

# PETITIONING FOR ADVERSE IMPACTS OF GLOBAL WARMING IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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*Greenhouse gases are accumulating in Earth's Atmosphere as a result of human activities, causing global mean surface air temperatures to rise.*

*U.S. Climate Action Report 2002*

## I. INTRODUCTION

It is beyond dispute that human activities are causing global warming, as even the U.S. government now admits. Although the world's least developed communities have contributed little to the problem of global warming, they likely will bear its heaviest impacts, and certainly will be least able to adapt to them.<sup>2</sup> The direct impacts of global warming include higher temperatures, sea-level rise, melting of sea ice and glaciers, increased precipitation in some areas and drought in others. Indirect social, environmental, economic and health impacts will follow, including increased death and serious illness in poor communities, decreased crop yields, heat stress in livestock and wildlife, and damage to coastal ecosystems, forests, drinking water, fisheries, buildings and other resources needed for subsistence.<sup>3</sup>

For the indigenous inhabitants of the Arctic—the Inuit, the Yupik and the Inupiat, to name but a few—these impacts threaten fundamental rights protected by regional and universal human rights systems. These include the rights to life and personal security; to use and enjoyment of property; to residence and movement; to inviolability of the home; to preservation of health; to the benefits of culture; to work and fair remuneration; to means of subsistence; and to free disposition of natural resources. Many of the impacts of global warming will be especially problematic for indigenous communities, who are recognized to have special status under international law. Citizens of wealthier countries may be able to insulate themselves from the impacts of global warming, at least in the near term, and perhaps it is partly for this reason that the United States, the world's largest contributor to global warming, has chosen to reject international response measures, such as the Kyoto Protocol to the United Nations Framework Convention on Global warming.

This paper examines the options for bringing a human rights complaint against the United States. Because international human rights law gives states primary responsibility for ensuring the protection of human rights, we confine this analysis to a claim against the United States. However, because some human rights institutions have in some instances recognized the

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<sup>2</sup> Intergovernmental Panel on Global warming, *Global warming 2001: Impacts, Adaptation and Vulnerability*, Summary for Policymakers and Technical Summary of the Working Group Two Report (2001), at 7.

<sup>3</sup> *Id.*, at 26.

responsibility of corporations for human rights violations,<sup>4</sup> global warming may be a basis for claims against U.S. corporations as well.

Only two international human rights regimes are available to bring a claim against the United States: the U.N. human rights system and the Inter-American system established under the Organization of American States (OAS). While the United States participates in both regimes, it is not a party to several key agreements of each. In particular, it has not signed the U.N. Optional Protocol to the International Covenant on Civil and Political Rights, by which states accept the jurisdiction of the Human Rights Committee to consider the human rights claims of private individuals. Nor has it ratified the American Convention on Human Rights, which subjects consenting member states to the jurisdiction of the Inter-American Court of Human Rights.

On balance, we believe the Inter-American system would be the more responsive forum for several reasons. First, the Inter-American Commission on Human Rights (“Commission”) has the authority to receive petitions by private citizens directed against any OAS member state.<sup>5</sup> Second, the Commission has recognized the relationship between human rights and the environmental impacts of development activities, and its interpretation of this relationship suggests that it would recognize the human rights implications of the effects of global warming.<sup>6</sup> Third, the Commission has wide-ranging power to look at new developments in human rights law, even if they arise in other systems.

This article first discusses the severe impacts of global warming already being felt by many indigenous Arctic communities that could give rise to a human rights claim in the Inter-American system. Next, it considers some of the procedural elements of such a claim, with particular emphasis on issues of jurisdiction. It then examines some of the rights protected by the Inter-American human rights system that might be implicated in a human rights claim and the remedies that might be available to claimants.

## II. THE PLIGHT OF THE INDIGENOUS PEOPLES OF THE ARCTIC<sup>7</sup>

The Arctic, the area above 66 degrees, 30 minutes North Latitude, is the aboriginal homeland of the Inuit, Inupiat, Yupik, and several other native groups. Most indigenous Arctic inhabitants reside along coastlines and in river valleys, living off the land in the traditions of their ancestors, using knowledge passed down for hundreds of generations. Their subsistence livelihoods depend on fish, marine mammals, and other wildlife. The activities associated with the harvest of these resources also make important contributions to the health, culture, and identity of native Arctic peoples. During the past several decades, the Arctic has warmed at an alarming rate, and it is

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<sup>4</sup> See, e.g., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997.

<sup>5</sup> Statute of the Inter-American Commission on Human Rights, Art. 20; Rules of Procedure of the Inter-American Commission on Human Rights (*hereinafter* Rules of Procedure), adopted at its 109<sup>th</sup> special session, Dec. 4-8, 2001, Art. 49. The Commission has the authority to receive communications from states complaining of human rights violations, but only if the alleged violator is a party to the American Convention on Human Rights, which the United States is not. American Convention on Human Rights, Art. 45; Rules of Procedure, Art. 48.

<sup>6</sup> *Supra*, n.4.

