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Protecting the Arctic Indigenous Peoples' Livelihoods in the Face of Climate Change: The Potential of Regional Human Rights Law and the Law of the Sea

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ABSTRACT:

Climate change presents existential challenges for the livelihoods of indigenous peoples, which depend on vulnerable ecosystems prone to extreme weather phenomena. Of all indigenous communities, those living in the Arctic have been worst affected. This raises the question to what extent international law can be mobilized to address the endangered livelihoods of Arctic indigenous peoples in light of rapid changes in the Arctic environment. This article examines two dimensions of the protection of livelihoods: an internal one – i.e., legal entitlements over assets, land and income – and an external one – i.e., the living environment in the Arctic. In so doing, the article analyses the right to property under regional human rights law and rules on the protection of marine resources under the law of the sea. Reflecting on relevant jurisprudence, it shows that both legal areas could provide important elements of litigation strategies to address the human rights costs of climate change.

KEYWORDS: Arctic indigenous peoples, climate change, right to property and marine resources, European Court of Human Rights, Inter-American Commission of Human Rights, International Tribunal on the Law of the Sea

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1. INTRODUCTION

Climate change has sparked an intense debate about its impact on human rights. Increasingly, legal arguments are tested before judicial forums in order to induce states to address alleged human rights violations caused by climate change. There is emerging litigation in national and regional human rights courts, which has drawn links between human rights, climate change and the environment[1] and concerns a variety of rights, including, among others, the rights to life, health, family life and property.[2]

Courts usually develop different formulations under the various regional treaties and national laws. That being said, Peel and Osofsky have identified a discernible general trend of the increasing reliance of courts on the linkage between the environment and human rights, characterising this as a 'rights turn' in climate change litigation.[3] In strategic terms, the impact of such a trend may be relevant beyond the successful applicants who had their claims upheld by a court. The cases brought forward can have a 'mobilizing power beyond the individual case concerned, by building a narrative about the need for stronger action to tackle climate change, which increases public awareness.'[4] In addition, they can shape public dialogue and government action around mitigation measures and the protection of vulnerable communities and should, thus, be viewed as part of a wider toolkit illustrating the human rights risks of climate change, alongside political and legal institutions, civil society and corporate actors. [5]

In this context, increasing attention is being paid to the indigenous communities that have been disproportionately affected by the effects of climate change while they have contributed least to it.[6] In particular, the indigenous communities living in the Arctic are among those that are exposed to significant risks due to the environmental changes documented in the

[1] Chatham House Report, 'Climate Change and Human Rights-based Strategic Litigation' (November 2021) 3 <https://www.chathamhouse.org/sites/default/files/2021-11/2021-11-11-climate-change-and-human-rights-litigation-guruparan-et-al.pdf> accessed 4 September 2022. Climate change litigation is broadly understood 'to include cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change' and concerns, inter alia, global warming, greenhouse gas and sea level rise' in Global Climate Litigation Report: 2020 Status Review (26 January 2021) 6 <www.unep.org/resources/report/global-climate-litigation-report-2020-status-review> accessed 4 September 2022.

[2] Global Climate Litigation Report ibid. For more detail, see Section 3. It is reported that more than 1,200 cases relating to climate change have been filed since 2015 with roughly one-quarter of these being filed between 2020 and 2022. In particular, 122 cases have reportedly been based on human rights by April 2023. See Setzer and Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot - Policy Report' June 2022, 1 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> accessed 14 February 2023; Global Climate Litigation Report ibid., 13 and Climate Change Litigation Databases <http://climatecasechart.com/non-us-climate-change-litigation/> accessed 20 April 2023.

[3] Peel and Osofsky, 'A Rights Turn in Climate Change Litigation', (2018) 7 *Transnational Environmental Law* 37. On the normative benefits and challenges of human rights-based climate litigation, see Venn, 'Rendering International Human Rights Law Fit for Purpose on Climate Change', (2023) 23 *HRLR* 1.

[4] Chatham House Report supra n 1 at 18.

[5] Peel and Osofsky supra n 3 at 67.

[6] Report of the Special Rapporteur on the Rights of Indigenous Peoples (A/HRC/36/46) (1 November 2017) para 6.

region.[7] Melting permafrost, reduction in sea ice, higher temperatures, ocean acidification and coastal erosion have altered the Arctic landscape, with serious implications for the habitat and ecosystems in which the Arctic indigenous peoples live and, therefore, for the resources and activities that secure their livelihoods. This raises the question what can be done to protect the livelihoods of Arctic indigenous peoples at least from some of the effects of climate change.

Admittedly, the potential of international law to mitigate challenges such as the endangered livelihoods of indigenous peoples and climate change is arguably limited.[8] Against this background, the article makes the case that in order to best harness the potential of international law to protect Arctic indigenous peoples against climate change, it is important to draw on different legal areas that may seem remote at first glance. In so doing, the article will examine the relevance of two such areas of international law: human rights law and the law of the sea. These legal areas are particularly relevant for capturing the complexity of the protection of indigenous peoples' livelihoods. As indigenous peoples' rights extend over the sea areas and are closely interconnected with the management and conservation of the marine environment, [9] human rights law and the international law of the sea can have a key role to play in the protection of land and marine resources that are vital for the livelihoods of Arctic indigenous peoples. This is especially so given that courts in these two legal regimes could have catalyst effects in climate change-related jurisprudence in the near future: requests for an advisory opinion on state obligations for responding to climate change impacts have been submitted to the International Tribunal on the Law of the Sea (ITLOS)[10] and the Inter-

[7] Arctic Monitoring and Assessment Programme, 'Arctic Climate Change Update 2021: Key Trends and Impacts – Summary for Policy-Makers' <https://oaarchive.arctic-council.org/bitstream/handle/11374/2621/MMIS12_2021_REYKJAVIK_AMAP_Arctic-Climate-Change-Update-2021-Key-Trends-and-Impacts.-Summary-for-Policy-makers.pdf?sequence=1&isAllowed=y> accessed 14 April 2023.

[8] Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis', (2010) 17 *International Journal on Minority and Groups Rights* 393; Meguro, 'Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy', (2020) 33 *Leiden Journal of International Law* 933; McConnell, 'Opportunity and Impasse: Social Change and the Limits of International Legal Strategy', (2022) 14 *International Theory* 25.

[9] While the ECtHR has not dealt with this issue explicitly, it has recognised that fishing rights fall within the scope of the right to property. Specifically, the IACtHR has also established the protection of natural resources under the same right. For relevant case law, see section 3 below. Under international law, both the UNDRIP and the ILO Convention 169 are key for recognising that indigenous peoples' property rights may extend over the sea areas. See Article 25 UNDRIP and Article 13(2) of ILO Convention 169. See also the discussion on the right to marine space and resources as a property right in Enyew, 'International Human Rights Law and the Rights of Indigenous Peoples in Relation to Marine Space and Resource' in Allen, Bankes and Ravna (eds), *The Rights of Indigenous Peoples in Marine Areas* (2019) 56-65. The rights of indigenous communities in respect to marine areas, waters and resources are also recognised in domestic law, see, for example, Ravna and Kalak, 'Legal Protection of Coastal Sámi Culture and Livelihood in Norway' in Allen, Bankes and Ravna (eds) *The Rights of Indigenous Peoples in Marine Areas* (2019) and Bankes, 'Modern Land Claims Agreements in Canada and Indigenous Rights with Respect to Marine Areas and Resources' in Allen, Bankes and Ravna (eds) *The Rights of Indigenous Peoples in Marine Areas* (2019).

[10] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (12 December 2022).

American Court of Human Rights (IACtHR)[11] while there are also relevant contentious cases pending before the European Court of Human Rights (ECtHR)[12] at the time of writing.

To illustrate the relevance of the above-mentioned legal regimes in this context, two dimensions of livelihoods are distinguished in this article. The *first* is an internal dimension that relates to the assets and legal entitlements over land, resources and income, which are covered within the scope of the right to property. It is well-established that climate change has negative effects on land, resources and traditional fishing and hunting activities of indigenous peoples. In the Inter-American and the European human rights systems in particular, an analysis of the jurisprudence on indigenous peoples' property rights, together with cases concerning the interaction between the environment and human rights, can illustrate different legal elements that can be mobilized for the protection of Arctic indigenous peoples against some of the effects of climate change. The *second* dimension of livelihoods is external. It concerns the living environment and, specifically for our purposes, the marine resources that are in the public realm. Given the reliance of the Arctic indigenous peoples on marine resources which are crucial for their sustenance, cultural identity and socio-economic development, it is important to clarify climate-related obligations of states under the law of the sea to protect the Arctic marine environment.[13]

In this light, the article proceeds as follows. First, it demonstrates how global warming and climate change affect the living environment of Arctic indigenous peoples and put their livelihoods at risk. Second, the article turns to the internal dimension of livelihoods from the prism of the right to property. While there are several human rights that can be, and have been, employed in cases relating to environmental harm, scholars have taken interest in scrutinizing the potential of less explored rights in pursuing relief from the impacts of climate change.[14] In this context, the right to property can play an important role. It has been used for framing socio-economic, cultural and environmental issues in the Inter-American system of human rights. It has also been relevant in cases concerning environmental obligations and some limited socio-economic issues before the ECtHR.[15] Yet, the right itself and its link to environmental harm remains largely under-examined in comparison with other rights. To fill this gap, the aim here is to analyse the doctrinal elements of the right that can be used to address some of the effects of climate change through judicial decisions and to shed light on some of the socio-economic and environmental aspects of the right. In this sense, the article evaluates the potential of the

[11] Colombia and Chile recently signed a request for an IACtHR Advisory Opinion on climate emergency: <https://www.minrel.gob.cl/noticias-anteriores/chile-y-colombia-realizan-inedita-consulta-a-la-corte-interamericana-de>.

[12] For example, *Duarte Agostinho and Others v Portugal and Others (relinquishment)* Application No 39371/20, June 2022; *Carême v France (relinquishment)*, Application No 7189/21, 7 June 2022; *Greenpeace Nordic and Others v Norway*, Application No 34068/21 Communication of 16 December 2021; *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, Application No 53600/20, Communication of 17 March 2021.

[13] On indigenous peoples, livelihoods and climate change see in general, Food and Agriculture Organisation (FAO), 'Indigenous Peoples' Food Systems. Insights on Sustainability and Resilience from the Front Line of Climate Change' (2021); Kalafatic, 'Indigenous Peoples' Sustainable Livelihoods' <https://www.fao.org/3/aj033e/aj033e02.pdf> accessed 20 September 2022.

