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Getting over the Hump: Establishing a Right to Environmental Protection for Indigenous Peoples in the Inter-American Human Rights System

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GETTING OVER THE HUMP: ESTABLISHING A RIGHT TO ENVIRONMENTAL PROTECTION FOR INDIGENOUS PEOPLES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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INTRODUCTION

Climate change is threatening the traditional way of life for

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indigenous peoples and the Inter-American Human Rights System¹ declines to combat this growing problem by refusing to acknowledge a right to environmental protection for indigenous peoples. The Inter-American Human Rights System has thus effectively cut off the possibility of remedying the harms suffered by indigenous peoples as a result of climate change. Because the problems that indigenous peoples face place them at the intersection of human rights and environmental law, an acknowledged right to environmental protection is crucial to their ability to sustain their customary way of life. Until recently, many scholars simply felt that a right to environmental protection did not exist.² Inaction based on this assertion, however, becomes increasingly difficult to justify given the number of treaties, declarations, and decisions by domestic, regional, and international bodies specifically acknowledging such a right.³ Without acknowledging a right to environmental protection, and more importantly, without providing effective means to remedy environmental abuses in the international community, indigenous peoples will continue to be marginalized and ultimately may not be able to protect their time-honored way of life.

Using the Inuit tribe as a principal example, Part I of this paper will demonstrate the unique impact climate change has on indigenous peoples. Part I will begin by identifying the effects of climate change which already strain this indigenous community's relationship with its traditionally inhabited land. After mentioning the anticipated challenges the Inuit face in moving forward, Part I will discuss the Inuit's efforts to combat climate change through the Inter-American Commission on Human Rights.

Part II will discuss indigenous peoples generally, first by defining indigenous peoples, and then explaining why indigenous peoples have more recently been afforded special protection with regard to human rights. Part III of this article will discuss the shortcomings of the Inter-American Human Rights System with regard to environmental protection of indigenous peoples. After briefly touching on the structure of the Inter-American Human Rights System, Part III will specifically set out the sources of law

1. The Inter-American Human Rights System, comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, is charged with protecting and promoting the human rights of persons in the Western Hemisphere. See Jo. M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 360 (1994).

2. James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583, 596-601 (1993).

3. See *infra* Parts III & IV.

that bind the Inter-American Human Rights System. More importantly, Part III will address Article 29 of the American Convention on Human Rights⁴ and how it provides the textual opening for a recognized right to environmental protection for indigenous peoples. Part III also will consider the Inter-American Commission and Court's reluctance to tackle environmental problems unless they are specifically tied other human rights violations, such as the right to life or the right to property.

Using the provisions of Article 29 of the American Convention on Human Rights, Part IV of this article will set out the basis for establishing a right to environmental protection in the Inter-American Human Rights Regime. Part IV first will argue that the post-Kyoto framework, in addition to taking a strong stance on climate change mitigation, should more adequately develop the adaptation measures set out in the United Nations Framework Convention on Climate Change.⁵ Specifically, Part IV argues that adaptation measures containing a strong articulated international commitment to environmental protection, including a need for judicial access and enforcement, will strengthen a claim for indigenous peoples in the Inter-American Commission and Court. Part IV also will address the various international bodies and treaties that, at least at a general level, recognize a right to environmental protection. Specifically, Part IV will discuss the grant of a right to environmental protection afforded by the United Nations Declaration on the Rights of Indigenous Peoples⁶ and a similar grant that stands to come into being through the adoption of the American Declaration on the Rights of Indigenous Peoples.⁷ Part IV also will argue that by not enforcing a right to environmental protection for indigenous peoples, the Inter-American Commission and Court severely limit the effect of the UN Declaration, the San Salvador Protocol,⁸ and the American Declaration, and therefore are in violation of Article 29 of the American Convention on Human Rights.

4. Organization of American States, American Convention on Human Rights art. 29, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

5. United Nations Framework Convention on Climate Change, May 21, 1994, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107 (1992), [hereinafter UNFCCC].

6. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 61st Sess., U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter U.N. Declaration].

7. Permanent Council of the Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI GT/DADIN/doc.334/08 rev.5 (Dec. 3, 2009), available at <http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp> [hereinafter American Declaration].

8. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989) [hereinafter San Salvador Protocol].

Despite the fact that the American Convention on Human Rights does not specifically grant a right to environmental protection, Part IV concludes that Article 29 of the American Convention on Human Rights allows for the evolution of international law and the expansion of the Commission and Court's jurisprudence in limited situations. Finally, this paper contends that because a post-Kyoto framework, which suggests legal enforcement as an adaptation measure, in conjunction with the textually grounded right to environmental protection for indigenous peoples satisfies the provisions of Article 29, the Inter-American Human Rights Commission and Court are positioned to establish and enforce a right to environmental protection for indigenous peoples.

I. THE PLIGHT OF THE INUIT

The Inuit are an indigenous people to the Arctic regions of Greenland, Alaska, Canada, and Russia.⁹ The Inuit describe themselves as an international community sharing common language, culture, and a common land, and even though they are not a nation-state, as a people they do constitute a nation.¹⁰ As an indigenous people to the Arctic regions, the Inuit have survived in the harsh conditions of the Arctic by developing and adapting to the region. "All Inuit share a common culture characterized by dependence on subsistence harvesting in both the terrestrial and marine environments, sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions."¹¹

However, this common base of traditional knowledge and ability to adapt to the Arctic conditions is being challenged by the ill-effects of global warming:

Global warming refers to an average increase in the Earth's temperature, causing changes in climate that lead to a wide range of adverse impacts on plants, wildlife, and humans. There is broad scientific con-

9. Earthjustice, Inuit Human Rights and Climate Change, <http://www.earthjustice.org/library/background/inuit-human-rights-and-climate-change.html> (last visited Jan. 18, 2010).

10. Inuit Circumpolar Council, ICC's Beginning, <http://inuitcircumpolar.com/section.php?ID=15> (last visited Jan. 24, 2010).

11. Petition to the Inter Amer. Comm'n on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the U.S. 1 (Dec. 7, 2005), available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [hereinafter Petition].

sensus that global warming is caused by the increase in concentrations of greenhouse gases in the atmosphere as a result of human activity.¹²

The effects of global warming are threatening the relationship the Inuit have developed with their Arctic surroundings. The Inuit fear they will no longer be able to survive on the already scarce resources given the changes to their environment in the past twenty years.¹³ “The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow[,]”¹⁴ but, due to climate change, ice and snow are becoming less and less prevalent in the Arctic regions traditionally inhabited by the Inuit.¹⁵ Because of these changes, the Inuit are being forced to adapt to their constantly changing surroundings.

Among the changes already experienced by the Inuit are less snow-fall annually, leading to an inability to build igloos for shelter in some areas; loss of sea ice, leading to more violent storms hitting the coast line; and increased flooding and coastal erosion.¹⁶ Cumulatively, “[e]rosion, storms, flooding and slumping harm homes, infrastructure, and communities, and have damaged Inuit property, forcing relocation in some cases and requiring many communities to develop relocation contingency plans.”¹⁷ For the Inuit, the effects of climate change are not only a concern for the future, but a problem that is forcing them to adapt their way of life presently.

While the impacts already experienced by the Inuit are severe and significant, “projected impacts are expected to be much worse.”¹⁸ Continued reductions in sea ice will severely shrink marine habitats for polar bears, seabirds, and seals, all animals the Inuit rely on, potentially pushing some species toward extinction.¹⁹ “For Inuit, warming is likely to disrupt or even destroy their hunting and food sharing culture as reduced sea ice causes the animals on which they depend on to decline[,] become less accessible, and possibly become extinct.”²⁰ Additionally, “[s]evere coastal erosion will be a growing problem as rising sea level and a reduction in sea

12. *Id.*

13. *Id.* at 1-5.

14. *Id.* at 1.

15. *Id.* at 2-4.

16. *Id.*

17. *Id.* at 3.

18. *Id.* at 4.

