

# RIGHT TO CARBON OR RIGHT TO LIFE: HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE

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We, the human species, are confronting a planetary emergency . . . . But there is hopeful news as well: we have the ability to solve this crisis and avoid the worst—though not all—of its consequences, if we act boldly, decisively and quickly.

Al Gore<sup>1</sup>

[T]hat which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. . . . [E]verybody is more inclined to neglect the duty which he expects another to fulfill . . . .

Aristotle, *Politics*<sup>2</sup>

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1. Al Gore, Former Vice President of the United States, 2007 Nobel Peace Laureate, Nobel Lecture (Dec. 10, 2007), [http://nobelprize.org/nobel\\_prizes/peace/laureates/2007/gore-lecture.html](http://nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture.html).

2. 1 THE POLITICS OF ARISTOTLE, ¶ 1261b30–40, p. 30 (Benjamin Jowett trans., Oxford: Clarendon Press 1885).

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## INTRODUCTION

Human rights form a central part of the thought system of many people in the world, including those in the United States. The enforcement of “rights” in the legal system does not, by itself, change government policy, but the embedding of rights in our thought systems can. I want to ask whether the concept of human rights has a role to play in changing minds—and more importantly, hearts—in our political system. The reason that I focus on hearts is that changes there are more permanent; and where the heart goes, the head tends to follow.

If we come to see human-caused global climate change as violating fundamental human rights—as something as unacceptable as other gross violations of human rights—perhaps we can make the breakthrough in our politics that is essential. Perhaps we can rescue ourselves from the planetary emergency that Al Gore, in the quote above, sees so clearly. Perhaps we can overcome the limitations of human nature that Aristotle saw so clearly more than two millennia ago. Perhaps that which is “common to the greatest number”—the precious planet that sustains our lives—may come to have not the least care, but our *loving* care, bestowed upon it.

Dr. James Hansen of the NASA Goddard Institute for Space Studies has said that a global tipping point could be reached by 2016.<sup>3</sup> According to Hansen:

If global emissions of carbon dioxide continue to rise at the rate of the past decade, . . . there will be disastrous effects, including increasingly rapid sea level rise, increased frequency of droughts and floods, and increased stress on wildlife and plants due to rapidly shifting climate zones.<sup>4</sup>

The U.N. Intergovernmental Panel on Climate Change (IPCC), in its 2007 Fourth Assessment Report, concluded that “[w]arming of the climate

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3. *Earth Climate Approaches Dangerous Tipping Point*, ENV’T NEWS SERVICE, June 1, 2007, <http://www.ens-newswire.com/ens/jun2007/2007-06-01-01.asp>.

4. *Id.*

system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.”<sup>5</sup> The Report also found “*high agreement and much evidence* that with current climate change mitigation policies and related sustainable development practices, global GHG emissions will continue to grow over the next few decades.”<sup>6</sup> The Report specifically points out important risks if governments fail to respond, such as species extinction, increases in droughts, heat waves, floods, increased vulnerability of indigenous communities and the poor and elderly, and loss of coastal area and associated impacts.<sup>7</sup>

Even still, the outlook is not completely negative. The Report indicates that there is “substantial economic potential for the mitigation of global GHG emissions over the coming decades that could offset the projected growth of global emissions or reduce emissions below current levels.”<sup>8</sup> However, to prevent a catastrophe, we will need to act without delay and adopt a multifaceted approach.<sup>9</sup>

The Conference of the Parties to the U.N. Framework Convention on Climate Change (UNFCCC) met in Bali, Indonesia, in December 2007 to launch comprehensive and inclusive negotiations for a new multilateral framework.<sup>10</sup> It was intended to create commitments beyond the year 2012,<sup>11</sup> the end of the first commitment period under the Kyoto Protocol.<sup>12</sup> The Bali Action Plan was agreed to, and consensus was achieved, only on the last day of negotiations.<sup>13</sup> Under pressure from the United States, the Plan set no worldwide goals.<sup>14</sup> The targets sought by some such as the European Union were omitted and a footnote in the preamble merely drew attention to the IPCC Fourth Assessment Report.<sup>15</sup> These omissions kept

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5. U.N. Env't Programme and World Meteorological Org., Intergovernmental Panel on Climate Change [IPCC], *IPCC Fourth Assessment Report, Climate Change 2007: Synthesis Report 72* (2007) [hereinafter *IPCC Synthesis Report*], available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf). The Synthesis Report is the fourth element of the IPCC Fourth Assessment Report. *Id.*

6. *Id.* at 44.

7. *Id.* at 64–65.

8. *Id.* at 58.

9. *Id.* at 64, 17–18, 23 (“Responding to climate change involves an iterative risk management process that includes both adaptation and mitigation, and takes into account climate change damages, co-benefits, sustainability, equity, and attitudes to risk.”) (citation omitted).

10. Thomas Fuller & Andrew C. Revkin, *Climate Plan Looks Beyond Bush's Tenure*, N.Y. TIMES, Dec. 16, 2007, <http://www.nytimes.com/2007/12/16/world/16climate.html>.

11. *Id.*

12. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter *Kyoto Protocol*], available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

13. Fuller & Revkin, *supra* note 10.

14. *Id.*

15. *Id.*

the United States at the negotiating table, but at a meeting in Hawaii in January 2008, the United States again refused to agree to any particular targets.<sup>16</sup> A new treaty—the Copenhagen Protocol—is supposed to be negotiated now, to be completed at the next meeting of the Conference of the Parties in December 2009 in Copenhagen, Denmark.

While diplomats and politicians are slowly starting to negotiate a new post-Kyoto treaty, lawyers in the United States and around the world are wondering how to speed up government action. Some believe that litigation has little role to play.<sup>17</sup> Others are wondering whether both litigation and political advocacy centered on human rights can make a difference. If new agreements are reached in Copenhagen, a further question will arise—whether commitments will be kept. The limitations of compliance mechanisms under international environmental law suggest that we should look to claims of human rights violations for potential enforcement, or at least shaming.

#### I. THE LIMITATIONS OF INTERNATIONAL ENVIRONMENTAL LAW MECHANISMS

The normal application and enforcement of international law occurs in diplomatic actions, in the self-restraint of governments, and sometimes in the compliance mechanisms that are set up to monitor whether countries are carrying out their obligations. In dealing with climate change, it is not clear, however, that these methods will be successful.

##### A. *The United Nations Framework Convention on Climate Change*

The UNFCCC plays an important role as a framework for international actions, political decisions, diplomatic negotiations, and coordinated scientific research.<sup>18</sup> It also provides technological and financial assistance for mitigation, adaptation, information exchange, and capacity building.<sup>19</sup> As a framework convention, the UNFCCC does not contain concrete obligations; however, article 2 of the Convention consists of some arguable

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16. *Europeans Test US Commitment to Climate Change*, SPIEGEL, Jan. 30, 2008, <http://www.spiegel.de/international/world/0,1518,532077,00.html>.

17. See Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. (forthcoming July 2008), available at <http://ssrn.com/abstract=1014870> (arguing that litigation is unlikely to make a significant difference in climate change).

18. U.N. Framework Convention on Climate Change, Essential Background, [http://unfccc.int/essential\\_background/items/2877.php](http://unfccc.int/essential_background/items/2877.php) (last visited Apr. 30, 2008).

19. *Id.*

legal obligations:

[T]o achieve in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>20</sup>

Roda Verheyen has argued that article 2 must be interpreted in accordance with the principles in articles 31 and 32 of the Vienna Convention of the Law of Treaties,<sup>21</sup> giving it at least some persuasive force. Considering that, according to the IPCC Fourth Assessment Report, we have not been able to prevent “dangerous anthropogenic interference with the climate system,” that ecosystems do not have sufficient time to adapt to climate change,<sup>22</sup> and that food production is threatened already, the Parties might be seen as already in violation of the UNFCCC. Similarly, it appears that some Parties to the Kyoto Protocol will also fail to meet their obligations, insignificant as those obligations appear to be in light of the size of the problem.

Despite apparent violations of the UNFCCC, the likelihood of effective enforcement action that would lead to compliance seems slight. Generally, compliance mechanisms of multilateral environmental agreements (MEAs) are weak.<sup>23</sup> Their main goal is to assist and facilitate compliance, not to enforce or punish. They do not have “teeth.” They lack serious sanctions, except for a few such as the Basel Convention,<sup>24</sup> the Montreal Protocol,<sup>25</sup> and the Convention on International Trade in

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20. United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 (*entered into force* Mar. 21, 1994) [hereinafter UNFCCC], available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

21. Roda Verheyen, *The Climate Change Regime After Montreal*, 7 Y.B. OF EUR. ENV'T'L L. 237–38 (2007). See generally Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).

22. See, e.g., *IPCC Synthesis Report*, *supra* note 5, at 64.

23. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. OF INT'L ENVTL. L. & POL'Y 1, 15–17 (2007) (explaining some of the shortcomings of MEAs).

24. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 9, Mar. 22, 1989, 28 I.L.M. 657, available at <http://www.basel.int/text/con-e-rev.doc>.

25. Montreal Protocol on Substances That Deplete the Ozone Layer art. IV, Sept. 16, 1987, 1522 U.N.T.S. 28 [hereinafter Montreal Protocol].

Endangered Species (CITES),<sup>26</sup> which use trade sanctions as measures for non-compliance. MEAs even avoid using the term “sanctions.” Instead, they use terms such as “measures”<sup>27</sup> or mention the “consequences” of non-compliance.<sup>28</sup>

The UNFCCC has a Subsidiary Body for Implementation (SBI) that is “established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention.”<sup>29</sup> Among other duties, it must “assess the overall aggregated effect of the steps taken by the Parties in the light of the latest scientific assessments concerning climate change.”<sup>30</sup> The SBI advises the COP on administrative and financial matters, examines information in the national communications and emissions inventories submitted by Parties, and reviews “financial assistance given to non-Annex I Parties”;<sup>31</sup> however, this body does not have any enforcement power.

The Convention also has a settlement procedure for a dispute between any two or more Parties concerning the interpretation or application of the Convention, “through negotiation or any other peaceful means of their own choice.”<sup>32</sup> In addition, Parties can accept compulsory submission of their dispute to the International Court of Justice (ICJ) or arbitration using procedures adopted by the Conference of the Parties.<sup>33</sup> These provisions appear never to have been used.

### *B. The Kyoto Protocol*

The Kyoto Protocol shares objectives with the UNFCCC. However, in comparison with the Convention, which encourages Parties to stabilize greenhouse gas (GHG) emissions and does not have mandatory obligations, the Protocol has legally binding obligations for developed countries to reduce GHG emissions below a level specified for each of them in Annex B

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26. Convention of International Trade in Endangered Species of Wild Fauna and Flora art. VIII, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

27. *See, e.g.*, Montreal Protocol, *supra* note 25, art. II; CITES, *supra* note 26, art. VIII (both using the term “measures” instead of “sanctions” to describe the trade sanctions).

28. *See, e.g.*, Kyoto Protocol, *supra* note 12.

29. UNFCCC, *supra* note 20, art. 10, ¶ 1.

30. *Id.* art. 10, ¶ (2)(a).

31. U.N. Framework Convention on Climate Change, Convention Bodies, [http://unfccc.int/essential\\_background/convention/convention\\_bodies/items/2629.php](http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php) (last visited Apr. 30, 2008).

32. UNFCCC, *supra* note 20, art. 14, ¶ 1.

33. *Id.* ¶ 2.

to the Protocol.<sup>34</sup> These reductions would achieve an overall reduction of 5% below the baseline level of 1990 by the year 2012.<sup>35</sup>

The Kyoto Protocol Compliance Mechanism, in contrast to the mechanism under the UNFCCC, is one of the most comprehensive and rigorous amongst all MEAs, although it is just starting to operate. The Kyoto Implementation Committee consists of two branches—a facilitative branch and an enforcement branch.<sup>36</sup> The “facilitative” approach is claimed to have several benefits, including:

building confidence in the treaty regime; ensuring that all Parties have the institutional, technical, and financial capacity to fulfill their obligations; reinforcing the Parties’ sense of collective action and obligation; demonstrating that obligations are reasonable and attainable; and encouraging greater participation in the regime while lowering resistance to the adoption of additional binding commitments.<sup>37</sup>

The facilitative branch started its operation in May 2006 with a case brought to it by South Africa, on behalf of the Group of 77 and China, entitled “Compliance with Article 3.1 of the Kyoto Protocol.”<sup>38</sup> The case was brought against Canada and fourteen other countries, alleging that the countries had failed to submit various kinds of information required by the procedures under the Protocol.<sup>39</sup> The facilitative branch found itself paralyzed, however, and could not take action.<sup>40</sup> A report by the facilitative branch to the Compliance Committee stated:

The branch made a number of attempts to arrive at a consensus. When all efforts to reach agreement on a

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34. Kyoto Protocol, *supra* note 12, Annex B.

35. U.N. Framework Convention on Climate Change, Kyoto Protocol, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (last visited Apr. 30, 2008).

36. Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 1st Sess., Montreal, Can., Nov. 28–Dec. 10, 2005, *Decision 27/CMP.1, Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, 92, 94–96, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006).

37. DONALD M. GOLDBERG ET AL., CTR. FOR INT’L ENVTL. LAW & EURONATURA, BUILDING A COMPLIANCE REGIME UNDER THE KYOTO PROTOCOL 2 (1998), available at <http://www.ciel.org/Publications/buildingacomplianceregimeunderKP.pdf>.

38. *Report to the Compliance Committee on the Deliberations in the Facilitative Branch Relating to the Submission Entitled “Compliance with Article 3.1 of the Kyoto Protocol,”* 3, U.N. Doc. CC/FB/3/2006/2 (Sept. 6, 2006), available at [http://unfccc.int/files/kyoto\\_mechanisms/compliance/application/pdf/cc-fb-3-2006-2.pdf](http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/cc-fb-3-2006-2.pdf).

39. *Id.*

40. *Id.* at 4.

decision by consensus had been exhausted, a vote was taken electronically on 21 June 2006, resulting in the failure to adopt either a decision to proceed or a decision not to proceed by a majority of three-fourths of the members present and voting, as required . . . .<sup>41</sup>

The facilitative branch had prepared two draft decisions—one to proceed and one not to proceed. The draft decision to proceed would have stated that the Parties had failed their information obligations and the branch should take “necessary actions to provide advice, facilitation and promotion to each Party concerned;”<sup>42</sup> however, this proposal failed by a vote of 4–4, with two abstentions.<sup>43</sup>

On the decision *not* to proceed, the branch had proposed a finding that:

a) The communication was not submitted by a Party on its own behalf through a representative duly authorized for this purpose.

The procedures and mechanisms do not provide for the possibility of groups of Parties making submissions by proxy . . .

b) The submission does not clearly and individually name the Parties with respect to which it purports to raise a question of implementation.

c) The submission is not supported by information corroborating the question of implementation it purports to raise, nor does it substantiate that this question relates to any of the specific commitments under the Kyoto Protocol identified in either of paragraphs 5 or 6 of section VII.<sup>44</sup>

This proposal failed by a vote of 5–5.<sup>45</sup> The inability of the facilitative branch to reach a decision by the required three-fourths vote, on even these relatively minor matters concerning information submissions, does not make the Committee’s work on the more difficult matters it may confront in the future look promising.

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41. *Id.* at 3.

42. *Id.*

43. *Id.* at 4.

44. *Id.*

45. *Id.* at 5.

*C. The International Court of Justice*

There is no international environmental court. Even if one were created, international tribunals have only moral authority and lack the power to force states to comply. Are principles of international environmental law robust enough for a case before the ICJ?

There have been only two environmental cases in the ICJ's jurisprudence to date: the Gabčíkovo-Nagymaros case<sup>46</sup> and the Nuclear Testing Case.<sup>47</sup> Some have argued that a small island state that is likely to be inundated by rising seas could press a claim before the ICJ.<sup>48</sup> Professor Rebecca Elizabeth Jacobs has argued that a suit by the South Pacific island nation of Tuvalu would face several problems:

Tuvalu must show not only that “the United States and Australia are unlawfully causing the island damage, but also that it has a right to future damages that have yet to occur. Tuvalu might succeed by arguing principles of intergenerational rights and the precautionary principle.”<sup>49</sup>

The general status of the precautionary principle in international law is not yet settled. In petitioning to the ICJ for damages in the 1995 Nuclear Test Case, New Zealand alleged “by virtue of the adoption into environmental law of the ‘Precautionary Principle,’ the burden of proof fell on a state [France] wishing to engage in potentially damaging environmental conduct to show in advance that its activities would not cause contamination.”<sup>50</sup> The ICJ dismissed New Zealand's claims without ruling on this issue.<sup>51</sup> Justice Weeramantry, however, in his dissent from the court order opinion argued that the precautionary principle is “gaining increasing support as part of the international law of the environment.”<sup>52</sup>

In the field of climate change, the status of the principle is stronger. The precautionary principle is embedded within article 3 of the UNFCCC,

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46. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7375.pdf>.

47. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 342 (Sept. 22), available at <http://www.icj-cij.org/docket/files/97/7187.pdf>.

48. Rebecca Elizabeth Jacobs, Abstract, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y 103 (2003).

49. *Id.*

50. Nuclear Tests, 1995 I.C.J. at 298.

51. *Id.* at 307.

