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Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights

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CLIMATE CHANGE, THE UNITED STATES, AND THE IMPACTS OF ARCTIC MELTING: A CASE STUDY IN THE NEED FOR ENFORCEABLE INTERNATIONAL ENVIRONMENTAL HUMAN RIGHTS

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I. INTRODUCTION

Climate change is currently the most significant and daunting international environmental problem, with disproportionate and devastating impacts on indigenous groups. Indigenous people and species in the Arctic now combat grave threats to their cultural identity and subsistence from the effects of thinning sea ice caused by climate change.[1] Similarly, inhabitants of low-lying island nations face potentially catastrophic consequences because of sea level rise triggered by melting sea ice in the polar regions.[2] The effects of increased global temperature are forcing these inhabitants and other indigenous cultures to "shoulder the burden of the rest of the world's development, with no corresponding

1. *See generally* SUSAN JOY HASSOL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT (2004), *available at* http://amap.no/acia/ [hereinafter ARCTIC CLIMATE IMPACT ASSESSMENT].

2. *See, e.g., Climate Change – Tuvalu: Global climate change may cause some small countries to disappear entirely*, ACFNEWSOURCE, Feb. 14, 2002, *available at* http://www.acfnewsource.org/environment/Tuvalu.html.

benefit."[3] As a result, international environmental law is entering a new era of urgency with a need for more empowering avenues of relief for these indigenous populations. To respond to the devastating consequences of twenty-first century environmental problems, international environmental law instruments and forums must now recognize that these problems are inextricably linked to human rights and survival.

Climate change is causing the normally frigid Arctic region to melt at an alarming rate.[4] Thinning sea ice and thawing permafrost are threatening the existence of the Inuit people and destroying the habitat of polar bears, seals, and caribou upon which the Inuit depend for subsistence and cultural identity.[5] Travel is increasingly dangerous as extensive melting compromises the predictability of wind and precipitation patterns and ice strength.[6] Sea ice, in particular, is essential to traditional Inuit culture. It provides a mode of transportation, protects coastal areas and seas,[7] and provides critical habitat for Inuit food sources such as walrus, polar bears, seals, and caribou.[8] The nearly complete loss of summer sea ice that some forecasters project by the end of this century[9] will destroy the Inuit's subsistence lifestyle. The potential ramifications of these changes have attracted the attention of thousands of members of the scientific community, who have joined together in designating 2007 the International Polar Year.[10]

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3. Inuit Circumpolar Conference, *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, at 21, *available at* http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf [hereinafter *ICC Petition*].

4. Brief for Alaska Inter-Tribal Council et al. as Amici Curiae Supporting Petitioners at 14, Massachusetts v. EPA, 126 S. Ct. 2960 (2006) (No. 05-1120). (argued Nov. 29, 2006) (citing J.T. Overpeck et al., *Arctic System on Trajectory to New, Seasonally Ice-Free State*, 86 EOS 312 (2005)), *available at* http://docs.nrdc.org/globalwarming/glo_06083101B.pdf. The temperature change is so dramatic that some Inuit are investing in air conditioners. Alister Doyle, *In Warmer World, Even Inuit Buy Air Conditioners*, REUTERS, Aug. 10, 2006, *available at* http://www.enn.com/today_PF.html?id=11039.

5. ARCTIC CLIMATE IMPACT ASSESSMENT, *supra* note 1, at 11.

6. *Id.* at 96-97.

7. Severe coastal erosion is an ongoing problem where higher waves and storm surges reach the shore without a buffer of sea ice. *Id.* at 11.

8. *Id.*

9. *Id.* at 94.

10. Alister Doyle, *Polar year starts with worries of rising seas*, REUTERS, Mar. 1, 2007, *available at* http://www.reuters.com/article/environmentNews/idUSL2869629020070301?&src=030107_16_DOUBLEFEATURE_environment_n_science. This U.N.-backed project involves over 50,000 people who have joined together to investigate the effects of climate change on marine life, ice conditions, and Northern communities. *Id. See also*

These climate change impacts that the Arctic and low-lying island nations are experiencing are closely linked to greenhouse gas emissions (GHGs) in the United States and the U.S. government's refusal to regulate such emissions. The United States is the leading emitter of GHGs and is responsible for approximately twenty-five percent of worldwide GHGs that cause global climate change.[11] Nevertheless, the U.S. government withdrew from the Kyoto Protocol in 2001[12] and has failed to implement a mandatory GHG emissions reduction system to address climate change.[13] This regulatory inaction has caused states and other concerned parties to pursue judicial remedies to work

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International Polar Year, *About IPY*, http://www.ipy.org/index.php?/ipy/about/ (last visited Mar. 11, 2007).

11. *See* Pew Center on Global Climate Change, Global Warming Basics: Policy FAQs, http://www.pewclimate.org/global-warming-basics/faq_s/faqs_policy.cfm (last visited Mar. 11, 2007).

12. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 639 (2d ed. 2002). The U.S. position on climate change is unique among major industrialized nations. As of this writing, Australia is the only other major industrialized nation that is not a party to the Kyoto Protocol. UNITED NATIONS, KYOTO PROTOCOL: STATUS OF RATIFICATION (updated Sept. 28, 2006), http://unfccc.int/files/essential_background/kyoto_protocol/status_of_ratification/application/pdf/kpstats.pdf.

13. For example, the McCain/Lieberman Climate Stewardship Act, which sought to reduce greenhouse gas emissions to 2000 levels by 2010, was defeated in the Senate by a vote of 55-43 in October 2003. S. 139, 108th Cong. § 316 (2003), 149 CONG. REC. S13598 (2003). The U.S. government currently supports only voluntary measures to address climate change. *See* Press Release, White House, Office of the Press Secretary, Climate Change Fact Sheet (May 18, 2005), *available at* http://www.state.gov/g/oes/rls/fs/46741.htm (detailing the Bush Administration's climate change policy). However, at least four bills addressing climate change have been introduced in Congress as of this writing. *See, e.g.*, Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (1st Sess. 2007) ("To accelerate the reduction of greenhouse gas emissions in the United States by establishing a market-driven system of greenhouse gas tradeable allowances that will limit greenhouse gas emissions in the United States, reduce dependence upon foreign oil, and ensure benefits to consumers from the trading in such allowances. . . ."), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-620; Global Warming Pollution Reduction Act, S. 309, 110th Cong. (1st Sess. 2007) ("To amend the Clean Air Act to reduce emissions of carbon dioxide. . . ."), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-309; Global Warming Reduction Act of 2007, S. 485, 110th Cong. (1st Sess. 2007) ("[T]o amend the Clean Air Act to establish an economy-wide global warming pollution emission cap-and-trade program to assist the economy in transitioning to new clean energy technologies, to protect employees and affected communities, to protect companies and consumers from significant increases in energy costs. . . ."), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-485; Safe Climate Act of 2007, H.R. 1590, 110th Cong. (1st Sess. 2007) ("To reduce greenhouse gas emissions and protect the climate"), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-1590.

towards implementing a mandatory climate change program and reduction or redress of damages caused by GHG emissions from other entities.[14] The absence of federal regulation to combat the climate change problem has also prompted regional initiatives[15] and state legislative responses[16] within the United States. These piecemeal regulatory efforts are a step in the right direction; however, they are not comprehensive enough to afford the necessary relief to individuals suffering from climate change impacts within and outside the United States.

The climate change impacts that the Inuit are suffering have inspired a new legal theory under which the United States may be expected to implement a mandatory GHG emission reduction system. On December 7, 2005, the Inuit Circumpolar Conference (ICC)[17] filed a petition with the Inter-American Commission on Human Rights of the Organization of American States (OAS),[18] accusing the U.S. government of violating their human rights by fueling global warming.[19] This concept of environmental human rights addresses the widespread and severely destructive effect that environmental harms can have on the health, land, livelihood, and culture of humans, and particularly, indigenous groups.[20]

The Inuit allege that their way of life, including fundamental aspects such as hunting and travel, are jeopardized by melting Arctic ice caused by global warming.[21] Sheila Watt-Cloutier, Chair

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14. *E.g.*, H. Josef Hebert, *Supreme Court Takes Up What Could Be Key Ruling on Climate Change*, ASSOCIATED PRESS, June 27, 2006, http://www.enn.com/today.html?id=10757 (discussing the United States Supreme Court's decision to hear *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (U.S. June 26, 2006) (No. 05-1120), a suit seeking to compel the EPA to regulate vehicle emissions as air pollutants under the Clean Air Act).

15. *See, e.g.*, About RGGI, Regional Greenhouse Gas Initiative: An Initiative of the Northeast and Mid-Atlantic States of the U.S., http://www.rggi.org/about.htm (last visited Mar. 13, 2007).

16. *See, e.g.*, California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE DIV. 25.5 (Westlaw 2007).

17. The ICC is an international organization representing more than 150,000 Inuit living in the Arctic regions of Alaska, Canada, Greenland, and Chukotka, Russia. *See generally* Inuit Circumpolar Council, http://www.inuitcircumpolar.com.

18. The OAS promotes cooperation and common interests among thirty-five nations in the Americas. The OAS at a Glance, http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=20. *See also infra* Part II.B.

19. Talia Whyte, *Inuit Seek US Attention to Global Warming*, WORLD INDIGENOUS NEWS, Dec. 28, 2005, http://209.200.101.189/publications/win/win-article.cfm?id=2815.

20. *See* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 73 (2005).

21. *ICC Petition*, *supra* note 3, at 2, 5.

of the ICC, submitted the petition on behalf of herself, sixty-two other named individuals, and all Inuit of the Arctic regions of the United States and Canada who have been affected by the impacts of climate change.[22] The petition asserts that "[n]owhere on Earth has global warming had a more severe impact than the Arctic."[23]

The Inter-American Commission on Human Rights is not the only forum in which to seek such relief. Under a similarly fashioned environmental human rights theory, foreign plaintiffs may have a claim in U.S. courts under the Alien Tort Claims Act to seek redress for the impacts of climate change.[24] The U.S. government's failure to implement a mandatory climate change regime also makes it a prime target for a climate change lawsuit in an international forum such as the International Court of Justice (ICJ) for violations of its international human rights and international environmental obligations resulting from its refusal to implement a mandatory GHG emissions reduction program in the United States. For example, the Pacific island nation of Tuvalu threatened suit in the ICJ in 2002 against the United States and Australia for exacerbating global warming by failing to curb GHG emissions.[25]

Another possible avenue of relief is through broader recognition of an international right to a clean and healthy environment. Many nations have constitutional provisions addressing environmental protection,[26] yet these rights are rarely, if ever, enforced.[27] Similarly, several U.S. states have constitutional

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22. *Id.* at 1.

23. *Id.*

24. *See generally* RoseMary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399 (2002) (suggesting Pacific Island nations use the ATCA to pursue actions against the United States, a major source of greenhouse gas emissions, for cultural genocide or environmental human rights violations resulting from damage caused by the increased global temperature). *See also* David A. Grossman, *Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003) (advocating the use of tort lawsuits against automobile manufacturers, fuel companies, and electric utilities based on products liability and public nuisance theories to curb carbon dioxide emissions and compensate for losses caused by global climate change).

25. Robin Pomeroy, *U.S. faces legal battles as climate bogeyman*, REUTERS, Aug. 28, 2002, *available at* http://www.enn.com/arch.html?id=23205.

26. *See infra* Part I.B.2.

27. *See, e.g.*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, OEA/Ser.L./V/II.96, doc. 10 rev. 1, at ch. 1 (Apr. 24, 1997), *available at* http://www.cidh.org/countryrep/ecuador-eng/Index%20-%20Ecuador.htm [hereinafter REPORT ON THE SITUATION OF HUMAN RIGHTS IN

provisions addressing a wide range of environmental rights; however, these too are rarely enforced and have not been interpreted favorably in the courts.[28] The most recent human rights-based theory in U.S. environmental law is environmental justice, which seeks to limit or avoid disproportionate environmental impacts on vulnerable low-income or minority communities. The human-centered theories underlying these mechanisms can serve as part of the foundation to secure recovery for the human-rights-based impacts of climate change in a future regulatory regime.

The plight of the Inuit is illustrative of a larger need to recognize and enforce international environmental human rights violations. Part I of this Article examines the evolution of various approaches to environmental human rights theories in (1) United States law, (2) international human rights law instruments, and (3) the laws of other nations. Part II considers the scientific evidence and legal theory underlying the Inuit petition before the Inter-American Commission on Human Rights and explores how this scenario underscores the need for a more viable avenue and forum to redress international environmental human rights violations.[29]

Part III explores other theories of recovery. It first addresses the Alien Tort Claims Act (ATCA)[30] and reviews environmental human rights claims that have been filed under the ATCA. It proposes two types of potentially viable new theories for environmental human rights claims under the ATCA: (1) asserting treaty violations under the United Nations Fish Stocks Agreement or under the United Nations Convention on the Law of the Sea (UNCLOS), or (2) asserting claims drawing on the U.S.'s

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ECUADOR].

28. Shortly after their enactment, state constitutional rights to environment provisions were overshadowed by the federal environmental statutory revolution of the 1970s and therefore generated little precedent. Courts that did address these provisions were concerned that the provisions were not self-executing and, therefore, were little more than policy statements supporting environmental protection. For further discussion of state constitutional right to environment provisions, *see infra* Part I.A.2.

29. Such relief, although only advisory in nature, is nevertheless a step in the right direction because a decision from the Inter-American Commission on Human Rights could serve as a source of law for the "law of nations" element of an ATCA claim in future ATCA claims. *See infra* Part III.A.1.

30. 28 U.S.C. § 1350 (Westlaw 2007). The ATCA is sometimes refered to as the Alien Tort Statute. *See, e.g.*, Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 597 (2006).

obligations under the transboundary pollution principle embodied in the Convention on Biological Diversity.

In addition to environmental human rights claims under the ATCA, Part III further suggests that (1) listing polar bears as a threatened species under the Endangered Species Act and (2) requiring human rights impact assessments are additional useful steps in addressing climate change impacts. Nevertheless, such mechanisms would not offer relief to the Inuit and other similarly affected populations soon enough or on a scale sufficient to address the problem. The Article concludes that more effective relief needs to be fashioned in the form of actionable international environmental human rights, drawing on existing domestic and international formulations of these rights in the environmental and human rights contexts.

II. DOMESTIC AND INTERNATIONAL RECOGNITION OF ENVIRONMENTAL HUMAN RIGHTS

Existing sources of domestic and international law embrace a human-centered approach to environmental protection and recognize the connection between human rights and environmental protection. These mechanisms can serve as a viable foundation upon which to build a new system to recognize and protect international environmental human rights.

A. *The Rebirth of Human Rights Theories in U.S. Environmental Law*

The environmental movement in the United States was originally armed with only non-statutory theories of relief to seek redress in the courts for environmental harm. However, the advent of widespread command-and-control legislation in the 1970s[31] limited the use of and need for non-statutory theories.

Three decades later, environmental plaintiffs are now revisiting non-statutory theories as a way to advance claims that are either not covered or not effectively addressed by existing federal environmental statutes. These non-statutory theories—some old[32]

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31. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7671 (Westlaw 2007); Clean Water Act, 33 U.S.C. §§ 1251-1387 (Westlaw 2007); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (Westlaw 2007).

32. For example, the public trust doctrine, constitutional right to environment provisions, and public nuisance.

and some new[33]—reflect a human rights-based approach to environmental protection by focusing on the relationship between humans and nature and the adverse effects on humans resulting from environmental harm. These theories differ considerably from the federal command-and-control statutory regimes implemented in the 1970s and 1980s, which regulate and issue permits for permissible levels of pollution of media—air, water, and land—and manage natural resources such as public lands, marine resources, and endangered species. This part of the Article examines the origins of key common law theories—the public trust doctrine, the constitutional right to environment theory, and public nuisance—and their revitalization as potentially viable models upon which to base enforcement of international environmental human rights.

1. *Public trust doctrine.*

The public trust doctrine traces its origins to Roman civil law, where its original purpose was to ensure access to waterways for transportation and as a source of food.[34] The doctrine first appeared in America in 1821 in the New Jersey case *Arnold v. Mundy*,[35] and was subsequently applied by the U.S. Supreme Court in several cases.[36] The public trust doctrine embraces a human rights approach to environmental protection through its emphasis on the public's collective right to protect the integrity of resources that the state holds in trust for future generations. The doctrine has been used broadly in the United States to protect public access to beaches for recreation[37] and provide other environmental protection measures.[38]

The traditional controversy in the use of the public trust doctrine is in how to apply it. Under the equal footing doctrine,

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33. *See infra* Part IV.B.2. (discussing environmental justice).

34. Allan Kanner, *The Public Trust Doctrine,* Parens Patriae, *and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 62 (2005).

35. Arnold v. Mundy, 6 N.J.L. 1 (1821).

36. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); Shively v. Bowlby, 152 U.S. 1 (1894); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

37. *See, e.g.*, Matthews v. Bay Head Improv. Ass'n., 471 A.2d 355 (N.J. 1984); Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972); Weden v. San Juan County, 958 P.2d 273 (Wash. 1998).

38. *See, e.g.*, Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196 (9th Cir. 1988) (prohibiting diversion of water from lake that resulted in water pollution); *In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980) (seeking damages for the death of migratory birds after an oil spill).

each state begins with the same authority to apply the public trust doctrine; however, each state may expand or restrict that authority through judicial and legislative responses.[39] For example, New Jersey and California have adopted expansive views of the doctrine,[40] but in different contexts. New Jersey expanded the doctrine beyond fishing and navigation to protect access to the beach for recreational uses.[41] This approach has strong economic overtones, as New Jersey derives substantial revenue from tourism and public use of the beach. California's use of the doctrine to protect tidelands and inland lakes, however, is more protective of environmental resources and "has the potential to break free from its water-based origins to apply to all natural resources . . . ."[42] While some states have expanded the trust beyond the water to protect wildlife and parklands,[43] Massachusetts and Maryland have taken more restrictive approaches.[44]

While use of the public trust doctrine is expanding in some states, there has been no rush to extend the public trust doctrine into the realm of ecosystem management.[45] One possible explanation for this lethargic approach is that not long after

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39. *See* JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 13 (1994).