<sup>7</sup> The authors wish to thank Andrés Pérez for his contribution to this section.

projected to continue to warm by as much as 18 degrees Fahrenheit by 2100.<sup>8</sup> This warming trend has had a devastating impact on Arctic ecosystems, including sea ice, permafrost, forests and tundra.<sup>9</sup>

### **A. Melting Sea Ice**

Melting sea ice affects populations of marine mammals, caribou, polar bears and the subsistence livelihoods of people that depend on them. Because sea ice forms a natural breakwater against storm wave action, ice melting allows larger storm surges to develop and causes erosion, sedimentation, and coastal inundation.<sup>10</sup> For centuries, native Arctic peoples like the Inupiat and Yupik have based their hunting seasons on the yearly freezing and thawing cycles of Arctic ice. Rising temperatures have disrupted these cycles, and Yupik hunters have noticed that seals have moved farther north and that walruses are becoming thinner.<sup>11</sup> According to scientists, the retreat of sea ice has reduced the platform that seals and walruses traditionally use to rest between searches for fish and mussels; weakened and less productive, they provide less sustenance for the Yupiks.<sup>12</sup> Inuit hunters find it increasingly hard to hunt caribou, long a staple of Inuit diet, because the caribou are falling through once solid sea ice. Yupik and Inupiat hunters themselves are increasingly at risk of falling through thinning ice, making hunting more difficult. This, combined with a shorter hunting season due to a shorter freezing period also makes hunting less productive. In the remote towns inhabited by native Arctic peoples, where store-bought meat can cost up to \$22 a pound, the negative effects of an unproductive hunting season also pose economic threats. Ironically, climate change is also likely to impair transport by shortening the seasonal use of ice roads, making it harder for native Arctic peoples to purchase food they might not be able to afford in the first place.

### **B. Thawing Permafrost**

Thawing permafrost in the Arctic has damaged houses, roads, airports and pipelines, and caused landscape erosion, slope instability, and landslides. Local coastal losses to erosion of up to 100 feet per year have been observed in some locations in the Siberian, Alaskan and Canadian Arctic.<sup>13</sup> Several villages in this region are sufficiently threatened by increased erosion and inundation that they must be protected or relocated.

In Shishmaref, Alaska, a small Inuit village in the Chukchi Sea, seven houses have had to be relocated, three have fallen into the sea, and engineers predict that the entire village of 600 houses could disappear into the sea within the next few decades. Shishmaref's airport runway has almost been met by rising seawater, and its fuel tank farm, which seven years ago was 300 feet from the edge of a seaside bluff, is now only 35 feet from the bluff. The town dump, which

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<sup>8</sup> Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change – Overview: Alaska, U.S. Global Change Research Program, 2000. pp. 74-75.

<sup>9</sup> Potential Consequences of Climate Variability and Change for Alaska, USGCRP Foundation Report (1998), Chapter 10, p. 289.

<sup>10</sup> *Id.* at 292.

<sup>11</sup> Infoterra: testament of Caleb Pungowiyi, Yupik elder from Nome, Alaska.

<sup>12</sup> *Supra* n.9, at 366.

<sup>13</sup> *Id.*, at 293.

has seawater within 8 feet of it, could pollute the nearby marine environment for years if inundated. Advancing seawater has contaminated Shishmaref's drinking water supply.<sup>14</sup>

Attempts to mitigate the impending disaster in Shishmaref have been futile. The U.S. Army Corps of Engineers built a succession of sea walls that were demolished by the sea, and town leaders say there is no longer any safe place to relocate threatened houses. Relocation of the entire town seems inevitable, but will cost tens of millions of dollars.<sup>15</sup> Even if such a project is feasible, the Inuit in Shishmaref will more than likely have to move to the outskirts of a large town, such as Nome or Kotzebue, a step that many feel would extinguish their subsistence lifestyle culture. Shishmaref's situation is not unique – coastal villages along the Beaufort and Chukchi seas such as Barrow, Kivalina, and Point Hope are experiencing similar fates.<sup>16</sup>

### C. Damage to Forest and Tundra Ecosystems

Forest and tundra ecosystems are important features of the Arctic and subarctic environments that native peoples rely on to practice their subsistence lifestyle. In Alaska, substantial changes in patterns of forest disturbance, including insect outbreaks, blowdown, and fire, have been observed in both the boreal and southeast coastal forest.<sup>17</sup> Rising temperatures have allowed spruce bark beetles to reproduce at twice their normal rate.<sup>18</sup> A sustained outbreak of the beetles on the Kenai Peninsula has caused over 2.3 million acres of tree mortality, the largest loss from a single outbreak recorded in North America.<sup>19</sup> Outbreaks of other defoliating insects in the boreal forest, such as spruce budworm, coneworm, and larch sawfly, also have increased sharply in the past decade.

Climate warming and insect infestations make forests more susceptible to forest fire. Since 1970, the acreage subjected to fire has increased steadily from 2.5 million to more than 7 million acres per year. A single fire in 1996 burned 37,000 acres of forest and peat, causing \$80 million in direct losses and destroying 450 structures, including 200 homes. As many as 200,000 Alaskan residents may now be at risk from such fires, with the number increasing as outlying suburban development continues to expand. The increase in forest fires also harms local wildlife, such as caribou,<sup>20</sup> that native Arctic peoples depend on for subsistence.

