

CLIMATE CHANGE ADAPTATION AND THE PROTECTION OF INDIGENOUS PEOPLES' LAND & RESOURCES IN LATIN AMERICA

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Scientists predict that climate change will adversely impact the ancestral lands of the approximately fifty million indigenous people inhabiting Latin America and thereby undermine the cultural survival and livelihoods of many indigenous communities.¹ For example, in 2020, wildfires intensified by abnormal drought conditions linked to climate change ravaged over eighty-five percent of the lands of the Guató, an indigenous group whose ancestors have inhabited the Pantanal wetlands of Brazil for thousands of years.² The fires wiped out crop fields, trees used to construct traditional houses, and groves of medicinal plants.³ Ash also polluted the rivers from which the Guató have traditionally fished for sustenance.⁴ In the wake of the fires, many Guató communities were left dependent on donations to satisfy their food and water needs.⁵

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¹ See Martin de Dios, *The situation of Latin America's indigenous population and the impact of COVID-19*, UNITED NATIONS DEVELOPMENT PROGRAMME ("UNDP") (May 14, 2020), <https://www.latinamerica.undp.org/content/rblac/en/home/blog/2020/impacto-y-situacion-de-la-poblacion-indigena-latinoamericana-ant.html>.

² See Catrin Einhorn et al., *The World's Largest Tropical Wetland has Become an Inferno*, THE NEW YORK TIMES (Oct. 13, 2020) <https://www.nytimes.com/interactive/2020/10/13/climate/pantanal-brazil-fires.html> (“[D]rought worsened by climate change turned the wetlands into a tinderbox and the fires raged out of control.”).

³ See *id.*; Bianca Muniz et al., *Incêndios já tomam quase metade das terras indígenas no Pantanal*, AGÊNCIA PÚBLICA (Sept. 17, 2020), <https://apublica.org/2020/09/incendios-ja-tomam-quase-metade-das-terras-indigenas-no-pantanal/>.

⁴ See *supra* note 3.

⁵ See Einhorn et al., *supra* note 2.

Undoubtedly, indigenous peoples' enjoyment of human rights is threatened by such severe climate change-linked degradation of their lands and resources. In addition, international human rights bodies have reasoned that States' can be held responsible for failing to undertake adequate measures to fulfill or ensure peoples' human rights in the face of the foreseeable adverse impacts of climate change. In a recent decision the UN Human Rights Committee determined that Australia had violated the rights of indigenous Torres Strait Islanders under the International Covenant on Civil and Political Rights ("ICCPR") by failing to undertake timely and adequate adaptive measures to protect the islands they inhabit and surrounding marine resources from climate change-linked degradation and hazards.⁶

This essay builds upon the Human Rights Committee decision and aims to answer whether Latin American States have an affirmative duty to undertake adaptive measures⁷ to address the foreseeable adverse impacts of climate change on indigenous peoples' lands and resources under the right to property prescribed in the American Convention on Human Rights ("American Convention"). This essay focuses on the American Convention because most Latin American States have ratified the treaty, and, in contrast to the ICCPR regime, there is a judicial body—the Inter-American Court of Human Rights ("Inter-American Court")—competent to issue legally binding judgments regarding the interpretation and application of the treaty.

American Convention States Parties' duties in respect of the right to property is examined

⁶ See generally Daniel Billy and others v. Australia, views adopted by the U.N. Hum. Rts. Comm., CCPR/C/135/D/3624/2019 (2022); see also Maria Antonia Tigre, *United Nations Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction*, COLUMBIA CLIMATE LAW BLOG (Sept. 27, 2022), <https://blogs.law.columbia.edu/climatechange/2022/09/27/u-n-human-rights-committee-finds-that-australia-is-violating-human-rights-obligations-towards-torres-strait-islanders-for-climate-inaction/>.