40. *See* Kanner, *supra* note 34, at 78-81.

41. *See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972).

42. Kanner, *supra* note 34, at 80.

43. *See* Kanner, *supra* note 34, at 78-81. *See also, e.g.*, United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 200 (Ct. App. 1986) (relying on public trust doctrine in allowing state agency to set water quality standards to protect fish and wildlife); Shokal v. Dunn, 707 P.2d 441, 447 n.2 (1985) (identifying state responsibilities to preserve fish and wildlife habitat, aquatic life, recreation, and aesthetic beauty under the public trust doctrine).

44. Dep't of Natural Res. v. Mayor & Council of Ocean City, 332 A.2d 630, 638 (Md. 1975) (rejecting an extension of Maryland's public trust doctrine to include recreational interests); Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (holding that the Massachusetts public trust doctrine does not include the right to walk on the beach for bathing).

45. J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1, 8 (2005). Commentators continue to analyze different aspects of the doctrine's applicability. *See, e.g.*, Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322 (2006) (addressing how the doctrine might be used to protect specific resources); Kanner, *supra* note 34, at 87 (arguing that the doctrine has the potential to become an even more useful tool for states to protect other resources); Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51 (1998) (asserting that the doctrine could be used to fill gaps where statutory schemes do not address a specific problem).

Professor Sax suggested how to take advantage of the doctrine's latent power, the legislative revolution of the 1970s introduced several comprehensive resource management laws.[46] This boom period of federal environmental legislation obviated the need for courts to employ the public trust doctrine to spearhead environmental protection objectives.[47] Nevertheless, using the public trust "is precisely what is needed in cases where no statutory scheme precisely addresses or redresses the harm befalling valuable federal resources."[48] Similarly, the public trust doctrine can be employed to seek human-centered, ecosystem-based relief for climate change impacts to public trust resources like coral reefs that are not adequately protected under existing environmental law regulatory regimes.[49]

2. *State constitutional right to environment provisions.*

Like the public trust doctrine, constitutional right to environment provisions focus on recognizing and protecting humanity's relationship to the environment, rather than protecting environmental resources as ends in themselves. Individual states are increasingly incorporating environmental and natural resource protection provisions into their constitutions.[50] Doing so "reframes the issue as one in which a government project or a failed government regulation violates an individual's environmental rights within an ecosystem."[51] The creation of such positive rights rests on a "new view of nature as an ecosystem—an interdependence of biotic and abiotic components."[52] Existing federal environmental law statutory schemes fail to account for the ways in which individuals' rights are violated by government action or inaction.[53] Therefore, to be effective, state constitutional right to

46. Ruhl, *supra* note 45, at 8.

47. *Id.*

48. Lewis, *supra* note 45, at 76.

49. *See generally* Judith Swan, *How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea*, 7 SUSTAINABLE DEV. L. & POL'Y 32 (2006).

50. Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, [2004] 34 Envtl. L. Rep. (Envtl. Law Inst.) 11013, 11023, *available at* http://ssrn.com/abstract=877286.

51. Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1108-09 (1992).

52. *Id.* at 1074.

53. *Id.* at 1065-67. *See* Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE

environment provisions should provide a substantive guarantee and not allow states or agencies to have discretion to ignore the rights created.[54]

Most state constitutions contain provisions relating to natural resources and the environment.[55] These provisions address many different substantive categories[56] and represent a continuum from those that make no reference to the environment[57] to those that explicitly contain environmental protections.[58] Despite this breadth and variety of provisions referring to the environment and natural resources, few provisions actually recognize a right to a healthful environment.[59]

Montana's 1972 constitution, which contains several environmental provisions, has been referred to as "the single strongest statement of conservation philosophy in the constitution of any state and, very likely, of any nation in the world."[60] The constitution creates an inalienable "right to a clean and healthful environment for citizens of Montana on par with the right to life,

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ENVTL. L. & POL'Y F. 207, 234-35 (2001).

54. States that provide constitutional protection to environmental rights do not apply a universal standard to determine whether individuals have a private right of action. *See* Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 366 (1996). However, at least one commentator has noted a preference among state courts for government over citizen enforcement. *See* Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights*, 20 B.C. ENVTL. AFF. L. REV. 173, 198 (1993).

55. Bret Adams et. al, *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002) [hereinafter *Environmental Provisions*].

56. *See id.* at 74-75 (identifying nineteen substantive categories for environmental provisions, including public land acquisition, preservation and management and fishing access, and eleven forms such as general policy statements and financial provisions).

57. The constitutions of Connecticut, Delaware, Georgia, Indiana, Kentucky, and Maryland contain no provisions dealing expressly with natural resources or the environment. *Id.* at 256-58.

58. *See, e.g.*, ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."); *id.* at § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings . . . .").

59. James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 127 (2006).

60. John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 323 (1996) (quoting Charles Wilkinson, Keynote Address to the Twenty-Ninth Montana Wilderness Association Convention, Wild Mont., Mar. 1988). *See also Environmental Provisions, supra* note 55, at 160.

liberty, and property.[61] The constitution also creates a duty to "maintain and improve a clean and healthful environment in Montana for present and future generations"[62] and empowers its legislature to enforce this duty.[63] It is not clear whether these provisions are "self-executing or require legislative implementation to be enforceable."[64]

Other state constitutions also explicitly protect rights to a healthful environment.[65] While many fall short of actually creating a right to a healthful environment,[66] "[s]everal states establish pollution control and conservation as state policies."[67] While clauses in state constitutions addressing the environment or natural resources are common, environmental rights provisions "often prove the least enforceable."[68] Therefore, although constitutionalizing environmental rights has had many positive effects, it is not clear whether these provisions can ultimately be successful in protecting rights.[69]

The constitutional right to environment provisions face problems regarding enforcement.[70] Courts frequently apply the doctrine of self-execution to "preserve the separation of powers

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61. MONT. CONST. art. II, § 3.

62. *Id.* art. IX, § 1(1).

63. *Id.* at §1(2) ("The legislature shall provide for the administration and enforcement of this duty.").

64. *Environmental Provisions*, *supra* note 55, at 161.

65. *See, e.g.*, PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); HAW. CONST. art. IX, § 8 ("The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources.").

66. *E.g.*, MASS. CONST. amend. art. XLIX (creating individual rights to "clean air and water" and protecting "esthetic qualities" of the environment).

67. John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 309 (2000) (referencing the constitutions of New York and North Carolina).

68. May, *supra* note 59, at 127.

69. Although Illinois's constitution includes a policy statement, legislative directives, and an explicit individual right to a healthful environment, the Illinois Supreme Court has held that this "does not grant a fundamental right and is subject to a rational basis standard of review rather than strict scrutiny." *See* Tucker, *supra* note 67, at 308 (citing Illinois Pure Water Comm., Inc. v. Dir. of Pub. Health, 470 N.E.2d 988, 992 (Ill. 1984)).

70. *See* Brooks, *supra* note 51, at 1108; Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 333-34 (1993) (examining environmental provisions in light of self-execution principles).

and the institutional legitimacy of the courts."[71] This doctrine requires a "complete and enforceable rule" be provided in constitutional provisions; otherwise, further legislation is needed before that provision can be enforced.[72] The doctrine of self-execution is warranted where there is a lack of consensus as to what is required under state constitutional provisions and judges risk making decisions based on nothing more than their own opinions.[73] Conversely, constitutional provisions that are sufficiently narrow to be enforced by the judiciary will likely be "statute-like . . . and therefore inflexible."[74] However, courts have always added meaning to what constitutional protections mean in practical effect, such as with First Amendment liberties,[75] so there does not appear to be a reason for environmental provisions in constitutions to be treated differently.

In addition to these provisions in state constitutions, the U.S. Constitution may provide an alternative source of law to justify protecting environmental norms. Some scholars have proposed a right to a healthful environment by relying on constitutional provisions that guarantee citizens the right to life using similar or identical language to the U.S. Constitution's due process guarantees.[76] The recognition of the right to life in these provisions suggests that the United States can recognize the right to a healthful environment within the theory of substantive due

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71. Fernandez, *supra* note 70, at 384.

72. *Id.* at 333.

73. *Id.* at 381. Fernandez further noted that "[t]he absence of consensus on environmental issues leaves the courts open to accusations of elitism and judicial 'legislating' when they attempt to enforce environmental rights provisions. Without a public consensus on the important issues involved, it would be difficult for a court to enforce an environmental right in any meaningful way without risking a loss of legitimacy in the eyes of a significant segment of the population. The court would have to answer many unresolved questions before it could enforce the right, and insofar as these questions remain highly controversial, the court's rulings might be derided or disregarded."). *Id.*

74. *Id.* at 386.

75. For example, Shepardizing the First Amendment reveals that it has been cited more than 20,000 times since its inception in 1791. *See* U.S. CONST. amend. I.

76. *E.g.*, Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185, 210-22 (2001). *Cf.* Carl Bruch, Wole Coker, & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 166-177 (2001) (analyzing right to life provisions in Tanzania, India, Pakistan, Bangladesh, Nepal, Columbia, Ecuador, and Costa Rica to establish constitutional environmental protections in Africa).

process under the Fifth and Fourteenth Amendments.[77] Recognition of environmental rights within substantive due process theory will allow citizens to bring lawsuits without alleging a separate state cause of action, and will "[1] add legal claims citizens can use in order to protect themselves from environmental problems, [2] place a further check on legislative actions that affect the environment, [3] increase the level of scrutiny applied to state and federal actions significantly affecting the environment, and [4] allow courts to impose new remedies that more effectively address environmental degradation."[78]

The current U.S. Supreme Court is unlikely to use a substantive due process theory to find a right to a healthful environment within those provisions of the U.S. Constitution. Although the idea of a "right to life" incorporating a right to environment enjoyed support in the early 1970s, it fizzled in response to the extensive regime of federal environmental legislation enacted under the Commerce Clause.[79]

A federal constitutional amendment relating to environmental protection has also been considered.[80] In discussing the importance of citizen suits in the protection of environmental rights, Professor Craig noted that current constitutional jurisprudence presents a challenge to Congress's intent to provide for citizens' ability to protect their own rights.[81] Craig recommended that a federal constitutional amendment that would "alter[] the operational rules of government" would best protect citizens seeking redress for environmental harm.[82] She further noted that state constitutional provisions are evidence of a growing national consensus but are not effective in protecting substantive rights.[83]

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77. U.S. CONST. amend. V ("Nor shall any person . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST., amend. XIV § 1 ([N]or shall any State deprive any person of life, liberty, or property, without due process of law."). *See infra* Part II.B.2 for further discussion on the right to a healthy environment as integral to the right to life.

78. Eurick, *supra* note 76, at 214-15.

79. *See* May, *supra* note 59, at 125-26.

80. *See* J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 247-48 (1999).

81. Craig, *supra* note 50, at 11,017.

82. *Id.* at 11,018 (quoting Ruhl, *supra* note 80, at 253).

83. *Id.* at 11,024.

3. *Public Nuisance*

Another non-statutory theory for the redress of environmental harm—public nuisance—also embraces a human-centered approach to environmental protection. Public nuisance is defined as "an unreasonable interference with a right common to the general public."[84] In determining the unreasonableness of the interference, courts consider: (1) whether the conduct involves significant interference with public health, safety, peace, comfort or convenience; (2) whether a statute or other law makes the conduct unlawful; and (3) whether the conduct is continuous or has a long-lasting effect, and whether the actor knows the conduct to have a significant effect on the public's rights.[85] Although the actor's state of mind is one factor in the unreasonableness analysis, to prove a public nuisance there is no need to show the actor was negligent or intended to cause the harm; only proof of unreasonable interference with public rights is required.[86]

Injuries asserted in climate change suits implicate public rights.[87] For example, thawing permafrost in the Arctic implicates public rights by leading to forest damage, erosion, sinking of ground surface, and more.[88] At a basic level, the theory underlying the Inuit petition is a public nuisance action on a transboundary scale.

On a narrower scale, litigants in the United States have recently embraced the public nuisance doctrine as a potentially viable tool in climate change litigation. The public nuisance doctrine employs a human rights-based theory of recovery for the widespread harm that climate change impacts cause to shared resources that citizens have a common interest to protect. In *Connecticut v. American*

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84. Restatement (Second) of Torts § 821B(2) (1979).

85. *Id. See also* New York v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40, 44-45 (N.Y. Sup. Ct. 1978) (finding unreasonable interference existed where the actor's conduct lasted for decades and recurred on a weekly basis, and dismissing the conduct's compliance with zoning ordinances as immaterial); Flo-Sun, Inc. v. Kirk, 783 So.2d 1029, 1036 (Fla. 2001) (stating that public nuisances may exist even if the actor complies with pollution laws).

86. *See* Copart Indus., Inc. v. Consol. Edison Co. of N.Y. 362 N.E.2d 968, 971 (N.Y. 1977) (explaining that "nuisance, as a general term, describes the consequences of conduct, the inconvenience to others, rather than the type of conduct involved").

87. *See* Grossman, *supra* note 24, at 53-54.

88. *Id.* For a detailed discussion of the climate change impacts in the Arctic and how these impacts are affecting the Inuit, *see infra* Part II.

Electric Power Company,[89] several states filed a public nuisance action alleging that the defendants—several major power suppliers through the United States—were knowingly contributing to a continuing public nuisance of global warming.[90] The court dismissed the case on political question grounds, noting that the plaintiffs' concerns were more appropriate for the legislative branch.[91] The State of California has filed a similar public nuisance suit against several automobile manufacturers alleging that the defendants' past and ongoing GHG emissions have significantly contributed to the effects of global warming and constitute a public nuisance.[92]

Public nuisance is also potentially synergistic with constitutional right to environment provisions. For example, one author recommended that citizen suits for public nuisance should be filed in Illinois or Hawaii where the Special Injury Rule has been abrogated or minimized.[93] The Illinois constitution creates a "self-executing right for private citizens to protect their right to a healthful environment," which provides: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."[94] Although this constitutional provision does not create ". . . any new causes of action, this right has been interpreted as abrogating the Special Injury Rule for private citizens who suffer public health injuries at the hands of pollution."[95]

B. *The Synergy Between Human Rights and Environmental Rights on a Global Scale*

There is a growing interrelationship between environmental

89. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

90. *Id.* at 267-68.

91. *Id.* at 273.

92. *See* Complaint in California v. General Motors (N.D. Cal. Sept. 20, 2006) *available at* http://ag.ca.gov/newsalerts/cms06/06-082_0a.pdf?PHPSESSID=bcafe4e63eecea93153f25e6fe5bc9ba (last visited Mar. 11, 2007).

93. James R. Drabick, Note, *"Private" Public Nuisance and Climate Change: Working Within, and Around, The Special Injury Rule*, 16 FORDHAM ENVTL. L. REV. 503, 532 (2005).

94. ILL. CONST. art. XI, § 2.

95. Drabick, *supra* note 93, at 537. Illinois's constitutional right to environment provision is the only one that has been interpreted to abrogate the Special Injury Rule. *Id.*

law and human rights law in international law instruments. International human rights instruments and bodies are becoming increasingly mindful of the overlap between human rights and environmental issues. Similarly, especially since the 1992 Rio Conference, international environmental law instruments have frequently incorporated human rights dimensions.

Comparable to the state constitutional provisions addressing environmental concerns in several U.S. states, many countries have adopted constitutional provisions that address the interplay between environmental protection and human rights. In addition, judicial decisions from foreign tribunals also have recognized and confirmed the connection between environmental and human rights concerns.

1. *Environmental human rights in international law instruments.*

Although more stringent standards, norms, and techniques have continually been adopted for the enforcement and implementation of international environmental law principles, there is currently "little recourse to individual victims of environmental harm."[96] In contrast, human rights approaches offer quasi-judicial procedures and allow injured parties to appeal to an international body for redress.[97] This process helps protect individuals and communities who would otherwise have very limited legal and political recourse in domestic courts.[98] Opportunities to raise environmental claims may exist within numerous international agreements including the United Nations' human rights bodies and treaties, the Rio Declaration, and the World Conference for Human Rights.

The United Nations Human Rights Commission (U.N. Commission) was established in 1947 to promote and protect human rights.[99] The U.N. Commission does not use judicial proceedings in human rights cases. Instead, the U.N. Commission examines individual cases of human rights violations and focuses on raising public awareness, promoting resolution of disputes, and

96. Caroline Dommen, *How Human Rights Norms Can Contribute to Environmental Protection: Some Practical Possibilities Within the United Nations System, in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 105, 105 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

97. *Id.*

98. *Id.*

99. *Id.* at 106.

implementing programs to address these issues in each of its fifty-three member states.[100] Within this system, environmental issues have been presented and interpreted as human rights violations in the context of indigenous peoples; economic, social, and cultural rights; and scientific and technological developments.[101]

For example, in 1996, the U.N. Commission reported on the situation of human rights in Cambodia, specifically mentioning rights to a healthy environment and to sustainable development in light of the potential effect of logging and agribusiness on the native Cambodians, who depend on the environment for their food, culture, and way of life.[102] The Inuit are currently experiencing similar disruptions as a result of climate change impacts in the Arctic. Therefore, the U.N. Commission would likely find that the Inuit also have a right to a healthy environment and to sustainable development to ensure the continuing viability of their subsistence culture.

Although the right to a healthy and clean environment is not explicitly recognized,[103] U.N. treaties provide a "useful channel of recourse" for environmental harm.[104] Other rights that are explicitly protected, such as the right to life or the right to health, are closely related to environmental issues.[105] This is evidenced by the fact that U.N. member states have repeatedly acknowledged that environmental issues fall within their obligations under human rights treaties in their periodic reports. For example, in 1986, Tunisia reported its measures taken to prevent degradation of its natural resources in connection with its obligations under the International Covenant on Economic, Social, and Cultural Rights.[106] In 1992, Bolivia included steps taken to promote the

100. *Id.*

101. Although "[t]he [U.N.] resolutions have relatively little legal weight, . . . States do go to great lengths to avoid criticism by these bodies." *Id.* at 108.