19. *Id.*

20. *Id.* at 4-5.

ice allow higher waves and storm surges to reach shore[,]" potentially causing many coastal Inuit tribes to relocate from their traditionally inhabited areas.²¹ "In some cases, communities and industrial facilities in coastal zones are already threatened or being forced to relocate, while others face increasing risks and costs."²² At current projections, the Arctic could be ice-free as early as 2040.²³ Confronted with both current problems and concerns about the future associated with climate change, the Inuit are left to wonder if their ancient way of life is destined to become a footnote in the history of globalization.²⁴

While the Inuit are presently suffering from the effects of climate change, until recently, there were reservations about the impacts of climate change. To this day, many of those same reservations continue to persist.²⁵ Richard Lindzen, a professor at Massachusetts Institute of Technology, claims "[t]here is no solid scientific evidence to back up the models used by climate scientists who warn of dire consequences if warming continues."²⁶ While skepticism still remains, scientific evidence gathered in the past decade suggests that the effects of climate change are a real and present threat.²⁷

Despite growing evidence regarding the effects of climate change, international regulatory and judicial bodies have been reluctant to weigh in on matters such as those presented by the Inuit.²⁸ The Inuit submitted a formal petition to the Inter-American

21. *Id.* at 4.

22. *Id.*

23. Sandra Hines, *Ice-free Arctic Ocean Possible in 30 Years, not 90 as Previously Estimated*, U. WASH. NEWS, Apr. 2, 2009, <http://uwnews.org/article.asp?articleID=48419> (last visited Jan. 24, 2010); see also *Study: Arctic Sea Ice Melting Faster Than Anticipated*, FOX-NEWS.COM, Apr. 3, 2009, <http://www.foxnews.com/story/0,2933,512244,00.html> (last visited Apr. 3, 2010).

24. Sheila Watt-Cloutier, Remarks at Climate 2050: Technology and Policy Solutions (Oct. 24, 2007), available at <http://www.youtube.com/watch?v=G1Sh4XeoLBA>.

25. See Andrew C. Revkin, *Skeptics Dispute Climate Worries and Each Other*, N.Y. TIMES, Mar. 9, 2009, at A12, available at <http://www.nytimes.com/2009/03/09/science/earth/09climate.html> ("The meeting participants hold a wide range of views of climate science. Some concede that humans probably contribute to global warming but they argue that the shift in temperatures poses no urgent risk. Others attribute the warming, along with cooler temperatures in recent years, to solar changes or ocean cycles.")

26. *Id.*

27. See generally Intergovernmental Panel on Climate Change, *Fourth Assessment Report*, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm (last visited Apr. 3, 2010). Further, the United States Environmental Protection Agency has declared that greenhouse gases are a health threat, calling the gases "a serious problem now and for future generations." *U.S. Declares Warming Gases are Health Threat*, MSNBC, Apr. 17, 2009, <http://www.msnbc.msn.com/id/30264214/> (last visited Jan. 24, 2010).

28. Marguerite E. Midaugh, Comment, *Linking Global Warming to Inuit Human Rights*, 8 SAN DIEGO INT'L L.J. 179, 180 (2006); see also Jorge Daniel Taillant, *Environmental Advocacy and the Inter-American Human Rights System* 28 (Feb. 2001) (working paper

Commission on Human Rights in December 2005, with hopes of preventing further environmental harms resulting from climate change.²⁹ “What we want is the United States to stop violating our rights. To do that the United States needs to lead the international effort for absolute reductions in emission of greenhouse gases. Without absolute reductions Inuit hunting and food sharing culture will not survive.”³⁰ In this petition, the Inuit alleged several human rights violations committed by the United States, which was the largest emitter of greenhouse gases in the world at the time.³¹ The violations include: the right to life and physical security, the right to personal property, the right to health; the right to practice their culture; the right to use land traditionally used and occupied, and the right to means of subsistence.³² Not included in this list of human rights violations is a right to environmental protection. This is because the Inter-American System for the protection of human rights is bound by the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, neither of which acknowledges that a right to environmental protection exists.³³ In November 2006, the Commission notified the Inuit that it would not be able process their petition, stating “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”³⁴

commissioned by Center for International Environmental Law, on file with author) (explaining that very few cases have been decided by the Inter-American Court and that States generally attempt to avoid the Inter-American Court, opting instead to pursue redress through the Inter-American Commission).

29. See Petition, *supra* note 11.

30. Shelia Watt-Cloutier, Chair, Inuit Circumpolar Conference, Presentation at Eleventh Conference of Parties to the UN Framework on Climate Change (Dec. 7, 2005), available at <http://inuitcircumpolar.com/index.php?ID=318>.

31. See Petition, *supra* note 11, at 1, 5-6. In 2006, when the Inuit Petition was filed, the United States was the largest emitter of greenhouse gases in the world. Recently, however, China has taken surpassed the United States and is now the largest gross emitter of greenhouse gases. *China Overtakes U.S. in Greenhouse Gas Emissions*, N.Y. TIMES, June 20, 2007, <http://www.nytimes.com/2007/06/20/business/worldbusiness/20iht-emit.1.6227564.html> (last visited Apr. 3, 2010).

32. *Id.* at 5-6.

33. See generally Organization of American States, American Convention on Human Rights, *supra* note 4; Organization of American States, American Declaration on the Rights and Duties of Man, Mar. 30-May 2, 1948: OAS Res XXX, OAS Off Rec OEA/Ser.L/V/I.4 Rev.

34. Svitlana Kravchenko, *Right to Carbon Right to Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 535 (2008) (quoting Letter from Ariel E. Dulitzky, Assistant Executive Sec’y, Org. American States, to Paul Crowley, Legal Representative (Nov. 16, 2006) available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>).

II. INDIGENOUS PEOPLES

The United Nations has estimated that there are over three hundred million indigenous peoples living in more than seventy countries around the world.³⁵ Yet, much like the Inuit, this significant population is having its traditional way of life threatened more and more each day as a result of climate change.³⁶ Simply defined, indigenous peoples are the groups of people “who inhabited a country or geographical region at the time when people of different cultures or ethnic origins arrived.”³⁷ However, the relevant characteristics of indigenous peoples extend far beyond simply being in a certain place at a certain time. Indigenous peoples historically “[p]ractic[e] unique traditions, they retain social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live.”³⁸ Rather than define indigenous peoples, the United Nations contends that a better approach is to identify indigenous peoples based on the following characteristics: (1) self-identification as indigenous peoples; (2) historical continuity with pre-colonial and/or pre-settler societies; (3) strong link to territories and surrounding natural resources; (4) distinct social, economic, and political systems; (5) distinct language, culture, and beliefs; (6) form non-dominant groups of society; and (7) resolve to maintain and reproduce their ancestral environments and systems as distinct peoples and communities.³⁹ While a precise definition of indigenous peoples may not be readily attainable, one characteristic they all seem to share is the common experience of traditionally being treated differently from the general population.⁴⁰

Historically, indigenous peoples, to a large extent, have not been afforded the same protections as the general population with

35. SVITLANA KRAVCHENKO & JOHN BONINE, *HUMAN RIGHTS AND THE ENVIRONMENT* 147 (2008).

36. Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 4 (2007). Similar to the Inuit, “inhabitants of low lying islands and nations face potentially catastrophic consequences because of sea level rise triggered by melting sea ice in the polar regions.” *Id.*

37. Press Release, United Nations Permanent Forum on Indigenous Issues, *Who are Indigenous Peoples?*, (May 12, 2006), available at http://www.un.org/esa/socdev/unpfi/documents/5session_factsheet1.pdf [hereinafter *Who are Indigenous Peoples?*].

