

## **Chapter 11**

# **CUSTOMARY LAW, HUMAN RIGHTS AND CLIMATE CHANGE**

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As suggested by previous chapters, treaty negotiations are the primary international approach to addressing climate change. But the slow pace of treaty negotiations has been frustrating to many observers, particularly those island States and other developing countries that have not been significant contributors to climate change but are victimized by its negative consequences. This frustration has led these countries and their civil society allies to consider and promote other international law approaches — most notably approaches dependent on customary international environmental law or human rights law. Even if invoking these other sources of international law does not result immediately in successful litigation, it potentially raises the profile of climate change and enhances political will for addressing it within the international treaty negotiations. This chapter looks at approaches to climate change based on international customary law and principles of human rights law.

## **I. CLIMATE DISPUTES UNDER CUSTOMARY INTERNATIONAL LAW**

For many years, representatives of small island States and their allies have considered litigation as a possible means for redressing climate change. Although their historic and current contributions to climate change are insignificant, small island States and some other developing countries are bearing disproportionate effects of climate change. Do they have a claim that they can bring against major emitters that is independent of the negotiations of the climate regime?

As early as 1990, two environmental attorneys laid out the basic outlines of an international claim on behalf of island States harmed by climate change. Durwood Zaelke & James Cameron, *Global Warming and Climate Change — An Overview of the International Legal Process*, 5 AM. U. J. INT’L L. & POL’Y 249, 259–60 (1990). Despite the serious impacts they face, island States have generally rejected the adversarial approach of litigation, hoping instead to press their claims through international climate regime negotiations. As those negotiations have slowed, however, the island States have begun to discuss more openly the possibility of bringing an international case against those countries that are the largest contributors to climate change.

Most notably, in September 2011, the island nation of Palau announced that it intends to ask the UN General Assembly to seek an Advisory Opinion from the International Court of Justice (ICJ), also known as the World Court, on the issue of whether the continued emission of greenhouse gases violates customary international law or UNCLOS's prohibition against transboundary harm to the marine environment. See *Palau Seeks UN World Court opinion on damage caused by greenhouse gases*, UN NEWS CENTRE, Sept. 22, 2011. Palau is actively working within the General Assembly to build the consensus necessary for the Assembly to seek a non-binding advisory opinion from the Court. In early 2013, Germany, Ireland, and Switzerland announced support of Palau's resolution, bringing the number of supporters at that time to thirty-three countries.

Central to any customary law claims generally relating to climate change, including Palau's claims, is the obligation not to cause environmental harm to other States or to areas beyond national jurisdiction. This principle has been recognized as a principle of customary law by the ICJ. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. para. 29-30; see also *US. v. Can. Trail Smelter Arbitration (U.S. v. Can.)*, *UN Reports of International Arbitral Awards*, Vol. III, 1905-81; Rio Declaration, Principle 2; *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 I.C.J. Rep. 4, 22 (Judgment of April 9). The obligation not to cause environmental harm provides the most compelling basis for redressing harms caused by climate change.

### **A. The Duty Not to Cause Environmental Harm**

The roots of the obligation not to cause environmental harm are found in the *Trail Smelter Arbitration*, a dispute involving transboundary pollution from Canada into the United States in the 1920s and 1930s. Perhaps the most famous international environmental dispute, the *Trail Smelter Arbitration* involved the emission of thousands of pounds of sulfur dioxide (SO<sub>2</sub>) from a smelter in Trail, British Columbia. Those emissions crossed the U.S.-Canada border just a few miles away, causing hundreds of thousands of dollars in damage to crops, buildings, and livestock. The tribunal ultimately concluded that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter Case (United States v. Canada)*, Arbitral Tribunal, 1941, 3 UN Rep. Int'l Arb. Awards (1941). The tribunal imposed monetary penalties on Canada and required the smelter to undertake investments costing some \$20 million to reduce its emissions.

The tribunal does not provide much direct legal precedent because Canada and the United States negotiated a special treaty to establish the tribunal and resolve the dispute. The treaty specified the sources of law to be reviewed and directed the tribunal to "give consideration to the desire of the high contracting parties to reach a solution just to all parties." Nevertheless, the obligation not to cause environmental harm is widely viewed as an extension of the general international norm that prohibits a State from using its territory, or allowing others to use its territory, in a way that can harm the interests of another State. The ICJ has affirmed the obligation not to cause harm in several rulings, perhaps most notably in the *Corfu Channel* case,

which concerned damage to British warships caused by mines placed in Albanian waters. In holding Albania responsible, the ICJ stated:

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been “accomplished without the knowledge of the Albanian Government.” The obligations resulting for Albania from this knowledge are not disputed between the Parties. Counsel for the Albanian Government expressly recognized that [translation] “if Albania had been informed of the operation before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved. . . .”

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a mine field in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; *and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States* [emphasis added.]

Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 22 (Judgment of April 9).

*Trail Smelter* and *Corfu Channel* provide clear precedents for the development of international environmental law. At the first major multilateral meeting to address international environmental issues, governments adopted the Stockholm Declaration on the Human Environment, including Principle 21 which provides:

States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14 and Corr.1, June 16, 1972 (1972), *reprinted in* 11 I.L.M. 1416 (1972). *See also* Rio Declaration on Environment and Development, UN DOC A/CONF.151/5/Rev. 1, Principle 2, June 13, 1992, *reprinted in* 31 I.L.M. 874 (1992); *Lac Lanoux Arbitration*, (Spain v. Fr.) XII R.I.A.A. 281 (1957); *UNEP Principles for Shared Natural Resources*, Principle 3; *United Nations Convention on the Law of the Sea*, Part XII; *IUCN Draft Covenant*, at Principle 4; *IUCN Draft Covenant on Environment and Development*, at Article 11.

Principle 21 of the Stockholm Declaration appears to be broader than the holdings in *Trail Smelter* and *Corfu Channel*. Whereas *Trail Smelter* limited its conclusions to transboundary

pollution between States, the Stockholm Declaration applies to “areas beyond the limits of national jurisdiction,” including, for example, the oceans and Antarctica and presumably the atmosphere. In addition, the ICJ in *Corfu Channel* suggested that a violation of another legal norm, such as a duty to notify, is required as a prerequisite to finding a breach of the duty not to cause harm to another State. In contrast, *Trail Smelter* and the Stockholm Declaration, as well as subsequent iterations in other declarations and treaties, make clear that the harm itself is sufficient to trigger a breach of the duty not to cause environmental harm. Nonetheless, Principle 21 prohibits only the impacts from activities under a State’s “jurisdiction or control.”

Principle 21 is widely accepted as customary international law. Indeed, the ICJ, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, declared:

The Court recognizes that the environment is under daily threat and that use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.*

Para. 29–30 (emphasis added). While the Court’s formulation differs from that of Principle 21, it nonetheless seems to endorse the general obligation not to cause environmental harm.

Given this background discussion of the legal obligation, consider again the scale and scope of environmental harms faced by small island States. The most recent reports of the IPCC, for example, confirm the dire environmental prospects for developing countries as a whole and small island developing States (SIDS) in particular. Both the IPCC and the UNFCCC report that SIDS are already feeling the impacts from climate change and that they have few resources to help them adapt.

## **UNFCCC, CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES**

24, 26 (2007)

In SIDS, arable land, water resources and biodiversity are already under pressure from sea level rise. Increases in population and the unsustainable use of available natural resources add further problems. Tropical storms and cyclones cause storm surges, coral bleaching, inundation of land, and coastal and soil erosion with resulting high-cost damages to socio-economic and cultural infrastructure. For example, in the Pacific islands region, cyclones accounted for 76 per cent of the reported disasters between 1950 and 2004, with the average costs relating to damage caused per cyclone standing at USD 75.7 million in 2004 value. In the Caribbean region, the 2004 hurricane season alone caused damages estimated at USD 2.2 billion in four countries: the Bahamas, Grenada, Jamaica and the Dominican Republic. \* \* \*

Water supply in SIDS is likely to be exacerbated by future climate change. Freshwater lenses are predicted to reduce in size due to increased demand and reduced rainfall. It has been estimated that a 10 per cent reduction in average rainfall by 2050 could produce a 20 per cent reduction in the size of the freshwater lens on the Tarawa Atoll, Kiribati, and reduce the thickness of the freshwater lens on atolls by as much as 29 percent. Freshwater supplies are also threatened by saltwater intrusion due to storm surge and sea level rise.

The projected impacts of climate change on agriculture include extended periods of drought, loss of soil fertility and shortening of the growing season which will lead to major economic losses and seriously affect food security.

On many islands, prime agricultural land is located on the coastal plains which are already threatened by sea-level rise. The relative magnitude of economic losses due to climate change is likely to differ among islands. For example, in the absence of adaptive measures on a high island such as Viti Levu in Fiji, the cost of damages could be in the range of USD 23–52 million per year (2–3 per cent of GDP) by 2050 whereas in a low island such as Tarawa, Kiribati, the annual average cost of damages would be in the order of USD 8–16 million (17–18 per cent of GDP) by 2050.

In SIDS, increasing extreme events such as tropical cyclones are predicted to have huge impacts on forest cover and biodiversity, particularly as adaptation responses on small islands are expected to be slow, and impacts of storms may be cumulative. Changes in temperature are likely to particularly affect high elevation SIDS, and biological invasions are predicted to drive several species, including many endemic birds, to extinction. Increasing temperatures and decreasing water availability due to climate change may also increase the burden of diarrhoeal and other infectious diseases in some small island States. Increases in tropical cyclones, storm surges, flooding, and drought are likely to have both short and long-term effects on human health, including drowning, injuries, increased disease transmission, decreases in agricultural productivity and subsequent malnutrition.

