Arctic Athabaskan Council's petition to the Inter-American Commission on human rights and climate change—business as usual or a breakthrough?

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Abstract

In 2013, the Arctic Athabaskan Council representing the Arctic Athabaskan peoples filed a petition to the Inter-American Commission on Human Rights. The Council sought relief for violations of their rights resulting from rapid Arctic warming and melting caused by emissions of black carbon by Canada. The aim of the paper is to show legal complaints and arguments of a particular indigenous people, Arctic Athabaskans—arguments intended to enforce Canada's obligation to reduce or eliminate black carbon emissions, which negatively affect numerous rights of indigenous Athabaskans. Additionally, the article will point to the new legal developments and potential success of those arguments and litigation itself. The article analyses issues at the intersection of human rights, indigenous peoples and climate change. The concluding remarks attempt to answer the research questions and offer some reflections on the potential to protect indigenous peoples' rights offered by this type of advocacy strategy and, more specifically, the petition in particular. The research method adopted is that of legal-institutional analysis as well as content analysis of relevant literature (analysis of the discourse). This paper moves forward existing climate litigation literature which focuses on human rights. As Osofsky and Peel (2018) highlight, human rights-based climate litigation is a new development in the field, and this paper expands it further.

Keywords Indigenous peoples · Climate change · Inter-American commission/court of human rights · Climate change litigation · The Arctic

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1 Introduction

Predictions regarding climate change consider its effects to be particularly severe in the case of polar regions and their inhabitants. As indigenous peoples' traditional ways of life and culture are nature based, for them it has become an especially significant human rights issue (Heinämäki 2009, p. 208; Grant 2018, pp. 113–118). Least guilty of the environmental damage and resulting climate changes, indigenous peoples are the first to be affected by these factors and feel them most acutely. Climate change, including global warming, has a huge impact on the ecosystem and way of life of indigenous peoples in the Arctic. According to the 2004 *Arctic Climate Impact Assessment* (p. 8),

[...] climate changes are being experienced particularly intensely in the Arctic. Arctic average temperature has risen at almost twice the rate as the rest of the world in the past few decades. Widespread melting of glaciers and sea ice and rising permafrost temperatures present additional evidence of strong Arctic warming. These changes in the Arctic provide an early indication of the environmental and societal significance of global warming.¹

Afterwards, the Inter-American Commission on Human Rights received two independent petitions from two indigenous northern communities who claimed that their human rights were violated by a State's lack of action on climate change. The first one was filed in 2005 by the Inuit and sought relief from such violations related to global warming and connected to the United States' actions or lack of thereof.² The Inuit petition was the first Arctic-specific one and suggested the legal responsibility of the USA for violations of Inuit human rights resulting from climate change. In the end, the petition was considered by the Commission as inadmissible on the ground of the information provided being insufficient to make a determination. The petitioners here were the Inuit who lived in Canada but complained about the acts and omissions of the United States. Hence, the problem of extraterritorial jurisdiction emerged: a responsibility of a State for protecting human rights of people beyond their territory. Another challenge was connected with the element of the future visible in the claims of human rights violations in the context of climate change. The latter encompasses using predictions of future climate change impacts as the basis for claims of violations of human rights, which are usually established only when the damage has been done (Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on Climate Change 2016, p. 10).

Then, in 2013 the Arctic Athabaskan Council representing the Arctic Athabaskan peoples filed a petition to the Inter-American Commission on Human Rights seeking relief for violations of their rights resulting from rapid Arctic warming and melting caused by emissions of black carbon by Canada. The second petition analysed comprehensively and in detail not only evidence of human rights violations reported by individual Athabaskans but also international human rights and applicable case law. The petition claimed that as Canada failed to regulate black carbon emissions, the State bore responsibility for the chain of causes and effects resulting in violating the rights of the Athabaskan people to preservation of health, to their own means of subsistence, to property and to maintaining their own culture, as defined in

¹ For more details, see Goldberg and Badua (2008); Koivurova (2014).

² *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States* (2005) and the Inter-American Commission's on Human Rights rejection of the petition (2006). See also: De la Rosa 2015, pp. 234–236; Heinämäki 2009, pp. 210–221; Osofsky 2009, pp. 272–292; Jodoin and Corobow 2020 and Harrington 2006.

the American Declaration of the Rights and Duties of Man (Canada did not ratify American Convention on Human Rights, but it is treated as an interpretative tool by the Inter-American Commission). The petition further claimed that Canada thus violated also its duties regarding avoidance of transboundary harm and protection of the environment consistent with the precautionary principle. The environmental damage caused by accelerating warming in the Arctic threatens with particular severity the indigenous peoples living in this area (including Athabaskan peoples) and their human rights. Their survival as well as maintenance of their cultural identity and beliefs is connected to their traditional means of subsistence and strongly based on their connection to their natural environment. The Athabaskan peoples depend for subsistence, health, property and culture on said environment and its biodiversity, which are directly threatened and degraded by black carbon pollution (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 by emissions of Black Carbon by Canada 2013, p. 54; hereinafter Arctic Athabaskan Petition). The biggest challenge the petitioners face is the obligation to provide a proof of a legally sufficient nexus between the acts or omissions of the government of Canada and the harm caused by climate change.

