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***MOSSVILLE ENVIRONMENTAL
ACTION NOW V. UNITED STATES:
IS A SOLUTION TO ENVIRONMENTAL
INJUSTICE UNFOLDING?***

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* Jeannine Cahill-Jackson, JD Pace Law School 2012, served as Senior Associate on Pace International Law Review and student attorney for the Equal Justice America Disability Rights and Health Law Clinic. I owe special thanks to my husband Kitama, my mother Sandy, and my siblings Julie and Jeremy for their love and support through the writing of this article and through my entire law school journey. This article is dedicated to the residents of Mossville, Louisiana, whose struggle for a healthy environment continues to this day. It is dedicated to them for their strength and spirit. This article is also dedicated to Monique Hardin and Nathalie Walker of Advocates for Environmental Human Rights, who brought this case. They are an inspiration to me and should serve as a reminder to us all that in the pursuit of justice, sometimes the laws we have at hand won't address the problems we face. In those situations, it can be the role of attorneys and advocates to help reshape the legal landscape to better address the needs of the people, especially those that have been forgotten.

INTRODUCTION

Surrounded by an army of hazardous industrial facilities, the residents of the small town of Mossville, Louisiana try to hold onto their lives and their homes, where many of their families have lived for over a century, despite an onslaught of pollution. "There are people [who] are getting sick; there are people who are dying because of what is happening in our community. These chemicals are killing us. They will destroy Mossville if nothing happens," said Dorothy Felix of the grassroots nonprofit Mossville Environmental Action Now.¹

The people of Mossville have been complaining for decades, trying to find someone to help them with their fight for a healthier environment. In 2008, the New Orleans based organization: Advocates for Environmental Human Rights, representing the Mossville residents, filed a petition with the Inter-American Commission on Human Rights ("IACHR") seeking, among other things, a declaration that there is a human right to a live a healthy life free from pollution and that the Mossville residents have been the victims of environmental discrimination based on race.

This article chronicles and analyzes the IACHR case resulting from the petition: *Mossville Environmental Action Now v. United States*.² Part I illuminates the harms faced by the residents of Mossville and the little that has been done to remedy their situation. It provides an in-depth look at the data that has been collected by the U.S. government and analyzed by the members of Mossville Environmental Action Now, which shows levels of dioxin contamination in both the people and the environment of Mossville and their significance. Part I also discusses environmental racism and environmental justice in theory and as applied to the pollution and sickness that the Mossville residents are facing. Part II explores the petition that was filed with the IACHR, the IACHR itself, the treaties that formed the Commission, and its duties. Part III analyzes

¹ David S. Martin, *Toxic Towns: People of Mossville 'are like an experiment*, CNN.COM (Feb. 26, 2010) http://articles.cnn.com/2010-06-02/health/mossville.results.toxic.america_1_epa-contractor-superfund-designation-environmental-protection-agency?_s=PM:HEALTH.

² *Mossville Env'tl. Action Now v. United States*, Petition 242/05 (Inter-Am. Comm'n H.R. filed Mar. 14, 2005).

each claim that was deemed admissible and relevant precedent from both the IACHR and the European Court on Human Rights in order to predict the outcome of the case, as it is still pending. Part IV puts forth predictions and summarizes all of the relevant rules that come from the applicable case law. Lastly, Part V discusses the remedies that have been requested in the petition and that are likely to be awarded if violations of human rights are found.

This case is of great significance for both the United States and the other countries in the Inter-American system, as it is the first of its kind to be deemed admissible. Describing the significance that a favorable decision would have on the Mossville residents, Monique Harden, co-director and attorney with Advocates for Environmental Human Rights stated, "It means they are going to have a legal judgment on their right to live in a healthy environment They are hard-working, good people. And they want nothing more than what anybody would want, which is a safe place to raise their children."³

I. THE ENVIRONMENTAL INJUSTICE FACED BY THE CITIZENS OF MOSSVILLE LOUISIANA

Mossville is a small Louisiana community only five miles wide.⁴ It was founded by African Americans in the 1790s. The homes and property of many of the residents have been passed down in their family for many generations.⁵ "In the years after World War II, industry came to Mossville, lured by the nearby ship channel and Louisiana's willingness to waive property taxes for industry. Plants now operate on land where Mossville homes and businesses once stood."⁶ Today, there are only 375 homes in Mossville because many others were pushed out by

³ David S. Martin, *Toxic Town's Advocate Sees Victory Ahead*, CNN.COM (June 2, 2010), http://articles.cnn.com/2010-06-02/health/mossville.results.toxic.america_1_epa-contractor-superfund-designation-environmental-protection-agency?_s=PM:HEALTH.

⁴ Second Amended Petition and Petitioners' Observations on the Government's Reply Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America at 1, Mossville Env'tl. Action Now v. United States, Petition 242/05 (Inter-Am. Comm'n H.R. June 23, 2008) [hereinafter Mossville Petition].

⁵ *Id.*

⁶ Martin, *supra* note 3.

the encroaching chemical companies and other industry that has become densely concentrated in the area.⁷

a. The Contamination: Tests and Context

Fourteen industrial facilities are currently manufacturing, processing, storing, and discharging toxic and hazardous substances in or near the community of Mossville.⁸ Three are located within Mossville, and the other eleven are located within half a mile from the town.⁹ The industry cluster is composed of petroleum product manufacturers, chemical manufacturers, and plastics manufacturers.¹⁰ Despite the fact that these industries have the necessary permits required by the United States Environmental Protection Agency (“EPA”), the residents of Mossville claim that the toxic emissions from these industries are having a severely negative effect on their health and homes by having repeatedly released toxic emissions into the air, land, and water for decades.¹¹

As a result of the repeated complaints of the Mossville residents regarding their illnesses and contamination, several studies were conducted to determine the extent of the residents’ exposure to toxins. In 1998, the Agency for Toxic Substances and Disease Registry (“ATSDR”) conducted a study on dioxin exposure in Mossville.¹² The ATSDR is a federal agency under the U.S. Department of Health and Human Services. “[The] ATSDR serves the public by using the best science, taking responsive public health actions, and providing trusted health information to prevent harmful exposures and diseases

⁷ Mossville Petition, *supra* note 4, at 1.

⁸ *Id.* at 2 n.4 (listing industries operating in the Mossville area: (1) Air Liquide, (2) Arch Chemical, (3) BioLab, (4) Certainteed, (5) Conoco Philips (formerly Conoco Lake Charles Refinery), (6) Entergy Roy S. Nelson Power Plant, (7) Excel Paralubes, (8) Georgia Gulf (formerly Condea Vista), (9) Lyondell/Arco Chemical, (10) PHH Monomer, (11) PPG Industries, (12) Sasol (formerly Condea Vista), (13) Tessenderlo Kerley Chemicals (formerly Jupiter Chemicals), and (14) Tetra Chemicals).

⁹ *Id.* at 2.

¹⁰ MOSSVILLE ENVTL. ACTION NOW ET. AL., INDUSTRIAL SOURCES OF DIOXIN POISONING IN MOSSVILLE, LOUISIANA: A REPORT BASED ON THE GOVERNMENT’S OWN DATA, II (2007) [hereinafter INDUSTRIAL SOURCES OF DIOXIN].

¹¹ *Id.* at 1.

¹² *Id.* at 2.

related to toxic substances.”¹³

The agency collected blood samples from twenty-eight Mossville residents who agreed to take part in the study.¹⁴ The data showed that the Mossville residents who participated had an average level of dioxin in their blood that was three times higher than the average level in a national comparison group that was used to represent the general population of the United States.¹⁵ The ATSDR concluded that the source of dioxin exposure was unknown,¹⁶ despite the additional discovery that the residents had a unique group of dioxin compounds that was unlike the national average group.¹⁷ This difference was noted by a health consultant as a possible indication that the dioxin contamination in the residents’ blood was from local sources.¹⁸ However, no further research was done in regard to this point, despite the numerous industrial facilities that could have possibly been found to be the local source of the residents’ contamination. Additionally, the ATSDR did not offer any assistance to the residents of Mossville after conducting the study.¹⁹

Three years later, in 2001, the ATSDR conducted a follow up investigation.²⁰ The purpose of this investigation was to evaluate potential environmental sources of dioxin exposure.²¹ The agency collected blood from twenty-two Mossville residents, more than half of whom participated in the 1998 study.²² The agency also tested fruits and vegetables, dust from homes, and soil to determine how severely the residents’ surrounding environment was contaminated with dioxin.²³

¹³ Agency for Toxic Substances and Disease Registry, ASTDR, <http://www.atsdr.cdc.gov/> (last visited May 12, 2012).