⁷ The Intergovernmental Panel on Climate Change's ("IPCC's") Fifth Assessment Report defines adaptation as "the process of adjustment to actual or expected climate and its effects . . . to moderate or avoid harm or exploit beneficial opportunities." IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 118 (2014).

because the Inter-American Court has regarded this right as a “repository of essential indigenous rights”—*i.e.*, “it has emphasized how the right is inextricably linked to other norms essential for indigenous peoples: cultural identity, social welfare, political participation, juridical personality, etc.”⁸

The essay proceeds as follows: Part I provides background information on the Inter-American Human Rights System, a working definition of “indigenous peoples,” and an introduction to indigenous concepts of property. Part II analyzes the Inter-American Court’s jurisprudence to outline the presently established scope of the right to property under the American Convention. Part III asserts that, under the American Convention, States Parties have a positive obligation to undertake adaptive measures to protect indigenous peoples’ lands and resources against foreseeable adverse climate change impacts.

I. Background and Definitions

A. The Inter-American Human Rights System

The Inter-American Human Rights System (the “IAHR System”) exists within the framework of the Organization of American States (“OAS”), a regional intergovernmental organization composed of thirty-five States of the Americas.⁹ The system comprises a series of legal instruments and institutions established to protect and promote human rights in the Americas. The system’s principal human rights instrument is the American Convention, which

⁸ Tom Antkowiak, *Rights, Resources and Rhetoric: Indigenous Peoples and the InterAmerican Court*, 35 U. PA. J. INT’L L. 113, 160 (2013).

⁹ See Charter of the Organization of American States, Apr. 30 1948, 119 U.N.T.S. 3

has been ratified by twenty-five OAS member States.¹⁰ The treaty obligates States Parties to respect and ensure the enjoyment of the rights prescribed therein.¹¹

Another key instrument of the IAHR System is the American Declaration on the Rights of Indigenous Peoples (“ADRIP”).¹² Although ADRIP is not a legally binding instrument, its provisions reflect emerging norms on indigenous peoples’ rights in the Americas and may inform the content of rights prescribed in the American Convention.¹³

As for the organs of the IAHR System, the Inter-American Court, an autonomous judicial institution of the OAS, is the most important for purposes of this essay. The Inter-American Court is charged with applying and interpreting the American Convention and may adjudicate both contentious cases and advisory cases.

The Inter-American Commission on Human Rights is another principal organ of the IAHR System. It is tasked with many competencies, such as analyzing and investigating alleged violations of the American Convention, and, in fulfilling its mandate, the Inter-American Commission often provides persuasive interpretations of the American Convention.¹⁴

B. Indigenous Peoples

¹⁰ See Organization of American States, American Convention on Human Rights (“American Convention”), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ; AMERICAN CONVENTION ON HUMAN RIGHTS, SIGNATORIES AND RATIFICATIONS, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

¹¹ *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 153 (Jun. 17, 2005).

¹² The adoption of the Declaration was accompanied by the U.S.’s objection, and the “non-position” of Canada. Organization of American States, American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16) (Jun. 15, 2016).

¹³ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 8 (Aug. 31, 2001) (Sep. Opinion of J. Sergio García Ramírez).

¹⁴ American Convention, 1144 U.N.T.S. 123, arts. 44, 46.

Some OAS member States have adopted formal definitions of “indigenous peoples” in national legislation pertaining to indigenous peoples’ rights.¹⁵ However, neither the American Convention nor international law generally provide a precise definition of “indigenous peoples” for determining what groups can benefit from the distinct legal rights and protections extended to indigenous peoples under international law. In absence of a precise definition, the Inter-American Court and the Inter-American Commission have applied a flexible standard under which self-identification is a principal factor in determining whether a group is indigenous.¹⁶ The Court may also consider objective criteria, such as whether a group has distinct social, economic, cultural and political institutions and whether a group descends from a society that inhabited the territory or region the group calls home prior to colonization, conquest, or the establishment of contemporary State boundaries.¹⁷

C. Indigenous Peoples’ Lands and Territories

Among indigenous peoples in Latin America there is a communitarian tradition regarding property interests in land and natural resources.¹⁸ Ownership of natural resources and land is centered on the community or peoples rather than individuals. Moreover, indigenous peoples’ communal nexus with land and natural resources “is not merely a matter of possession and

¹⁵ See INTER-AMERICAN COMM’N ON HUM. RTS., INDIGENOUS PEOPLES, AFRO-DESCENDENT COMMUNITIES, AND NATURAL RESOURCES: HUMAN RIGHTS PROTECTION IN THE CONTEXT OF EXTRACTION, EXPLOITATION, AND DEVELOPMENT ACTIVITIES (Dec. 13, 2015); Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, ¶ 93, U.N. Doc. E/CN.4/2002/97 (Feb. 4, 2002).

