

Central European University

Department of Legal Studies

LL.M. Human Rights

Capstone Thesis

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Climate Litigation on the Rights of Displaced Individuals

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Abstract

Climate litigation covers actions brought before courts worldwide in order to mitigate and compensate the damages and protect the individuals and communities affected by climate change and climate change induced events. While in the last decade climate change induced effects became more severe, climate litigation has also become a useful tool for victims to seek protection for their fundamental rights and for holding accountable those responsible. Climate litigation takes many forms but within the scope of this thesis, the rights of the individuals displaced by climate change induced events will be at the center. Groundbreaking cases at the international and regional levels will be analyzed.

Keywords: *Climate change, climate litigation, climate change-induced displacement, climate refugees, human rights, European Court of Human Rights, Inter-American Human Rights System, UN Human Rights Committee*

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Introduction

“... We have left the stable and secure climatic period that gave birth to our civilisation. There is no going back. No matter what we do now, it’s too late to avoid climate change. And the poorest and most vulnerable – those with the least security – are now certain to suffer. Our duty right now is surely to do all we can to help those in the most immediate danger.”

Sir David Attenborough¹

The future is before our eyes. The increased human population will try to live in chaos that combined with ecological disasters which both the reason and the result of climate change.² It is too late to be hopeful for the future, but time to be more cautious about the worsening conditions. The usage of legal tools carries significant importance for protecting the environment from humans and also for protecting humans from the results of a ruined environment.³

Climate change-induced disasters force people to move away within their country or even outside of their country in search of protection. The lack of adequate tools and policies has left many individuals vulnerable since some of them are extremely dependent on natural

¹ Sir David Attenborough in his address to the UN Security Council on 23 February 2021. Available at: <https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and-security-23-february-2021> [Accessed at 03.03.2021].

² Bratspies, R. (2017). “Claimed Not Granted: Finding Human Right to Healthy Environment”. Transnational Law and Contemporary Problems, 26(2), pp. 263, 265.

³ Taillant, J. D. (2001). "Environmental Advocacy and the Inter-American Human Rights System". The Center for International Environmental Law, Washington, DC, p. 8.

resources and are socio-economically less equipped to fight these threats. In recent years, many countries have suffered from various natural disasters, including ice-field regression, hurricanes, fires, droughts, and severe rains and floods, that push many individuals to migrate.⁴

Although the consensus is that climate change induced environmental degradation will challenge human rights severely, effective protection tools for a healthy environment and other fundamental rights are still ambiguous.⁵ Human rights and especially the right to a healthy environment can be used as a critical legal tool to help us to confront and fight climate change by holding various entities accountable for failing on the sustainability of life.⁶

Climate change and climate change induced events could not have been predicted as a type of persecution during the World War years and as a result they were not included in the 1951 Refugee Convention and its 1967 Protocol Relating to Status of Refugees.⁷ So, while refugees can receive protection due to this international human rights instrument, individuals displaced by climate change and climate change induced events have a lack of legal status and protection in the international sphere. As the Intergovernmental Panel on Climate Change (IPCC) observes, the worse climate change induced impact will be on cross-border displaced individuals⁸, and they have a high probability of facing human rights violations at the border

⁴ Auz, J. (2018). "Why is the Inter-American Human Rights System Lagging on Climate Change?". Available at: <https://www.openglobalrights.org/why-is-the-inter-american-human-rights-system-lagging-on-climate-change/> [Accessed at 18.02.2021]; Inter-American Commission on Human Rights (2015). Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 46/15, para. 63.

⁵ Bratspies, R. (2017), p. 268; Ali, B., & ur Rehman, F. (2015). "A Right to Healthy Environment". Journal of Law and Society (University of Peshawar), 46(66), pp. 70, 72.

⁶ Orellana, M. (2015). "Reflections on the Right to Healthy Environment: Comments on Rebecca Bratspies' Do We Need Human Right to Healthy Environment". Santa Clara Journal of International Law, 13(1), pp. 72, 79.

⁷ Rouleau-Dick, M. (2018). "Why Environmentally Displaced Persons from Low-lying Island Nations Are Not Climate "Refugees": A Legal Analysis", p. 13; Tripathi, S. (2018). "Climate Refugees Acknowledging the Existence of an Imminent Threat". 4(1) NLUJ Law Review, pp. 23, 25.

⁸ Intergovernmental Panel on Climate Change (1992). Climate Change: The IPCC 1990 and 1992 Assessments. IPCC First Assessment Report, Overview and Policymaker Summaries and 1992 IPCC Supplement. Canada: World Meteorological Organization and United Nations Environment Programme, p. 103, para. 5.0.10.

due to not having any legitimate right to enter the country⁹. In order to fill this legislative gap, climate litigation can and must be used as a tool.