¹⁴ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at 2–3.

¹⁵ AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, DIVISION OF HEALTH CONSULTATION, HEALTH CONSULTATION: EXPOSURE INVESTIGATION REPORT, CALCASIEU ESTUARY (A/K/A MOSSVILLE), CALCASIEU PARISH, LOUISIANA 11 (1999).

¹⁶ *Id.* at 7.

¹⁷ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at 3.

¹⁸ AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, HEALTH CONSULTATION: FOLLOW-UP EXPOSURE INVESTIGATION, CALCASIEU ESTUARY (A/K/A MOSSVILLE), LAKE CHARLES, CALCASIEU PARISH, LOUISIANA, 1 (2006) [hereinafter FOLLOW-UP EXPOSURE INVESTIGATION].

¹⁹ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at i.

²⁰ FOLLOW-UP EXPOSURE INVESTIGATION, *supra* note 18.

²¹ *Id.* at 2–3.

²² *Id.* at iv.

²³ *Id.*

The ATSDR did not publish the study until 2006.²⁴ When the study was published, the agency did not directly attribute the dioxin contamination to any particular industries, but rather inconclusively listed many possible causes of the dioxin detected, such as the natural environment and combustion processes.²⁵ Additionally, although the ATSDR concluded that the food, soil, and dust were heavily contaminated with dioxin, it neglected to make any statements about the possible effects of this level of environmental contamination could have on the people who were being exposed to it.²⁶ Nor did the agency make any recommendations for how to remove these contaminants.²⁷

The grassroots group of Mossville residents, Mossville Environmental Action Now ("MEAN"), published a report entitled, *Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report Based on the Government's Own Data*.²⁸ In this report, MEAN analyzed the ATSDR studies and compared the amounts of dioxin found in Mossville to standards set by the EPA to trigger clean up and remediation. They discovered that their situation did warrant clean up and remediation action according to EPA guidelines.²⁹ More than half of the samples taken by the ATSDR of the soil and dust exceeded the amount the EPA set for dioxin contamination to reach in order to be cleaned up.³⁰ In fact, the sample exceeded the EPA limit of 3.9 ppt by 2 to 230 times.³¹ Additionally, MEAN discovered that there was a clear link between a specific unique dioxin compound in the residents' blood and the compound of dioxin emitted by a local plant.³² This information and any correlations between health issues and exposure to toxics were not released to the public by ATSDR, leaving concerned citizens to analyze

²⁴ *Id.*

²⁵ *Id.* at 25–27.

²⁶ *Id.* at 23, 25–27.

²⁷ *Id.* at 38.

²⁸ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10.

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 7 (noting three particular compounds of dioxin are released by Georgia Gulf (one of the industries) and these three compounds of dioxin are seventy-seven percent of the dioxin contamination in the blood of Mossville residents).

the data on their own, as MEAN did in the report it created.

In 2002, the ATSDR conducted a parish-wide study of dioxin levels in residents' blood of Calcasieu Parish.³³ This data showed that the rest of the parish, which is not as heavily industrialized as the Mossville area, had dioxin levels more similar to the average United States comparison group than to those of the Mossville residents.³⁴ This data confirmed that the contamination and high blood dioxin levels were concentrated in and around Mossville and did not extend farther.³⁵

There have also been studies on the health symptoms of the residents of Mossville in 2008 and 2009.³⁶ A symptom survey was done by the University of Texas of 100 residents. In the survey, ninety-one percent of the residents reported at least one health problem that is a known effect of exposure to at least one of the toxic chemicals being emitted in the area. The same symptoms and their frequency included:

91% of the group had symptoms of ear, nose and throat illnesses such as burning eyes, nasal soreness, nose bleeds and sinus and ear infections, 84% had symptoms of central nervous system illnesses such as headaches, dizziness, tremors, and seizures, and 77% had symptoms related to illnesses of the cardiovascular system such as irregular heartbeat, stroke, heart disease, and chest pain.³⁷

This survey demonstrates that the people's health in this area is being adversely affected, and further, since the first study in 1998, there has not been anything done to remedy the residents' situation or to better their health.

Dioxin is the chemical of main concern in all of the tests and studies mentioned because it is the "most toxic substance known to science and is a health threatening byproduct of at least eight nearby industrial operations."³⁸ The Mossville area has the largest concentration of vinyl production facilities in the U.S., which creates dioxin as a byproduct.³⁹ In the

³³ *Id.* at 5.

³⁴ *Id.* at 5–6.

³⁵ *Id.*

³⁶ See WILMA SUBRA, HEALTH REPORT ON MOSSVILLE, CALCEIEU PARISH, LOUISIANA (2009).

³⁷ *Id.* at 26–28.

³⁸ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at 2.

³⁹ AGENCY FOR TOXIC SUBSTANCE & DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR CHLORINATED DIBENZO-P-DIOXINS (CDDS) 28, 31, 37, 41–42, 49

ATSDR's report published in 2006, it provided the following characterization of sources of dioxin (although not attributing it to any of the local industries):

Dioxin is found everywhere in the environment, with low background concentrations found in the air, water, and soil. Lower concentrations are found in biological and environmental samples in less industrialized, rural regions compared to more industrialized, urban areas. Dioxin is released to the environment during combustion processes (e.g., municipal solid waste, medical waste, and industrial hazardous waste incineration, and fossil fuel and wood combustion); during the production, use, and disposal of certain chemicals (e.g., PCBs, chlorinated benzenes, and chlorinated pesticides); during the production of bleached pulp by pulp and paper mills; and during the production and recycling of several metals. Highly chlorinated dioxins (1234678D, 1234679D, and OCDD) are the most common congeners found in environmental samples. Currently, atmospheric fallout of particulates and gases containing dioxin is the predominant source of dioxin in soil. Historically, dioxin was also deposited onto soil through pesticide applications, disposal of dioxin-contaminated industrial wastes, and via land application of paper mill sludge.⁴⁰

The health effects of dioxin are numerous. Possible health effects include: cancer, damage to the reproductive system, impairment of the immune system, and extensive disruption of normal hormone functions, including neuro-behavioral development.⁴¹ Another relevant characteristic of dioxin is that it is bio-accumulative. This means that it will increase in concentration as it is passed up through the food chain (i.e., from soil, to vegetables, to animals, to people).⁴² Once in the human body, dioxin is stored in fatty tissues and fluids.⁴³ This is particularly alarming because it indicates that dioxin can be stored in breast milk and can then be passed on to offspring during pregnancy and lactation by the mother if she is contaminated.⁴⁴ Furthermore, dioxins do not break down quickly and will persist in the environment and the human body

(1998).

⁴⁰INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at 1.

⁴¹*Id.* at 2.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

for years.⁴⁵

b. How the Studies Indicate Environmental Injustices

“Environmental racism is the disproportionate impact of environmental hazards on people of color. Environmental justice is the movement’s response to environmental racism . . . [T]he environmental justice movement is [not] seeking to simply redistribute environmental harms, but to abolish them.”⁴⁶ The residents state that the disproportionate siting and permitting of toxic industrial plants clustered in and nearby the small African American community of Mossville is reflective of patterns of environmental injustice.⁴⁷ There is both government and academic research that has documented the correlations between where a hazardous industrial facility is sited and the local population being comprised of ethnic minorities.⁴⁸ A study in 2004, which was published in the *Journal of Epidemiology and Community Health*, found that there was a stronger correlation between the racial makeup of the community with the intensive siting of hazardous industrial facilities, rather than the income level of residents.⁴⁹ Furthermore, the study cited findings that there was a greater risk of accidents occurring in the facilities that were located in African American communities.⁵⁰

The individuals that are faced with environmental injustice caused by the disproportionate siting of hazardous facilities commonly report that they have an increase in health problems and a decreased quality of life due to the burdens of pollution that their communities are faced with. The location of industrial facilities in Louisiana follows the aforementioned

⁴⁵ *Id.*

⁴⁶ *Environmental Justice/Environmental Racism*, ENVTL. JUST. NETWORK, <http://www.ejnet.org/ej/> (last visited May 12, 2012).