¹⁶ See *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 37 (Aug. 24, 2010); @INTER-AMERICAN COMMISSION, INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES, ¶ 25 (Dec. 30, 2009).

¹⁷ See Antkowiak, *supra* note 8, at 139; see also Int’l Labour Org. (“ILO”), Indigenous and Tribal Peoples Convention, C169, art. 1(1) (Jun. 27, 1989).

¹⁸ *Mayagna*, *supra* note 13, ¶ 149 (“ownership of the land is not centered on an individual but rather on the group and its community”).

production, but rather consists in material and spiritual elements.”¹⁹ The Inter-American Court has explained that “land is closely linked to [indigenous communities’] oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.”²⁰ Indigenous communities’ lands have also traditionally been communities’ main means of subsistence.²¹ Throughout this essay, the terms “territories” and “lands” are used broadly to include the total environment of the areas that an indigenous group occupies or uses (*e.g.*, for cultural, spiritual, or subsistence activities).²²

II. The Established Scope of Indigenous Peoples’ Property Rights under the American Convention

Under Article 21 of the American Convention, indigenous peoples have a communal (or collective) right to property. Additionally, States Parties have a positive obligation to undertake measures to protect and ensure indigenous peoples’ enjoyment of this right, particularly with respect to their lands and resources.

A. Indigenous Peoples’ Communal Right to Property

Article 21 of the American Convention provides that “[e]veryone has the right to the use and enjoyment of his property” Although indigenous peoples’ concept of land ownership may be distinguishable from the dominant Western notion of property, the Inter-American Court has consistently held that Article 21 protects indigenous peoples’ communal ownership of their ancestral lands.²³ One of the principal rationales underlying the Court’s reasoning is that:

¹⁹ *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 131 (Jun. 15, 2005).

²⁰ *Yakye Axa*, *supra* note 11, ¶ 154.

²¹ *See Xákmok Kásek*, *supra* note 16, ¶ 174.

²² INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES, *supra* note 16, ¶¶ 39–40.

²³ *See Mayagna*, *supra* note 13, ¶ 148.

failing to recognize the specific versions of the right to use and enjoyment of property that emanate from the culture, practices, customs and beliefs of each people would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by Article 21 of the Convention meaningless for millions of individuals.²⁴

The Inter-American Court has further clarified that Article 21 protects indigenous peoples' property interests in the natural resources they have traditionally used, as well as those resources necessary for their survival and development as peoples.²⁵ In *Saramaka People v. Suriname* (“*Saramaka*”), the Court explained that “members of . . . indigenous communities have the right to own the natural resources they have traditionally used within the[ir] territory . . . [because] [w]ithout them, the very physical and cultural survival of such peoples is at stake,” and . . . [indigenous communities’] right to use and enjoy their territory would be meaningless . . . if said right were not connected to the natural resources that lie on and within the land.”²⁶ The Court further reasoned that indigenous peoples have protected property interests in natural resources because Article 21 of the American Convention must be interpreted consistently with the right to self-determination under common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), which provides that peoples may “freely pursue their economic, social and cultural development,” and “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence.”²⁷

²⁴ *Xákmok Kásek*, *supra* note 16, ¶ 87.

²⁵ *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 121–22 (Nov. 28, 2007); *see also Kaliña & Lokono Peoples v. Suriname, Merits, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 139 (Nov. 25, 2015) (“[T]here may be other complementary or additional traditional areas to which [indigenous peoples] have had access for their traditional or subsistence activities (which may have other purposes), regarding which they should be ensured, at least, the necessary access and use.”).

²⁶ *Saramaka*, *supra* note 25, ¶¶ 121–22.

²⁷ *Saramaka*, *supra* note 25, ¶ 93; *see also* Antkowiak, *supra* note 8, at 152 (arguing that *Saramaka* “radically expands the content of Article 21,” and that, under the *Saramaka* decision, Article 21 is “effectively . . . the self-determination norm of the American Convention”).

