

# **Human Rights and Climate Change Obligations**

## **Draft Memorandum for the Experts' Group on Global Climate Obligations**

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## 1) Introduction

This memorandum aims to outline the obligations international human rights law generates with regard to the causes and effects of climate change. In particular, it aims to outline possible principles that succinctly describe general obligations and provide commentary on the sources of these obligations. It is our hope that these proposed obligations will contribute to a full understanding of all the legal obligations binding states and polluters with regard to climate change and its effects.

The memorandum contains two broad sections. The first section outlines the particular human rights that climate change threatens. Climate change threatens a wide range of human rights, most of which are in themselves well understood. Therefore, we have not drafted principles reflecting the impact of climate change on individual rights such as the right to life. This section instead shows the pervasive impact of climate change on a range of human rights and summarizes the nature and extent of these rights. We have, however, drafted one principle reflecting an emerging right to a clean and healthy environment, because climate change directly affects this right and the international community has not yet clearly articulated or accepted it.

The second section sets out a number of principles grounded in human rights jurisprudence that can be the basis of obligations on states (and, to a lesser extent, polluters) and responsibility for violations of human rights caused by climate change. Each principle is intended to overcome an apparent obstacle to imposing climate-based human rights obligations. The principles are broadly grouped into two categories: limitations on states' rights to exploit natural resources and principles for assigning particular obligations and responsibility for the effects of climate change. Taken together, these principles constitute a basis for enforceable obligations based on climate change's threats to individuals' and communities' human rights. The extent to which these principles have a strong foundation in international human rights law varies. The development of the jurisprudence from which they have been derived varies in its depth and effectiveness, and different courts vary in their support for the norms and concepts underlying these principles. Each principle is, therefore, accompanied by commentary that aims to explain the content of the principle and show the support for it.

The principles are:

1. Right to a clean and healthy environment: Every citizen has the right to a clean and healthy environment, one that permits the realization of a life of dignity and well-being. States have an obligation to take positive measures to safeguard and advance this right. In particular, States have a duty to prevent severe environmental pollution that could threaten human life and health, to remediate past harms, and to promote sustainable ecological systems and use of natural resources.
2. Duties to Prevent Transboundary Harms: States have an obligation to prevent violations of human rights under their control wherever they may take place. All states emitting pollutants that contribute to climate change therefore share responsibility for mitigating and helping communities adapt to the global effects of climate change.

3. Duties to Future Generations: Obligations to future generations are implicit in customary and conventional international human rights law. States have a duty to respect the rights of future generations by taking immediate measures to prevent climate change and to address its consequences.
4. Duties to Vulnerable Communities: Human rights law recognizes and protects the equal worth of individuals and communities. States have a primary obligation to protect and advance the rights of vulnerable communities that are threatened by climate change.
5. Causation by Omission: States have positive obligations to prevent foreseeable violations of human rights. The failure of States to take measures to prevent climate change-related harms is therefore itself a violation of human rights.
6. Cooperation Principle: States have a duty to cooperate to prevent violations of human rights, including those that result from circumstances for which no single State is entirely responsible. In particular, States have a duty to cooperate to find and implement solutions to climate change and other global challenges to human rights.
7. Common but Differentiated Responsibilities: States' foremost obligation is to ensure basic, minimum human rights protection to all people. States must share the responsibility to prevent climate change and provide remedies for individuals and communities affected by it in ways that ensure equal enjoyment of their rights.
  - a. States have a duty to act as expeditiously and to the maximum extent possible to mitigate contributions to climate change.
  - b. States must cooperate through technology and resource transfers to ensure that human rights are protected during the transition to less carbon-intensive societies.
  - c. States must cooperate to help vulnerable communities adapt in a way that maximally respects and protects their human rights as climate change impacts occur.
8. Procedural Rights: Individuals and communities have a right to participate in decisions affecting the environment in which they live. States have a duty to respect this right as they make decisions regarding climate change mitigation and adaptation.
  - a. States have a duty to make information publicly accessible about the anticipated impacts of climate change and contemplated response measures.
  - b. States have a duty to ensure that affected individuals and communities take part in decisions about climate change responses and to respect principles of consultation and free, prior, and informed consent, particularly with regards to adaptation measures.
  - c. States have a duty to ensure that individuals and communities who suffer severe harms from climate change have access to justice forums through which they can seek an appropriate remedy.

9. Precautionary Principle: States have an obligation to take steps to reduce or eliminate threats to the protection of fundamental human rights even if the degree of threat is uncertain. States therefore have a duty to act expeditiously to mitigate climate change contributions and to prepare, in advance, effective adaptation strategies.
10. Horizontal Application: States have an obligation to regulate private parties in order to prevent them from causing violations of protected human rights through their contributions and responses to climate change. Where a State fails to impose or enforce adequate regulations, private parties, including corporations, nevertheless have an obligation to avoid violating basic human rights.