Coastlines will almost certainly suffer from accelerated coastal erosion as well as inundation of settlements and arable land with associated social and economic consequences. For example, in Grenada, a 50 cm rise in sea level could lead to serious inundation with 60 per cent of beaches in some areas being lost. A one-metre rise in sea level is expected to cost Jamaica USD 462 million, 19 per cent of its GDP; while for the Maldives a one-meter rise in sea level would mean the complete disappearance of the nation.

Sea level rise, increasing sea surface temperatures and acidification of the oceans will entail a loss of mangrove forests and coral reefs and reduced fish stocks throughout this region. For example, studies have projected that 3 per cent of Cuba's mangrove forests may be lost with a one meter rise in sea level. For the same rise in sea level a complete collapse of the Port mangrove wetland in Jamaica is predicted, since this system has shown little capacity to migrate over the last 300 years.

Climate change is also likely to have a negative effect on tourism in SIDS, seriously affecting the economy of many small islands. The increasing frequency and severity of extreme weather,

sea-level rise and accelerated beach erosion, degradation of coral reefs (including bleaching), and the loss of cultural heritage on the coasts through inundation and flooding are likely to reduce the attractiveness of small island States to tourists. For example, in Barbados 70 per cent of the hotels are located within 250 m of the high water mark. This suggests that many hotels are almost exclusively within the 1 in 500 and 1 in 100 inundation zones, placing them at risk of major structural damage.

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As climate change's harm to SIDS becomes more imminent, the calls for legal responsibility also become louder. To be sure, the obligation not to cause transboundary environmental harm has never yet been used in an issue as complex as climate change, but the emission of greenhouse gases and the resulting impact on SIDS may differ from Trail Smelter only in the more complex causal connection between emissions and harm. As the science continues to demonstrate this causal connection, legal responsibility for the harm can no longer be easily ignored. The consequences or remedies resulting from finding a violation of international legal responsibility is determined by the law of State responsibility, discussed in the next section.

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## **B. State Responsibility**

The law of State responsibility establishes a set of rules that describe the consequences of a State's breach of its international obligations. As Ian Brownlie puts it:

Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 433 (6th ed. 2003).

After decades of work, the International Law Commission released its Draft Articles on the Responsibility of States for Internationally Wrongful Acts in December 2001. *See* Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001). The articles were "commend[ed] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action." UNGA Res. 56/83, para. 3 (Dec. 12, 2001). As set forth in the ILC Draft Article 1, "Every internationally wrongful act of a State entails the international responsibility of that State." And according to Article 2, an internationally wrongful act is any action or omission "attributable to the State under international law" and constituting a "breach of an international obligation of the State." State responsibility is thus the set of rules that defines the consequences of one State's breach of its international obligations.

Under the ILC Draft Articles, States responsible for an internationally wrongful act are under an obligation to make restitution (i.e., to re-establish the situation which existed before the

wrongful act was committed), to compensate for any damage caused, and to give satisfaction (for example, acknowledge the breach, express regret, or formally apologize). *See* Draft Articles 34–37.

International tribunals have several times affirmed State responsibility as an international legal norm. In the *Chorzow Factory* case, for example, the Permanent Court of International Justice, the predecessor to the ICJ, held:

It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In judgement No. 8 . . . the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

PCIJ (1928), Ser. A, no. 17, p. 29. Subsequently, the ICJ held in the *Corfu Channel* case that Albania was “responsible under international law” for allowing the use of its territory to harm British vessels and that Albania must pay compensation for the loss of property and human life.

State responsibility extends to breaches of international environmental law, as well. Thus, for example, States are responsible for breaching the obligation not to cause environmental harm. As noted above, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration refer to the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment. . . .” Many commentators thus refer to Stockholm Principle 21 and Rio Principle 2 as elaborating the principle of “State responsibility for environmental harm.” Despite the obviously close relationship between State responsibility and the obligation not to cause harm, it is nonetheless useful to think of the “obligation not to cause environmental harm” separately from the principle of “State responsibility.” The latter is broader and applies to violations of all obligations under international law, for example breaches of the obligation to notify or consult, and not only for environmental harm.

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## QUESTIONS AND DISCUSSION

**1. *Due Diligence.*** The duty to prevent environmental harm is not absolute. In practice it appears to require States to use due diligence in taking all practicable steps. For example, Article 194 of the UN Convention on the Law of the Sea requires that:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.

*See also Convention on Environmental Impact Assessment in a Transboundary Context*, Article 2(1), *done* Feb. 25, 1991, 30 I.L.M. 800, 803 (providing that “[t]he Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control

significant adverse transboundary environmental impact from proposed activities”). Other Conventions link the general principle to avoid harm to one that requires due diligence in environmental management. The Basel Convention, for example, requires the “environmentally sound management of hazardous wastes and other wastes,” which is defined as “taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.” Basel Convention, Article 2(8). How should the principle of common but differentiated responsibilities be reflected in a due diligence standard? Does the due diligence standard suggest that a negligence standard applies when seeking to hold a State responsible for environmental harm? Or should the focus of the inquiry simply be on the extent and nature — the “significance” — of the resulting harm, regardless of whether the acting State was at fault?

Consider as well in this regard, the ICJ’s 2010 opinion in the Uruguay–Argentine Pulp Mill case. Although the Court was interpreting a specific bilateral agreement, its analysis of the obligation to prevent environmental harm may have broader applicability:

[T]he obligation to “preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures” is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.

ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, para. 197. What elements of “due diligence” are envisaged by the Court? How would you argue that the United States and other industrialized countries have failed to meet their obligation to act with due diligence with respect to climate change? How would you argue that they have met this standard?

**2. Jurisdiction and Control.** Principle 21 of the Stockholm Declaration limits a State’s responsibility (i.e., when it must pay compensation) for harm to those activities under that State’s “jurisdiction and control.” How far does a State’s responsibility extend? Is a State responsible for transboundary pollution caused by individuals and corporations within its “jurisdiction”? Because individuals and corporations emit most greenhouse gases, as well as other transboundary pollution, the answer to this question is of obvious importance. Decisions of international tribunals do not provide much guidance. The U.S. *Restatement (Third) of the Law of Foreign Relations*, a scholarly review of what leading U.S. academics believe to be the state of international law from a U.S. perspective (but which is *not* a statement of the law *per se*), provides the following description of these terms in *Comments c* and *d* to Section 601 on State Obligations with Respect to the Environment of Other States and the Common Environment:

*c. “Activities within its jurisdiction” and “significant injury.”* An activity is considered to be within a state’s jurisdiction under this section if the state may exercise jurisdiction to prescribe law with respect to that activity under sections



402–403. The phrase “activities within its jurisdiction or control” includes jurisdiction, Part V, as well as activities on ships flying its flag or on installations on the high seas operating under its authority. . . . International law does not address internal pollution, but a state is responsible under this section if pollution within its jurisdiction causes significant injuries beyond its borders. “Significant injury” is not defined but references to “significant” impact on the environment are common in both international law and United States law. The word “significant” excludes minor incidents causing minimal damage. . . . In special circumstances, the significance of injury to another state is balanced against the importance of the activity to the state causing the injury.

*d. Conditions of responsibility.* A state is responsible . . . for both its own activities and those of individuals or private or public corporations under its jurisdiction. The state may be responsible, for instance, for not enacting necessary legislation, for not enforcing its laws against persons acting in its territory or against its vessels, or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it. In the case of ships flying its flags, a state is responsible for injury due to the state’s own defaults . . . but is not responsible for injury due to fault of the operators of the ship. In both cases, a state is responsible only if it has not taken “such measures as may be necessary” to comply with applicable international standards and to avoid causing injury outside its territory. . . . In general, the applicable international rules and standards do not hold a state responsible when it has taken the necessary and practicable measures; some international agreements provide also for responsibility regardless of fault in case of a discharge of highly dangerous (radioactive, toxic, etc.) substances, or an abnormally dangerous activity (e.g., launching of space satellites). . . . In all cases, however, some defenses may be available to the state: e.g., that it had acted pursuant to a binding decision of the Security Council of the United Nations, or that injury was due to the failure of the injured state to exercise reasonable care to avoid the threatened harm. . . . A state is not responsible for injury due to a natural disaster such as an eruption of a volcano, unless such disaster was triggered or aggravated by a human act, such as a nuclear explosion in a volcano’s vicinity. But a state is responsible if after a natural disaster has occurred it does not take necessary and practicable steps to prevent or reduce injury to other states.

**3.** Given the above discussions, outline the primary elements that must be demonstrated to bring a claim in the context of climate change that a State with large greenhouse gas emissions is responsible for violating Principle 21’s obligation not to cause environmental harm. What would be the major arguments for the defense?

**4.** Consider the various obligations of the UNFCCC and the Kyoto Protocol as well as relevant principles of international environmental law. What legal advice would you give to the government of Palau if it asks you to help it build a case seeking damages and injunctive relief to mitigate climate change? What problems will you have in bringing your claim? Consider the following questions:

- Will you have a better chance of success against the United States or another State?
- Although the United States is not a Party to the Kyoto Protocol, can you claim that the commitments to reduce emissions in the Kyoto Protocol have become customary international law?
- What level of harm should trigger any obligation to avoid harm from greenhouse gas emissions?
- To what standard of care should the State be held?
- What activities should be considered under the “jurisdiction and control” of a State?
- What remedies should be available to States who suffer such damage?

