁹⁶³ However, the authors concede that their determination of compliance was based the IA Commission's evaluations of compliance. These evaluations consider compliance with

⁹⁵⁹ *Guerra and Others v Italy*, *supra* note 306, para 74.

⁹⁶⁰ *ECHR*, *supra* note 140 Art 46.

⁹⁶¹ Hawkins & Jacoby, *supra* note 958 at 53; Council of Europe Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights 2008*, 2nd annual report (Strasbourg: Council of Europe, 2009) at 7.

⁹⁶² Basch *et al*, *supra* note 577 at 11.

⁹⁶³ *Ibid* at 18.

respect all ordered measures in a judgment and not each individual order.⁹⁶⁴ In some reports the IA Commission made explicit references to partial compliance to specific orders, but in many cases the authors had to independently distinguish compliance, partial compliance, and non-compliance based on other sources of information.⁹⁶⁵

Hawkins and Jacoby provide a different analysis of compliance. These authors specifically looked at partial compliance in both the European Court of Human Rights and the IA Court and, looking at each judgment as a whole, determined that only 6% of IA Court cases were resolved to full compliance.⁹⁶⁶ The authors found that 83% of judgements were in partial compliance, leaving 11% in non-compliance.⁹⁶⁷ The authors then compare this to judgements of the European Court of Human Rights and, while they do note that there are small areas of significant non-compliance and partial compliance, they generally conclude that most European States fully comply with judgements.⁹⁶⁸ While the authors find high compliance in Europe, they limit their conclusions in two ways.

First, the authors note that the dramatic rise in European Court of Human Rights caseload could expand the scope for partial compliance as it becomes more difficult for the Committee of Ministers to monitor compliance.⁹⁶⁹ Second, since European Court judgements do not mandate States to take specific actions beyond payment to victims, determining compliance can be more subjective.⁹⁷⁰ States may comply with judgements to the satisfaction of

⁹⁶⁴ *Ibid* at 12.

⁹⁶⁵ *Ibid*.

⁹⁶⁶ Hawkins & Jacoby, *supra* note 958 at 37 & 4 based on 81 compliance reports dating to June 23, 2010.

⁹⁶⁷ *Ibid* at 37.

⁹⁶⁸ *Ibid* at 38 & 66.

⁹⁶⁹ *Ibid* at 54–56.

⁹⁷⁰ *Ibid* at 84.

the Committee of Ministers, but may not actually be in line with court opinions.⁹⁷¹

The data on compliance with either the Inter-American or ECHR regimes is imperfect, but it is indicative of the ECHR having a higher rate of overall compliance than its Inter-American counterpart. This higher rate of compliance is in line with the idea that compliance is related to participation, and that there is less pressure to participate in the Inter-American regime than there is in the ECHR. Furthermore, building a human rights regime on the principle of non-intervention limits the regime's ability to enforce its own decisions in situations where rights are violated.⁹⁷²

4.4 Transferring jurisprudential principles in practice

The cumulative effect of non-intervention, early case law, and contrasting compliance rates creates a chasm between the Inter-American and European human rights regimes that inhibits either regime from adopting the judicial principles of the other. While the courts of both regimes have shown a willingness to creatively interpret their human rights documents in order to provide environmental protection, the two regimes function very differently in practice. The European Court of Human Rights has been a relatively conservative court and it enjoys a relatively high level of compliance. In contrast the IA Commission and IA Court have traditionally been more progressive and aggressive in the way they protect human rights and this has arguably led to lower levels of participation and compliance.⁹⁷³

⁹⁷¹ *Ibid* at 81–83.

⁹⁷² See Basch et al, *supra* note 577.

⁹⁷³ See Leiry Cornejo Chavez & Andreas Føllesdal, “Fragile Democracies, Strong Human Rights Courts? Comparing European and Inter-American Cases – Special Section Introduction” (2013) 31:4 *Nordic Journal of Human Rights* 471.

Brazil, Peru, Trinidad and Tobago, and Venezuela have all illustrated a willingness to rebuke the Inter-American human rights regime if judgments are not aligned with national interests. The Athabaskan Petition is certainly an interesting case in terms of incorporating climate change into a human rights claim, but Canada's non-participant status to the American Convention means that any recommendation by the IA Commission will be non-binding. Furthermore, if the IA Commission does find in favour of the Athabaskan people, the likelihood of Canada eventually acceding to the American Convention seems even lower as Canada is unlikely to want to be bound by a similar decision by the IA Court.

Attaining a high level of compliance is especially important for the Inter-American regime because it tends to deal with particularly egregious rights violations and because its decisions often issue "non-repetition" orders so as to prevent future violations.⁹⁷⁴ Unfortunately, partial compliance is common in the Inter-American regime⁹⁷⁵ and partial compliance is in many ways the same as non-compliance: either rights are fully respected or they are not.⁹⁷⁶ Full compliance with IA Court decisions generally occurs "only in exceptional cases, after a long period of time".⁹⁷⁷ In contrast, while partial compliance also occurs under the ECHR, most indications are that full compliance is the norm.⁹⁷⁸

Then, based on the importance of compliance and the difference between the rates of compliance in the two regimes, there is a strong argument for the idea that increasing its rate of compliance should be a top priority for the Inter-American regime. In their analyses of compliance rates, some authors volunteered suggestions on how rates could be increased: some cited

⁹⁷⁴ Huneeus, *supra* note 958 at 506.

⁹⁷⁵ Hawkins & Jacoby, *supra* note 958 at 83.

⁹⁷⁶ Bailliet, *supra* note 958 at 479 Bailliet goes on to call non-compliance an additional violation of the American Convention. .

⁹⁷⁷ Basch et al, *supra* note 577 at 28.

⁹⁷⁸ Hawkins & Jacoby, *supra* note 958 at 74.

increased monitoring of compliance,⁹⁷⁹ others sought to focus on the relationship between the national courts and those of the regime,⁹⁸⁰ and others suggested that domestic actors have the strongest influence on compliance and should therefore lead efforts.⁹⁸¹ Ultimately, these authors all concede that their proposals are not guaranteed to increase compliance⁹⁸² and really there are no mechanisms for improving compliance without simultaneously weakening the IA Court.⁹⁸³

Determining how to increase compliance in the Inter-American regime, while retaining strong human rights protection, is beyond the scope of this work. There is a delicate balance to be struck between having strong adjudicating bodies that vocally admonish human rights violators and a regime whose decisions are respected and followed by the member states.