[14] For the rights of nature, among others, see Tigre, 'Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation', (2022) 9 *e-Publica* 214. For the right to health, Viveros-Uehara, 'Litigating Climate Justice: The Right to Health and Vulnerable Populations in Latin America' MPIL Research Paper Series No 2023-09.

[15] See Section 3 for a more detailed discussion.

jurisprudence of the ECtHR and the Inter-American Commission on Human Rights (IACmHR or Commission) to contribute to a more effective protection of property rights of the Arctic indigenous peoples. This choice is motivated by the fact that the Arctic indigenous peoples reside in countries that are subject to the jurisdiction of the IACmHR (Canada and the US) or the ECtHR (Denmark, Finland, Norway and Sweden).[16] Their jurisprudence is thus of direct relevance to the question of how the right to property can be used to address the effects of climate change on Arctic indigenous peoples.[17] Third, the analysis focuses on the external aspect of livelihoods by shifting the focus on the protection of marine resources. To this end, the article explores the role that ITLOS can play in climate change litigation and its potential to contribute to safeguarding indigenous peoples' access to marine resources.[18] Reflecting on the different strands of cases considered by these forums, the article points to some elements in the relevant jurisprudence regarding the right to property and marine resources that may help maximise the potential of these three forums to benefit Arctic indigenous peoples.

2. THE IMPACT OF CLIMATE CHANGE ON THE LIVING ENVIRONMENT OF ARCTIC INDIGENOUS PEOPLES

The Arctic is home to approximately 4 million people and 9 per cent of them are indigenous peoples who live in settlements across two continents and eight countries.[19] Approximately 155,000 Inuit reside in Alaska, Canada, Greenland and Russia; 55,000 Athabaskans and Gwich'in people live in Alaska and Canada and 15,000 Aleut live in different territories of Alaska and Russia.[20] Russia is also home to 250,000 members of different indigenous groups, including the Sami people.[21] The Sami people are the only indigenous people recognised in Europe[22] and live across territories in Norway, Finland and Sweden.[23] The majority of Arctic settlements are located on permafrost, and nearly half of them are coastal permafrost

[16] On 15 March 2022, Russia withdrew its membership from the Council of Europe making it impossible for the Arctic indigenous peoples in its territory to access the ECtHR, <www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe> accessed 4 September 2022.

[17] Other international avenues that the Arctic indigenous peoples may access include the Human Rights Committee that has produced significant decisions on the protection of the human rights of indigenous peoples in light of climate change. The Committee, however, cannot decide on the right to property as such and is outside the scope of this article. See, for example, *Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019, UN Human Rights Committee, 22 September 2022; *Ioane Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee, 7 January 2020.

[18] Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?', (2022) *ODIL* 1; Cruz Carrillo, 'The Advisory Jurisdiction of the ITLOS – From Uncertainties to Opportunities for Ocean Governance' in Platjouw and Pozdnakova (eds) *The Environmental Rule of Law for Oceans – Designing Legal Solutions* (2023); Boyle, 'Litigating Climate Change under Part of the LOSC', (2019) 34 *IJMCL* 458; De Herdt and Ndiaye, 'The International Tribunal for the Law of the Sea and the Protection and Preservation of the marine Environment: Taking Stock and prospects', (2020) 57 *CYIL* 333 at 333-335.

[19] Arctic Climate Change Update supra n 7 at 9.

[20] Scopelliti, *Non-Governmental Actors in International Climate Change Law: The Case of Arctic Indigenous Peoples* (2021) 54. In general, Byers, *International Law and the Arctic* (2013).

[21] Ibid.

[22] Section 110(a) of the Norwegian Constitution, Section 17(3) of the Finnish Constitution, Section 17(3). Sweden recognised the Sami as an indigenous people in 1977 which gave them cultural rights and in 2011 which gave them political rights. Following an amendment of January 2011, the Swedish Constitution explicitly recognizes the Saami as people.

[23] Scopelliti supra n 20.

settlements which reinforces the importance of the distinct Arctic environment to the livelihoods and cultural identity of the Arctic indigenous peoples.[24]

Climate change has had a profound impact on the living environment of Arctic indigenous peoples and, thus, it merits special attention. The Artic is characterised 'as the world's climate change barometer'.[25] According to the reports of the Intergovernmental Panel on Climate Change (IPCC), 'surface warming in the Arctic will continue to be more pronounced than the global average warming over the 21st century'.[26] It is expected that 'additional warming will lead to more frequent and intense marine heatwaves and is projected to further amplify permafrost thawing and loss of seasonal snow cover, glaciers, land ice and Arctic sea ice'.[27] A significant decline in sea ice and glaciers is already being witnessed in the Chukchi and Beaufort seas.[28] Decline in seasonal sea ice and higher sea levels increase coastal hazards, such as flooding and coastal erosion.[29] Such changes have resulted in, and are projected to further lead to, restrictions on indigenous peoples' access to ancestral lands and natural resources, loss of land and houses or forced relocation and mass resettlements which directly affect the enjoyment of the right to property.[30] In addition, there have been serious consequences for the main sources of income of indigenous communities, as the thinning of ice makes it more difficult to hunt and fish and climate change has led to the degradation of reindeer pastures and to a lack of available food for reindeer herding.[31]

Ocean warming and acidification is also responsible for the depletion of fish stocks and decline in other marine species, limiting the opportunities of Arctic indigenous people to access marine resources, threatening their income, food security and cultural heritage.[32] Reduction in sea ice may facilitate overfishing which in turn is likely to affect the fish stocks and the fishing practices of Arctic indigenous peoples many of whom rely on small-scale subsistence fishing.[33]

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[24] Arctic Climate Change Update supra n 7 at 8-9.

[25] Smith, 'Climate Change in the Arctic: An Inuit Reality', (2007) XLIV *Green Our World!* <https://www.un.org/en/chronicle/article/climate-change-arctic-inuit-reality> accessed 6 March 2023.

[26] Climate Change 2021: The Physical Science Basis, Sixth Assessment Report of the IPCC (2021) TS-97- 98, <www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf> accessed 4 September 2022; Internal Displacement Monitoring Centre, 'Global Report on Internal Displacement' (2021) 92, <www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf> accessed 4 September 2022.

[27] Synthesis Report of the IPCC (March 2023) 34 <https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf> accessed 29 March 2023.

[28] Ruibo Lei et al, 'Changes in Sea Ice Conditions Along the Arctic Northeast Passage from 1979 to 2012', (2015) 119 *Cold Regions Science and Technology* 132 at 138-140.

[29] Arctic Climate Change Update supra n 7 at 6 and 11.

[30] McAdam et al, 'International Law and Sea-Level Rise: Forced Migration and Human Rights' (January 2016) paras 5 at 45 <www.fni.no/getfile.php/131711-1469868996/Filer/Publikasjoner/FNI-R0116.pdf> accessed 4 September 2022; International Law Association, Sydney Conference (2018), International Law and Sea Level Rise, 29 <www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf> accessed 4 September 2022.

[31] FAO, 'Impacts of Climate Change on Fisheries and Aquaculture' 2018, 133-137. <www.fao.org/3/i9705en/i9705en.pdf> accessed 4 September 2022.

[32] Voigt, 'Oceans and Climate Change: Implications for UNCLOS and the UN Climate Regime from Part II – Tackling Multiple Pressures on the Oceans' in Platjouw and Pozdnakova supra n 18 at 17-19; FAO ibid. at 87-138.

[33] Papastavridis, 'Fisheries Enforcement on the High Seas of the Arctic Ocean: Gaps, Solutions and the Potential Contribution of the European Union and Its Member States', (2018) 33 *International Journal of Marine and Coastal Law* 324. Fitzmaurice and Rosello, 'IUU Fishing as a Disputed Concept and Its Application to Vulnerable Groups: A Case Study on Arctic Fisheries', (2020) 22 *International Community Law Review* 410 at 411.

Sea-level rise can also change coastal configuration or lead to the partial or complete land loss of islands. This will affect the baselines from which maritime zones are measured and may result in their reduction or disappearance. [34] Such scenario could severely limit the access of the Arctic indigenous communities to natural resources, including their fishing rights.

Beyond the direct impact that rising temperatures have on the enjoyment of the living environment of the indigenous communities, it is worth evaluating the indirect impact that climate change has had on it. The receding ice cap has made the waters more navigable. Enhanced accessibility has been associated with a growth in all forms of shipping.[35] Ship operations are associated with high risks for the marine environment, such as pollution (oil, air and noise pollution, sewage and garbage) and damage or disruption to the marine ecosystem through ballast water and hull biofouling or by icebreaking and animal deaths caused by ship strikes.[36] Black carbon emissions from shipping and oil spills have been a major cause for alarm because of the disastrous impact they could have on the fragile ecosystem of the coastal communities. The rapid expansion of extractive activities has also caused concern to the Arctic indigenous communities. Pipelines, oil and gas extraction and production are known for transforming and polluting the environment in diverse ways forcing the Arctic indigenous peoples to relocate or adapt their social and economic practices to different ways of living, such as by adapting their harvesting, hunting and fishing practices.[37] Considering the changes reported in the Arctic environment, which have a significant impact on the livelihoods of indigenous peoples, the next section explores the extent to which regional human rights law can contribute to protecting the right to property against some of the effects of climate change.

3. CLIMATE CHANGE AND THE INTERNAL DIMENSION OF LIVELIHOODS: HARNESSING THE POTENTIAL OF THE RIGHT TO PROPERTY

A number of rights have been invoked by applicants in human rights-based environmental litigation. Some of these rights have played a prominent role in regional human rights systems; for example, the right to life in the Inter-American jurisprudence (Article 4 ACHR), [38] and the right to private and family life in the ECtHR case law (Article 8 ECHR).[39] Others have been more recently applied, such as the rights to a healthy environment, adequate food, cultural

[34] International Law Commission, 'Sea-Level Rise in Relation to International Law' A/CN.4/740 (28 February 2020) 56-69. Starita, 'The Impact of Sea-Level Rise on Baselines: A Question of Interpretation of the UNCLOS or Evolution of Customary Law?', (2022) 91 *QIL, Zoom-out* 5-21.
[35] Chircop, 'The Polar Code and the Arctic Marine Environment: Assessing the Regulation of the Environmental Risks of Shipping', (2020) 35 *International Journal of Marine and Coastal Law* 533 at 536-537.
[36] For a detailed analysis of the risks, see Chircop, ibid.
[37] Nuttall, 'Oil and Gas Development in the North: Resource Frontier or Extractive Periphery?', (2010) 2 *The Yearbook of Polar Law Online* 225 at 233-242; Fjellheim and Henriksen, 'Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories Human Rights, International Law and Corporate Social Responsibility', (2006) 4 *Journal of Indigenous Peoples Rights* 8 at 28-29. In general, see also Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties', (2020) 23 *Journal of International Economic Law* 431.
[38] IACmHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.
[39] For example, *Tătar v Romania,* Application No 67021/01, 17 March 2009 and *Grimkovskaya v Ukraine,* Application No 38182/03, 21 July 2011.

identity and water in the IACtHR (Article 26 ACHR).[40] At the same time, innovative arguments are tested in pending cases, invoking the prohibition of torture and inhuman and degrading treatment[41] and the prohibition of discrimination[42] before the ECtHR (Articles 3 and 14 ECHR). Amid these key developments, the focus here is placed on the under-examined right to property. The purpose is to analyse the extent to which it can provide an additional avenue for developing state obligations to respond to some of the multifaceted effects of climate change i.e., its economic impact on Arctic indigenous peoples and, importantly, the ensuing non-economic losses for these communities. The types of harm or loss covered under the right to property could overlap, but are still distinct, from those of the above-mentioned rights.