Therefore, in this thesis, to provide strategic litigation tools, the legal framework and limited practices towards the rights of the displaced individuals due to climate change induced events both at the international and regional level will be analyzed to provide a strategy for further litigation. The aim is to understand the human rights protection tools for climate change advocacy by highlighting and comparing the international and regional areas where some actions have been taken. In that respect, the structure of the thesis is as follows:

In **Chapter I**, at the international level, the legal framework will be discussed, and then for strategic litigation, the *Ioane Teitiota* judgment of the United Nations Human Rights Committee will be analyzed.

In **Chapter II**, at the regional level, the European Court of Human Rights and Inter-American Human Rights System will be analyzed as the two important human rights systems that both have legal frameworks and cases which can be relevant to climate change-induced displacement.

⁹ Addaney, M. & Jegede, A. O. & Matinda, M. (2019). “The Protection of Climate Refugees Under the African Human Rights System: Proposing a Value-Driven Approach”. *African Human Rights Yearbook*, pp. 250-251.

1 Chapter 1.

International Level

1.1 Legal Framework

Climate change-induced effects were not in the picture when many human rights instruments were created, e.g. the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the American Convention on Human Rights (1969).¹⁰ On one hand, other human rights such as the right to life¹¹ are stipulated in several international human rights instruments and this can provide protection for the individuals who are displaced by climate change and climate change induced events. On the other hand, it was not until 1972 that the right to a healthy environment gained its spot as an international human rights instrument, which was named the Declaration of the United Nations Conference on the Human Environment (also, known as the Stockholm Declaration).¹²

The Declaration stated that a dignified standard of living for all generations can only be provided in a livable and healthy environment which is fundamental for benefiting from other human rights.¹³ Two decades later, the Rio Declaration on Environment and Development emphasized the significance of a healthy environment for the sustainability of the lives of

¹⁰ Bratspies, R. (2017), pp. 268-269; Feria-Tinta, M., & Milnes, S. C. (2019). "International Environmental Law for the 21st Century: The Constitutionalization of the Right to Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion 23". *ACDI Anuario Colombiano de Derecho Internacional* (Colombian Yearbook of International Law), 12, p. 77; Ali, B., & ur Rehman, F. (2015), pp. 77-78.

¹¹ Article 6, UN General Assembly (1966). *International Covenant on Civil and Political Rights*. UNTS, Vol. 999; Article 3, UN General Assembly (1948). *Universal Declaration of Human Rights*. 217 A (III).

¹² UN General Assembly (1972). *Declaration of the United Nations Conference on the Human Environment*. Stockholm; Ali, B., & ur Rehman, F. (2015), pp. 77-78; Feria-Tinta, M., & Milnes, S. C. (2019), p. 59.

¹³ Chapter I, para. 1 and Chapter II, Principle 1 of the UN General Assembly (1972); Kalen, S. (2016). "An Essay: An Aspirational Right to Healthy Environment". *UCLA Journal of Environmental Law and Policy*, 34(2), p. 162.

humans.¹⁴ However, promising action was not taken until the 2010 Cancún Adaptation Framework, which in Article 14(f) states that States are obliged to coordinate and cooperate for climate change induced displacement and migration. Finally, in 2016, after years of advocacy, the importance of protecting and respecting human rights was highlighted in a climate change treaty, known as the Paris Agreement.¹⁵ At last, focus was given to the climate crisis in the UN 2030 Agenda for Sustainable Development which urged States to take action to combat its effects on lives and livelihoods.¹⁶

1.2 Strategic Litigation: *Ioane Teitiota*

Mr. Teitiota argued that climate change and climate change induced effects have made Kiribati an uninhabitable and dangerous place for him and his family, and that deporting them there from New Zealand is a violation of the right to life that is protected under the International Covenant on Civil and Political Rights.¹⁷ While exhausting domestic remedies, the Immigration and Protection Tribunal denied his asylum claim by stating that there was no proof of any conflicts, difficulty in finding housing, harvesting crops, or accessing drinking water; imminent life-threatening environmental situations; circumstances different from other residents, and the government's inability to fulfill its positive obligations on the right to life.¹⁸ Nevertheless, the Tribunal also allowed for the possibility that environmental deterioration could “create pathways into the Refugee Convention or protected person jurisdiction”.¹⁹ The author's

¹⁴ Principle 1 of the UN General Assembly (1992). Rio Declaration on Environment and Development. A/CONF.151/26/Rev.1 (Vol. I); Kalen, S. (2016), p. 162.

¹⁵ Recital 12 of the United Nations (2015). Paris Agreement. No. 54113; Mayer, B. (2016). "Human Rights in the Paris Agreement". Climate Law, 6, p. 109.

¹⁶ United Nations. "Goal 13: Take urgent action to combat climate change and its impacts". Available at: <https://www.un.org/sustainabledevelopment/climate-change/> [Accessed at 15.05.2021].