Three cases, *Yakye Axa*, *Sawhoyamaxa*, and *Xákmok*, illustrate the challenge faced by the IA Court in striking a balance and enforcing State compliance. In each case the Paraguayan government was found to have violated the petitioners' rights of either property or life and mandated that the traditional lands of the indigenous populations be returned to the petitioners.⁹⁸⁴ The IA Court's decisions in these cases pushed the boundaries of Inter-American human rights law and the interpretation of the American Convention in

⁹⁷⁹ Basch et al, *supra* note 577 at 32.

⁹⁸⁰ Huneeus, *supra* note 958 at 520.

⁹⁸¹ James L Cavallaro & Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" (2008) 102:4 *The American Journal of International Law* 768 at 792; Hawkins & Jacoby, *supra* note 958 at 84.

⁹⁸² Basch et al, *supra* note 577 at 30 the authors describe their recommendations as "hypotheses associated with the possibility of increasing compliance"; Huneeus, *supra* note 958 at 518 "a policy of engaging national courts... will not result in full compliance any time soon, if ever"; Cavallaro & Brewer, *supra* note 981 the authors consistently state that their recommendations "may" increase compliance.

⁹⁸³ Huneeus, *supra* note 958 at 519 notes that compliance could be increased simply by eliminating injunctive relief and providing only on compensation, but the author also notes that the severity of many Inter-American rights violations are not suited to simple monetary compensation such as a "deliberate and ongoing forced disappearance of a loved one".

⁹⁸⁴ These cases are discussed in detail in Section 12.3 of this work.

order to protect the rights of disenfranchised populations. Certainly the applicants in each of these cases were deprived of their property, but as the American Convention does not provide an explicit right to culture, the IA Court could have simply mandated financial compensation. On one hand, the decision to return the land in question to the applicants seems to be the proper decision of the IA Court based on the way these populations were wronged, but on the other, as of 2015 Paraguay was still not in compliance with the IA Court's decisions. The land in question has not been returned to any of the applicants.⁹⁸⁵ The petitioners have also not been paid the financial compensation ordered by the IA Court, but in general Inter-American member states do comply with orders to pay financial compensation.⁹⁸⁶

The IA Court's decisions in these cases support a strong interpretation of human rights, but the utility of these decisions must be questioned when the relevant governments do not act. The impacts of inaction are made sadly obvious by the 2007 compliance review of *Sawhoyamaxa* in which the IA Court noted that Paraguay's non-compliance with the original judgment in the case led to the death of four individuals, three of them children, and the hospitalization of at least five children.⁹⁸⁷

There is a strong argument for striving to strengthen compliance with Inter-American judgments; it should be one of the top priorities for the regime. To that end, while it is unclear how exactly to increase compliance, it does seem clear that new creative interpretations of human rights which expand human

⁹⁸⁵ *Cases of the Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay Monitoring Compliance with Judgment*, Order of the Inter-American Court of Human Rights of June 24, 2015 (Only in Spanish) (Inter-American Court of Human Rights), available at <http://www.corteidh.or.cr/docs/supervisiones/yakie_24_06_15.pdf> at 35, 41–45 on the failure to provide funds to acquire lands in question for Sawhoyamaxa and Yakye Axa communities.

⁹⁸⁶ Bailliet, *supra* note 958 at 488.

⁹⁸⁷ *Cases of the Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay Monitoring Compliance with Judgment*, Order of the Inter-American Court of Human Rights of December 14, 2007 (Only in Spanish) (Inter-American Court of Human Rights), available at <http://www.corteidh.or.cr/docs/supervisiones/yakyeaxa_%2014_12_07.pdf>, para 11.

rights protection are likely have a detrimental impact on efforts to increase compliance. The Inter-American regime lacks the ties to external bodies such as the EU or NATO which help to pressure nations into compliance in the European regime. The persistent impact of the principle of non-intervention and the value the regimes members place on sovereignty undermine its ability to aggressively pursue progressive environmental rights. Where the regime can make progress is in developing and clarifying its human rights law. The following section explores two areas where Inter-American human rights law could be clarified to improve environmental protection. Then, focus shifts to Europe and its ability to progressively modify its human rights in order to provide a broad and important right to protect the environment.

4.4.1 Opportunities to develop and clarify Inter-American human rights

The Inter-American regime is not in a strong position to make drastic changes to its interpretation of human rights to provide greater environmental protection. Making major progressive changes would risk further weakening participation and compliance; however, there are smaller developments that the regime should make to clarify the law and improve environmental protection. There are two areas of Inter-American human rights law that can easily be clarified by the IA Court to improve legal certainty and allow individuals to confidently rely on the regime's rights.

As discussed in Section 3.3.1 of this work, *Saramaka* established that States have a duty to consult and obtain the free and informed consent for projects that would have a major impact on the territory of indigenous people.⁹⁸⁸ The IA Court failed to say what constituted a “major impact” or if consent is required for projects which are not “large-scale”. In *Saramaka* the IA Court

⁹⁸⁸ *Saramaka People v Suriname*, *supra* note 139, para 134.

acknowledged that the United Nations Declaration on the Rights of Indigenous Peoples was supported by Suriname⁹⁸⁹ and provides that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institution in order to obtain their free and informed consent prior to the approval of *any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*⁹⁹⁰

The IA Court did not explain why it distinguished its decision from the standard set in the UNDRIP, so that under the American Convention, consultation and consent are necessary for “large-scale development” rather than “any project”. The major focus of the decision in *Saramaka* was on the how consultation and consent must be obtained rather than when it is necessary.

