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A PROPOSAL FOR ADDRESSING VIOLATIONS OF INDIGENOUS PEOPLES' ENVIRONMENTAL AND HUMAN RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Natalia Gove

I. INTRODUCTION

International concerns in the areas of human rights, health, and environment have expanded considerably in the past several decades.¹ In response, the international community has created a vast array of international legal instruments, specialized institutions, and agencies at the global and regional levels to respond to problems in each of the identified areas.² Nearly all global human rights bodies have considered the

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¹ Dinah Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice* 3 (Health and Human Rights Working Paper Series No 1, Working Paper A Background Paper for the World Health Organization), available at

http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf.

² *Id.*

links between environmental degradation and internationally guaranteed human rights.³ The concept of environmental human rights addresses the widespread and severely destructive effect that environmental harm can have on the health, land, livelihood, and culture of all mankind, and indigenous groups in particular.⁴ A right to environmental protection is especially crucial to indigenous peoples' ability to sustain their customary way of life because they are heavily dependent on the environment for their subsistence and cultural survival.⁵

Despite the explicit recognition of the linkage between human rights and environment, the multifaceted nature of addressing environmental harm makes enforcement of the environmental protections in the Inter-American Human Rights System ("Inter-American System") complex and almost unachievable.⁶ Although the various negative impacts from environmental harm implicate several areas of law, they do not fit neatly into any one of those areas.⁷ Claims of environmental harm have been categorized as violations of international environmental law and human rights law.⁸

³ Dinah Shelton, *Rainforests and Regulation: New Directions in Brazilian Environmental Law and Legal Institutions, Environmental Rights and Brazil's Obligations in the Inter-American Human Rights System*, 40 *Geo. Wash. Int'l. L. Rev.* 733 (2009) (citing Alexandre Kiss & Dinah Shelton, *International Environmental Law* ch. 15 (4th ed. 2005)).

⁴ Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 *STAN. ENVTL. L.J.* 71, 73 (2005).

⁵ Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *Proposed American Declaration on the Rights of Indigenous Peoples*, at arts. XII, XIII, XXI, Doc. 8 (February 26, 1997), (available at <http://www.cidh.oas.org/indigenas/chap.2g.htm>) [hereinafter *Proposed American Declaration*].

⁶ Osofsky, *supra* note 4.

⁷ *Id.*

⁸ See Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *STAN. J. INT'L L.* 103 (1991).

However, as this article suggests, there are issues with enforcement of both types of these claims.

International environmental law primarily focuses on environmental damage, rather than its impact on human beings.⁹ The focus of environmental treaties is primarily on constraining environmentally deleterious behavior, rather than preventing injuries to people.¹⁰ Further, environmental treaties do not take into consideration the special protection that indigenous people require on the basis of their inextricable connection with the land and its resources. In contrast, international human rights law focuses entirely upon human impacts, with little concern for the environmental dimension of the problem.¹¹

The American hemisphere was the first region in the world to recognize the human right to a healthy environment through the adoption of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights of 1988 ("San Salvador Protocol").¹² Although the San Salvador Protocol acknowledges the right to a healthy environment, it does not provide effective means to remedy environmental harm to indigenous people, as there is no mechanism to enforce

⁹ *Id.*

¹⁰ *Id.*

¹¹ Osofsky, *supra* note 4.

¹² See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 19.6, opened for signature Nov. 17, 1988, O.A.S.T.S. No. 6 [hereinafter San Salvador Protocol]. Please note that the only other regional instrument recognizing the right to environment is the African Charter on Human and Peoples' Rights. The European Human Rights System does not recognize such a right.

this right.¹³ The San Salvador Protocol explicitly provides for enforcement of only two rights contained therein: the trade union rights and the right to education.¹⁴ Since the San Salvador Protocol is not an enforceable instrument, Inter-American human rights litigation focuses instead on general infringements on human rights, such as the rights to property, life, health, and personal integrity in an attempt to remedy environmental harm.¹⁵

International environmental law continues to adopt stricter standards, but individuals still lack recourse to claim environmental violations in the regional and international systems.¹⁶ Therefore, states cannot be held directly accountable for environmental degradation or contamination in Inter-American jurisprudence,¹⁷ while indigenous people continue to be marginalized and lack means to protect their time-honored way of life from excessive and life threatening industrialization and development.

Part I of this paper will discuss the significance of environmental protection for indigenous peoples. It will consider the proposition central to the indigenous peoples' environmental claims in Central and South America that the Inter-American human rights jurisprudence acknowledges special protection granted to indigenous peoples, and safeguards their right to traditional land and natural resources. Part II will analyze

¹³ Paula Spieler, *The La Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations*, 18 No. 1 HUM. RTS. BRIEF 19 (2010).

¹⁴ San Salvador Protocol, *supra* note 12.

¹⁵ Spieler, *supra* note 13.

¹⁶ Caroline Dommen, *How Human Rights Norms Can Contribute to Environmental Protection: Some Practical Possibilities Within the United Nations System*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 105, 105 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

¹⁷ Spieler, *supra* note 13.

the linkage between environmental and human rights, as well as the lack of a direct enforcement mechanism for redressing violations of environmental rights. It will also describe the existing legal framework for addressing violations of environmental rights in the Inter-American Human Rights System. This framework is based on several Inter-American human rights instruments, related case law, and authoritative opinions. Part III will propose a solution to the lack of a mechanism for direct enforcement of the right to a healthy environment by suggesting a new enforcement clause for the San Salvador Protocol. The alternative proposal will suggest that enforcement of the San Salvador Protocol be grounded in progressive interpretation of Article 29 of the American Convention on Human Rights ("American Convention"). Finally, Part III will propose the framework for enforcement of the right to a healthy environment.

I. SIGNIFICANCE OF ENVIRONMENTAL PROTECTION FOR INDIGENOUS PEOPLES

In the past few decades, innovative legal instruments have been developed as a result of the increased awareness of our planet's environmental problems.¹⁸ The quest for the preservation of the environment, together with the enforcement of international human rights, has received special attention from various law-making entities throughout the world, including the Inter-American Human Rights System and the United Nations.¹⁹ This special attention culminated with a growing concern for the rights of indigenous peoples.²⁰ Indigenous peoples are now viewed as an active part of the existing environment that must also be preserved from destruction and as victims of the

¹⁸ Jose Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L.J. 97 (1997).

¹⁹ *Id.*

²⁰ *Id.*

civilization that has neglected their inherent human rights.²¹ This realization has led to a significant increase in the number of international instruments aimed at creating, protecting, and enforcing indigenous human rights.

Protection of environmental rights and indigenous peoples is particularly important in South and Central America. Despite the high mortality rate, the population of indigenous peoples in South and Central America is significant in comparison to other parts of the world.²² For example, indigenous peoples comprise sixty percent of the total population of Bolivia.²³ Further, for the past few decades, policies regarding indigenous peoples in Central and South America have been dictated solely by the economic interests of the regions where the indigenous peoples live without regard to their connection with the land or environment.²⁴

Prior to discussing the current legal mechanism in the Inter-American jurisprudence for enforcement of environmental rights, two critical questions should be answered: (1) Who are indigenous peoples? (2) Why do they require special protection? These questions are significant because diversity and distinctions uniquely identifying the indigenous populations confirm the urgent need to address human rights violations with respect to these marginalized communities and their environment.

²¹ See generally Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples* 5, *Colo. J. INT'L ENVTL. L. & POL'Y* 1, 5 (1994).

²² See Kastrup, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

A. WHO ARE "INDIGENOUS PEOPLES"?

Numerous attempts have been made to define the term "indigenous peoples"; however, no single universally accepted definition has been adopted.²⁵ Definitions vary depending on the territory, race, history, culture, subsistence lifestyle, the surrounding environment, and political dynamics of the area where indigenous populations reside. Indigenous peoples may be referred to in different countries by such terms as "indigenous ethnic minorities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," or "tribal groups."²⁶

No single definition is appropriate to cover the diversity of indigenous peoples because of the varied and changing contexts in which indigenous people live.²⁷ The term "indigenous peoples" is used in a generic sense to refer to distinct, vulnerable, social and cultural groups possessing the following characteristics in varying degrees: (1) close collective attachment to ancestral territories and natural resources; (2) self-identification and identification by others as members of a distinct cultural group; (3) possession of an indigenous language, which is often distinct from a national language; (4) presence of customary social or political institutions that are separate from the

²⁵ Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 HARV. HUM. RTS. J. 71 (2011).