*See generally* RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY (2005); Durwood Zaelke & James Cameron, *Global Warming and Climate Change — An Overview of the International Legal Process*, 5 AM. U. J. INT’L L. & POL’Y 249, 259-260 (1990).

**5.** Do the UNFCCC and the Kyoto Protocol help define the contours of the obligation not to cause environmental harm or establish other obligations upon which Palau could base its claim? Do you think any provisions of the UNFCCC or Kyoto Protocol have attained the status of custom? Do they otherwise inform the obligation not to cause environmental harm, for example by clarifying what is meant by due diligence?

**6.** The draft ILC articles on State Responsibility also set out general excuses or defenses to the claim of State responsibility for a wrongful act, including: consent, self-defense, countermeasures taken in response to another State’s wrongful acts, force majeure, distress, and necessity. *See* Draft Articles 20–27. Would any of these defenses be available in a climate change case?

**7.** A large number of international law principles have guided the creation of international treaties, international declarations, and domestic law, and these principles may also provide the basis for future customary law claims to mitigate climate change. *See, e.g.,* Chapter 4, discussing the precautionary principle, common but differentiated responsibilities, equity and common concern.

**8.** Given the dire consequences of sea level rise for many of the small island States, it may at first be surprising that none of them have yet turned to the ICJ to press their claims. Although some of the countries have periodically considered bringing such a case, no cases have yet been brought. Why do you think the island States have not pursued this strategy? Consider that even if the island States thought they could prevail (and this is not at all clear), many island States are heavily dependent on larger countries. U.S. assistance to Palau, for example, was approximately

28 percent of government revenue in 2011. It is thus important to see possible litigation before the ICJ as part of a broader set of diplomatic relationships.

9. Perhaps concerned over a direct confrontation with the United States and other large countries, Palau opted to ask the UN General Assembly to seek an Advisory Opinion from the ICJ. An ICJ Advisory Opinion is not legally binding on any party, unlike an ICJ opinion in a contentious case. Why else do you think Palau and the other SIDs are pursuing a non-binding Advisory Opinion rather than a binding opinion in a contentious case? What value would come from an Advisory Opinion in Palau's favor? The ICJ could not order any country to reduce greenhouse gas emissions, but an Advisory Opinion could provide an authoritative statement on the application of principles of international law to the emission of greenhouse gases. Aaron Korman and Giselle Barcia argue that an Advisory Opinion would have practical effect because "it could help develop new international norms of behavior regulating transboundary harm caused by emissions, and could provide needed clarity on the principles according to which states can negotiate effective solutions." Do you agree? See Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, 37 YALE J. OF INT'L L. ONLINE 35 (Spring 2012).

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## II. HUMAN RIGHTS AND CLIMATE CHANGE

### A. Introduction

In the wake of the atrocities of World War II, the international community recognized that certain fundamental rights inhere in individuals, not simply in the States of which they are subjects. The new United Nations Charter included as one of its purposes "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." UN Charter, Art. 1(3). In 1948, the United Nations enshrined certain fundamental human rights in the Universal Declaration of Human Rights. See U.N.G.A. Res. 217A (III) U.N.Doc. A/810 (Dec. 10, 1948). The Declaration was later followed by two human rights covenants adopted in 1966 and entering into force in 1976: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The full body of human rights law now includes approximately twenty universal treaties, more than a dozen regional conventions, and scores of declarations, resolutions and soft law instruments. At the United Nations level, the UN Commission on Human Rights is empowered to examine, monitor and publicly report either on human rights situations in specific countries or on major phenomena of human rights violations worldwide. Just as importantly, regional human rights institutions in Europe, the Americas, Africa and more recently Asia provide opportunities for individuals to vindicate their basic human rights at the regional level. See generally PHILIP ALSTON, RYAN GOODMAN, & HENRY J. STEINER, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2007).

Human rights evolved directly from moral principles set in philosophical views of what it means to be human, of the value and dignity of humanity. This foundation strengthens human rights law and gives it coherence and legitimacy as a counter-weight to a States-centered system of international law. It is this moral authority, along with the relatively robust mechanisms for

individuals to vindicate their rights, that attracts some environmental activists to look at the human rights system for promoting environmental protection.

If left unaddressed, climate change will have significant adverse impacts on the quality of human life — impacts that implicate many internationally recognized and protected human rights. In general, climate change threatens the achievement of sustainable levels of development necessary for the fulfillment of economic, social, and cultural rights. Climate change may also lead to or exacerbate specific violations of human rights, including the right to life, health, habitation, culture, equality before the law, and the right to property. Indeed many of the impacts of climate change discussed in Chapter 1, including, for example, the destruction of property and the creation of climate refugees, clearly affect human rights. Climate change's impacts on human rights are not going to be equally felt; the rights of the poor, of politically marginalized communities and of future generations are particularly at risk. How we respond to climate change may also give rise to human rights violations, and a rights-based approach might lead to different preferences among otherwise equivalent policy responses.

Although the moral authority of human rights makes it tempting for climate advocates, the structure of human rights — placing responsibilities on the government for the respect and promotion of its citizens' absolute human rights — may not be a perfect match for addressing the complexity of an issue like climate change. This complexity makes some argue that climate change should be “managed” free from the need to guarantee certain rights. A rights-based approach, by contrast, implies that some positions or interests cannot so easily be compromised. Consider the relative merits of framing climate change as a rights-based issue as you read the following excerpt from Professor Wolfgang Sachs:

### **WOLFGANG SACHS, HUMAN RIGHTS AND CLIMATE CHANGE**

*in* INTERACTIONS BETWEEN GLOBAL CHANGE AND HUMAN HEALTH 349 (PONT.  
ACAD. OF SCI, 2006)\*

Climate perturbations are likely to be superimposed on economic insecurity. As a consequence, climate impacts are at times likely to aggravate the living conditions of people up to a point where their basic rights are in jeopardy. It is for this reason that climate impacts may turn into a matter of human rights. As people already living at the edge see themselves pushed over into disaster, climate effects may trigger an infringement upon economic and social human rights. This is not to say that climate-related threats (hurricanes or heat waves, for instance) to human physical integrity under conditions of greater affluence may not constitute a human rights violation as well, but they are going to be more occasional and less structural in terms of their occurrence, just as they are going to be more accidental and less predictable in terms of their location. Impacts in poorer regions, in contrast, often add to an already structurally precarious livelihood situation; it is the compounded effect of economic insecurity and climate stress for large numbers of people that centres around the question of how much climate change should be allowed into a human rights issue.

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However, climate-related human rights are matched only by imperfect, not by perfect duties. Like with most economic, social and cultural rights, the link between the right and the corresponding duty is blurred. Just as a violation of the right to food, health, or shelter, can often not be traced back to the action of a clearly identifiable duty-bearer, also climate effects cannot be attributed to a culprit with name and address. Who exactly should be held responsible for hunger and widespread illness? While it might be possible to identify the victims, it is often impossible to identify the responsible agent or the causal relationship between a specific action and a specific damage. In fact, an objection often raised against the concept of economic, social and cultural rights holds that rights make no sense unless they are combined with exact duties imposed on specified actors who would make sure that these rights are fulfilled. But the objection is flawed, for it militates against the basic idea that people have some claims on others and on the design of social arrangements regardless of what laws happen to be enforced. The absence of culprits or judges does not nullify rights. A strictly legal conception, which maintains that there are no rights unless they are justiciable, misses out on the universalist nature of human rights entitlements.

Furthermore, climate rights call for extra-territorial responsibility, even more so than do economic, social and cultural rights. Climate perturbations most clearly surpass the jurisdiction of single states, they are in fact a striking example of the transnational character of threats in a highly interdependent world. Under such circumstances, the human rights obligations of states and non-state actors cannot simply stop at territorial borders; rather, they reach geographically to other countries as well. As the Special Rapporteur to the Human Rights Commission on the Right to Food has recently stated: ‘Governments must recognize their extra-territorial obligations towards the right to food. They should refrain from implementing any policies or programs that might have negative effects on the right to food of people living outside their territories.’ When the right to food is threatened by climate change, the principle of extra-territorial obligations becomes even more relevant, given that rich countries are largely responsible for climate perturbations in poorer countries. Just as climate effects reach to the ends of the earth, the geographical scope of responsibility has become global as well.

However, this responsibility is in the first place a negative one; it implies avoiding harmful action rather than intervening to provide conditions for an unmutated life. In other words, climate responsibility is first of all a matter of self-limitation on the part of high-emitting nations and social groups, not a matter of benevolent imperialism bent on improving the world. It is, incidentally, the liberal core of human rights law to emphasize negative obligations, i.e., to call on power-holders to refrain from actions that infringe upon people’s integrity. Since institutions are nothing but consolidated systems of action, the human rights imperative can be reformulated by saying that social institutions — including, one might add, energy systems — should be shaped in such a way that they do not structurally and permanently undermine fundamental rights. . . .