Having said this, there are normative reasons that call into question whether the right is a suitable tool for litigation strategies aiming to protect livelihoods in an increasingly warming planet. Indeed, some authors have demonstrated how, historically, property rights were used to serve imperial commercial interests and entrench colonial rule.[43] What is more, it has been illustrated how international and national policies on property rights allocation have perpetuated racial and gender discrimination.[44] Others have shown how Western notions of individual property rights and the processes of their commodification can lead to displacement, evictions and economic inequality and therefore, contribute to increased insecurity and vulnerability for large parts of the population.[45]

The use of the right to property may therefore seem paradoxical in this context. As one of the rights which has been employed for disenfranchising groups that are rendered structurally vulnerable, it may seem problematic to use it for the opposite purpose. Despite these serious challenges, it would be a mistake not to harness the doctrinal elements of this

[40] *The Indigenous Communities of the Lhaka Honhat (Our land) Association v Argentina* IACtHR Series C 400, 6 February 2020. For an analysis on indigenous peoples and climate change litigation and an overview of relevant cases at the international and national level, Tigre supra n 14.

[41] *Duarte Agostinho* supra n 12. For a discussion on the links between Article 3 ECHR and climate change, see Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability', (2022) *EJIL* 1

[42] *Greenpeace Nordic* supra n 12. For an important development in domestic courts, see *Statnett SF et al v Sør-Fosen sijte et al* (11 October 2021). The Norwegian Supreme Court found an interference with the right of Sami reindeer herders to enjoy their own culture under Article 27 ICCPR as a result of the construction of two wind power plants. See also, Swedish Supreme Court Case No T 853-18 (23 January 2020). In a case concerning the exclusive right of a Sami village to fishing and hunting over a particular area, the Swedish Supreme Court declared that Article 8 of the ILO Convention No 169, which requires that the customs or customary law of indigenous peoples be given due regard when applying national rules, constitutes a general principle of international law (see para 130). Even though Sweden has not ratified the Convention, the Supreme Court accepted that the state was bound to apply international principles and standards on indigenous people on a dispute concerning, essentially, domestic property law.

[43] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021) 574-5 and 645-7; Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (1996) 132-167.

[44] Rittich, 'The Properties of Gender Equality' in Alston and Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 87; Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (1994); Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Duke University Press 2018); Singer, 'Sovereignty and Property' (1991) 86 *Northwestern University Law Review* 1, 5 and 44-45.

[45] Indicatively, De Schutter and Rajagopal (eds), *Property Rights from Below: Commodification of Land and the Counter-Movement* (2019); Bhandar, 'Critical legal Studies and the Politics of Property' (2014) 3 *Property Law Review* 186; Golay and Cismas, 'Legal Opinion: The Right to Property from a Human Rights Perspective' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635359> accessed 14 March 2023; Hayward, 'Human Rights vs Property Rights' Just World Institute Working Paper No 2013/04; In general, Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development', (2011) 1 *Accounting, Economics, and Law* 1.

right to the extent it can provide relief, alongside other rights, from some of the effects of climate change. The link between the right to property and the rights of indigenous peoples is well established under international law and the case law of regional human rights courts.[46] This right has played a key role in formulating the deprivation of housing, land, traditional activities and livelihoods as a major human rights issue in the context of marginalisation of indigenous peoples, their forced displacement and exclusion from formal legal systems.[47] Demands to obtain recognition of rights over land and natural resources, including rights of ownership, management and conservation, have been at the centre of the struggles of indigenous peoples and other groups such as peasants.[48] Climate change constitutes another such context which threatens access to ancestral lands and resources and may trigger the loss of indigenous peoples' community bonds and ways of living.[49] Ensuring enjoyment of land and marine resources falls within the scope of the right to property and at the same time contributes to indigenous peoples' access to housing, food and water, the exercise of their culture and the improvement of their health and sanitation.[50]

At their core, these elements are interwoven with a broad understanding of property. In this sense, socio-economic, cultural and environmental considerations can, and have been, integrated into the scope of the right. Heri notes that '[a]s embodied and materially dependent beings, things and our access to and thus ownership of them guarantee the realisation of a number of our other rights. Thus, property is related to the realisation of the rights to food, housing, sanitation, a decent standard of living, non-discrimination and many other basic human rights including, arguably, the right to life.'[51] Heri argues that paying attention to these interrelations highlights the social function of the right to property. This can involve, for example, the protection of a minimum level of the right-holders' subsistence and considerations on whether there has been a disproportionate impact on specific segments of the population.[52] On this basis, the article departs from the assumption that, normatively, a socially embedded

[46] See, Alvarez, 'The Human Right of Property', (2018) 72 *University of Miami Law Review* 580; Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-Imagining International Law from the Bottom Up', (2020) 48 *Georgia Journal of International and Comparative Law* 473.

[47] Carpenter, Katyal and Riley, 'In Defense of Property', (2008) 118 *Yale Law Journal* 1022. On the link between indigenous peoples, land tenure and the environment, Food and Agriculture Organisation, 'Forest Governance by Indigenous and Tribal Peoples' 2021, <www.fao.org/documents/card/en/c/cb2953en> accessed 4 September 2022.

[48] See, for example, the 2018 UN Declaration on the Rights of Peasants and Other People Working in Areas (UNDROP). Heri, 'The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948', (2020) 20 *HRLR* 433.

[49] This was clearly highlighted in the complaint submitted on behalf of five tribes from Alaska and Louisiana to 10 UN Special Rapporteurs claiming that the US government and State governments of Alaska and Louisiana failed to take steps to address displacement caused by climate change, violating the tribes' fundamental rights: '[d]eprivation of the use and enjoyment of land through climate change threatens the human right to property. The permanent loss of land and housing due to climate change and the consequent inability to return to original homes and lands *is one of the most intense losses caused by the climate crisis*.' (emphasis added); Rights of Indigenous People in Addressing Climate-Forced Displacement (2020) 47-48 (pending) <www.uusc.org/wp-content/uploads/2020/01/Complaint.pdf> accessed 4 September 2022.

[50] See De Schutter, 'Report of the Special Rapporteur on the Right to Food' UNGA A/65/281 (2010) paras 3.

[51] Heri supra n 48 at 445.

[52] Ibid. at 442-448, focusing on the Universal Declaration of Human Rights and UNDROP. For other international legal orders, Mardikian, 'In-Between an Economic Freedom and a Human Right: A Hybrid Right to Private Property', (2021) 81 *Heidelberg Journal of International Law* 341; for property rights reform leading to social change in a domestic context, see Wilson, *Human Rights and the Transformation of Property* (2018).

interpretation of the right to property is possible and desirable and can be compatible with wider societal and environmental considerations.

The effectiveness of a wider understanding of property is exemplified by the case law of the IACtHR. The right to property has been part of the highly innovative jurisprudence of the Court which has interpreted collective property rights of indigenous peoples by giving prominence to their social, cultural and environmental aspects and taking into account the indigenous cosmovision.[53] The IACtHR has so far succeeded in advancing an alternative conceptualisation of the right to property that is not restricted to rights of ownership and use over land but encompasses non-economic concerns regarding the livelihoods of indigenous communities. In this sense, the right has been a key part of the 'transformative' jurisprudence of the Court that expands the interpretation of civil and political rights to address core structural problems in the region, such as widespread exclusion, mass poverty and economic inequality.[54]

In the European system of human rights, as will be illustrated below, the ECtHR has interpreted the right to property in a more restrictive way in the context of indigenous peoples in the region.[55] There are, however, elements in the jurisprudence of the Court that link the right with environmental harm as well as social considerations. Recently moreover, in *Duarte Agostinho*, the ECtHR demonstrated the potential relevance that the right to property could have with regard to climate change. In this case, the applicants had invoked, among others, Articles 2 and 8 to claim human rights violations by 33 states for failing their obligations to take measures to regulate in an adequate manner their contributions to climate change. When communicating the case, the ECtHR requested the applicants to comment on whether the alleged failure of states to abide by their commitments under the 2015 Paris Agreement to contain climate change and reduce greenhouse gas (GHG) emissions has infringed the applicants' right to property.[56] While a decision on the merits of the case is still a long way from being handed down, the ECtHR signalled, at least in principle, the possibility of the right to property to determine positive obligations against climate change. This further opens up the possibility for indigenous communities and civil society actors to advocate for more extensive engagement at the judicial and policy level with the human rights costs caused by climate change through the relevant obligations under the right to property.[57]

Against this background, the following sections will explore the potential of two international forums – the IACmHR and the ECtHR – to protect the right to property of the

[53] See Monteiro de Matos, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law* (2021); Ferrer Mac-Gregor, *'Lhaka Honhat* y los derechos sociales de los pueblos indígenas' (2020) 39 *Revista electrónica de estudios internacionales* 1, 2.

[54] Regarding the transformative mandate of the IACtHR, see von Bogdandy, 'El mandato transformador del sistema interamericano de derechos humanos. Legalidad y legitimidad de un proceso jurisgenerativo extraordinario', (2019) 9 *Revista del Centro de Estudios Constitucionales* 113, 116; von Bogdandy, 'The Constitutionalization of International Law in Latin America *Ius Constitutionale Commune en America Latina*: Observations on Transformative Constitutionalism', (2015) 109 *AJIL Unbound* 109.

[55] For a comparison between the IACtHR and the ECtHR on indigenous peoples' rights, see Abrusci, 'Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions', (2017) 5 *The International Journal of Human* Rights 550.

