Kapittel 10 Nature Protection, Indigenous Rights, and Climate Action

Margherita P. Poto and Endalew Lijalem Enyew[1]

General Introduction

Climate change is affecting indigenous peoples and their rights. However, indigenous peoples themselves are at the forefront of climate action, having protected nature for millennia, and now becoming increasingly aware of the active role they can play in the formulating and implementing processes of the international legal climate-change agenda.[2]

This chapter explores to what extent existing international legal instruments dealing with climate change have identified, reflected, and taken into consideration the rights of indigenous peoples on the one hand, and how indigenous peoples have developed their own nature-protection agreements and action on the other. We seek to clarify the link between the climate-law framework and the human and non-human rights-based framework pertaining to indigenous peoples. Part 1 offers an analysis of the environmental and climate law[3] applicable to indigenous peoples, exploring the weaknesses and strengths in relation to indigenous environmental justice. Part 2 scrutinizes several cases of human rights-based climate-change litigation involving indigenous peoples. The chapter finishes with some concluding remarks.

Part 1

10.1 Introduction

Does the integrated framework of environmental rights, which includes participatory rights *for* nature and substantive rights *of* nature,[4] applied to climate change, offer adequate protection to indigenous peoples' rights while also valorizing the contributions of indigenous peoples' climate action? We analyze this and related questions through two scenarios or angles: through the hermeneutics of public international law—more specifically, *the sources of international climate law applicable to indigenous peoples* (hereinafter, CLIP) and by exploring the tools offered by *indigenous environmental justice* (hereinafter, IEJ). [5]

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[2] *Linda Etchart* (2017), The role of indigenous peoples in combating climate change. *Palgrave Commun* 3, 17085, pp. 1–4. https://doi.org/10.1057/palcomms.2017.85.

[3] We describe the relationship between environmental law (EL) and climate law (CL) as a *genus* to *species* relationship, contextualized in terms of time and priority. EL (*genus*) is the corpus of laws whose primary objective is the protection of the environment, and therefore deals with the regulation of environmental issues. CL (*species*) tackles a major environmental issue of our times — climate change —, focusing on mitigation and adaptation strategies (priority). Thus, CL contains all the elements of EL, in particular the elements of time (climate change is the environmental issue of our time) and in priority (the specific environmental issue of climate change).

[4] The terms "procedural environmental rights," "access rights" and participatory rights for nature (PRfN) are considered synonyms and therefore used interchangeably in the text, as are the terms "substantive environmental rights," "nature's rights," and "rights of nature" (RoN).

[5] *D. McGregor, S. Whitaker and M. Sritharan* (2020) 'Indigenous environmental justice and sustainability', *Current Opinion in Environmental Sustainability*, 43:35–40. Such an approach has several connecting aspects with planetary justice, which does not seem to specifically focus on indigenous actions, even though it shares the same core values as the IEG. See *F. Biermann, A. Kalfagianni* (2018). 'Planetary justice: A research framework', *Earth System Governance Working Paper* 38, Utrecht: Earth System Governance Project.

10.2 CLIP and IEJ

CLIP views the evolution of indigenous peoples' rights from existing international law in the context of the challenges and opportunities posed by climate law. It analyzes how international legal instruments have been progressively extended and applied to indigenous peoples, offering, with varying degrees of success, coverage and protection in terms of rights to self-determination, land, territories, as well as in terms of environmental rights (procedural and substantive) in the face of climate actions.

IEJ calls into question the foundations of the "conventional perspective," challenging the legitimacy and applicability of global and nation-state political and legal mechanisms, based on the premise that such mechanisms do not sufficiently address environmental problems and indigenous rights. Such an approach, initiated and carried out by indigenous peoples' representatives, is grounded in indigenous cosmo-visions that see Planet Earth as a living being and therefore, in Western-based terminology, as a rights-bearing subject. Consequently, duties and responsibilities are recognized as applying to humans, seen as planetary guardians and stewards, under the umbrella of living well "(*buen vivir*)", in harmony with nature. In the concluding remarks to Part 1, we explore whether and how this chapter (and the contributions of indigenous peoples) has helped to address the current knowledge gaps in the subject matter.

10.3 The expansion of participatory rights *for* nature

Recognition of the need for new actors in environmental decision-making is a process that started from within environmental law, spurred by the need for environmental law to engage with the vast number of interested parties in public decisions. In this section, the steps that led to recognition of access rights to non-state actors will briefly be recapped to show how the recognition of environmental procedural *individual* and *collective* rights — including the right to information, participation and justice — has been formally accorded to all those suffering from the effects of environmental damages, including climate change.[6]

The tool of access rights, one of the cornerstones of environmental democracy as enshrined in Principle 10 of the Rio Declaration on Environment and Development,[7] has made possible inputs from a wide range of participants from civil society. This has facilitated the entry of substantive rights, starting from the right to a safe environment for environmental procedural-rights carriers, to environmental non-governmental organizations (e-NGOs), then to vulnerable groups and indigenous peoples. The number of actors involved in environmental decisions has grown due to the recognition of access rights under the general umbrella of Principle 10 of the

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[6] For a complete overview of the legal instruments contributed to the corpus of norms that connect human rights and the environment up to 2002, see *M. Déjeant-Pons., M. Pallemaerts M., with the collaboration of S. Fioravanti., (2002)*, Human rights and the environment. Compendium of instruments and other international texts on individual and collective rights relating to the environment in the international and European framework, Council of Europe publishing, available at https://rm.coe.int/1680489692, visited in August 2020.

[7] Principle 10 of the Rio Declaration 1992 states that "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." See https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf, visited in September 2020.

Rio Declaration above, later specified in the Aarhus Convention (AC) in 1998.[8] Heralded as the UN's most ambitious venture in the field of environmental democracy[9], the AC marks the recognition of environmental rights to non-state actors, developing the concept of access rights for the public, and dramatically changing the actor dynamics in international negotiations, by involving e-NGOs in addition to Parties and Signatories. Widely enforced, although not yet implemented by all Signatories, the AC paved the way for the expansion of participatory rights for nature to vulnerable groups, including indigenous peoples, by creating fertile ground for the approval of the 2018 Escazú Agreement (EA) for Latin America and the Caribbean[10]. The EA expressly carried forward the AC legacy,[11] further opened environmental decision-making to new actors and their views on nature; consequently, expanding the horizons of rights from merely participatory to substantive. Passing the baton of environmental decision-making to the carriers of nature-centered views, the EA opened perspectives for the gradual recognition of the rights of nature also at the international level.

In the prelude to the EA, the Parties reinforce their conviction "that access rights contribute to the strengthening of, *inter alia*, democracy, sustainable development and human rights"; additionally, in Article 9 the EA expressly qualifies the carriers of nature-centered views as "human rights defenders in environmental matters" whose safe and enabling environment is to be guaranteed so that "they are able to act free from threat, restriction and insecurity".[12] Thus, the EA brought forward the discourse on actors involved in environmental decision-making.[13] Its beneficiaries are the people of the regions concerned – the most vulnerable groups and communities in particular – recognized as human rights defenders that contribute to strengthening democracy, access rights, and sustainable development. The involvement of vulnerable groups was present in embryonic form in the AC. The EA marks a step forward towards a rights-based approach in a system of accountable, responsive and inclusive governance on environmental matters, which, according to Art. 6 (3) g, include *climate change*.

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[8] For updates on the Aarhus Convention, also in connection with the Agenda 2030, see http://www.unece.org/ro/env/pp/welcome.html, visited in October 2020.