Under human rights law, governments are supposed to carry out a triple task with regard to the rights to food, health, and housing. They are first and foremost obliged to respect these rights by avoiding violating them through state measures; they are further required to protect them against powerful third parties, such as industries or landlords; and they are, in the end, expected to fulfil them only through positive action by facilitating access to food, health or housing. It

would follow to apply the same hierarchy of obligations to climate rights; the right to live in freedom from human-induced climate perturbations has first to be respected by avoiding harmful emissions nationally, it has, secondly, to be protected against third-party emissions of countries or corporations through international cooperation, and it has, thirdly, to be fulfilled by upgrading people's capability to cope with climate change through adaptation measures, such as dam building, resettlement, or land redistribution. \* \* \*

From a human rights point of view, the classical policy responses to dangerous climate change, mitigation and adaptation, acquire an additional urgency. As to mitigation, human rights considerations need to enter into the definition of what constitutes dangerous climate change. They direct attention to the most vulnerable sections of the world population, suggesting a frame of evaluation that is consistent with the basic law that governs world society. However, negotiations at present fail to define a target of tolerable climate change that would sufficiently protect the fundamental rights of the most vulnerable people. . . [A] survey of possible impacts suggests that a target that avoids systematic threats to human rights would need to keep the global mean temperature increase below 2°C above pre-industrial levels. \* \* \*

One reason, however, for the neglect of a human rights approach so far is the prevalence of a utility-based framework of evaluation in climate research and politics. In this framework, benefits of climate mitigation are weighed against its cost in order to optimize both the amount and the time of protection measures. Achieving optimal welfare on the national or global level is the overriding goal. Yet the focus on aggregate welfare is largely incompatible with a focus on rights. For a rights-based framework centres on individual, local or ethnic rights that are not to be violated even at the expense of the aggregate good. It concentrates on the distribution of advantages/disadvantages across single groups, not on the maximization of welfare at the collective level. . . . It is therefore immune against considerations like the one, for example, that the flooding of the Maldives might be a cost to be justified by the aggregate benefit of unhindered growth. The utility approach is all too often inclined to trade away rights for higher aggregate welfare, while human rights are clearly absolute rights; they cannot be traded for higher incomes or disregarded because of a majority opinion.

Finally, human rights considerations also call for vigorous measures to facilitate adaptation to unavoidable climate change. . . . [I]n a human rights perspective, [high-emitting nations] are obliged to prevent violations of economic, social and cultural rights by adequate protective measures. These may range from upgrading health care, to investments in construction, to the building of dams. Governments, however, have so far not been very forthcoming; only a levy on projects in the framework of the Clean Development Mechanism is earmarked for this purpose up to this date. In any case, there can be no doubt that the adherence of the more affluent countries to human rights principles will be put to a hard test as long as emissions remain at current levels.

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## QUESTIONS AND DISCUSSION

1. What are the main arguments raised by Professor Sachs in favor of framing climate change as a human rights issue? What are the disadvantages? How does a human rights approach to addressing climate change compare to a regulatory approach or an approach based on tort law?

2. Sometimes climate change is framed in human rights terms as a legal argument based on specific provisions of international human rights law, but just as frequently human rights language is invoked for the moral authority it supports. Professor Michael Anderson notes that “[o]ften, the real value of a human right is that it is available as a moral trump card precisely when legal arrangements fail.” *Human Rights Approaches to Environmental Protection: An Overview*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 12–13 (Alan E. Boyle & Michael R. Anderson, eds., 1996). How can such a moral trump card be used in practice to address climate change? In its 2007 Human Development Report, the United Nations Development Programme described climate change in this way:

The values that inspired the drafters of the Universal Declaration of Human Rights provide a powerful point of reference. That document was a response to the political failure that gave rise to extreme nationalism, fascism and world war. It established a set of entitlements and rights — civil, political, cultural, social and economic — for “all members of the human family”. The values that inspired the Universal Declaration were seen as a code of conduct for human affairs that would prevent the “disregard and contempt for human rights that have resulted in barbarous acts which have outraged the conscience of mankind”.

The drafters of the Universal Declaration of Human Rights were looking back at a human tragedy, the second world war, that had already happened. Climate change is different. It is a human tragedy in the making. Allowing that tragedy to evolve would be a political failure that merits the description of an “outrage to the conscience of mankind”. It would represent a systematic violation of the human rights of the world’s poor and future generations and a step back from universal values. Conversely, preventing dangerous climate change would hold out the hope for the development of multilateral solutions to the wider problems facing the international community. Climate change confronts us with enormously complex questions that span science, economics and international relations. These questions have to be addressed through practical strategies. Yet it is important not to lose sight of the wider issues that are at stake. The real choice facing political leaders and people today is between universal human values, on the one side, and participating in the widespread and systematic violation of human rights on the other.

UNITED NATIONS DEVELOPMENT PROGRAMME, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD, HUMAN DEVELOPMENT REPORT, SUMM. at 10 (2007/2008). Who do you think the UNDP believes is “participating in the widespread and systematic violation of human rights?” Does this rhetoric help to build political will to address climate change? If you cannot appeal to courts or to international processes for protection of a right, to whom can you appeal? The government itself? The public? By what means?

In addition to the substantive perspectives that a rights-based approach brings to climate change, the human rights field provides unique institutional advantages for those affected by climate change. Several human rights fora allow individuals to press their claims for human rights violations. Communities, particularly indigenous and other resource-dependent communities, who are facing specific, climate-induced hardships, are increasingly reframing their concerns in human rights terms. If nothing else, these communities gain the moral (if not legal) standing to participate in dialogues about climate change. Climate change, for example, is already demonstrably deteriorating the quality of life for many island communities and communities in the Arctic. In response, these two groups of communities have both taken significant steps to invoke the legal and moral authority of human rights in their effort to build political support for responding to climate change — although their approaches have differed. Small island states and others have invoked human rights discourse at the U.N. Human Rights Council to highlight the connections between climate change and violations of fundamental economic, social, and cultural rights. The Inuit people of Alaska petitioned a regional human rights body, the Inter-American Commission on Human Rights, to address climate impacts on their culture and way of life. These and other efforts are discussed below.

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## **B. The OHCHR Report on Climate Change and Human Rights**

As part of their effort to raise awareness of the long-term implications of climate change for their continued existence, small island States began to frame their concerns in terms of human rights and to call on UN human rights institutions to address the linkages between human rights and climate change. In November 2007, in the preparation for the Bali Conference of the Parties under the UNFCCC, the Small Island Developing States issued the Male' Declaration on the Human Dimension of Global Climate Change, which called for among other things “[t]he Office of the United Nations High Commissioner for Human Rights to conduct a detailed study into the effects of climate change on the full enjoyment of human rights, which includes relevant conclusions and recommendations thereon, to be submitted prior to the tenth session of the Human Rights Council.”

Largely in response to this effort, the UN Human Rights Council issued a resolution recognizing the linkage between human rights and climate change and requesting the Office of the High Commissioner for Human Rights (OHCHR) to conduct “a detailed analytical study on the relationship between climate change and human rights.” UN Human Rights Council, A/HRC/7/L.21/Rev.1, 26 March 2008. The OHCHR report, issued in January 2009, thoroughly surveys the implications of climate change for the full enjoyment of many specific human rights:

### **HUMAN RIGHTS COUNCIL, REPORT OF THE UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE**

A/HRC/10/61 (Jan. 15, 2009)

## **II. IMPLICATIONS FOR THE ENJOYMENT OF HUMAN RIGHTS**



\* \* \*

## **B. Effects on specific rights**

20. Whereas global warming will potentially have implications for the full range of human rights, the following subsections provide examples of rights which seem to relate most directly to climate change-related impacts identified by [the] IPCC.

### **The right to life \* \* \***

22. A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. [The] IPCC . . . projects with high confidence an increase in people suffering from death, disease and injury from heatwaves, floods, storms, fires and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development; cardio-respiratory morbidity and mortality related to ground-level ozone. \* \* \*

### **The right to adequate food**

25. The right to food is explicitly mentioned under the International Covenant on Economic, Social and Cultural Rights [(ICESCR)], the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities . . . [The ICESCR] also enshrines “the fundamental right of everyone to be free from hunger”. Elements of the right to food include the availability of adequate food (including through the possibility of feeding oneself from natural resources) and accessible to all individuals under the jurisdiction of a State. Equally, States must ensure freedom from hunger and take necessary action to alleviate hunger, even in times of natural or other disasters.

26. As a consequence of climate change, the potential for food production is projected initially to increase at mid-to high latitudes with an increase in global average temperature in the range of 1–3°. However, at lower latitudes crop productivity is projected to decrease, increasing the risk of hunger and food insecurity in the poorer regions of the world. According to one estimate, an additional 600 million people will face malnutrition due to climate change, with a particularly negative effect on Sub-Saharan Africa. Poor people living in developing countries are particularly vulnerable given their disproportionate dependency on climate-sensitive resources for their food and livelihoods.

27. The Special Rapporteur on the right to food has documented how extreme climate events are increasingly threatening livelihoods and food security. In responding to this threat, the realization of the right to adequate food requires that special attention be given to vulnerable and disadvantaged groups, including people living in disaster prone areas and indigenous peoples whose livelihood may be threatened.

### **The right to water**

28. CESCR has defined the right to water as the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, such as drinking, food preparation and personal and household hygiene. The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities explicitly refer to access to water services in provisions on an adequate standard of living, while the Convention on the Rights of the Child refers to the provision of "clean drinking water" as part of the measures States shall take to combat disease and malnutrition.

29. Loss of glaciers and reductions in snow cover are projected to increase and to negatively affect water availability for more than one-sixth of the world's population supplied by melt water from mountain ranges. Weather extremes, such as drought and flooding, will also impact on water supplies. Climate change will thus exacerbate existing stresses on water resources and compound the problem of access to safe drinking water, currently denied to an estimated 1.1 billion people globally and a major cause of morbidity and disease. In this regard, climate change interacts with a range of other causes of water stress, such as population growth, environmental degradation, poor water management, poverty and inequality. \* \* \*

### **The right to health**

31. . . . This right implies the enjoyment of, and equal access to, appropriate health care and, more broadly, to goods, services and conditions which enable a person to live a healthy life. Underlying determinants of health include adequate food and nutrition, housing, safe drinking water and adequate sanitation, and a healthy environment. \* \* \*

32. Climate change is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrheal, cardio-respiratory and infectious diseases. Global warming may also affect the spread of malaria and other vector borne diseases in some parts of the world. Overall, the negative health effects will disproportionately be felt in Sub-Saharan Africa, South Asia and the Middle East. Poor health and malnutrition increases vulnerability and reduces the capacity of individuals and groups to adapt to climate change.