[56] *Duarte Agostinho and Others v Portugal and 32 Other States,* Communication of 13 November 2020. In general, Pedersen, 'Any Role for the ECHR When it Comes to Climate Change?' 3 *European Convention on Human Rights Law Review* (2021) 17; Siwior, 'The Potential of Application of the ECHR in Climate Change Related Cases', (2021) 23 *International Community Law Review* 197.

[57] Mardikian supra n 52 at 375.

Arctic indigenous peoples. The analysis will show that the right is a relevant component of the toolbox of indigenous communities seeking relief from the impacts of climate change. It could serve as an important legal tool which, through its various tenets, could help mitigate some of the negative effects on land, resources and housing, as well as fishing and hunting rights for Arctic indigenous peoples.

A. Insights From the Inter-American Human Rights System

(i) The IACmHR

The Arctic indigenous peoples residing in Alaska and Canada cannot petition the IACtHR, as neither the US nor Canada have ratified the American Convention on Human Rights (ACHR) and have not recognised the Court's jurisdiction. In the two-tier Inter-American human rights system, however, the IACmHR has the mandate to consider alleged violations of the American Declaration of the Rights and Duties of Man by OAS member states that are not parties to the ACHR.[58] Unlike the IACtHR, therefore, the Commission has jurisdiction over the US and Canada. In a nutshell, individuals, groups and non-governmental organisations can file petitions to the Commission. The latter has the authority to investigate the situation and produce a report on the merits of the case. In addition, the Commission has the competence to adopt specific precautionary measures to prevent serious and irreparable harm to human rights in urgent cases, as well as to order provisional measures in cases of extreme gravity and urgency which involve irreparable damage to persons, even where a case has not yet been submitted to the Court.[59]

Over the years, the engagement of the IACmHR with the right to property has been favourable in protecting the indigenous peoples' communal property rights. In a nutshell, the Commission was the first inter-governmental organisation requesting the demarcation of indigenous peoples' lands.[60] Even before the IACtHR had dealt with the indigenous peoples' right to property in a contentious case, the Commission had recognised the collective dimensions of the right to property, which includes and is closely intertwined with the right to the natural resources of indigenous peoples' ancestral lands.[61] This is so even though the ACHR and the American Declaration only include an individual conception of the right to property and do not make explicit references to communal property rights pertaining to indigenous peoples.[62] In addition, the IACmHR has integrated indigenous conceptualisations

[58] Rules of Procedure of the Commission, Article 51. The right to property is included in Article XXIII of the American Declaration of the rights and Duties of Man 1948: 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'
[59] See ACHR, Article 41 together with Rules of Procedures of the Commission, Articles 25 and 74.
[60] Resolution No 12/85, Case No 7615, Brazil, 5 March 1985. See, 'The Human Rights Situation of the Indigenous People in the Americas' Chapter III, Section 2**,** OEA/Ser.L/V/II.108, Doc 2 (20 October 2000).
[61] Resolution No 12/85 ibid.; 'Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin' OEA/Ser.L./V.II.62, Doc 10 rev 3 (29 November 1983).
[62] Article 21 ACHR refers to 'derecho a la propiedad privada' in the Spanish version even though this is not reflected in the English version which refers to 'the right to property'. Article XXIII of the American Declaration refers to private property in both the English and Spanish versions. The IACmHR interprets the American Declaration 'so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights […].' In this light, it has recognised that Article XXIII

of the link between peoples, territory and livelihood into the human right to property. For example, it has recognised that 'continued utilization of traditional collective systems for the control and use of territory are essential to [the] survival [of indigenous peoples], as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to "the geographical space necessary for the cultural and social reproduction of the group."'[63]

Importantly, the Commission's work and potential role for protecting Arctic indigenous peoples can only be understood in light of the case law of the IACtHR, which the Commission considers as authoritative for its own activities.[64] Moreover, the IACtHR can deliver advisory opinions requested by an OAS party regardless of whether it has ratified the Convention, i.e. the United States and Canada. [65] Although advisory opinions are not binding, 'the authority that usually emanates from [the] court gives them a significant weight.'[66] They have also played a significant role in advancing subsequent jurisprudence of the Court and hence, also the work of the Commission.[67]

The IACtHR has developed a wealth of jurisprudence in which it has fleshed out the contours of the collective right to property. As a starting point, the Court has recognised that the relation of indigenous peoples and their ancestral territories is not confined to an understanding of land as mere possession or an economic resource. Their ancestral territories form the fundamental basis of indigenous peoples' cultures, their spiritual life and economic survival. They represent a material and spiritual element which they must fully enjoy in order to preserve their distinctive cultural identity and social structures.[68] Similarly to the Commission therefore, the Court's understanding of collective property and ancestral territory conforms to worldviews of indigenous peoples, who conceive their territory as integrated with specific elements, including water, products on which their traditional diet is based and the natural environment.[69]

Following this line of reasoning, the IACtHR has established extensive negative and positive obligations of states to guarantee indigenous and tribal peoples full and equal exercise

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includes the collective interests that indigenous peoples 'have in the occupation and use of their traditional lands and resources'. *Mary and Carrie Dann United States,* Report No 75/02, Case 11.140, 27 December 2002, para 131.

[63] 'Report on the Situation of Human Rights in Ecuador' Chapter IX, OEA/Ser.L/V/II.96, Doc 10 rev 1 (24 April 1999). Citation in the original omitted. The IACmHR has also considered that various human rights applicable in the context of indigenous peoples give expression to general principles of international law, including their property and ownership rights with respect to lands, territories and resources they have historically occupied. *Mary and Carrie Dann* ibid. at para 130. In general, Bankes, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', (2010) 47 *Alberta Law Review* 457 at 491-494.

[64] On the evolving relationship between the IACmHR and the IACtHR, see already, Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture', (1990) 12 *Human Rights Quarterly* 439 at 448-461.

[65] Article 2 of the Statute of the IACtHR and Article 64 ACHR.

[66] Medina supra n 64.

[67] Lima and Mendes Felippe, 'The Expansion of the Inter-American Court of Human Rights' Jurisdiction Through Advisory Opinions', (2021) XXI *Annuario Mexicano de Derecho Internacional* 125. See, for example, Advisory Opinion OC-23/17, *The Environment and Human Rights* IACtHR Series A 23 (2017).

[68] *Mayagna Sumo (Awas Tigni) v Nicaragua*, IACtHR Series C 79, 31 August 2001, para 149. See also, *Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C 245, 27 June 2012, para 146.

[69] *Lhaka Honhat,* Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot para 12.

of their right to the territories they have traditionally used and occupied. In this sense, states must delimit and provide official recognition and registration of communal property rights of indigenous groups who can demonstrate traditional possession of, and customary connection to, their territory even if they do not hold formal title over the property.[70]

Already in its earlier case law, the IACtHR had dealt, at least indirectly, with environmental issues by integrating them into a broad definition of property and had identified the close relationship between the protection of ancestral territory and a healthy environment. As it has affirmed, collective ownership of indigenous peoples includes the protection of, and access to, the natural resources on their territories.[71] By recognising that the degradation of natural resources can have detrimental impact on the enjoyment of land, the material sustenance and cultural survival of indigenous peoples, the IACtHR has brought the protection of the environment within the scope of Article 21 ACHR.[72] For example, the right to property can be directly affected in the context where illegal extraction activities or concessions granted by public authorities have caused deforestation or water contamination. In such situations, states have the duty to prevent environmental harm in indigenous territories and to protect the habitat, with special emphasis on forests and waters, while taking into account the unique relationship that indigenous peoples have with their natural resources.[73]

Apart from bolstering the substantive and procedural guarantees of the indigenous peoples' property rights, the IACtHR has achieved to bring into light the conditions of vulnerability in which indigenous peoples live and to integrate them into legally relevant factors for the protection of their human rights. Significantly, states must ensure the full enjoyment of property rights, by taking into account the specific social, economic and cultural characteristics that differentiate the members of indigenous peoples from the general population, focusing in particular on their special vulnerability, their values and customs.[74] In this light, an expansive interpretation of the right to (communal) property in the reasoning of the IACtHR has become a vehicle for integrating wider social, economic and environmental issues under Article 21 ACHR and for recognising that the ancestral right of indigenous communities to their territories 'could affect other basic rights, such as the right to cultural identity and to [their] very survival'.[75]

(ii) Implications for Arctic indigenous peoples

[70] *Moiwana Community v Suriname*, IACtHR Series C 124, 15 June 2005 paras 130-131.
[71] *Saramaka People v Suriname*, IACtHR Series C 172, 28 November 2007, para 120-122.
[72] Ibid. at para 122; *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* Case 12.354, Report No 125/12, IACHR, 13 November 2012, paras 46, 232 and 233. See also Advisory Opinion OC-23/17 supra n 67 para 48.
[73] *Kuna Indigenous People of Madungandí* ibid. at para 234 and IACHR, 'Third Report on the Situation of Human Rights in Paraguay' Doc. OEA/Ser./L/VII.110, Doc. 52, 9 March 2001, Chapter IX, paras 38, 50 – Recommendation 8.
[74] *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C 125, 17 June 2005, paras 51 and 63.
[75] Ibid. at para 147. See also paras 163 and 164: lack of land and access to natural resources has been linked by the Court to deteriorating access to a decent life, which falls under the scope of the right to life, and causing grave difficulties to obtain food and water as well as to practice traditional subsistence activities, such as hunting, fishing and gathering.

The extensive protection that the IACtHR has afforded to the property rights of the indigenous peoples of the Americas has not yet reached the Arctic indigenous peoples. By the time of writing, two petitions by Arctic indigenous peoples have been brought before the Commission. In 2005, sixty-two Inuit people residing in Canada and the US filed a petition seeking relief from alleged violations of human rights, including the right to property, resulting from the impact of global warming and climate change caused by the GHG emissions of the US.[76] The Inuit detailed how the negative effects of climate change, including reduction in sea ice, the melting of permafrost, invasion of alien species to the Arctic waters and coastal erosion threatened their livelihoods. However, the petition was dismissed in a brief letter stating that the petition had failed to establish 'whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration'.[77] While the outcome highlighted the difficulties the Arctic indigenous peoples encounter in establishing a causal link between the harm they have suffered because of climate change and the acts or omissions of states, the petition has also been praised for its innovative legal arguments and is considered an important step towards promoting discursive and collective action frames related to the recognition of the rights of the Arctic indigenous peoples in the context of climate change.[78]

This suggests that the petition of the Arctic Athabaskan Council (AAC), currently pending before the Commission, may have more chances of succeeding. In 2013, the AAC on behalf of all the Athabaskan Peoples residing in Canada and the US filed a petition with the Commission seeking relief for the violations they have suffered from Canada's emissions of black carbon.[79] In a detailed memorial, the plaintiffs have sought to demonstrate the impact that climate change has had on the enjoyment of their human rights, including their right to property that has been affected by the destruction of waterways, riverbanks, airstrips, roads, houses, and cultural and historic sites.[80] While the decision is yet to be issued, it has been argued that in light of the direction the IACtHR has taken in cases concerning the indigenous peoples' rights and climate change, the Commission may find in favour of the petitioners.[81] It has been noted that 'in the past decade the Inter-American jurisprudence has transformed the

[76] Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America, 7 December 2005 <https://www.inuitcircumpolar.com/press-releases/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america/> accessed 12 September 2022.