¹⁷ *Ioane Teitiota v. New Zealand* [2020] UN Human Rights Committee, CCPR/C/127/D/2728/2016, paras. 2.1, 3.

¹⁸ *Ibid.*, paras. 2.8, 2.9, 9.6.

¹⁹ *Ibid.*, paras. 2.2, 9.6.

subsequent appeals to the Court of Appeal and the Supreme Court were all dismissed with the same reasoning. He then brought the case before the UN Human Rights Committee.²⁰

The Committee stated that States are obliged not to deport a person from their territory due to climate change-induced impacts, if:

- i. There are substantial grounds for believing that there is a real risk of irreparable harm to their right to life or if there is cruel, inhuman, or degrading treatment or punishment;²¹
- ii. The risk is personal, other than in extreme cases;²²
- iii. The danger is immediate and there should not be an adequate period for intervening to protect those individuals from that country;²³
- iv. The general human rights situation in the country of origin illustrates the situation;²⁴
- v. The author asserts evidence on life-threatening conditions.²⁵

Despite the fact that the Committee did not find a breach in this case, it did open the door for future applications by emphasizing that countries should not deport persons whose right to life may be violated as a result of sudden-onset or slow-onset climate events.²⁶

²⁰ Ioane Teitiota v. New Zealand [2020], paras. 2.2, 2.10, 9.6.

²¹ Ibid., paras. 9.3, 9.4.

²² Ibid., paras. 9.3, 9.7.

²³ Ibid., para. 9.12.

²⁴ Ibid., para. 9.3.

²⁵ Ibid., para. 9.9.

²⁶ Ibid., paras. 9.3, 9.11.

2 Chapter 2.

Regional Level

At the regional level, the European Court of Human Rights and the Inter-American Human Rights System will be analyzed as the two important human rights systems. Although there are no certain cases or legal framework that is specifically about the individuals displaced by climate change-induced event, those two human right systems still have legal framework and cases that can be relevant to climate change-induced displacement.

While the European Court of Human Rights' case law has mainly evolved around the right to life, protection against inhuman or degrading treatment and the right to private and family life, the Inter-American Human Rights System's case law mainly evolved around the right to a healthy environment. For this reason, in the following section, each right will be analyzed within the relevant legal framework and jurisdiction.

2.1 European Court of Human Rights

2.1.1 Legal Framework

Although, Judge Spanó, as the President of the Court, highlighted that climate change will play a transformative role in human rights, effective and real protection tools for a healthy environment are still ambiguous in the European Court of Human Rights agenda. The human rights treaty that was drafted in 1950, the European Convention on Human Rights (ECHR) did not include the right to a healthy environment in its scope since it was designed to protect fundamental rights in democratic societies.²⁷ Although the Parliamentary Assembly of the

²⁷ Duymaz, E. (2012). "Avrupa İnsan Hakları Mahkemesi'nin Çevrenin Korunmasına Katkısı". (Contribution of the European Court of Human Rights to the Protection of the Environment). İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, No: 47, p. 125; Eicke, T. (2021). "Human Rights and Climate Change: What Role for the European Court of Human Rights". Inaugural Annual Human Rights Lecture, Department of Law, Goldsmiths

Council of Europe (PACE) has continuously recommended the recognition of the right to a healthy environment in the Convention by drafting an additional protocol²⁸, the Committee of Ministers of the Council of Europe is also has continuously rejected those recommendations by assuming that the right already overlaps with the rights stipulated in the Convention and can be protected indirectly through case-law.²⁹ However, although the European Court of Human Rights itself recognized in 1991 that the protection of the environment gained significant importance in current living conditions³⁰, even in the two decades since the Court has not made a clear reference regarding the right to a healthy environment in its judgments. On the other hand, the Court keeps itself up-to-date with international environmental law instruments and refers to them in its judgments too.³¹

In general, the Court finds a violation when the environmental issue has a legal basis in the national law of the Contracting Party.³² Since the majority of the Contracting Parties have already recognized the right to a healthy environment³³, the only problem for the individuals residing in these countries is framing their case while bringing it before the European Court of

University. Available at: <https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4> [Accessed at 12.03.2021], para. 13.

²⁸ Parliamentary Assembly (2009). Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment. Recommendation 1885; Parliamentary Assembly (2003). Environment and human rights. Recommendation 1614; Parliamentary Assembly (1999). Future action to be taken by the Council of Europe in the field of environment protection. Recommendation 1431.

²⁹ Eicke, T. (2021), para. 14; Mendes Bota, J. (2009). Drafting an additional protocol to the European Convention on Human Rights, concerning the right to a healthy environment. Parliamentary Assembly, Doc. 12003, pp. 1, 4-6; van Duren, C. (2018). "The legal obligations for the European Union to protect climate-induced migrants crossing European borders". Master's Thesis LL.M International and European Law Tilburg Law School, p. 34.

³⁰ *Fredin v. Sweden* (No. 1) [1991] ECtHR, Application No. 12033/86, para. 48.