## III. SEEKING REDRESS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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<sup>14</sup> *Close-up Amid Global Warming Debate, Alaska's Landscape Shifts*, Kim Murphy, L.A. Times, Jul. 8, 2002.

<sup>15</sup> *Id.* According to the U.S Army Corps of Engineers (in 1998) plans to protect and relocate these villages included constructing a \$4-6 million sea wall in Shishmaref (a 10-15 year *interim* solution), and relocating Kivalina on higher ground at an estimated cost of \$54 million.

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* n.9, at 296.

<sup>18</sup> In Alaska, Hotter Weather Provokes Startling Changes, Egan, Timothy, *The New York Times*, June 18, 2002

<sup>19</sup> This figure constitutes 70-80% of the trees in the entire area. The federal government has given the Kenai Borough \$10 million for forest regeneration and to protect communities from beetle-induced fires. The spruce bark beetle has destroyed more than 2 billion board feet of timber in Alaska in the last 25 years. *Battling the Bark Beetle: As Global Warming Rises, so do Tree-Killing Infestations*, Emagazine.com November/December 2001

<sup>20</sup> *Id.*

The impacts described in the preceding section, severe as they are, may be only a foretaste of impacts Arctic peoples will face in the future. Unchecked, global warming threatens to destroy their culture, render their land uninhabitable and rob them of their means of subsistence. At present, it may not be possible to fully redress these harms through the Inter-American system. The Commission does not have the authority to force countries to curtail their emissions, nor can it compel states to compensate individuals for human rights violations. The Inter-American Court does have such power, at least in theory, but two barriers bar access to the Court by Arctic inhabitants seeking to sue the United States. First, the Convention does not permit a private citizen to submit a case directly to the Court. Second, because the United States has not ratified the Convention, it is not subject to the jurisdiction of the Court.

Nevertheless, a report by the Commission examining the connection between global warming and human rights could have a powerful impact on worldwide efforts to address global warming. It would demonstrate that the issue is not merely an abstract problem for the future, but is instead a problem of immediate concern to all people everywhere. Recognition by the Commission of a link between global warming and human rights may establish a legal basis for holding responsible countries that have profited from inadequate greenhouse gas regulation and could provide a strong incentive to all countries to participate in effective international response efforts.

## **A. Procedural Issues Arising Under the Rules of the Inter-American Commission**

### ***1. General Requirements***

Anyone alleging a human rights violation by the government of a nation that is a member of the OAS may submit a petition to the Inter-American Commission. If the accused state is party to the American Convention, that document, the Commission's Statute and its Rules of Procedure establish jurisdiction and procedure.<sup>21</sup> If, like the United States, the accused state is not a party to the American Convention, but is a member state of the OAS, the Commission's Rules of Procedure and past practice recognize that the obligations of the Declaration apply and the Commission may hear claims asserting violations by that state: "Pursuant to the [OAS] Charter, all member states undertake to uphold the fundamental rights of the individual, which, in the case of non-parties to the Convention, are those set forth in the American Declaration, which constitutes a source of international obligation."<sup>22</sup>

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<sup>21</sup> Rules of Procedure, Art.27.

<sup>22</sup> Report No. 109/99, Case 10.951, *Coard v. United States*, Sept. 29, 1999, at para. 36. See also Articles 49 and 50 of the Commission's Rules of Procedure, which state that procedures for receiving petitions alleging violation of the Convention also apply to the receipt of petitions alleging violations of the Declaration.

David Padilla, Assistant Executive Secretary of the Commission, has described the authority of the body over nonparties to the Convention:

[F]or those OAS member states that have yet to ratify the American Convention . . . the Commission's Statute, a binding instrument adopted by a unanimous General Assembly vote, provides that:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it,

Petitioners may be the victims themselves, third parties, or any “non-governmental entity legally recognized in one or more of the member states of the OAS.”<sup>23</sup> The petition must identify the state responsible, “by act or omission,” for the violations of any of the applicable human rights, and describe the acts or situation leading to the violations.

The petition must also identify the steps taken to exhaust domestic remedies, or the impossibility of doing so, and indicate whether the complaint has been submitted to another international settlement proceeding.<sup>24</sup> Regarding exhaustion, the Commission’s Statute requires it to “verify, as a prior condition to the exercise of [its authority to accept a petition], whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.”<sup>25</sup> The Commission has recognized a number of exceptions to the exhaustion requirement, including the absence of effective remedies and, in certain circumstances, the inability of the petitioner to exhaust remedies for lack of resources.<sup>26</sup>