²⁶ *Operational Policy 4.10 - Indigenous Peoples*, worldbank.org (July 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

²⁷ *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008)* (World Bank OPCS Working Paper August 2011), available at http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf

dominant society and culture; and (5) subsistence-oriented production systems.²⁸ The term “indigenous” applies to those people who are isolated socially or to marginal groups that have managed to preserve their traditions in spite of being incorporated into states dominated by other societies.²⁹

The United Nations Declaration on the Rights of Indigenous Peoples (“UN Declaration”) formulates the distinction as applied to indigenous peoples in terms of being a politically underprivileged group with an identity different to the nation in power.³⁰ However, the specific term “indigenous peoples” has a more restrictive interpretation when used in the more formalized, legalistic, and academic sense, associated with the collective rights of human populations.³¹ In these contexts, the term is used to denote particular peoples and groups around the world who, in addition to being native to or associated with some given territory, meet certain other criteria such as having reached a social and technological plateau thousands of years ago.³²

Such varied characterization of the indigenous populations leads to only one conclusion that indigenous peoples are so unique that a single definition is incapable of identifying their diverse and distinct character. Difficulty in appropriately identifying indigenous peoples also reveals the complexity of legal characterization of

²⁸ *Id.*

²⁹ Jose R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, Volume V. Conclusions, Proposals, and Recommendations, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987).

³⁰ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/61/L.67 Add.1 (Sept. 13, 2007) [hereinafter UN Declaration].

³¹ *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> (last visited Nov. 22, 2011).

³² *Id.*

environmental harm to humans due to substantive limitations of applicable international law, the varying approaches to sovereignty of indigenous peoples and the State, as well as complications imposed by applying general human rights law to environmental harm.³³ When environmental damage negatively impacts these peoples, a question arises regarding whether the imposed hardship violates their rights.³⁴

A. *WHY DO INDIGENOUS PEOPLES REQUIRE SPECIAL PROTECTION?*

One of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern.³⁵ Indigenous peoples require special protection because their land and natural resources associated with it is necessary for their survival, development, and lifestyle.³⁶ This special protection that stems from the close cultural and spiritual relationship binding indigenous people with their territory is critical because indigenous peoples' lives, as

³³ Osofsky, *supra* note 4.

³⁴ *Id.*

³⁵ See S. James Anaya, *Indigenous Peoples in International Law*, 259 (Oxford University Press, 2nd ed. 2004); Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990); W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM.J. INT'L L. 350 (1995).

³⁶ *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 149 (Aug 31, 2001); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, at ¶ 137 (June 17, 2005); *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at ¶ 122 (Nov. 28, 2007).

well as the realization of their human rights, depend on their access to and use of these natural resources.³⁷

At the regional level in the Americas, where a large part of the world's indigenous peoples live and struggle for cultural survival, the Inter-American Human Rights System has responded to the concerns of indigenous peoples.³⁸ The Inter-American System has addressed promotion and protection of human rights in the Organization of American States ("OAS") member States.³⁹ The recognition of indigenous peoples as special subjects of international concern is explicit in numerous Inter-American and United Nations Human Rights instruments, including the Inter-American Charter of Social Guarantees,⁴⁰ International Labour Organization Convention No. 169,⁴¹ and the UN Declaration on the Rights of Indigenous Peoples.⁴²

Cases related to the rights of indigenous peoples are typically those that most directly involve environmental violations.⁴³ This connection is not coincidental.⁴⁴ When

³⁷ *Saramaka People*, *supra* note 36; *Yakye Axa Indigenous*, *supra* note 36.

³⁸ S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33. (2001).

³⁹ Anaya, *supra* note 35.

⁴⁰ Inter-American Charter of Social Guaranties, art. 39 (1948), reprinted in *Encyclopedia of the United Nations and International Relations* 432, 433 (Edmund Jan Osmanczyk ed., 1990) [hereinafter *Inter-American Charter of Social Guaranties*]; see also *supra* note 39.

⁴¹ International Labour Organization [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, arts. 4(1) and 13, June 27, 1989, 72 ILO Official Bulletin 59, 1650 U.N.T.S 383 [hereinafter *ILO Convention No. 169*].

⁴² UN Declaration, *supra* note 30.

⁴³ Inter-American Association for Environmental Defense, AIDA, *Environmental Defense Guide: Building Strategies for Litigating*

seen from the indigenous worldview, the idea of “property” is based on factors related to the collective property rights of indigenous peoples, as well as their perception of territory as a holistic concept that includes cultural and religious elements.⁴⁵ Such a vision creates a sense of belonging that transcends spatial boundaries and differs greatly from the classic Western view, which is more focused on property as merely a factor of economic production.⁴⁶

The subject of enforcement of environmental rights in the context of indigenous peoples becomes particularly relevant during major development projects in developing countries.⁴⁷ Large-scale development operations harming the environment have severe effects on the enjoyment of basic human rights of indigenous people for three main reasons.⁴⁸ First, the rapidly expanding populations of developing countries and the diversification of their economies have adverse impact on the marginalized populations and their environment.⁴⁹ Second, indigenous peoples are often more vulnerable because they do not have the same access to mechanisms for asserting their rights as do other individuals.⁵⁰ Given the special relationship that indigenous people have with their territories, abuse in the exploitation of natural resources is an assault against their right to develop autonomously.⁵¹ Finally, numerous scientific discoveries, some of them

Cases Before the Inter-American System of Human Rights 45 (2010) [hereinafter Environmental Defense Guide].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Hitchcock, *supra* note 21, at 10.

⁴⁸ *Id.*

⁴⁹ *Id.* at 14.

⁵⁰ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at 50.

⁵¹ *Id.* at 68.

drawn from indigenous knowledge, have resulted in an expansion of the uses to which resources are put, also negatively impacting indigenous populations.⁵²

II. LEGAL FRAMEWORK FOR ADDRESSING VIOLATIONS OF ENVIRONMENTAL AND HUMAN RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Violations of indigenous peoples' rights are being increasingly addressed under both domestic and international law. As a result of the emerging global environmental concerns, many international treaties and declarations now provide for the protection of the environment and biodiversity.⁵³ Numerous international instruments challenge the national legislatures of signatory countries to regulate and to apply the international principles.⁵⁴ Consequently, many areas around the world have been selected for protection from human exploration, and some economic activities have been regulated.⁵⁵ Human rights and environmental protection are two of the main concerns of modern international law, and the deterioration of the global environment is threatening human life and health.⁵⁶

A. LINKAGE BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

According to Dinah Shelton, a leading expert in international environmental law, human rights and environmental protection represent "overlapping social values with a

⁵² See Hitchcock, *supra* note 21, at 14.

⁵³ See San Salvador Protocol, *supra* note 12, at Art. 11; Inter-American Democratic Charter, 28th Spec. Sess. of the OAS General Assembly, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), Sept. 11, 2001 [hereinafter Democratic Charter], art. 15; Convention on Biological Diversity, United Nations Convention on Biological Diversity, Rio de Janeiro (1992), 31 I.L.M. 818 [hereinafter CBD] arts. 8, 10; Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration], Principle 1.

⁵⁴ See generally Jose Paulo Kastrup, *supra* note 18.