38. *Id.* The dominant societies became dominant through conquest, occupation, settlement, or other means. *Id.*

39. *Id.*

40. W. Michael Reisman, Editorial Comment, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 350 (1995).

regard to human rights.⁴¹ However, “[o]ne of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern.”⁴² The International Work Group for Indigenous Affairs (IWGIA) states among its convictions that:

Indigenous peoples, belonging to the most marginalized and impoverished groups in the world, have the right to be recognized and to have their basic human rights respected. In particular indigenous peoples have the right to be able to survive as peoples and to maintain and develop their cultures based on their own aspirations, visions and identity.⁴³

Even though indigenous peoples are viewed as special subjects of concern, there remains a vast disconnect between what rights are acknowledged and what protections indigenous people are actually afforded. “Even though the international human rights program has recognized the need to protect indigenous peoples . . . adjustments taking account of these changes have not been carried over into other parts of international law.”⁴⁴ As the IWGIA has recognized, one of the main focuses of protections for indigenous peoples is the right to maintain and develop their cultures as they see fit.⁴⁵ However, indigenous peoples’ ability to maintain and develop their cultures is being impaired by both the effects of climate change and the lack of protection afforded to them in international law.⁴⁶ Because of their unique position, indigenous peoples are placed at the middle of the convergence of human rights and environmental law.⁴⁷

41. *Id.*

42. 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, 33 (2001).

43. International Work Group for Indigenous Affairs, IWGIA’s Mission Statement, <http://www.iwgia.org/sw17673.asp> (last visited Jan. 24, 2010).

44. Reisman, *supra* note 40, at 362.

45. See International Work Group for Indigenous Affairs, *supra* note 43.

46. JAN SALICK & ANJA BYG, INDIGENOUS PEOPLES AND CLIMATE CHANGE 7-11 (2007), available at <http://www.tyndall.ac.uk/publications/other-tyndall-publications/2007/indigenous-peoples-and-climate-change>; NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES 318-19 (1997) (noting that “the essential difference is that indigenous peoples are still an object rather than a subject of international law; at best they can be identified as an emerging subject.”)

47. Jennifer A. Amriott, Note, *Environment, Equality, and Indigenous Peoples’ Land Rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL L. 873, 875-76 (2002).

"Indigenous peoples are particularly vulnerable to environmental threats, as they often live in resource-rich areas and are closely dependent on the natural environment for their cultural and physical survival."⁴⁸ "[Indigenous peoples] have a special relation to and use of their traditional land. Their ancestral land has a fundamental importance for their collective physical and cultural survival as peoples. Indigenous peoples hold their own diverse concepts of development, based on their traditional values, visions, needs and priorities."⁴⁹ Throughout the world, indigenous peoples find themselves fighting to maintain their way of life in opposition to governments and businesses that look to these resource-rich areas as a means of broader development measures specifically targeted at turning a profit.⁵⁰ "As these developing states struggle for economic stability on an international plane, they are increasingly driven to exploit fresh resources, and tend to respond to that pressure by further dispossessing indigenous peoples of their land and resources."⁵¹ This is not simply to say that governments and businesses are wholly self-serving and that they quickly dismiss environmental and human rights concerns. Rather, this cross-section where governments and businesses intersect with indigenous peoples highlights a larger policy consideration that permeates environmental law generally: environmental protection versus economic growth. To the extent that economic concerns typically prevail, the indigenous communities suffer.⁵²

48. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1432 (3d ed. 2007).

49. Who are Indigenous Peoples?, *supra* note 37.

50. Matthew F. Jaksa, Comment, *Putting the "Sustainable" Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability*, 21 J. ENVTL. L. & LITIG. 157, 183-85 (2006); see International Work Group for Indigenous Affairs, *Indigenous Peoples and Land Rights*, <http://www.iwgia.org/sw231.asp> (last visited Jan. 24, 2010) ("In the name of national economic development, various policies are being put in place, which dispossess indigenous peoples of their lands and natural resources and threaten to undermine their cultures and survival as distinct peoples.").

51. Michael Holley, Comment, *Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 BERK. J. INT'L L. 119, 126 (1997). Actions by governments and business that threaten indigenous peoples are easily identifiable when the harm is direct, concrete, and tangible, as in the case of the Awas Tingni. See Amiot, *supra* note 47. The Awas Tingni, an indigenous people located on the Atlantic Coast of Nicaragua, faced the threat of deforestation of their lands when the Nicaraguan government gave permission to a foreign timber company to log more than 62,000 hectares of tropical forest claimed by the indigenous community. *Id.* at 877. In the case of the Awas Tingni, it is clear that by granting this right, the government threatens the traditional lands and natural resources that the indigenous community has long relied on. See *id.*

52. David C. Baluarte, Note *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, *SUSTAINABLE DEV. L. & POL'Y*, Summer 2004, at 9, 9.

Additionally, indigenous peoples are often politically marginalized and are thus subject to the oppression and domination of the majority who make decisions that ultimately affect indigenous lands.⁵³ “Indigenous peoples often have much in common with other neglected segments of societies, i.e. lack of political representation and participation, economic marginalization and poverty, lack of access to social services and discrimination.”⁵⁴ Complicating matters further for indigenous peoples is the fact that they generally comprise a small percentage of a region, state, or country’s population.⁵⁵ As alluded to by the Inter-American Commission on Human Rights, “because of their vulnerable conditions vis-à-vis majority populations, indigenous groups may require certain additional protections, beyond those granted to all citizens, in order to bring about true equality among the nationals of a state.”⁵⁶ Because many indigenous communities, like the Inuit, constitute such a small minority of the population, they simply do not have the option of altering their situation through the traditional political process.⁵⁷ Therefore, protection from harms—like climate change—will often happen only as a result of special protection being afforded outside the traditional political process.

The Intergovernmental Panel on Climate Change has determined that adverse effects from continued climate change will lead to increased flooding and the depletion of resource-rich ecosystems, which will result in the displacement of millions of people in the process.⁵⁸ While many of these environmental concerns are not specific to the indigenous populations of the world, it is important to acknowledge the fundamental interconnectedness of human rights, the environment, and indigenous peoples.⁵⁹ Because of this interconnectedness, human rights violations specifically tied to environmental abuses, like climate change, stand to affect indigenous peoples more than the population at large. As the United Nations has acknowledged, “while [climate change] affect[s] individuals and communities around the world, the effects . . . will be felt most acutely by those segments of the population who are already in

53. HUNTER ET AL., *supra* note 48, at 1432.

54. Who are Indigenous Peoples?, *supra* note 37.

55. International Fund for Agricultural Development, Indigenous People, <http://www.ifad.org/english/indigenous/index.htm> (last visited Jan. 24, 2010).

56. Anaya & Williams, *supra* note 42, at 74.

57. Who are Indigenous Peoples?, *supra* note 37; Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 23 TUL. ENVTL. L.J. 33, 43-45 (2009).

58. MEINHARD DOELLE, FROM HOT AIR TO ACTION? CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW 215 (2005).

59. See e.g., Abate, *supra* note 36.

vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status, and disability.”⁶⁰ Because the outlook for indigenous peoples regarding climate change is so bleak, failure to legally protect indigenous people’s traditional environments ultimately threatens the survival of individuals in the indigenous community and potentially the viability of the community altogether.

III. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American Human Rights System is the principal mechanism outside domestic law for protecting the human rights of people in North America, South America, Central America, and the Caribbean.⁶¹ The Organization of American States (OAS) is the region’s governing body and “principal multilateral forum for strengthening democracy, promoting human rights, and confronting shared problems”⁶² More specifically, the Inter-American Commission on Human Rights (Commission) and the Inter-American Court of Human Rights (Court), both organs of the OAS, function as a two-tiered system for legally addressing alleged human rights violations that take place in the western hemisphere.⁶³ While both bodies are charged with the same goal—protecting human rights—the two bodies function in very different ways.⁶⁴ However, at its very core, “[t]he primary difference between the two bodies is that the Court has the authority to make judgments that are binding on member states, while the Commission only can publish recommendations.”⁶⁵

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

Under the Inter-American Human Rights system, all human rights complaints must initially be brought to the Commission.⁶⁶

60. U.N. Human Rights Council, *Human Rights and Climate Change*, at 2, U.N. Doc. A/HRC/10/L.30 (Mar. 20, 2009), available at http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_10_L_30.pdf.

61. See Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration of the Rights of Indigenous Peoples*, 27 WIS. INT’L L.J. 51, 52 (2009).