[9] United Nations Economic Commission for Europe (UNECE), The Aarhus Convention: An Implementation Guide, 2nd edn. 2014, available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

[10] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 4 March 2020, available at https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf, visited in October 2020. For updates on signature and ratification status see: https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental, visited in October 2020. The EA is the first agreement of its kind because representative of indigenous groups and civil society organizations were engaged in the negotiations and included as beneficiaries of the Agreement provisions. One example among many is the participation of the organization DAR (Derecho, Ambiente y Recursos Naturales) committed to building and strengthening environmental governance and promoting the exercise of human rights in the Amazon Basin. DAR focuses on issues of environmental policy and legislation, indigenous peoples' rights, climate change and investment and good governance in the areas of infrastructure and extractive industries: see https://civicus.org/index.php/media-resources/news/interviews/3728-escazu-the-work-of-civil-society-made-a-huge-difference, visited in October 2020

[11] Moreover, as expressly mentioned in the Foreword of the EA, the year of approval marks the 20th Anniversary of the Declaration of Human Rights Defenders: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf, visited in October 2020.

[12] See the EA at https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf cit.

[13] Prior to the EA, several initiatives – not all of them binding, however – have been conducted in Latin America to promote and protect participatory rights for nature and rights of nature: here we may note the Peoples' World Conference on Climate Change and the Rights of Mother Earth, hosted by the Plurinational State of Bolivia in Cochabamba, 20–22 April 2010, followed by the Universal Declaration of the Rights of Mother Earth. See UNGA Resolution 73/235, https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/04/A.RES_.73.235.pdf, accessed in March 2020. On EA see S Guerra and G Parola (2019), 'Implementing Principle 10 of the 1992 Rio Declaration: a comparative study of the Aarhus Convention 1998 and the Escazu Agreement 2018', *Revista Juridica Unicuritiba* 2 (55), 1–33.

It gives voice to environmental defenders (Art. 9), whether *indigenous peoples*, or local communities, whose survival depends on nature and is threatened by large-scale projects of resources extraction, industrialization, and so-called development.[14]

Both the AC and the EA led to international legal recognition of effective participation *for* the environment. However, it remains to be clarified how and whether such environmental actors' mobilization can intersect with and enhance climate law, and ultimately how and whether such participation *for* the environment can improve the rights of indigenous peoples in the context of climate-change action.[15] There is now unanimous acknowledgement that climate change-related issues are covered by the regulatory framework of the access rights.[16] In particular, *Peeters and Nóbrega* discuss how climate change-related activities are covered by the access rights provisions.[17] However, the main research question of this chapter remains unanswered, more specifically, whether the integrated framework of environmental rights (rights *for* nature), albeit extended to the most vulnerable groups, including *indigenous peoples*, temporally contextualized in the climate law discourse, in fact offers adequate protection to indigenous peoples' rights, while also enhancing and valorizing indigenous peoples' contribution to climate action.

A promising, albeit partial, development towards recognition of indigenous voices in climate-related matters can be ascertained with the gradual recognition of the rights *of* nature, as argued in the next section. Our hypothesis is that strengthening the rights of nature has relevance not only for the recognition and articulation of rights of nature: it is also a mindful and intentional act of recognition, restoration, and revitalization of indigenous rights, which include, as noted, indigenous knowledge, indigenous agency and integrity. Recognizing and articulating RoN validates and strengthens procedural indigenous rights because it acknowledges the indigenous initiatives towards such recognition. It is by means of indigenous participation that the rights of nature are acknowledged, thereby translating recognition and restoration of their knowledge, their value sets, and their voice. Recognizing and articulating RoN validates and strengthens *also* substantive indigenous rights: RoN include human rights, as nature includes humans;[18] indeed, indigenous cultures see both humans and nature as part of an extended ecological family with shared ancestry and origins.[19] Healing the Earth through such recognition can serve to restore, heal, and strengthen the umbilical cord between nature and humans.

10.4 RoN from indigenous teachings: living in harmony with the world

[14] See 'What Does It Mean To Leave No One Behind? A UNDP discussion paper and framework for implementation July 2018', available at https://www.undp.org/content/dam/undp/library/Sustainable%20Development/2030%20Agenda/Discussion_Paper_LNOB_EN_lres.pdf

[15] *M. Peeters and S. Nóbrega*, (2014), Climate Change-related Aarhus Conflicts: How Successful are Procedural Rights in EU Climate Law? , RECIEL 23 3, 354–366. See also https://www.ciel.org/wp-content/uploads/2019/09/PromotingParticipation_EntryPoints_COP25_final.pdf, visited in September 2020.

[16] Ibid.

[17] *Peeters and Nóbrega* op. cit.

[18] The word "human" comes from the Latin *humanus*, generally recognized as deriving from *humus* (terra, soil, Earth). Humans are earthlings.

[19] *Enrique Salmón*, Kincentric Ecology: Indigenous Perceptions of the Human-Nature Relationship, *Ecological Applications*, Vol. 10, No. 5 (Oct., 2000), pp. 1327–1332.

The emerging legal recognition of entities 'other than human beings', with affirmation of their legal standing and consequent rights, has been progressively facilitated by the recognition of instrumental/procedural rights to groups of people and knowledge-keepers who have shared their understandings of natural laws. This has fostered the emergence of a revitalizing eco-spiritual consciousness paradigm around the world that translates into the need to live in harmony *with* the world.[20] Recognizing the inherent rights of nature builds on the shared understanding of the fundamental and non-anthropocentric relationship between human beings and natural world. Since 2009, Harmony with Nature, the UN Platform for recognition of RoN, has been developed under the leadership of the Plurinational State of Bolivia, and the charisma of Evo Morales Ayma, the first Bolivian president of indigenous descent (Aymara).[21]

The platform, clearly inspired by indigenous views and supported by indigenous and peasant organizations, endorses and contributes to develop intense activity towards the recognition of RoN in tune and *harmony with* indigenous cosmologies, through negotiations, inter-nations dialogue and nature rights-mapping activities at the national level.[22] This mapping has involved twenty-three legal cultures (as of today) which have progressively moved toward such acknowledgment by means of constitutions, national statutes, courts decisions, and local laws.[23] Various criteria have been followed in the categorization of such recognition: 1. legal basis: nature rights are sometimes defined by law as human responsibilities, sometimes as constitutional duties; 2. ensuring how responsibility is upheld: sometimes defined as legal personhood, sometimes as guardianship; 3. creating personhood/guardianship (by court or by statute); 4. elaborating the concept of duties for present and future generations.[24]

A promising step towards the recognition of RoN is the approval of the Universal Declaration of the Rights of Mother Earth (henceforth, UDRME or the Declaration), drafted by the participants at the World People's Congress on Climate Change and the Rights of Mother Earth held in Cochabamba, Bolivia, in 2010.[25] Although conventional international law does not currently recognize UDRME, the Declaration was submitted to the UN shortly after the Cochabamba meeting and was formally considered at the UN Dialogue on Harmony with Nature in April 2011. The Declaration provides a clear and detailed definition of RoN and of the corresponding obligations for human beings. Article 1 acknowledges Mother Earth as a living being, where the term "being" includes ecosystems, natural communities, species and all other natural entities which exist as part of Mother Earth, as per article 4, and a self-regulating community of interrelated beings that sustains, contains and reproduces all beings. The rights of Mother Earth include the right to life and existence, to be respected and to regenerate, not have her genetic structure modified, as well as to full and prompt restoration for the violation

[20] *John Borrows* (2010). Canada's Indigenous Constitution. University of Toronto Press. ISBN 978-1442610385. Archived from the original on 2018-07-25. Retrieved 2020-04-20.

[21] For the speech of E. Morales Ayma on the occasion of Earth Day, 22 April 2009, which inaugurated the opening of Harmony with Nature see https://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/PV.80&referer=/english/&Lang=E, visited in October 2020.

[22] http://www.harmonywithnatureun.org/, accessed in September 2020. Among the most relevant and recent cases recorded by Harmony with Nature in relation to nature rights and indigenous peoples rights is the Inter-American Court of Human Rights' first non-anthropocentric decision, rendered on 6 February 2020, recognizing the protection of the rights of Indigenous People in the case *Indigenous Community Members of the Lhaka Honhat (Our Land) Association Vs. Argentina*. This is the first precedent of the Court on the fundamental rights to water, food, a healthy environment and cultural identity.