The IA Court will need to clarify when consent and consultation are necessary and ideally it will adopt the standard of the UNDRIP. A clear standard protecting the territory of indigenous populations from all projects that affect their lands would prevent States from continually testing the unclear standard set in *Saramaka*. Without clarification, States may pursue projects they determine to be smaller than “large-scale” believing that they do not require consultation and consent. Unnecessary damage may be done to the environment and indigenous populations while States test the boundaries of the IA Court’s decision. Furthermore, the standard established in the UNDRIP is not unreasonable.

The IA Court has already acknowledged that indigenous people deserve the protection of a strong right to property:

⁹⁸⁹ *Ibid*, para 131.

⁹⁹⁰ *UNDRIP*, *supra* note 671 Article 32(2) emphasis added.

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.⁹⁹¹

The UNDRIP provides a clear, enforceable standard for when consultation and consent is necessary and the declaration has received the support of all parties to the American Convention⁹⁹² and all OAS members, except the United States.⁹⁹³ While the UNDRIP is non-binding, it establishes a clear and workable standard for consultation and consent which should be adopted by the IA Court.

Another necessary and pressing area where the Inter-American regime will need to clarify the law is in relation to non-indigenous people's ability to protect their environment using human rights. The court previously provided a strong interpretation of the right to property to a non-indigenous, tribal people, in *Saramaka*, but in that case the court acknowledged that the population shared similar characteristics with indigenous people⁹⁹⁴ and so treated them likewise. In the pending cases of *San Mateo*, *La Oroya*, and *Mossville*, the petitioners generally do not have the characteristics of indigenous populations and the IA Court and IA Commission will have to determine if and how these populations can use human rights to protect their environment.

⁹⁹¹ *Awas Tingni*, *supra* note 591, para 149.

⁹⁹² Colombia initially abstained from supporting the declaration, but signed and supported the declaration in 2009, see Andrej Mahecic, "Colombia's support for UN Declaration on Indigenous People welcomed", online: *UNHCR* <<http://www.unhcr.org/news/briefing/2009/4/49f1bc356/colombias-support-un-declaration-indigenous-people-welcomed.html>>.

⁹⁹³ Canada initially voted against the declaration, but removed its objector status in 2016; see "Canada now full supporter of UN Indigenous rights declaration", online: *CBC News* <<http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272>>.

⁹⁹⁴ Such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions. See *Saramaka People v Suriname*, *supra* note 139, para 79.

In each of these three cases, the petitioners' communities are negatively impacted by nearby sources of pollution. The pollution is detrimental to their health and the petitioners have brought various claims under the American Declaration and American Convention. The IA Commission has determined that all three cases are admissible, but each for different potential rights violations. If the IA Court and IA Commission determine that the petitioners' rights are violated in all three cases it will have to do so with some delicate interpretation of the law.

The situations in the two cases before the IA Court, *San Mateo* and *La Oroya*, are very similar, but their cases are only both admissible under their rights to life and humane treatment. Section 3.3.2 of this work explained why it may be difficult to apply the right to humane treatment to these cases, it typically applies to the treatment of people detained by the State, but the IA Commission may be intentionally creating an avenue for the IA Court to extend its application to the petitioners as a new means of responding to environmental degradation and its impact on health.

In its report on the admissibility of *San Mateo*, the IA Commission provides no discussion on the potential violation of the petitioners' right to humane treatment. The petitioners were never detained and there is no justification given for the petitioners' claim that the right was violated or reference by the IA Commission as to why that claim was specifically admissible. In *La Oroya*, the IA Commission makes one reference to the petitioners' claim that their right to human treatment was violated by "the manifest physical harm to the health of the alleged victims" and "continual anxiety and fear of the dangers they face every day".⁹⁹⁵ Then, without further elaboration on the petitioners' claims or the application of the right the IA Commission concludes:

⁹⁹⁵ *Community of La Oroya v Peru*, *supra* note 790, para 27.

[T]hat the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 [life] and 5 [human treatment] of the American Convention.⁹⁹⁶

This interpretation of the right to humane treatment is not beyond the text of the right, it provides that “every person has the right to have his physical, mental and moral integrity respected”, but it does go beyond the general application of the right to individuals mistreated in State custody.

The IA Court certainly could apply the right to humane treatment to the situations in *San Mateo* and *La Oroya*, but doing so would unnecessarily create a new standard of protection. If the IA Court decides to find that the rights of both sets of petitioners have been violated due to the health impacts of the nearby pollution it would be best for the it to do so using the petitioners’ right to life.

Applying the right to life would maintain consistency in Inter-American human rights law by following the principle laid down in *Xámok* which extended the right to life to include the “right to a decent life”.⁹⁹⁷ The IA Commission acknowledged the right to a decent life in *La Oroya*,⁹⁹⁸ but *San Mateo* predated the decision in *Xámok* so the right to a decent life had not yet been established. In *Xámok*, the petitioners’ right to a decent life was violated by the State because the indigenous population was prohibited from accessing their traditional lands which forced them into poverty. They suffered malnutrition, exposure to disease from lack of clean water, and an inability to access healthcare.⁹⁹⁹ The source of the petitioners’ health

⁹⁹⁶ *Ibid*, para 76.

⁹⁹⁷ *Xámok Kásek Indigenous Community v Paraguay*, *supra* note 672, para 217.

⁹⁹⁸ *Community of La Oroya v Peru*, *supra* note 790, para 26.

⁹⁹⁹ *Xámok Kásek Indigenous Community v Paraguay*, *supra* note 672, paras 194–217.

problems in *San Mateo* and *La Oroya* differs from *Xámok*, but the health impacts are arguably greater. In both cases the petitioners suffer from, *inter alia*: elevated lead and cadmium levels; dermatitis; liver dysfunction; respiratory problems; hearing loss; and malnutrition.¹⁰⁰⁰ While both cases are complex and this work does not pretend to be an exhaustive analysis of the petitioners' and States' positions, it seems clear that the IA Court could, in principle, find violations of the petitioners' right to a decent life in both cases.