While the respondent government has the burden of showing that effective domestic remedies exist, once it has done so, the petitioner has the burden of proving that those remedies were exhausted or that the case falls into one of the exceptions to the exhaustion requirement.<sup>27</sup> In the case of a claim for violations resulting from the effects of global warming, the primary question would be whether a tort action against the United States could provide a viable remedy. The U.S. government is immune to suit for tort except “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>28</sup> The government is not subject to suit, however, for acts or omissions that are the result of discretionary functions.<sup>29</sup> Because US courts would probably

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when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. [Statute, article 20]

This provision obligates the Commission to act where it finds that a complaint from any source meets the admissibility requirements contained in its rules and determines that a Convention-protected right, or a right set forth in the American Declaration of the Rights and Duties of Man, in the case of non-states parties, has prima facie been violated. This is a truly liberal provision compared to those governing other international human rights systems. Private actors become active participants in an international forum. Also, member states ipso facto voluntarily commit themselves to participate in the Commission’s quasi-judicial process aimed at clarifying and, when it so determines, remedying violations of internationally recognized human rights.

David J. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 Am. U.J. Int’l L. & Pol’y 95, 99-100 (1993).

<sup>23</sup> Rules of Procedure, Art. 23. Petitioners may designate an attorney or other person to represent them before the Commission. *Id.*

<sup>24</sup> Rules of Procedure, Art. 28.

<sup>25</sup> Statute of the Inter-American Commission on Human Rights, Art. 20(c).

<sup>26</sup> *See, e.g.*, Rules of Procedure of the Inter-American Commission on Human Rights, Art. 31.

<sup>27</sup> *See* Inter-American Court of Human Rights, *Velásquez Rodríguez* case (“The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2).”). Inter-American Commission’s decision in the Cherokee Nation case. It must be noted, however, that the Inter-American Court of Human Rights has stated, “It must not be rashly presumed that a State party to the Convention has failed to comply with its obligation to provide effective domestic remedies.” *Velásquez Rodríguez* case.

<sup>28</sup> Federal Tort Claims Act, 28 U.S.C. § 1346(b).

<sup>29</sup> *Id.* § 2680(a).

consider most actions that enhance or diminish global warming effects to be discretionary, there would probably not be a domestic remedy available that could force the government to take such actions. The government is also not subject to suit for conduct that violates the U.S. Constitution, such as the failure to compensate for the loss of property.<sup>30</sup>

## 2. *Claims of Extraterritorial Causes of Human Rights Violations*

The Arctic region includes parts of the United States, Canada, Greenland/Denmark, Iceland, Norway, Sweden, Finland, and Russia. An important question is whether all inhabitants of the Arctic have rights to bring claims against the United States in the Inter-American system, no matter which country they reside in. Article 1 of the American Convention suggests that a nation has a human rights obligation only with respect to individuals subject to its jurisdiction: “The States Parties...undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free exercise of those rights and freedoms, without any discrimination....”<sup>31</sup> The American Declaration of the Rights and Duties of Man contains no similar limitation, but the Commission has implied one (*see the Coard case*, described below).

Arctic peoples residing in Alaska clearly are subject to the jurisdiction of the United States, and the obligations of the United States under the Convention and Declaration apply to them without question. There are important reasons to extend these protections to inhabitants of other regions of the Arctic as well. Unlike the types of violations anticipated when the basic international human rights agreements were drafted, violations arising out of the effects of global warming are clearly not limited to the territory of the nations responsible for those effects. The impacts of U.S. greenhouse gas emissions on Siberian, Canadian and Scandinavian Arctic communities are fundamentally the same as those on Alaskan Arctic communities. Because the primary contributors to anthropogenic global warming are few (the United States being the primary culprit), and the victims of global warming effects are residents of nations all around the globe, it is important that those nations responsible for global warming not be shielded from responsibility for impacts outside their territory by outmoded limitations on human rights.

Fortunately, the Inter-American Commission is one of several international institutions that have recognized that responsibility for human rights is not circumscribed by national borders. The Commission has interpreted the notion of jurisdiction broadly, citing the Declaration’s Preamble:

The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality.

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<sup>30</sup> See *FDIC v. Meyer*, 114 S. Ct. 996, 1001 (1994).

<sup>31</sup> The drafters of the Inter-American Convention affirmatively rejected the idea of an explicit territorial limitation on responsibility for human rights violations. An early draft of Article 1 of the Convention stated: “The States Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons *within their territory and subject to their jurisdiction* the free and full exercise of those rights and freedoms.” (Emphasis added.) Subsequently, the negotiators unanimously agreed to omit the territorial limitation. See *Human Rights: the Inter-American System* (Thomas Buergenthal and Robert Norris, eds., 1982-1993), Part II, Booklet 13, p. 2; *Meetings of the Second Session of Committee I*, Doc. 36 (Nov. 11, 1969) in *Human Rights*, Part II, Booklet 12, p. 28.