## 2) Human rights affected by climate change

A wide variety of human rights have been used to advance environmental goals. Civil and political rights provide a basis for individuals and groups to gain access to information on the environment, judicial remedies and political processes. By facilitating participation in decision-making and compelling governments to meet minimum standards for protecting life and property from environmental harm, this category of rights empowers people to protect their environment. Furthermore, traditionally “civil and political” rights such as the right to life create positive obligations on the part of states to prevent violations by private parties. Certain environmental conditions have been recognized as essential to protecting social and economic rights. Recognizing that interference with the environment affects people’s full enjoyment of social and economic rights, states have interpreted these rights to encompass environmental rights. Regional treaties and state constitutions have also privileged environmental quality as a separate right, giving it status comparable to other social and economic rights. Other courts have used collective or solidarity rights such as the right to culture and the rights of indigenous groups to undergird environmental protection. The section below analyses how international instruments and courts have interpreted the rights affected by climate change and linked them to environmental protection.

### (i) Dignity as a Core Value and Specific Right

The anticipated impacts of climate change will jeopardize the ability of States to fulfill their legal obligations to protect and advance human dignity. The central place of the concept of dignity in the UN Charter and the Universal Declaration of Human Rights has contributed to the establishment of the concept as a core value throughout international and regional human rights law.<sup>1</sup> Corresponding with the creation of the Universal Declaration at the end of WWII, Germany enshrined dignity as the foundational principle of its new

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<sup>1</sup> See, e.g., Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993, preamble (determining to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person...”); Universal Declaration of Human Rights, preamble, GA Res 217A (III), UN Doc A/810 (Dec. 10, 1948) (“[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”); Charter of Fundamental Rights for the European Union, at chp. 1., art. 1 (“Human dignity is inviolable. It must be respected and protected.”); Christopher McCrudden, *Human Dignity and the Judicial Interpretation of Human Rights*, 19 Eur. J. Int’l L. 655, 655, 668 (2008)(describing the “remarkable degree of convergence on dignity as a central organizing principle” in international and regional human rights texts.).

constitution,<sup>2</sup> and many nations have since followed suit. As international and national courts begin to engage with climate change-related issues, they have begun to invoke dignity as a source of governmental limitations and affirmative duties. Dignity is a particularly powerful lens through which to view the human consequences of climate change because it provides a fabric that unifies the full panoply of human rights that climate change will compromise. It also requires a floor of minimum living conditions that States must provide for as climate change impacts accrue.

The Universal Declaration of Human Rights relies on the concept of dignity as a core human value.<sup>3</sup> In creating the Declaration, State parties began to engage in the project of creating a universal system of agreed upon human rights. Dignity helped to provide a common value that the participating parties could embrace and connect to their own legal traditions.<sup>4</sup> From that starting point, the concept of dignity has become established as foundational for the binding human rights obligations embedded in subsequent treaties and domestic constitutional law. The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights extended dignity's foundational role, establishing inherent dignity of the human person as the source from which all other human rights derive.<sup>5</sup> All major UN conventions have since included the concept of dignity in their preambles and/or their substantive provisions.<sup>6</sup> As the international community forms new human rights instruments in areas such as indigenous and cultural rights, their drafters have connected these rights to the protection and advancement of human dignity.<sup>7</sup>

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<sup>2</sup> GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 110 (2006) (explaining that “[a]ll [] provisions of the Basic Law, including the property clause, must be interpreted in light of the commitment to human dignity.”).

<sup>3</sup> Universal Declaration of Human Rights, at preamble (asserting that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”), art. 1 (recognizing that “all human beings are born free and equal in dignity and rights.”); art. 22 (“Everyone...is entitled to realization...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”).

<sup>4</sup> See McCrudden, *supra* note 1 at 677 (describing the “pivotal” role that the Declaration played in “popularizing the use of dignity... in human rights discourse” and asserting that its significance at the time of drafting of the UN Charter and Declaration “was that it supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus.”).

<sup>5</sup> See International Covenant on Economic Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at Preamble, UN Doc A/6316 (1966), 993 UNTS 3 (“recognizing that these rights derive from the inherent dignity of the human person”); International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at Preamble, UN Doc A/6316 (1966), 999 UNTS 171 (“recognizing that these rights derive from the inherent dignity of the human person.”).

<sup>6</sup> See, e.g., United Nations Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture, the Convention on Rights of the Child, and Conventions regarding the Rights of Migrant Workers, Protection Against Forced Disappearance, and the Rights of Disabled Persons. See also, the Vienna Declaration and Programme of Action, A/Conf.157/23 (1993) (referring to dignity in its preamble and in relation to several substantive provisions, including those referring to the treatment of indigenous peoples and the eradication of extreme poverty).

<sup>7</sup> See, United Nations Declaration on the Rights of Indigenous Peoples (September 13, 2007), (A/61/L.67 and Add.1) at art. 43 (“The rights recognized herein constitute the minimum standards for

Regional human rights instruments and many post-WWII constitutions have adopted dignity as their “central organizing principle,” giving the concept local meaning and force.<sup>8</sup> Dignity plays a prominent role, for instance, in the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the Revised Arab Charter on Human Rights, the African Charter on Human and Peoples’ Rights, and the European Union Charter of Fundamental Rights. Article I of the German Basic Law begins with the statement that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”<sup>9</sup> Similarly, Chapter 1 of the South African Constitution lists “human dignity” as the first value upon which the democratic state is founded. Many constitutions also protect dignity as a fundamental right itself. The South African Constitution, for instance, places the right of “[e]veryone ... to have their dignity respected and protected” ahead of the right to life.<sup>10</sup> Regional and domestic courts have given force to these provisions by finding that a wide range of State actions and omissions violate the right to dignity.