⁴⁷ Mossville Petition, *supra* note 4, at 77.

⁴⁸ U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983); UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994).

⁴⁹ M.R. Elliott et al., *Environmental Justice: Frequency and Severity of US Chemical Industry Accidents and the Socioeconomic Status of the Surrounding Communities*, 58 J. OF EPIDEMIOLOGY & COMMUNITY HEALTH 24 (2004).

⁵⁰ *Id.*

pattern of environmental injustice. In Louisiana, eighty percent of African Americans live within three miles of a toxic facility, even though they make up only thirty-four percent of the state's population.⁵¹ Even within Calcasieu Parish, the industrial clustering and the surrounding pollution are unique to a small portion of the county, where mostly African Americans reside.⁵²

The residents of Mossville also posit that this environmental injustice is an indication of unequal protection of their communities by the EPA and the current environmental regulations as applied and enforced.⁵³ The EPA issued permits allowing a large number of hazardous facilities to be located in such close proximity to one another.⁵⁴ Now that the problem is created, the EPA is not applying its powers under current environmental law to clean up the pollution in the community, nor is it revoking or modifying the permits of the facilities to lower the amount of contaminants that are allowed to be released into the environment.⁵⁵

II. MOSSVILLE ENVIRONMENTAL ACTION NOW SEEKS REMEDIES FROM THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Mossville residents seek more than can be afforded to them through domestic remedies. The Mossville residents want recognition that their human rights have been violated by the intensive siting of hazardous industrial facilities in their community, which was approved by the United States.⁵⁶ They argue that their quality of life has been significantly decreased by the level of contamination in their homes, food, and bodies.⁵⁷ They seek to have the harm they are enduring not only halted, but declared a violation of their human rights.⁵⁸

⁵¹ Mossville Petition, *supra* note 4, at 78.

⁵² *Id.* at 79 (noting African Americans are only 24.6% of the population of Calcasieu Parish).

⁵³ *Id.* at 80.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ INDUSTRIAL SOURCES OF DIOXIN, *supra* note 10, at 11.

⁵⁸ Mossville Petition, *supra* note 4.

a. Advocates for Environmental Human Rights Files a Petition

On March 8, 2005, Nathalie Walker and Monique Harden of Advocates for Environmental Human Rights, a New Orleans based “nonprofit, public interest law firm whose mission is to provide legal services, community organizing support, public education, and campaigns focused on defending and advancing the human right to a healthy environment,” filed a petition with the IACHR against the United States on behalf of the residents of Mossville and Mossville Environmental Action Now.⁵⁹ The petition asserted that the Mossville residents suffer health problems and were put at risk of further health problems due to the permits that the U.S. government issued the fourteen industrial chemical facilities that are located in and around the community of Mossville.⁶⁰

Additionally, the petition claims that the allowance of the emissions clustering under U.S. environmental laws, compounded with the U.S.’s lack of responsiveness to the problem, has resulted in the enormous environmental burden that is impacting the community of Mossville.⁶¹ The petitioners alleges several legal causes of action under the American Declaration of the Rights and Duties of Man (“American Declaration”) and explains how both the actions and the inactions of the U.S. government were responsible for human rights violations. The petitioners allege that the U.S. violated the “Mossville residents’ rights to life, health, and private life in relation to the inviolability of the home guaranteed, respectively by Articles I, II, V, IX, and XXIII of the American Declaration.”⁶²

b. The Inter-American Commission of Human Rights

The IACHR was established in 1959 by a resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, which stated it would: “create an Inter-American Commission on Human Rights composed of seven members elected as individuals by the Council of the Organization of American States

⁵⁹ Mossville Env’tl. Action Now v. United States, Report No. 43/10 (Inter-Am. Comm’n H.R. Mar. 17, 2010) (report on admissibility) [hereinafter Report on Admissibility].

⁶⁰ *Id.* ¶ 2.

⁶¹ *Id.*

⁶² *Id.*

from panels of three names presented by the governments.”⁶³ The definition of human rights that the IACHR would enforce was set forth in the American Declaration.⁶⁴ In 1978, the IACHR was given the powers to make country reports and to examine individual petitions from all states that were members of the Charter of the Organization of American States (“OAS”).⁶⁵

The OAS⁶⁶ “was adopted in 1948 at the Ninth International Conference of American States At the same Conference, the States of the American region also adopted” the American Declaration.⁶⁷ The United States is not a member of the OAS.⁶⁸ An important exception to the rule that the IACHR can only examine petitions from citizens in states that are members of the OAS, however, that the IACHR has historically and continually examined, without objection, are petitions alleging violations of non-member states such as the United States.⁶⁹ “The United States has objected to the [IACHR] view that the American Declaration is the source of legally binding obligations for it, but not to the power of the [IACHR] to hear cases against it.”⁷⁰ It is this odd arrangement that allows the Mossville residents to petition the IACHR alleging violations of the American Declaration by the U.S. despite the fact that the U.S. is not a member of the OAS and, therefore, not formally under the Commission’s jurisdiction.

The IACHR is composed of seven members who are required to be of “high moral character and recognized compe-

⁶³ DAVID J. HARRIS & STEPHEN LIVINGSTONE, *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 66 (1998).

⁶⁴ *Id.* at 67.

⁶⁵ *Id.* at 68.

⁶⁶ The OAS was established under the Charter of the Organization of American States. It was created by the Inter-American countries to “achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency. The [OAS] has no powers other than those expressly conferred upon it by th[e] Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States.” Charter of the Organization of American States art. 1, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

⁶⁷ HARRIS & LIVINGSTONE, *supra* note 63, at 65.

⁶⁸ *Id.* at 68–69.

⁶⁹ *Id.*

⁷⁰ *Id.* at 69 n.16.

tence in the field of human rights.”⁷¹ The seven members serve the IACHR in their personal capacities and do not represent their countries of origin, but rather all of the member countries in the OAS.⁷² The office of the IACHR is located in Washington, D.C.,⁷³ even though the United States is not officially a member of the OAS.

The functions and powers of the IACHR are “to promote respect for and defense of human rights.”⁷⁴ In addition to the definition of human rights put forth in the American Declaration,⁷⁵ Article 41 of the American Convention elaborates on the functions and powers of the Commission by stating: the IACHR

shall have the following functions and powers: (a) to develop an awareness of human rights among the peoples of America, (b) to make recommendations to the governments of the member states [and the United States], when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; (c) to prepare such studies or reports as it considers advisable in the performance of its duties; to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights . . . (f) to take action on petitions and other communications pursuant to its authority under provisions of Article 44 through 51 of this convention . . .⁷⁶

It is the power to review petitions that is being utilized by the Mossville residents in order to have their claims be heard and reviewed by the IACHR.

Nearly anyone who has had their human rights violated, or knows someone who has, can bring a petition for review before the IACHR. The IACHR allows “any person or group of persons or any nongovernmental entity legally recognized in one or more member states of the [OAS to] lodge a petition on his own behalf or on behalf of a third person with the [IACHR],

⁷¹ *Id.* at 69.

⁷² *Id.* at 70.

⁷³ *Inter-American Commission on Human Rights*, ORG. OF AM. STS., <http://www.oas.org/en/iachr/about/contactus.asp> (last visited May. 12, 2012).

⁷⁴ HARRIS & LIVINGSTONE, *supra* note 63, at 74 (quoting Article 41 of American Convention).