Nevertheless, indigenous communities' property rights under Article 21 are not absolute. A State may restrict their property rights where the restrictions are: (a) previously established by law; (b) necessary; (c) comport with the principle of proportionality; and (d) aimed at achieving a legitimate objective in a democratic society.²⁸ In *Saramaka*, the Inter-American Court added that "in analyzing whether restrictions on the property right of members of indigenous . . . peoples are permissible . . . another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members."²⁹ The court also held in *Yakye Axa Indigenous Community v. Paraguay* ("*Yakye Axa*") that:

When [States] apply the[] [Article 21 factors] to clashes between private property and claims for ancestral property by the members of indigenous communities, . . . States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.³⁰

In other words, given their special relationship with their lands and resources, there is a heightened standard for restricting indigenous peoples' property rights and interests as compared to the standard for restricting general private party property rights and interests.

B. Special Measures to Guarantee Indigenous Peoples' Right to Their Lands

Articles 1(1) and 2 of the American Convention help conceptualize the scope of States Parties duties with respect to the human rights enshrined in the treaty. Article 1(1) of the American Convention states that:

²⁸ See *Saramaka*, *supra* note 25, ¶ 127; *Yakye Axa*, *supra* note 11, ¶¶ 144–57.

²⁹ *Saramaka*, *supra* note 25, ¶ 128.

³⁰ *Yakye Axa*, *supra* note 11, ¶¶ 146–57.

States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.³¹

The obligation to ensure rights contained therein means that States Parties must take appropriate steps to protect and preserve the rights under the treaty;³² it “also means that States must take positive measures to permit as well as to help private individuals exercise their rights.”³³

Article 2 of the American Convention complements Article 1(1). This provision “obliges States Parties to adopt, in accordance with their constitutional processes and the provisions of [the American Convention], such legislative or other measures as may be necessary to give effect to the rights or freedoms protected therein.”³⁴ This obligation “is not limited to the constitutional or legislative text, but must extend to all legal provisions of a regulatory nature and result in effective practical implementation.”³⁵

Read in conjunction with Articles 1(1) and 2 of the American Convention, Article 21 obligates State Parties to affirmatively adopt measures to protect and ensure the right to property for all rights bearers. Additionally, under the Inter-American Court’s jurisprudence, it is well-established that these treaty provisions “place[] upon States a positive obligation to adopt special

³¹ See *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 111 (Sept. 15, 2005).

³² See *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 118, 121 (Nov. 15, 2017); see also Inter-Am. Comm’n on Hum Rts., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc 10 rev. 1, ch. VIII (1997) (“Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.”).

³³ Advisory Opinion OC-23/17, *supra* note 32, ¶ 121.

³⁴ American Convention, 1144 U.N.T.S. 123, art. 2; see also Advisory Opinion OC-23/17, *supra* note 32, ¶¶ 146–47 (“Given the relationship between protection of the environment and human rights . . . , all States must regulate this matter and take other similar measures to prevent significant damage to the environment.”).

³⁵ Advisory Opinion OC-23/17, *supra* note 32, ¶ 146.

measures that guarantee members of indigenous . . . peoples the full and equal exercise of their right to the territories they have traditionally used and occupied.”³⁶ The court has reasoned that indigenous peoples’ relationship with their lands requires greater protections than those afforded to the general populace due to historical marginalization and discrimination against indigenous peoples³⁷ and indigenous communities’ dependence on their lands for their physical and cultural survival.³⁸ States Parties must act with due diligence in fulfilling their positive obligations.³⁹

III. Grounding a Duty to Undertake Climate Adaptive Measures Under Article 21

The American Convention does not include express language on climate change or the environment, and the Inter-American Court has yet to directly consider whether State Parties have a duty under Articles 1(1), 2 and 21, read together, to undertake adaptive measures to protect indigenous peoples’ ancestral lands from the foreseeable adverse impacts of climate change.⁴⁰ This Section asserts that these treaty provisions obligate States Parties to undertake adaptive measures. Interpreting the American Convention in this manner furthers the object and purpose of the treaty and best reflects recent international human rights law and international environmental law developments.