⁵⁵ *Id.*

⁵⁶ Spieler, *supra* note 13.

core of common goals.”⁵⁷ Both seek the achievement of the highest quality of human life.⁵⁸ Human rights depend on environmental protection, and environmental protection depends on human rights.⁵⁹ According to the World Charter for Nature, “mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.”⁶⁰

This vision integrating human rights and the environment is not only necessary but is also useful for a number of reasons. First, the incorporation of environmental issues strengthens human rights laws as they allow for the application of new legal principles, and extend the scope of human rights guarantees to equally important areas that previously went ignored or neglected.⁶¹ Second, it allows for the more effective protection of human beings, generates preventative and remedial solutions for future harms, and establishes policies and legal mechanisms to ensure the enjoyment of the right to a high-quality environment.⁶² Third, human rights law can introduce essential principles into environmental law such as non-discrimination, progressive development, the need for public participation and access to information, as well as the protection of vulnerable groups.⁶³ Finally, implementing this vision can enrich the search for solutions to environmental problems.⁶⁴

⁵⁷ Shelton, *supra* note 8, at 138.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, pmb., para. 3(a), at 17, U.N. Doc. A/37/51 (1982).

⁶¹ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at 4.

⁶² Michael R. Anderson, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION: AN OVERVIEW, IN HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1-4, 21-23 (Alan E. Boyle & Michael R. Anderson eds., 1996).

⁶³ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at 4.

⁶⁴ *Id.*

1. INTERNATIONAL HUMAN RIGHTS RECOGNITION OF THE LINKAGE BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

The first nexus between human rights and the environment emerged in the 1972 Stockholm Declaration, which provides that “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”⁶⁵ Although it did not create a new human right to the environment per se, it represented the first real international recognition of the importance that the environment plays in the enjoyment of human rights.⁶⁶ The Stockholm Declaration served as a basis for the 1992 Rio Declaration, which now provides for the fundamental principles of international environmental law.⁶⁷

Christopher Weeramantry, Vice-President of the International Court of Justice, made one of the most persuasive propositions supporting the linkage between

⁶⁵ Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration], Principle 1. See also G.A. Res. 2398 (XXIII), U.N. Doc. A/23/2398 (Dec. 3, 1968) (calling for the Stockholm Conference).

⁶⁶ See Shelton, *supra* note 1, at 112; Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 74 (2002); Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT’L L.J. 261, 293 (1997).

⁶⁷ United Nations Conference on Environment and Development, June 14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/ CONF.151/26/Rev.1 (1992) [hereinafter Rio Declaration]. Several principles have gained the status of customary international law, such as Principle 15 of Rio Declaration (Precautionary Principle); Principle 17 of Rio Declaration (Environmental Impact Assessment); Principle 2 of Rio Declaration (which mirrors Principle 21 of Stockholm Declaration, *supra* note 65, at Principle 21) (Principle of Transboundary Harm).

environmental protection and human rights in a separate precedent-setting opinion, which declared that the “protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.”⁶⁸ Protection of the environment is justified on the grounds of its importance to the enjoyment of basic human rights and human survival.⁶⁹ When this approach is taken, it becomes clear that norms of environmental protection and human rights share a common platform.⁷⁰ Specifically, human rights doctrines largely aim at securing self-determination through creating a framework of rights to protect people from arbitrary government interference and secure their basic political needs for survival.⁷¹ Likewise, rules of environmental protection ultimately aim at preserving basic natural resources in order to secure human survival.⁷²

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) also underscores the importance of environmental protection.⁷³ Article 29 of the UNDRIP provides that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”⁷⁴ States shall establish and implement assistance programmes for

⁶⁸ See *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7, 88 at 91 (Sept. 25).

⁶⁹ Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming*, *GEO. INT'L ENVTL. L. REV.* 73, 76 (2008).

⁷⁰ *Id.*

⁷¹ See Shelton, *supra* note 13 (citing *THE ENVIRONMENTAL JURISPRUDENCE OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS*, IN *LINKING RIGHTS AND THE ENVIRONMENT* 1 (Romina Picolotti & Jorge Daniel Tillant eds., 2003)).

⁷² *Id.*

⁷³ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295, Oct. 2, 2007) [hereinafter UNDRIP].

⁷⁴ *Id.*

indigenous peoples for such conservation and protection, without discrimination.” It also stresses the significance of indigenous peoples’ land rights and ownership and control of natural resources.⁷⁵

The World Bank also realizes that this special linkage with the land and resources exposes indigenous peoples to heightened types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.⁷⁶ The World Bank, a vital global source of financial assistance to developing countries, plays a critical role in safeguarding the environment of indigenous people.⁷⁷ It set a mission to fight poverty, and help the people and the environment by “providing resources, sharing knowledge, and building capacity.”⁷⁸

2. INTER-AMERICAN HUMAN RIGHTS INSTRUMENTS ENCOMPASSING THE LINKAGE BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

The American hemisphere was the first region in the world to recognize the right to a healthy environment as a human right through the adoption of the San Salvador Protocol.⁷⁹ Article 11 of the San Salvador Protocol expressly protects the right to “live in a healthy Environment” as a human right, and requires States to promote “protection,

⁷⁵ *Id.*

⁷⁶ The World Bank, OPERATIONAL MANUAL 4.1 (July 2005), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

⁷⁷ *Id.*

⁷⁸ *About Us*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>.

⁷⁹ See ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at i. and San Salvador Protocol, *supra* note 12, art. 11.

preservation, and improvement of the environment.”⁸⁰ The American Convention does not recognize this right directly, but references it through a comprehensive interpretation of Article 26,⁸¹ which recognizes the duty of treaty Member States to respect economic, social and cultural rights. The inclusion of the right to a healthy environment in the protocol adds to the emergence of a substantive environmental human right on the international scene.⁸² However, despite explicit recognition of the right to a healthy environment, there are no international legal mechanisms to ensure its enforcement.⁸³

The OAS subsequently acknowledged the relationship between human rights violations and environmental degradation in several OAS Resolutions.⁸⁴ Despite its lack of a comprehensive and enforceable treaty mechanism for environmental protection, the Inter-American System recognizes the importance of the environment in a way that transcends a simple acknowledgement of yet another human right.⁸⁵ Article 15 of the Inter-American Democratic Charter identifies environmental protection as one of the objectives of democracy.⁸⁶

Express recognition of existence of the human right to a healthy environment in human rights law reaffirms and strengthens the existence of the linkage of between

⁸⁰ *Id.*

⁸¹ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

⁸² See Holwick, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, a Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 218 (2000).

⁸³ See Spieler, *supra* note 13.

⁸⁴ OAS AG/RES 1926 (XXXIII-O/03) (June 10, 2003); OAS AG/RES 1896 (XXXII-O/02) (June 10, 2002); OAS AG/RES 1819 (XXXI-O/01) (June 5, 2001) [hereinafter *OAS General Assembly Resolutions*].

⁸⁵ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43.

⁸⁶ Inter-American Democratic Charter art. 15.

human rights and environment.⁸⁷ It has further important consequences, such as the incorporation of environmental issues into the normative system of human rights, allowing them to be viewed through a new set of norms.⁸⁸ “Human rights norms” are understood as legal norms regulating the exercise of fundamental rights.⁸⁹ As a result, environmental law could incorporate the principles of human rights, including the possibility of direct judicial enforcement.⁹⁰ In effect, environmental laws regulate elements that already relate to the exercise of fundamental rights.⁹¹ This happens in cases concerning the right to participation and information in environmental issues, or the special protection of vulnerable indigenous groups.⁹² This situation implies that those specific norms could also be considered human rights norms, thereby opening new areas of doctrine that will, in practice, reinforce the simultaneous protection of human rights and the environment.⁹³

B. CATEGORIZATION OF A RELATIONSHIP BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

I. Claims of environmental infringements have been categorized as violations of international environmental law and human rights law. International environmental law focuses primarily on environmental damage, rather than on its impact

⁸⁷ International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

⁸⁸ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at 6.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1, ¶ 34, 1982 and Resolution 1 (Sept. 24, 1982).

on human beings.⁹⁴ The focus of environmental treaties is primarily on constraining environmentally deleterious behavior, rather than on preventing injuries to people.⁹⁵ In contrast, international human rights law focuses entirely on human impacts, with little concern for the environmental dimension of the problem.⁹⁶ Difficulty in finding the appropriate mechanism to enforce environmental rights is further exacerbated by the complexity of characterization of the appropriate legal framework to address human rights and environmental violations. The relationship between human rights and environmental protection has been described primarily from three perspectives.⁹⁷

II. First, environmental protection can be viewed as a precondition to the promotion of human rights, where human rights can only be realized if the environment is protected.⁹⁸ This perspective risks allowing States to use this precondition as an excuse not to protect human rights.⁹⁹ Furthermore, it fails to account for the complexity of the interrelationship between human rights and the environment.¹⁰⁰

The second perspective views the emergence of a right to healthy environment as a human right itself in the international sphere.¹⁰¹ The Stockholm and Rio Declarations, as well as the United Nations General Assembly Resolution confirm that all persons are entitled to live in a healthy environment.¹⁰² The OAS has affirmed the relationship between human rights violations and environmental degradation in several

⁹⁴ Osofsky, *supra* note 5, at 78.