33. Climate change constitutes a severe additional stress to health systems worldwide, prompting the Special Rapporteur on the right to health to warn that a failure of the international community to confront the health threats posed by global warming will endanger the lives of millions of people. Most at risk are those individuals and communities with a low adaptive capacity. Conversely, addressing poor health is one central aspect of reducing vulnerability to the effects of climate change. \* \* \*

### **The right to adequate housing**

\* \* \*

36. Observed and projected climate change will affect the right to adequate housing in several ways. Sea level rise and storm surges will have a direct impact on many coastal

settlements. In the Arctic region and in low-lying island States such impacts have already led to the relocation of peoples and communities. Settlements in low-lying mega-deltas are also particularly at risk, as evidenced by the millions of people and homes affected by flooding in recent years.

37. The erosion of livelihoods, partly caused by climate change, is a main “push” factor for increasing rural to urban migration. Many will move to urban slums and informal settlements where they are often forced to build shelters in hazardous areas. Already today, an estimated one billion people live in urban slums on fragile hillsides or flood-prone river banks and face acute vulnerability to extreme climate events.

38. Human rights guarantees in the context of climate change include: (a) adequate protection of housing from weather hazards (habitability of housing); (b) access to housing away from hazardous zones; (c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events; (d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons.

### **The right to self-determination**

39. The right to self-determination is a fundamental principle of international law. . . . [The ICESCR and ICCPR] establish that “all peoples have the right of self-determination”, by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development”. Important aspects of the right to self-determination include the right of a people not to be deprived of its own means of subsistence and the obligation of a State party to promote the realization of the right to self-determination, including for people living outside its territory. While the right to self-determination is a collective right held by peoples rather than individuals, its realization is an essential condition for the effective enjoyment of individual human rights.

40. Sea-level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination.

41. The inundation and disappearance of small island States would have implications for the right to self-determination, as well as for the full range of human rights for which individuals depend on the State for their protection. The disappearance of a State for climate change-related reasons would give rise to a range of legal questions, including concerning the status of people inhabiting such disappearing territories and the protection afforded to them under international law (discussed further below). While there is no clear precedence to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.

### **C. Effects on specific groups**

42. The effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability. Under international human rights law, States are legally bound to address such vulnerabilities in accordance with the principle of equality and non-discrimination.  
\* \* \*

#### **Women**

45. Women are especially exposed to climate change-related risks due to existing gender discrimination, inequality and inhibiting gender roles. It is established that women, particularly elderly women and girls, are affected more severely and are more at risk during all phases of weather-related disasters: risk preparedness, warning communication and response, social and economic impacts, recovery and reconstruction. The death rate of women is markedly higher than that of men during natural disasters (often linked to reasons such as: women are more likely to be looking after children, to be wearing clothes which inhibit movement and are less likely to be able to swim). This is particularly the case in disaster-affected societies in which the socio-economic status of women is low. Women are susceptible to gender-based violence during natural disasters and during migration, and girls are more likely to drop out of school when households come under additional stress. Rural women are particularly affected by effects on agriculture and deteriorating living conditions in rural areas. Vulnerability is exacerbated by factors such as unequal rights to property, exclusion from decision-making and difficulties in accessing information and financial services.

46. Studies document how crucial for successful climate change adaptation the knowledge and capacities of women are. For example, there are numerous examples of how measures to empower women and to address discriminatory practices have increased the capacity of communities to cope with extreme weather events.

47. International human rights standards and principles underline the need to adequately assess and address the gender-differentiated impacts of climate change. In the context of negotiations on the United Nations Framework Convention on Climate Change, States have highlighted gender-specific vulnerability assessments as important elements in determining adaptation options. Yet, there is a general lack of accurate data disaggregated by gender data in this area. \* \* \*

#### **Indigenous peoples**

51. Climate change, together with pollution and environmental degradation, poses a serious threat to indigenous peoples, who often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment. Climate change-related impacts have already led to the relocation of Inuit communities in polar regions and affected their traditional livelihoods. Indigenous peoples inhabiting low-lying island States face similar pressures, threatening their cultural identity which is closely linked to their traditional lands and

livelihoods. \* \* \*

53. The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change. Core international human rights treaties also provide for protection of indigenous peoples, in particular with regard to the right to self-determination and rights related to culture. The rights of indigenous peoples are also enshrined in ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

54. Indigenous peoples have brought several cases before national courts and regional and international human rights bodies claiming violations of human rights related to environmental issues. In 2005, a group of Inuit in the Canadian and Alaskan Arctic presented a case before the Inter-American Commission on Human Rights seeking compensation for alleged violations of their human rights resulting from climate change caused by greenhouse gas emissions from the United States of America. While the Inter-American Commission deemed the case inadmissible, it drew international attention to the threats posed by climate change to indigenous peoples.

#### **D. Displacement**

55. The First Assessment Report of the IPCC (1990) noted that the greatest single impact of climate change might be on human migration. The report estimated that by 2050, 150 million people could be displaced by climate change-related phenomena, such as desertification, increasing water scarcity, and floods and storms. It is estimated that climate change-related displacement will primarily occur within countries and that it will affect primarily poorer regions and countries. \* \* \*

57. Persons affected by displacement within national borders are entitled to the full range of human rights guarantees by a given State, including protection against arbitrary or forced displacement and rights related to housing and property restitution for displaced persons. To the extent that movement has been forced, persons would also qualify for increased assistance and protection as a vulnerable group in accordance with the Guiding Principles on Internal Displacement. However, with regard to slow-onset disasters and environmental degradation it remains challenging to distinguish between voluntary and forced population movements.

58. Persons moving voluntarily or forcibly across an international border due to environmental factors would be entitled to general human rights guarantees in a receiving State, but would often not have a right of entry to that State. Persons forcibly displaced across borders for environmental reasons have been referred to as “climate refugees” or “environmental refugees”. The Office of the United Nations High Commissioner for Refugees, the International Organization for Migration and other humanitarian organizations have advised that these terms have no legal basis in international refugee law and should be avoided in order not to undermine the international legal regime for the protection of refugees.

59. The Representative of the Secretary-General on human rights of internally displaced persons has suggested that a person who cannot be reasonably expected to return (e.g. if assistance and protection provided by the country of origin is far below international standards)

should be considered a victim of forced displacement and be granted at least a temporary stay.

60. One possible scenario of forcible displacement across national borders is the eventual total submergence of small island States. Two working papers of the Sub-Commission on the Promotion and Protection of Human Rights, point to some of the human rights issues such situations would raise, such as the rights of affected populations vis-à-vis receiving States and possible entitlement to live in community. Human rights law does not provide clear answers as to the status of populations who have been displaced from sinking island States. Arguably, dealing with such possible disasters and protecting the human rights of the people affected will first and foremost require adequate long-term political solutions, rather than new legal instruments. \* \* \*

### **III. RELEVANT HUMAN RIGHTS OBLIGATIONS**

69. There exists broad agreement that climate change has generally negative effects on the realization of human rights. This section seeks to outline how the empirical reality and projections of the adverse effects of climate change on the effective enjoyment of human rights relate to obligations assumed by States under the international human rights treaties.

70. While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense. Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.

71. Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.

#### **A. National level obligations**

72. Under international human rights law, individuals rely first and foremost on their own States for the protection of their human rights. In the face of climate change, however, it is doubtful, for the reasons mentioned above, that an individual would be able to hold a particular State responsible for harm caused by climate change. Human rights law provides more effective protection with regard to measures taken by States to address climate change and their impact on human rights.

73. For example, if individuals have to move away from a high-risk zone, the State must ensure adequate safeguards and take measures to avoid forced evictions. Equally, several claims

about environmental harm have been considered by national, regional and international judicial and quasi-judicial bodies, including the Human Rights Committee, regarding the impact on human rights, such as the right to life, to health, to privacy and family life and to information. Similar cases in which an environmental harm is linked to climate change could also be considered by courts and quasi-judicial human rights treaty bodies. In such cases, it would appear that the matter of the case would rest on whether the State through its acts or omissions had failed to protect an individual against a harm affecting the enjoyment of human rights.

74. In some cases, States may have an obligation to protect individuals against foreseeable threats to human rights related to climate change, such as an increased risk of flooding in certain areas. In that regard, the jurisprudence of the European Court of Human Rights gives some indication of how a failure to take measures against foreseeable risks could possibly amount to a violation of human rights. The Court found a violation of the right to life in a case where State authorities had failed to implement land-planning and emergency relief policies while they were aware of an increasing risk of a large-scale mudslide. The Court also noted that the population had not been adequately informed about the risk.

### **Progressive realization of economic, social and cultural rights**

75. As discussed [above], climate change will have implications for a number of economic, social and cultural rights. As specified in the relevant treaty provisions, States are obliged to take measures towards the full realization of economic, social and cultural rights to the maximum extent of their available resources. As climate change will place an additional burden on the resources available to States, economic and social rights are likely to suffer.

