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THE ARCTIC ATHABASKAN PETITION: WHERE ACCELERATED ARCTIC WARMING MEETS HUMAN RIGHTS

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I. INTRODUCTION

In the contemporary world, indigenous peoples¹ live under conditions of inequality and disadvantage.² For many indigenous

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1. “Today, the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others.” See JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2d ed. 2004). “Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.” *Id.* “They are *indigenous* because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.” *Id.* “Furthermore, they are *peoples* to the extent they comprise distinct communities with a continuity

peoples, pressure from industrialized nations to adapt to the adverse effects of climate change³ is lacerating indigenous peoples' human rights.⁴ The number of extreme weather events such as floods, droughts, heat waves, cyclones, wildfires, and storms, and reduced biodiversity are increasing and those with the least resources are most vulnerable.⁵ The indigenous communities that are most affected by the negative effects of climate change are those living in the Arctic region, where the effects of global warming become more evident each year.⁶ In the Arctic, climate change has caused warmer

of existence and identity that links them to the community, tribes, or nations of their ancestral past." *Id.*

2. *Id.* at 4.

3. The United Nations Framework Convention on Climate Change, defines in Article 1, climate change as: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." United Nations Framework Convention on Climate Change [UNFCCC], May 9, 1992, 1771 U.N.T.S. 107, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (entered into force Mar. 21, 1994), available at http://unfccc.int/essential_background/convention/items/2627.php.

4. See Klemetti Näkkäljärvi, Climate Change and Traditional Knowledge, Address at the International Conference at the German Federal Foreign Office in cooperation with the Ministry of Foreign Affairs of Finland (Mar. 17-18, 2011), in ARCTIC SCIENCE, INTERNATIONAL LAW AND CLIMATE CHANGE 105, 109 108-09 (Sussanne Wasum-Rainer et al. eds., 2012).

5. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Summary for Policy Makers in FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, 6 (2014) [hereinafter FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2014], available at http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf.

6. See STATISTICS CANADA, HUMAN ACTIVITY AND THE ENVIRONMENT: ANNUAL STATISTICS 33 (2007-2008), available at <http://www.statcan.gc.ca/pub/16-201-x/2007000/10542-eng.htm>; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Summary for Policy Makers in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 9 (2013) [hereinafter FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013], available at <http://www.climatechange2013.org/spm>; EUROPEAN SPACE AGENCY, *Arctic Lakes show Climate on Thin Ice*, SPACE FOR OUR CLIMATE (Feb. 3, 2014), available at http://www.esa.int/Our_Activities/Observing_the_Earth/Space_for_our_climate/Arctic_lakes_show_climate_on_thin_ice (describing some of the implications of climate change in the Arctic). "Snow and ice cover in Canada is already changing and signs show that glaciers are receding and sea ice is decreasing in the Arctic." STATISTICS CANADA, *supra*, at 35. "Arctic sea ice has experienced enhanced summer break-ups over the last few decades, adding to

temperatures, changes in snow and ice cover, thawing permafrost, glacier melt, increased precipitation, summer droughts, severe storms, and changes in the distribution and abundance of flora and fauna.⁷

In the past, most governments have addressed climate change as solely an environmental or economic problem.⁸ Recently, however, the link between “human and social dimensions of climate change” has been acknowledged.⁹ In some cases, the negative impacts of climate change are so severe that they violate the human rights of individuals and communities.¹⁰ The Intergovernmental Panel on Climate Change (“IPCC”), the leading international body for climate change,¹¹ predicted “litigation is likely to be used increasingly as countries and citizens become dissatisfied with the pace of decision-making on climate change.”¹² Numerous petitions have been brought before the Inter-American Commission on Human Rights (“IACHR”) alleging violations to land titles and resources.¹³ In contrast, litigation

evidence of warming near the North Pole.” *Id.* at 37. “In September 2007, sea ice throughout the circumpolar region shrunk to its lowest level since satellite measurement began.” *Id.*

7. FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013, *supra* note 6, at 5-6.

8. See Nicholas Stern, THE ECONOMICS OF CLIMATE CHANGE 25-28 (2007); HUMAN-INDUCED CLIMATE CHANGE 343-54 (Michael E. Schlesinger et al. eds., 2007) (detailing the effects of global warming in the economy).

9. Navi Pillay, High Commissioner for Human Rights, Opening Remarks on the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights, at the Human Rights Council Seminar (Feb. 23, 2012), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11872&LangID=e> (“Climate change-related impacts have a range of implication for the effective enjoyment of human rights.”).

10. See Pillay, *supra* note 9.

11. The IPCC “was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1988 to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.” *Organization, IPCC*, <http://ipcc.ch/organization/organization.shtml> (last visited Feb. 7, 2015).

12. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Litigation Related to Climate Change in CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE, 793 (2007) [hereinafter FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007], *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg3_report_mitigation_of_climate_change.htm.

13. See Nigel Bankes, *The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human*

alleging human rights violations arising from climate change and global warming has only recently been used at the regional level, and the outcome is not yet clear.¹⁴

This article will explore the negative effects of climate change on the human rights of indigenous peoples through a petition filed with the IACHR in 2013 on behalf of the Arctic Athabaskan peoples.¹⁵ The Athabaskan peoples allege that Canada is internationally responsible for the emissions of black carbon,¹⁶ which has caused rapid Arctic warming and melting, resulting in violations of the Arctic Athabaskan peoples' human rights.¹⁷ Remedies and reparation measures emerging from the IACHR have progressively acknowledged the link between the loss of traditional lands and natural resources, and human rights violations.¹⁸ However, the Athabaskan Petition presents the Inter-American System of Human Rights with a new challenge regarding environmental degradation. The IACHR, nevertheless, is well equipped to issue a recommendation and to develop adequate remedies to protect the human rights of the Arctic Athabaskan peoples.

Part II of this article examines the relationship between the consequences of climate change and human rights violations, particularly focusing on one of the most affected groups: indigenous

Rights Instruments, 3 Y.B. POLAR L. 57 (2011) [hereinafter Bankes, *Protection of the Rights*]; Nigel Bankes, *International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples*, 47 ALBERTA L. REV. 457, 478-94 (2010).

14. See Section IV.

15. Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada*, (Apr. 23, 2013), <http://earthjustice.org/sites/default/files/SummaryAACpetition13-04-23.pdf> [hereinafter Athabaskan Petition].

16. "Black carbon (BC) is the most strongly light-absorbing component of particulate matter (PM), and is formed by the incomplete combustion of fossil fuels, biofuels, and biomass." U.S. Env'tl. Prot. Agency, *What is black carbon?*, EPA (Mar. 30, 2012), <http://www.epa.gov/blackcarbon/basic.html>. "Most emissions of [black carbon] come from mobile sources (52%), especially diesel engines and vehicles." *Id.*

17. Athabaskan Petition, *supra* note 15, at 4.

18. See Bankes, *Protection of the Rights*, *supra* note 13.

peoples. Part III reviews the evolution of the Inter-American System of Human Rights and its supranational supervisory bodies. This section also analyzes the legal status of the American Declaration of the Rights and Duties of the Man (“American Declaration”),¹⁹ and highlights arguments by the Organization of American States (“OAS”), and its two supervisory bodies, to consider the American Declaration as a source of international obligations, binding on the member states of the OAS. Part IV briefly examines the Inuit Petition as precedent for the human rights approach to climate change in the Inter-American System of Human Rights. It then turns to the Athabaskan Petition and focuses on three human rights: the right to enjoy the benefits of the culture, the right to property, and the right to the preservation of health and well-being. This article will then discuss the IACHR’s ability to use the Athabaskan Petition to address the intersections among climate change, indigenous peoples, and human rights violations, and explores the main challenges the Petition will confront before the IACHR. Finally, Part V concludes by reflecting on the extent to which the Athabaskan Petition’s outcome will set the course for protecting the rights of indigenous peoples in the future and the reasons why the IACHR is well equipped to interpret the American Declaration in the light of the negative effects of the accelerated Arctic warming.

II. CLIMATE CHANGE, INDIGENOUS PEOPLES, AND HUMAN RIGHTS

The impacts of climate change on human systems tend to increase depending on the vulnerability²⁰ of the population.²¹ As the vulnerability of a community increases, so do the potential consequences for something of value to be at risk such as life, health,

19. American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration], *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.82 doc.6 rev.1, at 17 (1992).

20. “[T]he effects of climate change will be felt most acutely by individuals and communities around the world that are already in vulnerable situations owing to geography, poverty, gender, age, indigenous, minority status or disability.” U.N. Human Rights Council [UNHRC] Res. 26/27, Human Rights and Climate Change, U.N. Doc. A/HRC/26/L.33, at 3 (June 23, 2014), *available at* <http://ieenvironment.org/wp-content/uploads/2013/05/A-HRC-26-L33.pdf>.

21. FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013, *supra* note 6, at 6-7.

property, or culture.²² At the same time, the resilience to cope with, and adapt to, hazardous events decreases.²³ Indigenous communities often live in poverty, making them one of the most vulnerable populations.²⁴ Despite this, the link between climate change and human rights violations of indigenous communities was not acknowledged until 2005 with the Inuit Petition.²⁵

A. *Climate Change*

In 1989, the United Nations General Assembly characterized environmental degradation, including climate change, as a global problem.²⁶ Further, the General Assembly emphasized “that poverty and environmental degradation are closely interrelated and that environmental protection in developing countries” will require action at all levels.²⁷ In 2004, significant and accelerated change to the cultures, ecosystems, and biodiversity²⁸ of the Arctic were projected.²⁹ In 2007, the IPCC reiterated these projections.³⁰ The IPCC presented an updated report in 2013 that confirmed the Arctic’s summer sea

22. *Id.*

23. *Id.* at 3 (figure SPM.1).

24. *See, e.g.*, 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 (Dec. 7, 2005) [hereinafter Inuit Petition], available at http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

25. *Id.*

26. United Nations Conference on Environment and Development, Dec. 22, 1989, U.N. Doc. A/RES/44/228.

27. *Id.*

28. According to Article 2, of the Convention on Biological Diversity, biodiversity means: “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.” United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993), available at <http://www.cbd.int/doc/legal/cbd-en.pdf>.

29. GORDON McBEAN ET AL., ARCTIC CLIMATE IMPACT ASSESSMENT SCIENTIFIC REPORT, CHAPTER 2 ARCTIC CLIMATE: PAST AND PRESENT 21, 55 (2004), available at <http://www.acia.uaf.edu/pages/scientific.html>.