⁹⁵ *Id.*

⁹⁶ *Id.* at 79.

⁹⁷ See Spieler, *supra* note 13.

⁹⁸ Shelton, *supra* note 8, at 112.

⁹⁹ *Id.* at 113.

¹⁰⁰ Spieler, *supra* note 13, at 20.

¹⁰¹ *Id.*

¹⁰² Stockholm Declaration, *supra* note 66; Rio Declaration, *supra* note 68, at Principle 10; G.A. Res. 45/94, ¶ 1, U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

Resolutions.¹⁰³ At the Inter-American human rights level, Article 11 of the San Salvador Protocol explicitly acknowledges the right to a healthy environment as a human right.¹⁰⁴ Under the protection framework provided by the San Salvador Protocol, the right to a healthy environment is understood as a collective right listed among the economic, social and cultural rights.¹⁰⁵ However, taking into account the indivisible nature of human rights, environmental protection, given its extent and level of abstraction, transcends the limits of classical subjectivity as an individual right.¹⁰⁶ Therefore, this right can also be understood as a social right that affects national collectives or groups in special situations such as indigenous peoples, which could potentially encompass all of humanity and its future generations.¹⁰⁷ The protection framework under San Salvador Protocol, however, lacks a legal enforcement mechanism in Inter-American jurisprudence.¹⁰⁸

III. Finally, the third perspective gives rise to human rights litigation addressing environmental harm through an application of general human rights, such as rights to property, life and personal integrity, to address environmental violations.¹⁰⁹ This perspective views environmental protection as the result of the exercise of other human rights.¹¹⁰ Linking human rights to environmental harm allows individuals to use global and regional human rights procedures when states violate human rights by

¹⁰³ *OAS General Assembly Resolutions*, *supra* note 84.

¹⁰⁴ *San Salvador Protocol*, *supra* note 12, art. 11.

¹⁰⁵ *ENVIRONMENTAL DEFENSE GUIDE*, *supra* note 43, at 47

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See San Salvador Protocol*, *supra* note 12.

¹⁰⁹ *Id.*

¹¹⁰ *Spieler*, *supra* note 13, at 20.

allowing substantial environmental degradation.¹¹¹ Within this framework, a person can allege that environmental degradation has affected certain rights guaranteed under international human rights instruments.¹¹² This paper focuses on the second and third perspectives.

1. HUMAN RIGHT TO A HEALTHY ENVIRONMENT

The San Salvador Protocol was the first international human rights instrument in the world to expressly recognize the right to a healthy environment (Article 11).¹¹³ However, the reality in the Americas shows that the recognition of the right to a healthy environment as a human right, in and of itself, is not sufficient to ensure its effective protection.¹¹⁴ Recognition is just the first step.¹¹⁵ States must demonstrate a commitment to guarantee, respect and protect this right.¹¹⁶ They must also implement measures to ensure that their activities to promote development do not affect the environment to such a degree that they destroy ecosystems or prevent people from enjoying the conditions of a dignified life.¹¹⁷

Further, almost two decades since the recognition of the right to a healthy environment, the environmental situation in the region remains far from ideal for a number of reasons.¹¹⁸ Unfortunately, evidence of this reality is both varied and extensive, ranging from the negative effects of large infrastructure projects on indigenous communities in Central and South America to the Inuit indigenous

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ ENVIRONMENTAL DEFENSE GUIDE, *supra* note 43, at 18.

¹¹⁴ *Id.* at vi.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 19.

communities of Alaska whose survival is threatened by the impacts of climate change on their environment.¹¹⁹ The San Salvador Protocol entered into force in 1999, but to date, only nineteen States have signed it, fourteen of which have also ratified it.¹²⁰ Although the San Salvador Protocol explicitly recognizes this right, and imposes an obligation on the states to protect, preserve and improve the environment, it has a major drawback. Unfortunately, it does not provide for a legal mechanism to enforce violations of this right, thus precluding individuals from seeking redress in the Inter-American Human Rights system when states are violating environmental rights.¹²¹ The San Salvador Protocol expressly limits enforcement to only two rights: (1) trade union rights, and (2) the right to education.¹²² Consequently, remedy for violations of only the two aforementioned rights can be sought in the Inter-American Human Rights regime. Therefore, a state cannot be held directly accountable for environmental degradation or contamination.¹²³

2. REDRESSING ENVIRONMENTAL VIOLATIONS THROUGH HUMAN RIGHTS GUARANTEED UNDER INTER-AMERICAN HUMAN RIGHTS INSTRUMENTS

Although states cannot enforce violations of the right to a healthy environment, the Inter-American Human Rights jurisprudence has indirectly referred to environmental

¹¹⁹ *Id.*

¹²⁰ The States that have ratified the Protocol are Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname and Uruguay. The following States have signed the Protocol but have not yet ratified it: Chile, the Dominican Republic, Haiti, Nicaragua and Venezuela. Ratifications of Protocol of San Salvador, Inter-American Commission on Human Rights: Organization of American States, <http://www.cidh.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm> (last visited Feb. 25, 2013).

¹²¹ Spieler, *supra* note 13.

¹²² San Salvador Protocol, *supra* note 12.

¹²³ Spieler, *supra* note 13.

degradation in the context of other human rights violations.¹²⁴ The Inter-American adjudicative system has construed various provisions of the American Convention, and the Declaration on the Rights and Duties of Man, related to protection of the rights to property, life, health, equal protection and non-discrimination to encompass avenues for relief for environmental violations. Specifically, the Inter-American Commission has requested the suspension of oil exploration activities on indigenous land,¹²⁵ and requested medical treatment for those affected by severe environmental pollution.¹²⁶

a) COMMUNAL RIGHT TO PROPERTY

Inter-American human rights jurisprudence has applied a communitarian approach to the use of human rights in environmental disputes.¹²⁷ In its groundbreaking decision, *Awás Tingni Community v. Nicaragua*,¹²⁸ the Inter-American Court of Human Rights held that timber logging concessions awarded by Nicaragua to private investors in an area claimed by the Awás Tingni community constituted a violation of the indigenous peoples' property rights guaranteed by Article 21 of the American Convention.¹²⁹ Despite the lack of any express reference to communal property in the text of Article 21 of the American Convention, the Inter-American Court nonetheless interpreted the "right to property" as inclusive of the customary community entitlement of

¹²⁴ *Id.*

¹²⁵ *The Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador*, Case 167/03, Inter-Am Comm'n H.R. Report No. 62/04, OEA/Ser.L/V/II.122 (2004).

¹²⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, par. 149.*

¹²⁷ Francesco Francioni, *International Human Rights in an Environmental Horizon*, 21 EUR. J. INT'L L. 41 (2010).

¹²⁸ *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug 31, 2001).