62. U.N. High Commissioner for Refugees, Organization of American States, <http://www.unhcr.org/refworld/publisher/OAS.html> (last visited Apr. 3, 2010).

63. Inter-American Commission on Human Rights, What is the IACHR?, available at <http://www.cidh.oas.org/what.htm> (last visited Jan. 24, 2010).

64. *Id.*

65. Inara K. Scott, Note, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?*, 19 VA. ENVTL. L.J. 197, 200-01 (2000).

66. DOELLE, *supra* note 58, at 231.

As such, there is no right for individual application to the Inter-American Court on Human Rights; claims may only be referred to the Court by the Commission in certain limited circumstances.⁶⁷ The Commission represents all member states of the OAS, thus all countries in North, South, and Central America are subject to the jurisdiction of the Commission.⁶⁸ Therefore, because of the broad jurisdiction granted to the Commission, “any person, group of persons or non-governmental entity may submit a petition, as long as the petition is with respect to an alleged violation of a human right recognized under the [Inter-American Human Rights] regime.”⁶⁹ While there seems to be a broad grant of jurisdiction for matters being brought to the Commission, there are several limitations.⁷⁰ The most significant limitation is that before a petition may be brought to the Commission, the petitioner must have exhausted all potential remedies under domestic law.⁷¹

Once a claim is deemed as admissible by the Commission,⁷² the Commission has the opportunity to conduct hearings, on-site investigations, and ultimately has the authority to render a decision on the merits of the claim.⁷³ After a decision on the merits, the Commission is required to submit a report of its findings to the accused Member State “[identifying] whether or not there have been violations [of human rights].”⁷⁴ In cases where a violation has been established, the Commission sets forth recommendations to be im-

67. Scott, *supra* note 65, at 209.

68. Rules of Procedure of the Inter-American Commission on Human Rights, OAS Special Res., art. 1(2), 109th Sess., (Dec. 4-8 2000, amended Oct. 7, 2002 and Oct. 7, 2003) available at http://www.oas.org/xxxivga/english/reference_docs/Reglamento_CIDH.pdf (last visited Jan. 24, 2010) [hereinafter Rules of Procedure]. “[A]rticle 49 provides that the Commission has jurisdiction to receive and review petitions with respect to alleged violations by States who are not Parties to the American Convention on Human Rights. These petitions will be considered in the context of the American Declaration of the Rights and Duties of Man.” DOELLE, *supra* note 58, at 234.

69. DOELLE, *supra* note 58, at 231. See *infra* Part III as to whether the right to a healthy environment or environmental protection is a recognized human right under the Inter-American Human Rights regime. Although the grant of standing to the Commission is extremely broad, the Commission will not entertain theoretical or hypothetical cases. Scott, *supra* note 65, at 207.

70. See Rules of Procedure, *supra* note 68, tit. II, ch. II. “A claim brought before the Commission therefore must be brought against a Member State bound by the substantive obligation under the ICHR regime that the claimant alleges has been violated.” DOELLE, *supra* note 58, at 232.

71. Rules of Procedure, *supra* note 68, art. 31. However, the exhaustion of remedies provision is generally read favorably for the petitioner. DOELLE, *supra* note 58, at 233.

72. Admissible means that it meets the requirements of the Rules of Procedure of the Inter-American Commission on Human Rights. Rules of Procedure, *supra* note 68, tit. II ch. II.

73. *Id.*

74. DOELLE, *supra* note 58, at 234.

plemented by the State.⁷⁵ These recommendations are generally aimed at securing a full investigation of the facts, prosecuting and punishing those determined responsible, and taking action to repair the consequences suffered by the victim.⁷⁶ Subsequently, the Member State is given the opportunity to submit a report back to the Commission regarding its efforts to comply with the Commission's initial recommendations.⁷⁷ At this point, the Commission has the opportunity to refer cases to the Inter-American Court on Human Rights if the Commission feels the Member State has not done an adequate job of complying with its initial recommendations.⁷⁸ However, if the Commission chooses not to refer the case to the Court, the Commission will publish a final report of its findings and then may elect to "adopt a follow-up program to monitor the implementation of its recommendations or otherwise take measures to monitor whether the violation continues."⁷⁹

B. The Inter-American Court on Human Rights

Because of the constraints placed on the Inter-American Court's jurisdiction, the Court is even less likely to hear a claim based on violation of a right to environmental protection. The Inter-American Court on Human Rights, which derives its jurisdictional authority solely from the American Convention on Human rights, is strictly limited to hearing disputes between OAS Member States that are parties to the Convention.⁸⁰ Therefore, only State Parties, consenting to the jurisdiction of the Court, and the Commission can submit a case for review by the Court.⁸¹ However, much like an individual party, a State Party cannot circumvent the procedures of first petitioning the Commission before having their case potentially referred to the Court.⁸² While the Court is bound by the American Convention on Human Rights, the Convention itself does not provide any direction as to which cases should

75. Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, Ch. I(2)(C), OEA/Ser.LJ/II.108, Doc. 62 (Oct. 20, 2000), available at <http://cidh.org/Indigenas/TOC.htm>.

76. *Id.*

77. *Id.*

78. DOELLE, *supra* note 58, at 234. Referral to the Court can only happen when the member state has consented to the jurisdiction of the Court by ratifying the American Convention on Human Rights. *Id.*

79. *Id.*

80. Scott, *supra* note 65, at 205.

81. *Id.* at 208-09

82. *Id.*

be referred by the Commission to the Court.⁸³ Through an advisory opinion, the Court has attempted to provide some guidance in the matter by stating that the Commission should refer cases with “controversial legal issues that have not been previously decided by the Court, conflicting domestic proceedings, and subject matter of special importance to the hemisphere.”⁸⁴ While the bar to get a case before the Court can be quite high, the practical implications of doing so can be significant to successful parties, especially because of the Court’s ability to assess reparations and issue binding judgments against member states.⁸⁵ Thus, parties who proceed with successful claims in front of the Court are more likely to have their violations meaningfully remedied.

C. Sources of Law Under the Inter-American Human Rights System

Under the Inter-American Human Rights regime, there are several potential sources of law, each carrying different weight, both in terms of the rights they protect and the Member States which are ultimately bound by their respective provisions. In short, there are three primary sources which ultimately bear on the Commission and the Court in their interpretation and protection of human rights with respect to the possibility of protecting the environmental human rights of indigenous peoples.⁸⁶ These three sources are: the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and The San Salvador Protocol.⁸⁷ “Collectively, these provisions. . . are at the heart of any consideration of the state of recognition between the health of the environment and human rights under the [Inter-American Human Rights] regime.”⁸⁸

83. *Id.*

84. *Id.* Environmental harms suffered by indigenous peoples as a result of climate change arguably fit within the guidelines prescribed by the Court in the advisory opinion.

85. *Id.* at 207; *see also* American Convention on Human Rights, *supra* note 4, arts. 67, 68. “Therefore, while a decision by the Commission may be significant for the development of international and human rights law, only a decision by the Court is likely to make an immediate difference for the victims.” Scott, *supra* note 65, at 205. Additionally, “[c]leaning up environmental disasters can be costly. Unless a case goes before the Court, victims cannot receive reparations to allow them to heal damaged lands.” *Id.*

86. DOELLE, *supra* note 58, at 236.

87. *Id.* Additionally, the Organization of American States Charter and the American Declaration on the Rights of Indigenous Peoples also provide guidance to the Inter-American Court with regard to human rights disputes. *Id.*

88. *Id.*

1. The American Declaration on the Rights and Duties of Man

The American Declaration on the Rights and Duties of Man⁸⁹ and the original OAS Charter⁹⁰ are the only agreements under the Inter-American Human Rights system which are binding on all OAS Member States.⁹¹ The Declaration on the Rights and Duties of Man itself does not recognize a right to a healthy environment or a right to environmental protection.⁹² However, the Declaration on the Rights and Duties of Man does recognize several rights that can be indirectly linked to environmental concerns and therefore can protect human environmental rights in limited circumstances.⁹³ These rights include: the right to life, liberty, and security of the person; the right to residence and movement; the right to preservation and well-being; the right to benefits of culture; and the right to property.⁹⁴ The Declaration on the Rights and Duties of Man serves as “the principle instrument for determining the applicable substantive rights for those countries in proceedings before the Inter-American Commission.”⁹⁵

2. The American Convention on Human Rights

Because the American Convention on Human Rights created the Inter-American Court of Human Rights, the Court is strictly bound by its provisions.⁹⁶ The American Convention on Human Rights (Convention) was adopted in 1969 and entered into force in 1978.⁹⁷ The Convention has ultimately been ratified by twenty-five of the thirty-five member states of the OAS.⁹⁸ Because the Convention established the Inter-American Court on Human Rights, not only does a member state have to ratify the Convention, but the state must also has to formally accept the jurisdiction of the Court

89. American Declaration, *supra* note 7.

90. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (hereinafter “Charter”). The OAS charter does not specifically define the rights and duties of Member States, rather the OAS charter provides the procedure and structure that governs the OAS. DOELLE, *supra* note 58, at 236.