2 Review of literature and methodology

There is rich literature in the field of indigenous peoples and their role in the fight against climate change such as: J. Nakashima et al. 2012; Berkes 2012; Guidelines for Considering Traditional Knowledges in Climate Change Initiatives 2014; Raygorodetsky 2017; Pierotti 2011—all these publications point to the crucial role of indigenous knowledge in the preservation of nature and biodiversity and in the fight against climate change. Some publications refer to the legal remedies in the fight against climate change, yet consider it in close connection with indigenous knowledge, which may be considered a source or a component in shaping such remedies. Here one can list Maldonado, Colombi and Pandya 2014 or Abate and Kronk 2013. To this list, one may also add two chapters and one article of direct relevance to the present paper: De la Rosa 2015; Heinämäki 2009; and Osofsky 2009.

There are some publications in the field of climate change litigation; part of them also touch upon indigenous peoples, such as Jodoin and Corobow (2020) and Harrington (2006) who examine the Inuit petition more comprehensively; Koivurova (2007) where the author elaborates on various legal possibilities for advancing climate change litigation, including the Inter-American system of human rights protection; Savaresi and Auz (2019) who analyse climate change litigation to better understand under what conditions human rights arguments may lead to success in the court cases; Peel and Osofsky (2018) where after having surveyed important climate change court cases that included human rights arguments, the authors conclude that we are observing a ‘human rights turn’ in climate change litigation, by which they understand ‘a trend towards petitioners increasingly employing rights claims in climate change lawsuits, and a growing receptivity of courts to this framing’ (p. 40); or Setzer and Vanhala (2010), where the authors review 130 academic articles on climate change litigation published in English in the legal and social sciences between 2000 and 2018. This paper moves forward existing climate litigation literature which focuses on human rights. As Osofsky and Peel (2018) highlight, human rights-based climate litigation is a new development in the field, and this paper expands it further.

The aim of the paper is to show legal complaints and arguments of a particular indigenous people, Arctic Athabaskans—arguments intended to enforce Canada’s obligation to reduce or eliminate black carbon emissions, which negatively affect numerous rights of indigenous Athabaskans. The article will answer the following research questions: what is the potential for success of those arguments and litigation itself? This refers to the title question ‘will it be business as usual or a breakthrough?’ Moreover, what new legal developments may strengthen the Athabaskan petition? The article analyses issues at the intersection of human rights, indigenous peoples and climate change. The structure of the article is as follows: first the author points to the Arctic Athabaskan peoples complaints and then to the arguments supporting their position. New developments relevant for climate change litigation in the context of human rights such as 2017 landmark advisory opinion on environment and human rights of the Inter-American Court of Human Rights are included in Sect. 4. The concluding remarks attempt to answer the research questions and offer some reflections on the potential to protect indigenous peoples’ rights offered by this type of advocacy strategy and, more specifically, the petition in particular. The research method adopted is that of legal-institutional analysis as well as content analysis of relevant literature (analysis of the discourse).

3 The petitioners’ complaints and arguments

3.1 Background—climate change and human rights

By way of introduction and in order to determine a broader background, the petitioners pointed to the increasing link between climate change and human rights. They also noted that resolutions regarding climate change and human rights were adopted by the UN Human Rights Council in 2009 and 2011. Each resolution stresses ‘that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights’. Both resolutions point to the fact that a people must not be deprived in any case of their own means of subsistence and have the right to protecting their health. The resolutions ‘recognized’ (2009) and ‘expressed concern’ (2011) that the vulnerable parts of population would be the ones most affected by climate change; ‘indigenous or minority status’ is considered to be a vulnerability indicator. With regard to the commitments of the States, each resolution affirms that the commitments and obligations regarding human rights are able to inform and reinforce international and national policies on climate change, contributing to the latter’s legitimacy, coherence and sustainable results. The first of the resolutions drew upon the report on human rights in the face of climate change, prepared by the Office of the High Commissioner for Human Rights (OHCHR), and the input submitted by States, international institutions and non-governmental organizations. The report of the High Commissioner stated that States are bound by legal obligations towards people whose rights are influenced by climate change. Such obligations are extraterritorial because such obligations are an important source of protection for such individuals (Arctic Athabaskan Petition 2013, pp. 50–51).³ On

³ See also: U.N. Human Rights Council, Res. 18/22, *Human Rights and Climate Change* (2011); U.N. Human Rights Council, Res. 10/4, *Human rights and climate change* (2009); Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 (2009) paras. 71 and 86.

that basis, the petitioners argue that ‘these developments in the field of international human rights law should inform the Commission’s interpretation and application of the relevant human rights norms at issue in the present case’ (Arctic Athabaskan Petition 2013, p. 51).

The petitioners refer to the *Awas Tingni* case of the Inter-American Court of Human Rights, where it was reaffirmed that ‘human rights treaties are live instruments whose interpretation must adapt to the evolution of the times’ (Arctic Athabaskan Petition 2013, p. 51; Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), para. 146). They add that in its analysis of the acts and omissions of Canada with regard to black carbon emissions, the Commission ought to consider not only the specific provisions included in the American Declaration and the American Convention (the latter as to a huge extent reflecting customary rules as well as serving as an interpretative tool of the American Declaration) but also other relevant obligations assumed by Canada under customary international law and international treaties.⁴ A breach of such obligations gives strength to the conclusion that rights protected by the American Declaration are being violated by Canada most egregiously—due to inadequate regulation or lack of thereof or failure to supervise the application of extant norms—so that the resulting serious environmental problems may lead to human rights violations (Arctic Athabaskan Petition 2013, p. 51). In 2016, after the petition was filed, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment issued his report where the human rights obligations relating to climate change were examined in depth (p. 3). The report indicates complications and challenges that claimants in rights-based climate change litigation face, such as