¹²⁹ American Convention, *supra* note 81, art. 21; see Francioni, *supra* note 127.

indigenous peoples to use and enjoy their ancestral land, and to have it respected against the environmentally and culturally destructive project of commercial logging.¹³⁰

This case sets a far reaching precedent affirming indigenous land rights not only for the indigenous communities of Nicaragua, but also for indigenous peoples throughout the hemisphere.¹³¹ In addition, the case highlights the failure of states to protect the traditional landholdings of indigenous peoples, and illustrates the convergence of environmental, sustainable development, and human rights issues in indigenous land rights cases.¹³² This case is paramount on the environmental front. Indigenous societies have long been recognized for their stewardship practices and sustainable development of natural resources.¹³³ Perhaps as a result, significant portions of the world's remaining tropical forests are found on the traditional lands of indigenous peoples.¹³⁴ The efforts of indigenous peoples to protect their homelands may be the only check on state-sponsored development that degrades, destroys, and pollutes.¹³⁵ Nevertheless, environmentalists' efforts to protect natural ecosystems have often ignored the interests of indigenous peoples.¹³⁶ The *Awes Tingni* case may serve to convince many environmentalists that recognizing indigenous rights is an essential

¹³⁰ American Convention, *supra* note 81, art. 21.

¹³¹ Jennifer A. Amcott, *Environment, Equality, and Indigenous Peoples' Land in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awes Tingni v Nicaragua*, 32 ENVTL. L. 873, 874 (2002).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ S. James Anaya and S. Todd Crider, *Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awes Tingni, Nicaragua*, 18 HUM. RTS. Q. 345, 347 (1996).

¹³⁵ *Id.*

¹³⁶ Anaya, *supra* note 35, at 347.

element in environmental protection.¹³⁷ The Inter-American Court's ruling is an important step in acknowledging the critical linkages between indigenous land rights, human rights, and environmental protection issues.¹³⁸

In the subsequent case of *Maya Indigenous Community of Toledo*,¹³⁹ the Inter-American Commission on Human Rights ("Commission"), relying on the *Awes Tingni* decision, held that a logging project authorized by Belize posed such a threat to the natural environment of the Mayan community that it endangered the whole economic and life support on which the community depended.¹⁴⁰ While recognizing the importance of economic development, the Commission concluded that Belize had infringed the petitioners' right to property in their ancestral lands.¹⁴¹ Similarly, in the case of *Sarayaku v. Ecuador*, the Commission requested to suspend oil exploration in Ecuador on the affected Sarayaku indigenous territory to prevent further violations.¹⁴² The Commission had previously announced that land development regulations to explore the land and resources of indigenous populations should protect the environment and natural resources.¹⁴³ Unfortunately, decisions of the Commission are not binding or specifically enforceable in any state.¹⁴⁴

¹³⁷ Amiot, *supra* note 131, at 903.

¹³⁸ *Id.*

¹³⁹ *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 142 (2004).

¹⁴⁰ Francioni, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² *Sarayaku v. Ecuador*, Inter-Am Comm'n H.R. Report No. 62/04, Petition 167/03, OEA/Ser.L/V/II.122 (2004).

¹⁴³ Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm'n H.R., OEA/ Ser. L/V/II.96, doc. 10 rev. 1, 92 (1997).

¹⁴⁴ Rules of Procedure of the Inter-Am. Comm'n H.R., OAS Special Res., art. 46, 109th Sess. (Dec. 4-8, 2000, amended Oct. 7, 2002 and Oct. 7, 2003) [hereinafter Rules of Procedure], available at

b) RIGHT TO LIFE

The American Convention emphasizes the importance of the right to life¹⁴⁵ by defining it as a non-derogable right that may not be compromised or violated even in times of emergency or crisis.¹⁴⁶ The Commission has interpreted the provisions of the American Declaration on the Rights and Duties of Man (“American Declaration”) related to the rights to life and health¹⁴⁷ to extend human rights protection to communities threatened by some form of environmental destruction.¹⁴⁸ The Commission addressed an environmental issue for the first time in 1983.¹⁴⁹ The Commission recommended that Cuba take specific environmental measures to protect the right to health because inadequate water supply and sanitation could have a strong impact on health.¹⁵⁰

<http://iachr.org/Basicos/basic16.htm> (vesting authority in the Commission only to make recommendations, request additional information, and write reports on the offending state's compliance).

¹⁴⁵ See American Convention, *supra* note 81, art. 4.

¹⁴⁶ *Id.* at art. 27(2); see Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R., (ser. A) No. 9 (1987) (interpreting the judicial guarantees essential for the protection of non-derogable rights under the American Convention); see also Joan Fitzpatrick, Protection against Abuse of the Concept of “Emergency,” in Human Rights: An Agenda for the Next Century 203 (Louis Henkin & John Lawrence Hargrove eds., 1994).

¹⁴⁷ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, arts. I, XI, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) [hereinafter American Declaration].

¹⁴⁸ Francioni, *supra* note 127.

¹⁴⁹ Spieler, *supra* note 13, at 21.

¹⁵⁰ Situation of Human Rights in Cuba, Annual Report of the Inter-Am. Comm’n H.R., 1983, OEA/ Ser. L. / V/ II.61, doc. 29 rev. 1, ch. XIII (1983) (regarding the right to health).

*Yanomami Indians v. Brazil*¹⁵¹ is exemplary with respect to addressing violations of the right to life guaranteed by the American Declaration.¹⁵² In *Yanomami*, the Commission found that Brazil's construction of a highway and exploitation of the natural resources on the ancestral lands of Yanomami Indians threatened their life and caused environmental harm.¹⁵³ The Commission's report addressed specific threats to life that occurred after the construction of the highway, including the invasion of contagious diseases, failure of the State to provide medical care, and loss of ancestral lands.¹⁵⁴ Despite serious deleterious impact on the environment and the indigenous population, Brazil's government took no measures to either prevent the harm or protect the indigenous communities.¹⁵⁵ Although the Commission's report associated environmental harm with the right to life, it did not conclude that Yanomami had the right to a healthy environment, nor did it discuss the importance of the environment for their survival.¹⁵⁶ Unfortunately, the Commission's report is merely a recommendation, and little progress has been made despite the government's guarantees of protection.¹⁵⁷ The Commission concluded that exploitation of indigenous territory amounted to a violation of several human rights, including the right to life, liberty, physical integrity, and preservation of health and well-being, among others.¹⁵⁸

¹⁵¹ *Yanomami v. Brazil*, Inter-Am. Ct.H.R. 7615, OEA/Ser. L.V/II/66 doc. 10 rev. 1, 24 (1985).

¹⁵² American Declaration, *supra* note 147, art. I.

¹⁵³ *Yanomami*, Inter-Am. Ct.H.R. 7615.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Randall S. Abate, *Climate Change, The United States, And The Impacts of Arctic Melting: A Case Study in the Need for Enforceable Human Rights*, 43A STAN. J. INT'L L. 3, 42 (2007).

¹⁵⁷ *Id.*

¹⁵⁸ *Yanomami*, Inter-Am. Ct.H.R. 7615.

The Commission issued a report after examining a complaint against Peru for human rights violations in La Oroya, a Peruvian town described as one of the "most contaminated places on earth."¹⁵⁹ In its report, the Commission decided that the alleged deaths and health effects resulted from Peru's acts and omissions with regard to environmental pollution arising from the multi-metal complex operating in La Oroya due to toxic pollution.¹⁶⁰ This, if proved, could constitute a violation of the right to life protected in Article 4 of the American Convention.¹⁶¹

In Ecuador, the Huarorani Indians alleged human rights violations that resulted from oil drilling in their native territory; the Commission found that such violations contradicted an explicit provision in the Ecuadorian constitution guaranteeing "the right . . . to live in an environment free from contamination."¹⁶² In its report, the Commission focused on the environmental effects of oil development, not just the effect on human health as in the *Yanomami* case, and described in detail the pollution and its effect on the Huarorani Indians.¹⁶³ The Commission recognized that the right to life and the right to physical integrity include more than the right to be protected from arbitrary violence.¹⁶⁴ Moreover, it stated that oil development and exploitation damaged the environment and directly affected Ecuador's Amazonian indigenous peoples' "right to

¹⁵⁹ Martin Wagner, *Inter-American Commission on Human Rights to Hear La Oroya Case* (Aug. 19, 2009), <http://earthjustice.org/news/press/2009/inter-american-commission-on-human-rights-to-hear-la-oroya-case>.