The Commission took up the question of the extraterritorial application of the Declaration *sua sponte* in *Coard v. United States*, in which citizens of Grenada alleged violations of the Declaration by the United States arising out of the U.S. military invasion of Grenada.<sup>32</sup> The Commission determined that the fact that the alleged violations occurred outside the United States did not bar it from considering the petition:

[U]nder certain circumstances, the exercise of [the Commission's] jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – “without distinction as to race, nationality, creed or sex.” Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad.<sup>33</sup>

In another case, *Saldaño v. Argentina*, the Commission stated:

The Commission does not believe...that the term “jurisdiction” in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory.<sup>34</sup>

Thus, the Commission recognizes that in certain circumstances states must protect the rights of people outside their territory from the effects of acts or omissions by their agents. While these effects will usually result from actions taken abroad, they include effects of actions taken domestically. The Commission cites a decision by the European Court of Human Rights that clearly articulates this view:

[A]lthough Article 1 (art. 1) sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is not restricted to the national territory of the High Contracting Parties.... [T]he responsibility of Contracting Parties can be involved

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<sup>32</sup> Report No. 109/99, Case 10.951, Sept. 29, 1999, <<http://www1.umn.edu/humanrts/cases/us109-99.html>>.

<sup>33</sup> *Id.*, at para. 37.

<sup>34</sup> Report N° 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 289 (1998), at para. 17. The petitioner alleged that Argentina had violated the rights of an Argentine citizen being held on death row in the United States by not presenting any inter-state complaint to the United States on the citizen's behalf. The Commission found that it did not have jurisdiction to consider the petition because the petitioner failed to show that Argentina exercised any authority or control over Mr. Saldaño in relation to his arrest and conviction, and did not show “any act or omission by Argentine authorities that implicate that state in the alleged violations arising out of Mr. Saldaño's prosecution in the United States so as to subject him to Argentina's jurisdiction within the meaning of Article 1(1) of the American Convention.” *Id.*, paras. 21, 22.



because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.<sup>35</sup>

The Commission has further noted that the respondent government has the burden “to prove the existence of a provision or permissible reservation explicitly limiting or excluding the application of some or all of the provisions of the instrument to a particular class of individuals.”<sup>36</sup>

The Commission in *Saldaño* did not describe all the circumstances under which it is appropriate to extend jurisdiction beyond national boundaries. The negotiating history of the International Covenant on Civil and Political Rights provides some insight into the matter, however. In considering whether to base a similar limitation strictly on national boundaries, “it was contended that it was not possible for a State to protect the rights of persons subject to its jurisdiction when they were outside its territory; in such cases, action would be possible only through diplomatic channels.”<sup>37</sup> It thus appears that the intent of the jurisdictional limitation was not to prevent states from being held responsible for any violations they caused, but rather to ensure that states not be held responsible for violations they could do nothing about. In the case of transboundary environmental harm, obviously, the state causing or permitting the harm can prevent the violation.<sup>38</sup>

## **B. Relevant Rights Protected by the Declaration**

The rights that apply to OAS member states, like the United States, that are not parties to the Convention are those that are contained in the American Declaration. The Commission and the Inter-American Court on Human Rights have recognized, however, that related rights in the Convention or other human rights documents, even those in other systems, may be used to elaborate the rights in the Declaration, as well as to understand the human rights obligations of OAS member states. In the *Coard* case, for example, the Commission used international humanitarian law to interpret the obligations of the Declaration, stating that “it would be inconsistent with general principles of law for the Commission to construe and exercise its

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<sup>35</sup> *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) (1995), para. 62 (cited in *Saldaño* at para. 19).

<sup>36</sup> *Rafael Ferrer-Mazorra v. United States*, Report No. 51/01, Case 9903, April 4, 2001. In *Rafael Ferrer-Mazorra*, the Commission considered the rights of Mariel Cubans detained in the United States. In response to the US argument that the American Declaration did not apply because, under U.S. immigration law, the detainees were not officially within U.S. territory, the Commission responded that

*OAS member states are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control*, with the onus falling upon the State to prove the existence of a provision or permissible reservation explicitly limiting or excluding the application of some or all of the provisions of the instrument to a particular class of individuals, such as excludable aliens.

*Id.* para. 180.

<sup>37</sup> Marc J. Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* 53 (1987).

<sup>38</sup> The UN Committee on Civil and Political Rights has also discussed this issue. In considering a communication arising out of the abduction from Argentina of an Uruguayan citizen by agents of the Uruguayan government, the Committee stated that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Saldias de Lopez v. Uruguay*, UN GAOR, 36<sup>th</sup> Sess., Supp. No. 40, UN Doc. A/36/40 (1981), at 183.

Charter-based mandate without taking into account other international obligations of member states which may be relevant.”<sup>39</sup> The Court has even recognized that “a treaty can *concern* the protection of human rights, regardless of what the principal purpose of the treaty might be.”<sup>40</sup> Many rights have given rise to a body of law that, to some extent, transcends the document or regime in which they are enumerated.

Many rights contained in the Declaration may give rise to complaints based on the adverse impacts of global warming. These include the right to life (Art. I), the right to residence and movement (Art. VIII), the right to inviolability of the home (Art. IX), the right to the preservation of health and to well-being (Art. XI), the right to the benefits of culture (Art. XIII), and the right to work and to fair remuneration (Art. XIV). The Commission has applied several other rights that would be relevant to our petition, including the non-derogable right of all peoples to their own means of subsistence<sup>41</sup> and the right to freely dispose of natural resources.<sup>42</sup> In addition, the Commission has recognized that indigenous peoples are entitled to special protections, especially in the case of threats to the environment on which their physical and cultural lives depend.<sup>43</sup> While a full treatment of all of these rights is beyond the scope of this paper, we will briefly discuss a few that may be of particular interest.