- how to prove the causality of GHG emissions or adaptation policy failures in a specific country in relation to specific instances of climate change impacts, which ultimately have negative influence on human rights observance (‘causality challenge’);
- how to use predictions of climate change impacts likely to occur in the future as the grounds for human rights violations claims before actual harm occurs; (‘cross-temporal challenge’) and
- how to ensure rights protections in extraterritorial cases, i.e. when harmful actions take place in a state other than the one most acutely affected by the results (‘extraterritorial challenge’) (Report 2016, pp. 10–11; Peel and Osofsky 2018, p. 46; Setzer and Vanhala 2019, p. 17).⁵

Overall, however, the Report enhances the petitioners’ arguments, explicitly confirming the linkage between human rights and the environment as well as those indicating human rights obligations relating to climate change.

⁴ It is worth adding that in the meantime British Columbia incorporated UNDRIP into its constitutional law – Singh et al. (2019). Also the federal Greenhouse Gas Pollution Pricing Act was adopted in 2018 (<https://laws-lois.justice.gc.ca/eng/acts/G-11.55/FullText.html>).

⁵ In 2019, the new Special Rapporteur on human rights and the environment submitted another report, in which he argues for the necessity to act urgently so that the humanity can enjoy safe climate in the future. The argumentation is illustrated by examples of detrimental influence of present climate change situation worldwide on human rights enjoyment, leading to a conclusion that human rights are a key factor that may catalyze action to mitigate climate-related issues – Safe Climate. A Report of the Special Rapporteur on Human Rights and the Environment (2019), p. 3.

After general remarks on the linkage between human rights and the climate change, the Arctic Athabaskan Council invokes two principles particularly relevant to this petition: the duty to avoid transboundary harm and the duty to adhere to the precautionary principle. Canada is bound by the duty to avoid transboundary harm—a fundamental and widely recognized customary norm of international law which means preventing a State's territory from being used in ways that cause damage outside its jurisdiction. Black carbon emissions originating in Canada harm the environment located outside its jurisdiction, including the Alaskan territories inhabited by Athabaskan petitioners. Those emissions also significantly contribute to warming and melting both inside and outside the Canadian borders. Consequently, this leads to a number of negative transboundary impacts on the environment, including raised temperatures, earlier melting of ice and snow in spring, extended dry seasons and higher incidence of forest fires, shrinking glaciers, melting permafrost and even more extreme climate-related events. Insufficient regulation of black carbon emissions is a failure of the Canadian government that leads to violation of the State's international responsibility to prevent internal activities from causing transboundary damage to the environment. This in turn results in violating human rights, as presented in the petition (Arctic Athabaskan Petition 2013, p. 52).

When faced with scientific uncertainty, Canada is bound to exercise caution by the second (precautionary) principle. This international law principle is perhaps best defined by the Rio Declaration on Environment and Development (1992): 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation' (Arctic Athabaskan Petition 2013, p. 52).⁶ According to the petition, Canada failed to sufficiently regulate black carbon emissions, which in turn may cause damage by e.g. by contributing to rapid warming and melting in the Arctic. This threatens to cause irreversible damage to this region and serves as a proof of the State's failure to abide by the precautionary principle. The rapidly accelerating changes in average yearly temperatures, snowfall and melting patterns, the shrinking of permafrost and glaciers, as well as alterations in forest and species composition—all of these are tied to black carbon emissions. The latter therefore contribute to another damage that is difficult or impossible to reverse—they alter the traditional way of life of Arctic communities. Thus Canada is contributing to the human rights violations listed in the petition (Arctic Athabaskan Petition, pp. 52–53).

As to the essence of the complaints, the petitioners claim that 'protection of Arctic Athabaskan Peoples' human rights requires protection of the environment' (Arctic Athabaskan Petition, p. 54). The Inter-American Court and Inter-American Commission have recognized in their decisions on a number of cases brought by indigenous peoples that it is an obligation of a State to protect indigenous peoples against threats to their human rights that result from damage to the environment. Indigenous peoples are particularly vulnerable here because the unity of their societies, preservation and reproduction of their culture, and their very survival as individuals and peoples is dependent on being able to exist in communities and on maintaining their ancestral lands (Arctic Athabaskan Petition 2013, p. 54). Thus, States are bound by international obligation to prevent environmental degradation on a scale that endangers the

⁶ See also: 1972 Declaration of the United Nations Convention on the Human Environment (Principle 21); the 1992 Rio Declaration on Environment and Development (Principle 2) and the 1992 United Nations Framework Convention on Climate Change (Preamble, 2).

health, property, culture or means of subsistence of indigenous peoples. Following a variety of international instruments that recognize the duty to protect the environment, the Inter-American Commission has identified that the rights to life and health are infringed ‘where environmental contamination and degradation pose a persistent threat to human life and health’ (Arctic Athabaskan Petition 2013, p. 54). The link between environment and human rights was also noticed in the Report of the UN Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights where it was stated that

while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing (Arctic Athabaskan Petition 2013, p. 55; Office of the High Commissioner for Human Rights (OHCHR), *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (2009), point 18).