⁷⁵ *Id.* at 67.

⁷⁶ *Id.* at 74 (quoting Article 41 of the American Convention).

alleging a violation of the . . . American Declaration.”⁷⁷ In most cases brought before the IACHR, the petitioner is the representative of a victim, often a lawyer working for a human rights nonprofit.⁷⁸ The petition must be submitted in writing and must have the names and signatures of the petitioners and their legal representatives.⁷⁹ The petition also must include an account of the act or acts that resulted in the violation, specifying places, dates, and victim’s names when possible.⁸⁰ Additionally, the petition must contain allegations that an OAS member state (or the U.S.) is responsible for the violation of a human right provided in the American Declaration due to its action or inaction.⁸¹

c. Ruling on Admissibility

After the Advocates for Environmental Human Rights filed the petition, the IACHR issued a ruling on admissibility. Since there has only been a ruling on admissibility of the claims, the claims have not been judged on the merits by the IACHR yet.⁸² The IACHR declared the claims pursuant to Articles II and V of the American Declaration admissible because they met the requirements under Articles 31 and 34 in the IACHR’s Rules of Procedure. The IACHR, therefore, is currently reviewing the petitioners’ claims.⁸³

Article 31 requires the exhaustion of domestic remedies and states:

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
2. *The provisions of the preceding paragraph shall not apply when: a. the domestic legislation of the State concerned does not afford due process [under the] law for protection of the right or*

⁷⁷ *Id.* at 78.

⁷⁸ *Id.*

⁷⁹ *Id.* at 79.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Report on Admissibility, *supra* note 59.

⁸³ See Rules of Procedure of the Inter-American Commission on Human Rights art. 31, 34, 1991 O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 [hereinafter Rules of Procedure].

rights that have allegedly been violated; b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies [used] under domestic law have not been previously exhausted, unless that is clearly evident from the record.⁸⁴

The IACHR deemed that the petitioners were excused from having to exhaust all possible domestic remedies under Article 31.2(a) of the IACHR Rules of Procedure,⁸⁵ which provides that a party does not need to exhaust all domestic remedies if a country's domestic legislation does not provide due process for the rights that the petitioners claim have been violated.⁸⁶ The petitioners claimed that their right to a healthy environment was violated; as evidence that domestic legislation does not provide for due process, they put forth case law from United States courts indicating that there is no legally enforceable right under the Fourteenth Amendment or any other section of the Constitution to a healthy environment.⁸⁷ In numerous domestic cases, United States courts explicitly stated that there was no protection guaranteed for a right to a healthy environment or dismissed or denied certiorari to such claims each time they were brought.⁸⁸

Article 34 of the Rules of Procedure of the Inter-American Commission outlines the other grounds for admissibility:

The Commission shall declare any petition or case inadmissible when: (a) it does not state facts that tend to establish a violation

⁸⁴ *Id.* art. 31 (emphasis added).

⁸⁵ Report on Admissibility, *supra* note 59, ¶ 33.

⁸⁶ Rules of Procedure, *supra* note 83, art. 31.

⁸⁷ *DeShaney, v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989); *Upper W. Fork River Watershed Assoc. v. Corps of Eng'rs*, 414 F. Supp. 908 (N.D.W.Va. 1976), *aff'd*, 556 F.2d 576 (4th Cir. 1977), cert. denied 434 U.S. 1073; *Tanner v. Armco Steel*, 340 F. Supp. 532, 537 (S.D.Tex. 1972) (“no legally enforceable right to a healthful environment . . . is guaranteed by the constitution.”).

⁸⁸ *DeShaney*, 489 U.S. at 195–96; *Upper W. Fork River Watershed Assoc.*, 414 F. Supp. at 908; *Tanner*, 340 F. Supp. at 537.

of the rights referred to in Article 27 of these Rules of Procedure; (b) the statements of the petitioner or of the State indicate that it is manifestly groundless or out of order; or (c) supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order.⁸⁹

Article 27, which is referred to in Article 34(a), states that:

The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure.⁹⁰

The petition satisfied Article 34 by stating facts that clearly alleged violations under Articles II and V of the American Declaration. The fact that the violations were under the American Declaration fulfills the requirement in Article 27 by alleging violations of human rights under the “other applicable instruments” language.

III. ADMISSIBLE CLAIMS

a. Article II of the American Declaration: Admissible

The petitioners’ Article II claim was deemed admissible by the IACHR. Article II of the American Declaration guarantees the right to equality before the law.⁹¹ It states that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to *race*, sex, language, creed, or *any other factor*.⁹² The petitioners claimed that the Mossville residents were the victims of a violation of Article II because they were not equally protected under the law in regards to their health or the quality of their environment due to the clustering of fourteen industries within a half-mile radius of their homes and the inaction of the U.S. to

⁸⁹ Rules of Procedure, *supra* note 83, art. 34.

⁹⁰ *Id.* art. 27 (emphasis added).

⁹¹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. II, International Conference of American States, 9th Conference, OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (May 2, 1948) [hereinafter American Declaration].

⁹² *Id.* (emphasis added).

remedy their situation.⁹³

The IACHR has not yet heard a case that involves environmental discrimination under Article II with regard to African Americans. However, the IACHR has interpreted this article to apply to discrimination against indigenous populations who were victimized by the exploitation of their natural resources.⁹⁴ There have been several instances in which the IACHR has acknowledged unequal and discriminatory treatments of Brazilian native peoples.⁹⁵ For example, the IACHR held that historical racism against indigenous peoples and Brazil's government land demarcation system violated the equality of all citizens.⁹⁶ Additionally, in Brazil, the political support for environmentally destructive industrial development and a failure of the government to take adequate precautions to protect the environment and health of indigenous people was held to be a violation of Article II.⁹⁷ The IACHR's report indicates that the Commission interpreted a protection of environmental rights and land rights of the indigenous people of Brazil through Article II.

The IACHR also reviewed a case alleging discrimination of indigenous people in the United States.⁹⁸ In *Dann v. United States*, the IACHR found that the U.S. had not afforded equal protection to the petitioners, in violation of Article II.⁹⁹ The petitioners were members of the Western Shoshone indigenous people and citizens of the United States.¹⁰⁰ They alleged that the U.S. interfered with their use of their ancestral land by permitting gold prospecting on the land and threatening to remove the indigenous population while permitting non-indigenous people to move onto their land.¹⁰¹ Additionally, the petitioners asserted that the U.S. was obligated to protect their indigenous property rights and to give those rights the same

⁹³ See Mossville Petition, *supra* note 4, at 2.

⁹⁴ See Inter-Am. Comm'n on H.R., *Report on the Situation of Human Rights in Brazil*, Doc. 29 rev.1, OEA/Ser.L/V/II.97 (Sept. 29, 1997).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *id.*

⁹⁸ See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. ¶ 1 (2002).

⁹⁹ *Id.* ¶ 5.

¹⁰⁰ *Id.* ¶ 2.

¹⁰¹ *Id.*

protection that it provides for property rights of non-indigenous peoples.¹⁰² In particular, the petitioners alleged that the U.S.'s failure to do uphold this obligation resulted in a taking of their land.¹⁰³ They explained that while under the Fifth Amendment of the Constitution, as well as other state and federal laws, the taking of property by the government ordinarily "requires a valid public purpose and the entitlement of the owners to notice, a judicial hearing and fair compensation based upon the fair market value of the property taken," none of these protections were afforded to them.¹⁰⁴ Therefore, the petitioners alleged that they did not receive equal treatment under the law, creating a violation of Article II of the American Declaration.

The IACHR agreed. It found that by not affording the Danns property rights equal to those of non-indigenous people, their rights under Article II were violated.¹⁰⁵ The IACHR's reasoning for finding the violation was that the U.S. did not have a reasonable justification or legislative objective in denying the petitioners property rights equal to those of other citizens.¹⁰⁶

b. International Law Interpretation Rules from Dann v. United States

In *Dann v. United States*, the IACHR acknowledged the necessity of considering "the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law."¹⁰⁷ This statement is a significant guiding principle that could be used by the IACHR to interpret a violation of a right that the U.S. does not domestically recognize, as in the Mossville case, which the IACHR is currently reviewing.