Courts have interpreted dignity to require that States refrain from infringing on other fundamental rights, such as liberty and equality, and take positive steps to fulfill socioeconomic rights. Though the U.S. Constitution does not explicitly refer to human dignity, the Supreme Court has invoked dignity as the ultimate value at stake in striking down anti-sodomy laws and regulating the right to abortion.<sup>11</sup> The Canadian Supreme Court has interpreted the protection of dignity to require that States fulfill an array of obligations, such as ensuring “robust participation in the political process”<sup>12</sup> and preventing “the imposition of disadvantage, stereotyping, or political or social prejudice.”<sup>13</sup> Courts have also found dignity impaired when the State deprives persons and groups of housing and property interests. For instance, the Constitutional Court of South Africa has found violations of the rights to both dignity and equality where the State engages in mass evictions of landless persons<sup>14</sup> and fails to adequately fulfill the right to housing.<sup>15</sup> These examples suggest that

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the survival, dignity and well-being of the indigenous peoples of the world.”). *See also*, UNESCO Universal Declaration on Cultural Diversity, art. 4 (2001) (“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity.”).

<sup>8</sup> McCrudden, *supra* note 1, at 671.

<sup>9</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) at art. 1, para. 1.

<sup>10</sup> *See* S. AFR. CONST., 1996. chp. 2, sec. 10. *See also*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 21 (guaranteeing the “right to dignity”).

<sup>11</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>12</sup> *R. v. Keegstra* [1990] 3 SCR 697 (Sup Ct Canada).

<sup>13</sup> *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, at para. 51 (Sup Ct Canada).

<sup>14</sup> *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268 (CC) (“It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalization.”)

<sup>15</sup> *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), at 44 (“A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.”). German constitutional jurisprudence also treats property as a moral and dignitary interest, whose “function is to secure its holder a sphere of liberty in

courts tend to be particularly receptive to finding that State actions and omissions arise to constitutional violations when human dignity is at stake.

Litigants who have connected climate change to dignitary harms have already had some success in persuading courts to hold States accountable for their failures to take appropriate mitigation and adaptation measures. In a 2005 case, the Federal Court of Nigeria found that protecting the fundamental right to dignity required the State to enjoin gas flaring by the Shell Petroleum Development Company in the Niger Delta. The Court found that the “massive, relentless, and continuous gas flaring” in the production of crude oil and petroleum products “contributes to adverse climate change as it emits carbon dioxide and methane.”<sup>16</sup> The “warming of the environment” that results, combined with the direct environmental effects of the localized pollution, impairs the community’s health and jeopardizes their food and water sources.<sup>17</sup> The Court declared that the Nigerian “constitutional guarantee of right to life and dignity . . . includes the right to a clean, poison-free and pollution-free air and health environment conducive for human beings to reside in for our development and full enjoyment of life.”<sup>18</sup> Finding that these rights “are being wantonly violated,” the Court enjoined all further gas flaring in the area and instructed the government that regulations that allow for such gas flaring are unconstitutional.<sup>19</sup> Though gas flaring has continued in the area, the case provides a comparative precedent for other constitutional courts that enforce the right to dignity.

Regional courts have also referred to the right to dignity to prevent environmental degradation and when considering climate change harms. The Inter-American Court of Human Rights and the Inter American Commission on Human Rights have invoked human dignity in enjoining both Nicaragua and Belize from granting logging concessions that violated indigenous communities’ physical and cultural survival and exacerbated environmental damage to their property.<sup>20</sup> Although dismissed, the Inuit Petition to the Inter-American Commission on Human Rights articulated climate change as a threat to dignity, particularly given the threats that it poses to indigenous property rights and cultural

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the economic field and thereby enable him to lead a self-governing life.” *Hamburg Flood Control*, BVerfGE 24 at 389 (1967).

<sup>16</sup> *Gbemre v. Shell Petroleum Development Co. Nigeria Ltd.*, FHC/B/CS/53/05 (Nigeria, 2005), at paras. 3, 7(a).

<sup>17</sup> *Id.* at para. 7(c).

<sup>18</sup> *Id.* at para. 14.

<sup>19</sup> *Id.*

<sup>20</sup> *See, Maya Indigenous Communities v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. Comm’n. H.R., OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 2 (Oct. 12, 2004), *available at* <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>, at para. 84 (referring to the Constitution of Belize’s recognition that “[t]he People of Belize . . . require policies of state . . . which protect the identity, dignity, and social and cultural values of Belizeans, including Belize’s indigenous people.”); *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case No. 79/01 Inter-Am. Ct. H.R. (Aug. 31, 2001), *available at* <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>, at para. 116, 140(f), (citing the American Convention’s and the Nicaraguan Constitutions’ guarantees of the right to dignity).



integrity.<sup>21</sup> These early instances of judicial recognition of the relationship of dignity to climate change and environmental protection suggest that dignity may play an important role in shaping the duty of states and non-state actors with regards to climate change mitigation and adaptation.