91. DOELLE, *supra* note 58, at 228.

92. See American Declaration, *supra* note 7.

93. DOELLE, *supra* note 58 at 235-36.

94. *Id.*

95. Anaya & Williams, *supra* note 42, at 41.

96. Scott, *supra* note 65, at 205

97. Andrew T. Guzman & Jennifer Landslide, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1720 (2008).

98. DOELLE, *supra* note 58, at 229. Notably, neither the United States nor Canada have ratified the Convention. *Id.*

before that state would be subject to the court's jurisdiction.⁹⁹ Additionally, because claims that are eventually heard by the Court must first go through the Commission, the rights articulated in the Convention are also enforceable by the Commission to the extent that a member state has ratified the Convention.¹⁰⁰

Much like the American Declaration on the Rights and Duties of Man, the Convention makes no mention of a right to environmental protection, but similarly does include rights that can be indirectly linked to environmental human rights protections for indigenous people.¹⁰¹ Among those rights are: the right to life, the right to personal liberty and security, the right to property, the right to freedom of movement and residence, and the right to progressive development in accordance with the OAS Charter.¹⁰² "Substantively, while there are clearly differences between the Declaration and the Convention, in practice they have often not resulted in different standards for human rights."¹⁰³

Although neither the American Convention nor the American Declaration specifically mentions indigenous peoples, both include general human rights provisions that protect traditional indigenous land and resource tenure. . . . Thus, provisions of the American Declaration [on the Rights and Duties of Man] and the American Convention [on Human Rights] affirm rights of indigenous peoples to lands and natural resources on the basis of traditional patterns of use and occupancy, especially when viewed in light of other relevant human rights instruments and international developments concerning indigenous peoples.¹⁰⁴

However, even though the Convention does not purport to protect a right to environmental protection, it does not mean that the possibility is entirely cut off.

Importantly, Article 29 of the Convention provides "a mechanism that allows the American Convention to adapt itself to the evo-

99. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 991 (2008).

100. Cesare P.R. Romano, *The Shift from the Consensual to Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 819-20 (2007).

101. See American Convention on Human Rights, *supra* note 4, pt. I.

102. *Id.* arts. 4, 7, 21, 22, 26.

103. DOELLE, *supra* note 58, at 229.

104. Anaya & Williams, *supra* note 42, at 41.

lution of international law.”¹⁰⁵ Article 29 states that the provisions of the Convention as a whole should not be interpreted as “precluding other rights or guarantees that are inherent in the human personality” or “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”¹⁰⁶ These provisions of the Convention require “the adoption of the trends in effect in international law concerning the violation of rights.”¹⁰⁷ While the Convention does set forth human rights that are to be protected by the Commission and Court, it is not a static document, rather it is a document that specifically contemplates the evolution of law and the likelihood that new human rights issues will emerge and therefore need legal protection.

3. The San Salvador Protocol

The San Salvador Protocol¹⁰⁸ likely provides the greatest justification for recognizing and enforcing a right to environmental protection for everyone in the Inter-American Human Rights System. The San Salvador Protocol, adopted in 1988, entered into force in 1999 as an extension of the American Convention on Human Rights.¹⁰⁹ As an additional protocol to the American Convention on Human Rights, the San Salvador Protocol is only binding on states that have ratified it.¹¹⁰ To date, only fourteen of the thirty-five member states have ratified the protocol.¹¹¹ However, even without ratification by all member states, the San Salvador Protocol potentially represents the beginning of a key shift in human rights law with respect to environmental protection. This protocol is the first, at least with respect to agreements that affect the Inter-American

105. Taillant, *supra* note 28 (working paper at 32).

106. American Convention on Human Rights, *supra* note 4, art. 29(c), (d).

107. Taillant, *supra* note 28 (working paper at 32).

108. San Salvador Protocol, *supra* note 8.

109. Jennifer Cassel, Comment, *Enforcing Environmental Human Rights: Selected Strategies of US NGOs*, 6 NW. J. INT'L HUM. RTS. 104, 104 (2007).

110. See Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 337 (noting that “litigants wishing to invoke the Protocol of San Salvador must verify that the defendant state has in fact ratified the treaty, that their claims are limited to articles 8.1.a and/or 13, and that the alleged injury giving rise to the claim occurred after the Protocol entered into force for the state at issue” (emphasis added)).

111. See Organization of American States, General Information to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, <http://www.oas.org/juridico/English/signs/a-52.html> (last visited Jan. 24, 2010). Most notably, the United States and Canada have not ratified the San Salvador Protocol. *Id.*

Human Rights regime, which specifically grants a right to health and a healthy environment.¹¹²

While it is not clear from the Protocol whether the right to health and a healthy environment is seen as an extension or evolution of existing rights or alternatively as a new human right, there is a clear trend within the [Inter-American Human Rights] regime to recognize the right to a healthy environment as a human right.¹¹³

The right to a healthy environment granted by the Protocol is granted to all persons, not just indigenous peoples.¹¹⁴ However, the delineated right to environmental protection is severely undercut by the limitations of the Protocol. Most importantly, while the San Salvador Protocol does highlight human rights regarding environmental preservation, the procedural components of the protocol limit an individual's ability to bring claims based on this right before the Inter-American Court.¹¹⁵

D. The Commission's and Court's Approach to Indigenous Rights and Environmental Harms

Recently, the Commission and Court have expanded their jurisprudence with regard to indigenous peoples.¹¹⁶ Specifically, the Commission and Court have focused on protecting the property rights of indigenous peoples, noting that "the effective enjoyment of this land implies not only the need to protect the land as an economic unit, but also to protect the human rights of a collective community that bases its economic, cultural and social development on its relationship with its land."¹¹⁷ This heightened awareness has proved beneficial in protecting indigenous human rights

112. San Salvador Protocol, *supra* note 8, arts. 10-11 ("Everyone shall have the right to live in a healthy environment and to have access to basic public services." *Id.* art. 11. "States Parties shall promote the protection, preservation, and improvement of the environment." *Id.*). For the purposes of this paper, a right to a healthy environment and a right to environmental protection will be used interchangeably.

113. DOELLE, *supra* note 58, at 229-30.

114. See San Salvador Protocol, *supra* note 8, pmb., art. 3.

115. *Id.* With respect to rights set out in the San Salvador Protocol, the Commission and in some cases the Court can only receive individual petitions alleging violations of rights based on articles 8(a) (protecting trade union rights) and 13 (protecting a right to education). *Id.* art. 19(6).

116. Isabel Madariaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American Human Rights System*, 22 ARIZ. J. INT'L & COMP. L. 53, 54 (2005).

117. *Id.* at 56.

for communities like the Awas Tingni of Nicaragua and the Yanomami Indians of Brazil, both of which have prevented major private development efforts on their native lands through the Inter-American System.¹¹⁸ However, the Commission's and Court's special attention to indigenous peoples stops short of recognizing a right to environmental protection.