52. *Id.* at 342 (Weeramantry, J., dissenting).

and provides as follows:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.<sup>53</sup>

The ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons recognized another principle that would be relevant to a climate change lawsuit: it confirmed that the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>54</sup> This principle of international environmental law was also expressed in the Stockholm Declaration<sup>55</sup> and the Rio Declaration.<sup>56</sup>

Although Tuvalu has yet to bring a case before the ICJ, it continues to claim a right to compensation for damages caused by climate change. Recently the nation changed its approach from international litigation to making a broad request for compensation based on the polluter pays principle.<sup>57</sup> The Deputy Prime Minister of Tuvalu, the Honorable Tavau Teii, said in a speech to the U.N. High Level Meeting on Climate Change, held at the U.N. headquarters in New York in September 2007, that major greenhouse polluters should pay Tuvalu for the impacts of climate change:

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53. UNFCCC, *supra* note 20, art. 3, ¶ 3.

54. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29, at 241–42 (July 8), *available at* <http://www.icj-cij.org/docket/files/95/7495.pdf>.

55. Declaration of the United Nations Conference on the Human Environment princ. 21, June 16, 1972, 11 I.L.M. 1420 (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources . . . and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction.”).

56. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), *available at* <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [hereinafter Rio Declaration].

57. Press Release, Afelee Pita, Ambassador, Permanent Mission of Tuvalu to the United Nations, Tuvalu Calls for Climate Change Polluters to Pay, Sept. 29, 2007, [http://www.tuvaluislands.com/un/2007/un\\_2007-09-29.html](http://www.tuvaluislands.com/un/2007/un_2007-09-29.html).

Rather than relying on aid money we believe that the major greenhouse polluters should pay for the impacts they are causing. According to recent reports, funding to assist countries adapt to the impacts of climate change will cost in the region of US\$80 billion per year. This cannot be met by aid budgets; it must be new funding based on the polluter pays principle.<sup>58</sup>

Considering Tuvalu, a nation faced with being wiped off the map by climate change, has not pressed forward with a case before the ICJ, it is hard to foresee the ICJ as a likely forum for addressing climate change. Instead, the argument is likely to have more force in strictly political fora.

## II. HUMAN RIGHTS AND GLOBAL WARMING

At least four combinations of forums and claims might be used for litigation regarding climate change: international courts or compliance bodies, international human rights bodies, national courts applying international law, and national courts considering human rights claims under domestic law. If international courts or compliance bodies under MEAs offer little hope, what about the means and mechanisms that have been set up to protect human rights, both internationally and nationally?

The Inuit people claimed, in a 2005 petition to the Inter-American Commission on Human Rights, that global warming has an impact on their rights to life, health, culture, and subsistence. While the term “right to life” means something different to most Americans, in other countries it is often associated with the right to a healthy environment. It has been held to require environmentally protective actions in cases decided by regional human rights bodies such as the African Commission of Human Rights and the Inter-American Commission on Human Rights. Other substantive environmental human rights claims have been upheld on other grounds, such as a right to private and family life in the European Court of Human Rights. Finally, the Supreme Courts of India and the Philippines, the Supreme Court of Montana, and trial courts in places like Nigeria (dealing with gas flaring and climate change) have applied substantive environmental human rights claims to resolve cases.

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58. *Id.*

A. *Recognition of Linkages Between Human Rights and the Environment*

Linkages between human rights and the environment have been discussed and established during the last fifteen years by several scholars.<sup>59</sup> In 1994, the U.N. Special Rapporteur Fatma Zohra Ksentini prepared a final report titled “Human Rights and the Environment” in which she formulated strong and comprehensive linkages between human rights and the environment and provided environmental dimension of fundamental human rights—to life, health, and culture.<sup>60</sup>

In 2002, under the organization of the U.N. High Commissioner on Human Rights and the Executive Director of the U.N. Environmental Programme, a group of experts convened for an Expert Seminar on Human Rights and the Environment.<sup>61</sup> The expert participants, which included the present author, reached broad agreement on the growing interconnectedness between the fields of human rights and environmental protection. In their Conclusions the experts noted:

[L]inkage of human rights and environmental concerns, approaches and techniques is reflected in developments relating to procedural and substantive rights, in the activities of international organizations, and in the drafting and application of national constitutions. . . . [I]n the last decade a substantial body of case law and decisions has recognized the violation of a fundamental human right as the cause, or result, of environmental degradation. A significant number of decisions at the national and international levels have identified environmental harm to individuals or communities, especially indigenous peoples, arising as a result of violations of the rights to health, to life, to self-determination, to food and water, and to housing.<sup>62</sup>

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59. See, e.g., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996); DINAH SHELTON, ENVIRONMENTAL RIGHTS IN PEOPLE RIGHTS 187–88 (Philip Alston ed., 2001) (discussing the interconnectedness of human and environmental rights laws); LINKING HUMAN RIGHTS AND ENVIRONMENT (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (discussing the relationships between human rights and the environment).

60. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Special Rapporteur, *Human Rights and the Environment, Final Report*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (prepared by Mrs. Fatma Zohra Ksentini) [hereinafter *Final Report*].

61. Expert Seminar on Human Rights and the Environment, Meeting of Experts’ Conclusions (2002), available at <http://www.unhcr.ch/environment/conclusions.html>.

62. *Id.*

These linkages were further discussed at the World Summit on Sustainable Development in 2002, being included in the Johannesburg Plan of Implementation.<sup>63</sup> More recently, the interconnectedness of environmental and human rights has been discussed in relation to the issue of global climate change.<sup>64</sup> However, evaluating the connections is not only the domain of academics. The U.N. Human Rights Council in a resolution of March 26, 2008, entitled “Human Rights and Climate Change” emphasized that “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.”<sup>65</sup> The Council decided to undertake “a detailed analytical study of the relationship between climate change and human rights . . . and thereafter to make available the study . . . to the Conference of Parties to the United Nations Framework Convention on Climate Change for its consideration.”<sup>66</sup>

### B. International Human Rights Forums

Attempts to enforce MEAs such as the UNFCCC or Kyoto Protocol face several limitations. One limitation is that individuals have no standing to file complaints. State challenges against other states for non-compliance with MEAs are rather rare because states care about their diplomatic relations with other countries. A second limitation is that the members of most compliance mechanisms are not truly independent and instead appear as representatives of their governments. For example, the UNFCCC SBI is available only to governments complaining about other governments, and its members, although made up of experts on matters related to climate change, represent their home governments.<sup>67</sup>

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63. World Summit on Sustainable Development, Aug. 26–Sept. 4, 2002, *Johannesburg Plan of Implementation*, ¶¶ 164, 169, U.N. Doc. A/CONF.199/20 (2002), available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf).

64. See, e.g., Randall S. Abate, *Climate Change, the United States, and the Impact of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Rights*, 26A STAN. ENVTL. L.J. 3 (2007) (considering the bases of international human rights, the impact of climate change on the Inuit, and the bases for recovery for climate change in human rights lawsuits); Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 285, 295–98 (2007) (discussing the challenges to climate change damage recovery, within the context of the “Inuit Circumpolar Council’s (ICC) human rights petition against the United States,” as a human rights issue).

65. Office of the High Commissioner for Human Rights, U.N. Human Rights Council, 7th Sess., U.N. Doc. A/HRC/7/L.21/Rev.1 (Mar. 26, 2008), available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_7\\_L\\_21\\_Rev\\_1.doc](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_7_L_21_Rev_1.doc).

66. *Id.*

67. UNFCCC, *supra* note 20, art. 10.

Human rights bodies, on the other hand, are available for complaints from non-state actors—citizens and non-government organizations (NGOs)—and the bodies themselves usually consist of independent experts. Human rights bodies are well established in the form of U.N. Charter organs, such as the U.N. Human Rights Commission and the U.N. Human Rights Council, and in the form of U.N. human rights treaty organs, which include the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR),<sup>68</sup> the Committee on Economic, Social and Cultural Rights established under the Covenant of Economic, Social and Cultural Rights, the Committee on the Rights of the Child established under the Convention on the Rights of the Child, and similar bodies under other human rights treaties.

The U.N. Human Rights Committee is not a judicial body, but it does have authority to hear individual complaints. It has considered various complaints by indigenous peoples for alleged harm to their environment under article 27 of the ICCPR.<sup>69</sup> Some of them were successful. Special Rapporteur Fatma Zohra Ksentini has suggested that the U.N. Human Rights Committee

could expand its general comment on the right to life in order to include environmental concerns or formulate a general comment defining the links existing between civil and political rights and the environment. Moreover, it should be able, through dealing with complaints, to establish case law that will accommodate environmental concerns.<sup>70</sup>

This U.N. body might be used to raise concerns about violations of human rights caused by climate change.