³¹ *Taşkın and Others v. Turkey* [2005] ECtHR, Application No. 46117/99, paras. 98-99; There is no doubt on that, the most groundbreaking case will be "*Duarte Agostinho and Others v. Portugal and Others* [2020] ECtHR (communicated case), Application No. 39371/20" once it concluded. The applicants made a reference both to 1992 Rio Declaration, 1992 UNFCCC and 2015 Paris Agreement while bringing their claim to the ECtHR and this resulted in being fast-tracked and communicated by the Court. See, *Duarte Agostinho and Others v. Portugal and 32 Other States*. Available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/> [Accessed at 15.05.2021].

³² *Fadeyeva v. Russia* [2005] ECtHR, Application No. 55723/00, para. 97.

³³ Albania, Andorra, Armenia, Azerbaijan, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Georgia, Germany, Greece, Hungary, Latvia, Lithuania, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Switzerland, Turkey and Ukraine.

Human Rights.³⁴ There have been more than three hundred cases brought before the Court framed with various rights stipulated under the Convention since environmental damage usually affects multiple rights rather than just one.³⁵ While PACE highlighted the States responsibilities on Articles 2, 3 and 8 of the Convention regarding the environment-related issues³⁶, the Court gave broader "recognition" by finding violations of the right to life³⁷, the right to a fair trial³⁸, the right to private and family life, home and correspondence³⁹, the right to an effective remedy⁴⁰ and the right to property⁴¹.

In this context, it is important to highlight that the ECHR protects the rights of every individual whose rights are breached in the area of the Convention's effective control⁴², whether those individuals are asylum seekers or have obtained the legal status of refugee.⁴³ So the Convention does not limit the rights of asylum seekers or stipulate rights specifically regarding those individuals.

³⁴ Shelton, D. (2002). Human Rights, Health & Environmental Protection: Linkages in Law & Practice, A Background Paper for the World Health Organization. Health and Human Rights Working Paper Series No 1, p. 22, fn. 66.

³⁵ Eicke, T. (2021), paras. 15-16; Grant, E. (2015). "International Human Rights Courts and Environmental Human Rights: Re-imagining Adjudicative Paradigms". Journal of Human Rights and the Environment, 6(2), p. 159.

³⁶ Parliamentary Assembly (2009), para. 9.1; Parliamentary Assembly (2003), para. 9.1; Mendes Bota, J. (2009), p. 2.

³⁷ Budayeva and Others v. Russia [2008] ECtHR, Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02; Öneriyildiz v. Turkey [2004] ECtHR [Grand Chamber], Application No. 48939/99.

³⁸ See, Taşkın and Others v. Turkey [2005].

³⁹ Lopez-Ostra v. Spain [1994] ECtHR, Application No. 16798/90; Cordella and Others v. Italy [2019] ECtHR, Application Nos. 54414/13 and 54624/15; Tatar v. Romania [2009] ECtHR, Application No. 67021/01; Fadeyeva v. Russia [2005].

⁴⁰ Cordella and Others v. Italy [2019]; Öneriyildiz v. Turkey [2004].

⁴¹ Guerra v. Italy [1998] ECtHR, Application No. 14967/89; Öneriyildiz v. Turkey [2004].

⁴² Al-Skeini and Others v. The United Kingdom [2011] ECtHR, Application No. 55721/07, p. 59, paras. 136-137; Loizidou v. Turkey (Preliminary Objections) [1995] ECtHR, Application No. 15318/89, pp. 18-19, paras. 62-64.

⁴³ Article 1 of the Council of Europe (1950). European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. ETS 5; Güner, N. Ö. (2016). "Avrupa İnsan Hakları Mahkemesi'nin Mültecilerin Haklarının Korunmasındaki Rolü". Göç Araştırmaları Dergisi, Cilt: 2, Sayı: 2, pp. 214, 220.

2.1.2 Strategic Litigation

2.1.2.1 Article 2: *When the harm is on the life*

The Court reads Article 2 of the Convention as a practical and effective instrument for the protection of human beings.⁴⁴ In this context, the Court highlights the States' positive obligation to take appropriate measures to safeguard the lives of individuals in any activities whether made by public authorities or not.⁴⁵ To assess a case in light of this Article within the substantive aspect, the Court takes into account:

- i. The life-endangering risk for individuals;⁴⁶
- ii. The status of the presumed responsible party who brought the risk;⁴⁷
- iii. The intentional activities attributable to the presumed responsible party;⁴⁸
- iv. A causal link between the above-mentioned criteria;⁴⁹
- v. Although the States have a broad margin of appreciation on their positive obligation, whether the authorities did everything that is reasonably expected from them to prevent the risk.⁵⁰

Overall, to take all appropriate steps to safeguard life within the scope of Article 2 of the Convention, the positive obligations of the States are:

- i. To have effective and deterrent legal and administrative instruments to provide protection to individuals;⁵¹

⁴⁴ Öneriyildiz v. Turkey [2004], para. 69.