30. *See* FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007, *supra* note 12, at 230.

ice³¹ and spring snow cover³² had continued to decrease.³³ Further, the report introduced evidence to “support very substantial Arctic warming since the mid-20th century.”³⁴ Additionally, all three of the IPCC reports agree that the Arctic climate is experiencing these changes as a result of human activities.³⁵

B. *The Vulnerability of Indigenous Peoples*

In March 2014, the IPCC presented its most recent report.³⁶ There, the IPCC defined vulnerability as: “[t]he propensity or predisposition to be adversely affected . . . [which] encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt.”³⁷ The report explains that “[p]eople who are socially, economically, culturally, politically, institutionally, or otherwise marginalized are especially vulnerable” to

31. The ice cap covering the Arctic Ocean shrinks and expands with the seasons. *2013 Arctic Sea Ice Minimum*, NASA EARTH OBSERVATORY (Sept. 21, 2013), <http://earthobservatory.nasa.gov/IOTD/view.php?id=82094>. According to the NASA Earth Observatory, “[i]t grows dramatically each winter, usually reaching its maximum in March.” *Id.* It also “melts just as dramatically each summer, generally reaching its minimum in September.” *Id.* At this rate, “it is very likely that the Arctic’s summer sea ice will completely disappear within this century.” *Id.*

32. The Observatory has emphasized that “[i]n the high latitudes of the Northern Hemisphere, snow typically covers the land surface for nine months each year. . . . but recent decades have witnessed significant changes in snow cover extent,” especially during spring. *Snow Cover Extent Declines in the Arctic*, NASA EARTH OBSERVATORY (Jan. 8, 2013), <http://earthobservatory.nasa.gov/IOTD/view.php?id=80102>.

33. See FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013, *supra* note 6, at 10.

34. *Id.* at 9.

35. See FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007, *supra* note 12, at 2; FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013, *supra* note 6, at 5-6; FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2014, *supra* note 5, at 4-5; see also Press Release, Intergovernmental Panel on Climate Change, IPCC Publishes Full Report *Climate Change 2013: The Physical Science Basis* (Jan. 30, 2014), available at http://www.ipcc.ch/pdf/press/press_release_wg1_full_report.pdf (“[W]arming of the climate system is unequivocal [and] human influence on the climate system is clear.”).

36. FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2014, *supra* note 5.

37. *Id.* at 5.

the impacts of climate change.³⁸ According to the report, impacts of climate change “include alterations of ecosystems, disruption of food production and water supply, damage to infrastructure and settlements, morbidity and mortality, and consequences for mental health and human well being.”³⁹ Across the world today, indigenous peoples “exist under conditions of severe disadvantage relative to others within the states constructed around them.”⁴⁰ Therefore, they “have been crippled economically and socially, their cohesiveness as a community has been damaged or threatened, and the integrity of their cultures has been undermined.”⁴¹ These characteristics of indigenous peoples place them squarely within the IPCC’s definition of vulnerable populations.

The indigenous people of the Arctic, including the Athabaskan⁴² and Inuit⁴³ communities, have contributed the least to the accelerated warming and melting of the Arctic, yet they are among the first to face direct environmental, social, and human rights impacts of climate change.⁴⁴ Notably,

[i]ndigenous peoples have long depended on their knowledge and skills for survival, including their ability to function in small, independent groups by dividing labor and maintaining strong social support and mutual ties both within and between their immediate communities. Knowledge about the environment is equally important. . . . Knowing one’s surroundings was an often-tested requirement, one that remains true today for those who travel on and live off the land and sea. . . . Understanding the patterns of

38. *Id.* at 6.

39. *Id.*

40. ANAYA, *supra* note 1, at 4.

41. *Id.*

42. The Athabaskan peoples live in Alaska, British Columbia, Alberta, Saskatchewan, Manitoba, the North West Territories, and the Yukon. *See Athabaskan Communities*, ARCTIC ATHABASKAN COUNCIL, <http://www.arcticathabaskancouncil.com/aac/?q=node/5> (last visited Feb. 8, 2015).

43. The Inuit peoples live in Alaska and areas of Canada, Greenland, and Russia. *See ICC’s Beginning*, INUIT CIRCUMPOLAR COUNCIL, <http://www.inuitcircumpolar.com/icc.html> (last visited Feb. 8, 2015).

44. *See GREENFACTS & INT’L POLAR FOUND., FACTS ON ARCTIC CLIMATE CHANGE* (2004), available at <http://www.greenfacts.org/en/arctic-climate-change/foldout-arctic-climate-change.pdf>.

animal behavior and aggregation is necessary for acquiring food. Successful traveling and living in a cold-dominated landscape requires the ability to read subtle signs in the ice, snow, and weather.⁴⁵

Today, indigenous peoples in the Arctic “have more options than in the past but not all of these allow for the retention of all aspects of their cultures.”⁴⁶ In fact, for many, “these options have become available at the cost of dependency on the outside world.”⁴⁷ For example, “[c]onsiderable infrastructure has been built over the past century, bringing improvements in the material standard of living in the Arctic.”⁴⁸ But, “the settled way of life has reduced . . . the extent of their day-to-day contact with their environment, and thus the depth of their knowledge of precise environmental conditions.”⁴⁹ “[T]hese dependencies have increased the vulnerability of arctic communities to the impacts of climate change.”⁵⁰

C. Implication for Human Rights

Climate change poses a “massive threat to human development.”⁵¹ Particularly for the most vulnerable, as “[t]he effects of climate change will be most acutely felt by those segments of the population whose rights protections are already precarious due to factors such as poverty, gender, age, minority status, migrant status, and disability.”⁵² This situation is even worse for “[c]ertain groups, such as women, children, indigenous peoples and rural communities [that] are more exposed to climate change effects and risks.”⁵³ Extreme weather

45. Henry Huntington & Shari Fox, *The Changing Arctic: Indigenous Perspectives*, in ARCTIC CLIMATE IMPACT ASSESSMENT 61, 64 (Carolyn Symon et al. eds., 2005) (internal citations omitted).

46. *Id.* at 91.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. KEVIN WATKINS, *forward* to HUMAN DEVELOPMENT REPORT 2007/2008 (2007), available at http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf.

52. Pillay, *supra* note 9.

53. *Id.*

events have severely impacted the indigenous peoples' ability to perform life-sustaining activities such as hunting and fishing.⁵⁴ In 2008, the United Nations Human Rights Council adopted Resolution 7/23, which expressed its concern that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.⁵⁵ In regions like the Arctic, "climate change is causing indigenous people to lose land and natural resources that are crucial to their subsistence lifestyle."⁵⁶

Over the past decade, indigenous peoples have accessed the international and regional legal systems to address the human rights implications of environmental degradation.⁵⁷ The IACHR and the Inter-American Court of Human Rights ("IACtHR") complaint procedures have been "significant tools to help alter the course of state action or inaction when needed to bring about the implementation of international law."⁵⁸ Both the IACHR and the IACtHR have issued recommendations and rulings in cases where the effects of environmental degradation were determined to violate indigenous peoples' human rights.⁵⁹

54. *Id.* at 5.

55. U.N. Human Rights Council [UNHRC] Res. 7/23, Human Rights and Climate Change, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008), available at http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf; see Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 439 (2009).

56. Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impact on Indigenous Peoples*, 26 TUL. ENVTL. L.J. 1, 4 (2013).

57. See generally S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 39-54 (2001) (discussing the protection of indigenous peoples' rights to land and natural resources by Inter-American Human Rights Instruments and U.N. treaties). Several cases have been brought before the Inter-American Human Rights System. See *id.* Most of those cases have focused on violations of indigenous peoples' rights to land and natural resources. See *id.*

58. ANAYA, *supra* note 1, at 248-87 (elaborating on the use of the international complaint procedures by indigenous peoples).

59. Two seminal cases are *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, holding that Nicaragua's failure to demarcate communal land and to protect the indigenous people's right to own their ancestral land and natural resources violated

III. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The Inter-American System of Human Rights began in 1948 with the transition of the Pan American Union into the OAS.⁶⁰ In 1948, the adoption of the Charter of the Organization of American States in Bogota, Colombia, formally created the OAS.⁶¹ The Charter of the OAS has been amended four times.⁶² Presently, the OAS constitutes the main political, juridical, and social governmental forum in the American Continent with all thirty-five independent states of the Americas as member states.⁶³ After the OAS was established, additional institutions were created around its four main pillars: democracy, human rights, security, and development.⁶⁴ The bodies created to protect and promote human rights were the IACHR and the IACtHR.⁶⁵ Today, the IACHR, located in Washington DC, and the IACtHR, located in San José, Costa Rica, make up the Inter-American

the Awas Tingni Community's human rights, and *Maya Indigenous Cmty. v. Belize*, holding that Belize violated the Maya Indigenous Communities' rights to certain lands and natural resources by granting logging and oil concessions. See *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001)*; *Maya Indigenous Cmty. v. Belize, Merits, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)*.

60. *Our History*, ORGANIZATION AM. ST., http://www.oas.org/en/about/our_history.asp (last visited Feb. 8, 2015). The first International Conference of American States took place in Washington D.C., from October 1889 to April 1890. *Id.* Afterwards, several meetings were held and in 1970 the Conferences of American States were replaced by the sessions of the OAS General Assembly. *Id.*

61. Charter of the Organization of American States, 1948 [hereinafter Charter of the OAS], 119 U.N.T.S. 3 (entered into force Dec. 13, 1951).

62. See Buenos Aires Protocol to the Organization of American States, Feb. 27, 1967, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970); Cartagena de Indias Protocol to the Organization of American States, Dec. 5, 1985, O.A.S.T.S. No. 66 (entered into force Nov. 16, 1988); Washington Protocol to the Organization of American States, Dec. 14, 1992, 33 I.L.M. 1005 (entered into force Sept. 25, 1997); Managua Protocol to the Organization of American States, June 10, 1993, 33 I.L.M. 1009 (entered into force Jan. 29, 1996).

63. *Who We Are*, ORGANIZATION AM. ST., http://www.oas.org/en/about/who_we_are.asp (last visited Mar. 22, 2015).

64. *What We Do*, ORGANIZATION AM. ST., http://www.oas.org/en/about/what_we_do.asp (last visited Mar. 8, 2015).

65. See *Our History*, *supra* note 60.

System of Human Rights.⁶⁶ These supervisory bodies, through the enforcement of the American Declaration and the American Convention on Human Rights (“American Convention”), promote and protect human rights.⁶⁷

The Inter-American System of Human Rights was developed sixty-five years ago.⁶⁸ It was formally created with the adoption of the American Declaration, just months before the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations.⁶⁹ The same year the Charter of the OAS was adopted, the General Assembly of the OAS proclaimed both regional documents, that is, the American Declaration and the Charter of the OAS, to contain the fundamental principles of the OAS.⁷⁰ The American Declaration was the first international instrument that gave context and validation to the claim of the universality of human rights.⁷¹

Twenty years later, on November 22, 1969, the American Convention was adopted in San José, Costa Rica.⁷² Currently, twenty-five of the thirty-five OAS member states have ratified it.⁷³ The

66. *Human Rights*, ORGANIZATION AM. ST., http://www.oas.org/en/topics/human_rights.asp (last visited Apr. 5, 2015).

67. *Id.*

68. *See Our History*, *supra* note 60.

69. *See* Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.82 doc.6 rev.1 1, 6 (1992) [hereinafter Basic Documents], available at <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf>.