³⁶ *Saramaka*, *supra* note 25, ¶¶ 91, 96.

³⁷ See INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES, *supra* note 16.

³⁸ See *Saramaka*, *supra* note 25, ¶¶ 85, 103 ns.103, 121–22 (“[M]embers of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.”); *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284., ¶ 112 (Oct. 14, 2014).

³⁹ Advisory Opinion OC-23/17, *supra* note 32, ¶ 123.

⁴⁰ However, the Inter-American Commission adopted a non-legally binding resolution in 2021 expressing that “States must adopt measures to ensure that the climate crisis does not affect or jeopardize the effective protection of the human rights of indigenous peoples . . . such as communal property . . .” Inter-Am. Comm’n on Hum. Rts., Res. No. 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations, at C(IV.), ¶ 23 (Dec. 31, 2021).

A. Climate Adaptive Measures and the Object and Purpose of the American Convention

The Inter-American Court has established that “the object and purpose of [the American Convention] is the protection of the fundamental rights of the human being”,⁴¹ and that its “provisions must . . . be interpreted using a model based on the values that the inter-American system seeks to safeguard, from the ‘best perspective’ for the protection of the individual”⁴² and peoples. The court also considers that the American Convention is a “live instrument[] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”⁴³ Accordingly, the American Convention should not be interpreted to have no practical effect or application in the face of foreseeable climate change-driven degradation of indigenous peoples’ lands and resources.

Because their relationship with their lands is “the fundamental basis of their culture, spiritual life, integrity, and economic survival,” indigenous communities are disproportionately vulnerable to environmental changes.⁴⁴ The Inter-American Commission has explained that the degradation of indigenous communities’ lands “invariably leads to serious loss of life and health and damage to the cultural integrity of indigenous peoples.”⁴⁵ Moreover, in a recent advisory opinion on the environment and human rights, the Inter-American Court emphasized:⁴⁶

that the lack of access to . . . [their] territories and natural resources may expose indigenous communities to precarious and subhuman living conditions and increased vulnerability to disease and epidemics, and subject them to situations of extreme neglect that may result in various violations of their human rights in addition to causing them suffering and undermining the preservation of their way of life, customs and language.

⁴¹ Advisory Opinion OC-23/17, *supra* note 32, ¶ 41 (internal quotation marks omitted).

⁴² *Id.*

⁴³ *Mayagna*, *supra* note 13, ¶ 146.

⁴⁴ See *Moiwana*, *supra* note 19, ¶ 131; *Yakye Axa*, *supra* note 11, ¶ 131.

⁴⁵ Report on the Situation of Human Rights in Ecuador, *supra* note 32, ch. IX.

⁴⁶ Advisory Opinion OC-23/17, *supra* note 3, ¶ 48 (referencing *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 147 (Jun. 27, 2012)).

The Inter-American Court also declared that “environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights”,⁴⁷ and identified the right to property as a substantive right whose enjoyment is particularly vulnerable to environmental degradation.⁴⁸

It follows that foreseeable climate change-driven environmental degradation necessitates special measures to protect and ensure indigenous communities’ right to their lands and resources. Increasing global average temperatures “will have major, and predominantly negative, effects on ecosystems across the globe [and] on the goods and services they provide. Already today, climate change is among the most important drivers of ecosystem change.”⁴⁹ Climate change is shifting animal migration routes, reducing biodiversity, altering the conditions for plant growth, impairing freshwater resources, and increasing instances of extreme weather, such as floods, droughts, heatwaves, wildfires and cyclones.⁵⁰ This, in turn, is negatively impacting indigenous communities’ food security, drinking water supplies, access to traditional medicines, and their overall ability to enjoy their lands and resources.⁵¹ Indeed, as climate change alters the natural environment, some ancestral lands will become ill-suited for use in accordance with customary practices while others will become completely uninhabitable, forcing communities to

⁴⁷ Advisory Opinion OC-23/17, *supra* note 32, ¶ 47.

⁴⁸ *Id.* ¶ 64.