⁴⁵ Ibid., para. 71.

⁴⁶ Ibid., para. 73.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid., para. 75.

⁵⁰ Budayeva and Others v. Russia [2008], paras. 134-135.

⁵¹ Öneriyildiz v. Turkey [2004], para. 89.

- ii. To impose preventive and practical measures to ensure the effective protection for individuals whose lives are endangered by environmental risks;⁵²
- iii. To inform the public about environmental risks;⁵³
- iv. When a death occurs, to provide an effective judicial system for the affected individuals who are seeking justice.⁵⁴

Although the Court limits the responsibility of States on environmental disasters by highlighting the roots and ways to mitigate a threat⁵⁵, it contradicted this concept in *M. Özel and Others v. Turkey*. The Court found a violation in a threat which the State has no control over and expected them to build capacity to deal with these "unexpected" natural disasters.⁵⁶ This contradiction that the Court made in 2015 can also be read as if it is finally starting to become progressive in environment-related cases.

2.1.2.2 Article 3: When the harm arising from the living conditions

The Court emphasizes the fact that asylum seekers are among the most vulnerable groups in society.⁵⁷ While the Member States have the right to monitor their entry, residency, and deportation,⁵⁸ deportation could be an issue if substantial grounds have been found for believing that the individual concerned would be subjected to treatment in violation of Article 3 of the ECHR if deported.⁵⁹ In such a scenario, Article 3 of the ECHR can be read as recommending that the individual concerned should not be deported to that country.⁶⁰ The

⁵² Öneriyildiz v. Turkey [2004], para. 90.

⁵³ Ibid.; Budayeva and Others v. Russia [2008], para. 132.

⁵⁴ Öneriyildiz v. Turkey [2004], paras. 91-92, 95, 97.

⁵⁵ Budayeva and Others v. Russia [2008], paras. 136-137.

⁵⁶ M. Özel and Others v. Turkey [2015] ECtHR, Applications Nos. 14350/05, 15245/05 and 16051/05, paras. 173, 200.

⁵⁷ M.S.S. v. Belgium and Greece [2011] ECtHR, Application No. 30696/09, paras. 251.

⁵⁸ Sufi and Elmi v. United Kingdom [2011] ECtHR, Applications Nos. 8319/07 and 11449/07, para. 212.

⁵⁹ Ibid.

⁶⁰ Ibid.

assessment of this is relative, depending on all of the circumstances of the case, but there are some common grounds for the Court to find a violation in regard to Article 3⁶¹:

- i. The exposure to ill-treatment as a consequence of humanitarian conditions must reach a minimum degree of severity so that it affects an asylum seeker's ability to meet the most basic human needs (e.g. food, sanitation, and shelter), and their vulnerability to ill-treatment, and whether the situation will improve within a reasonable time period is vague;⁶²
- ii. The threat must be real and the receiving State's authorities must be unable to eliminate it;⁶³
- iii. The government must try to dispel concerns rigorously after examining the evidence provided by the asylum seeker in order to determine the existence of a real threat;⁶⁴
- iv. The assessment must concentrate on the likely consequences of the asylum seeker's deportation to the country of destination while taking into account the general situation in that country as well as the asylum seeker's personal circumstances;⁶⁵
- v. The dire humanitarian situation must inevitably lead to mass displacement and the collapse of social, political, and economic infrastructures.⁶⁶

Those displaced by climate change and climate change induced effects may be covered under Article 3 of the ECHR, which is linked to the non-refoulment principle that focuses on preventing human rights violations that will be triggered by deportations to inhuman living conditions.

⁶¹ Sufi and Elmi v. United Kingdom [2011], para. 213.

⁶² Ibid., paras. 213, 272, 278, 279, 280, 283, 292; M.S.S. v. Belgium and Greece [2011], para. 254.

⁶³ Sufi and Elmi v. United Kingdom [2011], para. 213.

⁶⁴ Ibid., para. 214.

⁶⁵ Ibid., para. 216.

⁶⁶ Ibid., para. 282.

2.1.2.3 Article 8: *When the harm is on the private and family life, home*

The Court made some progress on environment-related human rights when explicitly accepting the interrelation between environmental deterioration and that of private and family life, home.⁶⁷ However, according to the Court, environmental degradation is not enough by itself to find a violation.⁶⁸ To fall within the scope of Article 8 of the Convention, certain conditions need to be fulfilled:

- i. The issue must have a direct impact on the individuals' private and family life, home;⁶⁹
- ii. The adverse effects must attain a certain minimum level on a case by case basis, e.g. density, period, and its overall effect on physical or mental well-being;⁷⁰
- iii. The condition of the environment must have deteriorated.⁷¹

The Court can also find a violation if the State fails to control the private industry as its positive obligation.⁷² Since the State must take all the reasonable and appropriate measures to secure the individuals' rights, the Court's task is to assess:⁷³

- i. Whether the State could reasonably be expected to act to prevent or put an end to the alleged infringement of rights;⁷⁴
- ii. Whether the State, in securing the rights, cared about the fair balance between the interests of the individual and the community;⁷⁵

⁶⁷ Grant, E. (2015), p. 174.