Previously the Prime Minister of Tuvalu requested environmental refugee status for its citizens from both Australia and New Zealand.<sup>71</sup> While New Zealand responded to the plea by allowing seventy-five Tuvaluans to relocate annually to their country, Australia has refused to

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68. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

69. See, e.g., Bernard Ominayak & Lubicon Lake Band v. Canada, ICCPR H.R. Comm. Comm'n No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990); Länsman v. Finland, IPCC H.R. Comm., Comm'n No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, 6 (1994) (action by reindeer herders under article 27 of the ICCPR, alleging that a government approved stone quarry would adversely affect their environment, herding activities, and culture (denied)).

70. *Final Report*, *supra* note 60, ¶ 259(e).

71. *Australia Unfazed at Tuvalu over Anger on Climate Change*, TUVALU NEWS, Aug. 30, 2002, available at <http://www.tuvaluislands.com/news/archived/2002/2002-08-30a.htm>.

make any such offer.<sup>72</sup> At a rate of seventy-five Tuvaluan relocations a year, the island would hypothetically not become uninhabited until 140 years have passed—ninety years after scientists predict it will be under water.<sup>73</sup>

Almost all human rights treaties recognize the “right to life.”<sup>74</sup> According to article 6 of the ICCPR, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>75</sup> Conceivably, inhabitants of Tuvalu could present a claim to the Human Rights Committee that their right to life is being violated. In addition, under article 12 of the ICCPR, the people of Tuvalu might claim a violation of the right to liberty of movement and the freedom to choose their residence.<sup>76</sup>

The issue of environmental refugees displaced by climate change is not limited to Tuvalu, of course.<sup>77</sup> Bangladesh, already one of the poorest nations in the world, also has many citizens near sea level who are vulnerable to rising seas and stronger storms. Other nations with substantial populations at risk include Viet Nam, China, Egypt, the Philippines, Indonesia, the Maldives, and the Marshall Islands.<sup>78</sup> The likelihood of displacement due to flooding from sea-level rise is global and massive. According to the Fourth Assessment Report of the IPCC, more

72. *Pacific Island Villagers Become Climate Change Refugees*, ENV'T NEWS SERVICE, Dec. 6, 2005, <http://www.ens-newswire.com/ens/dec2005/2005-12-06-02.asp>.

73. See Anwen Roberts, *What Will Become of Tuvalu's Climate Refugees*, SPIEGEL, Sept. 14, 2007, <http://www.spiegel.de/international/world/0,1518,505819,00.html> (stating that Tuvalu is expected to be underwater within fifty years).

74. See, e.g., ICCPR, *supra* note 68, art. 6 (“Every human being has an inherent right to life.”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter Protocol of San Salvador], available at <http://www.oas.org/juridico/english/Treaties/a-52.html> (“Everyone shall have right to live in a healthy environment.”); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 38 I.L.M. 517 (1999) [hereinafter Aarhus Convention], available at <http://www.unece.org/env/pp/documents/cep43e.pdf> (endorsing “the right of every person . . . to live in an environment adequate to his or her health and well-being . . .”).

75. ICCPR, *supra* note 68, art. 6.

76. *Id.* art. 12.

77. Climate Institute, *Climate Change and Sea Level Rise*, <http://www.climate.org/topics/sea-level/index.shtml> (last visited Apr. 30, 2008).

78. *Id.*

Some developing countries are especially vulnerable to sea level rise due to their low-lying nature and limited financial resources to respond. Among the most vulnerable are countries with large populations in deltaic coastal regions such as Bangladesh, Viet Nam, China and Egypt. Two populous island nations, the Philippines and Indonesia, have millions who face displacement from their homes from sea level rise. Several small island state nations including the Maldives in the Indian Ocean and the Marshall Islands and Tuvalu in the Pacific could face extinction within this century if rates of sea level rise accelerate.

*Id.*

than 100 million people will be displaced each year by flooding even when the sea level has risen only by forty centimeters.<sup>79</sup>

However, the U.N. Human Rights Committee can only consider individual complaints against governments that have ratified the Optional Protocol to the ICCPR, thereby accepting the Committee's jurisdiction over such complaints.<sup>80</sup> Although the United States has ratified the ICCPR,<sup>81</sup> it has neither signed nor ratified the U.N. Optional Protocol.<sup>82</sup> Two other main polluters—China and India—ratified the ICCPR in 2005 and 1979, respectively, but have also not ratified the Optional Protocol.<sup>83</sup> Therefore, none of these present and future main emitters of GHG can be challenged by individuals for human rights violations in the Human Rights Committee. Most European nations, on the other hand, have accepted jurisdiction of the Committee to hear complaints and their actions could therefore be examined by the Committee.<sup>84</sup>

### C. *International Human Rights Courts and Other Bodies*

A better opportunity to challenge human rights violations related to climate change may lie in the regional human rights systems, namely, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court of Human and Peoples' Rights. As we will discuss below, human rights treaties have provisions that explicitly or implicitly recognize environmental rights. In recent years, the regional bodies enforcing these rights have moved to the position that degradation of the environment can violate human rights. In addition to explicit or implicit recognition of the right to a healthy environment in some human rights treaties, some courts interpret fundamental human rights—such as the rights to life, to health, to culture, and to subsistence, as well as the right to respect for private and family

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79. U.N. Env't Programme and World Meteorological Org., IPCC, *IPCC Fourth Assessment Report, Climate Change 2007: Impacts, Adaptation and Vulnerability* 334 fig.6.8 (2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg2.htm>.

80. *Id.*

81. U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 11 (July 14, 2006), available at <http://www2.ohchr.org/english/bodies/docs/status.pdf> [hereinafter *Status of Ratifications*].

82. *Id.* The U.S. Senate also imposed numerous conditions at the time of advice and consent to ratification of the ICCPR, including a declaration that it is not self-executing. U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. 45,934 (Aug. 31, 1993); 138 CONG. REC. S4781-01, \*S4783 (daily ed. Apr 2, 1992), available at <http://www1.umn.edu/humanrts/usdocs/civilres.html>.

83. *Status of Ratifications*, *supra* note 81, at 3, 6.

84. *See generally id.* (evidencing ratification of the ICCPR by European countries).

life—in ways that help protect the environment from pollution or degradation.

### 1. European Court of Human Rights

In Europe, the Aarhus Convention recognizes the “right of every person of present and future generations to live in an environment adequate to his or her health and well-being,” and requires each Party to guarantee the procedural “rights of access to information, public participation in decision-making and access to justice in environmental matters.”<sup>85</sup> Of equal importance, the European Convention on the Protection of Human Rights and Fundamental Freedoms (popularly known as the European Convention on Human Rights) has provisions concerning the right to life (article 2) and right to private and family life (article 8).<sup>86</sup>

- Article 2 reads in part: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”<sup>87</sup>
- Article 8 reads in part: “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>88</sup>

Article 8 has been used in several environmental cases such as *López Ostra v. Spain*,<sup>89</sup> *Guerra v. Italy*,<sup>90</sup> *Fadeyeva v. Russia*,<sup>91</sup> and *Taşkin v. Turkey*,<sup>92</sup> while article 2 has been used in one environmental case, *Öneryıldız v. Turkey*.<sup>93</sup>

In *López Ostra v. Spain*, the first and landmark environmental case of the European Court of Human Rights, applicant Gregoria López Ostra of Spain alleged a violation of her right to privacy and family security under

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85. Aarhus Convention, *supra* note 74, art.1.

86. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter European Convention].

87. *Id.* art. 2.

88. *Id.* art. 8.

89. *López-Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1995).

90. *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998).

91. *Fadeyeva v. Russia*, 45 Eur. Ct. H.R. 10 (2005).

92. *Taskin v. Turkey*, 2004-III Eur. Ct. H.R. 621 (2004).

93. *Öneryıldız v. Turkey (Grand Chamber)*, 41 Eur. Ct. H. R. 20 (2004).

article 8 of the European Convention.<sup>94</sup> The applicant based her claim on the siting of a leather processing waste treatment plant near her home, which released fumes, smells, and contamination and “immediately caused health problems and [a] nuisance.”<sup>95</sup> Mrs. López Ostra argued that the government had a positive duty to secure her rights under article 8.<sup>96</sup> The Court, while not finding an outright affirmative duty to prevent the pollution, did find the government failed “in striking a fair balance between the interest of the town’s economic well-being—that of having a waste-treatment plant—and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.”<sup>97</sup> Thus, finding a breach of article 8, the Court ordered the government to pay four million pesetas as compensation.<sup>98</sup>

Similarly, in *Fadeyeva v. Russia*, applicant Nadezhda Mikhaylovna Fadeyeva of Russia alleged a violation under article 8 of the European Convention for the government’s “failure to protect her private life and home.”<sup>99</sup> The applicant lived about 450 meters from Russia’s largest iron smelter and alleged “the extent of environmental [air] pollution at her place of residence was and remains seriously detrimental to her health and well-being.”<sup>100</sup> The court observed that “over a significant period of time the concentration of various toxic elements in the air near the applicant’s house seriously exceeded the [maximum permissible limits]”<sup>101</sup> The court ruled that the government, by not offering any effective solution to help the applicants move from the affected area, “failed to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life.”<sup>102</sup> Thus finding a breach of article 8, the court ordered the government to pay six thousand euros for non-pecuniary damages.<sup>103</sup>

In *Taskin v. Turkey*, the Turkish government had persisted in authorizing a mining process using sodium cyanide after numerous national court decisions ruling that the authorizations were illegal.<sup>104</sup> The European Court of Human Rights ruled that the mining for gold using sodium cyanide violated the right to respect for private and family life in breach of

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94. *López-Ostra*, 20 Eur. Ct. H.R. ¶¶ 6, 44.