### **I. The Rights to Life and the Preservation of Health and Well-Being**

By placing their means of subsistence, infrastructure and environment at risk, global warming threatens the life, health and well-being of native Arctic peoples. Melting sea ice, in addition to posing a direct threat to hunters who must traverse the ice in search of game, limits the availability of seals, walruses, polar bears, caribou and other wildlife that are the staples of the Arctic diet. Thawing of the permafrost destroys buildings, roads and other critical infrastructure. Erosion has allowed drinking water supplies to become contaminated with advancing seawater, and insect infestations have greatly increased the vulnerability of native peoples and their settlements to forest fires.

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<sup>39</sup> *Coard v. United States*, *supra*, para. 40.

<sup>40</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999) (citing “*Other Treaties*” *Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, Sept. 24, 1982. Series A No. 1; opinion, para. 1) (emphasis in original).

<sup>41</sup> International Covenant on Civil and Political Rights (*hereinafter* ICCPR), Art. 1; International Covenant on Economic, Social and Cultural Rights (*hereinafter* ICESCR), Art. 1.

<sup>42</sup> ICCPR, Art. 1; ICESCR, Art. 1.

<sup>43</sup> In the Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, the Commission noted that “[c]ertain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.” The Commission further noted that “[w]ithin international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival – a right protected in a range of international instruments and conventions.”

The right to life is the most fundamental human rights doctrine and is recognized in every basic international human rights instrument, including the American Declaration.<sup>44</sup> This right is “unanimously considered to be . . . enforceable in respect of all persons, even where there is no treaty obligation. The right to life is included among the peremptory norms (*jus cogens*) from which ‘no derogation is permitted.’”<sup>45</sup> The right to health is also fundamental.<sup>46</sup>

The Inter-American Commission has recognized the connection between environmental health and the rights to life, health and personal security. The Commission has found that oil exploitation activities that resulted in severe air and water pollution violated the rights of local residents to life and health. In the Commission’s words, “[t]he right to have one’s life respected is not . . . limited to protection against arbitrary killing. States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health.”<sup>47</sup> Likewise, the Commission has held that a government’s failure to prevent mining and other activities from degrading the environment of traditional indigenous lands violated the rights to life, health and personal security.<sup>48</sup> Other international human rights tribunals have reached similar conclusions.<sup>49</sup> In the words of one respected jurist, “States . . . may be criminally or civilly responsible under international law for causing serious environmental hazards posing grave risks to life.”<sup>50</sup>

## 2. *The Rights to Privacy, Residence and Protection of the Home*

The effects of global warming have already begun to impact the homes and communities of many individuals and groups in the Arctic. Subsidence due to permafrost melting is destroying homes, roads and other vital structures in the Arctic. Effects such as these violate the rights of each individual to protection of “private and family life,”<sup>51</sup> “the inviolability of his home”<sup>52</sup> and,

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<sup>44</sup> American Declaration, Art. 1. *See also* American Convention, Art. 4; Universal Declaration of Human Rights, Art. 3; International Covenant on Civil and Political Rights (ICCPR), art. 3, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>45</sup> *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, p. 44, U.N. ESCOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/Sub.2/1994/9 (1994).

<sup>46</sup> *See American Declaration*, Art. XI; Universal Declaration of Human Rights, Art. 25.1; International Covenant on Economic, Social and Cultural Rights, Art. 12; UN Convention on the Rights of the Child, Art. 24.

<sup>47</sup> *IACHR Ecuador Report* at 88.

<sup>48</sup> IACHR Res. No. 12/85, Case 7615 (*Yanomami Indians v. Brazil*), Mar. 5, 1985, *reprinted in* Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.62, Doc. 10 rev. 1, Oct. 1, 1985.

<sup>49</sup> *See, e.g., EHP v. Canada*, in which the UN Human Rights Committee determined that the dumping of nuclear wastes near a town posed a threat to the right to life. Communication No. 67/1980, ¶ 4.1, *in* United Nations, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 20, U.N. Doc. CCPR/C/OP/2 (1990).

National courts have recognized the connection as well. For example, the Supreme Court of Costa Rica has stated that life “is only possible when it exists in solidarity with nature, which nourishes and sustains us -- not only with regard to physical food, but also with physical well-being. It constitutes a right which all citizens possess to live in an environment free from contamination. This is the basis of a just and productive society.” Constitutional Chamber of the Supreme Court, Vote No. 3705, July 30, 1993.

<sup>50</sup> B.G. Ramcharan, *The Right to Life*, 30 Neth. Int’l L. Rev. 310-311 (1983).

<sup>51</sup> American Declaration, Art. V. *See also* Universal Declaration, Art. 12; UN Convention of the Rights of the Child, Art. 16; European Convention, Art. 8.