⁶⁸ Fadeyeva v. Russia [2005], paras. 68, 70.

⁶⁹ Ibid., paras. 68, 70.

⁷⁰ Ibid., paras. 69-70, 88.

⁷¹ Ibid., paras. 69-70.

⁷² Ibid., para. 89.

⁷³ Ibid.

⁷⁴ Ibid., paras. 89-92.

⁷⁵ Ibid., para. 93.

- iii. Whether the measures taken by the States are promising for the affected individuals, although States have a broad margin of appreciation regarding their positive obligation.⁷⁶

In brief, the Court shows willingness by including environmental issues within the scope of Article 8 and by broadening the scope of the protection of the right to private and family life, home by underlining States' positive obligations.⁷⁷ This approach can be expanded with further litigation and eventually the Court can change its “individualistic” rights-based standing to a collective one.⁷⁸

2.2 Inter-American Human Rights System

2.2.1 Legal Framework

The Inter-American Court of Human Rights recognized that climate change-induced impacts will severely affect the enjoyment of many human rights, but mainly the right to a healthy environment. Thus, it states in its decision that countries have discretion on how to safeguard and guarantee this right.⁷⁹ Although some countries are making progress in regulating climate change induced migration and the protection of those individuals, what will happen to the individuals who seek protection in other countries remains unanswered.⁸⁰ However, this contradicts the American Convention on Human Rights, which aims to protect every human

⁷⁶ Fadeyeva v. Russia [2005], paras. 96, 123, 133-134.

⁷⁷ Grant, E. (2015), pp. 164-165.

⁷⁸ Ibid.

⁷⁹ Yakye Axa Indigenous Community v. Paraguay [2005] Inter-American Court of Human Rights (Merits, Reparations and Costs), pp. 65-66; Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17. Requested by the Republic of Colombia: The Environment and Human Rights, para. 41; Organization of American States (2016). *Climate Change: A Comparative Overview of the Rights Based Approach in the Americas*. Department of Sustainable Development of the General Secretariat of the Organization of American States, p. 33.

⁸⁰ Watkins, G. & Salinas, A. G. (2020). "The Climate Crisis Could Drive Massive Human Displacement in Latin America and the Caribbean". Available at: <https://blogs.iadb.org/sostenibilidad/en/the-climate-crisis-could-drive-massive-human-displacement-in-latin-america-and-the-caribbean/#:~:text=In%202018%2C%20the%20Groundswell%20report,vulnerable%20being%20the%20most%20affected>. [Accessed at 18.02.2021]; See, (2018). Framework Law No. 30754 on Climate Change. Available at: <https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/1638161-1.pdf> [Accessed at 16.02.2021].

being without discriminating in their residence status.⁸¹ In this regard, this must be used as a mindset for closing the legal protection gap in the region.⁸² Overall, recognizing certain rights is not enough -their implementation and enforcement procedures must also be clear and effective, which are two ways to provide the right to a healthy environment with an effective way for those individuals who are forced to move due to climate change induced effects.

On one hand, the refugee definition in the Cartagena Declaration, which has been also recognized by the Inter-American Court of Human Rights, can provide those individuals who are displaced by climate change induced disasters with a framework to access refugee status since it included “massive violation of human rights” or “other circumstances which have seriously disturbed public order” as additional grounds.⁸³ However, it carries certain downsides since it is not legally binding and the protection offered by this regional definition is limited since it still depends on the political will of the countries that have adopted it.⁸⁴

On the other hand, since any country and the Inter-American Commission on Human Rights can submit proposals for the recognition or addition of rights, the right to seek asylum due to climate change induced impacts can be included in the San Salvador Protocol after a dialogue.⁸⁵ Article 26 of the American Convention on Human Rights specifically mentions that countries must take action for the full realization of certain rights, including the right to a

⁸¹ Article 1 of the Organization of American States (1969). American Convention on Human Rights, "Pact of San Jose", Costa Rica; Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17, para. 41.

⁸² Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17, para. 41.

⁸³ Article III (3) of the Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (1984). Available at: <https://www.refworld.org/docid/3ae6b36ec.html> [Accessed at 20.02.2021]; Inter-American Court of Human Rights (2018). Advisory Opinion OC-25/18. Requested by the Republic of Ecuador; Canepa, V. & Escobedo, D. G. (2021). "Can Regional Refugee Definitions Help Protect People Displaced by Climate Change in Latin America?". Available at: <https://www.refugeesinternational.org/reports/2021/2/16/can-regional-refugee-definitions-help-protect-people-displaced-by-climate-change-in-latin-america> [Accessed at 16.02.2021].