70. *See generally id.* at 4 (elaborating on the creation of the OAS and its principles).

71. *See id.* at 6 (“[T]he introduction to the American Declaration states ‘the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.’ The American States thus acknowledge that when the State legislates in this area, it is neither creating nor granting rights. Instead, it is recognizing rights that existed before the State was ever created and that flow from the very nature of the human person.”).

72. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

73. Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

American Convention affords treaty-level protection to the human rights previously included in the American Declaration.⁷⁴ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), which was adopted in San Salvador, El Salvador, in 1988 and entered into force in November, 1999, added an array of economic, social, and cultural rights to the American Convention.⁷⁵ So far sixteen of the thirty-five OAS member states have ratified the Protocol of San Salvador.⁷⁶

Although the IACtHR and the American Convention are central to the Inter-American System of Human Rights,⁷⁷ this article will primarily focus on the role of the IACHR and the American Declaration as they relate to the Athabaskan Petition.

A. *The Inter-American Commission on Human Rights*

In 1959, the IACHR was created by the OAS⁷⁸ with the principal function of “promot[ing] the observance and protection of human

74. See Basic Documents, *supra* note 69, at 10-11.

75. See San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Nov. 17, 1988), O.A.S.T.S. No. 69; 28 I.L.M. 156 *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.82 doc.6 rev.1, at 67 (1992). The Protocol of San Salvador protects the right to work; right to social security; right to health; right to a healthy environment; right to food; right to education; right to the benefits of culture; right to formation and protection of the families; and rights of children. See *id.*

76. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador” A-52 (Nov. 17, 1988), *available at* <http://www.oas.org/juridico/english/signs/a-52.html>.

77. As of today, twenty-five members of the OAS have ratified the American Convention and twenty-two have recognized the jurisdiction of the IACtHR. See OAS, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), *supra* note 73. Canada has not signed the American Convention. *Id.* The United States signed the Convention in 1978; however, it has not been ratified. *Id.* Cuba is technically a member of the OAS, but its government has been excluded from participation since 1962. See HENRY STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1021 (3d ed. 2006).

78. *What is the IACHR?*, ORGANIZATION AM. ST., <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Feb. 8, 2015).

rights and [serving] as a consultative organ of the [OAS] in these matters.”⁷⁹ In order to achieve its mission, the IACHR was given specific authority under the Charter of the OAS to analyze and monitor human rights in the Americas.⁸⁰ In 1965, the IACHR functions were expanded to include the power to issue recommendations on specific complaints or petitions from citizens who alleged their human rights had been violated.⁸¹

The entry into force of the Protocol of Buenos Aires, in 1970, strengthened the IACHR by including it in the Charter of the OAS and by changing the status of the IACHR from an autonomous entity of the OAS into one of its principal organs.⁸²

In the words of Thomas Buergenthal, former Judge of the IACtHR,

[T]hrough the transitory provisions, the Commission’s Statute became an inherent part of the O.A.S. Charter itself. The revised Charter thus effectively legitimated the powers that the Commission exercised under . . . its Statute and it recognized the normative character of the American Declaration of the Rights and Duties of Man as a standard by which to judge the human rights activities of all O.A.S. member states.⁸³

Thus, the IACHR was entrusted with a twofold role: “it retained its status as an organ of the OAS, thereby maintaining its powers to

79. Charter of the OAS, *supra* note 61, art. 106.

80. See David J. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. INT’L L. & POL’Y 95, 96 (1993).

81. See *id.*

82. Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 475 (Theodor Meron ed., 1986). The drafters of the Protocol of Buenos Aires had included a transitory provision to the revised Charter of the OAS that provided that until the American Convention entered into force, the IACHR should keep vigilance over the observance of human rights. See Buenos Aires Protocol to the Organization of American States, *supra* note 62, art. 150. In 1978, the American Convention entered into force and reaffirmed the IACHR’s mandate to protect human rights. See Buergenthal, *supra* note 82, at 440. A year later the IACtHR was established under the OAS as supervisory body for the American Convention. American Convention, *supra* note 72, art. 58.

83. Buergenthal, *supra* note 82, at 475 (internal citations omitted).

promote and protect human rights in the territories of all OAS member states; in addition, [became] a monitoring body of the American Convention.”⁸⁴ The core task of the Commission is “to promote respect for and defense of human rights.”⁸⁵ In the exercise of its mandate, visits *in loco* and country reports remain an important part of the IACHR’s work; nevertheless, the consideration of individual petitions plays an increasing role in its activities in recent years.⁸⁶

According to Article 44 of the American Convention, “[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the [OAS], may lodge petitions with the Commission containing denunciations or complaints of violation of [the American Convention] by a State Party.”⁸⁷ However, “the admission by the Commission of a petition or communication . . . [requires] that the remedies under domestic law have been pursued and exhausted . . . and that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.”⁸⁸

Filing a petition is only the first step towards an IACHR recommendation being issued.⁸⁹ In order for a petition to be admitted and then considered by the IACHR, the petition must comply with numerous procedural and substantive requirements such as meeting jurisdictional requirements and alleging enough facts to amount to a violation.⁹⁰

84. Cecilia Cristina Naddeo, *The Inter-American System of Human Rights: A Research Guide*, GLOBLALEX (2010), http://www.nyulawglobal.org/globalex/Inter_American_human_rights.htm#_edn51, § 3.1.

85. American Convention, *supra* note 72, art. 41.

86. PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 272 (2002); *see also* Buergethal, *supra* note 82, at 479-81.

87. American Convention, *supra* note 72, art. 44.

88. *Id.* art. 46. In addition, Article 46 requires “that the subject of the petition or communication is not pending in another international proceeding for settlement; and that in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.” *Id.*

89. *See Petition Form*, INTER-AM. COMMISSION ON HUM. RTS., https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E (last visited Apr. 12, 2015).

90. *Id.*

B. The Status of the American Declaration on the Rights and Duties of the Man

On several occasions the General Assembly of the OAS has recognized that the American Declaration is a source of binding international obligations for OAS member states.⁹¹ Further, the General Assembly of the OAS has recommended “member states continue to adopt and enforce appropriate measures and legislative provisions to preserve and fully maintain human rights, in keeping with the American Declaration of the Rights and Duties of Man.”⁹² In a subsequent resolution the General Assembly of the OAS recommended that,

the Inter-American Commission on Human Rights . . . prepare a study on the systems and methods of investigation of violations of those rights, based on nondiscriminatory principles that recognize the juridical equality of states and that set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man, to be submitted to the Permanent Council so that the latter may examine it and formulate observations with regard to it.⁹³

The General Assembly of the OAS reiterated this position by recommending the member states “continue to adopt and apply the corresponding measures and legislative provisions to preserve and maintain the full effectiveness of human rights in accordance with the American Declaration.”⁹⁴ The General Assembly of the OAS reaffirmed “that in the search for economic and social justice human dignity and the freedom of the individual as expressed in the American Declaration of the Rights and Duties of Man must be preserved and the rule of law respected.”⁹⁵

91. Basic Documents, *supra* note 69, at 7.

92. O.A.S. Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, AG/RES 312 (VII-0/77) (June 22, 1977).

93. O.A.S. Secretary-General, *Means to Promote Respect for and Protection of Human Rights*, AG/RES 314 (VII-O/77) (June 22, 1977).

94. O.A.S. Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, AG/RES 368 (VIII-0/78) (July 1, 1978).

95. O.A.S. Secretary-General, *Promotion of Human Rights*, AG/RES 371 (VIII-0/78) (July 1, 1978).

In 1979, the Statute of the IACHR⁹⁶ was approved by the General Assembly of the OAS and provides the IACHR with the authority to uphold the rights protected by the American Declaration.⁹⁷ Specifically, Article 1 of the Statute states:

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:
 - a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
 - b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.⁹⁸

Although many of the rights protected by the American Convention appear in the American Declaration, not all OAS member states have ratified the American Convention.⁹⁹ Thus, without the American Declaration, the IACHR does not have the authority to consider alleged human rights violations occurring in OAS member states that have not ratified the American Convention.¹⁰⁰ In 2010 the IACHR explicitly stated that,

in addition to examining complaints of violations of the American Convention committed by the instrument's states parties, the IACHR has competence, in accordance with the OAS Charter and with the Commission's Statute, to consider alleged violations of the American Declaration by OAS member states that are not yet parties to the American Convention.¹⁰¹

96. Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979), *available at* <http://www1.umn.edu/humanrts/oasinstr/zoas4cms.htm>.

97. *Id.* art. 1.

98. *Id.*

99. Compare American Convention, *supra* note 72, with American Declaration, *supra* note 19.

100. *Id.*

101. O.A.S. Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II, doc. 5 rev. 1 (Mar. 7, 2011).

In other words, the IACHR is vested with the authority to consider alleged violations of the American Declaration by OAS member states that are not parties to the American Convention. The IACHR has exercised this faculty by considering several cases arising out of countries that are members of the OAS but have not signed the American Convention. For example, in *Mary and Carrie Dann v. United States*, the Western Shoshone indigenous people submitted a petition to the IACHR alleging violations occurring in Nevada.¹⁰² The IACHR was able to consider these violations under Article 26 of the Commission Regulations¹⁰³ and Articles 18 and 20 of the IACHR Statute, which provide that any person legally recognized in one or more of the member states of the OAS may submit petitions to the IACHR, despite the fact that the United States has not ratified the American Convention.¹⁰⁴ Similarly, in *Maya Indigenous Communities v. Belize*, the IACHR maintained:

102. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 1-9 (1999).

103. Article 26(1) of the Commission's Regulations provides:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the Organization may submit petitions to the Commission, in accordance with these Regulations, on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man.

Regulations of the Inter-American Commission on Human Rights, *reprinted in* Basic Documents, *supra* note 69, at 103.

104. Article 18 of the IACHR's Statute refers to the Functions and Powers of the Commission. *See* Statute of the Inter-American Commission on Human Rights art. 18. Article 20 of the Commission's Statute provides:

[I]n relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18: (a) To pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, AND XXVI of the American Declaration of the Rights and Duties of Man; (b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and, (c) to verify, as a prior condition to the exercise of the powers granted under

The [American] Declaration became the source of legal norms for application by the Commission upon Belize becoming a member a Member State of the Organization of American States in 1981. In addition, the Commission has authority under the Charter of the Organization of American States, Article 20 of the Commission's Statute, and the Commission's Regulations to entertain the alleged violations of the Declaration raised by the petitioner against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States.¹⁰⁵

In *Grand Chief Michael Mitchell v. Canada*, the IACHR explained that although Canada is a member state of the OAS they are not a party to the American Convention.¹⁰⁶ Consequently, Canada was subject to the IACHR's jurisdiction for alleged violations of the American Declaration.¹⁰⁷

The IACtHR¹⁰⁸ examined the status of the American Declaration within the legal framework of the Inter-American System of Human

subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

Id. art. 20.