<sup>52</sup> American Declaration, Art. IX. *See also* Universal Declaration, Art. 12; ICCPR Art. 17; UN Convention of the Rights of the Child, Art. 16; European Convention, Art. 8.

in some situations, “not to leave [the territory of the state of which he is a national] except by his own will.”<sup>53</sup>

International tribunals have recognized that harm to the environment that affects one's home can violate these rights. For example, *Lopez Ostra v. Spain*, the European Court of Human Rights held that Spain's failure to prevent a waste treatment plant from polluting nearby homes violated the petitioner's “right to respect for her home and her private and family life,” and held the State liable for damages.<sup>54</sup>

### 3. *The Right to Property*

Article XXIII of the American Declaration provides: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.” When entire communities are forced to abandon their homes and ancestral lands, the violations of this right could not be less ambiguous. The Commission has noted that “various international human rights instruments, both universal and regional in nature, have recognized the right to property as featuring among the *fundamental rights of man*” (emphasis added).<sup>55</sup> The Commission adds that the Declaration, while not legally binding, establishes “rules which have become rules of international customary law and, as such, are considered obligatory in the doctrine and practice of international law.”<sup>56</sup>

Conceptually, the right to property falls somewhere between civil/political rights and economic/social rights. It has received its strongest support from Western countries, led by the United States.<sup>57</sup> It is not limited to any particular type of property and may include both movable and immovable property.<sup>58</sup> The property right may be particularly relevant when the petitioner is a member of an indigenous community because of the strong link between property and culture in those communities and their inherent ownership rights in the land they traditionally occupy. These rights are well established in the Inter-American human rights system.<sup>59</sup>

A notable feature of the right to property is the obligation to pay “just compensation” when the state deprives a person of property.<sup>60</sup> This obligation is not spelled out in the Declaration, but it may be considered a natural consequence of the right to property. Indeed, in some instances it is

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<sup>53</sup> American Declaration, Art. VIII.

<sup>54</sup> Series A, No. 303-C, Application No. 16798/90, 1994. See also *Hatton and Others v. United Kingdom*, European Court of Human Rights, Decision 36022/97, decided 10/2/01 (noise pollution from Heathrow Airport's overnight flights violated local residents' rights to privacy and inviolability of the home and family).

<sup>55</sup> IACHR, “Nicaragua”: The Right to Property, *Annual Report of the Inter-American Commission on Human Rights* 1993, OEA/Ser.L/V/II.85, doc.9, rev., Feb. 11, 1994, at 464-77.

<sup>56</sup> *Id.*

<sup>57</sup> Asbjorn Eide, Catarina Krause & Allan Rosas, *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff (1995), at 144. Conversely, the United States has generally opposed the inclusion of economic and social rights in the Inter-American human rights system. See Matthew Craven, *The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights*.

<sup>58</sup> Asbjorn Eide, Catarina Krause & Allan Rosas, *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff (1995), at 150.

<sup>59</sup> See, e.g., Inter-American Court of Human Rights, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001.

<sup>60</sup> See, e.g., the American Convention on Human Rights, Art. 21.

only through compensation that the property right can be given effect, as human rights law permits the state, in certain circumstances, to deprive persons of their property.<sup>61</sup>

#### 4. *The Right to One's Own Means of Subsistence*

Global warming is rapidly making unsustainable the subsistence lifestyle of indigenous Arctic communities. Customary international law provides special protection for the right of all people to their own means of subsistence. Two major international human rights agreements provide: "In no case may a people be deprived of its own means of subsistence."<sup>62</sup> Global warming has already begun to deprive people and communities of their means of subsistence. For example, the movement of seal populations threatens a critical Inuit food source. There can be no doubt that this effect of global warming constitutes a human rights violation.

#### 5. *The Right to Culture, Especially for Indigenous Peoples*

The ancient culture of the indigenous Arctic peoples cannot be separated from the land and the subsistence lifestyle it supports. As the land is altered in ways that make subsistence living difficult, if not impossible, their culture is put at grave risk. The Inter-American Commission has recognized that "certain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival."<sup>63</sup> As a result of the intimate connection between indigenous peoples and their lands, "displacement [from indigenous] lands or damage to these lands invariably leads to serious loss of life and health and damage to the cultural integrity of indigenous peoples."<sup>64</sup> As one expert international jurist writes:

"[Cultural] disintegration is compounded by destruction of the ecology and habitat upon which indigenous groups depend for their physical and cultural survival. Deforestation, particularly of rain forests, and pollution introduced by outsiders jeopardize the *modus vivendi* of indigenous groups. The social nexus binding members of the group to the environment is thus annihilated."<sup>65</sup>

The Commission has further noted that, "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."<sup>66</sup> For these reasons, the Commission has agreed that "[i]ndigenous

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<sup>61</sup> *Id.*

<sup>62</sup> ICCPR, Art. 1.2; ICESCR, Art. 1.2.

<sup>63</sup> *IACHR Ecuador Report* at 106; *see also id.* at 114.