It is also recognized in customary international law that environmental protection is often a prerequisite of human rights protection. According to Judge Weeramantry of the International Court of Justice, environmental protection is one of the core constituents of modern human rights doctrine as a prerequisite of such basic human rights as the right to health and the right to life itself. This concept hardly needs elaboration as the human rights granted by the Universal Declaration of Human Rights as well as other human rights instruments may be impaired or undermined by environmental damage (Arctic Athabaskan Petition, p. 55; International Court of Justice, *Gabčíkovo-Nagymaros (Hungary v. Slovakia)*, separate opinion of Vice-President Weeramantry (1997), 91–92). More specifically, even a singular case of harm to the environment often leads to concurrent violations of multiple rights, e.g. the rights to health, property and culture. In the case of Arctic Athabaskan peoples, multiple human rights are interlinked by the multi-way connections between health, subsistence, land and culture. Many of them depend on the land for their livelihood: if their right to land is violated by environmental degradation, it may well also violate the Athabaskans’ right to their own means of subsistence. Because the staple of Athabaskan peoples’ diets subsists on hunting and gathering, what encroaches on their right to their own means of subsistence often also affects their right to health. From a spiritual point of view, the land is sacred and holds significant cultural value for the Arctic Athabaskan peoples, so what impacts the land negatively violates also their right to culture. A specific case can be the caribou, which for indigenous peoples hold not only great material but also cultural significance. Therefore, factors influencing the caribou adversely not only infringe the subsistence rights and right to health of the Arctic Athabaskan peoples but also violate the latter’s right to culture. Thus, different human rights of the Athabaskan peoples are concurrently affected by black carbon emissions-related damage (Arctic Athabaskan Petition 2013, p. 56).

The petitioners indicated that the necessity to consider the unique context of the history and culture of indigenous peoples has been highlighted for decades by both the Inter-American Court and Commission whenever these entities applied the rights contained in the American Declaration to indigenous peoples. For example, in its analysis of the content and scope of the right to property, the Court took into account the particular significance of the land for the indigenous peoples, in particular with regard to maintaining and transmitting their cultural identity. The Commission recognized in the *Dann v. the United States* case that in order to

ensure that indigenous peoples can enjoy their human rights fully and effectively, their specific economic social, historical and cultural situation and experience must be considered. In addition, the American Declaration of the Rights of Indigenous Peoples (2016), Article XIX (1) explicitly guarantees indigenous peoples the right to environmental protection: ‘Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, world view and to collective well-being’. According to the petition (2013, p. 57) and considering how closely indigenous peoples’ environment is tied to their human rights, as well as the special status assigned to indigenous peoples under international law, Canada is obliged to ensure that Arctic Athabaskan peoples are protected from environmental degradation that may lead to violation of their human rights. It is thus Canada’s duty to protect Arctic Athabaskan peoples against violations of their rights to health, culture, property and their own means of subsistence. This includes violations caused by lack of adequate regulation of black carbon emissions.

The petitioners link the effects of climate change on the Arctic Athabaskans to violations of their rights. They claim that numerous rights guaranteed by the American Declaration of the Rights and Duties of Man are being violated by Canada as it has failed to ensure sufficient regulation of black carbon emissions. These violations include the rights of the Athabaskan peoples to enjoy the benefits of their culture and property, and to preserve their health and well-being as well as their own means of subsistence (Arctic Athabaskan Petition 2013, p. 57).

3.2 Right of indigenous peoples to the benefits of their culture

Regarding the right to the benefits of culture, the petitioners quote the judgments passed by the Inter-American Court of Human Rights in such cases as *Awatitzi v. Nicaragua*, *Moiwana v. Suriname* (2001, para. 39), *Yakye Axa v. Paraguay* (2005b, para. 154), *Sawhoyamaza v. Paraguay* (2005c, para. 131), *Saramaka v. Suriname* (2007, paras. 82, 90) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010b) para. 113). In these cases, the Court recognized that the right to culture is necessarily implicated when indigenous lands are interfered with. In *Chitay Nech et al. v. Guatemala* 2010a, para. 147), the Court acknowledged the role of the ties between indigenous peoples and their land as the keystone of their cultures and of their survival, both material and as distinct ethnic groups. The Court conformed to its jurisprudence on indigenous matters (Arctic Athabaskan Petition 2013, p. 59). The special relation of indigenous peoples to their lands has been also recognized by other international human rights institutions, particularly in the context of indigenous peoples’ right to culture. To exemplify, the importance of natural resources to the indigenous people’s right to the benefits of their unique culture was acknowledged by the UN Human Rights Committee in *Bernard Ominayak and the Lubicon Lake Band v. Canada* (Petition to the Inter-American Commission on Human Rights 2013, p. 59; *Bernard Ominayak and the Lubicon Lake Band v. Canada* (1990) para. 13.3). This was followed by the *Länsman v. Finland* case, which concerned the impact a stone quarry had on reindeer-herding activities of an Arctic indigenous group. In this case, the Human Rights Committee confirmed that the right to culture includes also its modern-day adaptations (Arctic Athabaskan Petition 2013, p. 60; Human Rights Committee, *Ilmari Länsman v. Finland* (1994) para. 9.3). Moreover, the 2009 General Comment No. 21 of the UN Committee on Economic, Social and Cultural Rights recognized that indigenous peoples’ relationship with nature as well as the cultural values and rights they associate with their traditional lands, deserve respect and protection. Such natural way of life should be protected

against degradation, including damage to their means of subsistence, loss of their natural resources and, consequently, harm to their cultural identity (Arctic Athabaskan Petition 2013, p. 60; UN Economic and Social Council, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights) 2009, para. 36).