105. *Maya Indigenous Cmty. v. Belize*, Merits, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 46 (2004).

106. *Grand Chief Michael Mitchell v. Canada*, Case No. 790/01, Inter-Am. Comm'n H.R., Report No. 74/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 160 ¶ 30 (2003).

107. *Id.* The Inter-American Commission had previously determined that the American Declaration is a source of international obligation for the OAS member states that are not parties to the American Convention on Human Rights, as a consequence of Articles 3, 16, 112 and 150 of the OAS Charter. James Terry Roach and Jay Pinkerton v. United States, Case No. 9647, Inter-Am. Comm'n H.R., Report No.3/87, OEA/Ser.L/V/II.71/doc. 9, rev. 1 ¶¶ 48-49 (1987).

108. The IACtHR is an autonomous judicial institution charged with applying and interpreting the American Convention. Statute of the Inter-American Court of Human Rights, art. 1, Oct. 1979, O.A.S. Res. 448, 9th Sess., available at <http://www.oas.org/en/iachr/mandate/Basics/23.STATUTE%20COURT.pdf>. To achieve this, the Court has two primary functions: a judicial function, and an advisory function. See American Convention, *supra* note 72, arts. 61-64. Only the IACHR and member states to the American Convention that have recognized the jurisdiction of the IACtHR are permitted to submit cases to the IACtHR about the interpretation or application of the American Convention. See *id.* art. 61. Before doing so, all required procedures before the IACHR must be exhausted. See *id.* In its advisory capacity the court may be consulted by any member state of the OAS

Rights.¹⁰⁹ In particular, the IACtHR contemplated whether Article 64 of the American Convention authorized the IACtHR “to render advisory opinions at the request of a member state or one of the organs of the OAS, regarding the interpretation of the American Declaration.”¹¹⁰ The IACtHR noted that unlike the American Convention, the earlier American Declaration was not a treaty.¹¹¹ Nevertheless, the IACtHR reasoned that the nature of the American Declaration established legal norms and vested the IACtHR with the authority to interpret the American Declaration and define how it applies to the OAS member states.¹¹² In doing so, the IACtHR held,

That Article 64(1) of the American Convention authorizes the Court, at the request of a member state of the OAS or any duly

regarding the interpretation of the American Convention or other treaties concerning the protection of human rights in the American States. *See id.* art. 64. Additionally, any member state of the OAS may request that the IACtHR issue an opinion concerning that member state’s domestic laws and treaties that implicate the protection of human rights in the American states. *See id.*

109. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989) [hereinafter Interpretation of the American Declaration]. In February 1988, the Government of Colombia submitted to the IACtHR a request for an advisory opinion on the interpretation of Article 64 of the American Convention, in relation to the American Declaration. *See id.* ¶ 2.

110. *Id.* ¶ 2.

111. *Id.* ¶ 35.

112. *Id.* ¶¶ 41-46. “The Inter-American Commission on Human Rights has maintained that the American Declaration acquired legally binding force because it was the only human rights document in existence in 1967, when the Charter of the OAS was amended and elevated the Inter-American Commission to the status of a ‘principal organ’ of the regional body.” Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man Anniversary Contributions—International Human Rights*, 30 U. PA. J. INT’L L. 1211, 1212-13 (2014). “It is argued that the American Declaration as incorporated into the text of the 1967 Charter by means of the amendment, since the reference to ‘human rights’ in the OAS Charter must be understood as referring to the American Declaration, the only existing catalogue of human rights norms in the inter American system at the time.” *Id.* “Given that the Charter amendments were ‘ratified’ by the OAS member States, it has been suggested that the American Declaration acquired the normative status of a treaty.” *Id.* “This position has been repeated in many merits decisions of the Inter-American Commission over the years.” *Id.*

qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of the human rights in the American states.¹¹³

Thus, although the American Declaration is not a treaty *per se*, it has been repeatedly recognized that it does not lack legal effect and may be validly used by the Inter-American System of Human Rights to respond to complaints of violations to the rights contained within the American Declaration.

IV. THE ATHABASKAN PETITION

As previously mentioned, the IACHR has issued recommendations in a number of situations involving the effects of environmental degradation on human rights.¹¹⁴ Most of these cases have involved indigenous communities.¹¹⁵ The role of the IACHR is important because these recommendations are not only expected to be implemented, but also to influence government policies and actions.¹¹⁶ Despite this, there have only been two claims presented to the IACHR alleging violations of human rights caused by the negative effects of climate change.¹¹⁷ The first petition was brought in 2005 by the Inuit peoples and was dismissed.¹¹⁸ The second petition was brought by the Athabaskan peoples and is currently being reviewed for admission.¹¹⁹

113. Interpretation of the American Declaration, *supra* note 109, ¶ 48.

114. See DAVID R. BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT, REVITALIZING CANADA'S CONSTITUTION* 133-39 (2012).

115. See, e.g., *Maya Indigenous Cmty's v. Belize, Merits*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶¶ 1-9 (1999); *Grand Chief Michael Mitchell v. Canada*, Case 790/01, Inter-Am. Comm'n H.R., Report No. 74/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 160 ¶ 30 (2003).

116. *Human Rights*, *supra* note 66.

117. See *Inuit Petition*, *supra* note 24; *Athabaskan Petition*, *supra* note 15.

118. *Inuit Petition*, *supra* note 24.

119. *Athabaskan Petition*, *supra* note 15.

A. *The Inuit Petition*

In 2005, sixty-two Inuit people from the Arctic regions of Canada and the United States submitted a petition seeking relief from alleged violations of human rights resulting from the impacts of global warming and climate change caused by greenhouse gas emissions from the United States.¹²⁰ The Inuit were represented by the Chair of the Inuit Circumpolar Conference (“ICC”), and filed the petition with the legal assistance of the Center of International Environmental Law and Earthjustice.¹²¹ The Inuit claimed the negative impacts of climate change in the Arctic, caused by U.S. greenhouse emissions and climate change policy, violated the fundamental human rights of the Inuit peoples, who are protected by the American Declaration and other international instruments.¹²² These negative consequences included:

[M]elting permafrost, thinning and ablation of sea ice, receding glaciers, invasion of species of animals not previously seen in the Arctic, increased coastal erosion, longer and warmer summers and shorter winters. (. . .) [T]he magnitude of these changes varies from place to place, but the trend is consistent across the Arctic.¹²³

The United States was alleged to have infringed on the right to enjoy the benefits of their culture, the right to property, the right to the preservation of health, the right to life, physical integrity and security,

120. Inuit Petition, *supra* note 24, at 1. The petition was filed by Sheila Watt-Cloutier, the chair of the Inuit Circumpolar Conference, on behalf of herself, sixty-two other named Inuit, and “all Inuit of the arctic regions of the United States and Canada who have been affected by the impacts of climate change described in this petition.” *Id.*; see also Sarah Nuffer, *Human Rights Violations and Climate Change: The Last Days of the Inuit People?*, 37 RUTGERS L. REV. 182, 188 (2010).

121. Nuffer, *supra* note 120, at 188.

122. Inuit Petition, *supra* note 24, at 74-96.

123. Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference Inuit Circumpolar Council, “The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights,” Presentation at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change Montreal (Dec. 7, 2005), available at <http://mailman.fsr.com/pipermail/vision2020/2007-October/049013.html>.

the right to their own means of subsistence, and the right to residence, movement, and inviolability of the home.¹²⁴

The Inuit also argued that, as resource-dependent people, they were dramatically impacted by the warmer temperatures.¹²⁵ Specifically, the sea ice and snow on which they had depended for millennia for cultural activities, transportation, and subsistence hunting and fishing was rapidly melting.¹²⁶ The loss of ice caused isolation between Inuit communities and forced the Inuit to relocate.¹²⁷ The warmer temperatures threatened agriculture and drinking water supplies, and had made subsistence activities dangerous or in some cases impossible, preventing younger generations to access to Inuit traditional knowledge.¹²⁸ The Inuit alleged that these negative impacts stripped the Inuit people of their human rights.¹²⁹

In November 2006, the petition was dismissed in a brief letter.¹³⁰ The IACHR concluded in two succinct paragraphs that the petition failed to establish “whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”¹³¹ In response to the IACHR’s dismissal, the ICC requested a hearing on the potential connection between the effects of global warming and human rights.¹³² On March 1, 2007, a hearing was held before the IACHR to assist the IACHR in better understanding the impact of climate change on human rights.¹³³

124. Inuit Petition, *supra* note 24, at 74-96.

125. *Id.* at 3.

126. *Id.* at 23.

127. *Id.* at 95.

128. *Id.* at 19, 61.

129. *Id.* at 5-7.

130. Letter from Ariel E. Dulitzky, Assistant Exec. Sec’y, Inter-Am. Comm’n H.R., to Sheila Watt-Cloutier, Petitioner, Chair of the Inuit Circumpolar Conference (Nov. 16, 2006), *available at* <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

131. *Id.*

132. *Id.*

133. Letter from Sheila Watt-Cloutier, Petitioner, Chair of the Inuit Circumpolar Conference Martin Wagner, Representative from EarthJustice, and Daniel Magraw, Representative from Center for International Environmental Law, to Santiago Canton, Exec. Sec’y, Inter-Am. Comm’n H.R. (Jan. 15, 2007), *available at* http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf; Letter from Ariel

The Inuit Petition is an example of the IPCC's prediction of increased litigation, as the unique connection between indigenous communities and their land and environment is destroyed by climate change.¹³⁴ Although the Inuit Petition was dismissed it advanced the development of environmental justice claims of indigenous groups by opening up an international dialogue about the link between climate change and human rights, as well as its effects on indigenous communities.¹³⁵

B. *The Athabaskan Petition*

On April 23, 2013, the Arctic Athabaskan Council ("AAC"), represented by Earthjustice and Ecojustice Canada, on behalf of all the Arctic Athabaskan Peoples of Canada and United States, filed a petition with the IACHR.¹³⁶ The Petitioners sought relief from violations of the Arctic Athabaskan peoples' human rights.¹³⁷ The Athabaskans allege that Canada is internationally responsible for the emissions of black carbon, which has caused rapid Arctic warming and melting.¹³⁸ The Athabaskan Petition is a detailed and comprehensive memorial thoroughly analyzing international human rights and case law, as well as evidence from the individual Athabaskan people claiming violations of their human rights.¹³⁹

E. Dulitzky, Assistant Exec. Sec'y, Inter-Am. Comm'n H.R., to Sheila Watt-Cloutier, Petitioner, Chair of the Inuit Circumpolar Conference (Feb. 1, 2007), available at http://earthjustice.org/sites/default/files/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf.

134. Elizabeth Ann Kronk & Randall Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L. REV. 113, 119 (2013).

135. See, e.g., UNHRC Res. 7/23, *supra* note 55; U.N. Human Rights Council [UNHRC] Res. 10/4, Human Rights and Climate Change, U.N. Doc. A/HRC/10/4 (Mar. 25, 2009), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf; U.N. Human Rights Council [UNHRC] Res. 18/22, Human Rights and Climate Change, U.N. Doc. A/HRC/18/22 (Mar. 25, 2009), available at <http://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf>; see also Kronk & Abate, *supra* note 133, at 138.