Furthermore, it could encourage the incorporation of human rights treaty interpretations from other human rights

¹⁰² *Id.* ¶ 53.

¹⁰³ *Id.*

¹⁰⁴ *Dann*, Case 11.140, Inter-Am. Comm'n H.R., ¶ 55.

¹⁰⁵ *Id.* ¶ 5.

¹⁰⁶ *Id.* ¶ 143.

¹⁰⁷ *Id.* ¶ 124.

courts. Another statement made by the IACHR expressed its concern about the actions of other nations, which undermine the right to equality and freedom from racial discrimination in the context of environmental protection . . . such as those of African descent.¹⁰⁸ This dictum could prove to be persuasive to the mode of analysis that the IACHR engages in when it examines the facts and circumstances of the *Mossville* case, which deals with African Americans facing racial discrimination in the context of environmental protection.

Another parallel between *Dann* and *Mossville* is that the petitioners in *Dann* cited solely to persuasive international precedent, such as rulings of the Australian High Court and statements by the U.N. Committee on the Elimination of Racial Discrimination, whereas the *Mossville* petitioners also cited predominantly to international persuasive case law in their petition.¹⁰⁹

c. Article V of the American Declaration: Admissible

The IACHR deemed the petitioners' claim with respect to Article V, the right to protection or honor, personal reputation, and private and family life,¹¹⁰ admissible. It stated that every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.¹¹¹ There is not any direct precedent from the IACHR about the right to protection of private and family life extending to environmental health, but other sources of international law have interpreted similar provisions accordingly.¹¹² This is particularly relevant in conjunction with the IACHR's decision in the *Dann* case to acknowledge the necessity of considering human rights laws and principles from the perspective of international law.¹¹³ Therefore, because there is not any precedent within the Inter-American system, the IACHR may look to decisions made by the European Court of Human Rights for guidance.

¹⁰⁸ *Mossville* Petition, *supra* note 4, at 87.

¹⁰⁹ *Dann*, Case 11.140, Inter-Am. Comm'n H.R., ¶ 58 (2002).

¹¹⁰ See American Declaration, *supra* note 91, art. V.

¹¹¹ See *id.*

¹¹² See *infra* pp. 213–19.

¹¹³ *Dann*, Case 11.140, Inter-Am. Comm'n H.R., ¶ 97.

The European Court of Human Rights (“ECHR”) has determined that there were violations of the right to protection of private and family life in cases factually similar to the *Moss-ville* case. The human right to privacy, which the ECHR utilizes, is in Article VIII in the European Convention on Human Rights (“European Convention”).¹¹⁴ Article VIII states that,

(1) everyone has the right to respect for his private and family life, his home and his correspondence.

(2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.¹¹⁵

1. Nature and Severity of Harm Needed to Find Violation of Right to Respect of Private and Family Life

A. *Guerra v. Italy: Direct Effect*

Forty petitioners from the town of Manfredonia, Italy lived within one kilometer of a chemical plant that manufactured pesticides and nylon.¹¹⁶ The plant released highly toxic substances, such as arsenic trioxide and benzoic acid.¹¹⁷ There was an accident at the plant in which a scrubbing tower exploded, causing large amounts of arsenic to be emitted.¹¹⁸ One hundred and fifty residents were hospitalized with arsenic poisoning.¹¹⁹ Additionally, there was a report made by the local government that determined that because of the location of the plant, its emissions were often channeled toward the town.¹²⁰ The plant had created a report as well, which showed that its emissions treatment equipment was inadequate and its envi-

¹¹⁴ European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ *Guerra v. Italy*, 26 Eur. Ct. H.R. 357, ¶¶ 1, 12, 13 (1998).

¹¹⁷ *Id.* ¶ 14.

¹¹⁸ *Id.* ¶ 15.

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 16.

ronmental assessment was not completed.¹²¹ All of these factors demonstrate that even during normal operation, the plant was unsafe due to inadequate emissions controls.

Additionally, because of the location of the plant in relation to the town and the emissions were channeled towards the community of Manfredonia.¹²² The petitioners relied on Article VIII and contended that the State violated their right to respect of their private and family lives by putting them in danger of explosions and withholding the emissions and plant inadequacy information.¹²³

The ECHR held that the directness of the effect of the toxic emissions on the applicants violated their right to respect for their private and family lives.¹²⁴ Therefore, because there were actual emissions transported by the wind to the homes of the petitioners, which had been studied and tested, the ECHR held that the petitioners were directly impacted.¹²⁵ This rule was reiterated in the ECHR case, *Fadeyeva v. Russia*, in which the court stated, in order to invoke Article VIII, “the interference must directly affect the applicant’s home, family, or private life.”¹²⁶

The ECHR held that the petitioners showed sufficient direct harm to their home, family, and private life because the wind transported the arsenic and other contaminants from the plant to the town where the petitioners lived.¹²⁷ Additionally, as a result of the accident, many of the residents suffered arsenic poisoning from the air in their homes and community.¹²⁸ The amount of contaminants that the petitioners were exposed to could have been decreased, but was not because the government failed to order the plant to stop operating after the accident or to install further emissions control technology. Therefore, because the petitioners were directly physically affected by the contamination at home and because the local government was not taking necessary measures to ensure their health

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See id.* ¶¶ 57–58.

¹²⁴ *Id.* ¶¶ 57, 60.

¹²⁵ *Id.* ¶ 16.

¹²⁶ *Fadeyeva v. Russia*, 2005 Eur. Ct. H.R. 10, ¶ 68 (2005).

¹²⁷ *Guerra*, 26 Eur. Ct. H.R. ¶ 16.

¹²⁸ *Id.* ¶ 15.

and safety, the ECHR held that Italy was in violation of Article VIII.

In relation to the *Mossville* case being considered by the IACHR, the residents of Mossville are able to show that the contaminants from the facilities surrounding their community are having a direct effect: the dust in their homes is contaminated with dioxin, their blood has uncommonly elevated dioxin levels, and their food is contaminated.¹²⁹ The U.S. government's environmental agency, the EPA, has conducted tests that have discovered this broad contamination. The pollution has literally contaminated the petitioners' homes, families, and their own bodies. Therefore, it seems logical that a violation of the petitioners' right to respect for their home, family, and private life would be found.

B. Lopez Ostra v. Spain: *Severity Tests*

Locora, the town in which the petitioner lived, had heavy concentrations of leather facilities.¹³⁰ A plant that treated liquid and solid waste from the facilities was located twelve meters away from the petitioner's home, where she lived with her husband and two daughters.¹³¹ The waste treatment plant emitted terrible smells and contamination so severe that the residents in the town were temporarily evacuated.¹³² The noise and fumes made life so unbearable that the petitioner's family had to move permanently after it was recommended by their daughter's pediatrician.¹³³ Due to the smell and contamination of their home and family, the petitioners alleged a violation of their right to respect for their home, family, and private life.

In ruling on these facts, the ECHR held that it was not necessary for the victim's health to be "seriously endangered" for a violation to be found. The ECHR stated that "severe environmental pollution may affect individuals' well being and pre-

¹²⁹ FOLLOW-UP EXPOSURE INVESTIGATION, *supra* note 18, at iv.

¹³⁰ Lopez Ostra v. Spain, App. No.16798/90, 20 Eur. Ct. H.R. 277, ¶ 7 (1994).

¹³¹ *Id.* ¶¶ 6–7.

¹³² *Id.* ¶ 8.

¹³³ COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT: PRINCIPLES EMERGING FROM THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 34 (2006).

vent them from enjoying their home in such a way as to affect their private and family life adversely, without however, seriously endangering their health.”¹³⁴ This is a significant ruling because it sets a precedent for petitioners to be able to bring a claim for violation of their right to respect for their home, family, and private life without having suffered or having to prove that they suffered any physical sickness as a result of such violation.