95. *Id.* ¶ 8.

96. *Id.* ¶ 51.

97. *Id.* ¶ 56.

98. *Id.* ¶ 65.

99. *Fadeyeva v. Russia*, 45 Eur. Ct. H.R. 10, ¶ 64 (2005).

100. *Id.* ¶¶ 10–11, 71.

101. *Id.* ¶¶ 11, 87.

102. *Id.* ¶¶ 133–34.

103. *Id.* ¶¶ 134, 138.

104. *Taskin v. Turkey*, 2004-III Eur. Ct. H.R. 621, ¶¶ 11–89 (2004).

article 8.<sup>105</sup> The court also concluded that the government's refusal to abide by its own courts' decisions deprived the citizens of "their right to effective judicial protection in the determination of their civil rights."<sup>106</sup> The particular civil right at issue was the national right, under article 56 of the Turkish Constitution, "to live in a healthy [and] balanced environment."<sup>107</sup>

In *Guerra v. Italy* the court discussed both article 2 and article 8.<sup>108</sup> In that case, forty applicants lived in the town of Manfredonia, approximately one kilometer from a "high risk" chemical factory that produced fertilizers and other highly toxic chemicals.<sup>109</sup> Accidents due to malfunctions had occurred in the past. During the most serious accident, "one hundred and fifty people were admitted to the hospital with acute arsenic poisoning."<sup>110</sup>

The court held unanimously that it was unnecessary to consider the case under article 2 of the Convention because it ruled that article 8 had been violated.<sup>111</sup> However, Judge Walsh, in his concurring opinion, said that article 2 was violated as well because it "also guarantees the protection of the bodily integrity of the applicants."<sup>112</sup> Judge Jambrek in his concurring opinion also made "some observations on the possible applicability of article 2 in this case."<sup>113</sup> The protection of health and physical integrity was, in his view, related to the "right to life."<sup>114</sup> He continued:

[P]erson(s) concerned face a real risk of being subjected to circumstances which endanger their health and physical integrity, and thereby put at serious risk their right to life, protected by law. . . .

. . . .

. . . It may therefore be time for the Court's case-law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case, in that 150 people were taken to hospital

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105. *Id.* ¶ 126.

106. *Id.* ¶ 127.

107. *Id.* ¶¶ 132, 90.

108. *Guerra v. Italy*, 26 Eur. Ct. H.R. 26, ¶¶ 56–62 (1998).

109. *Id.* ¶ 13 (stating that the factory "was classified as 'high risk' according to the criteria set out in Presidential Decree").

110. *Id.* ¶ 15.

111. *Id.* ¶¶ 62, 75.

112. *Id.* (Walsh, J., concurring).

113. *Id.* (Jambrek, J., concurring).

114. *Id.*

with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the activity carried on at the factory thus constituted a “major-accident hazard dangerous to the environment.”<sup>115</sup>

In 2002 the European Court of Human Rights for the first time decided to apply article 2 in *Öneryildiz v. Turkey*, an environmental case clearly involving loss of life.<sup>116</sup> The applicant complained that the accident on April 28, 1993, in which nine members of his family died, had occurred as a result of the negligence of the relevant authorities.<sup>117</sup> An expert committee’s report indicated that “the waste-collection site in question breached the Environment Act and the Regulation on Solid-Waste Control and consequently pose[d] a health hazard to humans and animals.”<sup>118</sup> The report observed that no measures had been taken to prevent a possible explosion of methane gas from the dump, and that such an explosion subsequently occurred.<sup>119</sup> The explosion buried ten homes, including that of the applicant.<sup>120</sup> The court held that as a consequence there had been a violation of article 2.<sup>121</sup>

A dramatic explosion and landslide, along with the widespread knowledge that methane can explode, led the court to the conclusion that the right to life in article 2 had been violated, but what are the prospects for bringing such a claim in Europe concerning loss of life from human-induced climate change? It is increasingly accepted that warm ocean waters fuel hurricanes and that climate change will cause hurricanes and tropical storms to become more intense—lasting longer, unleashing stronger winds, and causing more damage to coastal ecosystems and communities.<sup>122</sup> This will result in dramatic and adverse impacts on life and property, both of which are central concerns of human rights regimes. Hurricane Katrina caused a loss of 1300 lives and \$80 billion in economic damage.<sup>123</sup> Although hurricanes are not a problem in Europe, heat waves are. For example, heat waves killed more than 52,000 people in 2003 in

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115. *Id.*

116. *Öneryildiz v. Turkey (Grand Chamber)*, 41 Eur. Ct. H.R. 20, ¶ 18 (2004).

117. *Id.* ¶ 63.

118. *Id.* ¶ 15.

119. *Id.* ¶ 23.

120. *Id.* ¶ 18.

121. *Id.* ¶ 118.

122. *IPCC Synthesis Report*, *supra* note 5, at 46.

123. Nat’l Oceanic & Atmospheric Admin. [NOAA], Noteworthy Records of the 2005 Atlantic Hurricane Season, <http://www.noaanews.noaa.gov/stories2005/s2540b.htm> (last visited Apr. 30, 2008).

Europe.<sup>124</sup> “As the mercury climbs, more frequent and more severe heat waves are in store. Accordingly, the World Meteorological Organization estimates that the number of heat-related fatalities could double in less than 20 years.”<sup>125</sup>

If sufficient evidence could be accumulated to support a case linking heat wave deaths and GHG emissions, who could be the defendants in a complaint to the European Court of Human Rights? One possibility might be states that are members of the Council of Europe but have not introduced mandatory and significant reduction programs for GHG emissions. The Russian Federation is a party to the European Convention on Human Rights and its Optional Protocol.<sup>126</sup> The European Court of Human Rights has found Russia in violation of article 8 in the past.<sup>127</sup> The Russian Federation ratified the Kyoto Protocol in 2004, and therefore has obligations to reduce GHG emissions below its 1990 levels.

## 2. Inter-American Commission and Court of Human Rights

The Inter-American Commission and Court of Human Rights are known as strong bodies for the protection of indigenous peoples' rights. Legal instruments include the American Convention on Human Rights<sup>128</sup> and the Additional Protocol to the Convention (the Protocol of San Salvador), which recognizes that “[e]veryone shall have the right to live in a healthy environment.”<sup>129</sup> Although the Protocol of San Salvador has been ratified by only six countries, the American Convention has been ratified by twenty-five countries (not including the United States and Canada).<sup>130</sup> The court enforces the Convention, but the commission is willing to make findings in cases of alleged violation of a third document, the American Declaration of the Rights and Duties of Man, even in matters involving the United States and Canada.

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124. Janet Larsen, *Setting the Record Straight: More than 52,000 Europeans Died from Heat in Summer 2003*, EARTH POL'Y INST., July 28, 2007, <http://www.earth-policy.org/Updates/2006/Update56.htm>.

125. *Id.*

126. Council of Europe, Parties and Signatories to the European Convention on Human Rights and Additional Protocols, <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> (last visited Apr. 30, 2008).

127. *Faduyeva v. Russia*, 45 Eur. Ct. H.R. 10, ¶ 134 (2005); *Ledyayeva v. Russia*, Eur. Ct. H.R. Application. Nos. 53157/99, 53247/99, 53695/00, 56850/00, (2008), available at <http://www.asil.org/pdfs/ilibledyayeva061122.pdf>.

128. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> [hereinafter American Convention].

129. Protocol of San Salvador, *supra* note 74, art. 11.

130. Inter-American Commission on Human Rights, What is the IACHR?, <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Apr. 30, 2008).

The court recognized the land and property rights of indigenous people in the groundbreaking *Awes Tingni* case.<sup>131</sup> The court ruled that the State of Nicaragua violated the right to the use and enjoyment of property by granting a logging concession on traditional lands of the Mayagna (Sumo) Awes Tingni Community.<sup>132</sup> By “evolutionary interpretation” of the right to the use and enjoyment of property, the court held:

[A]rticle 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property. . . .

. . . .