[23] See http://www.harmonywithnatureun.org/rightsOfNature/, accessed in September 2020.

[24] Ibid.

[25] Available at https://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf, accessed in September 2020.

of her rights (Art. 2). To the recognition of rights to Mother Earth corresponds a set of obligations for human beings (Art. 3), which can be summarized in the duties of restoration of the integrity of the natural cycles and the rectification of the damages caused by human violations of the Earth's inherent rights. The initiative, as in the case of Harmony for Nature, has been initiated and strongly supported by indigenous peoples of the Andean region, and reflects the visions of indigenous peoples around the world.[26] Although international conventional law has not formally recognized the Declaration, many States (twelve, as of November 2020) have included the rights of nature in their own legal fabric.[27]

Such efforts, initiated at the international level although not yet formally recognized as an integral part of conventional international law, offer adequate recognition and protection to indigenous rights at the national level. As noted, at least twelve countries have implemented such visions by means of constitutional reforms, treaty agreements, statutes, local ordinances and courts decisions. Re-writing and re-structuring the national legal systems at the constitutional and legal levels, with indigenous words and values, is a valuable achievement in attempts at advancing the role of indigenous knowledge in the orientation of legal systems, as well as in informing policy decisions and actions towards a nature-centered approach.

10.5 Dealing with RoN and Indigenous Rights jointly[28]

We now ask whether and how such recognition of RoN, and the informative role that indigenous knowledge provides to policymaking at an international and national level, effectively validate the indigenous peoples' contribution to climate action. R.S. Abate holds that all of these developments constitute a promising foundation for enhanced action on climate change by providing mechanisms that urge a stop to activities that may violate the rights of the Earth to sustain herself.[29] Further, these developments serve to enhance the indigenous contribution to climate actions, for two reasons. First, they mark a post-anthropocentric phase, with a significant distancing from Western anthropocentrism, which in turn is seen as the main cause of climate change. This new phase, grounded in indigenous-centered views, offers the basis for a re-evaluation of indigenous knowledge in the context of nature protection. Second, the recognition and systematization of RoN grounded in indigenous cosmologies serve to replace

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[26] Initiated and supported by indigenous peoples around the world, the initiative of Rights of Mother Earth, and the Declaration, is also supported by the Earth scientists stream, the ethical, juridical, and Earth jurisprudence strands: see *Pablo Sólon* (2018). The Rights of Mother Earth. In: The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives, edited by Vishwas Satgar, Wits University Press, Johannesburg, 2018, pp. 107–130. JSTOR, www.jstor.org/stable/10.18772/22018020541.10. Accessed 29 Oct. 2020. The culmination of the cumulative efforts initiated and continued by indigenous peoples around the world is marked by the establishment of the Rights of Nature Tribunal (RoNT), an international governing institution created by the advocates Global Alliance for the Rights of Nature (GARN). Inspired by similar initiatives established by citizens to investigate human rights' violations, such as the Permanent Peoples' Tribunal, and composed of lawyers and leaders from indigenous and non-indigenous communities around the world, the RoNT has the mandate to promote and advance international rights of nature law, by hearing cases regarding alleged violations of the RoN and making recommendations about appropriate remedies and restoration. Its main source of law is the Universal Declaration of the Rights of Mother Earth (UDRME).

[27] For an analysis of the New Zealand's and India's cases, as well as for an updated literature review on the others, see *M. P. Poto*, Thinking of Ocean Governance: by whom and for whom? in *V. De Lucia, A. Oude Elferink, L. Nguyen* (eds), The Areas Beyond National Jurisdiction, forthcoming in 2021.

[28] On a critical appraisal see: *Brad Coombes*, Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera, Espace populations sociétés [En ligne], 2020/1-2 | 2020, on line 20.6.2020, visited 29.10.2020. URL: http://journals.openedition.org/eps/9857; DOI : https://doi.org/10.4000/eps.9857.

[29] *R. S. Abate* (2019). Rights of Nature: US and Foreign Domestic Perspectives. In *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources* Cambridge: Cambridge University Press. doi:10.1017/9781108647076.006, pp. 120–172.

the exploitation and domination of nature with the introduction of guardianship and nature-protection mechanisms, originating in indigenous cosmo-visions. Protecting nature and protecting indigenous views are two faces of the same coin.

10.6 Indigenous Environmental Declarations and Approach to Climate Change: from the Kari-Oca to the Lima Declaration

A strong alternative voice to the dominant narrative consolidated in the international legal framework on climate law and indigenous rights is raised by the scholarship that proposes approaching climate change and indigenous peoples from the perspective of *indigenous environmental justice* (IEJ). This section analyzes the content and the evolution of legal instruments and declarations acclaimed by indigenous peoples aimed at continuing to live *in harmony with* the Earth our Mother, in view of the official environmental and climate law conferences organized by the international community of states.

The first declaration where indigenous peoples expressed their role to continue building and formulating their commitment (*duty*) to save Mother Earth was accepted by acclamation in Kari-Oka Village, at Sacred Kari-Oka Púku, Rio de Janeiro, Brazil, 25–30 May 1992 (Kari-Oca Declaration).[30] Significant aspects of the Declaration show an approach very different from the one adopted in conventional legal mechanisms, and follow an indigenous protocol. For example, in the preamble, the indigenous peoples, united in one voice, express their collective gratitude to the Indigenous Peoples of Brazil, and by doing so celebrate their spiritual unity with the land, and emphasizing the relationality and connectivity with the ancestors living in the land of Brazil.[31] Such ties connect past and future: they originate in the footprints of the ancestors, and are maintained by the act of following such footsteps towards the future. Moreover, from these ties stem the inherent rights to self-determination and to decide forms of government, of land-use, of children's education, and of cultural identity. The Declaration continues:

> "We continue to maintain our rights as peoples despite centuries of deprivation, assimilation and genocide. We maintain our inalienable rights to our lands and territories, to all our resources – above and below – and to our waters. We assert our ongoing responsibility to pass these onto the future generations. We cannot be removed from our lands. We, the Indigenous peoples are connected by the circle of life to our lands and environments."[32]

In this way, the declaration in itself becomes a manifestation of a collective responsibility to carry indigenous minds and voices into the future.

Two subsequent declarations (the Kimberley[33] and the Indigenous Peoples Kyoto Water Declaration[34]) contribute to the building of an 'indigenous *corpus* of norms' dealing with

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[30] Although the original name of the Kari-Oka people is spelled with two "k"s, the two Declarations that carry the name are spelled Kari-Oca 1 and Kari-Oca 2. Available at https://www.cwis.org/document/kari-oca-declaration/, visited in November 2020. The declaration was acclaimed in the occasion of the UN Earth Summit 1992.

[31] See Preamble of the Declaration: https://www.cwis.org/document/kari-oca-declaration/. cit.

[32] See Declaration, para 5 and 6: https://www.cwis.org/document/kari-oca-declaration/. cit.

[33] Available at https://sustainabledevelopment.un.org/content/dsd/dsd_aofw_mg/mg_indipeop_declarations.shtml, visited in August 2020.

[34] Ibidem.

environmental rights, human rights, and environmental justice. The Kimberly Declaration renewed the ties with the past and the future by re-affirming the spiritual and material relationship between indigenous peoples and the land, between past and future generations, with the vivid image of ties as "umbilical cords" and "dust of […] ancestors". The Kyoto Water Declaration connects the right to water to the right of self-determination, as self-determination includes the practice of cultural and spiritual relationship with water. To strengthen the obligation to respect the right to water and self-determination, the Parties propose participatory measures to share experiences, knowledge and concerns (traditional knowledge).