While the ECHR does not require health problems, it does require the environmental pollution to be severe in order to constitute a violation. The ECHR explained that “the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article VIII.”¹³⁵ The assessment of the minimum level is determined on a case by case basis.¹³⁶ The ECHR evaluates such factors as the intensity of the nuisance, the duration of the nuisance, as well as the physical and mental effects that it has on the victims.¹³⁷ This rule was elaborated upon in *Fadeyva v. Russia*, in which the ECHR explained that there is not a valid claim under Article VIII “if the detriment complained of is negligible in comparison to the environmental hazards inherent to life in every modern city.”¹³⁸

The ECHR ruled that the State violated Article VIII by allowing such contamination and odor to affect the lives of the petitioners.¹³⁹ The smell and contamination was beyond the amount of pollution that one can assume they will be exposed to living in a city, which was evidenced by, among other things, how the government evacuated the petitioner as well as other residents from the town due to such contamination. Therefore, despite the fact the petitioner’s health had not yet been negatively impacted, the ECHR found that their Article VIII rights had been violated due to severe environmental pollution.

As to the *Mossville* case currently before the IACHR, many Mossville residents moved from their homes because of contaminated drinking water and ill health as a result of the contami-

¹³⁴ *Lopez Ostra*, 20 Eur. Ct. H.R. ¶ 51.

¹³⁵ *Id.* ¶ 52.

¹³⁶ *Id.*

¹³⁷ *Fadeyva*, 2005 Eur. Ct. H.R. ¶ 10.

¹³⁸ *Id.* ¶ 69.

¹³⁹ *Lopez Ostra*, 20 Eur. Ct. H.R. ¶ 58.

nation in the dust of their homes and on their fruits and vegetables.¹⁴⁰ The contamination particularly of dioxin is of a higher level than ordinary people living in the area should expect to be exposed to. Evidence of this can be found when the dioxin levels in the blood samples of Mossville residents are compared with those of residents of the rest of the Calcasieu Parish or the nation.¹⁴¹ The blood dioxin levels are significantly higher in the samples from Mossville residents.¹⁴² Therefore, the contamination is not simply a small background amount that comes as a result of living in a developed area. The severity rule from *Lopez* is significant in regard to *Mossville* because there may be debate about whether or not the health impacts suffered by the residents were actually caused by contamination. However, under the precedent in *Lopez Ostra*, it would not be necessary to show that there were negative health impacts. The petitioners would only have to show the contamination prohibited them from enjoying their homes and families, which could easily be shown by the invasion of pollution into their households and bodies.

C. Fadeyeva v. Russia: 2 Prong Test – Actual Interference and Severity

The petitioner and her family lived near a steel plant in employee housing, as her husband worked at the plant.¹⁴³ In an effort to decrease pollution in the residential areas, there was a buffer zone created between the steel plant and the neighborhoods.¹⁴⁴ However, the employee housing was within the buffer zone, which subjected the petitioner and her residence to higher levels of industrial pollution.¹⁴⁵ The petitioner alleged a violation of her Article VIII rights due to the severe nuisance of the plant and the failure of the State to protect her rights.¹⁴⁶

The ECHR stated that in order to fall under Article VIII, “[c]omplaints relating to environmental nuisances have to

¹⁴⁰ FOLLOW-UP EXPOSURE INVESTIGATION, *supra* note 18, at iv.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Fadeyeva*, 2005 Eur. Ct. H.R. ¶ 10.

¹⁴⁴ *Id.* ¶ 11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* ¶ 64 (emphasis added).

show, *first* that there was an actual interference with the applicants private sphere and *second* that a level of severity was attained.”¹⁴⁷ The Court first explored whether there was an actual interference and if that interference affected the petitioner’s private sphere. There was data offered that showed the levels of contamination of the dust in her home to demonstrate that there was an invasion of her private sphere.¹⁴⁸ Next, the Court examined whether the invasion was severe. The data showed that the levels of contamination in the dust were far above the allowable limits, thereby raising them to the level of severe.¹⁴⁹ Thus, in *Fadeyeva*, the ECHR held that there was a violation of the petitioner’s Article VIII rights.

If this test is applied in *Mossville*, and the IACHR looks to see if there was an actual interference with the residents’ private sphere, it would likely be determined in the affirmative. The Mossville residents have had their homes infested with contamination, many have lost their clean drinking water, and others are suffering health impacts as a result of just living near the industrial facilities. These facts would satisfy the interference requirement under the *Fadeyeva* precedent. In regard to the second prong of the test, the IACHR would likely find the level of severity of the contamination to be sufficient. The Mossville residents are faced with contamination in their homes, as detected in their dust similarly to the petitioners in *Fadeyeva*. Additionally, the Mossville residents have contamination in their blood, which would indicate an increased level of severity. Therefore, under the *Fadeyeva* precedent and two prong test, the IACHR could find that there was a violation of the petitioners’ rights under the American Declaration’s Article V.

2. Level of Proof Needed to Prove Violation of Article VIII

A. *Fadeyeva v. Russia: Flexible Evidentiary Requirements*

The petitioner in *Fadeyeva* lived near a steel mill with her family and brought her claim to the ECHR because she and her

¹⁴⁷ *Id.* ¶ 70.

¹⁴⁸ *Id.* ¶ 83–85.

¹⁴⁹ *Id.* ¶ 87.

family were subjected to more pollution from a nearby mill.¹⁵⁰ Her housing was in the buffer zone between the mill and the other residential neighborhoods, the area that was meant to protect the residential neighborhoods from the mill's pollution.¹⁵¹ The petitioner put forth a medical record to show that the pollution was negatively affecting her health.¹⁵² However, the ECHR held that a single record was not sufficient to show that her health had been impacted.¹⁵³

The petitioner did have a valid claim, however, despite the lack of medical evidence. The ECHR stated that “[i]t has been the practice of the court to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved.”¹⁵⁴ For example, sometimes the necessary report is one that the petitioner is not able to obtain because it is confidential.¹⁵⁵

Applying this flexible evidentiary requirement, the court looked to other evidence in determining a negative impact on the petitioner and her home, such as the study on the contaminated dust. This study was sufficient to show that there was an invasion of the home because the contamination was far above the allowable limits.¹⁵⁶ The ECHR concluded by stating:

Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the convention.¹⁵⁷

The flexible evidentiary requirement may be beneficial to the Mossville petitioners. Although the petitioners' proof of health effects are more extensive than that in *Fadeyeva*, there is a chance that the IACHR would find that the medical ailments are not related to the contamination or that the various

¹⁵⁰ *Id.* ¶ 10.

¹⁵¹ *Id.* ¶ 11.

¹⁵² *Id.* ¶ 80.

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶ 79.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ¶¶ 83–87.

¹⁵⁷ *Id.* ¶ 11.

studies are not sufficient. Additionally, while the above case states that a single medical record is not sufficient, it does not say how thorough the medical documentation has to be in order to be satisfactory. The ECHR combined the health impacts that the petitioner complained of with the amount of and proximity to pollution she endured in order to determine the “actual detriment to the applicant’s health and well being”¹⁵⁸ Therefore, even if the medical records and data were not sufficient alone, if they were combined with all of the other evidence that influences the petitioners’ health and well being it is more likely that the IACHR would find a valid violation of Article V.

B. Tatar v. Romania: Scientific Uncertainty & Positive State Obligations

A holding dam was breached at a gold mine, which caused the release of contaminated tailings water into the environment.¹⁵⁹ The water contained between 50 to 100 tons of the highly toxic substance cyanide.¹⁶⁰ After the holding dam was breached, the government did not stop the operations of the mine.¹⁶¹ The petitioner, who lived in the vicinity of the mine, filed suit in the ECHR alleging that the release of cyanide endangered and negatively affected both he and his son’s life.¹⁶² One health impact of the cyanide was that it caused or aggravated their asthma.¹⁶³ The petitioner alleged a violation of his Article VIII rights as a result of the dam breach incident.