¹⁶⁰ Shelton, *supra* note 3, at 751.

¹⁶¹ *Id.*

¹⁶² Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm'n H.R., OEA/ Ser. L/V/II.96, doc. 10 rev. 1, 92 (1997) (quoting Ecuador Const. art. 22).

¹⁶³ Spieler, *supra* note 13, at 21.

¹⁶⁴ *Id.*

physically and culturally survive as people.”¹⁶⁵ The Commission concluded that “[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment.”¹⁶⁶ Thus, it recommended that regulations for the development on indigenous land should protect the environment and natural resources.¹⁶⁷

C. *HURDLES FOR INDIGENOUS PEOPLES IN SEEKING RELIEF FOR ENVIRONMENTAL VIOLATIONS IN CENTRAL AND SOUTH AMERICA*

The *Yanomami* decision demonstrated that a State can be held accountable for violating human rights and for failing to take measures to prevent others from degrading the environment.¹⁶⁸ While a seemingly effective solution to redress environmental harm in the context of indigenous people has been discovered, it is not without hurdles, both on the Inter-American human rights front, and nationally. Obstacles that indigenous peoples face in seeking redress are both procedural and substantive in nature.

1. PROCEDURAL CHALLENGES FOR SEEKING RELIEF IN THE INTER-AMERICAN SYSTEM

The procedural path to the Inter-American Court is challenging. All complaints brought under the Inter-American Human Rights regime must first begin with the Commission, which has the discretion to refer cases to the Court.¹⁶⁹ Only the Member States of the OAS can be sued before the Inter-American System.¹⁷⁰ This System was created as a supranational body to protect individuals from violations committed by their

¹⁶⁵ Report on the Situation of Human Rights in Ecuador, *supra* note 162.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Shelton, *supra* note 3, at 751.

¹⁶⁹ *Id.* at art. 44.

¹⁷⁰ Environmental Defense Guide, *supra* note 43, at 23.

own States.¹⁷¹ The petition must always be brought against a State.¹⁷² Thus, neither individuals nor companies nor private organizations can be sued before the Inter-American System.¹⁷³ Although citizens can directly petition the Commission, only State Parties and the Commission can submit a case to the Court.¹⁷⁴

To make a determination on the merits of a petition, the Commission must first declare it admissible,¹⁷⁵ conduct an investigation if necessary,¹⁷⁶ explore possibilities for a friendly settlement,¹⁷⁷ and prepare a report.¹⁷⁸ The Commission may refer the case to the Court only upon completion of the above-referenced process.¹⁷⁹ A State Party may not circumvent these procedures, even if it desires the Court to examine the case.¹⁸⁰ Thus, the Court cannot hear a case until the procedures for the disposition of petitions to the Commission have been completed.¹⁸¹ Further, the decisions of the Commission are not binding on any states.¹⁸²

Moreover, the Inter-American System currently faces difficulties ensuring timely justice for indigenous claimants. An influx of new claims in recent years has hampered the adjudicative bodies' effectiveness and slowed the adjudication pace to address the

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ American Convention, *supra* note 81, art. 61(1).

¹⁷⁵ Rules of Procedure, *supra* note 144, art. 30.

¹⁷⁶ *Id.* at art 40.

¹⁷⁷ *Id.* at art 41.

¹⁷⁸ *Id.* at arts. 42-43.

¹⁷⁹ *Id.* at art. 35.

¹⁸⁰ See *In re Viviana Gallardo*, Inter-Am. Ct. H.R. (ser. A) No. G 101/81, reprinted in 20 I.L.M. 1424 (1981).

¹⁸¹ American Convention, *supra* note 81, art. 61(2).

¹⁸² See Rules of Procedure, *supra* note 144.

claims.¹⁸³ Between 2004 and 2009, more than 1,300 complaints were filed with the Commission each year.¹⁸⁴ In 2010, only 275 petitions were processed out of 1,676 complaints evaluated.¹⁸⁵ This significant backlog drastically reduces the chances of getting timely relief for individuals and communities by denying them the right to efficient justice. Often, the IAS responds to claims in an untimely fashion and the abuses in the original claim generally continue to occur even after favorable judgments.¹⁸⁶

Gathering proof of environmental violations is another obstacle that the petitioners in the Inter-American System might face.¹⁸⁷ The results of environmental harms are not always as obvious as epidemics of tuberculosis, or as dramatic as the complete displacement of villages following the construction of a highway.¹⁸⁸ Results may be as subtle as skin problems or nausea, or may be latent, and not become apparent until subsequent generations face birth defects or high infant mortality.¹⁸⁹ Governments often have a serious financial stake in awarding contracts to transnational

¹⁸³ See Paulo G. Carozza, *Address by the President of IACHR*, Inter-Am. Ct. H.R., (June 3, 2008), <http://www.cidh.org/Discursos/06.03.08eng.htm> [hereinafter *Carozza*] (addressing the need to find creative methods in managing an increasing backlog of cases before the Commission).

¹⁸⁴ See Rep. Inter-Am. Ct. H.R., ch. 3(B)(1)(d), OEA/Ser.L/V/II 134, Doc. 5, rev. 1.

¹⁸⁵ *Id.* at ch. 3(B)(1)(c), ch. 3(B)(1)(g).

¹⁸⁶ Cf. Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 Eur. J. Int'l L. 101, 104 (2008) (noting the "rate of compliance with the remedial orders in the Inter-American system is lower than in the European system").

¹⁸⁷ Inara K. Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?* 19 VA. ENVTL. L.J. 197 (2000).

¹⁸⁸ *Id.* at 216.

¹⁸⁹ *Id.*

corporations that might lead them to hide or distort evidence of environmental contamination, further impeding access to evidence by the petitioners.¹⁹⁰

2. SUBSTANTIVE OBSTACLES IN SEEKING RELIEF NATIONALLY

Seeking relief for environmental violations on the national level has also been challenging. Several legal systems are gradually starting to incorporate a human rights and environment perspective—as evidenced by domestic laws establishing the right to a healthy environment as an individual and collective right.¹⁹¹ However, this development has yet to translate into effective systems and mechanisms that guarantee the human rights of those affected by environmental degradation.¹⁹² The claims of the Yakye Axa and Sawhoyamaha indigenous peoples in Paraguay exemplify the difficulties claimants often encounter in the domestic system of justice.¹⁹³ The destruction of indigenous lands, and the government's inability coupled with unwillingness to reclaim them from third-party landowners, represent significant barriers contributing to delayed domestic justice.¹⁹⁴

¹⁹⁰ For example, in 1987 the national government in Guatemala granted concessions to much of the protected forest reserve area in the Peten after years of civil war, and currency devaluation left the country with increasing foreign debt, a recession, and growing unemployment. See Norman B. Schwartz, *Colonization, Development, and Deforestation in Peten, Northern Guatemala*, in *The Social Causes of Environmental Destruction in Latin America* 101, 108-09 (Michael Painter & William H. Durham, eds., Univ. Michigan Press 1995).

¹⁹¹ Environmental Defense Guide, *supra* note 43, at 2.

¹⁹² *Id.*

¹⁹³ Sean Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, 20 MINN. J. INT'L L. 123 (2011).

¹⁹⁴ *Id.*

Many countries still lack substantive laws, agencies, resources, or political will to protect environmental rights,¹⁹⁵ and even fewer have constitutionally enshrined environmental rights.¹⁹⁶ Further, when domestic law provisions purport to protect the environment, they are rarely invoked and are not frequently enforced.¹⁹⁷ Brazil's Constitution,¹⁹⁸ for example, aims to protect the Amazon rainforest and has some of the most detailed environmental provisions of all national constitutions in South America.¹⁹⁹ Yet, it is doubtful whether its declaration that all have "the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life," will be enforceable.²⁰⁰ Brazil's environmental constitutional provisions are yielding to high foreign debt and reliance on timber, crop, and cattle farming.²⁰¹ Environmental rights provisions in Ecuador have underperformed for similar reasons.²⁰²

III. PROPOSED SOLUTIONS TO ADDRESS THE LACK OF AN ENFORCEMENT MECHANISM FOR VIOLATIONS OF ENVIRONMENTAL RIGHTS OF INDIGENOUS PEOPLES

The widespread and growing recognition of environmental human rights in international human rights law and in the national constitutions has laid a firm

¹⁹⁵ James R. May, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT'L L. 365 (2009).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Constituição Federal [C.F.] [Constitution] art. 225 (Braz.).