Though it has not yet been invoked in relation to climate change, the notion of “*vida digna*” in the jurisprudence of the Inter-American Court of Human Rights could provide teeth to States’ climate change-related obligations. The Court has interpreted the “right to life,” protected by Article I of the American Declaration on the Rights and Duties of Man, to encompass the right to live a “*vida digna*,” or a dignified life.<sup>22</sup> The Court’s concept of the right to a “*vida digna*” “obligates the State to generate living conditions that are at least ‘minimum living conditions that are compatible with the dignity of the human person.’”<sup>23</sup> “*Vida digna*” imposes both positive and negative obligations on the State. It requires States to “take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.”<sup>24</sup> It also prevents them from impeding peoples’ access to basic resources and life necessities. The Court’s jurisprudence so far on “*vida digna*” suggests that States have obligations to undertake immediate mitigation measures to the extent possible to dampen the severe impacts of climate change on human welfare.<sup>25</sup> The requirement that States prioritize the needs of vulnerable communities also obliges States to implement adaptation measures to aid climate refugees, indigenous communities, poor agricultural and coastal communities, and other severely affected groups.<sup>26</sup> More generally, the concept of “*vida digna*” teaches that fulfilling the right to dignity requires States to ensure a minimum level of living conditions for all their members as climate change impacts accrue.

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<sup>21</sup> Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting From Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005)(*submitted by* Sheila Watt-Cloutier),

<sup>22</sup> *See, e.g.,* Sawhoyamaxa Indigenous Community Case (Paraguay), Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006) (finding that Paraguay violated the right to life of members of an indigenous community by delaying determination of title and preventing access to their ancestral lands.).

<sup>23</sup> Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights*, 31 HASTINGS INT’L & COMP. L. REV. 1, 2 (2008) (citing Indigenous Community Yakye Axa Case (Paraguay), Inter-Am. Ct. H.R. (ser.C) No. 125, at ¶¶ 162-4 (June 17, 2005)).

<sup>24</sup> Indigenous Community Yakye Axa, *supra* note 23.

<sup>25</sup> The Court has recognized some limitations to States’ requirements to fulfill the conditions for a dignified life. *See, Sawhoyamaxa Indigenous Community Case*, at ¶ 155 (citing the Pueblo Bello Massacre Case (Colombia), Inter-Am. Ct. H.R. (ser.C) No. 140, at ¶ 124 (January 31, 2006) (“[A] State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities.”)). The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights interpret ICESCR as imposing a much broader requirement that “minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.” Maastricht Guidelines, at 18 U.N. Doc. E/C.12/2000/13 (2000).

<sup>26</sup> Ximenes-Lopes Case (Brazil), Inter-Am. Ct. H.R. (ser.C) No. 149, at ¶ 103 (July 4, 2006) (citing Baldeón-García Case (Peru), Inter-Am. Ct. H.R. (ser.C) No. 147, at ¶ 81 (April 06, 2006)).

## (ii) Right to Life

The right to life is explicitly protected in ICCPR art. 6: “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>27</sup> The subsequent portions of art. 6 deal with the death penalty and genocide, but the Human Rights Committee has interpreted the right broadly in CCPR General Comment 6 to extend as far as creating an obligation to reduce infant mortality and increase life expectancy.<sup>28</sup> At the same time, the General Comment notes that the right to life, based on its unqualified language and primary position in the ICCPR, is a bedrock human right from which no derogation is permitted.<sup>29</sup>

General Comment 6 may well go too far; the language of the ICCPR itself does not make it clear that suffering an avoidable early natural death amounts to being “arbitrarily deprived of life.” Article 6 also explicitly contemplates and permits the death penalty, indicating that the word “arbitrarily” restricts the application of the right to situations in which no valid reason is offered for an individual’s death.

Climate change will threaten lives. Because climate change is anthropogenic, this threat to life is more clearly related to the core of art. 6 than, for example, deaths from preventable illness, which are not always as obviously caused by human activity. In human rights terms, a death is more unacceptably “arbitrary” when it is foreseeably caused by human activity. When human activities foreseeably threaten lives, engaging in these activities amounts to a potential violation of the right to life.<sup>30</sup> Based on ICCPR art. 2(1), the state has a positive obligation to ensure that such violations do not take place.<sup>31</sup>

The European Court of Human Rights has provided a similar interpretation of the parallel text of article 2 of the European Convention on Human Rights. States have an obligation “to take appropriate steps to safeguard the lives of those within their jurisdiction.” This duty applies “in the context of any activity, whether public or not, in which the right to life may be at stake.”<sup>32</sup> The key factor seems to be foreseeability of risk; the obligation applies even when there is a foreseeable risk in a situation that is not caused by human activity.<sup>33</sup> The Inter-American Court of Human Rights has enforced perhaps the most sweeping interpretation of the “right to life,” by interpreting it to require States to fulfill the conditions for their people to live a life with dignity.<sup>34</sup> As climate-change threats to human

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<sup>27</sup> ICCPR, at art. 6(1).