The third pending case, *Mossville*, complicates the situation slightly as the petitioners similarly have their health negatively affected by nearby sources of pollution, but their case was only admitted to the IA Commission based on potential violations of their rights to equality and privacy. The petitioners in *Mossville* also claimed a violation of their right to life, but the IA Commission determined that they had failed to exhaust domestic remedies to pursue that violation, therefore making the claim inadmissible.¹⁰⁰¹ Certainly the IA Commission could follow *Xámok*, and potentially *San Mateo* and *La Oroya*, and conclude that the negative effects of pollution on health is generally a violation of the right to life thereby limiting the ability of the petitioners in *Mossville* to have a successful claim. However, the IA Commission appears to entertain the idea of interpreting the American Declaration's right to privacy in the same way as the European Court of Human Rights has interpreted the ECHR right to privacy.

The ECHR, American Convention, and American Declaration rights to privacy are very similar:

ECHR Article 8(1)

Everyone has the right to respect of his private and family life, his home and his correspondence.

¹⁰⁰⁰ *San Mateo v Peru*, *supra* note 574, paras 21–5; *Community of La Oroya v Peru*, *supra* note 790, paras 15–20.

¹⁰⁰¹ *Mossville Environmental Action Now v United States*, *supra* note 798, paras 35–6.

American Convention Article 11(2)

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or the unlawful attacks on his honor or reputation.

American Declaration Article V

Every person has the right to the protection of the law against abusive attacks on his honor, his reputation, and his private and family life.

In *La Oroya* the petitioners forwarded an argument that their right to privacy was violated in a in identical way to the petitioners in the European case of *Fadeyeva*,¹⁰⁰² but the IA Commission rejected this idea simply stating “that the events described would not represent a violation of Article 11 of the American Convention”.¹⁰⁰³ However, the IA Commission in *Mossville* explicitly referenced the decisions of the European Court of Human Rights, including *Fadeyeva*, and stated that:

[I]n applying the American Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law...¹⁰⁰⁴

Interestingly, there were no major developments in ECHR law in the 7 months between the IA Commission’s decision in *La Oroya* and *Mossville*, but in that time the IA Commission appears to have become more willing to entertain the idea of following the European Court of Human Right’s interpretation of the right to privacy.

It is incredibly tempting under these circumstances to recommend that the IA Commission adopt the principle laid out in European cases such as *López-*

¹⁰⁰² Carlos Arrieta et al, *Petición de Caso - Comunidad de La Oroya* (2006) at 33–4.

¹⁰⁰³ *Community of La Oroya v Peru*, *supra* note 790, para 76.

¹⁰⁰⁴ *Mossville Environmental Action Now v United States*, *supra* note 798, para 43.

Ostra and *Fadeyeva*. Expanding the right to privacy to protect individuals from the health impacts of severe environmental pollution has worked well in Europe and its development over multiple cases would provide the Inter-American regime with a clear path for integrating the principle into its law. Applying this expanded right to privacy in the Inter-American regime is also likely to be the best means for providing redress to the petitioners in *Mossville* given their current circumstances, but it may not be the best path forward for the regime itself.

This work has cautioned against dramatically expanding Inter-American human rights law, at least until the regime can address some of the issues it appears to have with compliance and maintaining participation. Furthermore, the Inter-American regime is already potentially in the process of establishing protection for health through “the right to a decent life”. Developing its own law, while slower and more labour intensive than simply adopting European law, allows the Inter-American regime to gradually develop its own right and set its own thresholds regarding to how and when to apply the right. It will allow the adjudicating bodies to determine what constitutes “a decent life” and when a State is liable for violating a petitioners right. A gradual approach may be preferable for States as they may believe that their legal councils will be able to influence the law as it develops in consecutive cases. In contrast, adopting the European standard relinquishes a significant amount of control over the development of the law.

In *Tatar* the European Court of Human Rights expanded the right as applied in *Fadeyeva* to include the Precautionary Principle and a potential right to broad environmental protection. While the next section of this work advocates that the European court should pursue and develop the ideas it presented in *Tatar*, these developments may not be right for the Inter-American regime and may be too much too quickly.

Sections 4.1 to 4.3 of this work illustrated the major differences in these two regimes and recommended that under the circumstances, the European regime is in a better situation to make larger progressive developments in its law whereas the Inter-American regime should focus on strengthening the regime and clarifying existing areas of law. As stated herein, the Inter-American regime should clarify when an indigenous population's consultation and consent is required for projects taking place on their territory and the IA Court should give particular consideration to the standard established by Article 32(2) of the UNDRIP. The regime should also clarify the situation it has created for itself with *San Mateo*, *La Oroya*, and *Mossville*, but it must carefully consider the broader impacts of adopting the European Court of Human Right's interpretation of the right to privacy and weigh the advantages of developing its own interpretation of the potentially similar right to a decent life.

4.4.2 Expanding human rights in Europe: a human right to a healthy home environment

As introduced in Section 2.3.1 of this work, the ECHR has developed jurisprudence to expand the rights to property and life in ways which provide applicants means to respond to localized pollution. One of the strongest mechanisms for environmental protection comes from one of the European Court of Human Right's decisions in *López-Ostra*, *Guerra*, and *Tatar*. These decisions expand the ECHR the right to privacy to protect individuals from environmental pollution if it may affect their health and well-being at home; it can broadly be called a "right to a healthy home". *Tatar*, the most recent of these cases, builds on the right, incorporating the Precautionary Principle

and bringing ECHR jurisprudence towards what could become a variation on a right to a healthy environment.

A right to a healthy environment already has some support in Europe. Its recognition by the European Court of Human Rights would be consistent with Recommendations of the CoE's Parliamentary Assembly and the right's presence in European Constitutions and national laws. As of April 2016, the right to a healthy home found in *Tatar* has not been considered or elaborated upon by the court, so the exact application of the right's most recent iteration is unclear. When the court does reconsider this right, it should look back on *Tatar* and take advantage of an opportunity to further expand the right from its inception in *López-Ostra*, using *Tatar*, to its logical next step.