Using the terminology adopted in the sections above, we see that here participatory rights for nature and indigenous rights (self-determination, the right to be heard) are clearly connected, and consultation mechanisms are proposed as instruments to *recover and retain the connection* to water. The Declaration closes with a plan of action, which is structured as a list of requests to States and to the international community to honor the obligations and fulfill the mandates of the international agreements.

In 2010, in Mandaluyong, the Philippines, eighty indigenous women coming from sixty indigenous nations gathered together to approve the Mandaluyong Declaration on indigenous women, climate change and REDD+.[35] Here, as in the previously described indigenous instruments, the preamble is used as a very strong tool to set the stage for the enumeration of rights, obligations, and plan of action. The opening formula establishes the strong connection with the ancestors who for thousands of years lived in unity with the spirits of the land and Mother Earth. In listing the indictment of indifference, the parties denounce climate change as causing the disruption of rituals, traditions, and in general of the bond between humans and non-humans. The list of the suggested actions in this Declaration is extensive, addressing issues as food, water, and energy insecurity.

The Declaration then identifies priority areas of work including awareness-raising, skills-training workshops, information dissemination, research, enhancement of communities' capacity to adapt to and mitigate climate change, increase in political participation and policy advocacy, and networking. Interesting and novel is the closing formula which urges cooperation with states, the UN, intergovernmental organizations, institutions, indigenous peoples' formations, *to effectively implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in all climate change mitigation and adaptation* programs and activities. Such cooperation is possible, in the words and commitments of the Parties, by developing a holistic framework for gender sensitive, ecosystem, human rights and knowledge-based approach to climate change adaptation and mitigation efforts.

The Manaus Declaration of 2011 was a preparatory act of Indigenous Peoples on Rio +20 and Kari-Oca 2.[36] The Declaration makes explicit reference to the holistic framework for sustainable development, by continuing to express concerns about the substance of and processes related to the green economy and the institutional framework for sustainable development. The holistic framework envisioned in the Declaration contains the same elements enlisted in the Mandaluyong Declaration, with the addition of culturally sensitive approaches,

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[35] Available at https://www.asianindigenouswomen.org/index.php/climate-change-biodiversity-and-traditional-knowledge/climate-change/64-mandaluyong-declaration-of-the-global-conference-on-indigenous-women-climate-change-and-redd-plus/file, visited in August 2020.

[36] Available at http://www.forestpeoples.org/sites/fpp/files/publication/2011/09/final-manaus-declarationeng.pdf, visited in August 2020.

by hinting at the introduction of the element of culture that will become the suggested fourth pillar of sustainable development in the Kari-Oca 2 Declaration.

Kari-Oca 2, coming twenty years after the Kari-Oca Declaration, reinforced the strongest indictment of the tide of life commodification endorsed by international instruments[37] and the false promises of the Green Economy.[38] The way forward to the valuation of life and the reparation to the gross violations of indigenous rights perpetrated by attempts to privatize and commodify the natural world, is, according to Kari-Oca 2, possible only by means of a radical transformation. Such transformative change is possible only through common societal efforts based on indigenous knowledge, not on capitalist development. The ethics of the Living Well – *Buen Vivir* – are underscored and promoted, with an open invitation to all civil society to protect and promote indigenous rights and worldviews, respect natural law, indigenous spirituality, and the values of reciprocity, *harmony with nature*, solidarity and collectivity.[39] The values of caring and sharing are emphasized as crucial in enabling a just and equitable world. The closing formula reiterates the solidity of the path built following the footsteps of the ancestors. Hinting at the emptiness of concepts not supported by genuine acknowledgement of Mother Earth's centrality, Kari-Oca 2 shuns the vocabulary used by the international community regarding actions to prevent and reduce the adverse effects of climate change. The terms "climate action" and "indigenous rights enhancement" are not explicitly mentioned (and probably deliberately omitted), replaced by the ethics of *Buen Vivir*, which encapsulates nature-centered indigenous visions, as well as the essence of living in harmony with the Creation, constituting in itself "an appropriate basis for responding to climate change."[40]

The Lima Declaration, approved at the World Conference of Indigenous Women in Lima in 2013,[41] opens by supporting inclusion and visibility for indigenous women, and develops by noting the historic, sacred and continuing responsibility that indigenous peoples have towards the protection of Mother Earth. The primary role played by women in safeguarding the Planet and her cycles is also expressly mentioned. Further, in light of the compounded crises of climate change, the role of indigenous women in demanding the intervention of States is particularly emphasized. A list of recommendations closes the Declaration, followed by the signatures of 207 indigenous women's representatives from all over the world.

10.7 Part 1: Concluding remarks

[37] Specific reference is made to the UN Conference on Sustainable Development (UNCSD), or Rio+20, available at: https://sustainabledevelopment.un.org/rio20, visited in November 2020.

[38] Available at https://www.ienearth.org/kari-oca-2-declaration/ visited in August 2020.

[39] For the ethics of Buen Vivir, see *Thomson, B. Pachakuti*: Indigenous perspectives, *buen vivir*, *sumaq kawsay* and degrowth. *Development* 54, 448–454 (2011). https://doi.org/10.1057/dev.2011.85; *N. Chassagne*, Sustaining the 'Good Life': Buen Vivir as an alternative to sustainable development, *Community Development Journal*, Volume 54, Issue 3, July 2019, Pages 482–500, https://doi.org/10.1093/cdj/bsx062; *A. P. Cubillo, A. L. Hidalgo and J. A. Domínguez,* (2014) El pensamiento sobre el Buen Vivir. Entre el indigenismo, el socialismo y el postdesarrollismo, *Revista Del CLAD Reforma Y Democracia*, 60, 27; Arcila Calderón C., Barranquero A., González Tanco E., From Media to Buen Vivir: Latin American Approaches to Indigenous Communication De los medios al Buen Vivir: enfoques latinoamericanos de la comunicación indígena Das Mídias ao Buen Vivir: Abordagens Latino-Americanas para a Comunicação Indígena, in Communication Theory 28 (2018) 180–201.

[40] *R. Cochrane,* (2014), Climate Change, Buen Vivir, and the Dialectic of Enlightenment: Toward a Feminist Critical Philosophy of Climate Justice. Hypatia, 29: 576–598. doi:10.1111/hypa.12099.

[41] Available at http://www.forestpeoples.org/en/topics/gender-issues/news/2013/11/lima-declaration-world-conference-indigenous-women-october-2013 visited in August 2020.

We have presented the two paths towards recognition of indigenous rights in the context of climate action, illustrating the regulatory framework of indigenous peoples in the face of climate action, their vulnerability, and their strengths. The two scenarios, CLIP and IEJ, are interlaced, mutually supporting, and respectful of their respective underlying rationales. Progress in CLIP has led to the recognition of nature-centered visions, with the inclusion of indigenous knowledge in the legal fabric of the international agreements; in IEJ the gaps in CLIP are highlighted, among them the need to improve the ability to hear the unheard, the need to acknowledge the link to Mother Earth as a part of the legal fabric of international agreements on nature protection, and therefore solutions for improvement are indicated. The two approaches may appear distinct and distinguishable if for no other reason than that they are promoted, supported, and developed by different sets of actors: the community of States, in the former case, the indigenous representatives in the latter. Closer examination reveals that some of the branches of CLIP seem to lead to conclusions analogous to the aims pursued by the IEJ's approach, with the recognition of rights *of* nature, passing through the intermediate step of the participatory rights *for* nature's recognition, what we called previously 'procedural environmental rights'. Ultimately, the two approaches, albeit not aligned, contain elements of complementarity.

Part 1 contributes to the body of knowledge on nature protection, indigenous rights, and climate action by engaging for the first time with an analysis of conventional international law instruments *and* indigenous agreements, showing how an integrated analysis of different regulatory framework, and the revitalization of indigenous law is in itself an attempt to address indigenous peoples' vulnerability, and to leverage their strengths in the face of climate change.