[77] Letter dated November 16, 2006 <https://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> accessed 12 September 2022.

[78] De la Rosa Jaimes, 'Climate Change and Human Rights Litigation in Europe and the Americas', (2015) 51 *Seattle Journal of Environmental Law* 165 at 191-193; Jodoin, Snow and Corobow, 'Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming', (2020) 54 *Law and Society Review* 168.

[79] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, 23 April 2013 <http://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/> accessed 12 September 2022.

[80] Ibid. at 4.

[81] Szpak, 'Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change—Business as Usual or a Breakthrough?', (2020) 162 *Climatic Change* 1575. See also the discussion in de la Rosa Jaimes, 'The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights', (2015) 45 *California Western International Law Journal* 213 at 236-260; McCrimmon, 'The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change' (2016) 6 *The Polar Journal* 398.

international legal status of the land and has done this by taking seriously the property rights of indigenous peoples', highlighting therefore the potential for addressing the effects of climate change by relying on the right to property.[82]

In light of the above, it can be argued that states have the obligation to take positive measures to ensure that indigenous peoples have access to decent living, which includes their close relationship with their land and access to food and resources. In the context of climate change, this could be broken down into three interrelated duties.

First, domestic authorities can be required to take action to avoid the continuation of the loss of, or decrease in, natural resources that are connected to the livelihoods of indigenous peoples. For example, this could include the implementation of rehabilitation measures to support the gradual recovery of resources and to protect wildlife populations and harvests. These measures can be extended to food sources of livestock, such as reindeers, that form part of the sustenance and economic activities of indigenous communities. Moreover, it has been reported that climate change has affected the availability and safety of drinking water in the Arctic. Most notably, this has occurred through the emergence or increased occurrence of microbial contaminants, the increase of water turbidity because of permafrost thaw and erosion and the flooding of lowland areas with salty ocean water.[83] It could be envisaged therefore, that the IACmHR could order states to adopt measures that aim to improve the quality of water and the access of Arctic indigenous peoples to safe water. Consequently, this would reduce health risks to humans and livestock.

Second, the above closely links to obligations of states to supervise and monitor activities within their jurisdiction that may cause damage to the arctic environment. For instance, the IACtHR has required states to oversee the carrying out of *ex ante* environmental and social impact assessments of activities that involve the exploration and extraction of resources.[84] More broadly however, a similar duty could arise to ensure that general changes in the arctic environment are also monitored, e.g. water pollution or coastal contamination, thickness of ice and changes in fish stocks, because of their multifaceted effects on the living environment and human rights of Arctic indigenous peoples. This would allow states to evaluate the foreseeable negative impact that such changes may have on the livelihoods of Arctic indigenous communities and to implement the necessary adaptation measures in a timely manner. Here, public authorities would need to ensure the effective participation of indigenous peoples in decision-making processes regarding, among others, local monitoring of environmental changes and adaptation practices. Such processes should also take into account,

[82] De la Rosa Jaimes supra n 78 at 195. More recently, in its 2017 Advisory Opinion supra n 67, the Court declared the right to a healthy environment as an autonomous, justiciable right that can be enforced independently of other rights under the Convention. Nonetheless, it is not clear whether this right could also be derived from the American Declaration and would, thus, be of relevance to Arctic indigenous peoples. In addition, as this is a relatively recent development in the jurisprudence, some doctrinal elements of the right to a healthy environment remain to be further explored. For example, its legal contours could be fleshed out more clearly, while the corresponding reparations or methodology for damages could be clarified in other concrete situations. See also, *Lhaka Honhat* supra n 40. In general, Mejía-Lemos, 'The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System' (2022) 22 *HRLR* 1.
[83] Harper et al, 'Climate Change, Water, and Human Health Research in the Arctic', (2020) 10 *Water Security* 1.
[84] *Kaliña and Lokono Peoples v Suriname* IACtHR Series C 309, 25 November 2015, paras 213-226

where possible, the traditional knowledge of the affected communities about their living environment.[85]

Third, the state can be required to support the relocation of some indigenous communities and to provide basic goods and services until settlement to alternate land is possible.[86] Relocation and re-settlement, in consultation with those affected, may in some circumstances be a necessary and feasible strategy of adaptation when there are unmitigable risks to lives, properties and critical infrastructure.[87] This would require a broader governance framework for the planning, funding and implementation of relocation measures. While this may involve complex political decisions, certain legislative and administrative aspects could be reviewed by the IACmHR in individual cases on the basis of their compatibility with rights under the American Declaration. Moreover, Arctic indigenous communities could benefit from the creation of a community fund. This could be used for social and economic assistance related to relocation but also for projects on conservation, resource management, food security and improving the productive capacity of their territories and resources.[88]

B. Insights from the European Human Rights System

(i) The ECtHR

Unlike its Inter-American counterpart, the ECtHR has adopted a narrow interpretation of the right to property under Article 1-Protocol 1 (A1-P1) which has failed to adequately take into account the particular significance of land and property rights for the physical and cultural integrity of indigenous peoples.[89] Nonetheless, the ECtHR and the meanwhile obsolete European Commission of Human Rights (ECmHR) have examined cases concerning the property rights of the indigenous peoples residing in the Arctic regions of Europe and have considered the relevant state obligations under A1-P1 in the context of environmental harm. It is therefore worth evaluating how both institutions have so far protected the Arctic indigenous peoples' property rights with a view to understanding how the right to property can be used in climate change litigation.[90]

As a starting point, the ECmHR, in its *Könkämä v Sweden* decision, recognised the close link between the right to property and traditional activities, such as reindeer herding, hunting and fishing, as fundamental parts of the indigenous culture and way of life that fall

[85] See Romero Manrique, Corral and Guimarães Pereira, 'Climate-related Displacements of Coastal Communities in the Arctic: Engaging Traditional Knowledge in Adaptation Strategies and Policies', (2018) 85 *Environmental Science & Policy* 90.
[86] See in general, *Yakye Axa* supra n 74 paras 219-221; *Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214, 24 August 2010, para 301; *Kaliña and Lokono Peoples* supra n 84 paras 221-222 and 290.
[87] Bronen, 'Choice and Necessity: Relocations in the Arctic and South Pacific' <https://unfccc.int/sites/default/files/bronen_choice_and_necessity_relocations_in_the_arctic_and__south_pacific_2014.pdf > 17, 19-20 accessed 10 October 2022.
[88] See *Kaliña and Lokono Peoples* supra n 84 para 296.
[89] Gismodi, 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1', (2016) 18 *Yale Human Rights and Development Journal* 1 at 52. In general, Bankes, 'The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments', (2011) 3 The *Yearbook of Polar Law Online* 57.
[90] McCrimmon supra n 81.

within the scope of A1-P1.[91] In the case at hand, Sweden had enacted a new system for licencing small game hunting and fishing, which gave the general public wider access to hunting and fishing in a mountain region. The applicants claimed that they had exclusive hunting and fishing rights which had been infringed as a result of the new licensing system. Relying on a decision of the Swedish Supreme Court which had determined that some Sami villages had a 'better right' - but not an exclusive one - than the state in certain areas, the ECmHR rejected the applicants' argument.[92] The decision, nevertheless, is significant because it represented a departure from the ECmHR's approach in the earlier case of *G and E v Norway* where it had determined that the traditional use of territories for grazing, hunting and fishing did not constitute a property right.[93] In *Könkämä*, it was established that exclusive hunting and fishing rights can be regarded as possessions within the meaning of A1-P1.[94]

The ECmHR further considered the matter in *Halvar FROM v Sweden*[95] which concerned the hunting rights of a Sami village. The case was declared inadmissible, but the ECmHR clarified that respect for the special culture and way of life of the Sami is in the public interest and therefore, the traditional activities of reindeer herding and hunting may be afforded protection within the scope of their right to property.[96] As follows, access to resources and activities that form the basis of livelihood of Arctic indigenous peoples can be protected under A1-P1 if severely restricted as a result of an act or omission by the state. The decisions in *Könkämä* and *Halvar* signalled that the ECtHR could develop case-law that recognises the special characteristics of indigenous peoples' property rights and their integral link to their identity, culture and subsistence. Both cases however, left the question open as to how the Court would apply the margin of appreciation in cases where it had to weigh the indigenous peoples' rights against public interests or other rights protected under the ECHR.

Subsequent decisions relating to Arctic indigenous peoples have partially shed some light on this issue. In doing so, they have demonstrated two main limitations with regard to the scope and application of A1-P1 which have proven considerable hurdles for indigenous peoples: the extent to which the Court relies on domestic law in order to determine the existence of a property right and the degree of the margin of appreciation that the ECtHR applies in relation to A1-P1. The first limitation is illustrated by *Handölsdalen Sami Village*, where the issue raised was whether the applicants had the right to winter grazing on a specific area belonging to private landowners.[97] While it was not contended in the case that the right to reindeer grazing itself constituted possession, the ECtHR accepted that the right in the disputed areas was vested in the applicants subject to the determination of the Swedish courts. In this sense, the alleged right could not be characterised as an existing possession. It was in the nature of a claim and it had to be determined whether the claim constituted an 'asset'.[98] The domestic courts had already made such an assessment based on prescription from time immemorial and had established that such right did not exist. Even though the absence of a formal legal title or

[91] *Könkämä and 38 other Saami villages v Sweden*, Application No 27033/95, 25 November 2006, page 3.
[92] Ibid. at page 4-5.
[93] *G. and E. v Norway*, Applications No 9278/81 and 9415/81, 3 October 1983.
[94] *Könkämä* supra n 91 page 8.
[95] *Halvar FROM v. Sweden*, Application No 34776/97, 4 March 1998.
[96] Ibid. at page 3.
[97] *Handölsdalen Sami Village*, Application No 39013/04, Decision as to admissibility, 17 February 2009.
[98] Ibid. at para 51.

an express legal interest is not a prerequisite for finding the existence of a right to property under A1-P1, the Court requires that a property right or claim has its basis on national law. It thus considers the decisions of domestic authorities and courts on the issue as authoritative and does not review them unless there is evidence that they have been arbitrary or manifestly unreasonable. [99] This significantly limits the extent to which the Court can assess whether domestic law sufficiently recognises indigenous peoples' property rights.