. . . Based on this understanding, the Court considers that the members of the Awes Tingni Community have the right that the State . . . carry out the delimitation, demarcation, and titling of the territory belonging to the Community.<sup>133</sup>

The Inter-American Commission on Human Rights has recognized the relationship between human rights and the environmental impacts of development activities. Can it be a tool also for combating climate change? In 2005, for the first time, the commission received a petition requesting relief for a violation of human rights resulting from global warming, allegedly caused by “acts and omissions of the United States.”<sup>134</sup> The Inuit peoples of Alaska and Canada argued that the adverse impact on wildlife from climate change—changes in the location number and health of plant and animal species—violates their fundamental human rights to life, property, culture, and means of subsistence.<sup>135</sup>

Some species are starting to move to different locations, exacerbating the Inuit’s travel problems; other species cannot make their annual migrations because the ice on which they normally travel is gone.<sup>136</sup> Reduction of sea ice drastically shrinks the habitat for polar bears and seals,

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131. *Mayagna (Sumo) Awes Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

132. *Id.* ¶ 153.

133. *Id.* ¶¶ 148, 153.

134. 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 at 1 (Dec. 7, 2005), available at [http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf) [hereinafter Inuit Petition].

135. *Id.* at 5–6.

136. *Id.* at 3.

pushing them toward extinction.<sup>137</sup> The petition argued that this has impaired the Inuits' right to subsist by altering their food sources.<sup>138</sup> Furthermore, "[g]lobal warming violates these rights by melting the ice, snow and permafrost, changing the weather, and radically altering every aspect of the arctic environment on which Inuit lives and culture depend."<sup>139</sup>

The petition focused on the United States of America because it is one of the largest emitters of GHGs and has, up to this point, refused to join the international effort to reduce emissions under the Kyoto Protocol.<sup>140</sup> The petition asked the commission to declare the United States in violation of rights affirmed in the 1948 American Declaration of the Rights and Duties of Man and other instruments of international law.<sup>141</sup>

In November 2006, however, the petitioners received a letter from the commission, stating that it "will not be able to process your petition at present . . . the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."<sup>142</sup>

Although it rejected the petition, the commission subsequently held a hearing on March 1, 2007, at the request of petitioners, in which it discussed the connection between human rights and global warming.<sup>143</sup> The former chair of the Inuit Circumpolar Council, 2007 Nobel Peace Prize nominee Sheila Watt-Cloutier, testified to the effects of climate change on the global environment, health, and rights of indigenous peoples.<sup>144</sup> Her testimony went beyond the Arctic to include a broader region—the Caribbean, Central America, Venezuela, and Uruguay.<sup>145</sup> Even without a positive outcome, the petition has become a precedent of using the Inter-American Commission to raise questions of violations of human rights caused by global warming. As Donald M. Goldberg and Martin Wagner,

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137. *Id.* at 4.

138. *Id.* at 3.

139. Press Release, Earthjustice, Inuit Human Rights Petition Filed over Climate Change (Dec. 7, 2005), available at <http://www.earthjustice.org/news/press/005/inuit-human-rights-petition-filed-over-climate-change.html>.

140. Inuit Petition, *supra* note 134, at 6.

141. *Id.* at 5.

142. *Letter of the Inter-American Commission on Human Rights to Mr. Crowley, Ref.: Sheila Watt-Cloutier et al.*, Petition N P1413-05, United States, Nov. 16, 2006 (on file with author).

143. Press Release, EarthJustice, Inter-American Commission on Human Rights to Hold Hearing on Global Warming (Feb. 6, 2007), available at <http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html>.

144. Press Release, Earth Justice, Nobel Prize Nominee Testifies About Global Warming (Mar. 1, 2007), available at <http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html>.

145. *Id.*

lawyers for the petitioners, have written:

[A] report by the Commission examining the connection between global warming and human rights could have a powerful impact on worldwide efforts to address global warming. It would demonstrate that the issue is not merely an abstract problem for the future, but is instead a problem of immediate concern to all people everywhere. Recognition by the Commission of a link between global warming and human rights may establish a legal basis for holding responsible countries that have profited from inadequate greenhouse gas regulation and could provide a strong incentive to all countries to participate in effective international response efforts.<sup>146</sup>

At the very least, the filing of the Inuits' petition and the Inter-American Commission on Human Rights' decision to address the question of how climate change affects human rights has advanced the notion that climate change is an issue involving human rights, not just public policy.

### 3. African Commission of Human and Peoples' Rights

Article 24 of the African Charter on Human and Peoples' Rights (African Charter) says that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."<sup>147</sup> The African Commission on Human Rights enforced the right to health and the right to a satisfactory environment in the case *Social and Economic Rights Action Center v. Nigeria*.<sup>148</sup> The Action Center asserted:

[The] Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by:

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146. Donald M. Goldberg & Martin Wagner, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System*, in CLIMATE CHANGE—FIVE YEARS AFTER KYOTO 191, 195 (2002), available at [http://www.ciel.org/Publications/Petitioning\\_GlobalWarming\\_IAHR.pdf](http://www.ciel.org/Publications/Petitioning_GlobalWarming_IAHR.pdf).

147. African [Banjul] Charter on Human and Peoples' Rights art. 24, June 27, 1981, 21 I.L.M. 58 (1982), available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html).

148. Soc. & Econ. Rights Action Ctr. v. Nigeria, No. 155/96 (Afr. Comm'n H. & Peoples' R., May 27, 2002), available at [http://www.eschr-net.org/usr\\_doc/serac.pdf](http://www.eschr-net.org/usr_doc/serac.pdf).

Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,

Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage.<sup>149</sup>

The commission's ruling stated:

[D]espite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.<sup>150</sup>

The commission found Nigeria in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter and appealed to the government of the Federal Republic of Nigeria "to ensure protection of the environment, health and livelihood of the people of Ogoniland."<sup>151</sup> The commission asked Nigeria to ensure "adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and [to undertake] a comprehensive cleanup of lands and rivers damaged by oil operations."<sup>152</sup> This case could be useful precedent in climate change litigation in situations where a government violates human rights by not fulfilling its duty to protect the environment, health, and livelihood of people from the negative consequences of climate change, and has to resettle and compensate victims.

#### *D. National Courts Safeguarding Human Rights*

U.S. domestic courts have been unwilling to hold that environmental rights have gained sufficient status under international law to be

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149. *Id.* at 9–10 (bullet points omitted).

150. *Id.* at 12.

151. *Id.* at 15.

152. *Id.*

enforceable in tort. In *Flores v. Southern Peru Copper Corp.*, the plaintiffs alleged a violation of the rights to life and health as violation of customary international law, actionable under the Alien Tort Claims Act (ATCA).<sup>153</sup> The court rejected the argument, holding:

[T]he asserted “right to life” and “right to health” are insufficiently definite to constitute rules of customary international law. . . . [I]n order to state a claim under the ATCA, we have required that a plaintiff must allege a violation of a “clear and unambiguous” rule of customary international law. . . .

. . . .

. . . Far from being “clear and unambiguous,” the statements relied on by plaintiffs to define the rights to life and health are vague and amorphous.<sup>154</sup>

The plaintiffs referred to a “right to life” enshrined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Rio Declaration on Environment and Development; however, the court found these principles “boundless and indeterminate,” expressing “virtuous goals” but only “at a level of abstraction” and not establishing the existence of a customary international law “right to life” or “right to health.”<sup>155</sup>

On the other hand, in 2005 the Federal High Court of Nigeria (Benin Judicial Division) found that multinational oil companies, by flaring gas during exploration and production activities, violated the “fundamental rights to life (including healthy environment) and dignity of human person guaranteed by Sections 33(1) and 34(1) of the Constitution of [the] Federal Republic of Nigeria, 1999 and reinforced by Arts 4, 16 and 24 of the African Charter on Human and Peoples Rights.”<sup>156</sup> The court ordered the respondents to take immediate steps to stop further flaring of gas in the community.<sup>157</sup>

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153. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254 (2nd Cir. 2003).

154. *Id.* (citations omitted).

155. *Id.* at 255.

156. *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.*, No. FHC/B/CS/53/05, at 30 (F.H.C. Nov. 14, 2005) (Nigeria), available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>.

157. *Id.* at 31.

A right to a healthy environment in various formulations is recognized by the constitutions of 118 nations around the world.<sup>158</sup> The Supreme Court of the Philippines used the right to a “balanced and healthful ecology” in the Constitution of the Philippines to overturn and block government action in *Oposa v. Factoran*.<sup>159</sup> The plaintiffs brought the case on behalf of minor children and generations yet unborn to “prevent the misappropriation or impairment” of Philippine rainforests and “arrest the unabated hemorrhage of the country’s vital life-support systems and continued rape of Mother Earth.”<sup>160</sup> They alleged, “At the present rate of deforestation, i.e. about 200,000 hectares per annum or 25 hectares per hour . . . the Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.”<sup>161</sup>

The plaintiffs asked the court to order the defendant to: (1) “[c]ancel all existing timber license agreements in the country”; and (2) “[c]ease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.”<sup>162</sup> The court granted the petition, stating that “[t]he right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.”<sup>163</sup>

The right to life enshrined in the Constitution of India has been interpreted broadly by courts to include a right to a healthy environment. The Supreme Court of India in *Subhash Kumar v. State of Bihar* took a strong position on what is encompassed within the right to life:

Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Art. 32 for the prevention of pollution is

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158. EARTHJUSTICE, ENVTL. RIGHTS REPORT 2007: HUMAN RIGHTS AND THE ENVIRONMENT app. (2007), available at <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf>.