Part 2

10.8 The nexus between climate change and human rights: A bird's-eye view

Until recently, most States have considered climate change as a purely environmental problem. However, climate change directly or indirectly impacts on the human rights of individuals and communities.[42] Various international bodies have now recognized this intrinsic connection between climate change and human rights, and its special relevance to indigenous peoples. The Office of the UN High Commissioner for Human Rights[43] and the UN Human Rights Council[44] took the lead in recognizing climate change as a matter of human rights. The 2009 and 2011 resolutions of the Human Rights Council stress that 'climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, *inter alia*, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human

[42] For a general overview of the immense human rights implications of climate change, see the series of reports by Potsdam Institute, 'Turn Down the Heat': https://www.worldbank.org/en/topic/climatechange/publication/turn-down-the-heat

[43] Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61(15 January 2009), paras. 71 & 86.

[44] The Human Rights Council not only adopted resolutions on human rights and climate change in 2008, 2009 and 2011, but also that its Universal Periodic Review process has considered the issue several times. See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15528&LangID=E

rights obligations related to access to safe drinking water and sanitation'.[45] Further, these resolutions recognize that indigenous peoples and minorities are the most vulnerable to and affected by climate change, and emphasize that under no circumstances may these peoples be deprived of their own means of subsistence. Both resolutions call for integrated action affirming that human rights obligations, standards and principles have the ability 'to inform and strengthen international and national policymaking in the area of climate change'.

The 2015 Paris Agreement concretizes this development by expressly recognizing the obligations of States to respect, promote, and protect the human rights of indigenous peoples while taking action to address climate change.[46] The Agreement stresses that adaptation actions should be participatory, taking into consideration vulnerable communities, and should be based on the best available science and traditional knowledge of indigenous peoples.[47] After the Paris Agreement, several UN Special Procedures[48] and UN treaty monitoring bodies have widely discussed the human rights implications of climate change and the associated duties of States. Treaty-monitoring bodies underline that the duty of States to combat climate change 'requires respecting human rights, by refraining from the adoption of measures that could worsen climate change; protecting human rights, by effectively regulating private actors to ensure that their actions do not worsen climate change; and fulfilling human rights, by the adoption of policies that can channel modes of production and consumption towards a more environmentally sustainable pathway'.[49] Further, 'failure to prevent *foreseeable human rights harm* caused by climate change or a failure to mobilize the maximum available resources in an effort to do so' constitutes a breach of States obligation to respect, protect and fulfil human rights.[50] The Inter-American Court of Human Rights (IACtHR) joined this consensus by issuing its landmark Advisory Opinion on the 'interdependence and indivisibility' between environment and human rights in 2017, and its judgment of 6 February 2020 recognizing the right to a healthy environment as an 'autonomous' right of indigenous peoples.[51]

These are noteworthy positive developments that underlie the importance of applying human rights norms at every stage of the decision-making process of climate policies.[52] They

[45] UN Human Rights Council, Res. 18/22, Human Rights and Climate Change, UN Doc. A/HRC/RES/18/22 (17 October 2011); UN Human Rights Council, Res. 10/4, Human Rights and Climate Change, 10th Session (25 March 2009).
[46] The Paris Agreement, preamble.
[47] The Paris Agreement, Art. 7(5).
[48] See 'Climate Change and Human Rights', Statement of the UN Special Procedures Mandate Holders on the Occasion of Human Rights Day (Geneva, 10 December 2014), available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E; Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52 (1 February 2016); Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/40/55 (8 January 2019).
[49] CESCR, Statement on Climate Change and the International Covenant on Economic, Social and Cultural Rights (8 October 2018), para. 9, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E (accessed, November 2020); HRC, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36 (30 October 2018), para. 62; Joint statement of five human rights treaty bodies on 'Human Rights and Climate Change', available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E (accessed, November 2020).
[50] CESCR, Statement on Climate Change and ICCPR, para. 6; HRC, *Portillo Cáceres v. Paraguay*, UN Doc. CCPR/C/126/D/2751/2016, 25 July 2019 (emphasis added).
[51] IACtHR, *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Series C No 400 (Judgment of 6 February 2020). See the IACtHR press release here: https://www.corteidh.or.cr/docs/comunicados/cp_24_2020_eng.pdf
[52] For a detailed discussion of the interplay between climate change and human rights, see Chapter X in this volume.

are also of special significance in enabling climate change-related litigation in the context of human rights, discussed in the next section.

10.9 Human Rights-Based Climate Change Litigation

Litigation has become a widely used method for holding States accountable to their climate-change obligations. Much of the climate-change litigation around the globe is domestic and applies creative arguments in constitutional, environmental, human rights, and tort law.[53] National courts have played an active role in requiring States to adopt action plans tailored to mitigate climate change as well as to adapt to its unavoidable impacts. Prominent such cases where human rights formed part of the argument, if not the judgment, include *Urgenda Foundation v. Kingdom of the Netherlands*, *Juliana v. United States*, and *People v. Arctic Oil*. There is also an increasing trend towards petitioners filing climate-change lawsuits before international human rights bodies. This 'human rights turn'[54] in climate-change litigation is a new development in the field of climate change. This section discusses instances where indigenous peoples have used international human rights mechanisms to get redress to the violations of their human rights resulting from the impacts of global warming and climate change caused by acts and omissions of States.

10.9.1 Arctic Indigenous Peoples' Petitions to the IACHR

The Arctic region is particularly sensitive to global warming: temperatures have been rising at least two times faster than the global average.[55] Obviously, the indigenous peoples of the region are especially vulnerable. In response to the threats posed by climate change, two groups of Arctic indigenous peoples – the Inuit and Athabaskan peoples – independently petitioned the IACHR in 2005 and 2013, respectively, seeking relief for violations of their human rights resulting from climate change caused by States' actions and omissions. This sub-section offers a critical review of these two cases.

10.9.1.1. The 2005 Inuit Petition to the IACHR

In 2005, the Inuit of the United States (US) and Canada[56] filed a petition to the IACHR ('the Inuit Petition') claiming that the US – by its failure to take adequate policy steps to reduce its emission of greenhouse gases – violated their human rights.[57] The Petitioners claimed that, at the time of the Petition, US climate-change policy focused only on reducing greenhouse gas intensity, and the US did not have any policies which would ensure overall emissions

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[53] *J. Setzer and R. Byrnes*, Global Trends in Climate Change Litigation: 2019 Snapshot, *Policy Report* (July 2019).

[54] *J. Peel and H. M. Osofsky*, A rights turn in climate change litigation? (2018) 7(1) *Transnational Environmental Law*, 37–67, p. 40.

[55] The 2004 Arctic Climate Impact Assessment Report, p. 8.; Intergovernmental Panel on Climate Change, Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2014), 12.

[56] Although the Inuit are indigenous peoples living within the territories of four Arctic States – northern and western Alaska in the United States, northern Canada, Chukotka in the Russian Federation, and Greenland (Denmark) – the petition includes only the Inuit from the United States and Canada for the other two States are not part of the Inter-American Region.

[57] 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 (7 December, 2005), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf (accessed, August 2020). The Petition was filed by the then Chair of the Inuit Circumpolar Conference (Ms Sheila Watt-Cloutier), on behalf of herself, 62 other named individuals, and all Inuit of the Arctic Regions of the US and Canada who have been affected by impacts of climate change described in the Petition.

reductions.[58] Moreover, the US had explicitly rejected international overtures and compromises, including the Kyoto Protocol, which demonstrated its refusal 'to take meaningful action to tackle global warming'.[59] The Petition further cited the multiple impacts of climate change on the Inuit that resulted from inadequate regulation of emissions: *inter alia*, melting permafrost and worsening storms damage Inuit homes; changes in animal populations threaten their livelihood as hunting becomes more precarious; and ice thaws make it dangerous to use traditional travel routes.[60] Climate change also greatly alters large tracts of Inuit traditional lands and makes them inaccessible. Moreover, summer sea ice – an important extension of Inuit traditional land – is ceasing to exist, and winter sea ice is becoming thinner and unsafe to travel on. Slumping, erosion, landslides, and violent sea storms have destroyed coastal lands, wetlands, and lakes, and have detrimentally changed the features of the landscape upon which the Inuit depend. Limited ability to travel to lands traditionally used for subsistence, and the reduced wildlife harvest, have diminished and are likely to destroy the Inuit culture of hunting and food sharing.[61] Traditional knowledge is also becoming unreliable because of the rapidly changing environment.