136. Athabaskan Petition, *supra* note 15.

137. *Id.* at 4.

138. *Id.*

139. See generally *id.*

1. *The Athabaskan Culture*

“The Athabaskan peoples, [who] resid[e] in Arctic and sub-Arctic Alaska, U.S.A., and the Yukon Territory and Northwest Territories of Canada have traditionally occupied a vast geographic area of approximately 3 million square kilometers.”¹⁴⁰ The Athabaskan peoples have continuously occupied this expansive region for at least 10,000 years.¹⁴¹ The region includes vast areas of tundra (barren lands) and taiga (boreal forest) as well as North America’s highest mountains, Mount McKinley and Mount Logan, and the world’s largest non-polar ice field, the St. Elias Mountains.¹⁴² “The southeastern boundary of the Arctic Athabaskan peoples’ traditional territories includes portions of provincial northern Canada.”¹⁴³

Collectively, the Arctic Athabaskan peoples share twenty-three distinct languages, and live in communities spread far apart, such as the 5,400 kilometers, a distance that separates Tanana, Alaska and Tadoule Lake, northern Manitoba.¹⁴⁴ People of Arctic Athabaskan descent correspond to approximately two percent of the population of Alaska and United States.¹⁴⁵ They also represent one-third of the Yukon Territory, the Northwest Territories and northern British Columbia, Alberta, Saskatchewan, and Manitoba in Canada.¹⁴⁶

The Athabaskan peoples’ subsistence hunting system is “a tightly integrated social–ecological system in which people depend on nature for a wide range of ecosystem services, including subsistence resources, protection from fire risk, and cultural ties to their traditional lands.”¹⁴⁷ They have depended on and interacted with the same ecosystems for food shelter and cultural identity for millennia.¹⁴⁸ Alaskan Athabaskans have relied “on hunting and trapping animals,

140. *About Us*, ARCTIC ATHABASKAN COUNCIL, <http://www.arcticathabaskancouncil.com/aac/?q=about> (last visited Apr. 7, 2015).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Gary P. Kofinas et. al., *Resilience of Athabaskan Subsistence Systems to Interior Alaska’s Changing Climate*, 40 CAN. J. FOREST RES. 1347, 1357 (2010).

148. *Id.* at 1348.

fishing, and gathering edible plants.”¹⁴⁹ It is not unusual for them to “cover great distances in their quest for food.”¹⁵⁰ Their lives are ruled by the changing seasons, the weather, and the behavior of the animals they fish and hunt.¹⁵¹

2. *Black Carbon Emissions and Arctic Warming*

According to the Athabaskan Petition, Canada emits roughly 98,000 tons of black carbon a year.¹⁵² “Because this black carbon is emitted in or near the Arctic, it has a significantly higher climate warming impact than black carbon from lower latitudes.”¹⁵³ Diesel emissions, residential heating stoves, agricultural and forest fires, the burning of biomass in agriculture, and some industrial facilities are the major sources of Canada’s black carbon emissions.¹⁵⁴

The Athabaskans claim that “Canada’s failure to implement available black carbon emissions reduction measures that could slow the warming and melting that causes these harms violates many rights guaranteed to the Athabaskans” in the Inter-American System of Human Rights.¹⁵⁵ The Athabaskan peoples depend on natural resources for their livelihood, and thus the effects of climate change, such as higher temperatures, melting snow, melting permafrost, shrinking glaciers, longer dry seasons, increase in forest fires, and severe climate extremes, are felt most acutely by the Athabaskan populations.¹⁵⁶

Black carbon emissions in regions with ice and snow, such as the Arctic, have a significant impact on climate change.¹⁵⁷ “Although relatively smaller than emissions from lower latitudes, emissions from within or near the Arctic have a disproportionate effect because there

149. *Alaska Heritage*, ALASKA’S HIST. & CULTURAL STUD., <http://www.akhistorycourse.org/articles/article.php?artID=150> (last visited Mar. 25, 2015).

150. *Id.*

151. *Id.*

152. Athabaskan Petition, *supra* note 15, at 2.

153. *Id.*

154. *Id.* at 2, 13.

155. *Id.* at 1.

156. *Id.*

157. *Id.*

is great likelihood they will deposit on Arctic ice or snow.”¹⁵⁸ Taking action to reduce black carbon emissions from sources near or in the Arctic will significantly contribute to slowing rising temperatures and Arctic melting.¹⁵⁹

C. IACHR Jurisdiction

The jurisdiction of international supervisory bodies, such as the IACHR, depends upon whether or not there is competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*. When analyzing the competence of the Athabaskan Petition based on previous claims admitted to the IACHR and in light of other cases dealing with human rights violations by Canada, it can be drawn that the IACHR has competence *ratione persona*, *ratione loci*, *ratione temporis*, and *ratione materiae*.¹⁶⁰

Ratione personae is a Latin term that means by reason of the person concerned.¹⁶¹ Jurisdiction *ratione personae* refers to a court or commission’s power to bring a person into process.¹⁶² “[A]ny person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions” to the IACHR.¹⁶³ Many Athabaskans are nationals of Canada, which is a member state of the OAS by virtue of its ratification of the OAS Charter in 1990.¹⁶⁴ Because of this, the Petitioners are entitled to

158. *Id.* at 6.

159. *Id.*

160. See *Loni Edmonds and Children v. Canada*, Case 879-07, Inter-Am. Comm’n H.R., Report No. 89/13, OEA/Ser.L/V/II. Doc. 50 (Dec. 31 2013); *Hul’Qumi’Num Treaty Group v. Canada*, Case 592-07, Inter-Am. Comm’n H.R., Report No. 105/09, OEA/Ser.L/V/II. Doc. 51 corr. 1 ¶¶ 27-30 (2009).

161. *Ratione Personae Definition*, DUHAIME.ORG, available at <http://www.duhaime.org/LegalDictionary/R/RationePersonae.aspx> (last visited May 11, 2015).

162. *Jurisdiction Ratione Personae Definition*, USLEGAL DEFINITIONS, <http://definitions.uslegal.com/j/jurisdiction-ratione-personae/> (last visited Apr. 7, 2015).

163. INTER-AM. CT. H.R. R. P. art. 23, available at http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf.

164. Canada deposited its instrument of ratification of the OAS Charter on January 8, 1990. See Report of the Standing Senate Committee on Human Rights, *Enhancing Canada’s Role in the OAS: Canadian Adherence to the American*

submit their Petition to the IACHR. As previously discussed, the Petitioners' rights are protected by the American Declaration, which is binding on Canada,¹⁶⁵ giving the IACHR competence *ratione personae* to examine the complaint.

Loci is the plural form of *locus*, a Latin term which means place.¹⁶⁶ Jurisdiction *ratione loci* refers to whether the dispute is within a court or commission's territory.¹⁶⁷ The IACHR has jurisdiction *ratione loci* to hear the Petition because the violations of the American Declaration are alleged to be occurring within the territory of the Canada, a member state of the OAS.¹⁶⁸

Jurisdiction *ratione temporis* or temporal jurisdiction refers to the jurisdiction of a court or commission based on the passage of time.¹⁶⁹ Thus, the question is whether Canada was bound by the American Declaration at the time of the alleged violations. Canada's obligation, as a member state of the OAS, to respect and ensure the rights protected by the American Declaration began in 1990 when Canada ratified the OAS Charter and continues today.¹⁷⁰ The IACHR has competence *ratione temporis*, because the violations alleged in the

Convention on Human Rights 61 (2003) (Can.), available at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/repe/rep04may03-e.pdf> (last visited Apr. 13, 2015). Article 20(b) of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the IACHR may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the IACHR, and to make recommendations to such states, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. See Charter of the OAS, *supra* note 61, arts. 3, 16, 51, 112, 150; INTER-AM. CT. H.R. R. P. arts. 50, 51; Interpretation of the American Declaration, *supra* note 109, ¶¶ 35-45; James Terry Roach and Jay Pinkerton v. United States, Case No. 9647, Inter-Am. Comm'n H.R., Report No.3/87, OEA/Ser.L/V/II.71/doc. 9, rev. 1 ¶¶46-49 (1987).

165. See *supra* Part III.B.

166. *Locus*, OXFORD DICTIONARIES, available at <http://www.oxforddictionaries.com/definition/english/locus> (last visited May, 11, 2015).

167. *Ratione Loci Definition*, DUHAIME.ORG, <http://www.duhaime.org/LegalDictionary/R/Rationeloci.aspx> (last visited Apr. 7, 2015).

168. See *supra* Part III.B.

169. *Jurisdiction Ratione Temeporis Definition*, USLEGAL DEFINITIONS, <http://definitions.uslegal.com/j/jurisdiction-ratione-temporis/> (last visited Apr. 7, 2015).

170. See *supra* Part III.B.

Petition took place after Canada's obligations under the American Declaration were already in force.

Jurisdiction *ratione materiae* or subject-matter jurisdiction refers to a court or commission's authority to decide a particular case.¹⁷¹ The IACHR has jurisdiction to issue recommendations on cases involving member states of the OAS alleging violations to the American Declaration.¹⁷² The Petitioners allege their rights to property, the benefits of their culture, and to their health have been violated.¹⁷³ These rights are protected under Articles XI, XIII, and XXIII of the American Declaration,¹⁷⁴ and thus the IACHR is competent *ratione materiae* to examine the petition.

D. Arctic Athabaskan Peoples' Allegations of Human Rights Violations

In their Petition the Athabaskans ask the IACHR to investigate and declare that Canada's failure to implement adequate measures to reduce black carbon emissions, violates the Athabaskan peoples' rights established in Article XIII (right to the benefits of their culture), Article XXIII (right to property), and Article XI (right to health) of the American Declaration.¹⁷⁵ The Petition also refers to the right to the means of subsistence.¹⁷⁶ Although this right is not mentioned specifically in the American Declaration, the Petitioners argue that it can be implied from Article XIII, XXIII, and XI.¹⁷⁷ The AAC requests that the IACHR recommend Canada take steps to limit black carbon emissions and to protect the Athabaskans' culture and resources from the effects of accelerated Arctic warming.¹⁷⁸

171. *Jurisdiction Ratione Materiae Definition*, USLEGAL DEFINITIONS, <http://definitions.uslegal.com/j/jurisdiction-ratione-materiae/> (last visited Apr. 7, 2015).

172. American Declaration, *supra* note 19, art. 23.

173. Athabaskan Petition, *supra* note 15, at 3-5.

174. *See id.*

175. *Id.*

176. *Id.* at 78.