<sup>28</sup> Office of the High Commissioner for Human Rights, CCPR General Comment 6 at para. 5 (1982).

<sup>29</sup> *Id.* at para. 1.

<sup>30</sup> *See, e.g.*, UN Human Rights Committee, *Roger Judge v. Canada*, Comm. No. 829/1998, at para. 10.6, U.N. Doc. CCPR/C/78/D/829/1998 (2003) (holding that deporting an individual to a country where he might be executed is a sufficient causal link for a violation of ICCPR art. 6).

<sup>31</sup> ICCPR art. 2(1) (“respect and ensure”).

<sup>32</sup> *Oneyrildiz v. Turkey*, App. No. 48939/99 Eur. Ct. H.R. at para. 71 (2004) (holding that Turkish authorities had an obligation to anticipate and respond to the risk of a methane explosion from a rubbish dump).

<sup>33</sup> *Budayeva and Others v Russia*, App. No. 15339/02 Eur. Ct. H.R. at para. 133 (2008)(finding obligation to mitigate harm when imminence of a natural disaster is “clearly identifiable”).

<sup>34</sup> *See* discussion on “vida digna,” *supra* section 2(i).

life, particularly for vulnerable communities, become increasingly imminent and apparent, courts may become receptive to using “right to life” provisions to require mitigation measures. States will also need to use adaptation resources to safeguard the lives of affected groups.

### (iii) Right to Property

The right to property is not explicitly protected by the ICCPR or ICESCR, but it is protected by inter-American, African, and European rights treaties<sup>35</sup> as well as many national jurisdictions. The right to property is not absolute; the ability of states and their courts to balance the right to property against other values is essential for making it possible to regulate pollution.<sup>36</sup> At the same time, climate change may destroy individuals’ property, and in this case, parties may be entitled to compensation if they can show that their loss is not a natural event but rather something traceable to another’s actions. If courts recognize that climate change is caused by humans, they may be receptive to the argument that greenhouse-gas emitters are indirectly taking others’ property by causing its destruction. Such claims may be more appropriately addressed through tort suits or claims involving the taking or appropriation of property, which is beyond the scope of this analysis.

At the same time, the protections for property within human rights instruments also suggest that states have an obligation to ensure that private property is protected, particularly so as to prevent harms to other essential rights. For instance, the American Declaration on the Rights and Duties of Man ensures the right to private property to the extent that “it meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>37</sup> States may thus have an obligation, grounded in human rights, to regulate emitters in order to protect private property from environmental harm and thereby ensure that essential needs are met and core human rights protected.<sup>38</sup> In addition, the right to property is particularly important to the lives, dignity, and cultural integrity of indigenous communities, which will be among the groups first and most severely affected by climate change. Human rights instruments, discussed below, impose heightened protections for the property of indigenous communities.<sup>39</sup>

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<sup>35</sup> African [Banjul] Charter on Human and Peoples’ Rights, at art. 14, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986[*hereinafter* African Charter on Human and People’s Rights]; Council of Europe, Protocol to the Convention for the Protection of Rights and Freedoms art. 1, 213 U.N.T.S. 262, *entered into force* May 18, 1954 [*hereinafter* Protocol to the Convention for the Protection of Rights and Freedoms]; American Convention on Human Rights, art. 21, O.A.S. Treaty Series No. 36, 1144, U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)[*hereinafter* American Convention on Human Rights].

<sup>36</sup> *See, e.g.*, *Fredin v. Sweden*, App. No. 18928/91 Eur. Ct. H.R. (1991).

<sup>37</sup> American Declaration on the Rights and Duties of Man, at art. 23.

<sup>38</sup> *Oneyrildiz*, para. 145-146 (holding that the State has a duty to take measure to protect a squatter’s possessory interests in a self-built home).

<sup>39</sup> *See Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, at ¶ 95 (Nov. 28, 2007) (holding that art. 21 of the American Convention on Human Rights incorporates a “right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied”).

#### (iv) Right to Family

The ICCPR recognizes the family as a fundamental social unit<sup>40</sup> and protects families from interference.<sup>41</sup> Upheavals related to climate change will affect families' abilities to live together. Significant contributions to climate change and failures to undertake mitigation measures may violate the right to family. In addition, recognition of the right to family must also guide states' responses to climate-related disasters.

Regional courts have interpreted the right to family as being interconnected with the right to privacy and the right to property; thus, severe intrusions on property and home life may be construed as violations of the right to family.<sup>42</sup>

#### (v) Right to Self Determination

Both the ICCPR and the ICESCR begin with the same right to self-determination: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>43</sup> Both documents explicitly state, "In no case may a people be deprived of its own means of subsistence." The right to self-determination is treated as a background right that makes all other rights possible.<sup>44</sup> Presumably this is because individual rights are protected within societies, and the right to self-determination allows these societies to maintain themselves.