102. *Id.* at 107 (citing United Nations, Document E/CN.4/1996/93 (1996)).

103. *Id.* at 108. However, the World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 48th plen. mtg., U.N. Doc. A/RES/37/7 (Oct. 28, 1982), *available at* http://www.un.org/documents/ga/res/37/a37r007.htm, is a soft law instrument intended to contribute to the establishment of conservation as a principle of international law and includes aspirational language concerning states' obligations to protect the environment.

104. Dommen, *supra* note 96, at 108.

105. *Id.*

106. *Id.* at 109 (citing Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Jan. 14-18, 2002, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, U.N. Doc. E/1986/3/Add. 9).

economy, education, and the environment in its attempt to improve the health situation of its women and children.[107] Similarly, in 1995, the Ukraine presented information regarding the environmental situation following the Chernobyl disaster within the right to life framework.[108]

The U.N. Human Rights Committee (HRC) has examined a number of cases that raise environmental concerns.[109] In considering the effect of environmental degradation on the rights of indigenous or minority groups, the HRC supports the view that resources on which indigenous groups traditionally rely should be used only in a way that is compatible with these groups' cultures.[110] In addition, the HRC has been sympathetic to environmental claims regarding interim measures,[111] sustainable use of resources, and human rights violations that affect a large number of people.[112]

Another important environmental human rights issue—the obligation of nations to provide adequate clean water—is supported by rights protected in several international law instruments.[113] Although explicit references to water as a human right exist in the U.N. Convention on the Rights of the Child,[114] the right to water is also an inherent part of the basic rights to life,

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107. *Id.*

108. *Id.*

109. These cases generally fall into two categories: (1) cases involving nuclear weapons or radioactive materials, which are beyond the scope of this Article, and (2) cases involving the rights of minorities or indigenous people. *Id.* at 110.

110. *Id.* at 111.

111. Interim measures are those taken in response to activities whose potential impacts are uncertain. *Id.* at 112.

112. *Id.*

113. Ignacio J. Alvarez, *The Right to Water as a Human Right, in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 96, at 71, 72.

114. Convention on the Rights of the Child, G.A. Res. 44/25, art. 24, U.N. Doc. A/RES/44/25 (12 December 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm
(recognizing the right of the child to enjoy the highest standard of health, including the provision of adequate clean drinking-water and freedom from the dangers and risks of environmental pollution). The United States became a signatory to Convention on the Rights of the Child on February 16, 1995, but the treaty was never ratified by the Senate. Status of Ratifications of the Principle Human Rights Treaties, Jun. 9, 2004, at 11, http://www.unhchr.ch/pdf/report.pdf. Under the Vienna Convention on the Law of Treaties, the United States has an obligation as a treaty signatory to refrain from engaging in acts that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

health, and food.[115] Water as a fundamental component of the right to life is implicitly provided in the Universal Declaration on Human Rights,[116] the ICESCR,[117] and the ICCPR.[118] Water is essential to human life, and "shortages or contamination can lead to famine, disease, and even death."[119] In 2006, Bolivia refused to sign an international declaration on the importance of clean water because the declaration failed to specifically recognize access to water as a human right.[120]

Little attention has been given to the question of the scope or enforceability of a specific right to water.[121] However, if the right to water is an element of the right to life, then States have "an immediate obligation 'to respect and to ensure' the rights it proclaims and to take whatever other measures are necessary to bring about that result."[122] At a minimum, this includes ensuring a sufficient supply of safe drinking water exists to sustain life. [123] A right to water may also include those quantities needed for basic

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115. Alvarez, *supra* note 113, at 72.

116. Universal Declaration of Human Rights, G.A. Res. 217A, art. 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . . ."). Although not binding under international law on its own accord, the Universal Declaration of Human Rights is still a potent instrument to apply moral and diplomatic pressure on offending nations.

117. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), arts. 11-12, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (recognizing fundamental rights to an adequate standard of living, to be free from hunger, and to enjoy the highest attainable standard of physical and mental health). The United States ratified the ICESCR on October 5, 1977 and is bound by its provisions. Status of Ratifications of the Principle Human Rights Treaties, *supra* note 114, at 11.

118. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm ("Every human being has the inherent right to life.").

119. Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 5 (1992).

120. *Bolivia Says Water is a Right, Opposes Declaration*, REUTERS, Mar. 22, 2006, http://www.enn.com/today.html?id=10110. The Bolivian Water Minister commented that "[i]t's very clear that we all have a right to life and health. . . . The right to life and right to health without water is contradictory." *Id.*

121. McCaffrey, *supra* note 119, at 1.

122. *Id.* at 9 (citing THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 29-33 (Westlaw 1998)).

123. Alvarez, *supra* note 213, at 77.

sanitation and agricultural needs.[124] Enforcement may be accomplished through the reporting systems of the ICESCR or the petition system of the CCPR and Inter-American Human Rights system.[125]

International environmental law raises many issues familiar in international human rights law, such as the existence and application of minimum international standards and the proper role of individuals and other non-governmental organizations in the international legal process.[126] Modern international environmental law adopts an anthropocentric approach to regulation, which is the view that environmental protection is primarily justified as a means of protecting humans rather than as an end in itself.[127] For example, the U.N.'s Rio Declaration espouses this approach to sustainability by explicitly stating that "[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[128]

Environmentalists can capitalize on opportunities available in international human rights instruments as an additional avenue

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124. *Id.*

125. *Id.* at 79-80.

126. PHILIPPE SANDS & PAOLO GALIZZI, DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 975 (Cambridge Univ. Press, 2004).

127. *Id.*

128. U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, pr. 1, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), *reprinted in* 31 I.L.M. 874, *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm; *see also* U.N. Conference on Environment and Development, June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/4 (1992), *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm (providing a comprehensive blueprint for sustainability that addresses every area where humans affect the environment and affirming that sustainable development maximizes human potential while protecting the environment). Regional instruments also are representative of the anthropocentric approach. *See, e.g.*, African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58, art. 24 (Jun. 27, 1982), *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm ("All peoples shall have the right to a general satisfactory environment favorable to their development."); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," OAS/Ser.L/V/I.4, rev. 9, arts 11-12 (Nov. 17, 1988), *available at* http://iachr.org/Basicos/basic5.htm (identifying the right to health care, a healthy environment, and the benefits of culture, and further imposing upon ratifying states an obligation to enact domestic legislation to promote the protection, preservation, and improvement of the environment). An alternative version of the anthropocentric approach is where victims bring claims on the basis that personal or property rights have been violated. SANDS & GALIZZI, *supra* note 126, at 975.

for challenging activities of governments that violate international human rights or environmental norms.[129] The most useful aspect of using any of these international human rights mechanisms for environmental protection lies in the capacity of these mechanisms to serve as the hook for the "mobilization of shame."[130] States go to great lengths to avoid criticism from the U.N. Commission.[131] Recognition of the rights-based approach to environmental protection has already elevated the weight of environmental concerns when balanced against economic considerations and property rights and has enhanced recognition of the affirmative duties implicit in civil and political rights.[132] Therefore, any attention that may be drawn to situations affecting environmental human rights, like the climate change impacts that the Inuit are experiencing in the Arctic, will promote the growing recognition of international environmental human rights. This enhanced recognition is a necessary first step toward developing and implementing action-forcing mechanism to protect such rights.

2. *Environmental Human Rights in Other Nations.*

Expressing fundamental rights at the national level is appropriate where "extant international, national, and subnational legal mechanisms do not protect the right,"[133] as is true with environmental rights. A national constitutional right to a healthful environment makes sense where "[t]he values of life and health protection are nationally shared."[134] By including these rights in the constitution, pollution is viewed in terms of a "public assault upon an individual's substantive right to life and health."[135] This

129. Dommen, *supra* note 96, at 114.

130. *Id.* at 114.

131. *Id.* at 108.

132. *See* Dinah Shelton, Human Rights and Envtl. Law Scholar, Keynote Address at University of Chicago, Center for International Studies' Panel Discussion, Human Rights and Ecosystem Limits: Considering Environmental Rights, at 25 (Apr. 16 2004), *available at* http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf.

133. May, *supra* note 59, at 122. *But see* Ruhl, *supra* note 59, at 252 ("[A]ny [environmental quality amendment] attempting to capture a normative statement about the environment and plug it into the United States Constitution is simply a bad idea."). Professor Ruhl is extremely skeptical of applying the lessons learned from state and foreign national constitutions that have adopted environmental constitutional provisions. *Id.*

134. Brooks, *supra* note 51, at 1109.

135. *Id.*

recognition of environmental health as a fundamental right protects citizens from political whims; provides policy guidance to courts, legislatures, corporations, and private citizens; and highlights the growing importance of conserving ecosystems and biodiversity.[136]

Approximately 130 of the world's written constitutions have provisions addressing the environment.[137] Of these, only about sixty "grant individuals what may be fairly characterized as a fundamental right to a 'clean,' 'healthful,' or 'favorable' environment."[138] These provisions are found in nearly every emerging democracy of the former Eastern Bloc, Middle Eastern, and Soviet-influenced countries,[139] a majority of African countries,[140] and more than a dozen others.[141] Some nations have also interpreted constitutional "right to life" provisions to incorporate environmental rights,[142] again focusing on the interdependence of people and the environment. Such a reading was adopted by India, which interpreted its constitutional right to life to include "a fundamental right to a healthy environment."[143]

Although only a few of these provisions have been deemed judicially enforceable,[144] their inclusion represents a shift in the

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136. *See* Tucker, *supra* note 67, at 315-25.

137. May, *supra* note 59, at 114. Professor May catalogs the environmental provisions of national constitutions in Appendix A and Appendix B. *Id.*

138. *Id.*

139. These countries include Afghanistan, Azerbaijan, Albania, Belarus, Bulgaria, Croatia, Chechnya, Estonia, Georgia, Hungary, Kyrgyztan, Macedonia, Russia, Mongolia, Moldova, Poland, the Slovak Republic, Slovenia, Turkey, Ukraine, and Yugoslavia (Serbia & Montenegro). *Id.* at 130-31.

140. African countries with fundamental environmental rights include Algeria, Angola, Cameroon, Chad, Congo, Ethiopia, South Africa, Mozambique, and Niger. *Id.* at 132.

141. Other countries that have nationalized fundamental environmental rights include Argentina, Angola, Belgium, Benin, Brazil, Burkina Faso, Cape Verde, Chile, Columbia, Comoros, Costa Rica, East Timor, Ecuador, El Salvador, France, Guatemala, Honduras, Iraq, Mali, Nicaragua, Norway, Paraguay, Portugal, Sao Tome, Seychelles, South Korea, Spain, Togo, and Venezuela. *Id.* at 131-33.

142. *Id.* at 125.

143. *Id.*; *see also* Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 167-70 (2001) (explaining the judiciary's conclusion that India's constitution includes environmental rights).

144. Constitutional provisions concerning the right to a healthful environment have been held to be fundamental, self-executing, and individually enforceable in only a handful of nations, including Portugal, Argentina, Costa Rica, and India. May, *supra* note 59, at 134-35. Additionally, the Columbian Constitutional Court held that "the right to the environment is a right fundamental to the existence of humanity." *Id.* at 134.

global perspective on environmental rights. The focus is no longer on pollution abatement but rather on preserving biodiversity and human life and health.[145] The growing national importance of these rights is manifested in the fact that most of these provisions have been enacted during the last thirty years, and a majority within the last fifteen. Despite the current lack of enforcement of these provisions, their enactment is an important first step and represents an evolving recognition and growing consensus that environmental human rights will be the lens through which environmental protection disputes are viewed in this century.

Although constitutional statements of environmental rights are increasing, many national courts, such as those in Spain, Hungary, Turkey, Cameroon, and Namibia, have severely limited the operation of environmental rights provisions, often interpreting them to offer no substantive protections or cause of action.[146] This is likely for the same reasons that U.S. states have refused to do so. Judges are likely motivated by a desire to exercise restraint and promote legislative solutions to environmental problems.[147] In addition, countervailing economic and social factors, such as lack of political will or resource constraints, are likely to affect nations' decisions to enforce environmental rights provisions.[148]

At least one court has been receptive to recognition of environmental rights apart from constitutional sources. In *Lopez Ostra v. Spain*,[149] decided in the European Court of Human Rights, a Spanish citizen complained of noxious fumes, constant noise, and contamination from a waste treatment facility twelve meters from her home, which made her family's living conditions unbearable and caused them to suffer serious health problems.[150] Lopez Ostra claimed that the government authorities' passive attitude towards the nuisance and risks constituted "an unlawful interference with her home and her peaceful enjoyment of it, a violation of her right to choose freely her place of residence,

145. *See* Brooks, *supra* note 51, at 1108-09.

146. *Id.* at 136.

147. *See supra* Part II.A.2.

148. May, *supra* note 59, at 136; *see also* Shelton, *supra* note 132, at 25 ("[A]n internationally-recognized right to a safe and ecologically-balanced environment is unlikely at the global level because states fear the corresponding duties over time and over seas.").

149. Lopez Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) at 46 (1994), *available at* http://www.worldlii.org/eu/cases/ECHR/1994/46.html.

150. *Id.* ¶¶ 7-8, 47.

attacks on her physical and psychological integrity, and infringements of her liberty and her safety."[151]

The court agreed, finding that there had been a violation of privacy and family security.[152] The Spanish government failed to protect the applicant and her family from the environmental problems caused by the facility, despite the affirmative duty to do so under Article 8 of the European Convention.[153] The court noted that "[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[154]

The widespread and growing recognition of environmental human rights in international human rights law and in the constitutions of U.S. states and other nations has laid a firm foundation for enhancing the protection of international environmental human rights. Regulation of any significant international problem is best addressed where there is a healthy synergy between the measures that individual nations are undertaking to address issues within their borders and the measures that these nations would like to pursue on a more cooperative and integrated basis on the international level. The recognition of climate change as an international environmental crisis that needs to be regulated immediately has been approached in this fashion, and now the need to address the human rights impacts of climate change is the next step in addressing this domestic and international problem.

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151. *Id.* ¶ 10.

152. The court disagreed that Lopez Ostra was the victim of inhuman or degrading treatment in violation of Article 3 of the European Convention. *Id.* ¶ 60 ("The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3.").

153. *Id.* ¶ 58; *see also* European Convention on Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, *available at* http://www.hri.org/docs/ECHR50.html ("Everyone has the right to respect for his private and family life, his home and his correspondence . . . .There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

154. *Id.* ¶ 51.

III. THE INUIT PETITION: THE NEED FOR A VIABLE FORUM AND ENFORCEMENT MECHANISM FOR INTERNATIONAL ENVIRONMENTAL RIGHTS

The Inuit petition before the Inter-American Commission on Human Rights may mark the beginning of a new era in international environmental law, policy, and enforcement. The petition is supported by compelling scientific evidence that attests to the devastating impact that climate change is having, and will continue to have, on the Inuit population. The IACHR is the most promising of the available options for attempting to pressure the United States to consider more carefully the importance of implementing a mandatory GHG reduction regime. The theory of the Inuit petition draws on a compelling connection between the climate change impacts that the Inuit suffer and how the IACHR is empowered to fashion remedies that will respond to the Inuit's and the global community's interest in attaining U.S. compliance with federal climate change regulation before it is too late. Without such pressure on the United States now, indigenous populations like the Inuit risk becoming among the first to lose their homeland and subsistence lifestyle because of the climate change impacts that they are now experiencing in the Arctic region.

A. *The Evidence: The 2004 Arctic Climate Impact Assessment*

The 2004 Arctic Climate Impact Assessment (ACIA) is a comprehensive international evaluation of the present and future impacts of Arctic climate change.[155] Hundreds of scientists worked on the report over a four-year period, and it includes the specialized knowledge of the area's indigenous people.[156] "Records of increasing temperatures, melting glaciers, reductions in the extent and thickness of sea ice, thawing permafrost, and rising sea level all provide strong evidence" of recent global climate change.[157] The document recognizes the "international scientific consensus" that human activities, namely the burning of fossil fuels, are responsible for most of the warming observed in the last

155. ARCTIC CLIMATE IMPACT ASSESSMENT, *supra* note 1, at iii.

156. *Id.* In preparing the report, experts evaluated various types of evidence, including field and laboratory experiments, observed trends, theoretical analyses, and model simulations. *Id.* at 26.

157. *Id.* at 22.

fifty years.[158] The ACIA reports that the warming effects are particularly severe in the Arctic region, where the average temperature has risen at almost twice the rate as the rest of the world.[159] An acceleration of this warming trend is expected as the concentration of greenhouse gases in the atmosphere continues to increase,[160] with temperature increases of 3-5°C over land areas, and up to 7°C over oceans.[161] The most dramatic warming of all the sub-regions occurred in Alaska, Chukotka, and Western Canada.[162]

In the past thirty years, the annual average sea-ice coverage in the Arctic region has decreased by about 8%–an area larger than all of Norway, Sweden, and Denmark combined.[163] Summer sea-ice has suffered an even greater loss of 15-20%, and this melting trend is accelerating,[164] with some models projecting an almost total loss of summer sea ice by 2100.[165] The sea ice that remains is becoming thinner, with average reductions at 10-15%, with some areas showing a loss of thickness up to 40%.[166]

Arctic warming is further evidenced in the thawing of permafrost.[167] Permafrost temperatures have risen as much as 2°C in the past few decades, and permafrost degradation is projected to affect 10-20% of the present permafrost area in the next century.[168] In addition, the southern limit of permafrost is projected to shift northward by several hundred kilometers.[169]

Seasonal changes in the Arctic region have already been documented. The arrival of spring, although unquestionably occurring earlier, is particularly variable.[170] The season of river and lake ice has decreased by 1 to 3 weeks in some areas as a result of

158. *Id.* at 2.