The second limitation can be understood in light of the *Hingitaq* case concerning the eviction of the Thule Tribe in Greenland from the area they were residing so that an airbase could be built.[100] Domestic courts in this case had recognised that this amounted to a serious interference with their property rights and, in addition, determined that the applicants had suffered a substantial restriction of access to hunting and fishing. The acts of the state authorities amounted to acts of expropriation which, however, were carried out in the public interest. Subsequently, the domestic authorities had provided alternative housing and facilities for a new village to the applicants in 1953, compensation was paid for the eviction, the loss of hunting rights and for non-pecuniary damage, and new houses were built and provided to them in 1985.[101] An agreement was also reached to reduce the area of the base to almost half of its original size. Based on these factors, the ECtHR found that a fair balance between the proprietary interests of the applicants and the general public interest was struck.[102] It applied a wide margin of appreciation and demonstrated deference to the national authorities to determine the regulation of property.[103]

These two key characteristics of the Court's approach toward the right to property – the wide margin of appreciation and the reliance on national law – are not unique to the case law that relates to indigenous peoples. They are, indeed, prevalent in the way that the Court deals with claims under A1-P1. In the specific context of indigenous peoples' property rights, however, the effect of this approach is that it does not involve a detailed assessment of their economic, social, historical and cultural experiences and their living conditions. This may contribute to indigenous peoples bearing a disproportionate burden as a result of restrictions on their property rights.[104] While doctrinally the Court has not precluded an interpretation of property that is intertwined with indigenous peoples' livelihoods, the application of A1-P1 in the abovementioned cases may be regarded as not being sufficiently sensitive to the specific context and vulnerabilities of Arctic indigenous peoples.

(ii) Overcoming the ECtHR's narrow approach

How can the seemingly narrow approach of the Court be overcome? Two different lines of case law can prove particularly useful to Arctic indigenous peoples. The first deals with

[99] Ibid. at para 54.
[100] *Hingitaq 53 and others v Denmark*, Application No 18584/04, 12 January 2006.
[101] Ibid. at page 15.
[102] Ibid.
[103] *James and Others v UK*, Application No 8793/79, 21 February 1986, para 46. See also, *Former King of Greece v Greece*, Application No 25701/94, 28 November 2002, para 87.
[104] In general, Gismodi supra n 89; Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects', (2011) 18 *International Journal on Minority and Group* Rights 1; Niemivuo, 'Human and Fundamental Rights of the Sámi', (2015) 7 *The Yearbook of Polar Law Online* 290.

environmental harm and the right to property and the second integrates non-economic considerations into the scope of A1-P1. These two strands of case law are examined below.

With regard to the impact of climate change on human rights, the ECtHR has yet to deliver a relevant judgment.[105] While none of the articles of the Convention were designed to specifically promote the protection of the environment, this has progressively entered the discourse of the Court. For example, the ECtHR has recognised that environmental protection 'is an increasingly important consideration' in today's society whose defence gives rise to 'the constant and sustained interest of the public'. [106] Consequently, it has become a relevant factor to be considered by public authorities for the protection of fundamental rights under the Convention and for justifying a limitation of some of these rights. In this light, the Court has decided cases where the applicants have invoked, among others, violations of A1-P1, Article 2 (right to life)[107] and Article 8 (right to private life) caused by environmental harm.[108]

In relation to A1-P1 specifically, the Court has determined that it encompasses positive obligations to take appropriate measures to protect individuals' property rights from environmental harm. Significantly, the case law demonstrates that there is a parallel between the positive obligations that apply within the scope of A1-P1 and other Articles, such as Article 2 and Article 8.[109] The extent of this depends on the causes of harm that have led to a violation of the applicants' rights. In this sense, the Court makes a distinction between situations where harm is caused by natural disasters and weather hazards and those where damage is caused by dangerous activities of a man-made nature. In the first situation, the positive obligations under A1-P1 are less extensive than those under Article 2. Therefore, public authorities are afforded a wider margin of appreciation in deciding what measures to adopt so as to protect the applicants' property rights and the positive obligations of the state do not extend beyond what is reasonable in the circumstances.[110] In the second situation however, the causal link required between the gross negligence attributable to the state and the destruction of property under A1-P1 is the same with that applied to the loss of human lives under Article 2. The scope of measures that the authorities are required to take in this scenario to protect the lives of individuals and their properties, therefore, are indistinguishable.[111]

Furthermore, the obligations of public authorities involve preventive action to mitigate potential harms in light of a risk they knew or ought to have known.[112] The Court, for example, requires that the state take practical steps to remove the risk posed to the properties of the applicants and to inform them about the risks they are running.[113] It also assesses the regulatory

[105] On the potential of the ECtHR to address climate change and alleged violation of human rights, see Heri supra n 41; Zahar, 'The Limits of Human Rights Law: A Reply to Corina Heri', (2022) *EJIL* 1.
[106] *Hamer v Belgium*, Application No 21861/03, 27 November 2007, para 79.
[107] For example, *Kolyadenko and Others v Russia* Applications Nos 17423/05 et al, 28 February 2012.
[108] For example, *Solyanik v Russia*, Application No 47987/15, 10 May 2022.
[109] For examples of cases, see those listed in footnotes 39, 107 and 108. See also, Council of Europe Manual on Human Rights and the Environment (2012).
[110] *Budayeva and Others v Russia*, Applications Nos 15339/02 et al, 20 March 2008 para 175.
[111] *Öneryildiz v Turkey,* Application No 48939/99, 30 November 2004, paras 134-136 and 107-109. Regarding the positive obligations that bound state authorities to prevent a violation of A1-P1, the Court explained in para 136 that they are the same as those indicated in its analysis of Article 2 (see, for example, paras 107-109 of the judgment); *Budayeva* ibid. at para 173; *Kurşun v Turkey*, Application No 22677/10, 30 October 2018, para 115.
[112] *Öneryildiz* ibid. at para 101.
[113] *Öneryildiz* ibid. at paras 107-109. This part of the judgment refers to Article 2, but the principles apply to A1-P1, too.

framework in place and whether it has contributed to the creation or exacerbation of the environmental risk and the extent to which it has proven to be defective or inadequate in mitigating it.[114] Even though this line of case law has not developed in the context of Arctic indigenous peoples and climate change, it could provide two useful elements for the protection of their properties, natural habitat and livelihoods.

The first one relates to the margin of appreciation. It is well-established that the causes of environmental damage in the context of climate change are linked to human activities.[115] Following the case law on environmental harm of a man-made nature, it would not be a step too far for the Court to evaluate the compliance of public authorities with A1-P1 by applying a narrower margin of appreciation than the one applied in cases, such as *Hingitaq* discussed above.[116] This would lead to a higher standard of review by the Court when evaluating the actions taken by the relevant domestic actors to reduce the impact of environmental harm in the Arctic. This line of reasoning might not necessarily cover the effects of weather hazards. These are likely to fall within the first category of cases on natural disasters identified above, and a wider margin of appreciation is applied in these circumstances under A1-P1. Nonetheless, it could be argued that the melting of permafrost, sea level rise and coastal degradation pose foreseeable risks on the properties and livelihoods of Arctic indigenous peoples. Similarly to the Inter-American system, public authorities could therefore be required to take steps to mitigate the risk through actions involving the monitoring of environmental change in the Arctic, support for relocation of affected persons and the adoption of measures or appropriate infrastructure to ensure access to resources that constitute vital sources of income.

The second involves specific features of the positive obligations. The positive obligations developed under A1-P1 by the ECtHR could require putting in place a regulatory and administrative framework that takes into account the features of activities or situations that contribute to climate change and that pose a risk to the properties and livelihoods of indigenous peoples. For example, a possible review would assess the consistency of the approaches of different levels of government in managing adaptation measures and in monitoring aspects of the Arctic environment that pose a threat to the properties and resources of Arctic indigenous peoples. In line with the Court's case law on A1-P1, the domestic authorities would be required to 'act in good time, in an appropriate manner and with utmost consistency' where an issue in the public interest affecting the right to property of Arctic indigenous peoples is at stake.[117] These procedural elements clearly relate to the effectiveness of the domestic actors in developing their administrative conduct and a regulatory framework that is conducive to the protection of the right to property. By extension therefore, this could lead to an evaluation of the adequacy, timeliness and effectiveness of domestic authorities in adopting mitigation action to address the foreseeable risks of climate change. In addition, the participation and consultation of Arctic indigenous communities in the design and implementation of adaptation measures could become a relevant factor under A1-P1 and a subject of review. As opposed to

[114] Ibid. at para 109.

[115] 'Causes and Effects of Climate Change' <https://www.un.org/en/climatechange/science/causes-effects-climate-change> accessed 19 July 2022.

[116] Of course, this would require that applicants establish a causal link between transboundary environmental harm and the violation of the applicants' property rights.

[117] *Beyeler v Italy*, Application No 33202/96, 5 January 2000, para 120. See, *Moskal v Poland*, Application No 10373/05, 15 September 2009, para 51.

the IACtHR, the ECtHR has not specifically developed a requirement for indigenous peoples' participation in decision-making processes concerning their lands and properties. However, it would be compelling to argue that their participation in such processes should be reviewed where it is taking place as a matter of domestic policy in order to better support community-led adaptation.

As alluded to at the beginning of this section, there is another line of case law, which could be relied upon for prompting the ECtHR to take into account the specific economic, social and cultural experiences of indigenous peoples in comparison to other parts of the population. Importantly, considerations of an applicant's well-being, subsistence and levels of hardship have formed relevant elements of the Court's assessment of potential violations of the right to property. In cases such as *N.K.M.*[118] and *R.Sz*,[119] the ECtHR has read social criteria into the interpretation and application of A1-P1 by considering whether changes to the legislative framework submitted the applicant to 'substantial personal hardships'[120] which led to a violation of the right to property. Furthermore, in *Koufaki*,[121] even though the case was declared inadmissible, the Court identified the applicants' well-being as a central factor that needed to be evaluated in the context of A1-P1. The Court recognised that if domestic measures negatively affected the situation of the applicants, as a result of which their subsistence was at risk, this would indicate a breach of A1-P1.[122] Taken together, these considerations demonstrate that the ECtHR has incorporated a 'subsistence threshold'[123] into the interpretation of the right to property, highlighting the social dimensions of the right. In that way, the Court assesses whether the applicants have suffered an excessive burden in comparison to other parts of the population in the context of the broader social and economic circumstances of the state.