76. While international human rights treaties recognize that some aspects of economic, social and cultural rights may only be realized progressively over time, they also impose obligations which require immediate implementation. First, States parties must take deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of rights. Second, irrespective of resource limitations, States must guarantee non-discrimination in access to economic, social and cultural rights. Third, States have a core obligation to ensure, at the very least, minimum essential levels of each right enshrined in the Covenant. For example, a State party in which “any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education” would be failing to meet its minimum core obligations and, *prima facie*, be in violation of the Covenant.

77. In sum, irrespective of the additional strain climate change-related events may place on available resources, States remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights under any given circumstances. Importantly, States must, as a matter of priority, seek to satisfy core obligations and protect groups in society who are in a particularly vulnerable situation.

### **Access to information and participation in decision-making**

78. Awareness-raising and access to information are critical to efforts to address climate

change. For example, it is critically important that early-warning information be provided in a manner accessible to all sectors of society. Under the United Nations Framework Convention on Climate Change, the Parties commit to promote and facilitate public access to information on climate change. Under international human rights law, access to information is implied in the rights to freedom of opinion and expression. Jurisprudence of regional human rights courts has also underlined the importance of access to information in relation to environmental risks.

79. Participation in decision-making is of key importance in efforts to tackle climate change. For example, adequate and meaningful consultation with affected persons should precede decisions to relocate people away from hazardous zones. Under the Convention, States parties shall promote and facilitate “public participation in addressing climate change and its effects and developing adequate responses”. The right to participation in decision-making is implied in article 25 of the International Covenant on Civil and Political Rights which guarantees the right to “take part in the conduct of public affairs”. Equally, the United Nations Declaration on the Rights of Indigenous Peoples states that States shall consult and cooperate with indigenous peoples “to obtain their free, prior and informed consent” before adopting measures that may affect them. . . .

### **Guiding principles for policy-making**

80. Human rights standards and principles should inform and strengthen policy-making in the area of climate change, promoting policy coherence and sustainable outcomes. The human rights framework draws attention to the importance of aligning climate change policies and measures with overall human rights objectives, including through assessing possible effects of such policies and measures on human rights.

81. Moreover, looking at climate change vulnerability and adaptive capacity in human rights terms highlights the importance of analysing power relationships, addressing underlying causes of inequality and discrimination, and gives particular attention to marginalized and vulnerable members of society. The human rights framework seeks to empower individuals and underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives.

82. Equally, human rights standards underline the need to prioritize access of all persons to at least basic levels of economic, social and cultural rights, such as access to basic medical care, essential drugs and to compulsory primary education free of charge.

83. The human rights framework also stresses the importance of accountability mechanisms in the implementation of measures and policies in the area of climate change and requires access to administrative and judicial remedies in cases of human rights violations.

### **B. Obligations of international cooperation \* \* \***

86. The Committee on Economic, Social and Cultural Rights identifies four types of extraterritorial obligations to promote and protect economic, social and cultural rights. Accordingly, States have legal obligations to:



- refrain from interfering with the enjoyment of human rights in other countries;
- take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;
- take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons;
- ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.

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## QUESTIONS AND DISCUSSION

**1.** Given the exhaustive description of the potential climate change impacts on human rights, are you surprised by the OHCHR's conclusion in para. 70 that there may be no violation in a “legal sense”? Do you agree with that assessment? If there is no violation of the law, what value is there in framing the climate change discussion in terms of human rights? *See* David Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT'L L. 331 (2009); *see also* Center for International Environmental Law & Friedrich Ebert Stiftung, *Human Rights and Climate Change: Practical Steps for Implementation* (Feb. 25 2009).

**2.** The OHCHR Climate Report resulted in large part from a deliberate strategy by small island States to raise awareness of the long-term implications of climate change for their continued existence. *See, e.g.,* Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, paras. 4–5; Submission of the Maldives to the UN Office of the High Commissioner for Human Rights under Human Rights Council Resolution 7/23, Sept. 25, 2008 (elaborating the link between climate change and human rights). What specifically do you think the small island States hoped to achieve by appealing to the UN human rights bodies? Do you think they achieved their objectives?

**3.** The OHCHR report on the relationship of climate change to human rights also provided input for more general discussions at the Council on the relationship to human rights and the environment. In April 2012, the Council decided to appoint, for a period of three years, an “independent expert on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.” Human Rights Council, *Human Rights and the Environment*, Doc. No. A/HRC/RES/19/10, Apr. 19, 2012. The independent expert, Wake Forest Professor of Law John Knox, is tasked with studying human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment; to identify best practices relating to the use of human rights obligations in environmental policymaking; and to report back with recommendations to the Council. Some observers hope this will build momentum for future recognition of a right to a healthy environment. How do you think recognition of a right to a healthy environment would alter the international response to climate change?

4. As no binding human rights treaty explicitly establishes a human right to a stable climate, human rights activists have to rely on other provisions. Which provisions in human rights law form the basis for the OHCHR report? For the Inuit petition excerpted below?

### **C. The Inuit Petition to the Inter-American Commission on Human Rights**

The unique dependence of the Inuit people of the Arctic led them to submit a petition to the Inter-American Commission on Human Rights arguing that the United States should be held legally responsible for the climate change impacts on the Inuit's culture, livelihoods, and survival. Although the petition was ultimately not successful in finding the United States responsible, it significantly catalyzed the discussion of human rights and climate change both within the Inter-American human rights system and as a precursor to the OHCHR report. As you read the excerpted summary of the petition, consider whether framing climate change concerns in the language of human rights is an effective way of promoting the interests of the Inuit. What are the specific human rights claims and remedies put forward by the Inuit? Do you think the claims were convincing as a legal argument? As a political or moral argument?

#### **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**

(Dec. 7, 2005)

##### **I. SUMMARY OF THE PETITION**

In this petition, Sheila Watt-Cloutier, an Inuk woman and Chair of the Inuit Circumpolar Conference, requests the assistance of the Inter-American Commission on Human Rights in obtaining relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States. Ms. Watt-Cloutier submits this petition on behalf of herself, 62 other named individuals, and all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change described in this petition. \* \* \*

The Inuit, meaning “the people” in their native Inuktitut, are a linguistic and cultural group descended from the Thule people whose traditional range spans four countries — Chukotka in the Federation of Russia, northern and western Alaska in the United States, northern Canada, and Greenland. While there are local characteristics and differences within the broad ethnic category of “Inuit,” all Inuit share a common culture characterized by dependence on subsistence harvesting in both the terrestrial and marine environments, sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions. . . . Although many Inuit are engaged in wage employment, the Inuit continue to depend heavily on the subsistence harvest for food. Traditional “country food” is far more nutritious than imported “store-bought” food. Subsistence harvesting also provides spiritual and cultural affirmation, and is crucial for passing skills, knowledge and values from one generation to the next, thus ensuring cultural continuity and vibrancy.

Like many indigenous peoples, the Inuit are the product of the physical environment in which they live. The Inuit have fine-tuned tools, techniques and knowledge over thousands of years to adapt to the arctic environment. They have developed an intimate relationship with their surroundings, using their understanding of the arctic environment to develop a complex culture that has enabled them to thrive on scarce resources. The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow.

Nowhere on Earth has global warming had a more severe impact than the Arctic. Building on the 2001 findings of the Intergovernmental Panel on Climate Change, the 2004 Arctic Climate Impact Assessment [ACIA] — a comprehensive international evaluation of arctic climate change and its impacts undertaken by hundreds of scientists over four years — concluded that:

The Arctic is extremely vulnerable to observed and projected climate change and its impacts. The Arctic is now experiencing some of the most rapid and severe climate change on Earth. Over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social, and economic changes, many of which have already begun.

Because annual average arctic temperatures are increasing more than twice as fast as temperatures in the rest of the world, climate change has already caused severe impacts in the Arctic, including deterioration in ice conditions, a decrease in the quantity and quality of snow, changes in the weather and weather patterns, and a transfigured landscape as permafrost melts at an alarming rate, causing slumping, landslides, and severe erosion in some coastal areas. Inuit observations and scientific studies consistently document these changes. For the last 15 to 20 years, Inuit, particularly hunters and elders who have intimate knowledge of their environment, have reported climate-related changes within a context of generations of accumulated traditional knowledge.

[The Petition then summarizes the current impacts of global warming on the Arctic environment. For example, increased temperatures and sun intensity have heightened the risk of previously rare health problems such as sunburn, skin cancer, cataracts, immune system disorders and heat-related health problems. Warmer weather has increased the mortality and decreased the health of some harvested species, impacting important sources of protein for the Inuit. Due to these and other changes, the ACIA has stated: “For Inuit, warming is likely to disrupt or even destroy their hunting and food sharing culture as reduced sea ice causes the animals on which they depend [] to decline, become less accessible, and possibly become extinct.”]

Several principles of international law guide the application of the human rights issues in this case. Most directly, the United States is obligated by its membership in the Organization of American States and its acceptance of the American Declaration of the Rights and Duties of Man to protect the rights of the Inuit described above. Other international human rights instruments give meaning to the United States’ obligations under the Declaration. For example, as a party to the International Convention on Civil and Political Rights (“ICCPR”), the United States is bound by the principles therein. As a signatory to the International Convention on Economic, Social,

and Cultural Rights (“ICESCR”), the United States must act consistently with the principles of that agreement.

The United States also has international environmental law obligations that are relevant to this petition. For instance, the United States also has an obligation to ensure that activities within its territory do not cause transboundary harm or violate other treaties to which it is a party. As a party to the UN Framework Convention on Climate Change, the United States has committed to developing and implementing policies aimed at returning its greenhouse gas emissions to 1990 levels. All of these international obligations are relevant to the application of the rights in the American Declaration because, in the words of the Inter-American Commission, the Declaration “should be interpreted and applied in context of developments in the field of international human rights law . . . and with due regard to other relevant rules of international law applicable to [OAS] member states.”