Another claim of the petitioners was that the black carbon impact on the Arctic environment violates the right of the Arctic Athabaskan peoples to enjoy the benefits of their culture (Arctic Athabaskan Petition 2013, p. 60). This violation is particularly strongly felt in relation to subsistence-based living, traditional knowledge, and cultural sites (Arctic Athabaskan Petition 2013, p. 61). The first area of concern is what lies at the heart of Arctic Athabaskan subsistence culture and lifestyle—hunting, fishing, trapping and gathering, threatened and damaged by accelerating warming and melting of the Arctic. The impacts of climate change thus encroach on the indigenous right to culture by disrupting hunting and cultural activities associated with it, e.g. by making hunting more risky. Also, traditional subsistence harvest and related cultural practices are hindered by the changes in the characteristics and patterns of weather, snow and even land itself—winter travel, an established element of the harvest cycle, is becoming increasingly difficult and risky with thinning ice and more unpredictable weather. Later freezing and earlier, often unexpected thawing result in progressively shortening winter hunting season, impacting also the health and behaviour of the game and increasing the risk of accidents due to breaking ice (Arctic Athabaskan Petition 2013, p. 61).

The second area where black carbon pollution infringes upon the right of Arctic Athabaskan peoples is related to the loss of reliability and usefulness of traditional knowledge. It has been passed by the elders from generation to generation and is protected by international law as an integral part of indigenous culture. Nevertheless, in the quickly changing environment, a significant part of lore about weather patterns, snow and ice, navigating waters and travelling on land has lost its accuracy. This in turn undermines the position of the elders as teachers of the next generation, transmitting and building upon knowledge gathered by the ancestors, which is crucial to the survival of their culture. For example, travelling, hunting, gathering and associated cultural practices require reliable weather forecasting. However, with the warming-related changes in the environment and animal behaviour patterns, the ability of the elders to produce weather forecasts—based on the traditional knowledge of relationships of all living beings with each other and their environment—has been significantly reduced, and travelling has become far riskier (Arctic Athabaskan Petition 2013, p. 62). This may lead to the loss and erasure of traditional knowledge and, in consequence, of significant aspects of the history and culture of Arctic Athabaskan peoples (Arctic Athabaskan Petition 2013, p. 63) as the above-described effects are cumulating and undermining progressively and permanently the indigenous people's ability to engage in their culture (Arctic Athabaskan Petition 2013, p. 63).

3.3 Right to property

According to the petitioners, the effects of black carbon in the Arctic also violate Arctic Athabaskan peoples' right to property (Arctic Athabaskan Petition 2013, p. 63). In the American Declaration, the Arctic Athabaskan peoples are guaranteed the 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'. The American Convention states in a similar vein that '[e]veryone has the right to the use and enjoyment of his property' (Arctic Athabaskan Petition 2013, p. 64; Art. 21 (1) of the American Convention on Human Rights 1969). Access to land

and resources had been expressly recognized by the Inter-American Court as an element of property rights of the indigenous peoples. Referring to the case of *Xákmok Kásek v. Paraguay*, the Court pointed to loss of access to ancestral lands and increased difficulty in subsistence hunting, fishing and gathering practices; lack of territory and the resources located there ultimately affected the Community's cultural identity (Arctic Athabaskan Petition 2013, p. 64; *Xákmok Kásek v. Paraguay*, para. 182). Whether it is a State's action or inaction that causes environmental degradation, it may result in a violation of the human right to property. It can also put an obligation on the State to ensure (by taking positive measures) that no property rights are infringed upon by third parties, in particular the rights of indigenous peoples (Arctic Athabaskan Petition 2013, p. 65; *Saramaka v. Paraguay* 2007, para. 154; *Maya Indigenous Communities of the Toledo District v. Belize* 2004, para. 140). International law clearly recognizes the special relationship or meaning of traditional lands to indigenous peoples who rely on their land for culture, subsistence and well-being. Arts. 25–26 and 28 of UN Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) confirm the special meaning of the lands of indigenous peoples and their spiritual relation with these lands. Similar provisions can be found in Art. 14 of the International Labour Organization Convention 169 (1989).

Importantly, the broad scope of Arctic Athabaskans' human right to use and enjoy their property extends to their tangible and intangible personal property. Intellectual property, such as traditional knowledge, falls within this definition, as specified by the Court in the *Sawhoyamaxa v. Paraguay* (2005c, para. 121): 'the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, *as well as any incorporeal element deriving therefrom*, must be secured under' the right to property (Arctic Athabaskan Petition 2013, p. 66). Similarly, the system of traditional education in Arctic Athabaskan communities—which involves passing on knowledge from generation to generation and building upon it—is of utmost significance to their cultural survival. Now the climate change has devalued the environmental knowledge accrued over millennia (Arctic Athabaskan Petition 2013, p. 69).

3.4 Right to health

Another complaint refers to the right of Arctic Athabaskan peoples to health, which is violated by the effects of black carbon. The close connection between environmental degradation and the right to health has been recognized by the Inter-American Commission for decades (Inter-American Commission on Human Rights, *Yanomami v. Brazil* 1985, para. 10 b). Their 1997 Report on the Situation of Human Rights in Ecuador noted that any damage to traditional lands results in loss of health and life among the indigenous inhabitants. With this document, the Commission pioneered the international recognition of human rights' implications in the cases where contamination and degradation of the environment created a long-term threat to life and health of humans. The Commission also considered that protecting those rights by preventing environmental damage is governments' responsibility (Arctic Athabaskan Petition 2013, p. 70).