159. *Oposa et al. v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., July 30, 1993) (Phil.), available at <http://www.elaw.org/node/1343>, reprinted in 33 I.L.M. 173 (1994).

160. *Id.*

161. *Id.* ¶ 12.

162. *Id.* ¶ 20.

163. *Id.*

maintainable at the instance of affected persons or even by a group of social workers or journalists.<sup>164</sup>

In Hungary, the Constitutional Court overturned national legislation privatizing forests on the basis of a constitutional right to a “healthy environment.”<sup>165</sup> Courts in Bangladesh,<sup>166</sup> Nepal,<sup>167</sup> and Pakistan<sup>168</sup> have made constitutional rulings about violations of citizens’ environmental rights. The Constitutional Chamber of Costa Rica’s Supreme Court of Justice closed a municipal waste site due to violations of constitutional environmental rights.<sup>169</sup> The Constitutional Tribunal of Peru has ordered officials to set up health monitoring and ordered the Ministry of Mines and private companies to participate in health protection because of violations of health and environmental rights.<sup>170</sup>

The right to a healthy environment has been recognized in the constitutions of several states of the United States, including in the Montana Constitution.<sup>171</sup> The Supreme Court of Montana in *Montana Environmental Information Center v. Department of Environmental Quality* enforced this right when the State tried to lessen protections for water in the state.<sup>172</sup> The Court held that the State’s action violated “the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment.”<sup>173</sup>

That the highest courts of some nations and U.S. states have been willing to apply constitutional provisions to stop government actions

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164. Subhash Kumar v. State of Bihar, (1991) 1 S.C.R. 5, 13 (India), available at <http://www.elaw.org/node/2751>.

165. Alkotmánybíróság [Constitutional Court], No. 28/1994 (V.20), ABH. (1994) (Hung.); see also Stephen Stec, *Rights and Duties Towards a Healthy Environment*, in REG’L ENVTL. CTR. FOR CENT. & E. EUROPE, HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION 73, 74 (Stephen Stec ed., 2003), available at <http://www.elaw.org/node/2423> (describing the “protected forest” case).

166. Farooque v. Gov’t of Bangladesh, 17 B.L.D. (AD) 1, 1997, 1 B.L.C. (AD) 189 (1996) (Bangl.) (Flood Action Plan Case), available at <http://www.elaw.org/node/1300>.

167. Prakash Mani Sharma for Pro Public v. His Majesty Government Cabinet Secretariat and others, WP 2991/1995 (1997) (Nepal), available at <http://www.elaw.org/node/1391> (holding that the court may give orders to give effect to directive principles in constitution, including those concerning the environment).

168. Shehla Zia v. W.A.P.D.A. Human Rights Case No. 15-K of 1992, P.L.D. 1994 Supreme Court 693 (Pak.), available at <http://www.elaw.org/node/1342> (finding that electromagnetic radiation from power station violated constitutional rights).

169. Carlos Roberto Mejía Chacón v. Santa Ana, No. 3705-93, July 30, 1993 (Sala Constitucional de la Corte Suprema de Justicia) (Costa Rica), available at <http://www.elaw.org/node/1312>.

170. Pablo Miguel Fabián Martínez y Otros, Exp. N. 2002-2006-PC/TC, Sentencia de la Sala Segunda del Tribunal Constitucional (May 12, 2006), available at <http://www.elaw.org/node/1754>.

171. MONT. CONST. art. II, § 3 (“[Inalienable rights] include the right to a clean and healthful environment . . .”).

172. Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality, 988 P.2d 1236, 1249 (Mont. 1999).

173. *Id.* at 1249.

harmful to the environment is barely known among lawyers or academics in the United States. These cases are sure to strike some as adventurous, but they are becoming numerous. Is it too much to believe that such jurisprudence could be enlisted in the fight against global warming?

### III. PROCEDURAL RIGHTS AND GLOBAL WARMING

Procedural rights—the right to know, the right to participate in decision making, and the right to have access to justice in environmental matters—were formulated in principle 10 of the Rio Declaration.<sup>174</sup> They can be a powerful tool for combating climate change through litigation. Public access to information on climate change and its effects is necessary to assess the actions or inactions of governments and the emissions of polluting industries. Provisions to enhance public participation also open the door to citizens for lobbying governments for the adoption of needed regulations and measures to combat climate change. Access to justice for citizens and nongovernmental organizations ensures that if governments or industries fail to comply with measures that are adopted, the violations can be brought to the attention of the courts.

Procedural rights are included in the U.N. Framework Convention on Climate Change. Article 6 requires Parties to “[p]romote and facilitate at the national and, as appropriate, subregional and regional levels . . . [p]ublic access to information on climate change and its effects; [and p]ublic participation in addressing climate change and its effects and developing adequate responses.”<sup>175</sup>

The Kyoto Protocol similarly requires Parties to facilitate “public access to information on, climate change” and to seek and utilize information from NGOs.<sup>176</sup> In addition, procedural human rights can be found in various other international and national instruments, as discussed next.

#### *A. Access to Information*

Access to information is coming to be recognized as a basic human right. For instance, in 1996 the Parliamentary Assembly of the Council of Europe (PACE),<sup>177</sup> with the passage of the Resolution of 1087,<sup>178</sup> took an

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174. Rio Declaration, *supra* note 56.

175. UNFCCC, *supra* note 20, art. 6(a).

176. Kyoto Protocol, *supra* note 12, arts. 10(e), 13(4)(i).

177. Council of Europe Parliamentary Assembly, PACE Historical Overview, [http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE\\_history.htm](http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_history.htm) (last visited Apr. 30, 2008). The

important step in the recognition of the right to information as a human right. Resolution 1087 on the Consequences of the Chernobyl Disaster stated that “the Assembly believes that public access to clear and full information on this subject—and many others for that matter—must be viewed as a basic human right.”<sup>179</sup>

In *Öneryıldız v. Turkey*, the Grand Chamber of the European Court of Human Rights said broadly that where dangerous activities are concerned, “public access to clear and full information is viewed as a basic human right” in Europe.<sup>180</sup> For this proposition, it cited Resolution 1087 and said that the resolution “makes clear that this right must not be taken to be limited to the risks associated with the use of nuclear energy in the civil sector.”<sup>181</sup> The Grand Chamber went further, noting that such a human right to information had previously been found by the Court to be part of the right of private and family life under article 8 of the European Convention on Human Rights where pollution was concerned, citing the decision in *Guerra v. Italy*.<sup>182</sup> The Grand Chamber said that this same right to information “may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards,” referring back to its discussion of Resolution 1087.<sup>183</sup> The Grand Chamber said that “particular emphasis should be placed on the public’s right to information” as a way for governments to “take all appropriate steps to safeguard life for the purposes

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Parliamentary Assembly of the Council of Europe (PACE) was formed in 1949. It consists of 318 representatives (636 with alternates) sent by the national parliaments of the forty-seven states that are members of the Council of Europe, a pan-European institution whose members stretch from Russia to Portugal. Council of Europe Parliamentary Assembly, Assembly Procedure, [http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE\\_structures.htm](http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_structures.htm) (last visited Apr. 30, 2008). The Assembly elects the judges of the European Court of Human Rights, among other duties. Council of Europe Parliamentary Assembly, PACE Assembly Structure, [http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE\\_Procedure.htm](http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_Procedure.htm) (last visited Apr. 30, 2008).

178. EUR. PARL. ASS., *Resolution 1087 on the Consequences of the Chernobyl Disaster*, 16th Sitting (Apr. 26, 1996), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1087.htm>; see also Comm. on the Env’t, Reg’l Planning and Local Auths., *The Consequences of the Chernobyl Disaster*, Doc. No. 7538 (1996), available at <http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7538.htm>.

179. *Id.* ¶ 4.

180. *Öneryıldız v. Turkey (Grand Chamber)*, 41 Eur. Ct. H.R. 20 ¶ 62 (2004).

181. *Id.*

182. *Id.* ¶ 90. This was a rather dramatic, or clever, or just deceptive use of *Guerra*, for in that case Resolution 1087 had been offered to the court as a basis for holding that article 10 recognized a right to obtain information from the government (or at least a duty of government to provide information), and the court had refused to do so. Now, some years later, the Court in *Öneryıldız* chose to refer to another part of the *Guerra* decision in which information had been mentioned as part of article 8—and now the Court used that and Resolution 1087 to assert that the right to information is a “basic human right.”