159. *Id.* at 8.

160. *Id.* The ACIA findings do not represent a worst-case scenario but rather use a temperature increase that falls below the middle range of the projections considered by the Intergovernmental Panel on Climate Change. *Id.* at 27.

161. *Id.* at 28.

162. *Id.* at 118.

163. *Id.* at 25.

164. *Id.*

165. *Id.* at 30.

166. *Id.* at 25.

167. *Id.* at 74. Permafrost is soil, rock, or sediment that has remained below freezing for two or more consecutive years. *Id.* at 87.

168. *Id.*

169. *Id.*

170. *Id.* at 94.

later autumns and earlier springs.[171] Weather patterns have become more severe and less predictable in the Arctic. Experienced hunters and elders, who could previously accurately predict weather patterns using traditional methods, are no longer able to do so.[172] Thunderstorms with high winds are occurring more frequently and without warning,[173] and sea-ice no longer shields traveling vessels or coastlines.[174]

Snow quality changes have been widely observed in the Arctic[175] and are expected to continue. Changing wind patterns cause snow to be hard-packed.[176] The Arctic has also seen an increase in rain and freezing rain.[177] An increase in thawing and freezing cycles in the winter leads to ice layer formation, which coats plants in a layer of ice and destroys the snow's insulating properties.[178]

Shifts in vegetation are projected to result from rising temperatures.[179] Warmer weather favors taller, denser vegetation, and will promote the expansion of forests into the Arctic tundra, and the tundra into the polar deserts.[180] Tundra is expected to decrease to its lowest level in the past 21,000 years.[181]

Although this rapid warming has important global implications, its effects are most significant on the indigenous people who rely on the predictability and resources of the unique Arctic climate for their survival and cultural identity.[182] Flexibility and adaptability have always been integral to the survival of Arctic indigenous people, but indigenous knowledge cannot adapt fast enough to keep up with the consequences of Arctic climate change.[183] The ACIA concludes 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,

171. *Id.* at 13.
172. *Id.* at 96.
173. *Id.*
174. *Id.* at 97.
175. *Id.* at 96.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 46.
180. *Id.*
181. *Id.*
182. *Id.* at 11.
183. *Id.* at 93.

> contributing to major physical, ecological, social, and economic changes, many of which have already begun.[184]

Mindful of the impacts that these changes will have on the Inuit, the ACIA added that "[f]or 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 on to decline, become less accessible, and possibly become extinct."[185]

Arctic warming affects the Inuit in two main ways: (1) the food sources on which they rely for both sustenance and cultural identity are threatened and (2) they are unable to travel safely in pursuit of these food sources. These effects are attributable to the reduction and destabilization of sea ice, altered seasons and unpredictable weather patterns, and changing snow and precipitation characteristics. Sea ice in particular is extremely important to Inuit culture and is described as "a supporter of life."[186] "It brings the sea animals from the north into our area and in the fall it also becomes an extension of our land. When it freezes along the shore, we go out on the ice to fish, to hunt marine mammals, and to travel . . . . When it starts disintegrating and disappearing faster, it affects our lives dramatically."[187]

Inuit depend on many animals for sustenance and cultural identity, including polar bears, caribou, sea birds, and various types of seals. Arctic melting will likely have a devastating effect on these species. For example, polar bears rely on sea ice for traveling and seal hunting.[188] Mother polar bears fast for 5-7 months and depend on good spring ice conditions for seal-hunting success.[189] Early break-up of spring sea ice could separate traditional den sites from traditional feeding areas, and young cubs cannot swim long distances from the dens to feed.[190] Polar bears are unlikely to survive as a species if there is a near-complete loss of summer sea ice.[191] In addition, increased spring rain has caused some polar bear dens to collapse, killing the females and cubs trapped underneath.[192]

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184. *Id.* at 10.
185. *Id.* at 16.
186. *Id.* at 24.
187. *Id.*
188. *Id.* at 58.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

Various species of seals also depend on the ice, giving birth to and nursing their pups on the ice and using it as a resting platform.[193] The ice must be strong enough to successfully rear young. Earlier ice break-up could result in premature separation of mothers and pups, leading to higher newborn death rates.[194] The ice edge also provides an important location for foraging.[195] The decrease in snow has caused hardships for species of seals which require sufficient snow cover to construct lairs.[196]

Herds of caribou, although not directly dependent on sea ice, also have been adversely affected by the impacts of climate change. Caribou and reindeer, which provide indigenous people with food, shelter, fuel, tools, and cultural items, are dependent on tundra vegetation, especially during calving season.[197] Deeper snows and more freeze-thaw cycles produce poorer quality vegetation, which limits the caribou's ability to forage and delays the caribou's northern migration.[198] Ice crusting from freeze-thaw events has been reported with increasing frequency and resulted in dramatic reindeer population crashes.[199] Records and oral history show that times of caribou scarcity were often accompanied by great human hardship and coincide with periods of climate change.[200] Today, caribou remain a central feature of the mythology, spirituality, and cultural identity of the Inuit.[201]

Water from rivers, lakes, and wetlands have drained into groundwater as a result of permafrost melting, eliminating the aquatic habitat of freshwater fish and birds, limiting migration paths and impairing fish migration.[202] Vegetation shifts will greatly reduce the breeding area and grazing areas for many birds and land animals that depend on the open landscape of tundra and polar desert habitats.[203] Mosses and lichens are particularly vulnerable to warming, and because these plants are the bases of the Arctic food chain, their decline can have far-reaching impacts

193. *Id.* at 59.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 70.
198. *Id.* at 72.
199. *Id.* at 69.
200. *Id.* at 71.
201. *Id.*
202. *Id.* at 74, 90.
203. *Id.* at 46.

throughout the ecosystem.[204] All of these species face additional stress from increases in disease, pollution, competition, and human traffic and development in previously inaccessible, ice-covered areas.[205]

As these important species become increasingly scarce, Inuit are presented with more challenges in trying to reach them. While generally more accessible in winter when the tundra is frozen and ice bridges and roads are available, Arctic land becomes soggy and boggy when permafrost thaws, which jeopardizes land travel.[206] Ice roads are useable for shorter periods of time, and snow travel is limited when there is less snow for a shorter duration.[207] Seas are more stormy, violent, and dangerous for travelers because thinner, less extensive sea ice allows winds to generate greater waves.[208] Although ice bridges have traditionally formed as early as October, Inuit must now wait until early December to venture on the ice.[209] Changes in the rate and timing of spring melt and increased variability with spring weather conditions affect access to hunting and fishing camps.[210]

Prevailing wind patterns, upon which Inuit reindeer herders in Norway rely for navigation, have shifted, forcing changes in traditional travel routes.[211] An ice layer and hard-packed snow caused by stronger winds makes it more difficult for the Inuit to use snow cover for shelter and insulation.[212] Multiple deaths and injuries have been attributed to the unavailability of good snow to build igloos to protect hunters and travelers from the weather.[213]

Because hunting, catching, and sharing of traditional food sources, such as ringed seals, polar bears, and caribou, are the "essence of the Inuit culture,"[214] the Inuit are not just losing a food

204. *Id.* at 68.
205. *Id.* at 60.
206. *Id.* at 86.
207. *Id.* at 86, 119.
208. *Id.* at 78, 97.
209. *Id.* at 97.
210. *Id.* at 94.
211. *Id.* at 92.
212. *Id.* at 96.
213. *Id.*
214. *Id.* at 94. The bonds that are formed by the sharing of food and labor among many in the community are central to Inuit culture. *ICC Petition*, *supra* note 3, at 18. Sharing the hunt among community members serves two practical purposes: (1) harvesting large animals requires a cooperative effort and results in lots of food, and (2) it sustains individual families when their endeavors are sometimes unsuccessful. *Id.* at 18.

source, but an important source of their cultural identity.[215] As stated by Sheila Walt-Cloutier:

> [T]he process of the hunt and eating of our country food personifies what it means to be Inuit. It is on the land that our values and age-old knowledge are passed down from generation to generation. . . . The wisdom of the land and process of the hunt teaches young Inuit to be patient, courageous, tenacious, bold under pressure, reflective to withstand stress, to focus and carry out a plan to achieve a goal. . . . Hunting and eating the animals we hunt are spiritual and cultural activities.[216]

Rich mythologies, festivals, and animal ceremonies illustrate the deep social and spiritual relationships that indigenous people have with the Arctic.[217]

These changes are happening too rapidly for the Inuit to adapt and are exacerbated by many other simultaneous changes, including pollution, increased UV radiation, and habitat destruction.[218] Although decreased availability of traditional food sources and direct impairment of the ability to travel are already occurring and expected to worsen, Inuit are also likely to experience less tangible negative impacts from climate change, such as increased mental and social stresses related to changes in their environment and lifestyle and a corresponding loss of cultural identity.[219]

B. *The Forum: The Inter-American Human Rights Commission*

The Inter-American Human Rights (IAHR) regime consists of two bodies that work to promote and protect human rights: the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court).[220] Both bodies are governed by the Organization of American States

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215. ARCTIC CLIMATE IMPACT ASSESSMENT, *supra* note 1, at 94.

216. Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Remarks at The World Bank Environmentally and Socially Sustainable Development Week. (Mar. 30, 2005), *available at* http://www.inuitcircumpolar.com/index.php?ID=290&Lang=En.

217. ARCTIC CLIMATE IMPACT ASSESSMENT, *supra* note 1, at 94.

218. *Id.* at 106.

219. *Id.* at 110-11.

220. American Convention on Human Rights art. 33, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *available at* http://www.cidh.org/Basicos/basic3.htm [hereinafter American Convention].

(OAS).[221] The OAS was formed in 1948 to strengthen cooperation and advance common interests among countries of the Western Hemisphere, and it works to promote good governance, foster peace and security, expand trade, and strengthen human rights.[222]

In 1959, the Commission was created under the OAS Charter "to promote the observance and protection of human rights."[223] The Commission examines petitions claiming violation of rights protected under the IAHR scheme.[224] Based on these petitions, the Commission investigates and monitors human rights abuses in the thirty-five OAS member states and may recommend remedial measures.[225] The Commission also conducts on-site visits to member states to analyze and report on the status of human rights.[226]

In 1969, an OAS Charter amendment required that a convention on human rights determine the structure and procedure of the IAHR Commission.[227] The resulting American Convention on Human Rights (the Convention) outlines the function, competence, procedure, and organization of the Commission[228] and provides a new list of protected rights.[229] Currently, twenty-five of the thirty-five member states have ratified the Convention and are bound by its provisions.[230] Unfortunately, neither the United States nor Canada have ratified the Convention,[231] so they are only bound by the OAS Charter and

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221. *Id.* chs. VII-VIII.

222. Charter of the Organization of American States art. 1-2, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951), *available at* http://iachr.org/Basicos/charter.htm [hereinafter OAS Charter].

223. *Id.* art. 106.

224. Statute of the Inter-American Commission on Human Rights, OAS G.A. Res. 447, art. 19, Inter-Am C.H.R., 9th Sess., OAS/Ser.L/V/I.4 rev.8 (Oct. 1979), *available at* http://iachr.org/Basicos/basic15.htm.

225. *Id.* art. 18.

226. *Id.*

227. Protocol of Buenos Aires art. 112, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970).

228. *See generally* American Convention, *supra* note 220, at pt. II.

229. *Id.* chs. II-III.

230. At present, Argentina, Barbados, Bolivia, Brazil, Chile, Columbia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela are parties to the Convention. Signatures and Current Status of Ratifications, American Convention on Human Rights, http://www.cidh/org/Basicos/basic4.htm (last visited Mar. 13, 2007).

231. *See* Signatories and Ratifications, American Convention on Human Rights,

original Declaration of the Rights and Duties of Man.[232] Although the Declaration and the Convention enumerate similar rights,[233] the Convention provides for active realization of "rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States . . ."[234]

All complaints brought under the Inter-American Human Rights regime begin with the Commission, which may later refer cases to the Court under appropriate circumstances.[235] Any person, group of persons, or legally recognized non-governmental entity may present a petition to the IAHR Commission regarding an OAS member state's alleged violation of a human right recognized under the IAHR regime. Petitioners may act either on their own behalf or on behalf of others,[236] and the state need not have committed the violation directly. In the *Velasquez Rodriguez Case*,[237] the Court held that states have a responsibility to use due diligence to prevent, investigate, and address human rights violations committed by private actors within the state.[238] This allows the IAHR bodies to intervene in situations where private corporations, rather than government agents, are committing violations.

To dispose of a petition, the Commission must first declare it admissible,[239] conduct an investigation if necessary,[240] explore possibilities for a friendly settlement,[241] and deliberate and prepare

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http://www.oas.org/juridico/english/sigs/b-32.html (last visited Mar. 13, 2007).

232. Statute of the Inter-American Commission on Human Rights, *supra* note 224, arts. 18-20. Although the United States signed the treaty, the Senate failed to ratify it. Under the Vienna Convention on the Law of Treaties, the United States has an obligation as a treaty signatory to refrain from engaging in acts that would defeat the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

233. *Compare* American Declaration on the Rights and Duties of Man, OEA/Ser.L/V/I.4, rev. 9, ch. 1, *available at* http://iachr.org/Basicos/basic2.htm *with* American Convention, *supra* note 220, chs. II-III.

234. American Convention, *supra* note 220, ch. III.

235. Rules of Procedure of the Inter-American Commission on Human Rights, OAS Special Res., art. 44, 109th Sess. (Dec. 4-8, 2000, amended Oct. 7, 2002 and Oct. 7, 2003), *available at* http://iachr.org/Basicos/basic16.htm [hereinafter Rules of Procedure].

236. *Id.* art. 23.

237. Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988), *available at* http://wwwl/umn.edu/humanrts/iachr/b_11_12d.htm.

238. *Id.* ¶¶ 174-76.

239. Rules of Procedure, *supra* note 235, art. 30.

240. *Id.* art. 40.

241. *Id.* art. 41.

a report.[242] Only upon the conclusion of this process may the Commission submit the case to the Court, with its "fundamental consideration [being] obtaining justice in the particular case."[243] Although the Convention provides little guidance to the Commission in determining which cases to refer to the Court, the Court has identified several determinative characteristics, including controversial legal issues not previously decided by the Court, conflicting domestic proceedings, and subject matter of special importance to the hemisphere.[244] Remedies may include compensatory damages and reasonable attorneys' fees or a temporary injunction to correct a violation or prevent future harm; such remedies are enforced in the state's domestic courts.[245] If the Commission declines to refer a case to the Court, it publishes its opinion and makes recommendations concerning a human rights violation.[246] Decisions of the Commission are not binding or specifically enforceable in any state.[247] Because neither the Court's decisions nor the Commission's recommendations are binding on the United States, they are of equal persuasive value and are not distinguished for purposes of this article.

Currently, only two agreements bind all members of the OAS: the OAS Charter and the American Declaration of the Rights and Duties of Man. The OAS Charter is based on mutual respect of the sovereignty of its member states and promotes peaceful settlement

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242. *Id.* arts. 42-43.

243. *Id.* art. 44. In this way, the Commission acts as the state attorney of the OAS, bringing claims on behalf of all the member states where it believes OAS principles have been violated.

244. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Inter-Am. Ct. H.R. (ser. A) No. 5, at ¶ 25 (1985) (advisory opinion concerning articles 13 and 29 of the American Convention on Human Rights), *available at* http://wwwl.umn.edu/humanrts/iachr/b_11_4e.htm.

245. *See* Jennifer A. Amiott, Note, *Environment, Equality and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL. L. 873, 889 (2002). The IAHR Court derives its authority solely from the Convention; therefore its judgments are only binding on the twenty-two states that have ratified it and specifically accepted the Court's jurisdiction. Of the twenty-five states ratifying the Convention, only Dominica, Grenada, and Jamaica have not accepted the contentious jurisdiction of the Court. *See* Signatories and Current Status of Ratifications: American Convention on Human Rights,
http://www.cidh.org/Basicos/basic4.htm (last visited Jan. 25, 2007).

246. Rules of Procedure, *supra* note 235, arts. 42-43, 45.

247. *See id.* art. 46 (vesting authority in the Commission only to make recommendations, request additional information, and write reports on the offending state's compliance).

of disputes.[248] Most relevant to the discussion of environmental human rights is the provision requiring member states to "refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States."[249] The Charter further recognizes the right to material well-being and spiritual development, "under circumstances of liberty, dignity, equality of opportunity, and economic security."[250]

The American Declaration of the Rights and Duties of Man is an OAS resolution, incorporated by reference,[251] and recognizes a myriad of rights common to all human beings, including the right to life, liberty, property, security of person, protection against abusive attacks, inviolability of the home, and the preservation of health and well-being.[252] The American Declaration states that "it is the duty of man to preserve, practice and foster culture by every means within his power."[253]

Although not adopted or binding on any OAS member states, the Proposed American Declaration on the Rights of Indigenous Peoples[254] is persuasive authority regarding the current state of environmental human rights. Approved in 1997, the proposed declaration applies general human rights concepts to the indigenous context, recognizing the unique relationship indigenous people have with the environment and their cultural, social, and economic dependence upon it.[255] Specific rights include the rights to belong to an indigenous people,[256] limited self-government,[257] protection from assimilation,[258] and cultural integrity.[259]

In addition, the proposed declaration explicitly provides a

248. OAS Charter, *supra* note 222, art. 3(c)-(d), (i)-(k).

249. *Id.* art. 35.

250. *Id.* art. 45(a).

251. Statute of the Inter-American Commission of Human Rights, *supra* note 224, art.1(2).

252. American Declaration on the Rights and Duties of Man, *supra* note 233, ch. 1.

253. *Id.*at Preamble.

254. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 1333rd sess., OEA/Ser/L/V/.II.95, art. 1(1) (1997), *available at* http://www.cidh.org/Indigenous.htm.

255. *Id.* Preamble (3), art. II.