¹⁹⁹ James Bruinsma, *Environmental Law: Brazil Enacts New Protections for the Amazon Rain Forest*, 30 HARV. INT'L L.J. 503, 503-05 (1989).

²⁰⁰ See Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 796-97 (1990).

²⁰¹ See May, *supra* note 195, at 406.

²⁰² For a discussion of environmental rights in Ecuador, see Adriana Fabra, *Indigenous Peoples, Environmental Degradation and Human Rights: A Case Study*, in *Human Rights Approaches to Environmental Protection*, 245, 245 (Alan E. Boyle & Michael R. Anderson eds., Oxford Univ. Press 1998).

foundation for enhancing the protection of international environmental human rights.²⁰³ Regulation of any significant international problem is best addressed where there is a healthy synergy between the measures that individual nations are undertaking to address issues within their borders, and the measures that these nations would like to pursue on a more cooperative and integrated basis on the international level.²⁰⁴

Considering the universality of human rights and the importance each one has for individuals, ideally all of them should be justiciable, including the right to a healthy environment.²⁰⁵ Otherwise, continuing to treat the enforceability of human rights differently would mean placing some above others in a hierarchy of importance, thereby undermining the universal guarantee of protection.²⁰⁶ Human rights law is a “floor” above which the environmental regulations could strengthen the protection of those rights, but never restrict or diminish them.²⁰⁷ Lack of a direct enforcement mechanism for a well-established right to a healthy environment undermines the protection of a human right to environment guaranteed under the San Salvador Protocol. This paper proposes to create a new legal mechanism for indigenous peoples to enforce the right to a healthy environment.

A. WAYS TO ENFORCE THE RIGHT TO A HEALTHY ENVIRONMENT

The Inter-American Court considers human rights treaties to be “live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current

²⁰³ Abate, *supra* note 156, at 28.

²⁰⁴ *Id.*

²⁰⁵ See Environmental Defense Guide, *supra* note 43, at 125.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 7.

living conditions.”²⁰⁸ It indicated that in order to determine the normative status of the American Declaration of the Rights and Duties of Man, “it is appropriate to look at the Inter-American system of today in the light of the evolution it has undergone.”²⁰⁹ Even the Preamble to the American Declaration itself stresses that “[t]he international protection of the rights of man should be the principal guide of an evolving American law,”²¹⁰ and that the States recognize “that they should increasingly strengthen that system [of human rights] in the international field as conditions become more favorable.”²¹¹

Moving towards direct justiciability of the right to a healthy environment is viable by its very nature, given that respect for this right is essential for guaranteeing human dignity and life.²¹² Recognizing progressive jurisprudence of the Inter-American Court, and in light of critical importance of environmental protection, the enforceability mechanism for the San Salvador Protocol has long been overdue. The significance of the San Salvador Protocol is undeniable, as it represents “the pinnacle of a global awareness for the American continent, parallel to similar progress within the sphere of the United Nations and the European system, in favor of more effective procedures for the international protection of economic, social and cultural rights.”²¹³ The concept of

²⁰⁸ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79, ¶ 146.

²⁰⁹ See *Interpretation of the American Declaration on the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R., Advisory Opinion OC-10/89, (ser. A) No. 10 (1989) [hereinafter *Interpretation of the American Declaration*].

²¹⁰ *Interpretations of the American Declaration*, *supra* note 147, ¶ 3.

²¹¹ *Id.* at ¶ 4.

²¹² *Environmental Defense Guide*, *supra* note 43, at 125.

²¹³ *Id.*

human rights being hierarchically superior to other treaties or conventions, which cannot derogate the essence of human rights norms, especially those considered *jus cogens* (preemptive international law), further underscores the importance of making a human right to a healthy environment enforceable.²¹⁴ Thus, the right to a healthy environment should be redefined as a justiciable right, instead of being used merely as an interpretive standard.

The Inter-American System emphasizes the vital importance of the protection of human rights. This protection cannot be accomplished effectively without taking into account contemporary trends in international law. According to the rules for interpreting the rights of the American Convention, these standards should be dynamic, meaning that guarantees can be expanded to ensure the protection of individuals.²¹⁵ Article 29 of the Convention is a mechanism that allows the Inter American-System to achieve this objective.²¹⁶ This Article precludes interpretations restricting rights protected in the Convention, other international treaties, or rights “inherent” in the human personality.²¹⁷

This paper suggests two ways to solve the issue of non-justiciability of the right to a healthy environment aimed specifically to protect indigenous peoples. One way is to incorporate the right to a healthy environment through interpretation of Article 29 of the American Convention.²¹⁸ This proposition would be grounded in the theory that failure to enforce a right to a healthy environment would restrict other human rights protected under the American Convention. The Inter-American Court of Human Rights relied on Article 29(a) of the American Convention in *Awas Tingni, Yakye Axa* and

²¹⁴ *Id.* at 6.

²¹⁵ Environmental Defense Guide, *supra* note 43, at 125.

²¹⁶ See American Convention, *supra* note 81, art. 29.

²¹⁷ *Id.*

²¹⁸ *Id.*

Sawhoyamaxa, to interpret the rights to property of indigenous communities in accordance with the rights embodied in the ILO Convention 169.²¹⁹

Another argument supporting the inclusion of international obligations from other legal instruments is contained in Article 29(b), which holds that the interpretation most favorable to the individual should be applied.²²⁰ Under this principle, if domestic legislation or other international treaties outside the Inter-American System provide broader parameters for the defense of human rights, they should take precedence.²²¹ Thus, since the Inter-American System's jurisprudence is limited with respect to enforceability of the right to a healthy environment, legal instruments with better guarantees and should be adopted in order to protect human rights to the utmost extent.²²²

A second proposed approach to make the right to a healthy environment enforceable would be to expand the list of enforceable rights under the San Salvador Protocol to incorporate the right to a healthy environment, in addition to the right to education and trade union rights (currently the only two enforceable rights under the Protocol.)²²³ This approach would require further doctrinal development. If a human right to a healthy environment is recognized, a State will have an obligation to protect this right proactively, prior to the harm being incurred. The Court would be authorized to review violations of an independent human right to a healthy environment early on,

²¹⁹ See *Mayagna (Sumo) Awas Tingni Community*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149; *Yakye Axa Indigenous Community*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137; *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 122.

²²⁰ Environmental Defense Guide, *supra* note 43, at 111.

²²¹ *Id.*

²²² *Id.*

²²³ See San Salvador Protocol, *supra* note 12.

starting with evaluating probable consequences of any developments on the indigenous territory prior to the harm being incurred.

B. FRAMEWORK FOR ENFORCING THE RIGHT TO A HEALTHY ENVIRONMENT

The Inter-American System has established itself through its jurisprudence as an evolving system, in which its rights and norms should be interpreted in accordance with its greater legal context at the moment of interpretation.²²⁴ As a result, in addition to Inter-American human rights instruments, the Inter-American System can apply the full body of international human rights law to concrete cases.²²⁵ No matter which of the foregoing ways to enforce the right to a healthy environment is implemented, the same legal framework could be used to enforce this right.

Article 29 of the American Convention should be interpreted to include customary international law principles, such as the Precautionary Principle,²²⁶ the Duty to Conduct Environmental Impact Assessments,²²⁷ and the Principle of Sustainable Development,²²⁸ in order to meaningfully protect the right to a healthy environment in the context of indigenous peoples without restricting their human rights. The principle of Transboundary Harm prevention recognized under international customary law should

²²⁴ Environmental Defense Guide, *supra* note 43, at 19.