⁴⁹ Office of the United Nations High Commissioner for Human Rights, *Report on the Relationship Between Climate Change and Human Rights*, ¶ 16, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009); IPCC, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 50 (2014).

⁵⁰ See Report of the Special Rapporteur on the rights of indigenous peoples, ¶¶ 5, 6, 9, A/HRC/36/46 (Nov. 1, 2017); *Report on the Relationship Between Climate Change and Human Rights*, *supra* note 49, ¶ 51; see also Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Preliminary Report), ¶ 45, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012); Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (Mapping Report), ¶¶ 76–78, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

⁵¹ See IPCC, *supra* note 49, at 51, 59, 80, 120.

relocate or migrate. Such scenarios would frustrate and pose a grave threat to indigenous peoples' right to property.⁵²

It is also critical to highlight that many indigenous communities would likely lack the means to finance sufficient adaptive projects themselves to avoid or manage expected adverse climate change impacts.

In short, climate change-driven environmental degradation is already occurring, and poses a grave threat to indigenous peoples' lands and resources, to which indigenous peoples' cultural identity and social welfare are inextricably linked.⁵³ Therefore, interpreting the special measures prescribed under Articles 1(1), 2, and 21 of the American Convention, read together, to require climate adaptive measures to protect and ensure indigenous communities' use and enjoyment of their territories and resources best furthers the American Convention's object and purpose of protecting the fundamental rights of individuals and peoples.

B. Climate Adaptive Measures and International Human Rights Law Developments

Consistent with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the Inter-American Court considers other international human rights treaties and broader developments in international human rights law when interpreting the American Convention.⁵⁴ In this instance, legal opinions and statements of human rights treaty bodies, the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), ADRIP, and International Labour Organization ("ILO") Convention 169 support that States Parties must undertake adaptive measures to address

⁵² Report of the Special Rapporteur on the rights of indigenous peoples, *supra* note 50, ¶ 9.

⁵³ *Saramaka*, *supra* note 25, ¶¶ 91, 121–22; *see also Yakye Axa*, *supra* note 11, ¶ 154; Inter-Am. Comm'n H.R., Res. No. 3/2021, *supra* note 40 at 9.

⁵⁴ *See Yakye Axa*, *supra* note 11, ¶ 127.

the foreseeable adverse effects of climate change on indigenous peoples' lands and resources under Articles 1(1), 2, and 21 of the American Convention, read together.

The UN Human Rights Committee's Torres Strait Islanders Decision

This year, as noted above, the UN Human Rights Committee determined that, under the ICCPR, Australia had violated the right to privacy, family and home and the right to culture of indigenous individuals inhabiting the Torres Strait Islands by failing to undertake timely and adequate adaptive measures to protect the islands and surrounding marine resources from climate changed-linked environmental degradation and hazards.⁵⁵

The committee recognized that ICCPR States Parties have an affirmative duty to implement climate adaptive measures to protect indigenous peoples' lands and resources that stems from Article 2(1) of the ICCPR,⁵⁶ which has very similar language to Article 1(1) of the American Convention. Article 2(1) of the ICCPR requires that ICCPR States parties "undertake[] to . . . ensure . . . the rights recognized in the . . . Covenant," while Article 1(1) of the American Convention requires American Convention States Parties to "undertake . . . to ensure . . . the free and full exercise of [the] rights and freedoms [therein]."

In addition, in finding that Australia violated the indigenous Torres Strait Islander's right to culture under the ICCPR, the committee recognized that: the right to culture "enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity"⁵⁷; and that the reduced viability of indigenous lands and resources for traditional cultural activities and ways of life

⁵⁵ *Daniel Billy and others*, *supra* note 6, ¶ 10.

⁵⁶ *Id.* ¶¶ 7.7, 8.3.