In *Tatar*, the court came very close to a general recognition of a right to a healthy environment. Unfortunately, an official English transcript of the decision has never been released, but in the official French decision the European Court said:

Elle estime toutefois que malgré l'absence d'une probabilité causale en l'espèce, l'existence d'un risque sérieux et substantiel pour la santé et pour le bien-être des requérants faisait peser sur l'État l'obligation positive d'adopter des mesures raisonnables et adéquates capables à protéger les droits des intéressés au respect de leur vie privée et leur domicile et, plus généralement, à la jouissance d'un environnement sain et protégé.¹⁰⁰⁵

Or, translated:

It considers, however, that despite the absence of a causal likelihood in this case, the existence of a serious and substantial risk to the health and welfare of the applicants posed to the State positive obligation to take reasonable and appropriate measures able to protect

¹⁰⁰⁵ *Tatar c Roumanie*, *supra* note 134, para 107.

the rights of respect for their private life and their home and, more generally, to the enjoyment of a healthy and protected environment.¹⁰⁰⁶

The court's statement that there is a positive obligation on States to protect an individual's enjoyment of a healthy and protected environment is a significant shift from its previous interpretation of the ECHR.

The European Court of Human Rights has yet to expand on what it meant by "enjoyment of a healthy and protected environment". On one hand, it could simply be that unofficial translations of the French decision are simply inaccurate and misrepresent the intention of the court.¹⁰⁰⁷ If the court were to clarify that what has been translated as "healthy and protected environment" was only intended to be "healthy and protected home environment", then the law would not shift from where it was prior to *Tatar*. It would simply reiterate the general provision for health in the home as established by *López-Ostra*. This would be a missed opportunity for the court to build upon *Tatar* and increase environmental protection.

The ECHR does not provide a general right to health – a right only arises when an applicant's health is affected when they are in their home or on their property. Restricting this right to health to the applicant's home and property creates an odd situation in which an individual's health is only protected in a small fictitious bubble. Today many people live in cities and communities

¹⁰⁰⁶ Translation provided by Google Translate, available at <translate.google.com>

¹⁰⁰⁷ However this seems unlikely as the official press release does conclude that the European Court concluded that the Romanian Authorities failed to take suitable measures to "protect the rights of those concerned to respect for their private lives and homes, within the meaning of Article, and more generally their right to enjoy a healthy and protected environment. See Registrar, "Press release: Chamber Judgment in *Tatar v Romania*" 61, 27.1.2009 European Court of Human Rights, online: <<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2615810-2848789&filename=003-2615810-2848789.pdf&TID=ihgdqbxnfi>> at 3.

where their private dwelling only accounts for a small fraction of “where they live”.

Under the current interpretation of the ECHR, an individual’s health is protected while they are in their home. If they live in an apartment adjacent to a park, their health is not protected from potential pollutants they may be exposed to in the park. It would be common today for people to interpret their “home” not only as the building where they sleep at night, but also the community in which they live. *López-Ostra* and *Tatar* provide the European Court of Human Rights an opportunity to broaden the aspects of the right to privacy that establish protection at home, and move incrementally toward a right to a healthy environment.

The ECHR cases which establish a right to health, *López-Ostra*, *Guerra*, *Fadeyeva*,¹⁰⁰⁸ *Giacomelli*,¹⁰⁰⁹ *Dubetska*,¹⁰¹⁰ and *Tatar*, are all based on the applicants’ Article 8 right to privacy. In these cases, the applicants’ health was endangered or negatively impacted while they were in their homes and the court consistently noted that the rights violations occurred as the applicants’ were prevented from enjoying their homes, private life, and family life. While it would appear that these decisions are limited to impacts occurring within an applicant’s dwelling, it is important to note that Article 8 is not explicitly connected to a narrow definition of home as meaning a person’s actual dwelling. Article 8 simply states:

ARTICE 8

Right to respect for private and family life

1. **Everyone has the right to his private and family life, his home and correspondence.**

¹⁰⁰⁸ *Fadeyeva v Russia*, *supra* note 307.

¹⁰⁰⁹ *Giacomelli v Italy*, *supra* note 308.

¹⁰¹⁰ *Dubetska and Others v Ukraine*, *supra* note 309.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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.

Article 8 is not a property right: it is a right to private and family life, home and correspondence. It would not be a major reinterpretation of Article 8(1) to broadly interpret “family life” and “home” as concepts which extend beyond the walls of a person’s dwelling to include the community in which people’s family life occurs. It is not unreasonable for someone to refer to their town or neighbourhood as their “home”. Furthermore, it is unreasonable to narrowly provide protection to an individual when they are in their dwelling, but not to extend it to the areas where they work, shop, attend school, recreate, or conduct numerous other aspects of a normal life.

The European Court of Human Rights has already extended the privacy protection component of Article 8 to apply beyond an individual’s dwelling and extend it to an individual’s business office.¹⁰¹¹ In *Niemietz v Germany*, the court specifically refutes a narrow definition of “home”, noting that the French text of the ECHR uses word “domicile” in Article 8 and that “domicile” has a broader connotation than the English word “home”.¹⁰¹² The court does not elaborate on the French meaning of the word “domicile”, but does extend Article 8 protection to the applicant’s workplace.¹⁰¹³ While *Niemietz* pertained specifically to the right to “private life” under Article 8, the court clearly extended the “domicile” or “home” component of Article 8 and this

¹⁰¹¹ *Niemietz v Germany*, [1992] No 13710/88 (European Court of Human Rights), para 29.

¹⁰¹² *Ibid*, para 30.

¹⁰¹³ *Ibid*, para 29.

should allow all aspects of Article 8 to extend, at a minimum to the workplace and potentially to the community in which one lives.

A broader definition of home could then be coupled with the cases that established right to health, specifically *Tatar*, to create a right which protects and individual's health in their "home environment".

This right, "a right to a healthy home environment", would likely differ from what many think of as a "right to a healthy environment", but precisely contrasting these rights is difficult since the "right to a healthy environment" lacks a universally accepted definition. Few authors advocating a right to a healthy environment actually provide a clear definition and scope of the right. Most simply reference the right as it has been documented in international declarations and national legislation.¹⁰¹⁴ Boyd, whose extensive writings encourage greater recognition of the right, notes that the right is inherently vague and it is designed for its precise meaning to evolve over time.¹⁰¹⁵ While this is not necessarily a problem, Boyd rightly notes that most human rights are vague, it does make it difficult to say if "a right to a healthy home environment" is the same as the commonly advocated for "right to a healthy environment".