The Petitioners claimed that, by its failure to take immediate and effective action to regulate emissions of greenhouse gases, the US violates the rights of the Inuit to enjoy their culture, to use their traditional lands, to the preservation of health, life, physical integrity, and security, the right to their means of subsistence, to residence, movement, and inviolability of the home.[62] Basically, the Petition underlined that the culture, economy, and identity of the Inuit as an indigenous people depend on the ice and snow; and it claimed recognition of the Inuit's 'right to be cold'.[63] In making these human rights claims, the Petition relied upon the norms contained in the American Declaration of the Rights and Duties of Man (ADRDM), as the US had not ratified the American Convention on Human Rights (ACHR) or ILO Convention 169, and the UNDRIP had not been adopted at that time. Yet, the Petition invited the Commission to interpret the rights contained in ADRDM in light of broader international legal developments, including the global human rights instruments.[64] In their request for relief, the Petitioners asked the IACHR to declare the USA as internationally responsible for violations of human rights affirmed in ADRDM and in other instruments of international law.

The Petitioners also requested the IACHR to recommend that the US:[65]

a) adopt mandatory measures to limit its emissions of greenhouse gases;

b) establish and implement, in consultation with the affected Inuit, a plan to protect and mitigate the impacts of its emissions on Inuit culture and resources, including the land, water, snow, ice, and plant and animal species used or occupied by the Inuit; and

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[58] Inuit Petition, pp. 105–106.
[59] Inuit Petition, p. 111.
[60] Inuit Petition, pp. 35–67.
[61] Inuit Petition, 54–56.
[62] Inuit petition, pp. 74–96.
[63] See *S. Jodoin, S. Snow and A. Corobow*, 'Realizing the Right to be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming' (2020) 54(1) *Law and Society Review* 168; *J. Harrington*, 'Climate Change, Human Rights, and the Right to Be Cold' (2007) 18(3) *Fordham Environmental Law Review* 513; and *M. Wagner*, 'The Right to be Cold: Global Warming and Human Rights' (2008), *The Global Network for Human Rights and the Environment*, available at: https://gnhre.org/2015/10/25/the-right-to-be-cold-global-warming-and-human-rights-m-wagner/ (accessed, August 2020).
[64] Inuit Petition, p. 96–102.
[65] Inuit Petition, p. 118.

c) establish and implement, in consultation with the affected Inuit communities, a plan to provide assistance necessary for Inuit to adapt to the impacts of climate change that cannot be avoided.

These claims are very holistic, requiring the US not only to refrain from actions that increase emissions but also to take positive measures, in consultation with the Inuit, to reduce emissions as well as to rectify the current and future impacts of climate change on the human rights of the Inuit.

Unfortunately, the IACHR rejected the Petition with a two-paragraph letter stating that 'the information provided [did] not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration'.[66] Following this letter, the Inuit Petitioners requested the Commission to hold a hearing on the interplay between climate change and human rights so as 'to assist the Commission in exploring and better understanding the relationship between global warming and human rights'.[67] Whereas the IACHR heard the testimonies of experts on the issue,[68] the Commission failed to comment on the substance of the hearing, thereby missing an important opportunity to provide further precise clarification on the reasons for its dismissal of the Inuit Petition, leaving the issue in uncertainty.

However, despite its rejection by the IACHR, the Inuit Petition is significant in that it, for the first time, framed a climate-change problem, typically treated as an environmental law issue, in the broader context of human rights law. Thus, it succeeded in initiating discourse about the interplay between climate change and human rights. Although the Petition had limited capacity to compel action (even when the IACHR handed down a positive ruling), it served as a bridge and means of dialogue between the US and indigenous peoples through a shared commitment to the protection of human rights that are affected by climate change.[69] The Petition also generated broad publicity that helped to raise awareness about the ways in which climate change is affecting indigenous peoples, and showed that international human rights bodies are appropriate institutions for addressing such cross-cutting problems.[70] In this respect, the Petition set an important precedent and contributed to the progressive development of indigenous peoples' rights in the context of climate-change effects. As discussed in the

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[66] Letter from Ariel E Dulitzky, Assistant Executive Secretary, Organization of American States, to Paul Crowley, legal representative (16 November 2006), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf (accessed, August 2020).

[67] Inuit Petitioners, 'Request for a Hearing on the Relationship between Global Warming and Human Rights' (15 January 2007), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070115_na_na-1.pdf (accessed, October 2020).

[68] Inter-American Commission on Human Rights, 'Global Warming and Human Rights Hearing – 127th Ordinary Period of Sessions' (1 February 2007), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070201_na_reply-1.pdf (accessed, October 2020); Earth Justice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights', (1 March 2007), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070301_na_na-2.pdf (accessed, October 2020); Center for International Environmental Law, 'Global Warming and Human Rights: Testimony of Donald M. Goldberg before the Inter-American Commission on Human Rights', (1 March 2007), available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070301_na_na.pdf (accessed, October 2020).

[69] *H. M. Osofsky*, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 *American Indian Law Review* 675.

[70] Ibid. p. 696; *J. Gordon*, 'Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition' (2007) 7 (2) *Sustainable Development Law & Policy* 55, 55.

following section, the Athabaskan peoples followed in the footsteps of the Inuit by bringing a similar climate-change case before the IACHR.

10.9.1.2. The 2013 Athabaskan Peoples' Petition to IACHR

In 2013, the Athabaskan peoples,[71] another indigenous people of the Arctic region greatly impacted by the effects of climate change, used the Inter-American human rights system in an attempt to gain recognition of the violations of their human rights resulting from such climate-change effects. They submitted a petition to the IACHR (hereafter the Athabaskan Petition)[72] seeking relief from violations of their rights resulting from rapid Arctic warming and melting caused by emissions of black carbon by Canada. Like the Inuit Petition, the Athabaskan Petition discusses the causes and effects of climate change in the Arctic, how these impacts violate the human rights of the Athabaskan peoples, and offers arguments as to why Canada is responsible for such climate change-induced human rights violations.

The Petitioners cited black carbon pollution from Canada as a significant cause of the warming and melting of the Arctic ecosystems upon which the indigenous Athabaskan peoples depend for their lives, livelihoods, and cultural practices. Black carbon has a double warming effect in Polar regions: on the air and on land surfaces. While in the air, black carbon absorbs sunlight and heats the atmosphere; and when it falls onto snow and ice, black carbon reduces the reflectivity of these surfaces, accelerating the rate of melting and exposing underlying darker water or land that absorbs more incoming sunlight and leads to additional warming.[73] The Athabaskan Petition argued that Canada is a significant contributor of black carbon emissions in the Arctic region. Diesel engines, residential heating stoves, agricultural and forest fires, and industrial facilities are the main sources of black carbon emissions in Canada.[74] Black carbon emissions are 'short-lived' climate pollutants which remain in the atmosphere for about a week and then settle on the ground.[75] According to the Petition, the short-lived nature of black carbon emissions means that immediate emissions reduction can reduce near-term warming in the Arctic, but that Canada had failed to take such measures.[76] The Petition claimed that by failing to take black carbon emissions reduction measures, Canada violated several human rights guaranteed to the Athabaskans in the ADRDM, including the rights to culture, property, subsistence and health.[77]

In addition to the specific provisions of the ADRDM, the Petitioners called on the IACHR to consider the relevant provisions of the ACHR (as reflecting customary rules and as an interpretative tool of the ADRDM) as well as other relevant obligations that Canada assumes

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[71] The Athabaskan peoples are indigenous peoples residing within the Arctic regions of Canada (within the territories of Yukon, Northwest Territories, Northern British Columbia, Alberta, Saskatchewan, and Manitoba) and United States of America (Alaska). The Athabaskan Council is an international organization that represents these peoples.