²²⁵ *Id.*

²²⁶ Precautionary Principle is recognized in Rio Declaration, see *supra* note 102, Principle 15; CBD, *supra* note 53; UN Declaration, *supra* note 31.

²²⁷ Recognized in CBD, *supra* note 53, at art. 14(1)(a); Rio Declaration, *supra* note 82, Principle 17.

²²⁸ Rio Declaration, *supra* note 82.

also be incorporated to impose obligation on States not to damage areas in the jurisdiction of other States.²²⁹

Moreover, when enforcing the right to a healthy environment, special protection granted to indigenous peoples by the OAS should be taken into consideration. The UN Declaration on the Rights of Indigenous Peoples adopted in 2007 is exemplary in this respect.²³⁰ It could be used as an interpretative tool for developing jurisprudence regarding the relationship between indigenous peoples and the environment. First, the UN Declaration explicitly acknowledges the rights of indigenous peoples, the need for their special protection, and unique relationship with the land.²³¹ It grants them the right to maintain and strengthen their spiritual connection with their traditionally owned land and resources.²³² Second, Article 29 of the UN Declaration provides that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”²³³ It mandates States to “establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”²³⁴ It also requires States to “take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and

²²⁹ See Philippe Sands, *Principles of International Environmental Law*, Vol. I 190-194 (1995). Some international environmental instruments also include this obligation, see, e.g. Stockholm Declaration, *supra* note 102; Rio Declaration, *supra* note 102; CBD, Art. 3.

²³⁰ See UN Declaration, *supra* note 30.

²³¹ *Id.* at art. 25.

²³² *Id.*

²³³ *Id.* at art. 29.

²³⁴ *Id.*

informed consent.”²³⁵ Third, the UN Declaration requires States to develop and implement “programmes for monitoring, maintaining and restoring the health of indigenous peoples.”²³⁶ Finally, the UN Declaration is highly relevant in addressing the effects of climate change.²³⁷ The UN Permanent Forum on Indigenous Issues emphasizes the central importance of the UN Declaration in climate change issues by suggesting that it should “serve as a key and binding framework in the formulation of plans for development and should be considered fundamental in all processes related to climate change at the local, national, regional and global levels.”²³⁸

C. *ALTERING A STANDARD OF PROOF*

Acknowledging potential latency of long-term effects of environmental degradation, and evidentiary obstacles in proving a case against a State, such as a government’s interest in manipulating available evidence, and petitioners’ inability to meet the burden of proof, will require the Court to consider altering standards of proof to enhance the significance of the right to a healthy environment.²³⁹ In this regard, the absence of studies on activities that can affect the environment, or presence of some

²³⁵ *Id.*

²³⁶ *Id.* Please note that there is growing recognition of the plight of indigenous people in the climate change context, and the international efforts to address the situation.

²³⁷ Paul Joffe, *UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*, 26 NAT'L J. CONST. L. 121, 193(2010).

²³⁸ Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April-2 May 2008)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2008/43, E/C.19/2008/13, para.18.

²³⁹ Environmental Defense Guide, *supra* note 43.

pollutants, could be an element of proof of environmental degradation and of potential threats to human rights.²⁴⁰

One of the ways to alter the standard of proof would be to adopt a similar evidentiary standard as the Inter-American Court applied to human disappearance cases. For example, in *Velasquez Rodriguez*, the Court reasoned that it would presume the truth of victim's allegations unless the State produced some exculpatory evidence.²⁴¹ By shifting the burden of proof from the victim to the state, the Court considered State's role in altering and hiding evidence, and the difficulty faced by an individual in opposing the machinery of the State.²⁴² In further recognition of these evidentiary difficulties, the Court allowed introduction of circumstantial or presumptive evidence.²⁴³

Using this standard of proof as a framework in the context of environmental violations would translate into compelling States to present evidence that developments on indigenous land would not negatively affect health or environment of the local populations. Petitioners could also use circumstantial evidence of mandatory environmental assessments, and health studies on exposure to environmental hazards caused by a development on the indigenous territory. For example, granting a

²⁴⁰ *Id.* at 133.

²⁴¹ See *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R., (Ser. C) No. 4, at ¶¶ 128-38 (July 29, 1988) (discussing the standard of proof in contrast to the standard of proof in domestic criminal proceedings).

²⁴² *Id.*

²⁴³ See *Godinez Cruz Case*, Inter-Am. Ct. H.R., ¶137, (Ser. C.) No. 5 (1989), reprinted in *Inter-American Court of Human Rights, 1996 Annual Report*, Inter-Amer. Ct. H.R. 213, OAS/ser. L./V./III.35, doc. 4 (1997).

development project without conducting the requisite environmental assessments could amount to a violation of the right to a healthy environment.

IV. CONCLUSION

Human rights depend on environmental protection, and environmental protection depends on human rights.²⁴⁴ These areas are two of the main concerns of modern international law, and the deterioration of the global environment is threatening human life and health.²⁴⁵ While damage to the environment ultimately affects all mankind, it is particularly devastating for indigenous peoples whose cultures are closely interwoven with their territory. A healthy environment is integral to indigenous peoples' ability to survive as distinct peoples with a collective identity.²⁴⁶ Indigenous peoples themselves are now viewed as an active part of the environment that must also be preserved from destruction, and as victims of the civilization that has neglected their inherent human rights.²⁴⁷ As a result, they are recognized as special subjects of international concern by Inter-American human rights instruments.²⁴⁸

Realizing the significance of the linkage between human rights and environment, the Inter-American human rights system pioneered in elevating the right to healthy environment to the status of a human right by adopting Article 11 of the San Salvador Protocol.²⁴⁹ Nevertheless, more than two decades later, violations of this right cannot be reviewed by the Inter-American System. The Inter-American human rights system

²⁴⁴ Shelton, *supra* note 8.

²⁴⁵ Spieler, *supra* note 13.

²⁴⁶ See *Mayagna (Sumo) Awas Tingni Community*, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 79, ¶ 149.

²⁴⁷ See Hitchcock, *supra* note 21.

²⁴⁸ See *supra* international human rights instruments, at notes 41, 42, 43.

²⁴⁹ See Environmental Defense Guide, *supra* note 43.

has indirectly referred to environmental degradation in the context of other human rights violations.²⁵⁰ This approach, however, is not without significant hurdles. Thus, moving towards direct justiciability of the right to a healthy environment seems to be a necessary solution for the current state of affairs in Inter-American jurisprudence, given that right is integral for guaranteeing human dignity and life.²⁵¹

This paper proposed to redefine the right to a healthy environment to be directly enforceable given the changing international norms and progressive jurisprudence of Inter-American jurisprudence. The proposal suggested two ways to implement this proposition. First, through Article 29 of the American Convention, a mechanism allowing adoption of international legal instruments from other judicial systems. Article 29 precludes interpretations restricting rights protected in the Convention, other international treaties, or rights 'inherent in the human personality.'²⁵² This proposition would be grounded in the theory that failure to enforce a right to a healthy environment would restrict other human rights protected under the American Convention and other international treaties.²⁵³ The second way proposed to make the right to a healthy environment enforceable would be to expand the list of enforceable rights under the San Salvador Protocol to incorporate the right to a healthy environment.

The Inter-American System for protection of human rights provides an opportunity to defend human rights affected by environmental degradation.²⁵⁴ The potential for that defense is dependent on a broader development of doctrine and

²⁵⁰ Spieler, *supra* note 13.

²⁵¹ Environmental Defense Guide, *supra* note 34, at 125.

²⁵² American Convention, *supra* note 81, art. 29.

²⁵³ *Id.*

²⁵⁴ Environmental Defense Guide, *supra* note 34, at 145.

jurisprudence.²⁵⁵ This paper suggested a way that this potential could be realized in a way that protects both human rights and the environment of indigenous peoples.

²⁵⁵ *Id.*