⁸⁴ Canepa, V. & Escobedo, D. G. (2021); Esthimer, M. (2016). "Protecting the Forcibly Displaced: Latin America's Evolving Refugee and Asylum Framework". Available at: <https://www.migrationpolicy.org/article/protecting-forcibly-displaced-latin-america-evolving-refugee-and-asylum-framework> [Accessed 16.02.2021].

⁸⁵ Article 22 of the Organization of American States (1999). Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"). A-52.

healthy environment, which is not possible without providing legal status and protection for these individuals.

2.2.2 Strategic Litigation: *The Right to a Healthy Environment*

For more than two decades, the interrelation of the enjoyment of human rights and a healthy environment has been recognized in the Inter-American Human Rights System.⁸⁶ This alone shows that the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights interpret the legislative framework in light of the changing conditions.⁸⁷ Further, the Court highlighted the importance of intergenerational justice by stating that solidarity involves both past, present and future generations, which also challenges the individualism in human right protection.⁸⁸

In the Inter-American Human Rights System, access to protection regarding the right to a healthy environment of individuals and communities is highly possible, since victims, third persons, or NGOs can bring cases before the Commission and Court.⁸⁹ Its jurisprudence has mainly been developed in the context of claims of the right to property of indigenous peoples in case of environmental destruction, which is an important step in the development of a broader approach for general interest.⁹⁰

⁸⁶ Bratspies, R. (2017), p. 270; Inter-American Commission on Human Rights (1997). Report on the Situation of Human Rights in Ecuador. OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, Chapter VIII, para. 2.

⁸⁷ Chavarro, J. (2016). “The Emergence of the Right to Water in the Inter-American Court of Human Rights”. Inter-American and European Human Rights Journal, 8, p. 110; Feria-Tinta, M., & Milnes, S. C. (2019), pp. 52-54; Inter-American Court of Human Rights (1999). Advisory Opinion OC-16/99. Requested by the United Mexican States: The Right to Information on Consular Assistance within the Framework of the Guarantee of Legal Due Process, para. 114.

⁸⁸ Ali, B., & ur Rehman, F. (2015), p. 79; Grant, E. (2015), pp. 173-174; Bámaca-Velásquez v. Guatemala [2000] Inter-American Court of Human Rights.

⁸⁹ Grant, E. (2015), p. 165; Taillant, J. D. (2001), p. 20.

⁹⁰ See, Saramaka People v. Suriname [2007] Inter-American Court of Human Rights; Mayagna (Sumo) Awas Tingni Community v. Nicaragua [2001] Inter-American Court of Human Rights (Merits, reparations and costs); Yanomami v. Brazil [1985] Inter-American Commission on Human Rights; Grant, E. (2015), pp. 166-167; Feria-Tinta, M., & Milnes, S. C. (2019), pp. 52-54.

In particular, the *Inuit* petition⁹¹ which was submitted in 2005, changed the dialogue around climate change and its interrelation with human rights. However, the Commission refused to proceed with their claim on the lack of policy for protecting them from greenhouse gas emissions that violates their human rights, by reasoning that they failed on providing sufficient information on whether their claim is in the scope of the rights protected under the American Declaration.⁹² After that date, a new understanding took place in the region regarding a healthy environment and its relationship with human rights.⁹³

In 2008, the Organization of American States (OAS) recognized the impacts that climate change has on human rights.⁹⁴ Later, in 2016, OAS published a comprehensive report on how climate change induced impacts affect human rights, including the right to a healthy environment, the right to life, and the right to water and food.⁹⁵ Furthermore, after receiving a massive amount of cases related to this issue, the Inter-American Commission (as an autonomous organ of the OAS) called for the Member States to advocate for human rights while negotiating the Paris Agreement.⁹⁶

However, effective usage of legal framework did not occur until 2018 when Colombia submitted a groundbreaking request to the Court asking for its Advisory Opinion regarding the degradation of the environment that might arise by the State's open sea activities in the

⁹¹ Watt-Cloutier, S. (2005). *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*. Available at: <http://climatecasechart.com/non-us-case/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/> [Accessed at 01.03.2021].

⁹² Ibid.; Bratspies, R. (2017), pp. 276-277.

⁹³ Bratspies, R. (2017), p. 276.

⁹⁴ OAS General Assembly (2008). *Human Rights and Climate Change in the Americas*. Resolution No. 2429 (XXXVIII-O/08); OAS (2008). "Panel of Experts at OAS Warns of Climate Change Impact in the Americas". E-325/08. Available at: https://www.oas.org/En/media_center/press_release.asp?sCodigo=E-325/08 [Accessed at 01.03.2021]; Bratspies, R. (2017), p. 277.