The impacts of climate change, caused by acts and omissions by the United States, violate the Inuit’s fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments. These include their rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.

Because Inuit culture is inseparable from the condition of their physical surroundings, the widespread environmental upheaval resulting from climate change violates the Inuit’s right to practice and enjoy the benefits of their culture. The subsistence culture central to Inuit cultural identity has been damaged by climate change, and may cease to exist if action is not taken by the United States in concert with the community of nations

The Inuit’s fundamental right to use and enjoy their traditional lands is violated as a result of the impacts of climate change because large tracks of Inuit traditional lands are fundamentally changing, and still other areas are becoming inaccessible. Summer sea ice, a critical extension of traditional Inuit land, is literally ceasing to exist. Winter sea ice is thinner and unsafe in some areas. Slumping, erosion, landslides, drainage, and more violent sea storms have destroyed coastal land, wetlands, and lakes, and have detrimentally changed the characteristics of the landscape upon which the Inuit depend. The inability to travel to lands traditionally used for subsistence and the reduced harvest have diminished the value of the Inuit’s right of access to these lands.

The Inuit’s fundamental right to enjoy their personal property is violated because climate change has reduced the value of the Inuit’s personal effects, decreasing the quality of food and hides, and damaging snowmobiles, dog sleds and other tools. Their right to cultural intellectual property is also violated, because much of the Inuit’s traditional knowledge, a formerly priceless asset, has become frequently unreliable or inaccurate as a result of climate change.

The Inuit’s fundamental rights to health and life are violated as climate change exacerbates pressure on the Inuit to change their diet, which for millennia has consisted of wild meat and a few wild plants. Climate change is accelerating a transition by Inuit to a more western store-bought diet with all of its inherent health problems. Life-threatening accidents are increasing

because of rapid changes to ice, snow, and land. Traditional food preservation methods are becoming difficult to practice safely. Natural sources of drinking water are disappearing and diminishing in quality. Increased risks of previously rare heat and sun related illnesses also implicate the right to health and life.

The Inuit's fundamental rights to residence and movement, and inviolability of the home are likewise violated as a result of the impacts of climate change because the physical integrity of Inuit homes is threatened. Most Inuit settlements are located in coastal areas, where storm surges, permafrost melt, and erosion are destroying certain coastal Inuit homes and communities. In inland areas, slumping and landslides threaten Inuit homes and infrastructure.

The Inuit's fundamental right to their own means of subsistence has also been violated as a result of the impacts of climate change. The travel problems, lack of wildlife, and diminished quality of harvested game resulting from climate change have deprived the Inuit of the ability to rely on the harvest for year-round sustenance. Traditional Inuit knowledge, passed from Inuit elders in their role as keepers of the Inuit culture, is also becoming outdated because of the rapidly changing environment.

The United States of America, currently the largest contributor to greenhouse emissions in the world, has nevertheless repeatedly declined to take steps to regulate and reduce its emissions of the gases responsible for climate change. As a result of well-documented increases in atmospheric concentrations of greenhouse gases, it is beyond dispute that most of the observed change in global temperatures over the last 50 years is attributable to human actions. This conclusion is supported by a remarkable consensus in the scientific community, including every major US scientific body with expertise on the subject. Even the Government of the United States has accepted this conclusion.

However, and notwithstanding its ratification of the UN Framework Convention on Climate Change, United States has explicitly rejected international overtures and compromises, including the Kyoto Protocol to the U.N. Framework Convention on Climate Change, aimed at securing agreement to curtail destructive greenhouse gas emissions. With full knowledge that this course of action is radically transforming the arctic environment upon which the Inuit depend for their cultural survival, the United States has persisted in permitting the unregulated emission of greenhouse gases from within its jurisdiction into the atmosphere. \* \* \*

Because this petition raises violations of the American Declaration of the Rights and Duties of Man by the United States of American, the Inter-American Commission on Human Rights has jurisdiction to receive and consider it. The petition is timely because the acts and omissions of the United States that form the basis for the petition are ongoing, and the human rights violations they are causing is increasing. Because there are no domestic remedies suitable to address the violations, the requirement that domestic remedies be exhausted does not apply in this case.

The violations detailed in the petition can be remedied. As such, the Petitioner respectfully requests that the Commission:

1. Make an onsite visit to investigate and confirm the harms suffered by the named individuals whose rights have been violated and other affected Inuit;
2. Hold a hearing to investigate the claims raised in this Petition;
3. Prepare a report setting forth all the facts and applicable law, declaring that the United States of America is internationally responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other instruments of international law, and recommending that the United States:
  - a. Adopt mandatory measures to limit its emissions of greenhouse gases and cooperate in efforts of the community of nations — as expressed, for example, in activities relating to the United Nations Framework Convention on Climate Change — to limit such emissions at the global level;
  - b. Take into account the impacts of U.S. greenhouse gas emissions on the Arctic and affected Inuit in evaluating and before approving all major government actions;
  - c. Establish and implement, in coordination with Petitioner and the affected Inuit, a plan to protect Inuit culture and resources, including, *inter alia*, the land, water, snow, ice, and plant and animal species used or occupied by the named individuals whose rights have been violated and other affected Inuit; and mitigate any harm to these resources caused by US greenhouse gas emissions;
  - d. Establish and implement, in coordination with Petitioner and the affected Inuit communities, a plan to provide assistance necessary for Inuit to adapt to the impacts of climate change that cannot be avoided;
  - e. Provide any other relief that the Commission considers appropriate and just.

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## QUESTIONS AND DISCUSSION

1. On November 16, 2006, the Inter-American Commission on Human Rights wrote the Inuit that it would not process the petition “at present” because the petition “does not enable [it] to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.” The Commission subsequently invited the petitioners to testify at an information hearing on March 1, 2007 to investigate the relationship between global warming and human rights. For an audiotape of the hearing, see <http://www.cidh.org/audiencias/select.aspx>. Links to the testimony can be found at [http://www.ciel.org/Climate/IACHR\\_Inuit\\_5Mar07.html](http://www.ciel.org/Climate/IACHR_Inuit_5Mar07.html).

Although not successful in holding the United States legally responsible, the Inuit petition brought substantial international attention to the Inuit’s plight and undoubtedly increased the overall sense of urgency in international climate negotiations. The Inter-American Commission

has also continued its periodic review of the impacts on human rights due to climate change, including holding a 2011 hearing on the human rights implications of freshwater loss caused by climate change in the Americas. Do you think that raising the political will for action was a significant reason for filing the petition in the first place? If you were the attorney representing the Inuit, how important would it be to identify from the beginning the specific goals for filing the petition? How would different possible goals affect your strategy?

2. At least one Inuit village, which is being forced to relocate, chose to pursue its rights to compensation in U.S. federal court. On February 26, 2008, the Native Village of Kivalina filed a tort suit based on theories of public nuisance, private nuisance, and conspiracy to commit a tortious wrong. *See* Complaint, *Kivalina v. ExxonMobil Corp.*, (N.D. Cal. Feb. 26, 2008). The Kivalina case was dismissed in September 2012. *Native Village of Kivalina, et al. v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). Do you see how torts law may provide an alternative potential avenue for enforcing a rights-based approach to climate change? Climate change and torts is discussed further in Chapter 17.

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## **D. Human Rights Implications of Climate Change Mitigation and Adaptation Policies**

Not all of the linkages between human rights and climate change result from climate impacts. Human rights are also implicated by the various policy interventions designed to mitigate or adapt to climate change. And as the impacts of climate change become more serious, many observers fear that governments will respond in ways that ignore or even exacerbate human rights violations. A potential influx of climate refugees could be met with military force or border fences, for example.

Currently, the most active human rights concerns relate to the potential impacts of projects that are financed by northern countries to address climate change but located in developing countries where indigenous peoples or other vulnerable groups may be at risk. This has led indigenous and other human rights advocates to argue for procedural and substantive safeguards on the implementation of mitigation measures. They argue that investments promoted under the Kyoto Protocol's Clean Development Mechanism (CDM) and the UNFCCC's mechanism for Reducing Emissions from Deforestation in Developing Countries (REDD), for example, may lead to new pressures to encroach on indigenous lands or that the rules for CDM and REDD investments will not promote procedural rights for community-based participation and decisionmaking. *See* Chapter 8, discussing forest policies. They also worry that adaptation measures will ignore the special needs of resource-dependent communities.