177. *Id.*

178. *Id.*

1. *Right to Enjoy the Benefits of the Culture*

Article XIII of the American Declaration provides that “[e]very 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.”¹⁷⁹ Because of the close ties between the Athabaskan peoples’ rights to culture and the condition of their lands and environment; Arctic warming and melting adversely affects the Athabaskan peoples’ ability to transmit cultural knowledge to future generations.¹⁸⁰ The Petitioners argue that under the American Declaration Canada has a duty not to degrade the Arctic environment, and continued degradation infringes upon the Athabaskan peoples’ right to enjoy the benefits of their culture.¹⁸¹

i. *Recognition of the Right to Enjoy the Benefits of the Culture by the Inter-American System of Human Rights and Other International Bodies*

The IACHR has recognized the “special relationship between indigenous and tribal peoples and their territories”¹⁸² and that “the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.”¹⁸³ Moreover, their lands represent a cultural bond of collective memory and this relationship must be internationally protected.¹⁸⁴ “[T]he right to culture includes distinctive forms and modalities of using territories

179. American Declaration, *supra* note 19, art. 13.

180. Athabaskan Petition, *supra* note 15, at 61.

181. *Id.*

182. *Id.* at 62; Inter-Am. Comm’n H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, and Norms and Jurisprudence of the Inter-American Human Rights System*, ¶¶ 55-57, OEA/Ser.L./V/II, doc. 56/09 (Dec. 30, 2009) [hereinafter *Indigenous and Tribal Peoples’ Rights*].

183. *Maya Indigenous Cmty. v. Belize*, Merits, Case 12.053, Inter-Am. Comm’n H.R., Report No. 78/00, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶ 114 (2004).

184. Athabaskan Petition, *supra* note 15, at 62; *see also Indigenous and Tribal Peoples’ Rights*, *supra* note 182, ¶ 78.

such as traditional fishing, hunting and gathering as essential elements of indigenous culture.”¹⁸⁵

In *Xákmok Kásek Indigenous Community v. Paraguay*, the IACtHR held that:

In the case of indigenous tribes or peoples, the traditional possession of their lands and the cultural patterns that arise from this close relationship form part of their identity. This identity has a unique content owing to the collective perception they have as a group, their cosmovision, their collective imagination, and the relationship with the land where they live their lives.¹⁸⁶

Other international bodies play an important role in recognizing the special link between indigenous peoples, their land, and its connection to their culture.¹⁸⁷ The United Nations Human Rights Committee acknowledged the importance of natural resources when considering whether an indigenous community’s right to the benefits of culture has been violated.¹⁸⁸ The Committee, discussing the exercise of the cultural rights protected under Article 27 of the International Covenant on Civil and Political Rights, observed that,

culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case

185. *Indigenous and Tribal Peoples’ Rights*, supra note 182, ¶ 74. In *Mary and Carrie Dann v. United States*, the Commission considered that general international legal principles applicable in the context of indigenous human rights include the use and enjoyment of territories and property. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 130 (1999). As well, in the same case, the Commission states: “‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people.’ According to the [Human Rights] Committee, securing the cultural rights of an indigenous people may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.” *Id.* ¶ 97.

186. *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 175 (Aug. 24, 2010).

187. *Athabaskan Petition*, supra note 15, at 63-64.

188. U.N. Human Rights Committee [UNHRC] General Comment 23, Article 27 (Fiftieth session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5 ¶ 7 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 158 (2003).

of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁸⁹

In *Länsman v. Finland*, the Committee expressed that the right to enjoy one's culture cannot be determined *in abstracto* but it has to be placed in context, encompassing traditional means of livelihood as well as modern-day adaptation.¹⁹⁰ Similarly, in *Poma Poma v. Peru*, the Committee recognized that "a State may legitimately take steps to promote its economic development . . . [but] economic development may not undermine the rights protected by article 27."¹⁹¹ The United Nations Committee on Economic and Social Rights recognized:

Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.¹⁹²

Thus, the right to enjoy the benefits of one's culture is established as a protected right by the Inter-American System of Human Rights and other international bodies and forms a solid foundation for the Athabaskan peoples to allege a violation.

189. *Id.*

190. *Länsman et. al. v. Finland*, U.N. Human Rights Committee, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

191. *Angela Poma Poma v. Peru*, U.N. Human Rights Committee, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 ¶ 7.4 (2009).

192. United Nations, Econ. & Soc. Council [ESCOR], Gen. Comment 21 on Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Econ., Soc., and Cultural Rights), U.N. Doc. E/C.12/GC/21 (2009).

ii. Impacts of Climate Change on the Athabaskan Peoples' Right to Enjoy the Benefits of the Culture

The Petitioners allege that through its failure to take effective action to reduce black carbon emissions, Canada violates Arctic Athabaskan peoples' right to the benefits of the culture.¹⁹³ The effects of black carbon are affecting Athabaskan peoples' subsistence-based living, traditional knowledge, and cultural sites.¹⁹⁴

"Knowledge, developed over millennia, about Arctic lands, weather, ecology, and the use of natural resources, is central to Arctic Athabaskan culture and mythological heritage because it provides a basis for the elders to educate the younger generation in traditional ways of life, kinship and bonding."¹⁹⁵ This is vital for their cultural survival.¹⁹⁶ The IACHR has acknowledged that "land traditionally used and occupied by [indigenous peoples] plays a central role in their physical, cultural[,] and spiritual vitality."¹⁹⁷ The adverse effects of climate change have caused such erratic weather and hunting conditions that elders no longer feel confident in teaching their traditional ways to younger generations.¹⁹⁸

The Petitioners describe how the Arctic warming is damaging the subsistence way of life central to Athabaskan cultural identities.¹⁹⁹ The warming and melting is changing the characteristics of the snow and land, and interfering with hunting, trapping, fishing and gathering.²⁰⁰ Traditional activities have become more dangerous.²⁰¹ Travel over ice has become more risky.²⁰² Winter hunting has diminished because of earlier thaws.²⁰³ Water fluctuations and forest

193. Athabaskan Petition, *supra* note 15, at 64.

194. *Id.*

195. *Id.* at 6.

196. *Id.*

197. Maya Indigenous Cmty. v. Belize, Merits, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 150 (2004).

198. Athabaskan Petition, *supra* note 15, at 3.

199. *Id.* at 65.

200. *Id.* at 64.

201. *Id.* at 64-65.

202. *Id.*

203. *Id.*

fires harm salmon, caribou and other species that are significant to the Athabaskan culture.²⁰⁴

Black carbon pollution has caused significant climate change, making the Arctic Athabaskan peoples' traditional knowledge of their environmental surroundings less reliable and less useful.²⁰⁵ Because so much of the Athabaskan peoples' culture and tradition is derived from relationships with one another and the environment,²⁰⁶ the effects of the accelerated warming have limited the elders' ability to pass on traditional knowledge.²⁰⁷ The "[l]oss of this traditional knowledge threatens to permanently erase aspects of Arctic Athabaskan history and culture."²⁰⁸ The changes in weather patterns have also resulted in changes to wildlife patterns and migration.²⁰⁹

The preservation of cultural and historic sites has been threatened.²¹⁰ Land slumping, erosion, and landslides threaten the structural integrity of such sites.²¹¹ Flooding can result in the destruction of cemeteries and other culturally significant sites.²¹² Melting permafrost and changing weather patterns are interfering with the use of traditional underground methods of storing foods.²¹³

The Athabaskan Petition indicates that "Canada has a duty not to degrade or allow the degradation of the Arctic environment to an extent that infringes upon the Arctic Athabaskan peoples' human right to enjoy the benefits of their culture."²¹⁴

2. *Right to Property*

Article XI of the American Declaration provides that "[e]very person has a right to such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 66.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 67.

of the home.”²¹⁵ The Athabaskans assert that Arctic warming and melting is compromising the integrity of the land itself.²¹⁶ The effects of climate change are destroying waterways, riverbanks, airstrips, roads and houses.²¹⁷ Moreover, cultural and historic sites, and traditional travel routes are threatened by flooding, land slumping, erosion, landslides, and forest fires.²¹⁸ The Petitioners emphasize that IACtHR has established the importance and significance of land to indigenous peoples.²¹⁹ The IACtHR has also recognized access to land and resources as part of the indigenous peoples’ property rights.²²⁰ Moreover, the IACtHR has held on several occasions that the close link that indigenous peoples have to their traditional lands and to the natural resources found on those lands are part of their culture, and to the lands’ other intangible elements, should be safeguarded by the right to property.²²¹

i. Recognition of the Right Property by the Inter-American System of Human Rights and Other International Bodies

The Inter-American System of Human Rights has long recognized that indigenous peoples have a right to use and enjoy the lands they have traditionally occupied.²²² For example, in *Xákmok Kásek*

215. American Declaration, *supra* note 19.

216. Athabaskan Petition, *supra* note 15, at 7.

217. *Id.*

218. *Id.*

219. *Id.* at 68.

220. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

221. *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137 (June 17, 2005); *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006); *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 88 (Nov. 28, 2007).

222. Athabaskan Petition, *supra* note 15, at 68; *Moiwana Cmty. v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 86(6) (June 15, 2005); *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶¶149; *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125 ¶¶131, 135, 137; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146 ¶¶ 127, 131.

Indigenous Community v. Paraguay, the IACtHR held that the effects on the cultural identity produced by the lack of the territory and natural resources of the Xákmok Kásek Community represented a violation of their right to property.²²³

In *Saramaka People v. Suriname*, the members of the Saramaka tribal community, living in the Upper Suriname River region, alleged that Suriname had not adopted effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used.²²⁴ There, the IACtHR held that the Saramaka people had “a right to use and enjoy their traditionally owned lands,” which “necessarily implies a similar right with regards to the natural resources that are necessary for their survival.”²²⁵ The IACtHR went on to say that although Suriname may restrict these rights,²²⁶ adequate safeguards must be put in place to ensure that these restrictions do not deny the survival of the Saramaka people.²²⁷ After a lengthy analysis, the IACtHR concluded Surinam had violated the Saramaka peoples’ right to property by failing to put in place adequate safeguards to ensure state activities such as logging, mining, and extracting natural resources would not cause major damage to Saramaka territory and communities.²²⁸

223. Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 182 (Aug. 24, 2010); Athabaskan Petition, *supra* note 15, at 69.

224. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 2; *see also* Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶¶ 129-130 (1999) (“[I]ndigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied as well as to the use of those to which they have historically had access for their traditional activities and livelihood.”).

225. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 141.

226. “[A] State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society. . . . [A]nother crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.” *Id.* ¶ 128.

227. *Id.*

228. *Id.* ¶¶ 154, 156, 129; *see also* Athabaskan Petition, *supra* note 15, at 69.

In similar cases where the IACtHR has considered indigenous peoples' right to property, the IACtHR has consistently held that:

the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, 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.²²⁹

In *Maya Indigenous Communities v. Belize*, the IACHR explained,

that [indigenous peoples'] 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 without due consideration of and informed consultations with those having rights in the property.²³⁰

Here, the Petitioners emphasize that the right to property, and specifically the special significance of the traditional lands to people who rely on their land for culture, well-being, or subsistence, has also been recognized by international human rights law.²³¹ "Various international human rights instruments, both universal and regional in nature, have recognized the right to property as featuring among the fundamental rights of man."²³²

229. Athabaskan Petition, *supra* note 15, at 68; *see also* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 86 (Aug. 24, 2010); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶131 (June 17, 2005); *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 90, 96; Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006).