Atapattu and Lee provide two of the rare elaborations on what they believe is meant by a right to a healthy environment. Atapattu advocates for a right to a healthy environment which would be violated by activities which created an unhealthy environment based on a standard of health established by a regional or international authority, such as the World Health

¹⁰¹⁴ In his survey of European nations, Boyd finds that Albania, Andorra, Armenia, Belgium, Belarus, Bulgaria, Croatia, Czech Republic, Finland, France, Georgia, Greece, Hungary, Latvia, Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, and Ukraine all recognize a right to a healthy environment either as part of their constitution or in their legislation. See Boyd, *supra* note 32, ch 9 and 10.

¹⁰¹⁵ *Ibid* at 34.

Organization.¹⁰¹⁶ She also notes that the right to a healthy environment must be independent from other existing rights.¹⁰¹⁷ Lee recommends defining the right such that it would be violated:

As a result of a specific course of state action, a degraded environment occurs, with either serious health consequences for a specific group of people or a disruption of a people's way of life.¹⁰¹⁸

If the European Court of Human Rights were to extend Article 8 to include a right to healthy home environment, this right would differ from Atapattu and Lee's concepts of the right to a healthy environment. For one, it would be depended on another human right, specifically the right to respect for private and family life. Furthermore, it would differ from Lee's right as it would build on *Tatar* such that it would not be a test for "serious health consequences" or a "disruption of a people's way of life", instead it would be based on "the existence of a serious and substantial risk to health and welfare of the applicants".¹⁰¹⁹ *Tatar* establishes a relatively low threshold for placing a positive obligation on States to maintain a healthy environment. This lower threshold could risk the ECHR member states rebuking the court's creation of the right to a healthy home environment, so to reduce this risk the court would be wise to limit the geographic scope of the right.

Tatar blurs the definition of home and the associated right to health – prior to *Tatar*, protection only applied to health when the pollution affected an individual's health while they were in their dwelling. In *Tatar*, the concept of "home" is directly linked to "a healthy and protected environment". This could and should be used by the court to expand the definition of home to one

¹⁰¹⁶ Sumudu Atapattu, "Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law, The" (2002) 16 Tul Evtl LJ 65 at 111.

¹⁰¹⁷ *Ibid* at 73.

¹⁰¹⁸ John Lee, "Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law, The" (2000) 25 Colum J Evtl L 283 at 339.

¹⁰¹⁹ *Tatar c Roumanie*, *supra* note 134, para 107.

encompassing an individual's environment. It seems reasonable for the court to consider one's home environment to consist of the spaces where a person spends the majority of their time: their dwelling, their place of work or school, and their town or neighbourhood.

This expanded interpretation of "home" and the creation of a right to a healthy home environment would be in accordance with the prior Recommendations and statements by the CoE's Parliamentary Assembly and Committee of Ministers. In 1990 the Parliamentary Assembly recommended that every person have a right to "an environment and living conditions conducive to his good health, well-being and full development of the human personality".¹⁰²⁰ In 2003, it recommended that member states "recognize a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment".¹⁰²¹ Then in 2009, it recommended formalizing a right to a healthy environment, specifically noting that "Man has the fundamental right to... adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".¹⁰²²

These repeated calls by the Parliamentary Assembly are strikingly similar to the European Court of Human Rights' phrasing in *Tatar* which protects the applicant's private life, home, and the enjoyment of a healthy and protected environment. It must also be noted that the Committee of Ministers responded to the Parliamentary Assembly's repeated Recommendations one year after the court's decision in *Tatar*. In their response, the Committee of Ministers said that it recognized the importance of a right to a healthy, viable and decent environment,¹⁰²³ but in its opinion, the right was already being

¹⁰²⁰ *PA Rec 1130*, *supra* note 98, para 6.

¹⁰²¹ *PA Rec 1614*, *supra* note 179, para 9(ii).

¹⁰²² *PA Rec 1885*, *supra* note 99 at (5).

¹⁰²³ *CM Reply to PA Recs 1883-1885*, *supra* note 192, para 7.

protected through the European Court's evolving interpretation of the ECHR.¹⁰²⁴

It is not unreasonable to think that the Committee of Ministers comments in 2010 were in direct response to the recent decision in *Tatar*. The Committee of Ministers recognized the value of a right to a healthy environment, saw that the European Court of Human Rights was in the process of creating one with *Tatar*, was pleased with the direction the court had taken, and felt there was no need to draft a new protocol. With *Tatar* the court was gradually working to establish a relatively narrow right to a healthy environment: it would protect the areas where people live, but would not extend protection to the environment in general as to encompass places where nobody lives or where people visit temporarily.

Limiting the scope of protection to the environment or "home area" to an area within a reasonable proximity of a person's dwelling would keep ECHR law roughly in line with previous decisions. In *Hamer* the court made it clear that the ECHR does not provide a general protection of the environment,¹⁰²⁵ especially when the area in question is uninhabited by people.¹⁰²⁶ Following *Hamer*, it would not make sense to extend a right to a healthy home environment beyond areas where people actually "live" so as to include areas where they may "visit". Granted, this would reduce the rights ability to provide general environmental protection, but the European Court of Human Rights has had success maintaining compliance while slowly developing the relationship between human rights and the environment. Establishing a right which placed an obligation on governments to ensure that no places in Europe posed a risk to an individual's health would be a huge shift in the law and place a heavy burden on member states.

¹⁰²⁴ *Ibid*, para 9.

¹⁰²⁵ *Hamer*, *supra* note 138, para 79.

¹⁰²⁶ The "environment" in *Hamer v Belgium* was a forested area in which people were not allowed to reside.

Importantly, the creation of a right to a healthy home environment can easily be justified under the two leading human rights theories: natural law and positivist law.¹⁰²⁷ As discussed in Section 1.2 of this work, numerous advocates for a right to a healthy environment justify the right based on natural law. Boyd, Hayward, Shelton, Birnie and Boyle all contend that a right to a healthy environment meets the criteria of a human right following natural law principles: it is universally applicable to all, possesses a moral basis, and serves the dignity of all human beings. While a European right to a healthy home environment is not as broad as a general right to a healthy environment, it is a component of the larger right and should be justified as easily.