256. *Id.* art. III.

257. *Id.* art. XV.

258. *Id.* art. V.

259. *Id.* art. VII.

right to environmental protection.[260] The Commission has recognized this special relationship since 1972, when it proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[261] In 1983, the Commission reiterated this principle by finding that the Miskito People of Nicaragua deserved "special legal protection" to preserve their cultural identity and native lands.[262] In a 1997 report on the state of human rights in Ecuador, the Commission added that:

> Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. . . . [and] to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.[263]

As an alternative, the Commission and Court have the power to declare that the right to a healthy environment exists under natural or customary law. The Convention states that a provision of state or international law may not limit a broad right that is "inherent in the human personality."[264] In the Commission's 1997 Report on Ecuador, it concluded that:

> Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[265]

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260. *Id.* art. XIII.

261. REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, *supra* note 27, ch. IX, n.18 (quoting Resolution of the Inter-Am. C.H.R. on the Problem of Special Protection for Indigenous Populations, Inter-Am. C.H.R., OEA/Ser.L/V/II.29, doc. 38 rev. 1 (1972).)

262. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3, pt. 2(B)(15) (1983), *available at* http://www.cidh.org/countryrep/Miskitoeng/toc.htm.

263. REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, *supra* note 27, ch. IX.

264. American Convention, *supra* note 220, art. 29(c).

265. REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, *supra* note 27, ch. VIII.

Prior decisions in the IAHR system indicate that the right to a healthy environment is an inherent and inviolable right. In 1985, the Commission first considered claims of environmental degradation as a violation of the right to life. The Yanomami Indians, an indigenous tribe in Brazil, petitioned the Commission after the government began to build a major highway through their native lands and discovered valuable mineral deposits.[266] The construction and resulting influx of prospectors displaced native communities and caused epidemics of influenza and tuberculosis.[267] The Commission found that the construction resulted in violations of the Yanomami's rights to life, liberty, personal security, residence and movement, and preservation of health and well-being.[268] Although the report did not mention violations of the Yanomami's right to cultural identity or the importance of the environment to its survival, the Commission's findings linked the necessity of a healthy environment to a well-established human right – the right to life. Unfortunately, the Commission's report is merely a recommendation, and little progress has been made despite the government's guarantees of protection.

In 1990, the Huarorani Indians petitioned the Commission, alleging that human rights violations resulting from oil drilling in their native lands contrary to an explicit provision in the Ecuadorian constitution guaranteeing "the right . . . to live in an environment free from contamination."[269] In its 1997 report, the Commission focused on the environmental effects of oil development, not just the effect on human health as in the Yanomami case, and described in detail the pollution and its effect on the Huarorani.[270] The Commission recognized that the right to life and the right to physical security and integrity include more than the right to be protected from arbitrary violence.[271] The Commission concluded that "[t]he realization of the right to life, and to physical security and integrity is necessarily related to and

266. Brazil, Case 7615, Inter-Am. C.H.R., Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10 ¶ 2 (1985), *available at* http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm.

267. *Id.* ¶ 3(a).

268. *Id.* ¶ 13.

269. REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, *supra* note 27, ch. II (quoting ECUADOR CONST. art. 22).

270. *Id.* ch. VIII.

271. *See id.*

in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."[272]

The Commission noted:

> [Although] the right to development implies that each state has the freedom to exploit its natural resources, ... the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment *which translate into violations of human rights* . . ."[273]

Thus, severe environmental pollution may pose a threat to human health and life, and in some cases may impose upon a state the obligation to take reasonable measures to prevent and respond to those risks associated with environmental degradation.[274]

In 2001, the IAHR Court ruled against Nicaragua in an indigenous land rights case,[275] and linked the right to a healthy and usable environment to the right to property. The Nicaraguan government granted a logging concession to a Korean firm within the native ancestral lands of the Awas Tingni, even though the Nicaraguan Constitution provides broad autonomy to indigenous populations.[276] The petition, which the Commission relayed to the Court, alleged that the logging violates the Awas Tingni's right to secure property, cultural integrity, religion, equality before the law, and participation in government.[277]

The IAHR Court upheld the Awas Tingni's right to its ancestral lands, resources, and environment and found that Nicaragua violated their right to property and judicial protection. The

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272. *Id.* Moreover, "respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being." *Id.*

273. *Id.* (emphasis added).

274. *See id.*; *see also* Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUM. J. ENVTL. L. 371, 388 (2003).

275. Mayagna Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001), *available at* http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html.

276. *Id.* ¶¶ 2, 27.

277. *Id.* ¶¶ 2, 156.

government's failure to prevent environmental damage to indigenous lands caused "catastrophic damage" to the Awas Tingni because "the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally, depend[ed] on the collective, communitarian existence and maintenance of the land . . ."[278] The Nicaraguan government was ordered to recognize and demarcate the traditional territories of its indigenous people.[279] Further, the court enjoined the Nicaraguan government from acting in any way that could adversely impact the value, use, or enjoyment of the resources in the territories of the Awas Tingni until the lands were properly demarcated.[280] After this case, states can no longer use their domestic laws to justify exploiting the human rights and environments of their indigenous people.[281]

Three years later in an almost identical case involving logging and oil concessions brought by the Mayan people against the state of Belize, the Commission issued a decision on the merits after proceedings for a friendly settlement were unsuccessful.[282] The Mayans' allegations related to four main areas: the traditional use and occupancy of the Mayan people of the subject territory; the impact of logging and oil concessions on their natural environment; lack of recognition and adequate protection of their indigenous lands; and unreasonable delay in domestic judicial proceedings.[283] In addition to current damage caused by destruction of their natural agriculture, hunting, and sacred lands, the Mayans also alleged future harms.[284]

The Mayans identified a threat of long-term and irreversible damage caused by top soil erosion where the land is stripped of forest cover, which could permanently diminish the availability of wildlife and plant resources, damage stream flows that control their water supplies, and damage coastal areas through siltation.[285]

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278. *Id.* ¶ 83(k).

279. *Id.* ¶ 153.

280. *Id.*

281. *See* Amiott, *supra* note 245, at 882-83.

282. Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 2 (2004), *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm.

283. *Id.* ¶ 20.

284. *Id.* ¶ 31.

285. *Id.* ¶¶ 32, 34.

Further, relying on the Commission's report on Ecuador in 1997, the Mayans alleged that oil drilling in Belize is likely to have a similar devastating impact on the health of individuals and wildlife as well as adverse social impacts caused by the influx of non-indigenous workers and settlers.[286] The Mayans relied on various articles of the American Declaration, as well as "general principles of international law" requiring the state to recognize and secure indigenous territorial rights.[287] In opposition, Belize claimed that it balanced the interests of its many cultural groups and decided to grant the concessions in the interest of the greater good.[288]

The Court noted that the Inter-American Human Rights regime has acknowledged that "use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly,"[289] and are independently protected under international law.[290] Thus, the Court concluded that Belize violated the Mayans' right to property, judicial protection, and equal protection.[291] The Court recommended that the state adopt domestic legislation to protect the Mayans' land use practices, demarcate the territorial lands, and repair the environmental damage resulting from the logging concessions.[292] The Court did not discuss the future threat of environmental damage, but held that depriving native people of a clean environment was a violation of the right to property.[293]

More recently, in 2005, the IAHR Court ratified provisional measures set by the Commission in 2004 requiring Ecuador to guarantee the rights of the Sarayaku community after the Ecuadorian government repeatedly threatened to militarize the Sarayaku territory to allow entry to a foreign oil company.[294] The resolution requires Ecuador to comply "strictly and immediately" with the orders from the Court "in order to effectively protect the

286. *Id.* ¶ 36.

287. *Id.* ¶ 45.

288. *Id.* ¶ 70.

289. *Id.* ¶ 114.

290. These rights are specifically protected by Article XXIII of the American Declaration of the Rights and Duties of Man. *Id.* ¶ 131.

291. *Id.* ¶¶ 193-96.

292. *Id.* ¶ 197(1)-(3).

293. *See id.* ¶ 193-94.

294. Sarayaku, *Inter-American Court Makes Pronouncement in Favor of Sarayaku*, Jul. 7, 2004, http://www.sarayacu.com/oil/news040707.html#eng.

life, personal integrity and free movement of all members of the indigenous people of Sarayaku."[295] This resolution required immediate removal of explosives placed in the Sarayaku territory for the purpose of seismic exploration.[296]

Also in 2005, the Court submitted a judgment on the merits and ordered reparations be paid to the Yakye Axa community in Paraguay for violations of their right to property, a dignified existence, education, and a cultural identity.[297] Dislocated from their ancestral lands, the Yakye Axa were forced to settle alongside a nearby roadway.[298] The desperate conditions in the settlement—including lack of potable water, food insecurity, lack of medical attention, and the dangerous physical proximity to the highway—resulted in the deaths of several community members and negatively impacted the community's "most vulnerable members—children and the elderly."[299] The Commission emphasized the need to restore the Yakye Axa to their exact ancestral lands to recover their roots, culture, and way of life.[300]

In clarifying its order requiring demarcation, title, and the return of sacred territory in the latter case, the Court stressed that the valuing of indigenous lands calls for criteria other than those usually applicable to private property.[301] Other considerations must be weighed because "indigenous community culture . . . derives from the relationship with traditional territories and the resources located therein, not only because these provide a means of subsistence, but because they are integral elements of their cosmovision, religion and their cultural identity."[302] In addition to

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295. Sarayaku, *Inter-American Court Ratifies Measures in Favor of Sarayaku*, Jun. 24, 2005, http://www.sarayacu.com/oil/news050624.html#eng.

296. *Id.* The people of Sarayaku employed a group of experts monitored by a commission of human rights organizations and the U.N. to ensure all the explosives are removed. *Sarayku Demands Removal of Explsosives*, Aug. 17, 2005, http://www.sarayacu.com/oil/news050817.html#eng.

297. Fabiola Carrion, *Updates From the Regional Human Rights Systems*, 13 HUM. RTS. BRIEF 25, 28 (2005), *available at* http://www.wcl.american.edu/hrbrief/13/131.pdf?rd=1.

298. Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay, Admissibility Petition 12.313, Inter-Am. C.H.R., Report No. 2/02, ¶ 20 (2002), *available at* http://www.cidh.org/annualrep/2002eng/Paraguay.12313.htm.

299. *Id.* ¶ 22.

300. Carrion, *supra* note 297.

301. *See id.*

302. F. Michael Willis & Timothy Seward, *Protecting and Preserving Indigenous Communities in the Americas*, A.B.A. SEC. OF INDIVIDUAL RTS. AND RESP. HUM. RTS. MAG. (2006) (quoting Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 135 (2005)), *available at*

paying reparations and creating a program to monitor and promote development of the Yakye Axa, Paraguay was required to perform a public act of recognition of responsibility.[303] This case links the right to a source of food and clean water to the right to life.

The Commission initially dismissed the Inuit petition in November 2006 after determining that the petition contained insufficient information for it to determine whether the alleged facts amounted to a violation of rights protected by the American Declaration.[304] However, in February 2007, the Commission granted the Inuit an opportunity to present evidence connecting human-induced climate change to international human rights.[305] The information presented at this hearing provides a unique opportunity for the Commission to investigate and study the effects of climate change on the Inuit and recognize violations of their rights to culture and subsistence.[306] Although a Commission recommendation can do little more than suggest a resolution, the publicity generated by an international human rights organization's acknowledgement of the link between GHG emissions, climate change, and the devastating effects on the Inuit's culture and subsistence lifestyle would be an important first step in effecting change on both a national and international level.

C. *The Theory of the Case*

As a member of the OAS, the United States is bound by the American Declaration, which protects, among other rights, the rights to life, liberty, property, and security of person.[307] The Commission stated that the American Declaration "should be interpreted and applied in [the] context of developments in the field of international human rights law . . . and with due regard to other relevant rules of international law applicable to member states . . ."[308] The United States has specifically accepted the

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http://www.abanet.org/irr/hr/spring06/willis.html.

303. Carrion, *supra* note 297.

304. Letter from Ariel E. Dulitzky, Assistant Executive Secretary of the Inter-American Commission on Human Rights, to Paul Crowley (Nov. 16, 2006), *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf.

305. Jonathan Spicer, *Hearing to Probe Climate Change and Inuit Rights*, REUTERS, Feb. 22, 2007, *available at* http://www.enn.com/med.html?id=1416.

306. *See id.*

307. *See* American Declaration on the Rights and Duties of Man, *supra* note 233.

308. Maya Indigenous Communities of the Toledo District (Belize Maya), Case

transboundary pollution principle,[309] which provides that:

> Under principles of international law, as well as 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 . . . .[310]

The United States has an international obligation to adhere to this principle of transboundary air pollution as a party to the Convention on Biological Diversity.[311] The transboundary pollution principle as contained in the Convention on Biological Diversity is broader than the obligation not to release transboundary fumes, which was at issue in the Trail Smelter case. Rather, the transboundary pollution principle requires that states act to ensure that their activities do not cause transboundary pollution in any form–whether it be by air, water, or by other means.

The Inuit petition before the Inter-American Commission on Human Rights cites several additional international human rights and international environmental law obligations that the United States has disregarded but that are contained in instruments to which the United States is a signatory.[312] These instruments include the International Covenant on Civil and Political Rights, the International Convention on Economic, Social, and Cultural

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12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 86 (2004) (citations omitted), *available at* http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm.

309. This principle requires that property be used in a manner that will not harm others and is a matter of customary international law, as well as the law of the United States. Austen L. Parrish, Trail Smelter Déjà Vu*: Extraterritoriality, International Environmental Law, and the Search for Solution to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 421 (2005) (discussing the Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938)).

310. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 253 (2006) (quoting Trail Smelter Arbitration, 3 R.I.A.A. at 1965).

311. Convention on Biological Diversity art. 3, Jun. 5, 1992, 1760 U.N.T.S. 79, (entered into force Dec. 29, 1993), *available at* http://www.biodiv.org/convention/articles.shtml?a=cbd-03 ("States have . . . 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.").

312. Under the Vienna Convention on the Law of Treaties, the United States has an obligation as a treaty signatory to refrain from engaging in acts that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

Rights, and the United Nations Framework Convention on Climate Change.[313] Under these instruments, the United States has committed to promote universal respect for and observance of human rights, including the right to self-determination and the benefits of culture,[314] to take steps for the conservation, development, and diffusion of culture,[315] and to develop and implement policies aimed at returning GHG emissions to 1990 levels and minimizing anthropogenic interference with the climate system.[316] Notwithstanding its withdrawal from the Kyoto Protocol, the U.S. remains bound by the obligations contained in Kyoto's precursor agreement, the United States Framework Convention on Climate Change.

The petition asserts that the Inuit's fundamental right to health and life, right to enjoy their personal property, right to residence and movement, and right to their own means of subsistence have been violated as a result of the impacts of climate change.[317] The petition seeks to have the United States, as the largest source of GHGs in the world, take immediate and effective action to protect the rights of the Inuit.[318] Because the petition raises transgressions of the American Declaration of the Rights and Duties of Man, to which the United States committed, the Inter-American Commission on Human Rights has jurisdiction to resolve the dispute.

The petition seeks a declaration that the United States is responsible for these human rights violations and seeks a report recommending that the United States perform the following:

> Adopt mandatory measures to reduce GHG emissions;
>
> Consider the impacts of its GHG emissions on the Arctic environment and peoples before approving all major government actions;
>
> Establish and implement a plan to protect Inuit culture and resources and mitigate any harm to these resources caused by its

313. *ICC Petition*, *supra* note 3, at 5. For a discussion of these obligations, see *supra* Part II.B.1.

314. ICCPR, *supra* note 118, art. 1.

315. ICESCR, *supra* note 117, art. 15.

316. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

317. *ICC Petition*, *supra* note 3, at 5-6.

318. *Id.* at 6-7.

GHG emissions;

Implement a plan to provide assistance necessary for Inuit to adapt to climate change related impacts that cannot be avoided.[319]

A direct suit against the United States is unlikely to succeed. Private persons cannot submit a case directly to the OAS Inter-American Court.[320] Moreover, the United States has not ratified the American Convention on Human Rights, so the Court's judgments are not binding upon it.[321] However, the United States participates in the OAS and the Inter-American system; therefore, the Commission is authorized to issue recommendations to resolve the Inuit's petition against the United States.[322]

Therefore, even though the Commission lacks authority to compel the U.S. to act to implement a mandatory GHG regulatory system, the Inuit petition nonetheless has great significance. The primary purpose of the petition is to raise international awareness of the impacts of climate on the Inuits' rights to culture and subsistence. This publicity in turn can mobilize political will to formulate a more meaningful international response to human rights theories and to respond to climate change impacts.

IV. ANALYSIS OF POSSIBLE THEORIES OF RECOVERY

There are two types of legal theories through which there may be recovery for climate change impacts outside the United States. The first type includes extraterritorial and transboundary theories that work within the existing systems of rights and remedies available under domestic and international law. In this context, U.S. law can be applied outside U.S. boundaries, such as through ATCA claims or in the extraterritorial application of the Endangered Species Act, to afford indigenous cultures or species recovery for or protection from climate change impacts. In addition, existing principles imposing responsibility for transboundary harm under international environmental law are also relevant to limit the environmental human rights impacts of

319. *Id.* at 7-8.

320. *See supra* notes 234-35 and accompanying text.

321. *See* American Convention, *supra* note 220; Signatories and Ratifications, American Convention on Human Rights, http://www.oas.org/juridico/english/sigs/b-32.html (last visited Jan. 25, 2007).

322. *See* Statute of Inter-American Commission, *supra* note 224, art. 18.

U.S. actions.

A second approach involves the integration and enhancement of existing domestic and international legal mechanisms to develop a system of remedies and forums for recognition and protection of environmental human rights. This approach has both substantive and procedural dimensions. On the substantive side, enhancing the integration between the U.S. environmental justice theory and sustainable development may give the rhetorical policy underpinnings of sustainable development in international environmental law more meaningful practical effect in protecting environmental human rights.