To support their claim, the petitioners argue that intensified impacts of environmental damage on indigenous peoples' life and health have been recognized also by international human rights experts. As concluded in 2005 by Special Rapporteur Rodolfo Stavenhagen from the UN Commission on Human Rights, the life chances of indigenous peoples of Canadian North were particularly at risk of experiencing the impacts of climate change and global

pollution. This is a matter of human rights that demands urgent attention from national and international authorities and institutions, as the Arctic Climate Impact Assessment estimates (Arctic Athabaskan Petition 2013, p. 71). Due to lack of sufficient regulation of black carbon emissions in Canada, the State is contributing to accelerating climate change in the Arctic region, thus harming the health and well-being of its Arctic Athabaskan inhabitants. Their food consumption has changed due to decreasing populations, accessibility and health of the game. As traditional foods from this source are the staple of Arctic Athabaskan peoples' diet, their health is negatively influenced by scarcity of the game. To make up for the deficiency, they are forced to consume industrially produced food purchased in shops. It is, costlier and, more importantly, less healthy—as evidenced by reports of increasingly frequent cases of obesity, cardiovascular problems and cancers among indigenous peoples of the Arctic (Arctic Athabaskan Petition 2013, p. 71).

3.5 Right of indigenous peoples to their own means of subsistence

The petition also alleges that the effects of black carbon in the Arctic violate Athabaskans' right to their own means of subsistence. This is a necessary element, an inherent part of the American Declaration's rights to property, health, life and culture because indigenous peoples' livelihood is dependent on natural resources. As provided in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, all peoples are allowed to dispose freely of natural wealth and resources that belong to them; also, a people may not be deprived of its means of subsistence in any case. Likewise, the UNDRIP offers the same assurances to indigenous peoples (for whom this right is particularly vital), confirming the latter's right to securely enjoy their means of subsistence. In actuality, the indigenous peoples' right to their own means of subsistence has been recognized and included as a principle of international human rights law (Arctic Athabaskan Petition 2013, p. 74; Art. 1 of both International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights 1966 and Art. 20 of UNDRIP). The Inter-American Commission has echoed this, recognizing that the material subsistence of indigenous people fundamentally depends on the special relationship that indigenous peoples have with their lands (Arctic Athabaskan Petition 2013, p. 75; Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' rights over their ancestral lands and natural resources. Norms and Jurisprudence of the Inter-American Human Rights System* 2009, para. 56). If they lose ownership and/or access to their territories, they cannot obtain and use the natural resources to provide themselves with goods essential for their subsistence, cultivate the land in a traditional way, hunt, fish and gather food, access the traditional health system and conduct important socio-cultural practices (Arctic Athabaskan Petition 2013, p. 78; Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' rights over their ancestral lands and natural resources. Norms and Jurisprudence of the Inter-American Human Rights System* 2009, para. 57). With climate warming, ecosystems shrink and/or move northwards, and traditional subsistence species' populations are dwindling or also migrating, depleting further the traditional food source of the Arctic Athabaskan populations. The most important subsistence species, the caribou, may be endangered by extreme weather events: whole herds may starve following unusually large snowfalls or a hard top layer of ice crust on the snow after a sudden thaw and freeze that prevent grazing (Arctic Athabaskan Petition 2013, p. 76).

Arctic Athabaskan peoples are further deprived of their means of subsistence by the loss of safety and reliability of winter travel, which is a key element of their subsistence harvest

(Arctic Athabaskan Petition 2013, p. 77). Recent unpredictability of weather patterns impacted the reliability of traditional knowledge-based weather forecasting. Also, traditional berries and other summer vegetation may be unable to adapt to warmer climate or to compete successfully with invasion of southern species. As established in the American Declaration and international law, Arctic Athabaskan peoples enjoy the protection of the intrinsic right to their own means of subsistence. Yet with traditional subsistence harvest model and food sources threatened by global warming-related changes to seasons, weather, snow and ice, and sea and land have increased food insecurity, necessitating dietary changes and greater dependence on non-traditional food coming from the outside. It did not escape the notice of the Inter-American Court, which observed that subsistence practices of indigenous populations may be significantly changed if access to their traditional lands is restricted (Arctic Athabaskan Petition 2013, p. 78).

3.6 Exhaustion of local remedies and relief sought

In order to pre-emptively address the accusations that they failed to pursue remedies via administrative proceedings in Canada and its provinces, the petitioners demonstrated poor feasibility of this option due to Canada's remedies being inadequate, ineffective or unsuitable to offer redress for the alleged violations (Arctic Athabaskan Petition 2013, p. 79). Were the Athabaskans to seek sufficient enhancement of black carbon regulations under Canadian law, they would have to challenge a variety of air emissions regulations, both at the federal level and separately in each province. This would generate prohibitive court-related costs, making it impossible for the indigenous peoples to obtain satisfactory results in this way (Arctic Athabaskan Petition 2013, pp. 80–81; De la Rosa 2015, p. 257).