Evidently, the case law adopting this approach to A1-P1 is scarce, but it demonstrates that the ECtHR has the potential to make a more 'context-sensitive'[124] analysis of the application of the right to property for Arctic indigenous peoples. This would enable the Court to evaluate the extent to which socio-economic or cultural factors contribute to the applicants being disproportionately affected by national measures, in general, or by environmental degradation, in particular. This would carry the weight in assessing the individual burden within this wider framework of analysis, including any specific characteristics of vulnerability,[125] and would have the potential of lightening the burden of those most adversely affected by the impact of climate change. Indicatively, similar arguments are partly raised by the applicants in relation to Articles 2, 8 and 14 in the pending *Greenpeace Nordic* case. Two

[118] *N.K.M. v Hungary*, Application no 66529/11 (14 May 2013). See also, *Pyrantienė v Lithuania*, Application No 45092/07,12 November 2013, para 62. When assessing whether a violation of A1-P1 had occurred, the Court considered relevant the fact that the land in dispute was used for agriculture and was the main source of income for a disabled applicant.
[119] *R.Sz v Hungary*, Application no 41838/11 (2 July 2013).
[120] *N.K.M.* supra n 118 at para 70.
[121] *Koufaki and ADEDY v Greece,* Application Nos 57665/12 and 57657/12, 7 May 2013.
[122] Ibid. at paras 44-48.
[123] Kagiaros, 'Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?', (2019) 25 *European Public Law* 535, 557.
[124] Heri, *Responsive Human Rights. Vulnerability, Ill-treatment and the ECtHR* (2021) 8.
[125] On the concept of vulnerability in the case law of the ECtHR see, Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', (2013) 11 *International Journal of Constitutional Law* 1056.

of the applicants are members of the indigenous Sami community and have highlighted the impact that climate change has on their ability to use land and resources for their traditional way of life.[126] As illustrated here, such wider considerations can also be relevant in regard to A1-P1 and inform the assessment of the Court.

Despite the limitations in the jurisprudence of the ECtHR, the latter has gradually developed the necessary tools to interpret A1-P1 to protect indigenous peoples from violations of their property rights as a result of climate change. Not only does the Court include traditional activities within the remit of A1-P1, but it has also expanded the positive state obligations for the protection of the right to property against environmental harm. A potentially successful case relating to Arctic indigenous peoples would depend, among others, on proving the causal link between the states' actions or omissions and the harm caused on the applicant leading to the alleged violation of their right to property.[127] Nonetheless, an approach that integrates the above strands of case law illustrates that, in substantive terms, existing rules can be interpreted to advance the rights of Arctic indigenous peoples. The evolving links between property, indigenous peoples and climate change render A1-P1 a useful component in the judicial strategies of potential applicants to induce better protection of the possessions, resources and livelihoods of the Arctic indigenous peoples.

4. CLIMATE CHANGE AND PROTECTION OF THE EXTERNAL DIMENSION OF LIVELIHOODS: MARINE RESOURCES

A. The Potential of ITLOS to Protect the Marine Environment Against the Impacts of Climate Change

Besides the aforesaid human rights bodies, ITLOS has attracted attention with reference to the role it can play in climate change litigation.[128] The latter was established under Annex VI of the 1982 UN Convention on the Law of the Sea (LOSC) with the aim to resolve disputes arising from the interpretation and application of LOSC. ITLOS may also deliver advisory opinions either under Section 4 of Part XI of LOSC or on any matter related to LOSC.[129] Although the latter is not explicitly mentioned in LOSC and has caused significant controversy,[130] a request for an advisory opinion on the obligations of states under LOSC in relation to climate change

[126] *Greenpeace Nordic and Others v Norway,* Application to the ECtHR, 15 June 202 paras 9 and 67 available at <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/ accessed 23 March 2023>.
[127] Venn supra n 3.
[128] See sources in footnote 18.
[129] Article 139 of the Tribunal's Rules of Procedures provides that 'the Tribunal may give an advisory opinion on a legal question ... related to the purposes of the Convention' 'transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal', Rules of the Tribunal (ITLOS/8) as adopted on 28 October 1997 and amended on 15 March 2001, 21 September 2001, 17 March 2009, 25 September 2018, 25 September 2020 and 25 March 2021.
[130] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4. See, for example, Ruys and Soete, 'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea', (2016) 29 *Leiden Journal of International Law* 155 and Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission', (2016) 29 *Leiden Journal of International Law* 441.

has already been submitted to ITLOS.[131] More specifically, the Commission of Small Island States on Climate Change and International Law (COSIS) asked ITLOS to answer the following questions:

> What are the specific obligations of State Parties to UNCLOS, including under Part XII:
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[132]

Whereas it is too soon to tell how ITLOS will respond to this request, the potential of LOSC to mitigate the impacts of climate change has already been extensively discussed.[133] It is thus worth considering how ITLOS could approach these issues on the basis of existing analyses of LOSC and how these initial findings may apply to the Arctic indigenous peoples.

From the preamble of LOSC, it becomes clear that one of the aims of the Convention was to promote the 'equitable and efficient utilization' of the marine resources, the conservation of 'living resources, and the study, protection and preservation of the marine environment'.[134] Forty-six out of the 320 articles were devoted to the marine environment which indicates the strong interests of states to protect it at a time when the impacts of anthropogenic pollution on the planet had barely started being widely visible.[135] Inevitably though, this means that the drafters could not have included any references to climate change in LOSC. Nonetheless, LOSC, as a 'living treaty', has allowed for an interpretation that brings climate change within its provisions.[136]

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[131] Request for an Advisory Opinion supra n 10. In 2021, Antigua and Barbuda and Tuvalu signed an agreement that established a Commission vested with the power to request an advisory opinion from ITLOS on the matter of State obligations to protect the marine environment and climate change. Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law (COSIS Agreement) <https://commonwealthfoundation.com/wp-content/uploads/2021/12/Commission-of-Small-Island-States-on-Climate-Change-and-International-Law.pdf> accessed 4 September 2022. Freestone, Barnes and Akhavan, 'Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law', (2022) 37 *International Journal of Marine and Coastal Law* 1.

[132] Request for an Advisory Opinion supra n 10.

[133] Johansen, Busch, Jakobsen (eds) *The Law of the Sea and Climate Change - Solutions and Constraints* (2021); Platjouw and Pozdnakova supra n 18; Johansen, 'The Legal Interactions between the Climate Change and Law of the Sea Regimes' in Matz-Lück, Jensen and Johansen (eds), *The Law of the Sea. Normative Context and Interactions with other Legal Regimes* (2022) 68. See also, Enyew and Bankes, 'Interaction between the Law of the Sea and the Rights of Indigenous Peoples' in Matz-Lück, Jensen and Johansen (eds), *The Law of the Sea. Normative Context and Interactions with other Legal Regimes* (2022) 151.

[134] Preamble of LOSC. See also, Koivurova, 'The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay', (2011) 42 *Ocean Development & International Law* 211, 212-214; Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea', (2012) 27 *The International Journal of Marine and Coastal Law* 553, 556.

[135] Redgwell, 'From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment' in Freestone et al (eds) *The Law of the Sea: Progress and Prospects* (2006) 180 at 180-181.

[136] Barrett and Barnes (eds), *Law of the Sea – LOSC as a Living Treaty* (2016).

Article 192 of LOSC, for example, obliges states 'to protect and preserve the marine environment' imposing on states a due diligence obligation to take all possible measures to prevent or mitigate significant harm to the environment. This obligation has been interpreted to extend 'both to "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition'[137] which is understood to cover 'both current and future impacts'.[138] In addition, Article 194(1) obliges states 'to prevent, reduce and control pollution of the marine environment *from any source*'.[139] This suggests that although GHG emissions are not explicitly listed here, they could still be considered a source of pollution that gives rise to the relevant obligations of states.[140] Boyle has argued that Article 207 (on land-based sources of marine pollution) and Article 212 (on pollution from or through the atmosphere) could also be interpreted to cover GHG emissions generated from land-based activities and CO_2 emissions originating from ships or aircrafts respectively.[141]

The duty of states to protect and preserve the marine environment also encompasses their duty to protect rare and fragile ecosystems as well as living resources. Article 194(5) provides that the measures taken to implement the Part XII obligations 'include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'. This obligation was further reinforced in the *Chagos Arbitration* in which the arbitral tribunal held that Article 194 is 'not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems'.[142] In the *Chagos Arbitration*, the ecosystem in question was a coral reef, as was in the *South China Sea* arbitration in which the tribunal took a similar stand.[143] The Arctic Ocean is also recognised as a rare and fragile ecosystem and this is evidenced by the bespoke provision, included in LOSC, for the protection of ice-covered areas.[144] Article 234 gives coastal states the power:

> to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

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[137] *South China Sea Arbitration (The Republic of the Philippines v People's Republic of China)* (Award) Arbitral Tribunal (2016) PCA Case No 2013-19 (South China Sea) para 941.
[138] Boyle supra n 18 at 463.
[139] Emphasis added.
[140] Churchill, 'The LOSC Regime for Protection of the Marine Environment – Fit for the Twenty-First Century?' in Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (2015) 3 at 29; Boyle, 'Protecting the Marine Environment from Climate Change - The LOSC Part XII Regime' in Johansen et al (eds) *The Law of the Sea and Climate Change - Solutions and Constraints* (2021) 81 at 86.
[141] Boyle, ibid. at 87-91.
[142] *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*), PCA Case No. 2011-03 para 538.
[143] *South China Sea Arbitration* para 945.
[144] Despite some claims that the Arctic Ocean is a distinct ocean that cannot be governed by LOSC, the five Arctic States (Canada, Denmark, Norway, Russia and the US) have explicitly recognised that the LOSC applies to it. See the Ilulissat Declaration, Arctic Ocean Conference (27-29 May 2008) <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf> accessed 4 September 2022.