At a procedural level, human rights impacts assessments can help ensure that environmental human rights impacts are always recognized when evaluating proposed development projects, similar to the success of the "look before you leap" rationale underlying the National Environmental Policy Act (NEPA).[323] Like substantive and procedural due process protections under U.S. law, these evolving substantive and procedural dimensions work together to effectively protect environmental human rights.

A. *Extraterritorial Theories*

There are two theories under which extraterritorial claims applying U.S. law may be asserted to address the plight of the Inuit: (1) ATCA claims grounded either in violations of treaties to which the United States is a party or signatory, or violations of the law of nations; and (2) other transboundary theories.

1. *Environmental human rights claims under the ATCA.*

On September 24, 1789, Congress enacted the ATCA,[324] most

323. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (Westlaw 2007).

324. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. The current version of the ATCA is codified at 28 U.S.C. § 1350 (Westlaw 2007). Although the purpose of the Federal Judiciary Act was to organize the newly created federal judicial system, the purpose of the ATCA is not clear and has been extensively debated given the Act's complete lack of formal legislative history. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.10 (2d Cir. 2000) ("The [Alien Tort Claims] Act has no formal legislative history."); Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 756 (2004). Despite this absence of legislative history, Judge Edwards suggested that the ATCA was enacted to ensure that alien claims were litigated in federal courts, rather than state courts, to prevent

likely to "provide extraterritorial jurisdiction over the crimes of piracy, slave trading, violations of safe conduct, and the kidnapping of ambassadors."[325] Under the ATCA, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[326] There are three elements that must be established in a cause of action under the ATCA: 1) an alien sues, 2) for a tort, 3) that is committed in violation of the law of nations.[327]

a. *The ATCA as a vehicle for human rights litigation.*

The modern era of ATCA jurisprudence began in 1980 with the Second Circuit's decision in *Filartiga v. Pena-Irala.*[328] In *Filartiga,* the plaintiff, a Paraguayan citizen, brought suit under the ATCA against the former Inspector General of Police of Paraguay for

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international incidents resulting from the mishandling of such claims. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782-83 (D.C. Cir. 1984) (Edwards, J., concurring). *See also* Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 597 (2006) ("The inclusion of the [ATCA] in the Judiciary Act reflects the First Congress's distrust of the state courts' ability and willingness to properly adjudicate aliens' claims involving the law of nations."). Others agree that the ATCA was part of the Federalists' effort to ensure that federal courts heard all cases involving foreigners and foreign affairs. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor,* 83 AM. J. INT'L L. 461, 465 (1989). Still others believe the scope to be even narrower and assert that the ATCA was created solely in response to cases where ambassadors and other alien plaintiffs were denied an impartial forum or where torts were committed by crews of vessels boarding ships suspected of aiding the enemy during times of war. *See* James Boeving, Essay, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post* Sosa v. Alvarez Machain, 18 GEO. INT'L ENVTL. L. REV. 109, 110-11 (2005) (citing William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 CONN. L. REV. 467, 488-510 (1986)); *see generally* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations,* 18 HASTINGS INT'L & COMP. L. REV. 445 (1995). For a discussion of the challenge of ascertaining ATCA intent in the post-*Filartiga* world, see generally Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act,* 16 FLA. J. INT'L L. 249 (2004).

325. Abadie, *supra* note 324, at 757.

326. 28 U.S.C. § 1350 (Westlaw 2007).

327. Reed, *supra* note 24, at 405.

328. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Prior to this, the ATCA was only invoked as a basis for jurisdiction two times in its first two hundred years. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (relying on the ATCA in a suit to determine title to slaves on board an enemy vessel taken on the high seas to "dismiss all doubt" regarding jurisdiction); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (holding that a mother committed a tort in violation of the law of nations where she took her daughter from country to country under a false passport in an attempt to withhold her from her father's rightful custody in violation of Muslim law).

torturing and killing his son.[329] The Second Circuit overturned the district's court decision to construe the law of nations narrowly, holding that in light of the "universal condemnation" of torture, such an act committed by a state official is clearly a violation of the law of nations;[330] therefore, jurisdiction was proper under the ATCA.[331]

In so holding, the *Filartiga* court recognized that the substance of customary international law was based on the decisions and customs and usages of the great majority of civilized nations[332] and "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[333] The court then rejected the notion that the law of nations remains static; instead, it evolves to keep pace with rights and duties recognized by the international community.[334]

Finally, the court recognized that international law is part of U.S. law and that plaintiffs could rely on customary international law where there is no treaty or controlling executive or legislative act or judicial decision that could supersede customary international law.[335] Following these principles, the majority concluded that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, section 1350 provides federal jurisdiction."[336] After *Filartiga*, it became clear that norms of international law would be enforceable in United States

329. Filartiga, 630 F.2d at 876.

330. *See id.* at 890 ("In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights.").

331. *Id.* at 880.

332. *Id.* (relying on *The Paquete Habana*, 175 U.S. 677, 687-708 (1900)).

333. *Id.* (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820)).

334. *Id.* at 881.

335. *Id.* at 882.

336. *Id.* at 878, 890. ("In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights."). The court discerned the international prohibition ofn torture from the U.N. Charter, the Universal Declaration of Human Rights, the U.N. Declaration Against Torture, the OAS Declaration of Rights and Duties of Man, and affidavits from various law professors. *Id.* at 881-85. The Second Circuit acknowledged that these sources were not binding in themselves because they were not self-executing without state action incorporating them into domestic law. *Id.* at 881-82.

courts,[337] so long as the court is able to determine whether the law is binding, and whether a violation has occurred.[338]

As written, the ATCA provides two ways for foreign plaintiffs to engage the jurisdiction of U.S. courts. A plaintiff may allege (1) a tort that violates "a treaty of the United States," [339] or (2) a tort in violation of the law of nations.[340] Few plaintiffs have attempted to establish jurisdiction under the first prong of the ATCA by alleging violation of a treaty, and only one such claim has been successful since *Sosa*'s narrow reading of the ATCA. In 2005, the Seventh Circuit held in *Jogi v. Voges*[341] that the Vienna Convention on Consular Relations was both self-executing and sufficiently specific to allege a cause of action under the ATCA.[342] Subject matter jurisdiction existed and the alien plaintiff was permitted to proceed with a claim for violation of his right to consular assistance under that treaty.[343]

Since *Filartiga*, the second prong of the ATCA has been used to bring suits for human rights offenses committed in violation of the

337. *Id.* at 887.

338. *Id.* at 881. Judge Bork criticized the *Filartiga* decision in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, affirming dismissal for lack of subject matter jurisdiction in an ATCA case involving an armed attack on a civilian bus. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring). Judge Bork reasoned (1) that separation of powers principles required an explicit grant from Congress to grant a private right of action in a suit affecting foreign relations, and (2) that to assume the law of nations as defined in 1789 incorporated all modern international law rules would run contrary to the Framers' general purpose – to avoid foreign conflict – and to the traditional minimalist role of the courts in foreign affairs. *Id.* at 801-04, 812-13. However, in 1991, Congress responded to *Tel-Oren* by passing the Torture Victim Protection Act (TVPA), which provides a federal cause of action for damages "against any individual who, under actual or apparent authority, or under color of law, . . . of any foreign nations, subjects any individual to torture . . . or . . . extrajudicial killing." Torture Victim Protection Act, 28 U.S.C. § 1350 (Westlaw 2007). Judge Bork's opinion has been generally disregarded, and application of the ATCA rests primarily on *Filartiga*'s analysis. *See* Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 956 (2001).

339. Reed, *supra* note 24, at 406. The second prong is likely subject to two limitations: the United States must be a party to the treaty, and the treaty must be either self-executing or adopted by Congress. *See* Boeving, *supra* note 324, at 117.

340. *Id.* Customary international law is included in the "law of nations." *See, e.g.*, Filartiga, 630 F.2d at 884.

341. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).

342. *Id.* at 375, 385.

343. *Id.* at 386. *But see* Frazer v. Chi. Bridge & Iron, No. 05-3109, 2006 U.S. Dist. Lexis 23367, at *17 (S.D. Tex. 2006) (rejecting ATCA claim alleging violation of the OAS Charter related to principles of labor relations, standards and fair working conditions because the Charter was unenforceable for lack of specificity).

law of nations. In *Kadic v. Karadzic*, the Second Circuit used *Filartiga*'s analysis to establish genocide and war crimes as prohibited by customary international law.[344] This analysis has resulted in international law violations in suits alleging torture,[345] summary execution and disappearances,[346] and prolonged arbitrary detention.[347]

Nevertheless, the "law of nations" element of the ATCA presented an ongoing challenge for courts because the meaning of "the law of nations" remained unsettled. Not only had the ATCA remained dormant for the majority of its existence, but the United States Supreme Court had not yet articulated a conclusive definition of the law of nations.[348]

The U.S. Supreme Court first considered the scope and meaning of the ATCA in *Sosa v. Alvarez-Machain*,[349] holding that the

344. Kadic v. Karadzic, 70 F.3d 232, 241-43 (2d Cir. 1995). In considering the genocide claim, the court relied on the U.N. General Assembly Resolution, Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Genocide Convention Implementation Act of 1987. *Id.* at 241-42. In considering the war crimes claim, the court relied on a U.S. Supreme Court case, the four Geneva Conventions, and scholarly articles. *Id.* at 242-43.

345. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 499 (9th Cir. 1992) ("[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law.").

346. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), *reh'g granted*, 694 F. Supp. 707, 711 (1988) (concluding that the state "practice[d], encourage[d], or condone[d]" murder in violation of international law based on resolutions from the U.N. General Assembly and the Inter-American Commission of Human Rights, the Restatement (Third) of Foreign Relations, and numerous scholarly statements).

347. Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985) (adopting a broad view of the law of nations in recognizing an international norm against prolonged arbitrary detention based on U.N. General Assembly resolutions, the 1969 American Convention on Civil Rights, and the 1950 European Convention for the Protection of Human Rights). *See also* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1092-94 (S.D. Fla. 1997) (recognizing conspiring to bring about arbitrary and inhumane detention as a violation of the law of nations sufficient to establish jurisdiction under the ATCA based on the International Convention on Civil and Political Rights and the American Convention on Human Rights); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) ("[A]ny act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this Court under § 1350."). The *Xuncax* court also acknowledged that the main limitation on recognizing other instances of "cruel, inhuman or degrading treatment" as law of nations violations was that the norm was not well-defined in international law; therefore, only behavior prohibited by the U.S. Constitution was actionable. *Id.* at 186-87.

348. Reed, *supra* note 24, at 406.

349. United States v. Alvarez-Machain [Sosa I], 504 U.S. 655 (2004).

plaintiff's claims for arbitrary arrest and detention did not violate any norm of international law and could not be litigated under the ATCA.[350] The Court interpreted the law of nations narrowly, holding that a claim under the ATCA must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[351] The Court declined to completely cease "independent judicial recognition of actionable international norms" [352] beyond the traditional offenses,[353] and again recognized that the law of nations is not static.[354] However, "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[355]

Cases filed under the ATCA have increased considerably since the early 1990s, with the vast majority alleging a violation of customary international law. For purposes of this Article, the most significant aspect of this post-*Filartiga* case law is that the courts' efforts to define the "law of nations" have the left the door open for environmental violations as potentially within the scope and meaning of the ATCA.

b. *Environmental human rights cases under the ATCA.*

Courts have been reluctant to accept violations of environmental principles as a basis to find a violation of the law of the nations.[356] Until courts recognize violation of environmental principles as actionable under the ATCA, plaintiffs should use

350. Sosa v. Alvarez-Machain [Sosa II], 542 U.S. 692, 732-33, 738 (2004).

351. *Id.* at 725.

352. *Id.* at 729.

353. Traditionally, the law of nations prohibits three offenses – violation of safe conduct, infringement of the rights of ambassadors, and piracy. D'Amore, *supra* note 324, at 599.

354. Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) ("It seems clear beyond cavil that violations of the 'law of nations' under section 1350 are not limited to Blackstone's enumerated offenses."); Flores v. S. Peru Copper Corp., 343 F.3d 140, 149 (2d Cir. 2003); Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004).

355. Sosa II, 542 U.S. at 729. One commentator has suggested that future plaintiffs need to allege declaratory recognition of international norms to prevail in ATCA suits. Reed, *supra* note 24, at 412. Such recognition would include General Assembly resolutions, conventions, constitutional provisions, scholarly support, and U.S. government acknowledgement. *Id.*

356. *See, e.g.*, Flores, 343 F.3d at 172 (holding that environmental damage, without more, generally does not violate international law).

accepted human rights claims as a foundation upon which to frame their environmental actions; such claims are frequently linked to human rights abuses.[357]

Several cases have addressed the applicability of the ATCA to environmental claims. For example, in *Amlon Metals, Inc.v. FMC Corp.*,[358] Amlon Metals sued FMC for shipping hazardous materials in violation of a contract between the two parties.[359] Amlon alleged violation of principles of the Stockholm Declaration[360] and relied on the Restatement Third of Foreign Relations Law of the United States for additional support.[361] The district court granted FMC's motion to dismiss, holding that the claim was not a tort enforceable under the ATCA because the Stockholm Declaration did not contain any specific proscriptions, and the Restatement, although accurately portraying the United States' interpretation of international law, failed to consider other nations' views on the scope and content of international environmental law. [362]

In *Beanal v. Freeport-McMoran, Inc.*, an Indonesian plaintiff filed suit under the ATCA against the U.S.-based corporate parent of a precious metals mine located in Indonesia,[363] alleging that the corporation had committed "environmental torts, human rights abuses, and cultural genocide."[364] The court reiterated the three elements required to properly establish a claim under the ATCA.[365] Beanal, an Indonesian citizen, met the first prong of the test requiring that the claimant be an "alien."[366] In addition, the court, citing extensive precedent, determined that the ATCA provides a private right of action for violation of the law of nations.[367] The

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357. *See* Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 35-36 (2003).

358. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

359. *Id.* at 670.

360. Conference on the Human Environment, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, (Jun. 16, 1972) [hereinafter *Stockholm Declaration*], *available at* http://www1.umn.edu/humanrts/instree/humanenvironment.html.

361. Amlon Metals, 775 F. Supp. at 671.

362. *Id.*

363. Beanal v. Freeport-McMoran, 969 F. Supp. 362, 366 (E.D. La. 1997).

364. *Id.*

365. "[Section 1350] confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations." Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

366. Beanal, 969 F. Supp. at 370.

367. *Id.* (citing, among others, the Second Circuit in *Filartiga*, 630 F.2d at 887, the

court held that the plaintiff's claims, which included battery and genocide, as well as environmental torts, satisfied the second prong requiring the assertion of a tort claim.[368] The opinion also confirmed that private citizens, including corporations, are subject to ATCA jurisdiction.

The court then addressed the third requirement that the tort be "committed in violation of the law of nations." After noting that the plaintiff "has not pled nor argued that a treaty applies,"[369] the court held that an environmental tort not based on a specific treaty does not constitute a violation of the law of nations.[370] The Fifth Circuit affirmed the district court's dismissal, acknowledging that it would have allowed the claim under the ATCA had the plaintiff alleged sufficient facts regarding the defendant's conduct and the existence of environmental torts as part of the law of nations.[371]

In *Jota v. Texaco, Inc.*,[372] Ecuadorian residents brought an ATCA action alleging forest and water pollution from a multinational oil corporation's exploration and refining activities.[373] The plaintiffs sought money damages and equitable relief for their resulting physical injuries, including poisoning and pre-cancerous

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Ninth Circuit in *Estate of Marcos*, 25 F.3d at 1467, and the Eleventh Circuit in *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (1996)).

368. *Id.*

369. *Id.*

370. *Id.* at 383.

371. Beanal, 197 F.3d 161, 169 ("[I]n light of the gravity and far ranging implications of Beanal's allegations, not only did the [district] court give Beanal several opportunities to amend his complaint to conform with the minimum requisites as set forth in the federal rules, the court also conscientiously provided Beanal with a road-map as to how to amend his complaint to survive a motion to dismiss assuming that Beanal could marshal facts sufficient to comply with the federal rules. Nevertheless, Beanal was unable to put before the court a complaint that met minimum pleading requirements under the federal rules."). A different approach to the same situation can be found in *Alomang v. Freeport-McMoRan, Inc.*, 1996 U.S. Dist. LEXIS 15908, *1-2 (E.D. La. 1996), in which an Indonesian national filed suit in Louisiana state court alleging human rights violations, cultural genocide, and environmental damage caused by mining activities in Irian Jaya, Indonesia. As a citizen of Louisiana, the defendant could only remove based on federal question jurisdiction. *Id.* at *3. The court refused to allow removal, relying on the well-pleaded complaint rule. *Id.* at *27. While a federal claim may have existed under the ATCA or TVPA, these statutes do not affect a state's right to adjudicate its common law tort claims, and Plaintiff chose to claim only state law violations. *Id.* at *9, 11.

372. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).

373. *Id.* at 155. Residents of Ecuador and Peru brought a similar claim arising out of the same circumstances in *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd* 303 F.3d 470 (2d Cir. 2002). The appeals were later consolidated. 303 F.3d at 472-73.

growths.[374] In dismissing the action for *forum non conveniens*, Judge Rakoff opined that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments."[375] Although the court never addressed the question of subject matter jurisdiction, the Second Circuit implicitly acknowledged that it existed in *Jota* by considering the merits of the case.[376]

A year after *Jota* was dismissed, residents of Peru appealed the dismissal of their ATCA claim alleging injuries caused by air and water pollution from the defendant's copper mining, refining, and smelting activities in *Flores v. Southern Peru Copper*.[377] Specifically, the plaintiffs claimed violations of their "right to life," "right to health," and "right to sustainable development," as well as violations of international environmental law.[378] As in *Beanal*, the *Flores* plaintiffs failed to establish a violation of the law of nations. Instead, the court concluded that the principles set forth by plaintiffs to establish the right to health, life, and sustainable development presented only "virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them."[379] Such "boundless and indeterminate" rights are insufficient to comprise part of customary international law.[380]

The court further found the treaties cited unpersuasive as instruments to establish norms of international environmental law because only one was ratified by the United States[381] and none referenced conduct by private actors or provided specific

374. Jota, 157 F.3d at 156.

375. Aguinda, 142 F. Supp. 2d at 522-23 (quoting *Beanal*, 197 F.3d at 167).

376. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 312 (S.D.N.Y.); *but see* Jota, 157 F.3d at 159 n.6 ("We express no view on whether the plaintiffs have alleged conduct by Texaco that violates the law of nations.").

377. Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

378. *Id.* at 143.

379. *Id.* at 161 (citing *Beanal*, 197 F.3d at 167).

380. *Id.* (noting that in order to state a claim under the ATCA, plaintiffs must allege a violation of a "clear and unambiguous" rule of customary international law).

381. Plaintiffs relied on the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child. *Id.* at 163. The ICCPR, although ratified by the United States, is not self-executing. *Id.*

guidelines to which states must adhere.[382] The General Assembly resolutions, non-U.N. declarations,[383] and judicial opinions[384] were rejected because none formed binding international rules.[385] The court further noted that the amici briefs submitted by legal scholars on the plaintiffs' behalf were "policy-driven" and "theoretical" rather than unbiased reports on the actual status of the law.[386] Because the plaintiffs failed to demonstrate that "high levels of environmental pollution within a nation's borders, causing harm to human life, health, and development, violate well-established, universally recognized norms of international law," the Second Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction.[387]

Thus, environmental cases under the ATCA to date reflect the courts' continuing reluctance to accept violation of environmental principles as a basis to find a violation of the law of the nations. Recent decisions[388] offer some hope, however, that this reluctance is slowly eroding. Until courts recognize violation of environmental principles as actionable under the ATCA, plaintiffs may be able to succeed in ATCA claims by attempting to "piggy-back" alleged environmental violations onto alleged violations of general human rights principles recognized as part of the law of nations. In many ATCA cases, the distinctions between environmental violations and human rights violations are blurry at best, and the similarities between these types of violations will enhance the likelihood of success for future ATCA claims alleging environmental violations.

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382. *Id.* at 164-65.

383. Plaintiffs relied on two multi-national declarations: (1) the American Declaration on the Rights and Duties of Man promulgated by the Organization of American States, "an aspirational document" that fails to create any enforceable obligations, *id.* at 169 (citing *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001)), and (2) the Rio Declaration, which includes no language indicating that States joining intended to be legally bound by it. *Id.*

384. Neither the International Court of Justice nor the European Court of Human Rights is empowered to create binding norms of customary international law. *Id.* at 169.

385. *Id.* at 172.

386. *Id.* at 171.

387. *Id.* at 143 (citing the Southern District of New York's opinion in *Flores v. S. Peru Copper Corp.* 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002)). The court noted *forum non conveniens* as an additional ground warranting dismissal. *Id.* at 172.

388. *See, e.g.*, Beanal v. Freeport-McMoran, 969 F. Supp. 362 (E.D. La. 1997), *supra* notes 363-371 and accompanying text.

c. *New theories for ATCA environmental human rights claims.*

Although ATCA claims alleging environmental violations have not yet succeeded, plaintiffs seeking recovery for such violations in ATCA suits still have two reasons to be optimistic. First, plaintiffs could base climate change claims on treaty violations of agreements such as the United Nations Convention on the Law of the Sea Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[389] and the United Nations Convention on the Law of the Sea.[390] This approach, which alleges breaches of obligations contained in multilateral environmental agreements, has not yet been tested and could be the most likely basis on which to prevail.[391] Second, plaintiffs could argue that sustainable development and the transboundary pollution principle have attained "law of nations" status and should form the basis of an actionable claim under the ATCA.[392] The threat of such potential liability could more effectively deter potential government-based or private sector polluters.

The Fish Stocks Agreement is an ideal theory because the United States has not only played an active role in its implementation,[393] but also was one of the first countries to ratify the Agreement and is therefore bound by its provisions.[394] In

389. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/Conf. 164/37 (Sept. 8, 1995) [hereinafter Fish Stocks Agreement or UNFSA], *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement.

390. *See infra* note 403 and accompanying text.

391. *See generally* William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 INT'L J. OF SUSTAINABLE DEV. L. & POL'Y 27 (2006) [hereinafter Burns, *UNCLOS*], *available at* http://policy.miis.edu/programs/BurnsFT.pdf; Meinhard Doelle, *Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention*, 37 OCEAN DEV. & INT'L L. 319 (2006).

392. *See generally infra* Part III.A.1.

393. *See* William C.G. Burns, *Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement*, 7 SUSTAINABLE DEV. L. & POL'Y 34, 34 (2007) [hereinafter Burns, *UNFSA*], *available at* http://www.wcl.american.edu/org/sustainabledevelopment/2007/07winter.pdf?rd=1.

394. The United Nations Convention on the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, http://www.un.org/Depts/los/reference_files/

addition, the Fish Stocks Agreement is unlike any other international environmental law instrument in that it provides for a binding dispute resolution mechanism where non-binding methods, such as negotiation or mediation, have failed.[395] Under this framework, the major barriers to success are proving causation and overcoming judicial reluctance to enforce the agreement.[396]

These provisions of the Fish Stocks Agreement mainly attempt to ensure long-term conservation and sustainable use in migratory fish species by fostering cooperation between coastal and fishing states.[397] However, the Agreement contemplates regulation of activities likely to damage fish stocks which could give rise to claims associated with climate change impacts.[398] For example, the Fish Stocks Agreement requires parties to minimize pollution.[399] The Agreement's definition of pollution could encompass the introduction of heat and the uptake of carbon dioxide into the oceans.[400] In addition, parties to the Fish Stocks Agreement must adopt conservation and management measures to protect biodiversity and species associated with or dependent upon target species.[401] Thus, a right of action may exist to the extent that climate change may result in a diminution of certain protected fish stocks.[402]

A suit filed under the ATCA grounded in violation of the Fish Stocks Agreement could result in an award of damages or injunctive relief. Such a claim would overcome the concerns of the *Beanal* and *Flores* courts regarding the insufficiently specific and non-mandatory sources of international law upon which to base a claim in the ATCA. If a Fish Stocks Agreement-based suit were able to survive a summary judgment motion, it could address the plight of the Inuit and the Tuvaluans, indigenous people who are among

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chronological_lists_of_ratifications.htm# (last visited Mar. 5, 2007).

395. UNFSA applies the dispute resolution mechanism in UNCLOS to any dispute, even where parties are not bound by UNCLOS. UNFSA, *supra* note 389, art. 30(1). UNCLOS provides states with four potential forums for settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral panel, or a special arbitral panel. United Nations Convention on the Law of the Sea, art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

396. *See* Burns, *UNFSA*, *supra* note 393, at 37.

397. UNFSA, *supra* note 389, art. 2.

398. *See generally* Burns, *UNFSA*, *supra* note 393, at 36-37.

399. UNFSA, *supra* note 389, art. 5(f).

400. Burns, *UNFSA*, *supra* note 393, at 36.

401. UNFSA, *supra* note 389, art. 5(g).

402. Burns, *UNFSA*, *supra* note 393, at 36.

the most vulnerable victims of climate change impacts in the world.

Another treaty that also may support a possible ATCA claim for climate change impacts is the United Nations Convention on the Law of the Sea (UNCLOS).[403] UNCLOS was drafted in 1982 and serves as "a constitution for the oceans."[404] Under this treaty, parties agree to prevent, reduce, and control pollution of the marine environment from any source.[405] UNCLOS provides an expansive definition of "pollution"[406] that includes the introduction of substances through the atmosphere likely to harm living resources and marine life, hazards to human health, and hindrances to legitimate uses of the sea.[407] In addition, states are explicitly required to take all possible measures to avoid causing pollution damage to other nations and their environment.[408] This mandate includes those measures necessary to protect and preserve "rare or fragile ecosystems" and the habitats of depleted, threatened, or endangered species and other marine life.[409]

Failure to comply with UNCLOS provisions results in liability under international law.[410] Disputes that cannot be settled are submitted to the International Tribunal for the Law of the Sea, the International Court of Justice, or an arbitral panel.[411] Although not yet a party to UNCLOS as of this writing, the United States is a signatory to the treaty. It has been actively considering whether to ratify UNCLOS for the past two years and has pledged to adhere to most of the treaty's provisions.[412] As a signatory to UNCLOS, the United States is obligated to refrain from acts that would defeat

403. UNCLOS, *supra* note 395.

404. *Id.*

405. *Id.* art. 194(3).

406. *Id.* art. 1(4) ("'Pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.").

407. *Id.*

408. *Id.* art. 194(2).

409. *Id.* art. 194 (5).

410. *Id.* art. 235.

411. *Id.* art. 287.

412. President Reagan refused to become a party in response to Part XI, which established a deep seabed mining regime. John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward*, 35 OCEAN DEV. & INT'L L. 195, 197 (2004); *see also* Presidential Proclamation No. 5030 (1983).

the object or purpose of the treaty.[413]

A recent case illustrates the viability of an ATCA environmental human rights under UNCLOS. In *Sarei v. Rio Tinto,*[414] plaintiffs, current or former residents an island off of Papua New Guinea, brought suit against Rio Tinto, a mining corporation, for war crimes, crimes against humanity, racial discrimination and environmental devastation. These crimes resulted in fish deaths, respiratory and other health problems, crop damage, and displacement of animals and people that severely harmed the island's land, environment, culture and economy. The district court recognized ATCA claims for racial discrimination, crimes against humanity, war crimes, and environmental claims in violation of UNCLOS. The court further noted that UNCLOS has been ratified by at least 149 nations, which is sufficient for it to codify customary international law that can provide the basis of an ATCA claim.[415] Relying on *Sosa,* the Ninth Circuit concluded that claims of war crimes, violations of the laws of war, racial discrimination, and violations of UNCLOS implicated "specific, universal and obligatory norms of international law" that properly form the basis for ATCA claims.

The continued introduction of carbon dioxide into the atmosphere constitutes pollution under the broad UNCLOS definition because the resultant warming creates a hazard to life, health, and use of the sea.[416] Most relevant to the possible UNCLOS claims of the Inuit is the effect of climate change on the marine species that they depend on for their culture and sustenance. The Arctic is a unique and vulnerable ecosystem, as evidenced by the radical changes taking place there,[417] and it provides a habitat for polar bears, seals, and walruses, all of which are threatened by increased global temperatures.[418] A convincing case may be made that failure to prevent pollution constitutes a violation of UNCLOS obligations to protect and preserve the marine environment and its inhabitants.[419] Moreover, the United States may be liable for failure to mitigate climate change as a

413. Vienna Convention on the Law of Treaties, *supra* note 114, art. 18.

414. Sarei v. Rio Tinto, 456 F.3d 1069 (9th Cir. 2006).

415. *Id.* at 1078 (citing *United States v. Alaska,* 503 U.S. 569, 588 n.10 (1992)).

416. Doelle, *supra* note 391, at 331.

417. See *supra* Part II.A for evidence of the dangerous effects of climate change in the Arctic.

418. ARCTIC CLIMATE IMPACT ASSESSMENT, *supra* note 1, at 58-59.

419. Doelle, *supra* note 391, at 331.

"necessary measure" to avoid causing transboundary damage and failure to protect and preserve fragile environments.[420]

An alternative to treaty-based theories of relief for environmental claims under the ATCA is to recognize sustainable development as part of the law of nations. At least one international tribunal has recognized sustainable development as an environmental human right in need of protection. In the *Case Concerning the Gabcikovo-Nagymaros Project*,[421] Hungary refused to comply with its treaty obligations until further studies of the environmental impact of its dam project could be conducted.[422] The International Court of Justice refused to accept Hungary's excuse for non-performance.

In his concurring opinion, Judge Weeramantry provided an in-depth discussion of international environmental obligations. Weeramantry explicitly linked environmental and human rights concerns, stating:

> The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[423]

He also identified the principle of trusteeship of the earth's resources, the principle of intergenerational rights, and the principle that development and environmental conservation must co-exist.[424] Weeramantry concluded that these principles of sustainable development and long-term environmental impact

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420. *Id.* Another treaty-based option regarding climate change impacts is the conciliation commission established under the United Nations Framework Convention on Climate Change (UNFCC). *See* Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, [2003] 33 ENVTL. L. REP. (Envtl. Law Inst.) 10,185, 10,187-88. Although decisions of the conciliation commission are not binding, such a decision could be an important first step to recognize and publicize that the United States is not complying with its commitments under the UNFCCC. *Id.* at 10,188.

421. Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 60 (Sept. 25), Westlaw 1168556, at *60.

422. *Id.* 66-69.

423. *Id.* at 91-92 (separate opinion of Vice-President Weeramantry).

424. *Id.* at 110.

assessment have become a matter of customary law and should be included in all treaties regardless of their express terms.[425]

The impacts of climate change in the Arctic could justify an application of the transboundary pollution principle.[426] The transboundary pollution principle arguably has attained the status of customary international law, along with the principle of sustainable development. With 190 parties,[427] the Convention on Biological Diversity is one of the most widely embraced multilateral environmental agreements in the world. Article 3 of this treaty codifies the transboundary pollution principle and requires that parties adhere to it.[428]

2. *Other transboundary theories.*

Another extraterritorial theory to address the climate change impacts in the Arctic is the proposed listing of the polar bear as a threatened species under the Endangered Species Act (ESA).[429] In response to a petition filed by The Center for Biological Diversity (CBD) in 2005 alleging that polar bears could become extinct by the end of the century because their sea ice habitat is melting away, the U.S. Secretary of the Interior, Dirk Kempthorne, has recommended listing them as a "threatened" species.[430] This decision came after the U.S. Fish & Wildlife Service released its 90-

425. *Id.* at 92 ("While . . . all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment."); *see also id.* at 112 ("[E]nvironmental law . . . would read into treaties which may reasonably be considered to have significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impact of any substantial project during the operation of the scheme.").

426. Brief for Alaska Inter-Tribal Council, et al. as Amici Curiae Supporting Petitioners, *supra* note 4, at 25 ("The effects of climate change already occurring in Alaska are among the most dramatic on Earth, even though the vast majority of the world's greenhouse gas emissions originate elsewhere.").

427. Convention on Biological Diversity, *Parties to the Convention on Biological Diversity*, http://www.biodiv.org/world/parties.asp (last visited Jan. 5, 2007).

428. Convention on Biological Diversity, *supra* note 311, art. 3 ("States have . . . 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.").

429. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (Westlaw 2007).

430. Dan Joling, *Feds Move to Protect Polar Bears*, ASSOCIATED PRESS, Feb. 9, 2006, http://enn.com/today.html?id=9847; John Heilprin, *Government Sees Polar Bears As 'Threatened,'* ASSOCIATED PRESS, Dec. 28, 2006, http://www.enn.com/today_PF.html?id=11928.

day finding that the "petition presents substantial scientific or commercial information indicating that the petitioned action of listing the polar bear may be warranted,"[431] and a 60-day public comment period during which "more than 200,000 comments from scientists, legislators and the public were filed in support of listing the polar bear under the [ESA]."[432]

Kempthorne specifically cited thinning sea ice brought on by global warming as the main culprit of the polar bear's decline,[433] marking the first admission by the Bush Administration regarding the existence of global warming.[434] Environmentalists are hopeful that invoking Endangered Species Act protections for the polar bear will provide motivation for the government to reduce its GHG emissions that contribute significantly to climate change. The polar bear, "a charismatic megavertabrate,"[435] is typically perceived as a warm and fuzzy animal and is the perfect icon to use as a warning of the perilous effects of climate change.

If listed, federal agencies would be required to ensure that any action they take "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat."[436] Such a listing could affect industries seeking permission to release GHGs and government policies such as setting fuel economy standards for vehicles.[437] A final decision will be issued in late 2007, after the government completes another year of scientific studies.[438]

There are, however, some conflicts concerning the proposed polar bear listing under the ESA. For example, the ESA listing would have a huge impact on the market for polar bear sport hunting. In a sense, those wishing to list the bear under the ESA are using the bears as a pretext to limit emission of greenhouse

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431. *Endangered and Threatened Wildlife and Plants: Petition to List the Polar Bear as Threatened*, 71 Fed. Reg. 6745 (Feb. 9, 2006), *available at* http://www.sw-center.org/swcbd/SPECIES/polarbear/90-day-Finding.pdf.

432. Center for Biological Diversity, *Leading Scientists, Legislators and Public Petition for Polar Bear Protections Under the Endangered Species Act*, Jun. 19, 2006, http://www.enn.com/net.html?id=1542.

433. Heilprin, *supra* note 430.

434. Kassie Siegel, *The tip of the iceberg*, L.A. TIMES, Jan. 9, 2007, at A17.

435. Joe Baird, *A 'warm and fuzzy' icon of climate-change threat*, SCRIPPS NEWS, Jan. 25, 2007, http://www.scrippsnews.com/node/18912.

436. 16 U.S.C. § 1536(a)(2) (Westlaw 2007).