The petitioners' request for relief included investigations involving an onsite visit and a hearing before the Commission; the Commission's declaration that by failing to regulate domestic black carbon emissions, Canada violates the American Declaration; and a plan to protect the Athabaskan people, developed and implemented in coordination with the petitioners and the Athabaskan communities (Arctic Athabaskan Petition 2013, pp. 86–87). As to the reparations, the petitioners indicate that according to the Inter-American Court, reparations can involve non-monetary measures, aimed e.g. at environmental protection. For example, 'protection of land claimed' was included by the Court in the reparation measures issued in *Xákmok Kásek v. Paraguay case*, where the petitioners had been displaced from their ancestral territory. The ruling stated that it is the State's duty to return the land to the petitioners. Furthermore, before the land could be returned, the State's duty was to prevent deforestation or other forms of exploitation that could irreversibly damage the land or natural resources located there. Environmental protection measures were identified as a form of reparation because money would not be able to repair damage caused by the declared violations (Arctic Athabaskan Petition 2013, p. 53; *Xákmok Kásek v. Paraguay* 2010b, para. 291). Also, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people recognized that the States had the obligations to take measures with a view to addressing effects of climate change on the indigenous peoples of the Arctic. In his 2011 report on the situation of the Saami people (an indigenous group living in the Nordic States and Russia), the Special Rapporteur appealed to the Nordic States and Saami parliaments to join forces and cooperate on mitigating climate change impacts on the Saami people (Arctic Athabaskan Petition 2013, pp. 53–54; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Addendum. The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland 2011, paras. 60, 86).

4 New developments relevant for climate change litigation in the context of human rights

Several decades ago, most governments considered climate change as a purely environmental or economic problem. However, recent developments have led to acknowledging the connection between ‘human and social dimensions of climate change’ (Opening Remarks by Ms. Navi Pillay 2012). Some cases of climate change impact are so drastic that they lead to violating human rights of individuals and entire communities. The petition examined here is an important demonstration that climate change directly and dramatically impacts on a number of important human rights of Arctic Athabaskans. According to the prediction of the Intergovernmental Panel on Climate Change, it is likely that litigation will be increasingly used as groups of citizens and entire countries become dissatisfied with the decision making pace on matters related to climate change (Intergovernmental Panel on Climate Change 2007, p. 793; De la Rosa 2015, p. 215). The petition of the Arctic Athabaskan Council can serve as a proof of this prognosis. This reflects the relationship between climate change and environmental protection and human rights as well as—in this case—between indigenous peoples and nations-States (Osofsky 2009, p. 283).

As to the new developments that may actually strengthen the Arctic Athabaskan petitioners, in 2015 the Paris Agreement was the first climate agreement to expressly recognize the relevance of human rights for the environment (preamble). In 2016 and 2019, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment issued two reports on Climate Change and Human Rights and the Environment respectively. Both of them were mentioned in the context of linkage between human rights and the environment/climate change. In 2017 also the Inter-American Court of Human Rights issued its landmark advisory opinion on environment and human rights, in which it recognized that there is an irrefutable relationship between environmental protection and other human rights realization as effective enjoyment of the latter is affected by degradation of the environment. The Court further emphasized that human rights, sustainable development and environment are interdependent and indivisible as human rights can be enjoyed fully only in favourable environment. This close interrelation led the Court to conclude that at present: (i) the right to a healthy environment is recognized in many systems of human rights protection as a right in itself; simultaneously, it is undeniable that (ii) multiple other human rights are at risk due to degradation of the environment. All of the above creates a series of environmental duties for States, which must ensure that they honour their obligations to respect and ensure those human rights (Official Summary 2017, p. 2). As to the problem of jurisdiction, including the extraterritorial jurisdiction, the Court held that the exercising jurisdiction outside a State’s borders under Article 1(1) of the American Convention is a particular situation to be examined restrictively on a case-by-case basis; however, States are under obligation to use all measures necessary to prevent activities conducted on their territory or under their control from affecting the individuals’ rights, no matter whether they are residents of that State’s territory or not. Hence, States are obligated to prevent causing transboundary harm (Official Summary 2017, p. 3). According to the Court, the exercise of jurisdiction occurs when the State from which the harm originated establishes **effective control over the activities that resulted in environmental damage** and thus led to human rights violation. The particular significance of this conclusion lies in the fact that as the Court’s opinion refers to transboundary environmental damage, ‘effective control’ has ceased to be something to be exercised *over the territory* of the victim’s residence, or even *over the*

individual victim herself. The important question now is whether the source State can exercise effective control over the activities that resulted in transboundary harm. With this advisory opinion, also cross-border human rights claims related to transboundary environmental damage are now permitted to be pursued before the Court itself or before the Inter-American Commission on Human Rights (Feria-Tinta and Milnes 2018). In the case at hand, it would be difficult for Canada to deny control over the activities being the source of black carbon emissions.

Considering that in 2005 the Commission refused to accept an Inuit peoples' petition addressing violation of Inuit human rights by climate change, the advisory opinion increased principle and authority to the issues raised by the Inuit as well as the Athabaskans and other vulnerable communities whose lands, livelihoods have been threatened by climate change (Feria-Tinta and Milnes 2018). In the light of this new development, the potential for the success of the Athabaskan petition has been strengthened. It is uncertain whether the Athabaskan petition will fare differently than the Inuit petition in the hands of the Commission; however, the advisory opinion is a fresh opportunity to found the claim that harm caused by black carbon emissions is a human rights violation that has an extraterritorial dimension (Savaresi and Auz 2019, p. 10).