[72] 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, Submitted by the Arctic Athabaskan Council on behalf of all Arctic Athabaskan Peoples of the Arctic Region of Canada and the United States (23 April 2013), available at: https://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf (accessed, October 2020).

[73] Athabaskan Peoples' Petition, p. 16, 18.

[74] Athabaskan Petition, p. 16.

[75] Athabaskan Peoples' Petition, p. 9.

[76] Athabaskan Peoples' Petition, p. 14.

[77] Athabaskan Petition, p. 57–78. it is worth noting here that Canada, like the US, has not ratified the American Convention on Human Rights.

under customary international law[78] and treaties.[79] Accordingly, the Petitioners requested the IACHR to declare that Canada's failure to implement adequate measures to substantially reduce its black carbon emissions violates the rights of Athabaskan peoples as affirmed in the ADRDM.[80] Further, the Petitioners requested the IACHR to recommend that Canada:[81]

a) take steps to protect the rights of Arctic Athabaskan peoples by adopting mandatory measures to limit emissions of black carbon from key Canadian emissions sectors;

b) take into account the climate impacts of black carbon emissions on the Arctic and the affected Arctic Athabaskan peoples in evaluating, and before approving, all major government actions; and

c) establish and implement, in consultation with the affected Arctic Athabaskan peoples, a plan to protect Arctic Athabaskan culture and resources from the effects of accelerated Arctic warming and melting, including the land, water, snow, ice, and plant and animal species used or occupied by the Arctic Athabaskan peoples.

This case has remained pending for the last seven years; it still remains to be seen whether the IACHR will deliver a favorable ruling. However, here we can indicate the comparative advantages of the Athabaskan Petition over the previous Inuit Petition.

First, the Athabaskan Petition demonstrates a strong causal link between Canada's failure to take emissions reductions measures and the consequent rights violations. Unlike the Inuit Petition, which dealt with overall global warming resulting from greenhouse gases in general, the Athabaskan Petition specifies black carbon emissions as the cause of climate change in the Arctic region. This specificity concentrates the argument on regional pollution rather than the broader issue of global climate change.[82] The Petition describes black carbon as 'a particularly potent climate change force over ice and snow regions',[83] and it underlines that reducing black carbon along with other short-lived climate pollutants 'could quickly decrease positive climate forcing and hence climate warming'.[84] These arguments, directly connecting the failures of Canada to regulate emissions of black carbon that have resulted in climate change with the impacts of such change on the rights of the Athabaskan peoples, seems both concrete and convincing.[85] The Petition is prepared so as to address the 'causality challenge' and 'cross-temporal challenge' manifested in the Inuit Petition.

Second, recent developments in international law and jurisprudence related to climate change and human rights (discussed above) have strongly supported the Athabaskan Petition; and these will inform the IACHR. The 2017 Advisory Opinion and the 2020 judgment of the IACtHR are of particular relevance to the Athabaskan Petition. Clearly articulating the links between climate change and human rights, these decisions could provide additional authority to the issues raised by the Athabaskan peoples. In particular, the IACtHR addressed the issue

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[78] This particularly refers to Canada's duties to avoid transboundary harm and to protect the environment in line with the precautionary principle (Athabaskan Petition, p. 54).
[79] Athabaskan Petition, p. 51.
[80] Athabaskan Peoples' Petition, p. 86.
[81] Athabaskan Peoples' Petition, p. 86–87.
[82] *D. McCrimmon*, 'The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change' (2016) 6(2) *The Polar Journal* 398–416, at p. 411.
[83] Athabaskan Peoples' Petition, p. 15.
[84] Athabaskan petition, p. 18.
[85] For a similar conclusion, see *A. Szpak*, 'Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change – Business as Usual or a Breakthrough?' (2020) *Climate Change*, https://doi.org/10.1007/s10584-020-02826-y (accessed, October 2020).

of extraterritorial jurisdiction in climate-change cases. It held that, pursuant to Article 1(1) of the ACHR, States are obliged to use all measures necessary to prevent activities conducted on their territory or under their control from affecting the rights of individuals or communities, whether they are residents of that State or not.[86]

According to the IACtHR, the exercise of jurisdiction occurs when a State from which the harm originated establishes 'effective control over the activities that resulted in environmental damage', thus leading to violation of human rights. The Court has made it clear that, in the context of transboundary environmental damage, 'effective control' does not mean that the State should exercise control over the territory of the victims of violations of human rights, or the victims themselves. In the current case, Canada is presumed to have exercised effective control over the activities generating black carbon emissions that resulted in transboundary harm, in so far as such activities have been conducted within the territorial limits of Canada. The Advisory Opinion is further significant in that it indicates that cross-border human rights claims related to transboundary environmental damage may be pursued before the Court itself or before the IACHR.[87] Thus, the Advisory Opinion of the IACtHR offers 'a fresh opportunity to found the claim that harm caused by black carbon emission is a human rights violation that has an extraterritorial dimension'.[88]

Given these comparative advantages, it is greatly hoped that the IACHR will issue a favorable decision that can contribute to stronger protection of the rights of indigenous peoples. A positive decision would also serve as a catalyst for UN human rights monitoring bodies, enabling them to interpret the relevant provisions of their respective human rights instruments so as to protect and address the complex impacts of climate change on human rights of indigenous peoples. As discussed in the next section, the first-ever climate-change complaint has been lodged before the UN Human Rights Committee (HRC), a committee monitoring the ICCPR, by the Torres Strait Islanders.

10.9.2 The 2019 Torres Strait Islanders Complaint to the UN Human Rights Committee (HRC)

Like the Arctic region, climate change has been the 'greatest existential threat' to several small island States and indigenous peoples of the Pacific region, with sea-level rise occurring up to four times the global average in some States.[89] On the frontline are the Torres Strait Islanders, who, living on low-lying islands defined as part of Queensland, are among the most vulnerable peoples severely affected by climate change in Australia.[90] Climate change puts their rights to land and sea, and their unique culture and ways of life, under immediate and irreversible threat. Rising sea levels and tidal surges have already caused devastating effects, including erosion and the flooding of homes, lands, burial grounds and cultural sites.[91] Rising sea temperatures

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[86] IACtHR, 2017 Advisory Opinion, Official Summary, p. 3.
[87] IACtHR, 2017 Advisory Opinion, Official Summary, p. 3–4. See also *A. Szpak*, 'Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change – Business as Usual or a Breakthrough?'.
[88] *A. Savaresi and J. Auz*, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) *Climate Law*, p. 10.
[89] 'Pacific Islands call on help from neighbouring "bigger countries" to battle climate change', SBS News, May 2019, available at: https://www.sbs.com.au/news/pacific-islands-call-on-help-from-neighbouring-bigger-countries-to-battle-climate-change (accessed, November 2020).
[90] *W. Steffen, J. Hunter and L. Hughes*, *Counting the Coasts: Climate Change and Coastal Flooding*, Climate Council Australia Limited, 2014, pp. 7–11.
[91] See *M. Roache*, 'The Mayor Fighting to Save Her Island Home from Climate Change', *Time*, April 2019, available at: https://time.com/5572445/torres-strait-islands-climate-change/ (accessed, November 2020); *O. Cordes-Holland*, 'The Sinking

have also affected marine environments, causing coral bleaching and ocean acidification, and disrupting the habitats of traditionally used marine species, such as dugong, saltwater crocodiles, and turtles.[92] Climate change presents a real threat of destruction of sacred places of deep cultural and spiritual meaning, as well as the possible forced removal of the islanders from their traditional land and sea territories.[93]