437. Joling, *supra* note 430.

438. Heilprin, *supra* note 430.

gases, while the Inuit seem legitimately concerned for the bears' value as an exploitable and indispensable economic and subsistence resource.[439]

The Inuit are not the only indigenous group in the Arctic seeking to preserve its rights to culture and subsistence. The Gwich'in people of northeastern Alaska and northwestern Canada are in a similar situation. A U.S. proposal to open the Coastal Plains of the Arctic National Wildlife Refuge to oil and gas drilling threatens to violate the internationally recognized human rights to culture, subsistence, health, and religion of the Gwich'in people.[440] However, the U.S. government also has a clear obligation, consistent with the transboundary pollution principle, to avoid disturbing the environment in a way that will irreparably damage the Gwich'in culture and way of life. Like the Inuit, the Gwich'in have relied physically, socially, and culturally on the Porcupine Caribou Herd for more than 20,000 years.[441] This herd migrates hundreds of miles each year to the Coastal Plains–the only location with an optimal combination of high quality forage, early snowmelt, and smaller populations of predators and insects–to give birth and raise their young.[442]

For indigenous people, human rights are often inseparable from their environment.[443] Thus, although the Gwich'in do not live on the Coastal Plains, the protection of that area is nonetheless essential to Gwich'in human rights.[444] The inevitable decline of the

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439. "To Arctic Indigenous peoples climate change is a cultural issue. We have survived in a harsh environment and if, as a result of global climate change, the species of animals upon which we depend are greatly reduced in number or location or even disappear, we as peoples would also disappear." Sheila Watt-Cloutier, et al., *Responding to Global Climate Change: The Perspective of the Inuit Circumpolar Conference of the Artic Climate impact Assessment, available at* http://www.inuitcircumpolar.com/index.php?ID=267&Lang=En (last visited Mar. 9, 2007). The preceding statement, which was submitted to be included at the beginning of the Arctic Climate Impact Report, was rejected as too political. *Id.*

440. RICHARD J. WILSON, A MORAL CHOICE FOR THE UNITED STATES: THE HUMAN RIGHTS IMPLICATIONS FOR THE GWICH'IN OF DRILLING IN THE ARTIC NATIONAL WILDLIFE REFUGE iii (2005), *available at* http://www.gwichinsteeringcommittee.org/GSChumanrightsreport.pdf.

441. *Id.* at 6. "The Gwich'in are caribou people. . . . Our whole way of life as a people is tied to the Porcupine caribou. It is our language, our song and our stories." Arctic Coastal Plain Leasing: Hearing Before the Comm. on Resources of the House of Rep., 104th Cong. 185 (1995) (statement of Sarah James of Artic Village, Alaska).

441. WILSON, *supra* note 440, at 6.

442. *Id.* at 10.

443. *Id.* at 18.

444. *Id.*

Porcupine Caribou Herd that would result from drilling in the Arctic National Wildlife Refuge would destroy the Gwich'in's subsistence lifestyle, cause food shortages, and obliterate their culture.[445] Both the Inuit and the Canada-based members of the Gwitch'in may have actionable claims under the ATCA premised on the principles of sustainable development and transboundary pollution, which arguably have attained the status of "law of nations" as customary international law.

Harm caused by transboundary pollution is covered under the IAHR system. In *Saldano v. Argentina*,[446] the Commission specifically held that it:

> does not believe . . . that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory.[447]

In *Saldano*, the Commission recognized that the rights and duties of states are not static, and may shift according to present conditions and knowledge. Therefore, the IAHR Court and Commission should interpret and apply the provisions of the IAHR regime in the context of developments in the field of international human rights law.[448] At a minimum, such evolving rights would include a right to the level of environmental health that prevents interference with human health and well-being, and entitles future generations to the same standard of health.[449] Various international law instruments, constitutional provisions, and courts in the Americas have identified the right to a healthy environment.[450]

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445. *Id.* at 21-23.

446. Saldano v. Argentina, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L/V/II.95 doc. 7 rev. 289 (1998).

447. *Id.* ¶ 17.

448. *See* Inara K. Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?*, 19 VA. ENVTL. L.J. 197, 203 (2000).

449. *See* MEINHARD DOELLE, FROM HOT AIR TO ACTION?: CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF ENVIRONMENTAL LAW 249 (Thomson Canada 2005).

450. *See supra* Part I.

B. *International Environmental Human Rights Theories*

1. *Linking environmental justice and sustainable development.*

Environmental justice offers another layer to the foundation for an international environmental human rights-based approach to environmental protection in the United States. The environmental justice movement in the United States was brought to the forefront of environmental protection policy in 1982, when an African-American community in North Carolina challenged the citing of a hazardous waste landfill.[451] The EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[452] The environmental justice movement incorporates not only notions of fair treatment to minority groups, but also how these notions of fairness can be reflected in political, legal, and administrative processes that enforce environmental policies.[453]

The term "environment" contains notions of economics and development. Approaching these problems from overly scientific and technical points-of-view can exclude the communities who have the most at stake from the debate. As much as "justice" means avoidance of "environmental racism," it also means looking at ways to create opportunities for community involvement in decision making, which is ultimately a political or procedural protection. It also means achieving "distributional" fairness, which involves equitable distribution of environmental burdens among communities and seems ultimately to be a substantive protection.[454] Environmental justice is premised on the notion that merely regulating environmental resources and media will have untoward and disproportionate effects on minority and low-income communities.

Environmental justice theory overlaps with sustainable

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451. Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 296 (1995).

452. *See generally*, Environmental Protection Agency, *Environmental Justice*, Aug. 8, 2006, http://www.epa.gov/compliance/environmentaljustice/ (offering information and further links to the EPA's Environmental Justice program).

453. *See generally* Tom Stephens, *An Overview of Environmental Justice*, 20 T.M. COOLEY L. REV. 229 (2003) (discussing environmental justice in detail).

454. *See* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 231 (1997).

development.[455] The Center for International Environmental Law noted the following similarities between these doctrines:

> The concepts of sustainable development and environmental justice share many critical and defining characteristics. Each requires taking into account and integrating policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real life conditions now facing individuals and local communities, while also addressing the impacts that different policy options may have in the future – to ensure, on one hand, that development is sustainable and, on the other, that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term.[456]

The synergy between environmental justice and sustainable development is highly relevant to the plight of the Inuit. The Inuit are disproportionately affected by the impacts of climate change and are far less equipped than developed nations to adapt to or mitigate these impacts. As noted above, sustainable development is already on its way to becoming recognized as part of the law of nations for purposes of ATCA claims. More generally, to the extent that sustainable development becomes the defining principle of international environmental law management, it could form the basis for strengthening human rights-based mechanisms to allow indigenous groups and other disproportionately affected populations to secure relief from the impacts of climate change.

In their most extreme form, these disproportionate impacts may rise to the level of cultural genocide. This theory was raised and rejected in *Beanal*, but the conditions in the Inuit context are much more severe than the facts presented in *Beanal*. International law already recognizes the duty to refrain from engaging in acts of genocide, slavery, and racial discrimination. These principles are recognized as *jus cogens*–peremptory norms that trump the effect of all other international law obligations. In

455. *See* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 5 (2002), *available at* http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf. *See also* David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 485-93 (2006) (discussing the interplay between environmental justice, sustainable development, and international environmental human rights).

456. CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 455, at 5.

the Inuit situation, the loss of the right to be cold arguably encompasses all three of these peremptory norms because the Inuit are in danger of losing their entire cultural identity and subsistence existence from the loss of Arctic sea ice caused by climate change.

2. *Human rights impact assessment.*

Unfortunately, the relationship between human rights and environmental protection often results from response to crises rather than from analysis of the substance of the law well in advance of any problems.[457] A human rights impact assessment (HRIA) is a proactive procedural mechanism that evaluates human rights threats posed by climate change impacts before permanent adverse impacts are experienced. An HRIA is analogous to an environmental impact assessment[458] and seeks to prevent abuses, improve policy, increase corporate accountability, and ultimately to increase knowledge of and respect for human rights.[459]

If foreign direct investment projects are to contribute to development, their human rights impacts must be addressed; however, those who make decisions regarding investment–generally governments and companies–often fail to adequately consider these impacts.[460] At the heart of this analysis is the importance of "recourse," or the right of people affected by such projects to claim their human rights.[461] Ideally, an HRIA is

457. *See* Dinah Shelton, Human Rights & Envtl. Law Scholar, *The Links Between International Human Rights Guarantees and Environmental Protection*, Keynote Address at University of Chicago, Center for International Studies' Panel Discussion, Human Rights & Ecosystem Limits: Considering Environmental Rights, at 3 (Apr. 16, 2004), *available at* http://internationalstudies.uchicago.edu/environmentalrights/Shelton.pdf.

458. *See* 42 U.S.C. § 4332 (Westlaw 2007).

459. Diana Bronson, Coordinator, Globalisation and Human Rights, Presentation to the Parliamentary Sub-Committee on Human Rights and International Development and Canadian Investment: Human Rights as Due Diligence, Jun. 1, 2005, http://www.ddrd.ca/site/what_we_do/index.php?subsection=documents&lang=en&id=1610.

See also Simon Evans, *Improving Human Rights Analysis in the Legislative and Policy Processes*, 29 MELB. U. L. REV. 665 (2005) (advocating for use of human rights impact assessments to improve the human rights situation in Australia).

460. Rights & Democracy, Letter from Rights & Democracy Initiative on Human Rights Impact Assessment Advisory Committee, to Professor John Ruggie, UN Special Representative to the Secretary General on Business and Human Rights (Sept. 24, 2006), http://www.ddrd.ca/site/what_we_do/index.php?subsection=documents&lang=en&id=1904&page=1.

461. RIGHTS & DEMOCRACY, INTERNATIONAL CENTER FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT, ANNUAL REPORT, at 22-23 (2006) *available at* http://www.dd-

completed before a project begins so problem areas can be identified and solutions devised before irreversible evils occur.[462] HRIAs should be required for projects or situations where human rights abuses are likely to occur, for example where, as in the case of the Inuit, the disproportionate impacts of GHG-induced climate change are suffered by an isolated indigenous group.[463]

Rights & Democracy, a non-partisan organization with an international mandate created by Canada's Parliament, is attempting to develop a methodology to help organizations evaluate human rights impacts of specific investment projects.[464] Since its founding in 1988, Rights & Democracy has worked to encourage and support universal values of human rights and the promotion of democratic institutions and practices around the world.[465] These efforts include promoting recognition of the rights of indigenous peoples in regional and international legal instruments and national laws.[466]

In 2004, Rights & Democracy launched a three-year project to develop and test its HRIA methodology.[467] The project has allowed the group to develop a set of principles and criteria appropriate to the context of a community-driven HRIA.[468] These principles should be embodied in national and international normative and regulatory frameworks and include:

> All foreign direct investment projects should be subject to an HRIA.
>
> The HRIAs should be thorough and comprehensive and address all rights contained in relevant international documents including the UN Declaration on Indigenous Peoples' Rights.
>
> Emphasis should be placed on avoiding rather than mitigating adverse human rights impacts.
>
> An HRIA should be conducted by a competent body subject to levels of independent scrutiny.

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rd.ca/site/_PDF/publications/annual_reports/annualReport2005-2006.pdf [hereinafter RIGHTS & DEMOCRACY ANNUAL REPORT].

462. Bronson, *supra* note 459.

463. *See id.*

464. Rights & Democracy, *supra* note 460.

465. *Id.*

466. RIGHTS & DEMOCRACY ANNUAL REPORT, *supra* note 461, at 19.

467. *Id.* at 22.

468. Rights & Democracy, *supra* note 460.

> An HRIA should be conducted as early as possible and should inform the decision whether to invest, the location of the investment, and the full design of the project.
>
> The starting point should be assessment of risks to and rights of communities.
>
> An HRIA should address impacts through the lifecycle of a project.
>
> The process to develop an HRIA should be transparent and involve potentially-affected communities.
>
> Findings should be public and shared with affected communities and relevant regulatory bodies.
>
> An HRIA should reflect actual impacts and evolving national and international standards.
>
> Findings and recommendations should be embodied in a public management and implementation plan that is monitored by a competent and independent company.
>
> Government and inter-government support should be conditional on an HRIA that reflects the above principles and in compliance with a management and implementation plan.[469]

The UN Declaration on the Rights of Indigenous Peoples is on the verge of being adopted after more than ten years of negotiation. This international human rights law instrument would be an important first step toward recognizing the collective rights of indigenous peoples, thus filling a gap in international human rights law.[470] In addition, negotiations regarding the American Declaration on the Rights of Indigenous Peoples at the OAS are ongoing.[471] These instruments are important steps in the process of securing enforceable international environmental rights.

If human rights are not fully considered during all phases of development decisions, however, it will not be possible to harness the potential to actually improve people's lives, "ensuring them the life of dignity that is the unrealized promise of the Universal Declaration of Human Rights."[472] Therefore, HRIAs add an

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469. Rights & Democracy, *supra* note 460.

470. RIGHTS & DEMOCRACY ANNUAL REPORT, *supra* note 461, at 19.

471. *Id.* at 20.

472. Bronson, *supra* note 459; *see also* RIGHTS & DEMOCRACY, INTERNATIONAL CENTER FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT, EMERGING HUMAN RIGHTS ISSUES, REPORT OF THE ROUNDTABLE 29 (Feb. 16-17, 2006), http://www.dd-rd.ca/site/_PDF/publications//demDev/Emerging%20issues2.pdf (noting the irony where development that destroys the environment and the people who live and work there

important procedural safeguard in the process of promoting the significance of international environmental human rights in much the same way that NEPA instilled awareness in the 1970s that environmental concerns should be balanced with the economic benefits of proposed federal agency projects.

V. CONCLUSION

The IAHR Commission has been able to draw attention to various human rights abuses across the Americas and has brought about substantial positive change through this publicity. Claims previously ignored by states have been elevated to internationally recognized legal rights, which must be honored.[473] Appealing to the conscience of the United States or Canada may be an effective way to curb environmental harm, as both countries pride themselves on their awareness and recognition of human rights[474] and would likely be affected by public denouncement of their practices by a respected international forum.[475]

A recommendation from the Commission could have a significant impact on international efforts to address global warming and recognition of environmental human rights. Although not binding, Commission recommendations have been successful at curbing human rights violations in the past.[476] If that effort fails, the Commission could issue a report examining the

precludes further development).

473. For prominent decisions issued by the Commission, see Report on the Situation of Human Rights in Argentina, Inter-Am. C.H.R., OEA/Ser.L./V/II.49, doc. 19, corr. 1, ¶¶ 53-134 (Apr. 11, 1980), *available at* http://iachr.org/countryrep/Argentina80eng/toc.htm (recommending investigation, political reorganization, and abolition of laws limiting labor organizations, free expression, and religious practices); Report on the Situation of Human Rights in Mexico, Inter-Am. C.H.R., OEA/Ser.L./V/II.100, doc. 7, rev. 1, ch. IX, ¶¶ 610-645 (Sept. 24, 1998), *available at* http://iachr.org/countryrep/Mexico98en/table-of-contents.htm (discussing the economic participation of women in business, violence against women, and employment discrimination); Report on the Situation of Human Rights in Brazil, Inter-Am. C.H.R., OEA/Ser.L./V/II.97, doc. 29, rev. 1, ¶¶ 93-111 (Sept. 29, 1997), *available at* http://iachr.org/countryrep/brazil-eng/index%20-%20brazil.htm (recommending a variety of measures to curb human rights violations by the Brazilian government against its indigenous people).

474. *See* Caroline Davidson, *Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law*, 38 VAND. J. TRANSNAT'L L. 1403, 1404-05 (2005); T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 425 (2004).

475. *See* Dommen, *supra* note 96, at 114.

476. *See* materials cited, *supra* note 473.

link between global warming and human rights.[477] The Commission's recognition that the United States has violated the rights of the Inuit would raise public awareness of global efforts to combat global warming and promote further political action.[478] It may also establish a legal basis for holding responsible those countries that have profited from inadequate greenhouse gas regulation.[479]

In domestic and international forums, parties seeking to recover from the impacts of climate change will be plagued by problems of causation and proof.[480] Nevertheless, growing international scientific research and consensus on the causes and effects of climate change will diminish such challenges, as will the increased sophistication of the bench and bar in evaluating the legal theories underlying climate change litigation.

The Inter-American Human Rights Commission decisions discussed above lay a foundation that can be applied to the Inuit petition as the next logical step in developing an emerging international right to life, environment, and culture free from the impacts of increased greenhouse gas emissions. Such a legal right can be understood and refined by drawing on a variety of sources. First, new and existing environmental human rights-based theories in the United States can offer guidance. The public trust doctrine and state constitutional right to environmental provisions lay a foundation to go beyond merely protecting resources and to begin considering how environmental protection mechanisms can focus on humanity's relations to the resources.

Extraterritorial remedies and an advisory ruling from the IACHR in favor of the Inuit are steps in the right direction to prompt the United States to engage in more serious consideration of its failure to impose mandatory measures to address climate change. However, the "mobilization of shame" against the United States that may result from the Inuit petition is not likely to be enough to prompt the United States to respond with a mandatory federal GHG emissions reduction regime. Nor will such shame mitigate the impacts that climate change has had, and will continue to have, on the integrity and viability of the Inuit's

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477. *Id.*

478. *Id.*

479. *Id.*; *see also* Henry W. McGee, Jr., *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL. L. REV. 371, 379 (2005).

480. *See* Strauss, *supra* note 420, at 10,191.

culture and subsistence lifestyle. A more effective avenue of relief is necessary.

As international environmental problems like climate change become more daunting and imminent, the international legal system must respond by strengthening the ties between the environmental and human rights regimes. The human rights-based theory of a right to a clean and healthy environment, which is recognized in state constitutions throughout the United States and in the constitutions of other legal systems throughout the world, needs to be synonymous with the right to health and the right to life. Several international human rights law instruments and international environmental law instruments already reflect the connections between environmental rights and human rights, and the momentum is growing.

Until that goal is reached, international environmental law and international human rights law need to draw closer. The Inuit petition is an important first step on this journey. Human rights components of environmental treaties could be developed or a new treaty regime could be negotiated to recognize environmental human rights and establish a tribunal to address such claims. Such collaborations have occurred in other contexts. For example, in light of the continuing overlap and interrelationship between trade and environmental disputes, the dispute resolution body of the World Trade Organization added a specialized environmental panel to address such disputes more effectively. Similarly, the overlap between environmental and human rights has reached a point now where it should be the rule, rather than the exception, for treaty negotiation conventions and dispute resolution bodies to confront the urgent need for protection and enforcement of international environmental human rights.