The ECHR stated that there can be “the existence of a serious and substantial risk to health and well being of the applicants, even if scientific certainty is lacking”¹⁶⁴ The ECHR also held that the evidence put forth was enough to impose on the state the “positive obligations to adopt reasonable and adequate measures capable of protecting the rights of those indi-

¹⁵⁸ *Id.*

¹⁵⁹ Dinah L. Shelton, *Tatar C. Roumanie*, App. No. 67021/01. at [Http://www.echr.coe.int](http://www.echr.coe.int). *European Court of Human Rights, January 27, 2009*, 104 AM. J. INT’L L. 247, 248 (2010) (summarizing the *Tatar v. Romania* case. The full case is not yet published in English).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 247.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 252.

viduals to respect for their private home life, and more generally, to enjoy a healthy and protected environment.”¹⁶⁵ Therefore, even though there is not scientific certainty that the petitioner’s asthma was caused by the cyanide from the spill, it does not preclude the determination that a serious and substantial risk to the well being of the petitioner and his son exists.¹⁶⁶ The toxicity of cyanide is well established; being exposed to it at high levels does increase one’s risk of health problems.¹⁶⁷ Thus, there was a violation of Article VIII rights. The ECHR created an affirmative duty of the State to remedy the problem, and since the State did not, it was in violation of this affirmative duty as well.

Tatar is the most recently decided of all of the ECHR cases cited. One of the most interesting aspects of this case is that the symptoms and contamination are very similar to those of the Mossville petitioners. In both cases, the petitioners have asthma as a main ailment, which was likely caused by exposure to substances that are known to be highly toxic. The crux of this comparison is that, in the *Tatar* case, the ECHR found that there was a violation of the right to respect for private and family life with little evidence of health impacts that were only caused by a single incident, while the Mossville exposure has been ongoing for decades and based on exposure from fourteen different facilities.¹⁶⁸

Yet, although the *Tatar* petitioner only had one ailment from one instance of exposure, the court went beyond finding an Article VIII violation and added that in such a situation, the State has “positive obligations to adopt reasonable and adequate measures capable of protecting the rights of those individuals to respect for their private home life.”¹⁶⁹ These obligations could prove to be key to the *Mossville* case since the U.S. government has known of the residents’ condition for many years and has yet to take affirmative action to fix it. It could prove invaluable to have the IACHR impose such obligations on the U.S. government; because the Mossville contamination has affected more people for a longer period of time under this

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 251.

¹⁶⁸ Mossville Petition, *supra* note 4, at 2.

¹⁶⁹ Shelton, *supra* note 159, at 252.

precedent, the IACHR could find that there was a violation of the petitioners' Article V rights.

3. Evaluating the Governments Actions

A. *Giacomelli v. Italy: Fair Balance Test*

The petitioner claimed a violation of Article VIII due to the persistent noise and harmful emissions from the hazardous waste processing facility only thirty meters from her home.¹⁷⁰ She suffered from disturbances to her environment and risk to her health and home.¹⁷¹ The emissions and odors prevented the petitioner from being able to live in adequate conditions.¹⁷²

The ECHR considered two aspects in evaluating government decisions that affect environmental issues. First, it assessed the substantive merits of the government's decision to ensure that it was compatible with Article VIII.¹⁷³ Second, it scrutinized the government's decision, ensuring that due weight was accorded to the interests of the individuals.¹⁷⁴ In relation to the substantive aspect of the above analysis, the state is allowed a great deal of deference since it is closer to the issue and more familiar with it.¹⁷⁵ "However, the court must ensure that the interests of the community are balanced against the individual's right to respect for his or her home and private life."¹⁷⁶

The governmental decision that the ECHR was analyzing in *Giacomelli* was the decision to continue to operate the plant despite the persistent noise and harmful emissions.¹⁷⁷ This decision was not compatible with Article VIII. The ECHR explored the decision making process to ensure that the interests of the petitioners were given sufficient weight. The ECHR found "that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective

¹⁷⁰ *Giacomelli v. Italy*, 2006-XII Eur. Ct. H.R., ¶ 68.

¹⁷¹ *Id.*

¹⁷² *Id.* ¶ 70.

¹⁷³ *Id.* ¶ 79.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶ 80.

¹⁷⁶ *Id.* ¶ 82.

¹⁷⁷ *See id.* ¶¶ 82–83.

enjoyment of her right to respect for her home and private life.”¹⁷⁸ The ECHR further stated that even if the government made the plant implement all of the features that would be necessary to remedy the violation, there has still been a violation for many years and the petitioner is entitled to a remedy.¹⁷⁹

This fair balancing test is highly applicable to *Mossville*. Under the first prong, the substantive merits of the government’s decision to permit all fourteen of these industrial facilities near Mossville does not, on its face, violate Article V because all of the facilities are legally permitted to be there and operate under EPA permits. However, when the second prong is explored, it becomes clear that the situation in Mossville does violate Article V. The interests of the community to have these facilities located near their homes are notable: they bring jobs and tax revenue to the area. However, when weighed against the plethora of health impacts that the Mossville residents are dealing with and the ways in which contamination has become infused with the local environment and community, it becomes more difficult to say that the balance is fair.

The *Giacomelli* precedent supports the plight of the Mossville residents because while the contamination in that case was similar in nature, it was only a fraction as pervasive as the contamination in Mossville. Under this precedent, the IACHR could be persuaded to find that there was not a fair balance struck between the government’s decisions and the victims’ interests, and therefore a violation of Article V.

B. *Fadeyeva v. Russia: Domestic Legality is not Conclusive*

The operation of the steel mill and the creation of the buffer zone in *Fadeyeva* were all within the limits of domestic law.¹⁸⁰ Additionally, the inclusion of residences within the buffer zone was not illegal, despite the complaints of the petitioner. However, although the steel mill was not breaking a domestic law, the ECHR still held that the State was violating the petitioner’s Article VIII rights.¹⁸¹ The Court stated,

¹⁷⁸ *Id.* ¶ 97.

¹⁷⁹ *Id.* ¶ 96.

¹⁸⁰ See *Fadeyeva v. Russia*, 2005 Eur. Ct. H.R. 10, ¶ 68 (2005).

¹⁸¹ See *id.* ¶ 152.

when an applicant complains about the State's failure to protect his or her rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the state has struck a fair balance between the interests of the community as a whole and the individuals affected.¹⁸²

Therefore, the ECHR did not simply dismiss the petitioner's claims because the violations she asserted were domestically legal. The ECHR also factored in other circumstances, such as those in the aforementioned fair balance test. The ECHR considered the benefits of the buffer zone to the whole community. However, it is apparent that those benefits were not received by the petitioners, who remained situated in close proximity to the plant and were plagued by its pollution. It was determined that despite the domestic legality, there was not a fair balance of the interests and, therefore, the ECHR found a violation of the petitioner's Article VIII rights.

This rule is particularly relevant in *Mossville* because the industries complained of are all operating within their permitted limits and, therefore, lawfully. If other factors were not considered, it is likely that the *Mossville* petitioners would not have a case. However, since the IACHR is required to assess a totality of the circumstances and make sure that the interests are balanced, the odds are more in favor of the victims. If the IACHR were to consider whether the state has struck a fair balance between the interests of the community as a whole and the individuals affected,¹⁸³ then it could consider all of the evidence that the petitioners introduce showing how they have been negatively affected despite the plants' legal operation. When considering the multitude of residents affected, all the numerous symptoms they suffer, along with the duration and intensity of the pollution, it seems likely that there is not a fair balance.

The prospects of *Mossville* look promising, especially in light of the *Fadeyeva* case. *Fadeyeva* was only brought on behalf of one family, and the contamination was only caused by one plant, yet a violation was found, while the *Mossville* case is brought on behalf of many petitioners as a result of contamina-

¹⁸² *Id.* ¶ 98.

¹⁸³ *Id.* ¶ 93.

tion from fourteen plants over decades.