230. *Maya Indigenous Cmty. v. Belize*, Merits, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 140 (2004); Athabaskan Petition, *supra* note 15, at 69.

231. Athabaskan Petition, *supra* note 15, at 69-70.

232. *Id.* at 64 (citing O.A.S. Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.85, doc. 9 rev. (Feb. 11, 1994)). These instruments include the Universal Declaration of Human Rights, the

In *Dogan v. Turkey*, the European Court of Human Rights “accepted a claim based on customary entitlements, including rights to use some lands and resources in common, which were not evidenced by a formal title.”²³³ The court noted that the petitioners had “unchallenged rights over the common [ancestral] lands in the village, such as pasture, grazing and the forest land”²³⁴ from which their livelihood depended and that the resulting economic resources and revenue may qualify as part of the right to property.²³⁵

Moreover, the Indigenous and Tribal People’s Convention (“Convention No. 169”) of the International Labour Organization, recognizes indigenous peoples’ rights of ownership and possession over the lands that they traditionally occupy and the natural resources found on those lands.²³⁶ It also acknowledges indigenous peoples’ right to access the lands they have traditionally used for subsistence.²³⁷ Under Article 7 of Convention No. 169 governments are required to “take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”²³⁸

The United Nations Declaration on the Rights of Indigenous Peoples also acknowledges indigenous peoples’ right to property in Article 26(2), which protects “the right to own, use, develop[,] and control the lands, territories, and resources that [indigenous people] possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”²³⁹ It also recognizes “the right to maintain and strengthen

American Convention, the European Convention on Human Rights, and the African Charter on Human Rights and Peoples’ Rights. *Id.*

233. Bankes, *Protection of the Rights*, *supra* note 13, at 76.

234. Athabaskan Petition, *supra* note 15, at 66 (citing *Dogan v. Turkey*, 2004-VI Eur. Ct. H.R. 81, 113)).

235. *Id.*

236. Int’l Labour Org. [ILO], *Indigenous and Tribal Peoples Convention (No.169)*, art. 14, 72 ILO Official Bull. 59; 28 ILM 1382 (June 27, 1989), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

237. *Id.*

238. *Id.* art. 7.

239. Athabaskan Petition, *supra* note 15, at 66 (citing Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 art. 26, U.N. Doc. A/RES/61/29 (Oct. 2, 2007)).

their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters[,] and coastal seas and other resources and to uphold their responsibilities to future generations on this regard.”²⁴⁰ Moreover, the Declaration on the Rights of Indigenous Peoples provides indigenous peoples with “the right to conservation and protection of the environment and the productive capacity of their lands or territories and resources”²⁴¹ and requires states to “give legal recognition and protection to these lands, territories and resources.”²⁴²

*ii. Impacts of Climate Change on the Athabaskan Peoples’
Right to Property*

The Arctic Athabaskan peoples argue that they have the right to the use and enjoyment of land they have traditionally used and occupied.²⁴³ This use and enjoyment of their land includes ice used for travel, as well as hunting, and camping, having access to the necessary resources for their subsistence and intellectual property of their traditional knowledge.²⁴⁴ The Petitioners contend that Arctic warming, caused by black carbon emissions, has made traditional lands unfamiliar and less valuable for them.²⁴⁵ The melting permafrost has changed the characteristics of the Arctic land, altered landmarks, and transformed critical habitat.²⁴⁶ Increases in rain and freezing rain damage their towns, homes, riverbank camps, rivers, and roads.²⁴⁷ Permafrost thaw and ground slumping threaten damage to all-weather roads and winter roads built on frozen lakes and rivers, airport runways, bridges, ferries, and railroads.²⁴⁸ The effects of warming has also compromised the structural integrity of buildings

240. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 art. 25, U.N. Doc. A/RES/61/29 (Oct. 2, 2007).

241. *Id.* art. 29.

242. *Id.* art. 26.

243. *See* Athabaskan Petition, *supra* note 15, at 67.

244. *See id.* at 69.

245. *See id.*

246. *Id.* at 67.

247. *Id.*

248. *Id.* at 48.

causing foundations to be destroyed, roofs to collapse, and outbreaks of fire to increase.²⁴⁹

The Petitioners also argue that the accelerated Arctic warming has interfered with their traditional knowledge, which is intangible property, protected by intellectual property rights.²⁵⁰ This argument is supported by the IACtHR's language in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* where property was defined as "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value."²⁵¹

Canada's failure to regulate black carbon emissions is causing the Arctic to warm more than twice as fast as the global average, posing an ongoing threat to Athabaskan peoples' property rights.²⁵²

3. *Right to the Preservation of Health and Well-being*

Article XI of the American Declaration provides that, "[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."²⁵³ Arctic warming has caused the loss of traditional foods obtained through hunting, fishing, and gathering.²⁵⁴ This loss has adversely affected the health of Athabaskan peoples.²⁵⁵ Moreover, Arctic warming and melting permafrost has worsened the water quality, increased the likelihood of disease and injury due to dangerous conditions, and causes psychological stress.²⁵⁶

249. *Id.*

250. *Id.* at 69.

251. *Id.* at 66 (citing *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 144 (Aug. 31, 2001)*).

252. *Id.* at 69.

253. American Declaration, *supra* note 19.

254. Athabaskan Petition, *supra* note 15, at 5.

255. *Id.*

256. *Id.*; see also JIM BERNER ET AL., ARCTIC CLIMATE IMPACT ASSESSMENT SCIENTIFIC REPORT, CHAPTER 15 HUMAN HEALTH 863, 878-881 (2004), available at

The IACHR has long recognized the close relationship between environmental degradation and the right to preservation of health.²⁵⁷ In *Maya Indigenous Communities. v. Belize*, the IACHR found that the negative environmental effects arising from the actions of Belize constituted violations to the right to preservation of health and well-being of the Mayan communities.²⁵⁸ Furthermore, in its 1997 Report of the Situation of Human Rights in Ecuador, the IACHR noted that human rights are implicated “where environmental contamination and degradation pose a persistent threat to human life and health.”²⁵⁹ It also recognized that “severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.”²⁶⁰

International human rights bodies and experts have also acknowledged the close relationship between environmental protection and health.²⁶¹ The Committee on Economic and Social Rights affirmed that the right to the highest attainable standard of physical and mental health²⁶² “extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, . . . and a healthy environment.”²⁶³ Similarly, the former United Nations Special Rapporteur on the Right to Health concluded that the right to health gives rise to an obligation on the part of a state to ensure that

http://www.acia.uaf.edu/PDFs/ACIA_Science_Chapters_Final/ACIA_Ch15_Final.pdf [hereinafter ACIA SCIENTIFIC REPORT CHAPTER 15].

257. Athabaskan Petition, *supra* note 15, at 73.

258. *Maya Indigenous Cmty. v. Belize*, Merits, Case 12.053, Inter-Am. Comm’n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 154 (2004).

259. Athabaskan Petition, *supra* note 15, at 56 (citing Inter-Am. Comm’n H.R., *Report on Situation of Human Rights in Ecuador*, OEA/Ser L/V/II 96 doc. 10 rev. 1 (Apr. 24, 1997)).

260. *Id.*

261. *Id.*

262. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S 3.

263. See Athabaskan Petition, *supra* note 15, at 70 (citing United Nations, Comm. on Econ., Soc. & Cultural Rights, Gen. Comment 14 on the Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 at 59 (2000)).

environmental degradation does not endanger human health.²⁶⁴ In 2005, the United Nations Special Rapporteur of the Commission on Human Rights noted “the effects of global warming and environmental pollution are particularly pertinent to the life chances of [indigenous] people in Canada’s North, a human rights issue that requires urgent attention at the national and international levels.”²⁶⁵

The Petitioners allege that impacts of accelerated warming on the nutritional value of Arctic Athabaskan diet affect their right to health, as traditional foods are the mainstay of their diet.²⁶⁶

The melting sea ice has two key negative effects on human health in the Arctic. First, the risk of injury increases as hunters venture out onto the unstable ice. Second, melting sea ice may change the distribution of marine animals and fish, which could result in a change of diet for northerners. It has been noted that shifts to a more western diet increases risks of cancer, obesity, diabetes, and cardiovascular disease among Arctic populations.²⁶⁷

Additionally, Arctic warming has caused the quality of Athabaskan peoples’ natural sources of water to worsen; in some places, riverbank erosion has created muddy and undrinkable water.²⁶⁸ In addition, permafrost, thawing, floods, rockslides, and intense rainfall also diminish water quality.²⁶⁹ These impacts on the water quality are jeopardizing the Athabaskan peoples’ clean drinking water.²⁷⁰

264. *See id.* (citing U.N. Comm’n H.R., Right of Everyone to the Highest Standard of Physical and Mental Health: Addendum, Mission to Peru, U.N. Doc E/CN.4/2005/51/Add3 at 54 (Feb. 4, 2005)).

265. *Id.* (citing U.N. Comm’n H.R., Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum, Mission to Canada, U.N. Doc E/CN.4/2005/88/Add3 at 94 (Dec 2, 2004)).

266. *Id.* at 71.

267. IMPLEMENTATION EVALUATION OF GOVERNMENT OF CANADA, INAC CLIMATE CHANGE ADAPTATION PROGRAM 5 (2009), available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev_pubs_ev_cca_1306863778339_eng.pdf.

268. Athabaskan Petition, *supra* note 15, at 76.

269. *Id.*

270. *Id.*

Arctic warming is also causing changes in insects and pest populations and the movement of new wildlife diseases, “such as brain worm in deer, and tick-borne Lyme disease, brucellosis, rabies, tularemia, and echinococcus.”²⁷¹ Warming can exacerbate water and food-borne contamination that lead to intestinal disorders, chemical and biological contaminants, animal-borne diseases, causing new patterns of diseases from bacteria and viruses carried by mosquitoes, ticks, and other animals experiencing habitat shifts, threatening the Athabaskan peoples’ right to health.²⁷²

The Petitioners claim that the effects of the accelerated warming pose greater risk of injury arising from changing weather conditions.²⁷³ This is a potential threat not only for hunters but also for populations and communities that live and travel in areas with weather-related natural hazards.²⁷⁴ Infrastructure damage is another risk.²⁷⁵ It can be caused by low water levels, flooding from ice jamming, and unusual breakup patterns of ice in rivers, threatening Athabaskan peoples’ lives and health.²⁷⁶ All these negative impacts of accelerated warming are also sources of social and psychological stress for Athabaskan peoples.²⁷⁷

The Athabaskans contend that Canada has breached its international obligation not to infringe on the right to the preservation of health and well-being of Athabaskan peoples, by failing to develop an appropriate strategy to prevent and respond to the effects of accelerated warming on human health.²⁷⁸

E. Challenges That Will Be Faced by the Petition

In order to succeed, the Petitioners will need to show how environmental degradation violates their right to enjoy the benefits of their culture, their right to property, and their right to health and well-

271. *Id.*; ACIA SCIENTIFIC REPORT CHAPTER 15, *supra* note 256, at 879-81.