The additional powers that coastal states enjoy in the Arctic Ocean are justified due to the unique Artic landscape that demands special measures for its environmental protection.[145] While the article refers to 'ice-covered areas', suggesting that it might have been drafted with the intention to apply both to the Arctic and the Antarctic. However, the preparatory works show that Canada, Russia and the United States were involved almost exclusively in the drafting of the provision.[146] One of the reasons for this was the impact an environmental disaster would have on the indigenous communities in the Arctic, unlike Antarctica where there are no human settlements.[147]

With regard to the obligation of states to protect marine life, ITLOS, in its *SRFC Advisory Opinion*, confirmed that 'living resources and marine life are part of the marine environment'.[148] This finding, which confirms that the protection and preservation of marine biodiversity falls within the aims and scope of LOSC, receives support from other international treaties on biological diversity and living resources,[149] including the most recent international agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[150] Agenda 21 of the 1992 Rio Conference Report has also recognised LOSC as providing 'the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources'.[151]

All this shows that ITLOS should not find it difficult to rely on LOSC to provide normative answers to the climate change-related questions put before it by COSIS. The examination of the advisory opinion could further give the opportunity to other entities, including the organisations representing the Arctic indigenous, to present their views, through the oral or written proceedings, further elaborating on both how they experience the impact of the effects of climate change and the relevance of LOSC to the matter.[152] An advisory opinion seems to have been the best option states had in their disposal. The alternative would be for states to use the compulsory dispute mechanism available under Part XV of LOSC. Since disputes concerning climate-related impacts do not fall within the exceptions of Articles 297

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[145] Article 234 was an important extension of the coastal States' powers in their EEZ, given that all States enjoy the right to freedom of navigation in EEZ (article 58 LOSC).

[146] Kraska, 'Governance of Ice-Covered Areas: Rule Construction in the Arctic Ocean' (2014) 45 *ODIL* 260 at 266; De Mestral, 'Article 234 of the United Nations Convention on the Law of the Sea' in Lalonde et al (eds) *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand* (2015), 112 at 118-120.

[147] See Third United Nations Convention on the Law of the Sea, Revised Single Negotiating Text (Part III), A/CONF.62/WP.8/REV.1, 6 May 1976, Third UN Conference on the Law of the Sea, Official Records, Vol V, at 173.

[148] *SRFC Advisory Opinion* supra n 130 at para 216.

[149] See, for example, the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79 and the 1995 Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, 2167 UNTS 3.

[150] Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction <https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf > accessed 6 March 2023. The final text of the treaty was agreed on 5 March 2023, see <https://www.un.org/bbnj/>

[151] 1992 UN Conference on Environment and Development: Agenda 21, Chapter 17, para 17.1, in Report of the UN Conference on Environment and Development, UNDoc A/ 151/rev 1 (1992) 3. See also the discussion in Boyle supra n 18 at 460-461.

[152] Cruz Carrillo supra n 18 at 248.

or 298, they fall within the compulsory jurisdiction under LOSC Part XV.[153] The political challenges, however, in litigating against other states, and in particular those responsible for most of the GHG emissions, remains a major obstacle.[154] This also seems to be the case for the Arctic states and thus the organisations representing the Arctic indigenous peoples could seize the opportunity to present their views before ITLOS along with COSIS. Alternatively, if the currently pending advisory opinion is favourable, they could explore the opportunity of putting forward another request for an advisory opinion, focusing on the impacts of climate change on the rare and fragile ecosystem of the Arctic and its indigenous communities.[155] Finally, it is worth noting that even though an ITLOS advisory opinion is not legally binding, it offers authoritative guidance on the interpretation and implementation of LOSC and has the potential to influence wider policies with an environmental impact on the oceans.[156]

B. Potential Contribution of ITLOS to Protecting Marine Resources of Arctic Indigenous Peoples

Another way ITLOS could contribute to the protection of the Arctic indigenous peoples' access to marine resources would be through the emphasis it has been paying, in its jurisprudence, to the rights of persons at sea. It has been increasingly noted that LOSC barely deals with persons at sea, leaving significant questions concerning the exercise of jurisdiction for the protection of their rights unanswered.[157] Evans, for example, has noted that LOSC has 'more to say about protecting fish than about protecting people'.[158] This is also the case in relation to the rights of the Arctic indigenous communities to access marine resources. Indeed, while the provisions mentioned in the above section are of great importance to the Arctic indigenous communities whose livelihoods and cultural identity depend on the marine environment and ice-covered areas, none makes any reference to their rights. Perhaps, the only reference to indigenous peoples' rights concerns the traditional fishing rights which, according to Article 51 of LOSC, an archipelagic state shall recognise and respect on the basis of existing agreements with other

[153] Boyle supra n 18 at 475.
[154] Boyle supra n 140 at 97.
[155] All Arctic States, but the US that has not ratified LOSC, have access to ITLOS.
[156] De Herdt and Ndiaye supra n 18 at 373-376; Cruz Carrillo, 'ITLOS Advisory Opinion on Climate Change and Oceans: Possibilities and Benefits' *OpinioJuris* (21 July 2021) <http://opiniojuris.org/2021/07/21/itlos-advisory-opinion-on-climate-change-and-oceans-possibilities-and-benefits/> accessed 4 September 2022. The importance of advisory opinions on climate change is further highlighted by Vanuatu's ICJ initiative to rally support for an ICJ advisory opinion on the obligations of States under international law to ensure the protection of environment from anthropogenic GHG emissions and the legal consequences where States, by their acts and omissions have caused harm to the environment. See UNGA Resolution A/77/L.58 (1 March 2023). See also the discussion in Fitzmaurice and Rydberg, 'Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice?', (2023) *4 Yearbook of International Disaster Law* 281-305.
[157] Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?', (2012) 27 *IJMCL* 867; Papanicolopulu, *International Law and the Protection of People at Sea* (2018); Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', (1997) 36 *Columbia Journal of Transnational Law* 399; Treves, 'Human Rights and Law of the Sea', (2010) 28 *Berkley Journal of International Law* 1; Galani, 'Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain', (2020) 35 *IJMCL* 325; Whomersley, 'UNCLOS at 40: What about human rights?', (2023) 148 *Marine Policy*, 1.
[158] House of Lords, International Relations and Defence Select Committee Inquiry, 'UNCLOS: fit for purpose in the 21st century?' para 175 <https://committees.parliament.uk/work/1557/unclos-fit-for-purpose-in-the-21st-century> accessed 5 March 2023.

states in certain areas falling within archipelagic waters. It has been contended that 'the term traditional could be interpreted to include traditional indigenous use'.[159] While there is no similar duty in the territorial waters or the EEZ, it has been argued that one of the relevant factors a coastal state has to consider in the allocation of the surplus in the total allowable catch to other states is 'the traditional indigenous fishing and habitual fishing that is long-established in the area' and such interpretation could be applicable to the Arctic indigenous communities.[160] Arctic States may also harness the LOSC's dispute settlement provisions in order to protect the fishing rights of Arctic indigenous peoples. An interstate dispute before ITLOS is considered 'a vital remedial device through which the rights [of the indigenous peoples] can be vindicated on the international plane'.[161] Besides the political challenges of interstate disputes, however, this approach has been criticised for entailing the risk of transforming the fishing rights of the indigenous communities into state rights.[162]

To remedy LOSC's 'human rights blindness',[163] ITLOS has insisted that 'considerations of humanity must apply in the law of the sea, as they do in other areas of international law'.[164] In this way, ITLOS has tried to safeguard the human rights of persons at sea by giving effect to the references found in LOSC concerning their arrest, detention or punishment.[165] Accordingly, it has been argued that 'the increasing reference to humanitarian considerations in the ITLOS jurisprudence signals that law of the sea disputes can no longer be resolved without giving due consideration to human rights'.[166] Similarly, questions about the interpretation of Part XII could prompt ITLOS to factor in the human rights of coastal communities, including the Arctic indigenous communities, in climate change-related disputes. In this way, ITLOS could contribute to the 'rights turn'[167] approach of courts in climate change litigation.

5. CONCLUSION

The article has explored the potential of the IACmHR, the ECtHR and ITLOS to provide effective protection to the livelihoods of Arctic indigenous peoples and to develop

[159] Chircop, Koivurova and Singh, 'Is There a Relationship between UNDRIP and UNCLOS?', (2019) 33 *Ocean Yearbook* 90 at 113.
[160] Ibid.
[161] Allen, 'The Jurisprudence of Artisanal Fishing Rights Revisited' in Allen, Bankes and Ravna (eds) *The Rights of Indigenous Peoples in Marine Areas* (2019) 104.
[162] Ibid. at 103-104.
[163] House of Lords supra n 158 at para 235.
[164] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, 10, para 155.
[165] *The M/T 'San Padre Pio' Case (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 2019) ITLOS Case No 27, paras 129–130; *'Enrica Lexie' Incident (Italy v India)*, PCA Case No 2015–28, Order – Request for Prescription of Provisional Measures (29 April 2016) paras 106, 124, 132(a); *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russia)* (Provisional measures, Order of 25 May 2019) ITLOS Case No 26, para 112. See also the discussion in Petrig and Bo, 'The International Tribunal for the Law of the Sea and Human Rights' in Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (2019); Delfino, '"Considerations of Humanity" in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals' in Del Vecchio and Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019).
[166] Galani, 'Port Closures and Persons at Sea in International Law', (2021) 70 *ICLQ* 618.
[167] Peel and Osofsky supra n 3.

corresponding state obligations. Each forum has its own particularities and limitations. That being said, the respective substantive approaches in the case law in the Inter-American and European human rights systems have strengthened the link between the right to property and protection from environmental harm and incorporated non-economic considerations within the scope of the right. Similarly, an advisory opinion by ITLOS could indirectly support the livelihoods of Arctic indigenous peoples and ensure their access to marine resources by shedding light on the obligations of state parties to LOSC to protect the marine environment against the impact of climate change.

In this sense, both the right to property and the principles regarding marine resources that arise from the law of the sea could form important elements of litigation strategies that aim to address the human rights costs of climate change and to induce greater judicial and policy engagement with the protection of Arctic indigenous communities. The combined effect of normative developments taking place in these forums can be valuable in enabling indigenous peoples to seek the enforcement of their rights and to maintain their cultural and economic relationship with the ecosystems they inhabit. It can also have a role in inducing closer international cooperation and in strengthening the legal and political initiatives of states which promote climate protection at the domestic and global arenas and take into proper consideration indigenous peoples' rights. Given the growing number of cases on climate change that reach domestic and international courts, the role of the three forums discussed here in dealing with related issues is likely to increase. It is therefore timely to reflect on the legal tools available from the strands of cases discussed in this article. The findings, after all, may be relevant to other indigenous communities beyond the Arctic, and especially those residing on islands and coastal regions.

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