IV. HOW THE IACHR MIGHT RULE

Applying the rule from the IACHR's *Dann* case, considering "the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law,"¹⁸⁴ the IACHR should consider the case law from the ECHR as instructive in deciding its cases.

a. Article II

While the IACHR does not have an abundance of precedent to base its decision on, a finding in favor of the Mossville petitioners would be consistent with prior opinions that it has decided. Several cases stand for the interpretation that equal protection under the law rightly extends to equal environmental protection. While bases for discrimination in prior precedent involved racism against indigenous people, the dictum from the *Dann* case suggests that the IACHR has recognized that racial discrimination in the context of environmental protection has occurred in African American communities as well. Finally, even if the IACHR does not find that the acts of the U.S. government were racially discriminatory, there is the additional wording in Article II involving discrimination based on "other factors."¹⁸⁵ This wording could be used to justify a finding of a violation if the IACHR does not find a racial connection because it is clear that the Mossville area is much more contaminated and its residents are less healthy than those in other parts of the parish and country. Therefore, there must be another factor by which this dissimilar treatment has occurred, if not because of race, because of unequal treatment.

b. Article V

The *Mossville* case is a case of first impression for the IACHR in regard to deciding if there is a violation of Article V

¹⁸⁴ *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. ¶ 124 (2002).

¹⁸⁵ American Declaration, *supra* note 91, art. II.

rights due to environmental contamination. However, there is a wealth of persuasive precedent from the ECHR for the Commission to draw on. In regard to the nature and severity of the harm caused by the alleged violation, the harm must be direct and severe. The contamination must have directly affected the petitioners and their right of privacy in their private sphere. Additionally, the harm must be more severe than what could normally be expected from living in a developed area, but does not necessarily have to have harmed the petitioners' health, only their privacy interests. The level of proof required is rather flexible, not requiring a high level of proof of causation, and allows leeway if the petitioner is unable to obtain confidential reports that may help his or her case. Even if there is scientific uncertainty in regard to the causation of the petitioner's illness, for example, when it is not certain that cyanide exposure caused the petitioner's asthma, it is sufficient evidence that asthma is a known effect of cyanide exposure and that the petitioner was in fact exposed.¹⁸⁶

Lastly, in terms of evaluating governmental action, the ECHR puts forth two very interesting rules. First, that domestic legality should not be interpreted to mean that the government decision is not violative of the human right laws. Second, the ECHR articulated a fair balance test in which it is necessary to examine the substantive merits of the government's decision in regard to the privacy rights and compare the government's interests to those of the individuals in the community.

Under this wealth of case law, the plight of the Mossville petitioners seems extremely similar in nature and more severe in scope, duration, and intensity that the other examples explored. Although the IACHR is not bound by the decisions of the ECHR, the ECHR decisions clearly indicate an interpretation that supports claims against environmental contamination under the human right to respect for private and family life. Since the wording of Articles V and VII are so similar, and because the facts and circumstances of the Mossville petitioners are so similar to those of the ECHR petitioners, it would be a well-supported decision for the IACHR to find a violation of Article V in *Mossville*. If the IACHR uses the ECHR cases as precedent, it would likely find that the Mossville residents are

¹⁸⁶ See Shelton, *supra* note 159, at 252.

victims of violations of both Article II and V of the American Declaration.

V. REMEDIES

If the IACHR finds that there are violations of Article II and V by the United States on the merits of the *Mossville* case pursuant to Article 42 in the Rules of Procedure,¹⁸⁷ then the IACHR will write up its decisions in a report.¹⁸⁸

If [the IACHR] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations.¹⁸⁹

The report will contain recommendations that the State is to implement to remedy the violations. Then, according to Article 46,

[o]nce the [IACHR] has published a report...on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with...its recommendations. The IACHR shall report on progress in complying with those agreements and recommendations as it deems appropriate.¹⁹⁰

The petitioners include a list of remedies in their petition that the IACHR could incorporate in the recommendations should a violation be found. The petitioners request that the United States provide medical services and health monitoring, relocate residents that are willing to move, and not issue permits for increased pollution or new facilities in the area.¹⁹¹ Additionally, the petitioners request that the United States reform its current environmental regulatory system by including cumulative impacts of multiple industries when creating regulations. They also request a buffer zone between the residen-

¹⁸⁷ Rules of Procedure, *supra* note 83, art. 42.

¹⁸⁸ *Id.* art. 43.

¹⁸⁹ *Id.* art. 44.

¹⁹⁰ *Id.* art. 48.

¹⁹¹ *Mossville* Petition, *supra* note 4, at 93–94.

tial population and the toxic industries.¹⁹² Finally, the petitioners request that the United States “[r]emedy past practices and prevent future actions that intentionally or inadvertently impose racially disproportionate pollution burdens.”¹⁹³ These requested remedies could be recommended by the IACHR in its report to the United States as possible ways to fix the alleged violations.

The United States claims that the IACHR cannot enforce these sorts of remedies.¹⁹⁴ However, case law does not support this statement.¹⁹⁵ The IACHR has made specific recommendations to governments pursuant to the American Declaration in regard to their violation of human rights by environmental causes. The following recommendations have been made in prior cases: the provision of health care to protect the lives and health of people harmed by environmental degradation was made in *Yanomami v. Brazil*,¹⁹⁶ the review of law, procedures, and practices that appear to interfere with human rights was recommended in *Dann v. United States*,¹⁹⁷ the adoption of legislative or other measures necessary to prevent environmentally destructive projects and to provide remedial action was also recommended in *Dann*,¹⁹⁸ and the suspension of all decisions that have an effect on the communities of people whose human rights have been violated has also been included in the IACHR’s recommendations.¹⁹⁹ Therefore, under the IACHR’s own precedent, it is feasible that the IACHR could award any of the remedies that have been requested.

Under the EHCR cases that have been discussed, however, the petitioners were only awarded monetary damages to reme-

¹⁹² *Id.* at 94.

¹⁹³ *Id.*

¹⁹⁴ Mossville Petition, *supra* note 4, at 92 (citing Response of Government of the United States of America to the Inter-American Commission on Human Rights Regarding Mossville Environmental Action Now, Petition No. 242-05, Precautionary Measure No. 25-05 at 6, Mossville Env’tl. Action Now v. United States, Petition 242/05 (Inter-Am. Comm’n H.R. 2006)).

¹⁹⁵ Mossville Petition, *supra* note 4, at 92.

¹⁹⁶ *Yanomami v. Brazil*, Case No. 7617, Inter-Am. Comm’n H.R., Report No. 12/85, OEA/Ser.L/V/II/66, doc. 10 rev. 1, ¶ 4 (1985).

¹⁹⁷ *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 rev. ¶ 173 (2002).

¹⁹⁸ *Id.*

¹⁹⁹ Inter-Am. Comm’n on H.R., *supra* note 94, ¶ 82.

dy the violations found.²⁰⁰ The damages were to pay for their suffering or relocation and fees of bringing the case.²⁰¹ There were no larger recommendations to governments to change their policies, despite language asserting a positive duty on the States to take action and remedy the situations sooner so as to avoid human rights violations. This may be due, however, to the generally smaller nature of the petitioners' claims in these cases; they were often related to just one incident or one factory and not an indication of a larger systemic problem throughout the whole country the way that discrimination against native peoples was in the *Dann* case. Under this theory, it is possible for the remedies for the Mossville petitioners to include recommendations to the government to review their policies as well as monetary damages and relocation.

CONCLUSION

Although the *Mossville* case is one of first impression for the IACHR, based on its prior decisions in regard to Article II of the American Declaration, the persuasive decisions of the ECHR in regard to the Article V claim, and its own acknowledgement of the importance of considering international interpretations of evolving human rights law when making decisions, a compelling argument for why the IACHR should find the United States to be in violation of Article II and V of the American Declaration can be made.

²⁰⁰ *Fadeyeva v. Russia*, 2005 Eur. Ct. H.R. 10, ¶ 152 (2005); *Giacomelli v. Italy*, 2006-XII Eur. Ct. H.R., ¶ 104; *Guerra v. Italy*, 26 Eur. Ct. H.R. 357, ¶ 75 (1998).

²⁰¹ *Fadeyeva*, 2005 Eur. Ct. H.R. ¶ 141.