Climate change threatens the right to self-determination for nations dependent on coastal life and other vulnerable ecosystems. Some states and sub-populations may be forced to relocate entirely, while globally rising sea levels will dramatically influence economic, social, and cultural development. In the context of these climate-change effects, states owe obligations to peoples and states, rather than to individuals. Although, traditionally, this right was violated through acts of war or open hostility, knowingly creating or failing to prevent an environmental disaster would constitute a comparable violation.

In one notable example, the Inter-American Court of Human Rights held that failing to protect indigenous peoples' land and secure their land rights was not only a violation of property (which is a right generally held by individuals) but also a violation of the right of self-determination.<sup>45</sup> The Court noted that land traditionally held by indigenous peoples

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<sup>40</sup> ICCPR at art. 23(1).

<sup>41</sup> ICCPR at art. 17, art. 23(2).

<sup>42</sup> For examples, see COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2012), available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual\\_Env\\_2012\\_nocover\\_Eng.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf), at pp. 45-54.

<sup>43</sup> ICCPR at art. 1(1); ICESCR at art. 1(1).

<sup>44</sup> Human Rights Committee, General Comment No. 12, at art. 1 (The Right to Self Determination of All Peoples) at para. 1, UN Doc. HRI/GEN/1/Rev. 9 (1984) [hereinafter General Comment 12 (1984)]

<sup>45</sup> Maya indigenous community of the Toledo District v. Belize, Inter-Am. C.H.R. Case 12.053, Report No. 40/04, at ¶ 154 (2004). See also Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, at 16 (Summer 2004).

“plays a central role in their physical, cultural and spiritual vitality.”<sup>46</sup> Therefore, securing an indigenous community’s property rights as the rights of a group is important for reasons separate from the general justifications for protecting individual property rights. The right of self-determination thus imposes an obligation to preserve, as far as possible, existing communities and to allow them to play a role in determining their future.<sup>47</sup>

#### (vi) Right to Adequate Housing

State parties to international human rights treaties recognize the right of everyone to adequate housing and the continuous improvement of living conditions. The Committee on Economic, Social and Cultural Rights has recommended that the right to housing be “seen as the right to live somewhere in security, peace and dignity.”<sup>48</sup> The Committee recognized that the right to housing “is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised.” For instance, the Committee’s Comment on the right to housing recommends that “housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants.”<sup>49</sup>

Regional Courts have applied the right to housing to the environment. While the European Court of Human Rights has refused to construe Article 8, concerning the right to respect for private and family life, as requiring states to ensure that every individual enjoys housing that meets particular environmental standards, it has found a procedural violation of Article 8 when minimum safeguards have not been respected by the authorities.<sup>50</sup> In the *Dubetska and Others v. Ukraine* case,<sup>51</sup> the Court refused to establish an applicant’s general right to free new housing at the State’s expense, because the situation could be remedied by duly addressing the environmental hazards.<sup>52</sup> It recognized that there would be no issue if the detriment were comparable to the environmental hazards inherent in modern city life. However, the court stated, “an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant’s ability to enjoy his home, private or family life.”<sup>53</sup> The court held that Article 8

<sup>46</sup> Maya Indigenous Community at para. 155.

<sup>47</sup> The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79/01, at para. 164, (August 31, 2001),

<sup>48</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, *The Right to Adequate Housing* (Sixth session, 1991), at para. 7, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) [hereinafter General Comment 4 (1991)].

<sup>49</sup> General Comment 4, para. 8 (f) (1991).

<sup>50</sup> See *Grimkovskaya v. Ukraine*, App. No 38182/03, Eur. Ct. H.R. paras 65-66, 68, 73 (2006) (holding that the efficient and meaningful management of the street through a reasonable policy aimed at mitigating the motorway’s harmful effects on the Article 8 right of the street’s residents belonged to those minimal safeguards).

<sup>51</sup> *Dubetska and others v. Ukraine*, App. No. 30499/03 Eur. Ct. H.R. (2011). The applicants’ housing had been affected by pollution from mines and a state owned factory for twelve years. The applicants had set up their housing years before the construction of the mine and factory. They were unable to relocate without state assistance since there was no demand for real estate in their area so they could not sell their housing and were unable to find other sources of funding for relocation.

<sup>52</sup> *Id.* at para. 150.

<sup>53</sup> *Id.* at para. 105.

had been violated because the government's approach to tackling pollution near the applicants' houses was delayed and inconsistently enforced and the government had failed to put "in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity."<sup>54</sup>

In the context of climate change, climate impacts will displace large populations and diminish habitable areas, particularly in coastal zones, increasing pressure on already severe housing needs. States' failure to undertake effective mitigation measures will compromise their obligation to ensure the realization of the right to housing. In addition, States and the international community will need to ensure that adaptation measures fulfill the housing needs of displaced climate refugees.