These current and inevitable future climate catastrophes led a group of Torres Strait Islanders[94] to present a climate-change complaint before the HRC. They allege that Australia violates their fundamental human rights recognized under ICCPR by its failure to take adequate action to address climate change.[95] Specifically, they claim that Australia has violated their right to culture (Article 27), the right to be free from arbitrary interference in privacy, family and home (Article 17), and the right to life (Article 6). According to the applicants, these rights have been violated both by Australia's insufficient greenhouse gas mitigation targets and plans, as well as by its failure to implement adequate coastal defense and resilience measures (infrastructure) on the islands, such as seawalls.[96] The applicants emphasize that, as of the time of their application, Australia has not adopted concrete policies to meet its Nationally Determined Contribution (NDC) under the Paris agreement or low emissions reductions target of 26–28% from levels measured in 2005 by 2030.[97] They further emphasize that the catastrophic nature of the predicted future impacts of climate change, including total submergence of their ancestral homelands, is a sufficiently severe impact to constitute a violation of their human rights.[98] Accordingly, the applicants request the HRC to find that Australia has violated their human rights, and to require Australia to take sufficient measures to address the impacts of climate change on the people of the Torres Straits Islands. These measures include:

i) to reduce its greenhouse gas emissions by at least 65% below 2005 levels by 2030 and going net zero by 2050;

ii) to phase out thermal coal for domestic electricity generation and export markets; and

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of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9 *Melbourne Journal of International Law* 1.

[92] *Kristen Lyons*, 'Torres Strait Islanders ask the UN to hold Australia to account on climate "human rights abuses"', *The Conversation,* 26 May 2019, available at: https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262 (accessed November 2020).

[93] For a detailed discussion, see *C. Farbotko et al*, 'Transformative Mobilities in the Pacific: Promoting Adaptation and Development in a Changing Climate' (2018) 5 *Asia and the Pacific Policy Studies* 393–407; *W Steffen, J Hunter and L Hughes,* op.cit.

[94] The applicants are eight islanders from four different islands in the Torres Strait represented by the Torres Strait Sea and Land Council (Gur A Baradharaw Kod) – a native title body representing the collective interests of the region's Traditional Owners by initiating and developing policy and programs. The applicants were also supported by lawyers from an environmental law NGO, Client Earth. See Client Earth, 'Climate threatened Torres Strait Islanders bring human rights claim against Australia', available at: https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/ (accessed, November 2020).

[95] The complaint was lodged before the HRC in May 2019. However, the text of the official complaint is not publicly available due to prohibition by the rules of procedure of the HRC. Thus, our analysis here builds on secondary materials, particularly those materials released by Client Earth and other media outlets.

[96] Client Earth, 'Climate threatened Torres Strait Islanders bring human rights claim against Australia' (n 94).

[97] Client Earth, 'Human Rights and Climate Change: World-first Case to Protect Indigenous Australians', available at: https://www.clientearth.org/human-rights-and-climate-change-world-first-case-to-protect-indigenous-australians/ (accessed, November 2020).

[98] Client Earth, Torres Strait FAQ, available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf (accessed November 2020).

iii) to take adequate coastal defense measures in consultation with the Island communities concerned.[99]

Regarding the latter, the applicants request Australia to allocate at least $20 million for emergency measures such as seawalls, and make sustained investment in long-term adaptation measures to ensure that the Torres Straits Islands remain habitable.[100]

Australia responded to the complaint by requesting that the HRC dismiss the case, arguing that 'it concerns future risks, rather than impacts being felt now'; thus effects constituting violations of human rights have not yet been suffered.[101] This sounds like a blatant denial of the highly evident fact that some Island communities have already experienced severe flooding and ocean inundation. Further, Australia argued that, since it is not the main or only contributor to global warming, climate change action is not its legal responsibility under human rights law.[102] Both arguments stand on the causality and temporal challenges often invoked in the context of climate-change litigation, as discussed in the sections above.

The HRC is expected to issue its Views in the course of 2021. The complaint offers an important opportunity for the HRC to elaborate relevant human rights standards that interplay with States' climate-change compliance measures, and how state responsibility might arise in this context. As highlighted above, recent developments in international law and jurisprudence on climate change and human rights, including the HRC's own General Comment and View, are driving forces for a favorable decision by the Committee. A positive ruling from the HRC will not only create international pressure on Australia to enhance the protection of the Islanders' rights, but also would serve as a guide to similar domestic, regional, and international human rights claims. Even if the HRC should find no violations, the complaint is still historic as a first 'show of defiance in the face of Australia's years of political inertia and turmoil over climate change'.[103]

10.10 Part 2: Concluding Remarks

Human rights have clearly become part of the climate-change agenda. Recent developments in international law and jurisprudence, including practices of several UN bodies, recognize the interplay between climate change and human rights violations in the context of indigenous peoples. This human rights and climate change nexus requires States to take climate action in a manner that protects and promotes the substantive rights of indigenous peoples as well as access rights of indigenous peoples in climate change adaptation measures. As part of the strategy to enforce this, a growing wave of human rights-based climate-change litigation has emerged around the globe, with indigenous peoples calling on the UN and other concerned international and regional bodies to hold States to account on their human rights obligations in the context of climate change. The cases discussed in Part 2 showcase this increasing tendency of indigenous peoples to use international human rights litigation as a tool to compel State action.

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[99] Client Earth, Torres Strait FAQ (n 98).

[100] Client Earth, 'Climate threatened Torres Strait Islanders bring human rights claim against Australia' (n 94).

[101] The Guardian, Australia asks UN to dismiss Torres Strait Islanders' claim climate change affects their human rights, available at: https://www.theguardian.com/australia-news/2020/aug/14/australia-asks-un-to-dismiss-torres-strait-islanders-claim-climate-change-affects-their-human-rights (accessed, November 2020).

[102] The Guardian, Australia asks UN to dismiss Torres Strait Islanders' claim (n 101).

[103] *Kristen Lyons*, op.cit.

These human rights mechanisms would play essential roles in protecting and promoting human rights of indigenous peoples by requiring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. While litigation on its own may not be sufficient for solving the climate change-related problems of indigenous peoples, it can usher in long-overdue innovation and serve as a call to action. However, to exactly what extent the recent developments (trends) in climate-change litigation (*Urgenda* case in particular) may further influence and strengthen indigenous peoples' rights in general, and the outcomes of pending cases in particular, remains to be seen.

10.11 Conclusions and way forward

This contribution has developed the theme of indigenous rights and climate change by observing how the invisible red thread that connects CLIP, IEJ, and litigation scenarios is composed of three components or keywords: nature protection, indigenous knowledge, and climate action. Promoting and therefore protecting nature-centered visions has a dual effect. On the one hand, it offers and advanced and effective way to protect the environment and to develop responses to climate change (climate action). On the other, it can restore and heal the wounds to humans and non-humans caused by the marginalization of indigenous knowledge, by recognizing the leading and *active* regulatory role of indigenous peoples and their cosmologies, and ultimately by recognizing indigenous rights: to protect and be protected, to be heard, to participate, to be included, to have knowledge, to access justice, to develop—and *not* to develop.[104] Legal research can offer several possible remedies to the undisputed anthropocentric origin of climate change, reflected in the legal fabric of conventional international law: counterbalancing anthropocentrism by implementing nature-centered visions (as indigenous-regulated and driven climate action), by hearing and reporting the voices of indigenous representatives, indigenous agreements, indigenous law, and indigenous- initiated and supported controversies. Our analysis of these three scenarios (CLIP, IEJ, litigation) helps to shed light on the "exclusion dilemma"[105] facing indigenous peoples with regard to climate action. They are the most knowledgeable, and yet the most vulnerable and unheard parties in such ventures.

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[104] *Linda Etchart*, op. cit., p. 1.

[105] We would like to credit Hans Christian Bugge for this expression and thank him for suggesting it in his early comments to this contribution.