These concerns have led indigenous leaders to call for a greater voice in climate change deliberations. In particular, indigenous leaders have repeatedly called on the UNFCCC to create, among other things, an Ad Hoc Working Group on Indigenous Peoples and Climate Change within the UNFCCC framework:

### **MILAN DECLARATION OF THE SIXTH INTERNATIONAL INDIGENOUS PEOPLES FORUM**

**ON CLIMATE CHANGE**  
COP 9, UNFCCC, Milan, Italy, Nov. 29 – 30, 2003

We, the representatives of the Indigenous Peoples of the world present at the 6th International Indigenous Peoples Forum on Climate Change held prior to the 9th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC) in Milan, Italy, restate our principles and . . . **call upon the States Parties of the United Nations Framework Convention on Climate Change that:**

a. COP 9 to the . . . [UNFCCC] recognizes the fundamental role of Indigenous Peoples in addressing climate change and environmental degradation to restore the natural balance.

b. COP 9 considers the creation of the Inter-sessional Ad hoc Working Group on Indigenous Peoples and Climate Change for the timely, effective and adequate solutions in response to the urgent situation caused by climate change.

c. COP 9 provides necessary support to indigenous peoples for their full and effective participation in all levels of discussion, decision making and implementation as well as ensuring that the necessary funding be provided to guarantee such participation and to strengthen their capacities.

d. Include Indigenous Peoples and climate change as items in the agenda of the COP and the Subsidiary Bodies meetings with specific reference to vulnerability, adaptation, poverty, and other climate change related issues.

e. The Clean Development Mechanism (CDM) and Joint Implementation (JI) must incorporate principles which address transparency, free, prior and informed consent and equitable benefit sharing with Indigenous Peoples in order to accomplish the objectives of lowering greenhouse gas emissions and achieving sustainable development in developed and developing countries.

f. All development projects within indigenous ancestral territories must respect our fundamental rights to lands, territories, self-determination and ensure our right to our free, prior and informed consent. Sinks project do not contribute to climate change mitigation and sustainable development. The modalities and procedures for afforestation and reforestation project activities under the CDM do not respect and guarantee our right to lands, territories, and self-determination.

g. We vigorously support the creation and financing of the Adaptation Fund to be accessed by Indigenous Peoples to address the potential and actual impacts of climate change in a manner compatible with our traditional knowledge, customs, culture and lifestyles.

h. We express our desire to be included in UNFCCC capacity building initiatives and propose that special capacity building be undertaken for Indigenous Peoples. Such capacity building would strengthen our ability to exercise our right to fully participate in climate change negotiations.



i. We call upon all governments to implement Climate Impact Assessments which take into account indigenous knowledge systems, culture, social values, spirituality and ecosystems; as well as the full and equal participation of Indigenous Peoples in all aspects and stages of the assessment.

Recognizing all of the above, we call upon the UNFCCC to recognize that through the protection and promotion of Indigenous Peoples' rights and through recognizing and integrating our dynamic and holistic visions, we are securing not only our future, but the future of humanity and social and environmental justice for all.

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Despite repeated calls, the UNFCCC has not yet agreed to such a working group and at this point indigenous peoples' organizations are allowed to participate in the climate negotiations on essentially the same terms as an NGO.

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## QUESTIONS AND DISCUSSION

1. Having failed to gain significant support for their positions within the UNFCCC, indigenous peoples have begun to raise climate change concerns within the UN Permanent Forum on Indigenous Issues. In April 2008, the Permanent Forum issued a set of recommendations aimed at climate mitigation and adaptation efforts:

6. Strategies for mitigation and adaptation must be holistic, taking into account not only the ecological dimensions of climate change, but also social impacts, human rights, equity and environmental justice. Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change. \* \* \*

36. The Permanent Forum recommends that the Framework Convention on Climate Change, in cooperation with States, provide adaptation funds to indigenous peoples affected by climate change-related disasters. Indigenous peoples whose lands have already disappeared or have become uninhabitable or spoilt due to seawater rise, floods, droughts or erosion, and who have thus become environmental refugees or displaced persons, should be provided with appropriate relocation with the support of the international community.

37. The Permanent Forum recommends following the example of indigenous peoples, who have been the stewards of the land and sea for millenniums. When allocating research and development funding and setting the criteria for clean development mechanism projects, policymakers at the State and multilateral levels must look beyond the simple question of whether a particular form of alternative energy or carbon absorption technique can provide a short-term reduction in greenhouse gases. Policymakers should consider the long-term sustainability of any mitigation policy they choose. \* \* \*

41. The Permanent Forum urges the Human Rights Council expert mechanism on indigenous peoples to evaluate whether existing and proposed climate change policies and projects adhere to the standards set by the United Nations Declaration on the Rights of Indigenous Peoples. These bodies, together with the members of the Inter-Agency Support Group for Indigenous Issues, should collaborate with States, multilateral bodies, donors and indigenous peoples to effectively ensure that the implementation of the Declaration is central to the design and implementation of climate change policies and programmes.

42. The Permanent Forum reaffirms the need for all actors to respect the right to self-determination of indigenous peoples to decide on mitigation and adaptation measures in their lands and territories.

Permanent Forum on Indigenous Issues, Declaration, *Climate Change, Biocultural Diversity and Livelihoods: The Stewardship Role of Indigenous Peoples and New Challenges*, in U.N. Economic and Social Council, Report on the Seventh Session (21 April–2 May 2008), E/2008/43, E/C.19/2008/13.

2. Ensuring greater public participation in the CDM has been the focus of significant attention, because of the potentially adverse environmental and social impact that CDM projects can have on specific communities, even if the project provides some climate benefits. Consider the following request from the Center for International Environmental Law for greater transparency and participatory rights:

While opportunities for vigorous public participation in CDM governance and project planning and implementation will likely prove essential for the CDM's long-term success, neither the Convention nor Protocol texts provide much indication of what these public participation rights and mechanisms should entail.

Under the Convention, all developed and developing country parties agreed to “promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations.” Implementation of these provisions has been left to the discretion of individual parties, with effectively no oversight from the Convention's Conference of the Parties (COP). Article 12 of the Protocol, which defines the CDM, contains no mention of any role for the public.

Accordingly, neither the Convention nor the Protocol contains provisions that properly can be described as creating “rights” to public participation in CDM processes. Instead, the CDM public participation rights that presently exist were established as part of the “Marrakech Accords,” which were adopted by the COP in November 2001. \* \* \*

[But] it is important to bear . . . in mind . . . [that] CDM rules established at the international level under the auspices of the Protocol generally pertain either

to CDM governance (e.g., the CDM executive board) or to the setting of minimum performance standards for projects. Since all CDM projects must be approved by both the “home” (investor/developer’s) country and the “host” (project site) country, Protocol parties that participate in the CDM will have an opportunity under their domestic laws to establish and enforce more liberal standards for public participation, if they wish.

Nathalie Eddy & Glenn Wiser, *Public Participation in the Clean Development Mechanism of the Kyoto Protocol*, in CARL BRUCH, ED., *THE NEW PUBLIC: THE GLOBALIZATION OF PUBLIC PARTICIPATION* (Envtl. L. Inst. 2002). The CDM executive board has clarified that CDM projects should be open to public comment and sponsors should engage in consultations with hosting local communities — but implementation at the project level is largely left up to domestic law. Given that any project approved under the CDM must comply with domestic law, is there any need for additional procedural safeguards at the international level? If so, what specific procedures would you recommend be included in the CDM’s operating rules?

3. Climate change has potentially disparate impacts on women and women may also bring different perspectives to the debate. These considerations partly motivate the following recommendations regarding climate change and gender equality:

**WOMEN’S ENVIRONMENT AND DEVELOPMENT ORGANIZATION  
(WEDO), ET AL, DECLARATION ON CLIMATE CHANGE AND  
GENDER EQUALITY**  
(Sept. 2007)

- Given that women’s knowledge and participation has been critical to the survival of entire communities in disaster situations, governments should take advantage of women’s specialized skills in various aspects of their livelihood and natural resource management strategies that lend themselves to mitigation and adaptation.
- Since climate change disproportionately affects poor women, governments should analyze and identify gender-specific impacts and protection measures related to floods, droughts, heat waves, diseases, and other environmental changes and disasters. The global community should prioritize reducing the high levels of female mortality rates resulting from climate-induced disasters and livelihood changes.
- Given the vulnerability of the poor, and particularly women, to climate change, adequate funds must be allocated by Annex I countries to help these groups adapt to the impacts.
- Practical tools should be developed that allow governments and institutions to incorporate gender equality in climate change initiatives. \* \* \*
- Women’s participation in climate change related debates and planning must be enhanced by tools and procedures that augment their capacity and sensitize decisionmakers to the advantages of equal participation.

- The UNFCCC should develop a gender strategy, invest in gender-specific climate change research, and establish a system for the use of gender-sensitive indicators and criteria for governments to use in national reporting to the UNFCCC Secretariat, adaptation planning, or projects under the Clean Development Mechanism (CDM).
- Market-based approaches to curbing climate change, such as the Clean Development Mechanism, should be made accessible to both women and men and ensure equitable benefits, considering that women and men do not have equal access to natural resources such as water and energy, land titles, credit, or information. In particular, the CDM should fund projects that make renewable energy technologies more available to women and meet their household needs.
- The gendered impacts of biofuels and nuclear energy as a solution to reducing greenhouse gas emissions should be assessed, in cooperation with gender experts and women's organizations. \* \* \*

If you were advising the UNFCCC Secretariat, what specific steps do you think it should take to respond to the above recommendations on gender equity? What value is added to the climate debate by invoking gender analysis or concerns?

4. While the climate change regime has not embraced the larger human rights agenda discussed above, it has begun to look at how climate change may affect specific groups of people. Within the discussion of “loss and damage,” an issue that addresses slow onset climate change impacts, the Parties have sought additional information concerning “[h]ow loss and damage associated with the adverse effects of climate change affects those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability, and how the implementation of approaches to address loss and damage can benefit those segments of the population.” Decision 3/CP.18, para. 7 (2012). In addition, the Parties have asked for additional information on “[s]trengthening and supporting the collection and management of relevant data, including gender-disaggregated data, for assessing the risk of loss and damage associated with the adverse effects of climate change.” *Id.*

5. On the relationship between human rights and the environment generally, see SVITLANA KRAVCHENKO & JOHN BONINE, HUMAN RIGHTS AND THE ENVIRONMENT (2008); ALAN BOYLE & MICHAEL ANDERSON, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1996). For a discussion of climate change and refugees or internally displaced people, see the discussion in Chapter 1, Section IV.C. Review the other impacts discussed in Chapter 1; which of them give rise to human rights concerns?