Because neither the Declaration on the Rights and Duties of Man nor the American Convention on Human Rights explicitly mentions a right to environmental protection for the general population, much less indigenous peoples, and because the right to environmental protection is not considered a customary protection at the international level, the Inter-American Commission and Court have traditionally been very reluctant to hear claims based on solely environmental harms.¹¹⁹ Therefore, the Commission and Court have historically been willing to hear and settle environmental disputes involving indigenous peoples only when they can be tied to a specifically enumerated right under the Declaration or Convention, such as the right to life or the right to property.¹²⁰ These types of claims often employ the transformation approach to environmental harms which "essentially strives to transform environmental claims into human rights claims."¹²¹ Because the Commission and Court have strictly held to the rights articulated in the Declaration and the Convention, claims alleging only human rights violations strongly tied to protection from environmental

118. See generally *id.*; Amriott, *supra* note 47.

119. Cf. Taillant, *supra* note 28 (working paper at 29-30) (noting that "[t]he [Inter-American Human Rights System] will heed a plea for a violation of environmental abuse, if and only if, the abuse can be shown to violate a human right in one of the legal instruments it defends").

120. See Amriott, *supra* note 47; see generally *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (Ser. C) no. 70 (Aug. 31, 2001), available at http://www.oas.org/dil/XXXV_Course_IACHR_Case_Mayagna_v_Nicaragua_Luis_Toro.pdf. Additionally, in the case of the Huarorani Indians of Ecuador, the Commission recognized the relationship between the environment and the right to life. "The realization of the right to life . . . in some ways [is] dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated." Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L./VII.96, doc. 10 rev. 1, ch. VIII (Apr. 24, 1997), available at <http://www.cidh.org/countryrep/ecuador-eng/Index%20%20Ecuador.htm>.

121. Taillant, *supra* note 28 (working paper at 31). In addition to the Transformation Approach, Taillant also provides reinter-pretation and interpretation approaches as alternative means by which to get environmental cases before the Commission and Court. The Reinterpretation Approach "reinterprets basic human rights to include environmental rights." *Id.* An example would be broadening the understanding of a right to life so as to include the right to live in a healthy environment as part of the right to life. *Id.* The Interpretation Approach "allows for the inclusion of other national and international laws, treaties, declaration, etc. into the system." *Id.* (working paper at 32).

harms, like the claims alleged by the Inuit, have been unsuccessful.¹²²

However, the Commission's and Court's limited treatment of environmental harms with regard to indigenous peoples does not completely foreclose the possibility of a right to environmental protection being established for indigenous peoples. The Inter-American Human Rights Regime is viewed as a progressive body willing to expand the scope of human rights protections for indigenous peoples.¹²³ Further, while not ultimately recognizing a right to environmental protection, the Commission "ha[s] previously recognized the connection between human rights and a state's environmentally hazardous actions."¹²⁴ Additionally, while ultimately rejecting the Inuit petition, the Commission was responsive to a request to conduct hearings on the connection between human rights and climate change.¹²⁵ Given the progressive views of the Commission and Court with regard to indigenous peoples, an increased commitment to environmental protection both regionally and internationally could stand to get the Inter-American Human Rights System over the hump and provide the basis for establishing an enforceable right to environmental protection.

IV. ESTABLISHING A RIGHT TO ENVIRONMENTAL PROTECTION FOR INDIGENOUS PEOPLE IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

As demonstrated, indigenous peoples stand to have their lives transformed dramatically as a result of climate change. Possibly the most frustrating aspect to indigenous communities, such as the Inuit, is the fact that there is simply nothing they can do to stop or even lessen the harm.¹²⁶ Domestically, legislative pleas to curb

122. See Kravchenko, *supra* note 34, at 535.

123. Middaugh, *supra* note 28, at 181.

124. Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 287 (2007); see *Yanomami Indians v. Brazil*, Case 7615, Inter-Am. C.H.R., Report No 12/85, OEA/Ser. L/V/II.66, doc.10 rev. 1 (1984-85), available at <http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm>.

125. Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, available at <http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html> (last visited Apr. 3, 2010). Press Release, Earthjustice, Inter-American Commission on Human Rights to Hold Hearing on Global Warming (Feb. 6, 2007), available at <http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-hearing-on-global-warming.html>.

126. See *supra* Part I.

greenhouse gas emissions fall on deaf ears and legal challenges in courts are rarely enforced.¹²⁷ Similarly, the Inter-American Commission and Court currently maintain that they cannot address environmental harms resulting from climate change for indigenous peoples because a right to environmental protection does not exist or is not explicitly articulated by their binding sources of law.¹²⁸ However, Article 29 of the American Convention on Human Rights provides a glimmer of hope for indigenous peoples in the Inter-American Human Rights System. Article 29 demonstrates that the drafters of the American Convention on Human Rights left the door open to acknowledge the evolution of human rights and to therefore adjust their jurisprudence accordingly.¹²⁹ Given Article 29's expansionist properties, the key for establishing a right to environmental protection for indigenous peoples in the Inter-American Human Rights System will be demonstrating that such a protection is either "inherent in the human personality," or, alternatively, that failure to recognize such a right would unduly limit the effect of other international acts.¹³⁰

A. *The Post-Kyoto Framework: Mitigation and Adaptation*

To demonstrate that environmental protection for indigenous peoples is "inherent in the human personality," there must be a clear global consensus that such a protection should be afforded. One opportunity for conveying such a global commitment to the Inter-American Commission and Court is through the framework being established to continue fighting climate change upon the expiration of the Kyoto Protocol. The United Nations Framework Convention on Climate Change (UNFCCC)¹³¹ and the Kyoto Protocol¹³² comprise the first and only international agreements aimed

127. Abate, *supra* note 36, at 8-9; John S. Gray, 'A Glorious Mess': Congress' Creation if its Inaction Forces EPA to Regulate Climate Change Under Existing Laws, HOUSTON LAWYER, Nov.-Dec. 2008, at 30, 31.

128. Taillant, *supra* note 28 at 29 (stating that "the [Inter-American Human Rights System] will heed a plea for a violation of environmental abuse, if and only if, the abuse can be shown to violate a human right in one of the legal instruments it defends.").

129. American Convention on Human Rights, *supra* note 4, art. 29(c), (d)

130. *Id.* Alternatively, one could argue that enforcement of a right to environmental protection for indigenous peoples or for the greater population could also be required if the right is viewed as customary international law. For a detailed argument that a right to a healthy environment has been elevated to customary international law, see John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000).

131. UNFCCC, *supra* note 5.

132. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

at the global reduction of greenhouse gas emissions to combat human-induced climate change.¹³³

However, in its effort to combat climate change, the Kyoto Protocol has emphasized a mitigation approach. This approach identifies a strictly scientific measure, creating obligations for developed states to reduce greenhouse gas emissions by 2012.¹³⁴ Climate change reports that induced the Kyoto Protocol warned that failure to reduce greenhouse gas emissions would have devastating effects: glacial melting leading to sea-level rise, increased risk of extreme weather events, and negative impacts relating to food production capacities.¹³⁵ While the goals of the Kyoto Protocol are certainly commendable and necessary, the scientific nature of the targets and obligations created focus primarily on the long-term effects of a failure to address global warming.

In addition to the mitigation goals of the Kyoto Protocol, the UNFCCC provides for adaptation measures to be taken.¹³⁶ Adaptation measures seek to reduce or moderate the negative effects of climate change. Specifically, the UNFCCC sets out general adaptation guidelines for parties to follow, including “[f]ormulat[ing], implement[ing] . . . national and, where appropriate, regional programmes containing measures . . . to facilitate adequate adaptation to climate change.”¹³⁷ The UNFCCC further provides more generally that parties shall “[c]ooperate in preparing for adaptation to the impacts of climate change.”¹³⁸ However, the long-term mitigation focus of Kyoto has seemingly set aside the short-term adaptation goals of the UNFCCC and therefore also set aside the short-term harms felt by the indigenous communities as a result of climate change.¹³⁹ This is not to say that Kyoto does not recognize the incremental damage caused by climate change in the short term. Rather, the Kyoto Protocol’s primary focus is to prevent catastrophic damage to the Earth that is estimated to occur by 2050 and 2100 at current greenhouse gas emission levels.¹⁴⁰

Viewing Kyoto’s mitigation efforts from the Inuit perspective demonstrates how the Kyoto compliance goals both aim to help long term and fall short in emphasizing the UNFCCC adaptation

133. DOELLE, *supra* note 58, at xv.

134. *Id.* at xviii.