272. Athabaskan Petition, *supra* note 15, at 76; ACIA SCIENTIFIC REPORT CHAPTER 15, *supra* note 256, at 879.

273. Athabaskan Petition, *supra* note 15, at 77.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

being. As discussed above, the American Declaration, as well as many other international sources, recognize and protect these rights. Although Canada is an OAS member state, it has not ratified the American Convention. But this does not leave the IACHR without an avenue to protect the Athabaskan peoples' rights. The American Declaration can, and should, be used by the IACHR to grant and protect the Athabaskan peoples. Since the adoption of the Convention No. 169, both international and regional human rights systems have developed new ways to enhance the protection of human rights of indigenous peoples.²⁷⁹ The IACHR has followed this trend and in the last decade has admitted petitions alleging violations of the right to property and right to culture of indigenous peoples from many different OAS countries including Canada.²⁸⁰

The Petition also faces two other critical challenges. First, the IACHR requires that Petitioners exhaust their domestic remedies. Secondly, the Petitioners face the burden of proving a legally sufficient nexus between the harm resulting from climate change and the acts or omissions of the Canadian government.

1. Exhaustion of Domestic Remedies

Article 31 of the IACHR Rules of Procedure requires a petitioner to exhaust domestic remedies before submitting a case to its jurisdiction.²⁸¹ Nevertheless, Article 31 provides three exceptions to this requirement.²⁸² The first is if access to the remedies under domestic law has been denied.²⁸³ The second is where there has been unwarranted delay in rendering a final judgment.²⁸⁴ The third is when "the domestic legislation of the State concerned does not afford due

279. ANAYA, *supra* note 1, at 58-61.

280. Grand Chief Michael Mitchell v. Canada, Case 790/01, Inter-Am. Comm'n H.R., Report No. 74/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 (2003); Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); Hul'Qumi'Num Treaty Group v. Canada, Case 592-07, Inter-Am. Comm'n H.R., Report No. 105/09, OEA/Ser.L/V/II. Doc. 51 corr. 1 (2009).

281. INTER-AM. CT. H.R. R. P. art. art. 31.

282. *Id.*

283. *Id.*

284. *Id.*

process of law for protection of the right or rights that have allegedly been violated.”²⁸⁵ The IACHR jurisprudence establishes that,

a petitioner may be exempt from the requirement of having to exhaust domestic remedies with regard to a complaint, when it is evident from the case file that any action filed regarding that complaint had no reasonable chance of success based on the prevailing jurisprudence of the highest courts of the State.²⁸⁶

The Petitioners contend no exhaustion of the domestic remedies is necessary in this case because Canada’s remedies are not adequate, suitable, or effective to redress the alleged violations.²⁸⁷

Additionally, the Petitioners argue that Canada does not have a single, comprehensive statute that could be challenged to obtain the remedies sought in the Petition.²⁸⁸ Seeking enhanced and sufficient regulation of black carbon under Canadian law would require the Athabaskans to challenge different air emissions regulations in each of the provinces across the country and at the federal level.²⁸⁹ Thus, access to Canadian courts will be so costly as to make any potentially available legal remedies impossible for Athabaskan peoples to obtain.²⁹⁰ This argument was previously made to the IACHR in the Hul’Qumi’Num Treaty Group’s petition, which was successfully admitted without exhausting all of the possible domestic remedies.²⁹¹ In *Hul’Qumi’Num Treaty Group v. Canada*, the petitioners alleged, among other things, that Canada was responsible for violating the Hul’Qumi’Num Treaty Group’s right to property and right to culture.²⁹² Hul’Qumi’Num Treaty Group argued that no exhaustion of Canada’s domestic remedies was necessary because “there [was] no effective mechanism to obtain legal recognition and restitution of their

285. *Id.*

286. Hul’Qumi’Num Treaty Group v. Canada, Case 592-07, Inter-Am. Comm’n H.R., Report No. 105/09, OEA/Ser.L/V/II, Doc. 51 corr. 1 ¶ 41 (2009).

287. Athabaskan Petition, *supra* note 15, at 83.

288. *Id.*

289. *Id.* at 82-84.

290. *Id.* at 8.

291. *Hul’Qumi’Num Treaty Group*, Case 592-07, Inter-Am. Comm’n H.R. ¶ 31-43.

292. *Id.* ¶ 2.

ancestral lands, and . . . access to Canadian courts [was] very costly for the HTG and makes it impossible to lodge the legal remedies mentioned by the State.”²⁹³

Thus, not only will the Athabaskan peoples’ need to convince the IACHR that seeking the available domestic remedies would be extremely costly, they will also need to show that even if they were to pursue the domestic remedies, they would not effectively protect the rights alleged to have been violated.

2. *Causation Between the Alleged Human Rights Violations and Canada’s Acts or Omissions*

The Athabaskan Petition lays out scientific evidence connecting black carbon emissions to the climate change that has occurred in the Arctic.²⁹⁴ It has further described the vulnerability of the Arctic to future climate change.²⁹⁵ The ACC states that when black carbon, a “short-lived” climate pollutant²⁹⁶ deposits on ice and snow it not only reduces albedo²⁹⁷ but also absorbs sunlight and heats the atmosphere, thereby accelerating Arctic warming.²⁹⁸ Therefore, due to the close proximity of Canada’s emissions of black carbon to the Athabaskan lands, the Athabaskan peoples are affected the most.²⁹⁹

Scientific evidence showing a strong link between Canada’s black carbon emissions and the climate change occurring in the Arctic is crucial to the Athabaskan Petition being admitted to the IACHR. Without a strong link, it will be difficult for the IACHR to conclude

293. *Id.* ¶ 33.

294. Athabaskan Petition, *supra* note 15, at 14-24.

295. *Id.* at 14-21.

296. Black carbon is a short-lived climate pollutant due to the fact that it stays in the atmosphere for few days. *What are Short-Lived Climate Pollutants?*, CLIMATE AND CLEAN AIR COALITION, available at <http://www.unep.org/ccac/Short-LivedClimatePollutants/Definitions/tabid/130285/Default.aspx> (last visited May 11, 2015).

297. “Albedo is a non-dimensional, unitless quantity that indicates how well a surface reflects solar energy (. . .) commonly refers to the ‘whiteness’ of the surface.” *Thermodynamics: Albedo*, NATIONAL SNOW & ICE DATA CENTER, available at <https://nsidc.org/cryosphere/seaice/processes/albedo.html> (last visited May 11, 2015).

298. *Id.* at 5.

299. *Id.* at 6.

that Canada's failure to implement more effective regulation of black carbon emissions amounts to a human rights violation. This scientific link is likely what prevented the Inuit Petition from being considered by the IACHR. Propitiously, in the time since the Inuit Petition, significant scientific research has been done concerning the rapid climate change in the Arctic.

A report by the Ad Hoc Black Carbon Expert Group of the Convention on Long-Range Transboundary Air Pollution ("CLRTAP") indicated that black carbon emissions in CLRTAP countries, which include Canada, could be reduced by an additional forty percent by 2020 using currently available technology and measures.³⁰⁰ These measures have also been identified by the Arctic Council Task Force on Short-Lived Climate Forcers as key abatement opportunities for member states.³⁰¹ The Athabaskan Petition enumerates several actions that Canada could take to significantly reduce black carbon emissions.³⁰² These actions include "improving combustion efficiency of residential heating and off-road diesel machinery, retrofits of the legacy (existing) fleet of on-road diesel vehicles with exhaust particle traps, and eliminating of high-emitting vehicles, gas flaring, and forest and agricultural waste burning."³⁰³

Although the Athabaskan Petition does face some significant challenges, scientific advances and previous case before the IACHR have laid a solid foundation to support the human rights violations alleged.

V. CONCLUSIONS

The Canadian government will have to respond to the IACHR after which the IACHR will determine the admissibility of the

300. *Id.*; ESCOR, *Report by the Co-Chairs of the Ad Hoc Expert Group on Black Carbon*, U.N. Doc. ECE/EB/AIR/2010/7 at 7 (Sept. 30, 2010).

301. Athabaskan Petition, *supra* note 15, at 19; ARCTIC COUNCIL, PROGRESS REPORT AND RECOMMENDATIONS FOR MINISTERS 6-7 (2011), available at http://arctic-council.npolar.no/accms/export/sites/default/en/meetings/2011-nuuk-ministerial/docs/3-0a_TF_SPM_recommendations_2May11_final.pdf.

302. Athabaskan Petition, *supra* note 15, at 19-20.

303. *Id.*

Petition.³⁰⁴ If deemed admissible the IACHR will proceed to review the Petition on its merits. The Athabaskan Petition, like the Inuit Petition,³⁰⁵ is an example of creative lawyering in both substance and form. The petitions characterize a problem typically treated as an environmental one, as human rights problem, which allows the dialogue to move beyond the boundaries of Canadian law to a supranational forum. The Athabaskan Petition presents the IACHR with challenging questions regarding the link between climate change and human rights. The outcome of this case and the reasoning of the IACHR will be not only of relevance to Canada and the Athabaskan peoples, but will also affect indigenous populations around the world. This Petition will set the course for future decisions of the IACHR regarding the negative impacts of climate change.

Providing a recommendation will require bold and innovative thinking. But the earlier decisions of the IACHR³⁰⁶ suggest that they are well equipped to interpret the American Declaration in light of broader developments in international human rights law. This will pave the way for protecting human rights in OAS member states that have not yet ratified the American Convention. Even more significantly, the Athabaskan Petition will give the Inter-American System of Human Rights the opportunity to open the door to a genuinely brave and ambitious call for the environmental protection of the Arctic.

304. Issuing admissibility reports can take the IACHR several years. *See, e.g.*, *Loni Edmonds and Children v. Canada*, Case 879-07, Inter-Am. Comm'n H.R., Report No. 89/13, OEA/Ser.L/V/II. Doc. 50 (2013) (submitted 2007, admitted 2013); *Hul'Qumi'Num Treaty Group v. Canada*, Case 592-07, Inter-Am. Comm'n H.R., Report No. 105/09, OEA/Ser.L/V/II. Doc. 51 corr. 1 (2009) (submitted 2007, admitted 2009).

305. *See Hari Osofsky, Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*, in *CLIMATE CHANGE AND INDIGENOUS PEOPLES* 313-15 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

306. *See, e.g.*, *Maya Indigenous Cmty's v. Belize, Merits*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 86-88 (2004); *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶¶ 96-97 (1999); *Kichwa Indigenous People v. Ecuador, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) Report No. 245, ¶ 161 (June 27, 2012).