#### (vii) **Right to Health**

The right to health has been relied upon as a source of the right to a clean and healthy environment. In turn, a healthy environment is deemed a *sine qua non* for the right to health to be meaningful. International law reflects this strong interface between health and the environment. The International Covenant on Economic, Social and Cultural Rights guarantees the right to safe and healthy working conditions<sup>55</sup> and the right of children and young persons to be free from work harmful to their health.<sup>56</sup> In article 12, the Covenant expressly calls on state parties to take steps to improve all aspects of environmental and industrial hygiene and to enable the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.<sup>57</sup> In General Comment 14, the Committee on Economic, Social and Cultural Rights elaborates on what the right to health entails, stipulating that the right to health is "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing,[and] healthy occupational and environmental conditions."<sup>58</sup> Recognizing the link between health and the environment, particularly for indigenous communities, the Committee noted that "in indigenous communities, the health of the individual is often linked to the health of the

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<sup>54</sup> *Id.* at para, 154. See also *Guerra v. Italy*, 1998-I, no. 64 Eur. Ct. H.R (1998). where the Court found a violation of Article 8 and reiterated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life."

<sup>55</sup> ICESCR, at art. 7(b).

<sup>56</sup> *Id.* at art. 10(3).

<sup>57</sup> The General Comment 14 recognizes that the "improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, "*inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health." See Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health*, at para. 15, UN Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003)[*hereinafter* General Comment 14 (2000)], at <http://www1.umn.edu/humanrts/gencomm/escgencom14.htm>.

<sup>58</sup> General Comment 14, at para. 11 (2000).

society as a whole and has a collective dimension.”<sup>59</sup> It therefore concluded that “development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.”<sup>60</sup>

The right to health also imposes obligations on the State. According to the Committee on Economic, Social and Cultural Rights, state parties to the Convention have obligations that include “adopt[ing] measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline.”<sup>61</sup> Although the covenant recognizes resource constraints, it provides for progressive realization and imposes on States parties various obligations which are of immediate effect. It stipulates that “progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.”<sup>62</sup> Similarly, Article 24 of the Convention on the Rights of the Child also mentions environmental protection in respect to the child’s right to health. It provides that “States Parties shall take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.”<sup>63</sup> It also urges that information and education be provided to all segments of society on hygiene and environmental sanitation.<sup>64</sup> These conventions clearly link human rights like health to environmental protection, recognizing environmental protection as an integral component of the right to health. Since environmental protection is an essential means to achieve full realization of the right to health, the obligations states have to realize the right to health can therefore be applied to states in relation to the environment.

Regional Courts have recognized that the right to health is linked to the environment. The Inter-American Commission on Human Rights heard a petition brought on behalf of the Yanomami Indians of Brazil, accusing the government of violating the American Declaration of the Rights and Duties of Man. The government had constructed a trans-Amazonian highway through Yanomami territory and authorized the exploitation of the resources in the

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<sup>59</sup> *Id.* at para. 27.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at para. 36.

<sup>62</sup> *Id.* at para. 31; para. 33 (“The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.” This obligation is applicable to environmental aspects that affect the right to health).

<sup>63</sup> Convention On The. Rights Of The Child. Distr. General. art. 24 (2)(c). CRC/C/GC/12. (July 20, 2009).

<sup>64</sup> *Id.* at art. 24(2)(e).

Indian's territory.<sup>65</sup> As a result, non-indigenous people flooded the territory and spread contagious diseases like skin rashes and venereal infections.<sup>66</sup> The authorities responsible for the Indian's health did not attempt to remedy this and due to lack of available medical care, these infections remained untreated.<sup>67</sup> The Commission found that the government had failed to take "timely and effective measures" and as a result the government had violated the Yanomami rights to "life, liberty and personal security (Art. 1); the right to residence and movement (Art. VIII); and the right to the preservation of health and well-being (Art. XI)."<sup>68</sup> The Yanomami case reflects the intersection of indigenous rights, health and the environment and how the destruction of the environment affects the ability of indigenous people to enjoy these rights. This case also highlights that the government can be held responsible not only for state action that violates human rights like health but also if it fails to take measures to prevent private actors from interfering with that right. A similar logic can be applied to the environment and the government should be held responsible when it fails to take measures to prevent outside actors from degrading the environment.

The Inter-American Commission reiterated this link between the environment and health in its report on Ecuador. The Commission responded to the human rights situation in the Oriente region, where oil exploitation activities were contaminating the water, air and soil and driving away fish. The Commission identified human rights violations, particularly violations of the right to life and health, resulting from effects of the contamination. The contamination threatened the food and water supply, caused the people of the region to become sick,<sup>69</sup> and greatly increased their risk of serious illness. The Commission determined that "[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being."<sup>70</sup> Emphasizing the interrelatedness of health and the environment, it stated that "[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's

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<sup>65</sup> Dinah Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENV. J. INT'L L. & POL'Y 129,146 (2006-2007).

<sup>66</sup> Case No. 7615, Resolution No. 12/85, (Brazil), Mar. 5, 1985, *printed in, Annual Report of the Inter-Am. Comm'n H.R. 1984-1985*, OEA Ser. L/V/II.6, doc. 10 rev. 1, Oct. 1 1985, at para. 3(a), <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>. [hereinafter Case No. 7615, Resolution No. 1285].