⁵⁷ *Id.* ¶ 8.13.

owing to a State's failure to undertake adequate and timely adaptive measures to address foreseeable climate change impacts may violate the right to culture.⁵⁸

The Human Rights Committee's reasoning regarding States' duties to ensure the right to culture under the ICCPR is highly persuasive when interpreting States' duties to ensure right to property under Article 21 of the American Convention because the Inter-American Court has "explicitly linked cultural identity to Article 21."⁵⁹ In *Xákmok Kásek Indigenous Community v. Paraguay*, the Court held that the members of an indigenous community "suffered diverse effects on their cultural identity produced, above all, by the lack of their own territory and the natural resources found on it, which represents a violation of Article 21(1) . . . in relation to Article 1(1)."⁶⁰ In *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, the Court emphasized that the:

connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.⁶¹

Moreover, the Court clarified in *Saramaka* that:

the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.⁶²

⁵⁸ *Id.* ¶ 8.14.

⁵⁹ Antkowiak, *supra* note 8, at 150.

⁶⁰ *Xákmok Kásek*, *supra* note 16, ¶ 182.

⁶¹ *Kuna Indigenous People of Madungandí*, *supra* note 38, ¶ 112.

⁶² *Saramaka*, *supra* note 25, ¶ 121.

Reports of the Office of the UN High Commissioner for Human Rights

Like the Human Rights Committee, the Office of the UN High Commissioner for Human Rights (“OHCHR”) recognizes that States have a duty under international human rights law to undertake climate adaptive measures. In 2015, OHCHR submitted a report to the 21st Conference of the Parties to the UN Framework Convention on Climate Change (“UNFCCC”), expressing that “[f]ailure to take affirmative measures to prevent human rights harms caused by climate change, including foreseeable long-term harms, breaches [States’] obligation” to “respect, protect, fulfil and promote all human rights for all persons without discrimination.”⁶³ Additionally, the report provided that “States are obliged to take adequate measures to guarantee the rights of all peoples to self-determination in the face of the looming threat posed by climate change.”⁶⁴

Later, in a 2016 report, OHCHR explicitly opined on States’ climate change adaptation obligations, stating that “[w]hen climate mitigation efforts fail to adequately protect rights, States must ensure that appropriate adaptation measures are taken to protect and fulfil the rights of all persons, particularly those most endangered by the negative impacts of climate change.”⁶⁵

Observations and Statements of CESCR & CERD

⁶³ Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, *Understanding Human Rights and Climate Change* 2, 15 (2015).

⁶⁴ *Id.* at 15.

⁶⁵ Office of the High Commissioner for Human Rights, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 32, U.N. Doc. A/HRC/32/23 (May 6, 2016).

The Committee on Economic, Social and Cultural Rights (“CESCR”) and the Committee on the Elimination of All Forms of Racial Discrimination (“CERD”) have built upon the OHCHR reports.⁶⁶

In 2018, CESCR set forth that:

a 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, could constitute a breach of their obligation to respect, protect and fulfil all human rights for all [under the ICESCR]. States must, therefore, dedicate the maximum available financial and material resources to . . . halt and reverse deforestation and soil deterioration; and increase adaptive capacity, especially in vulnerable and marginalized communities.⁶⁷

Similarly, in 2019, CESCR issued a joint statement with the Committee on the Elimination of Discrimination Against Women, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, declaring that “[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.”⁶⁸ In reviewing periodic reports of ICESCR States Parties, CESCR has also urged certain States to “specify measures to mitigate the effects of the climate crisis on [indigenous

⁶⁶ In 2019, UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment also asserted in a report transmitted to the UN General Assembly that “[t]he foreseeable and potentially catastrophic adverse effects of climate change on the enjoyment of a wide range of human rights give rise to extensive duties of States to take immediate actions to prevent those harms.” U.N. Secretary General, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, ¶ 62, U.N. Doc. A/74/161 (Jul. 15, 2019).

⁶⁷ Press Release, CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights (Oct. 8, 2018).