If a right to broad environmental protection can be justified, then a right to specific localized protection should also be justifiable under the same rationale. It is certainly unfortunate that a European right to a healthy home does not provide universal protection, but in a perfect world it would be applied globally, as with all human rights. The right to a healthy home environment possesses the same moral basis as a general right to a healthy environment it also serves the dignity of all humans and should be universally applied. More broadly, a right to a healthy home environment can easily be justified as a “human need”, the standard advocated by Bay.¹⁰²⁸ Expanding the ECHR right to property to incorporate a broader definition of “home environment” would provide the individuals with a protection that is practical (if the area is limited in scope), universal, and of paramount

¹⁰²⁷ With regard to legal positivism, the the preceding discussion of the creation of the right based on *Tatar, Niemietz*, an expanded interpretation of Article 8, and the comments of the CoE’s Committee of Ministers, provides the justification of the right under positivist legal theory. Laws are made and developed by humans and the preceding explains how the development of a right to a healthy home environment can be explained as a simple evolution of ECHR law.

¹⁰²⁸ Bay, *supra* note 6 at 62.

importance, and this is in accordance with the natural law principles of Cranston.¹⁰²⁹

Expanding the right to health at home through *Tatar* and Article 8 would certainly open the court to a broader range of point-source pollution cases – particularly those arising from health impacts at work and in communal areas such as neighbourhood parks. Depending on how a broader right to health is formulated and applied, it might also open the ECHR to cases arising from the impacts of climate change and force the ECHR to consider cases akin to the Inuit and Athabaskan petitions seen by the Inter-American Commission.

4.4.3 An expanded right to health and climate change

If *Tatar* and Article 8 were interpreted by the European Court of Human Rights to create a right to a healthy home environment, it could make it easier for individuals to bring climate change related cases to the court. A right to a healthy home environment would allow applicants to enforce an obligation on States to take reasonable and appropriate measures to protect the health and welfare of those applicants in their “home environment”. This would create an opportunity for a European applicant to bring a strong climate change related case if the applicant’s situation was akin to that of the Athabaskan petitioners.

Both the Athabaskan and Inuit petitions pose strong arguments for the idea that climate change poses serious and substantial risks to the petitioners’ health and welfare in their “home environment”. For these arguments to be the strongest, “home environment” must be defined relatively broadly and

¹⁰²⁹ Cranston, *supra* note 7 at 13–14.

encompass not only dwellings, but also the area where they “live” and “work”. For the Inuit and Athabaskan people, it is not unreasonable to conclude that they “work” in the areas where they hunt and forage. The European Court of Human Rights has shown a willingness to extend the definition of “home” to an individual’s office – the place where that person earns a living for his or her own subsistence.¹⁰³⁰ The Inuit and Athabaskan peoples’ subsistence is similarly earned by hunting and foraging on particular areas of land and that area should be given equivalent protection.

The Athabaskan and Inuit petitions both establish that climate change poses serious threats to their health and welfare. Section 3.2 of this work discussed both petitions in detail, in particular why the Inuit petition was ultimately disappointing and why the Athabaskan petition is arguably stronger than the Inuit petition and therefore has a higher likelihood of success before the IA Commission. It is important to note that neither petition could be brought to the European Court of Human Rights *per se* as the applicants do not reside in a member state to the ECHR, but if *Tatar* has expanded ECHR law, a European applicant in similar circumstances to those petitioners would have a stronger case before the European Court than the Athabaskan petitioners have before the IA Commission.

The American Declaration does not provide a strong right to health and the Athabaskan petitioners have based their claims on the rights to culture, property and subsistence. The Athabaskan petitioners have also had to draw a causal connection linking the actions of the Canadian government to the environmental impacts that have violated their rights under the American Declaration. In contrast, *Tatar* established that European applicants can rely on a right to health under Article 8 without the need of a causal relationship between State actions and real health impacts. In *Tatar*, the European Court specifically noted that the State was under an obligation even though there

¹⁰³⁰ *Niemietz*, *supra* note 1011.

was no causal connection between the State's action and the pollution.¹⁰³¹ Furthermore, the pollution in *Tatar* did not cause actual deterioration of health, but simply created a "serious and substantial risk to the health and welfare of the applicants".¹⁰³²

If they were able to bring a claim in Europe, the Athabaskan petitioners would have a strong case of an Article 8 violation under *Tatar*. Following *Tatar* the Athabaskans would not have to establish a causal link between climate change and a violation of their rights and, based on their petition, it is clear that warming weather poses a serious and substantial risk to their health and welfare. If European applicants were able to mount a similar claim such that climate change places their health and welfare in serious risk, they would equally have a strong case under Article 8, *Tatar*, and a right to a healthy home environment. Potential applicants may include Europe's northern indigenous populations who maintain a subsistence living, such as the Sami of Scandinavia or one of the numerous indigenous peoples of Russia. This is not to say that applicants would be limited to northern or indigenous people. Climate change is projected to pose serious risks to many coastal populations and it could cause serious risks to the health of numerous people who are not necessarily indigenous.

One obvious response to the idea that Article 8 and *Tatar* could be applied in a way which holds States responsible for climate change would be to argue that small States with low historical greenhouse gas emissions are not responsible for climate change and are also incapable of preventing it. While *Tatar* makes it clear that a rights violation can occur irrespective of the State actually causing the harm, the design of the ECHR provides some protection to States. Climate change cases under a right to a healthy home environment could open States to a large number of claims, but the design of the ECHR's

¹⁰³¹ *Tatar c Roumanie*, *supra* note 134, para 107.

¹⁰³² *Ibid.*

rules of procedure prevents States from actually having to address climate change in order resolve a potential rights violation.