183. *Id.*

of Article 2.”<sup>184</sup> It must be asked whether European courts would be willing to take this right concerning access to information on pollution risks and apply it to information relevant to the pollution causing global warming.<sup>185</sup>

The view that the right to information in environmental matters is a basic human right has been stated even more strongly by the Inter-American Court of Human Rights. The American Convention on Human Rights was cited in *Claude Reyes v. Chile*, a recent decision.<sup>186</sup> The American Convention’s direct provision on the human right to information, article 13, states that “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds.”<sup>187</sup> This language largely tracks article 10 of the European Convention on Human Rights regarding freedom of expression) although the American Convention adds the word “seek.”<sup>188</sup>

The American Convention’s article 13 could be seen as simply an anti-censorship provision, just as the European Court found in *Guerra*.<sup>189</sup> In fact, the American Convention made that link even more directly in section 2 of article 13, which states “[t]he exercise of the right provided . . . shall not be subject to prior censorship.”<sup>190</sup> But the Inter-American Court took a much broader view in the *Claude Reyes* case, saying that by denying information requests by Mr. Reyes the Chilean government had violated article 13.<sup>191</sup> The Inter-American Commission, in presenting the case to the court, had asserted:

The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests.

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184. *Id.* ¶¶ 89–90.

185. In addition to these convention-based or general human rights claims, many countries in Europe also recognize rights to information through legislation. In the case of members of the European Union, these rights are part of the European Union’s Directive on Access to Information. European Parliament and Council Directive 2003/4, 2003 O.J. (L 41) 26, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>.

186. Marcel Claude Reyes v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 1, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf).

187. American Convention, *supra* note 128, art. 13(1).

188. *Compare id.* (“freedom to seek, receive, and impart information”), with European Convention, *supra* note 86 (“freedom . . . to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

189. American Convention, *supra* note 128, art. 13(1); *Guerra*, 26 Eur. Ct. H.R. ¶ 53.

190. *Compare* American Convention, *supra* note 128, art. 13(2), with European Convention, *supra* note 86 (stating that the exercise of the freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”).

191. Marcel Claude Reyes v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 148, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf).

“Article 13 of the Convention should be understood as a positive obligation on the part of the State to provide access to the information it holds.”<sup>192</sup>

The court found it necessary to “determine whether the failure to hand over part of the information requested from the Foreign Investment Committee in 1998 constituted a violation of the right to freedom of thought and expression of Marcel Claude Reyes, and, consequently, a violation of Article 13 of the American Convention.”<sup>193</sup>

The court ruled that, indeed, this was a violation. This kind of ruling indicates that, at least in the Americas, the right to gather information on emissions causing global warming is a basic human right that cannot be limited by restrictive national policies.

Returning to Europe, the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters recognizes not only the right of the public to receive information upon request (article 4), but also the duty of the government to collect and disseminate information (article 5).<sup>194</sup> This Convention has been ratified by thirty-nine countries of Europe as well as the European Community. U.N. Secretary-General Kofi Annan has characterized its importance: “Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens’ participation in environmental issues and for access to information on the environment held by public authorities.”<sup>195</sup>

The Aarhus Convention Compliance Committee enforces these provisions, provides guidance through authoritative interpretations of the Convention in its jurisprudence, and facilitates improvement of laws and practices on national levels.<sup>196</sup> It has done so on the question of access to information in cases involving Kazakhstan and Ukraine.<sup>197</sup>

National legislation and some national constitutions also recognize the right to information.<sup>198</sup> The right to information has been enforced in

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192. *Id.* ¶ 58.

193. *Id.* ¶ 65.

194. Aarhus Convention, *supra* note 74, arts. 4, 5.

195. Kofi A. Annan, U.N. Secretary-General, *Foreword to U.N. ECON. COMM’N FOR EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE*, at v (2000), available at <http://www.unece.org/env/pp/acig.pdf>.

196. See Kravchenko, *supra* note 23, at 34 (summarizing ways that the Aarhus Convention’s compliance mechanisms have been effective).

197. *Id.* at 35–39.

198. CONST. OF UKRAINE art. 34, available at <http://www.rada.gov.ua/const/conengl.htm> (“Everyone has the right to freely collect, store, use and disseminate information . . .”); S. AFR. CONST. ch. 2, § 32 (1), available at <http://www.concourt.gov.za/site/theconstitution/english.pdf> (“Everyone has

matters involving climate change in at least one national court. In Germany, the Berlin Administrative Court in 2006 ordered the release of information about the extent to which Euler Hermes AG, an export credit agency, provides political and economic risk insurance to projects that produce GHGs.<sup>199</sup> The procedural human right to information may well have an important future in disputes where access to information related to climate change is denied to the public.

### B. Public Participation

The U.N. Framework Convention on Climate Change requires public participation in addressing climate change and its effects and developing adequate responses.<sup>200</sup> This provision of the Convention can be used in various ways, including to demand participation in the environmental assessment of certain projects and activities that emit GHGs contributing to climate change. Case law involving environmental impact assessment and climate change is evolving in various national courts. For example, in November 2006, in the case *Gray v. Minister for Planning* in New South Wales (NSW), the Land and Environment Court made a decision that an EIA for a large coal mine known as the Anvil Hill Project *must* address global warming.<sup>201</sup> Judge Nicola Pain decided:

[T]here is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.<sup>202</sup>

One of the main arguments of the plaintiff was that members of the public must be properly informed in order to determine if they wish to

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the right of access to—(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.”).

199. *Bund für Umwelt und Naturschutz Deutschland v. Federal Republic of Germany*, VerwG 10 A 215.04 (Verwaltungsgericht Berlin, 10th Chamber) (Jan. 10, 2006), available at <http://www.climatelaw.org/cases/case-documents/germany/de-export-jan06.pdf>; *unofficial translation available at* <http://www.climatelaw.org/cases/case-documents/germany/de-export-jan06-eng.doc>.

200. UNFCCC, *supra* note 20, art. 6(a)(iii).

201. *Gray v. Minister for Planning*, (2006) N.S.W.L.E.C. 720, ¶¶ 96–100, available at <http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2006/720.html>.

202. *Id.* ¶ 100.

make submissions.<sup>203</sup> The NSW court found that defendant's failure to take into account the precautionary principle and intergenerational equity were unlawful: "[T]he requirement for prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity, and productivity of the environment is maintained and enhanced for the benefit of future generations."<sup>204</sup> Soon thereafter, the Land and Resources Tribunal of Queensland took the opposite position in *Re Xstrata Coal Queensland Pty Ltd.*, ruling that that an EIA for a coal mine need not assess greenhouse gas emissions.<sup>205</sup>

In the United States, Friends of the Earth, Greenpeace, and four cities sued the Export-Import Bank (Ex-Im) and the Overseas Private Investment Corporation (OPIC).<sup>206</sup> Plaintiffs alleged that the defendants failed to evaluate the effects of their "financial support . . . [of] fossil fuel projects that emit greenhouse gases" on global climate change.<sup>207</sup> The parties argued that the defendants were "required to conduct an environmental review under NEPA."<sup>208</sup> The court ruled that Ex-Im and OPIC are not completely exempt from NEPA requirements, but did not yet make a decision about whether Ex-Im or OPIC have enough authority over the specific projects in issue that their funding must be subject to EIA requirements.<sup>209</sup> This lingering issue was left to be decided in a future trial. The door is clearly open in the United States to require NEPA review and its concomitant public participation in at least some projects affecting GHG emissions, even in other countries. Even more recently, the U.S. Court of Appeals for the Ninth Circuit has ruled in a case involving potential emissions in the United States that "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."<sup>210</sup>

Public participation is an important environmental right. To the extent that EIA processes are initiated for projects that may affect the climate, the public will have an opportunity to participate in assessment of the impact of those projects, require public hearings, and raise comments. The resultant

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203. *Id.* ¶¶ 14–15.

204. *Id.* ¶ 116.

205. *Re Xstrata Coal Queensland Pty Ltd.*, (2007) Q.L.R.T. 33, available at <http://www.austlii.edu.au/au/cases/qld/QLRT/2007/33.html>.

206. *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 891 n.1 (N.D. Cal. 2007).

207. *Id.* at 892.

208. *Id.*

209. *Id.* at 889.

210. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety*, 508 F.3d 508, 550 (9th Cir. 2007).

public outcry may halt a project. To the extent that institutions ignore requirements for public participation in decisions that may affect the climate, court actions challenging the decisions as illegal may give environmental procedural rights an important role in overturning them.

#### CONCLUSION

The accelerating pace of climate change puts the lives of current and future generations in danger. Human rights instruments can bring new arguments to the international and national debates. Attempts to use international human rights bodies, regional human rights courts, or national courts to combat climate change have met mixed success so far. However, they do start to reframe the debate, which might be their greatest contribution.