135. *Id.* at 17-23.

136. UNFCCC, *supra* note 5, arts. 4(e), 11, 41(b).

137. *Id.* art. 4(1)(b).

138. *Id.* art. 4(1)(e).

139. See, e.g., Dr. James D. Ford, *Supporting Adaptation: A Priority for Action on Climate Change for Canadian Inuit*, 8 SUSTAINABLE DEV. L. & POL’Y 25, 27-29 (2008).

140. DOELLE, *supra* note 58, at 21-22.

goals aimed at protecting indigenous peoples in the immediate future. As discussed earlier, Kyoto's emissions goals strive to slow or even eliminate: (1) glacial melting and (2) loss of sea ice, both of which are of the utmost importance to the Inuit people. A failure to slow or eliminate glacial melting and sea ice losses over the long term would certainly force the Inuit to abandon their traditional arctic hunting lifestyle as the habitats of animals the Inuit rely on would be nonexistent. Further, without mitigation efforts, severe weather, sea-level rise, and coastal erosion would most likely force the Inuit inland, potentially rendering their traditional way of life non-existent. While not diminishing the necessity of Kyoto's long term goals, it is also easy to see how, without further adapting to the current effects of climate change, even with long term reductions in greenhouse gas emissions, indigenous peoples like the Inuit cannot be fully protected from the environmental harms of global warming.¹⁴¹

Adaptation to climate change is vital: its impacts are already happening, and will worsen in the future. Shortages of water and food, increased strength of tropical storms, coastal inundation and changing spread of disease vectors will all lead to greater risks to health and life for billions of people, particularly in developing countries.¹⁴²

While symbolically important, reducing emissions "will have limited impact on the speed, magnitude, or effects of climate change."¹⁴³ Adaptation, however, "offers a tangible way in which the impacts of current and future climate change can be reduced."¹⁴⁴ Even with successful mitigation efforts, indigenous ways of life will continue to be threatened absent increased adaptation measures.

Importantly, with the first commitment period of the Kyoto Protocol set to expire in 2012, efforts are currently underway to negotiate Kyoto's successor protocol.¹⁴⁵ To demonstrate a global

141. See *supra* Introduction.

142. Asia-Pacific Gateway to Climate Change, *What is Integrated Adaptation to Climate Change?* <http://www.climateanddevelopment.org/Adaptation/index.html> (last visited Apr. 3, 2010).

143. Ford, *supra* note 139, at 28.

144. *Id.*

145. See Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, art. 3(1); United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Jan. 24, 2010); Robert Stavins, *Three Pillars of a New Climate Pact*, BELFER CENTER, Sept. 21, 2009,

commitment to environmental protection both for indigenous peoples and the general population, Kyoto's successor protocol needs to more fully develop the adaptation goals previously set out in the UNFCCC. In addition, the successor document should strive to create obligations aimed at further mitigating greenhouse gas emissions. A post-Kyoto framework which more fully develops adaptation measures and continues mitigation efforts demonstrates a commitment to both long and short term goals by the global community to combat the environmental effects of climate change. It therefore also signals to the world a consensus in the international community that environmental protection measures must be taken to both adapt and mitigate.

Current discussions indicate that adaptation strategies will play a larger role in post-Kyoto negotiations. The UNFCCC and the Action Plan from the Conference of Parties to the UNFCCC have both recently called for "enhanced action on adaptation" with regards to a post-Kyoto framework.¹⁴⁶ However, few adaptation strategies, like the Bali Action Plan, mention a need for judicial access and enforcement for indigenous peoples suffering from the effects of climate change. Adopted in 2007, the Bali Action Plan¹⁴⁷ suggests several adaptation measures. These measures include risk management and risk reductions strategies, providing incentives to countries for implementing adaptation measures, and developed countries sending support in the form of financial and technological assistance to developing countries.¹⁴⁸ While not diminishing the necessity of such adaptation efforts, a post-Kyoto framework that does not articulate the need for judicial access for indigenous peoples will fall woefully short of providing a meaningful adaptation strategy. Such access will be of the utmost importance for indigenous peoples moving forward, especially in cases where national governments fall short in providing adequate assistance to indigenous communities having to relocate or alter their

<http://belfercenter.ksg.harvard.edu/analysis/stavins/?p=274> (last visited Apr. 3, 2010).

146. Ford, *supra* note 139, at 27.

147. The Bali Action Plan is the UN process that charts the course for a new negotiating process under the UNFCCC with the aim of completing a post-Kyoto climate change response framework by 2009. Conference of the Parties to the Thirteenth Session of the United Nations Framework Convention on Climate Change, Bali, Indon., Dec. 3-15, 2007, *Report of the Conference of the Parties: Decisions Adopted by the Parties*, 3-6, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008), available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf>. To learn more about the plan, please consult United Nations Development Programme [UNDP], Environment & Energy Group, *The Bali Action Plan: Key Issues in the Climate Negotiations, Summary for Policy Makers* (Sept. 2008) (prepared by Chad Carpenter), available at http://www.undp.org/climatechange/docs/UNDP_BAP_Summary.pdf. (hereinafter "United Nations Development Programme")

148. See United Nations Development Programme *supra* note 147 at 10-11.

traditional ways of life in order to meet the demands of a changing environment. An articulated need for judicial access in a post-Kyoto framework stands to significantly aid adaptation efforts, as it would strengthen claims for judicial access and ultimately judicial enforcement for a segment of the population which arguably experiences the effects of climate change more than the general population.

Such an adaptation measure articulated in the post-Kyoto framework could potentially have profound effects on the Inter-American Commission's and Court's jurisprudence, as it would become increasingly difficult to argue that environmental protection for indigenous peoples is not "inherent in the human personality". Given the vast international cooperation needed to bring the Kyoto Protocol into existence, similar international cooperation will be needed to effectuate a meaningful plan to continue combating climate change. Therefore, a strong commitment to environmental protection for indigenous peoples by the post-Kyoto framework would suggest that by not enforcing such a right in the Inter-American Human Rights System would be to preclude a guarantee that is "inherent in the human personality."

B. Textual Support: Moving Past Moral Force

Alternatively, to demonstrate that a right to environmental protection exists for indigenous peoples under the auspices of Article 29 of the American Convention on Human Rights, the Court and Commission would need to acknowledge that failure to do so would unduly limit the effect of other international acts. To reach such a conclusion, these bodies would need to draw on textual support for a right to environmental protection in the international community. While less than fifteen years ago there appeared to be little to no textual support for such a right, recent developments in international law, like the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, demonstrate a steady increase in textual acknowledgement of such a right. Further, at the regional level, in addition to the San Salvador Protocol, the potential adoption of the American Declaration on the Rights of Indigenous Peoples only stands to strengthen the already significant textual support for establishing and protecting a right to a healthy environment for indigenous peoples in the Inter-American Human Rights System.

1. The United Nations Declaration on the Rights of Indigenous Peoples

On September 13, 2007 the United Nations adopted the Declaration on the Rights of Indigenous Peoples.¹⁴⁹ Les Malezer, Chair of the International Indigenous Peoples' Caucus, described the significance of the Declaration in a statement made to the UN General Assembly upon adoption of the Declaration:

The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests and which sets the framework for the future. It is a tool for peace and justice, based upon mutual recognition and mutual respect.¹⁵⁰

Although somewhat indirect, the UN Declaration demonstrates the international community's recognition of the special protection needed for indigenous peoples. Article 26 specifically provides that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."¹⁵¹ Article 26 goes on to state that "[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."¹⁵² While this is not an explicit grant of environmental protection, the provisions of Article 26 demonstrate an understanding of the relationship that indigenous communities have with their traditionally owned lands. When read in the light of prevailing environmental concerns like climate change, it is easy to see the interrelationship and interdependence of land rights and the environment; specifically it can be seen how environmental abuses threaten indigenous people's ability to rely on their traditionally owned lands.