⁹⁵ Organization of American States (2016), pp. 33-36.

⁹⁶ Bratspies, R. (2017), p. 277; OAS (2015). "IACHR Expresses Concern Regarding Effects of Climate Change on Human Rights". No. 140/15. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2015/140.asp [Accessed at 01.03.2021].

Caribbean Sea.⁹⁷ While the San Salvador Protocol to the American Convention⁹⁸ expressly acknowledges that states have a duty to protect, preserve and improve the right to a healthy environment, the American Convention on Human Rights⁹⁹ provides a jurisdictional path for individuals to legally enforce states to take action for the full realization of this socio-economic right.¹⁰⁰ By citing that legal framework, the Commission also considered a healthy environment as a key to the effective enjoyment of other human rights, e.g. the right to life and the right to not be forcibly displaced.¹⁰¹ Consequently, the Court recognized this as a fundamental right for the existence of humanity which gave rise to the obligations for states to protect even cross-border where it exercises “effective control”.¹⁰² This case simply shows that States can be held responsible internationally regarding their role in climate change induced effects and its effect on human rights.

In its latest judgment, the Court analyzed the human right to a healthy environment and found Argentina responsible for violating Indigenous peoples’ human rights (e.g., the right to a healthy environment, to cultural identity, and to adequate food and water) through its failure to recognize and protect their lands from illegal logging and other detrimental activities.¹⁰³ Regarding the right to a healthy environment, the Court stated that:

⁹⁷ Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17.; Feria-Tinta, M., & Milnes, S. C. (2019), p. 47; Banda, M. L. (2018). “Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights”. ASIL Insights: Volume 22, Issue 6. Available at: https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#_ednref32 [Accessed at 21.03.2021].

⁹⁸ Article 11 of the Organization of American States (1999). Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"). A-52.

⁹⁹ Article 26 of the Organization of American States (1969). American Convention on Human Rights, "Pact of San Jose", Costa Rica.

¹⁰⁰ Grant, E. (2015), p. 160; Ali, B., & ur Rehman, F. (2015), p. 82; Feria-Tinta, M., & Milnes, S. C. (2019), pp. 52-54.

¹⁰¹ Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17, paras. 38, 47, 55, 59, 66; Feria-Tinta, M., & Milnes, S. C. (2019), pp. 49, 52-54.

¹⁰² Inter-American Court of Human Rights (2017). Advisory Opinion OC-23/17, paras. 59, 104(h); Feria-Tinta, M., & Milnes, S. C. (2019), pp. 52-54.

¹⁰³ Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina [2020] Inter-American Court of Human Rights, para. 289.

- i. States have obligations to respect, ensure and prevent violations;¹⁰⁴
- ii. States' obligations expand to the private domain to prevent and protect individuals from third parties infringing upon their right to a healthy environment;¹⁰⁵
- iii. To fulfill these obligations, States must build adequate systems to check and control the activities of private individuals and public entities;¹⁰⁶
- iv. Overall, States must take into account the vulnerabilities in light of the principles of equality and nondiscrimination.¹⁰⁷

The latest litigation shows that States have almost unlimited responsibility to fulfill protection within the context of the right to a healthy environment, which opens the door for further litigation for individuals displaced due to climate change induced events.

¹⁰⁴ Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina [2020], para. 207.

¹⁰⁵ Ibid., para. 207.

¹⁰⁶ Ibid., para. 207.

¹⁰⁷ Ibid., para. 209.

Conclusion

Climate litigation covers the actions brought before courts worldwide in order to mitigate and compensate the damages and protect the individuals and communities affected by climate change and climate change induced events. While in the last decade climate change induced effects have become more severe, climate litigation also has become a useful tool for victims to seek protection for their fundamental rights and for holding accountable those responsible. Climate litigation on the rights of individuals displaced by climate change induced events evolved both at the international and regional level. Focusing on the strategies stipulated during this thesis will help to bring these cases before the courts:

First of all, at the international level, the *Ioane Teitiota* judgment of the UN Human Rights Committee opened the door for future applications by emphasizing that countries should not deport persons whose right to life may be violated as a result of sudden-onset or slow-onset climate events. Second of all, at the regional level, the European Court of Human Rights' case law mainly evolved around the right to life, protection against inhuman or degrading treatment, and the right to private and family life, home. Meanwhile, the Inter-American Human Rights System's case law evolved around the right to a healthy environment. In this context, it is important to highlight that the European Court of Human Rights protects the rights of every individual whose rights are breached in the area of the Convention's effective control, whether those individuals are asylum seekers or have obtained the legal status of refugee. Since the Convention does not limit the rights of asylum seekers, the European Court of Human Rights can be a strategic place to bring cases for the rights of displaced individuals. While in the Inter-American Human Rights System, access to protection regarding the right to a healthy environment of the individuals and communities is highly possible since victims, third persons, or NGOs can bring cases regardless of their residence status.

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