<sup>64</sup> *IACHR Ecuador Report, supra*, at 114 (quotation omitted).

<sup>65</sup> *Ksentini Final Report, supra*, ¶ 79 (quoting Prof. V. Muntarbhorn, background paper, 1989 UN Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, E/CN.4/1989/22, annex III A, 27-28).

<sup>66</sup> Resolution of the IACHR, OEA/Ser.L/V/II.29, Doc. 38 rev. (1972). *See also Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* 76, IACHR, OEA/Ser.L/V/II.62, Doc. 10 rev. 3, at 81 29 Nov. 1983 (hereafter *Miskito Report*) ("[F]or an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity.").

peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”<sup>67</sup>

The Commission has applied these principles to find human rights violations where environmental degradation affects indigenous peoples. For example, the Commission has found that involuntary relocation of indigenous peoples due to development activities constituted a human rights violation that could be justified only in time of war or national emergency.<sup>68</sup> Other international tribunals have agreed. In *Lubicon Lake Band v. Canada*, the UN Human Rights Committee found that expropriation and destruction of indigenous band's land for oil and gas exploitation threatened the way of life and culture of the band, and therefore violated their right to enjoy their culture, as guaranteed by article 27 of the International Covenant on Civil and Political Rights.<sup>69</sup>

As noted above, global warming has already begun degrading lands traditionally occupied by indigenous peoples. This degradation and other effects of global warming inevitably affect other aspects of indigenous culture as well. Indigenous communities risk being forced from their traditional lands, losing traditional food sources, and the destruction of religious or culturally important sites. Global warming has particular human rights implications for these indigenous communities.

### C. Remedies

The Commission cannot force the United States to take any particular action, whether to reduce the causes of global warming or compensate for the effects. However, a favorable outcome to a claim based on those effects could contribute significantly to global efforts to address global warming. In the best case, the Commission would accept the claim and encourage the parties to negotiate a solution. Assuming the United States and the petitioners would not agree to a mutually satisfactory remedy (a safe assumption in this case), the Commission likely would undertake an independent investigation of the facts underlying the claim, probably including site visits to affected regions, and would then issue a report on the petition. The report would set out the Commission's conclusions concerning the relationship between global warming and human rights.

Each significant phase of the Commission's consideration of the claim would provide an opportunity to raise public awareness concerning the human rights implications of global warming. A Commission report finding that global warming results in human rights violations would be important. As an authoritative interpretation of international law, such a finding would help bring a rights-based approach to global warming discussions. Governments or private

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<sup>67</sup> Proposed American Declaration of Indigenous Rights, Art. XIII.1 (approved by the Inter-American Commission on Human Rights February 26, 1997). *See also Yanomami Case, supra* (holding that destruction of Brazilian rainforests violated the human rights of indigenous forest-dwellers).

<sup>68</sup> *Miskito Case, supra*, at 84-85.

<sup>69</sup> Decision of Mar. 26, 1990 (*Lubicon Lake Band v. Canada*), U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/38/D/167/1984 (1990). *See also Ilmari Lansman v. Finland*, Case No. 511/1992 U.N. Hum. Rts. Comm., Oct. 26, 1994, *reprinted in* Official Records of the General Assembly, 50th Sess., Supp. No. 40, A/50/40, vol. I (approval of mining activities in areas essential to Finnish indigenous peoples' culture and spiritual practices threatened their cultural integrity and thereby violated Article 27).

individuals wishing to pressure the United States and other governments to take meaningful action to address the causes of global warming would welcome the ability to cite the Commission's findings. Plaintiffs in domestic judicial proceedings could use the findings to supplement their claims (or, in some judicial systems, as an independent basis for a claim), and domestic tribunals could use them to justify favorable decisions.

#### **IV. CONCLUSION**

The jurisprudence of human rights law has grown in recent years and continues to develop rapidly. This brief article has touched on a few of the issues relevant to establishing accountability for global warming and its impacts. We conclude that a petition to the Inter-American Commission has significant potential benefits and merits further consideration.

Many rights contained in the American Declaration, including the rights to life and personal security; to residence and movement; to inviolability of the home; to the benefits of culture; and to work and to fair remuneration, could serve as the basis of a complaint. Other rights – such as the rights to means of subsistence, to freely dispose of natural resources, and special protection for indigenous communities – have been recognized by the Commission, even though they are not explicitly mentioned in the Declaration, and are relevant to understanding rights in the Declaration as they relate to the effects of global warming.

Formal recognition by an international authority like the Inter-American Commission of the connection between global warming and human rights would have a powerful impact on worldwide efforts to address global warming. Such recognition would demonstrate that the issue is not an abstract problem of degrees per decade and statistical probabilities, but is instead a vital concern of all people everywhere. It would bring to the global warming discourse a basis for holding responsible those who have profited from poorly regulated greenhouse gas emissions, and for placing limits on such emissions in the future. And it would be consistent with the growing international recognition that a healthy environment is fundamental to the enjoyment of nearly all of the most fundamental human rights.