149. U.N. Declaration, *supra* note 6. The Declaration was passed by an overwhelming majority with 143 votes in favor and only 4 votes cast against. U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A61/PV.107 (Sept. 13, 2007). Parties voting against adoption were Canada, United States, Australia and New Zealand. *Id.*

150. International Work Group for Indigenous Affairs, Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw248.asp> (last visited Jan. 24, 2010).

151. U.N. Declaration, *supra* note 6, art. 26(1).

152. *Id.* art. 26(2).

2. The American Declaration on the Rights of Indigenous Peoples

Possibly the most important step toward acknowledging a right to environmental protection for indigenous peoples in the Inter-American Human Rights System is the potential adoption of the American Declaration on the Rights of Indigenous Peoples. The Draft Declaration was approved by the Inter-American Commission on Human Rights in 1997; however, the Draft Declaration has not yet been adopted and therefore has not been made available for ratification by Member States.¹⁵³ Similar to the San Salvador Protocol, the proposed American Declaration on the Rights of Indigenous Peoples specifically provides a right to environmental protection.¹⁵⁴ However, “[w]ith respect to environmental rights, the declaration [extends] further than the San Salvador Protocol in that it recognizes the special relationship between indigenous peoples and the environment and their cultural, social and economic dependence on the environment.”¹⁵⁵ Even if adopted, it is possible that Member States, like the United States and Canada, will not ratify the Declaration.¹⁵⁶

Unfortunately, without ratification by a member state, neither the United Nations Declaration on the Rights of Indigenous Peoples nor the American Declaration on the Rights of Indigenous Peoples is binding law.¹⁵⁷ However, adoption of this Declaration in conjunction with other international agreements, specifically the recently passed United Nations Declaration on the Rights of Indigenous Peoples, stands to have a profound effect on the jurisdiction of the Inter-American Commission and Court alike. With regard to the UN Declaration, the International Working Group for Indigenous Affairs has observed that “[w]hile this Declaration will not be legally binding on States, and will not, therefore, impose legal obligations on governments, the declaration will carry considerable moral force.”¹⁵⁸

153. Abate, *supra* note 36, at 39.

154. American Declaration, *supra* note 7, art. 18.

155. DOELLE, *supra* note 58, at 230.

156. Indian Law Resource Center, *Scant Progress of OAS Declaration on the Rights of Indigenous Peoples*, INDIGENOUS NOTES, 2008, <http://www.indianlaw.org/node/293>. (“The United States and Canada have stated a refusal to approve a strong declaration at this time, reflecting the same position they took in refusing to vote in favor the [sic] UN Declaration on the Rights of Indigenous Peoples . . .”).

157. *Id.*

158. International Work Group for Indigenous Affairs, Background Information on the Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw356.asp> (last visited Jan. 24, 2010).

It is important not to underestimate the role that moral force plays in the development of international law. As “soft law,”¹⁵⁹ documents such as the UN Declaration and the American Declaration on the Rights of Indigenous Peoples are not legally binding on member states. However, it is often “soft law” which helps communicate the standards of good behavior that are expected from a “well-governed State.”¹⁶⁰ These agreements serve “as reference models which anticipate internationally-grounded State obligations emerging in the near future.”¹⁶¹ Without textually rooted international acts displaying a commitment to the establishment of a right to environmental protection for indigenous peoples, the Inter-American Commission and Court are not defying Article 29’s mandate. Specifically, while only “soft law,” international acts, such as the UN and American Declarations on the Rights of Indigenous Peoples and the San Salvador Protocol, provide the basis for arguing that failing to enforce a right to environmental protection for indigenous peoples unduly limits the effect of these acts.

Using the Inuit’s struggle with climate change as an example, it is easy to see how the Inter-American Commission and Court’s failure to affirmatively protect, or even recognize, a right to environmental protection for indigenous peoples severely limits the effect of the UN and American Declarations on the Rights of Indigenous Peoples and the San Salvador Protocol. At the broadest level, the San Salvador Protocol states that everyone has the right to live in a healthy environment and further states that “State Parties shall promote the protection, preservation, and improvement of the environment.”¹⁶² Yet the Inuit are watching sea ice melt away and their coasts erode. Regrettably, they are forced to sit idly by as nations continue to emit greenhouse gases, an action that is arguably in direct opposition to the goals of protection, preservation, and improvement. The proposed American Declaration

159. Soft law refers to “international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law.” Timothy Meyer, *Soft Law as Delegation*, 32 *FORDHAM INT’L L.J.* 888, 890 (2009). Further, “the Draft U.N. Declaration will only be a nonbinding, ‘soft law’ instrument. However, it is upon this document that indigenous peoples rely in order to safeguard their rights and interests and to improve their status in international law.” Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 *VT. L. REV.* 565, 588 (2006). Similarly, “[a]lthough the [American] Declaration is properly characterized as ‘soft law,’ the principles it states figure prominently in the decisions of the Commission and Court, and may ultimately become binding as customary international law.” Jaksa, *supra* note 50, at 203-04 (citation omitted).

160. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 *MICH. J. INT’L. L.* 420, 434 (1990).

161. *Id.*

162. San Salvador Protocol, *supra* note 8, art. 11.

on the Rights of Indigenous Peoples specifically grants indigenous peoples "the right to the conserve, restore, recover, manage, use, and protect the environment and to the sustainable management of their lands, territories and resources."¹⁶³ Yet the Inuit cannot conserve, restore, or protect those resources most fundamental to their survival. As a result of climate change, this group is losing the productive capacity of their lands.

Finally, the UN Declaration provides "the right to own, use, develop and control the lands, territories and resources that [Inuit] possess by reason of traditional ownership."¹⁶⁴ Yet it is impossible for the Inuit to use and develop lands that no longer exist because of the effects of climate change. By not recognizing or enforcing a right to environmental protection, the Inter-American Commission and Court are not only limiting the effect of these international acts, but also rendering these provisions effectively meaningless.

CONCLUSION

Establishing that a right to environmental protection for indigenous peoples exists would be significantly strengthened by a post-Kyoto framework that advances the adaptation principles set forth in the UNFCCC in addition to continuing mitigation efforts. Most importantly, an articulated commitment to environmental protection for indigenous peoples in conjunction with articulated need for judicial access and enforcement could significantly alter the way regional human rights systems, like the Inter-American Commission and Court, choose to handle the adverse effects of climate change. Specifically, given the overarching international cooperation surrounding the Kyoto Protocol and assuming a continued cooperation in Kyoto's successor, an emphasis on adaptation principles in the post-Kyoto regime demonstrates that protecting the environmental rights of indigenous peoples is inherent in the human personality.

Further, the textual support presented by the recently adopted United Nations Declaration on the Rights of Indigenous Peoples, the proposed American Declaration on the Rights of Indigenous Peoples, and the San Salvador Protocol demonstrates that failure to recognize such a right in the Inter-American Commission and Court not only unduly limits the effect of other international acts but has the potential to render certain provisions worthless. There-

163. American Declaration, *supra* note 7, art. 18(2).

164. U.N. Declaration, *supra* note 6, art. 26(2).

fore, a post-Kyoto framework with an emphasis on both adaptation and mitigation in conjunction with the textual support provided by international acts, such as the UN Declaration and the American Declaration on the Rights of Indigenous Peoples, provide a concrete example as to how Article 29 can be used to establish a right to environmental protection for indigenous peoples. As such, an established right to environmental protection for indigenous people should arguably expand the jurisprudence of the Inter-American Commission and Court, and ultimately provide a meaningful channel for redressing harms already suffered and potentially an avenue for minimizing the impacts of climate change in the immediate future.