When the European Court of Human Rights finds a rights violation, it is the State's responsibility to determine how it will remedy the situation and prevent further violation. This provision will mean that States held in violation of a right to a healthy home environment would not be obligated to actually improve the environment by mitigating climate change. At the same time the provision would help protect vulnerable populations and potentially provide them access to climate change adaptation or, in the most extreme cases, relocation. Obviously, from a humanitarian perspective, the ideal situation is one where people negatively affected by climate change are provided relief. This relief could come in the form of climate change mitigation, adaptation or relocation and there is value in establishing a mechanism for providing this sort of relief since, as discussed in Section 2.4 of this work, the ECHR currently lacks a good mechanism to respond to climate change.

Chapter 5: Conclusions

Inter-American and European human rights provide useful, if limited, mechanisms for responding to environmental challenges. While the rights protected by both regimes are similar on paper, the application of these rights varies significantly between the two regimes. They also developed along very different paths and their authority is perceived differently in the two regions. These factors have made the European regime more effective and given it a greater ability to use regional human rights to provide environmental protection.

Both the ECHR and American Declaration were drafted after World War 2 in efforts to create regional unity, strengthen democracy, and prevent future conflict. The Inter-American regime was first, but the European regime had greater authority. The ECHR was drafted based on the United Nations Declaration on Human Rights, sharing many of its characteristics, and going beyond the UN Declaration by creating a court where individuals could bring claims against States and to which States would be bound. In contrast, the American Declaration was non-binding and had no mechanism for individuals to challenge States' actions. The principle of "non-intervention" was thoroughly ingrained in the regional politics of the Americas and the Inter-American regime was constrained by this principle when it drafted the American Declaration and it has felt its effects ever since. Non-intervention arguably delayed the adoption of the American Convention, reduced participation to it, and it retains an influence in the regime with regard to participation and compliance.

In Europe the human rights regime benefitted early from various factors which allowed the ECHR to become the foundation of a very strong regime. Early cases were capable of being treated lightly by the regime's adjudicating

bodies so States could perceive the regime as one which supported human rights while being sympathetic to their interests. The CoE has positioned itself as a body to which States seek and value participation and the mandatory commitment to the ECHR as a prerequisite for joining the CoE has further strengthened participation and compliance.

Combined, these and other factors have allowed the ECHR to be applied by numerous applicants to directly or indirectly protect the environment. The ECHR's right to privacy is particularly capable of providing relief from pollution when it negatively affects an individual's health. The right to life has been used in Europe to establish an obligation on States to protect individuals from recognized risks even if they arise from natural disasters. Although untested, this application of the right to life may provide a means to oblige States to take action on climate change, if only as a way of ensuring that peoples' lives are not placed at undue risk from foreseeable weather events brought on by climate change.

The European regime also places a particularly high priority on environmental conservation, at times placing conservation efforts above fundamental human rights. The European Court of Human Rights has yet to elaborate on which rights along with the right to property can be overridden by conservation policies, but the fact that environmental conservation can override any human rights illustrates how far the European law since it was drafted in the absence of any consideration for the environment and early decisions which downplayed the value of a clean environment.

The gradual development of ECHR rights and their ability to provide environmental protection has recently culminated in the possible creation of a variant of a right to a healthy environment. Following *Tatar*, *Niemietz* and the language of Article 8, the European Court of Human Rights has potentially established a broad right to a healthy home environment. The

right would protect the environment in places where people spend the majority of their time: their local communities; where they work, go to school, and recreate.

The right to a healthy home environment is the next step for the European human rights regime. It would not only expand environmental protection and human rights in Europe, but it would also progress the broader international discussion on the relationship between the environment and human rights. Numerous individuals and international bodies have advocated for a recognized right to a healthy environment and the court's recognition of a right to a healthy home environment would be a logical, important, and defensible step in that direction. With the support of the CoE's Committee of Ministers, Parliamentary Assembly, and numerous European States, the European Court of Human Rights is in an ideal position to expand the right to privacy in this way and to not do so will be a missed opportunity.

In contrast to the European regime, the Inter-American regime, the IA Commission, and IA Court have been faced with particularly challenging human rights violations, nations reluctant to abandon the principle of non-intervention, States willing to abandon their commitment to the regime if faced with unfavourable decisions, and an overall inability to oblige States to comply with recommendations and decisions. Even faced with these challenges, the Inter-American human rights regime has managed to provide individuals with mechanisms to use human rights to protect their environment. Indigenous populations have a particularly strong right to property which they have used to protect their environment from resource exploitation, deforestation and pollution. Recent cases have also illustrated the potential for non-indigenous groups to also use the human rights to protect their communities from pollution.

The Inter-American human rights regime also has one of the most interesting and potentially powerful climate change related cases pending a decision on its admissibility. The Athabaskan petition, if admitted to the IA Commission is a near ideal case for those interested in using regional human rights to respond to climate change and its outcome will have a major impact on the Inter-American regime and its member states.

The Inter-American regime unfortunately appears to struggle with ensuring compliance and States have illustrated a willingness to publically challenge and rebuke the regime. While there is great potential for the Inter-American regime to provide applicants with favourable decisions related to environmental matters, the regime needs to find a way to improve compliance so that wronged applicants receive real reprieve from violations and not just paper judgments. To this end, the next developments of Inter-American human rights law and its relation to the environment should be minor. The IA Court has established that States must consult and gain the consent of indigenous populations when undertaking large-scale projects on their territory and the court should further expand this right to “all projects”. The IA Court and IA Commission also have three similar pending cases and they may force the regime to define the right of non-indigenous people to have their health protected from local pollution. One option will be for the Inter-American regime to follow the European Court of Human Rights and use the right to privacy to establish a right to health, but this may not be the best option for the regime and a more gradual development of the regime’s developing “right to a decent life” may be best for the health and stability of the regime, even if it fails to protect some early petitioners.

European human rights under the ECHR and Inter-American human rights provide established and growing mechanisms for responding to environmental challenges. While they are incapable of addressing all aspects of environmental degradation – they are effective in particular circumstances

and are continually developing the law to provided increased protection. This work has explored both regimes, their respective strengths and weaknesses, and recommended avenues for future development. Hopefully both regimes will be able to continue to strengthen the relationship between human rights and environmental protection and provide individuals with enforceable rights and clean environments.

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