⁶⁸ Press Release, CESCR, Cmte. on the Elimination of Discrimination Against Women, the Cmte. on the Prot. of the Rts. of All Migrant Workers and Members of their Families, the Cmte. on the Rts. of the Child, and the Cmte. on the Rts. of Pers. with Disabilities, Join Statement on “Human Rights and Climate Change” (Sept. 16, 2019).

peoples’] lands, territories and resources with a view to protecting their traditional ways of life and means of subsistence.”⁶⁹

As for CERD, the committee, in its concluding observations on the periodic reports of Mexico, expressed concern “that the effects of the climate crisis, such as the degradation of land and water resources, may have a disproportionate impact on indigenous peoples,” and recommended that Mexico “specify measures to mitigate the effects of the climate crisis on their lands, territories and resources with a view to protecting their traditional ways of life and means of subsistence.”⁷⁰

UNDRIP, ADRIP, and ILO Convention 169

Although UNDRIP, ADRIP, and ILO Convention 169 do not directly address climate change, they provide that States must take measures to protect and conserve the environment of indigenous peoples’ lands and territories.⁷¹ Thus, these instruments reinforce the need for States to undertake measures to combat climate change-linked environmental degradation under international law.

C. Climate Adaptive Measures and International Environmental Law Developments

The Inter-American Court has reasoned that, as a “consequence of the interdependence and indivisibility of human rights and environmental protection . . . the Court may avail itself of

⁶⁹ See CESCR, *Concluding observations on the fifth periodic report of Australia*, U.N. Doc. E/C.12/AUS/CO/5 (11 Jul. 2017).

⁷⁰ See CERD, *Concluding observations on the combined eighteenth to twenty-first periodic reports of Mexico*, U.N. Doc. CERD/C/MEX/CO/18-21 (Sept. 19, 2019).

⁷¹ See ADRIP, art. XIX(4) (“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”); ILO Convention 169, art. 7(4) (“Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”); UNDRIP, art. 29.

the principles, rights and obligations of international environmental law” when establishing the scope of the obligations under the American Convention.⁷² Here, the Paris Agreement and the UNFCCC are relevant.

The Paris Agreement characterizes climate change as an “urgent threat” that requires an “effective” response, and includes an objective of “[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster[ing] climate resilience.”⁷³ In addition, under the agreement:

Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems⁷⁴

The agreement also affirms that “adaptation action should . . . tak[e] into consideration vulnerable groups, communities and ecosystems, and . . . be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems”⁷⁵ As for the UNFCCC, it recognizes that climate change “may adversely affect natural ecosystems and humankind,”⁷⁶ and its States Parties are obligated to formulate and implement “national . . . programmes.”⁷⁷

These two treaties support interpreting Article 21 of the American Convention (read together with Articles 1(1) and 2) to require that American Convention States Parties address the foreseeable adverse effects of climate change on indigenous peoples’ lands and resources. It is implicit in these treaties recognition that climate change may threaten ecosystems and

⁷² Advisory Opinion OC-23/17, *supra* note 32, ¶ 55.

⁷³ Paris Agreement, preamb. art. 2(1)(b), Dec. 12, 2015, 55 I.L.M. 740.

⁷⁴ *Id.*, art. 7(2).

⁷⁵ *Id.*, art. 7(5).

⁷⁶ United Nations Framework Convention on Climate Change, preamb., May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

⁷⁷ *Id.*, art. 4(1)(b).

humankind that climate change may impact the enjoyment of human rights, particularly those closely linked to ecosystem health and the availability of natural resources. In addition, these two treaties underscore that States should effectively respond to climate change, and that any effective response should include climate adaptation, as it is critical for protecting humans and the natural environment upon which they depend for survival.⁷⁸ Therefore, when considering States' obligations under the American Convention in light of text of international treaties on climate change, it is reasonable to conclude that climate adaptive measures are important for ensuring human rights and that climate adaptive measures may be a necessary requirement under certain circumstances to ensure that adverse climate change impacts do not undermine the cultural and physical survival of indigenous communities.

CONCLUSION

Under the American Convention, State Parties have an affirmative duty to undertake adaptive measures to protect indigenous peoples' ancestral lands and resources from the foreseeable adverse effects of climate change. As demonstrated by the wildfires that ravaged the Guató communities' territories, the threat of climate change for the indigenous peoples of Latin America is significant and States must respond accordingly. In developing climate adaptive measures in relation to indigenous peoples' land and resources, State should ensure indigenous peoples' meaningful participation in decision-making processes in accordance with applicable obligations under international law.

⁷⁸ See Benoit Mayer, *Climate Change Adaptation and the Law*, 39 VA. ENV'T'L L.J., 141, 143, 147-48 (2021).