Finally, on February 6, 2020, a milestone in terms of indigenous people's rights was achieved in the form of a decision made by the Inter-American Court of Human Rights with regard to the case of Indigenous Communities Members of the Lhaka Honhat Association v. Argentina. This was the first instance when the Court used Article 26 of the American Convention on Human Rights (progressive development of economic, social, and cultural rights) in a contentious case to analyse the right to a healthy environment, setting an important precedent with this ruling. Building on the approach taken in 2018 advisory opinion, the Court established standards regarding the right to a healthy environment (Tigre 2020).

5 Concluding remarks

The Athabaskan petition is a confirmation that it is a necessity for indigenous peoples to have their human rights interpreted in the context of their specific indigenous culture and the related need to protect their land and environment—as demonstrated by the document, the lives and culture of the native inhabitants of American Arctic can serve as a proof that human rights of indigenous peoples cannot be separated from the environment in which they live. Thus, one of the distinct protections they require to enjoy their human rights fully, on an equal basis with all peoples, is the preservation of the environment of the Arctic (Heinämäki 2009, p. 213).

With reference to the role of indigenous peoples in combating climate change, it is worth emphasizing that for millennia, indigenous peoples used to manage successfully their water/marine and land species, having built social and cultural systems rooted in deep spiritual relations with nature. To survive and thrive, they have developed models of sustainable use of available natural resources that secured the needs of future generations. The traditional knowledge and practices of indigenous peoples have contributed to the preservation of nature as they have been developed, cultivated and transmitted from generation to generation (Woodman 2015).

Respect for the rights of indigenous peoples, in particular land rights and a right to natural resources, is closely correlated with environmental protection (Eisen 2016) as the former contributes to the latter. Moreover, the development vision construed by indigenous peoples is

holistic: they see it as commitment to environmental stability with socio-economic development placed in the general framework of human rights (Leaving no one behind 2017). Considering this approach, indigenous peoples should be recognized in their role of environmental stewards or guardians. The outcome of the Athabaskan Petition may set the future course for protection of their rights. Whether it will be business as usual or a breakthrough is difficult to ascertain now. However, the arguments of the Arctic Athabaskan Council seem quite convincing, especially in the field of causation between black carbon emissions and violations of human rights of the Arctic Athabaskans (Arctic Athabaskan Petition 2013, pp. 11–17, 27–49).⁷ The present petition contains more concrete claims as to the impact of Canada's failure to adequately regulate black carbon emissions and resulting climate change on indigenous peoples' rights. It does not refer merely to the broader impact of inadequately regulated emissions in general and the resulting climate change. Hence, this facilitates dealing with both the 'causality challenge' and the 'cross-temporal challenge' as the signs of climate change are already here—as the petitioners evidenced in detail in the paragraphs mentioned above.

As to the potential for petitioners' success, in the author's opinion the various reports, decisions and judgments referenced above strongly support the petitioners' claims. The Arctic Athabaskan Council petition builds on the jurisprudence that has already been analysed in the Inter-American Commission on Human Rights as it presented a violation of environmental rights separated temporarily and spatially from its causes. Earlier rulings issued by the Inter-American Commission and Court show receptiveness to establishing connections between human rights violations and environmental harm, especially in the cases brought in by indigenous peoples (Osofsky 2009, p. 283).

Hopefully, the Inter-American Commission on Human Rights will prove its audacity and innovative nature and issue a breakthrough decision which will contribute to stronger protection of indigenous peoples and enhance their role in preserving nature and biodiversity. Hence, such a decision may also contribute to the protection of the environment. Cases such as the current one pose an important challenge for the monitoring bodies: to establish new ways of thinking and approaches to the articles of the human rights instruments that were not originally created to manage the complex impacts of worldwide climate change (Heinämäki 2009, p. 219).

Even if the decision is not favourable to the petitioners—like in the case of the Inuit Petition—it may still contribute to opening, or rather continuing, a discourse on climate change and human rights. It may also become 'a vehicle for articulating and protecting traditional [indigenous – A. Sz.] values on an international stage' (Osofsky 2009, pp. 288, 289). Hari M. Osofsky (2009, p. 290) argued that the Inuit petition

generated publicity that helped to raise awareness about the way in which climate change is impacting the Inuit and about international human rights tribunals as appropriate institutions for addressing crosscutting problems. A statement from the Inter-American Commission on climate change and human rights could be used as persuasive

⁷ As Leena Heinämäki (2009, p. 218) stated with reference to the Inuit petition: 'it is certainly not easy, first of all, to find and understand all the connections between environmental impacts and human rights, on one hand, as is already evident in the original rejection of the petition by the Commission, but secondly—and perhaps more importantly—it might be extremely difficult, if not impossible, for the Commission to point to one particular state as being responsible for a clearly global environmental problem, even though it is a well-known fact that the United States has been the biggest single producer of greenhouse gases'.

authority in other pending actions addressing climate change and/or environmental rights issues. In its various formal and informal interactions with governments and civil society, the petition becomes a “port of entry” for making progress on these issues.

This statement would equally hold the truth if the word ‘Inuit’ was replaced with ‘Athabaskans’. And while litigation on its own is not sufficient to solve the climate change-related problem, it can usher in long overdue innovation and serve as a call to action (Burns and Osofsky 2009, p. 27). This decision may be significant as it allows a legal body to determine responsibilities of an individual State, even though the climate change is a result of a variety of activities undertaken by other actors who are jointly and severally responsible for its destructive impacts.

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