<sup>67</sup> Dinah Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENV. J. INT'L L. & POL'Y 129,146 (2006-2007).

<sup>68</sup> Case No. 7615. Resolution No. 12/85 at para. 1.

<sup>69</sup> Many people suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, they claimed that the pollution of local waters contaminated fish and drove away wildlife, and affected their food supplies. See Dinah Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENV. J. INT'L L. & POL'Y 129,146 (2006-2007).

<sup>70</sup> Inter-Am. Comm'n H.R. *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997) Chapter VIII, *The Human Rights Situation Of The Inhabitants Of The Interior Of Ecuador Affected By Development Activities* [hereinafter *Report on Ecuador*], accessed at <http://www.cidh.org/countryrep/ecuador-eng/chaper-8.htm#THE%20HUMAN%20RIGHTS%20SITUATION%20OF%20THE%20INHABITANTS%20OF%20THE%20INTERIOR%20OF%20ECUADOR%20AFFECTED%20BY%20DEVELOPMENT%20ACTIVITIES>.



physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”<sup>71</sup> The Commission pointed out that “states parties may therefore be required to take positive measures to safeguard the fundamental and non-derogable rights to life and physical integrity, particularly to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury.”<sup>72</sup> The Commission called on the government to implement legislation to strengthen protection against pollution and to force private companies to clean up areas they contaminated. It stipulated that it is the duty of the state to ensure that decontamination takes place.<sup>73</sup> It also urged the government to prevent future recurrences and to take further action to remedy existing contamination. The Commission’s insistence on positive measures to protect health from future contamination can be used as a powerful tool in environmental protection. It not only calls on the government to formulate laws but also to enforce them.

### (viii) Right to Food

The right to food is enshrined in international instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. It is also recognized in subject-specific human rights treaties, such as the Convention on the Rights of the Child,<sup>74</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>75</sup> and the Convention on the Rights of Persons with Disabilities.<sup>76</sup> The right to food is also recognized by many national constitutions<sup>77</sup> and regional human rights instruments, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador), the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

The Committee on Economic, Social and Cultural Rights has clarified that the right to adequate food requires the adoption of “appropriate economic, environmental and social

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> The Commission observed “Decontamination is needed to correct mistakes that ought never to have happened.”(quoting the conclusion of its observation Loco). It stipulated that “[b]oth the State and the companies conducting oil exploitation activities are responsible for such anomalies, and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.” *Report on Ecuador* at 1232.

<sup>74</sup> Convention On The Rights Of The Child. arts. 24(2)(c), 27(3) , Nov. 20 1989, entered into force September 2, 1990, A/RES/44/25.

<sup>75</sup> Convention On The Elimination Of All Forms Of Discrimination Against Women, art. 12(2), G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

<sup>76</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, arts. 24(f), 28(1), G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

<sup>77</sup> *See, e.g.,* Brazil, South Africa.

policies.”<sup>78</sup> In General Comment No. 12, the Committee stated that “[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement”<sup>79</sup> The Covenant on Economic, Social and Cultural Rights also enshrines “the fundamental right of everyone to be free from hunger.”<sup>80</sup> The UN Special Rapporteur on the Right to Food has declared that the right encompasses “[t]he right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear”

Climate change will adversely affect States’ ability to realize the right to food. Fulfillment of the right to food requires access to appropriate natural resources and healthy ecosystems, particularly for those populations that depend on a subsistence economy. It also requires production and distribution of sufficiently nutritious foodstuffs to satisfy the basic needs of all individuals. Climate change is expected to disrupt.

#### **(ix) Right to Safe Drinking Water and Sanitation**

The right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>81</sup> States must ensure there is adequate access to water to secure the health, dignity and livelihoods of all people.<sup>82</sup> Water is essential to fulfilling many of the social, economic, and cultural rights protected under the ICESCR. As climate change puts additional stress on water resources, thereby reducing access to safe drinking water, water for crop production and sanitation resources, it will also endanger other rights, such the rights to life, health and food.<sup>83</sup> The ESCR Committee has underscored that water and water facilities and services must be accessible to all, including the most vulnerable and marginalized sections of the population. The manner in which States realize the right to water must be sustainable, ensuring that present and future generations can depend on safe and reliable water resources.<sup>84</sup> The Committee has also stated, “Steps should

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<sup>78</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12 (1999) on the right to adequate food (art.11), para. 4, U.N. Doc. E/C.12/1999/5 (1999), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003) [*hereinafter* General Comment No. 12 (1999)].

<sup>79</sup> *Id.*

<sup>80</sup> ICESCR, at article 11, para. 2.

<sup>81</sup> Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), para. 2 [*hereinafter* General Comment No. 15 (2002)].

<sup>82</sup> Human Rights Council Res. 15/9, para. 7, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

<sup>83</sup> Annual Report Of The United Nations High Commissioner For Human Rights And Reports Of The Office Of The High Commissioner And The Secretary General, Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights. Human Rights Council Tenth session Item 2 of the provisional agenda. A/HRC/10/61. at para. 29.

<sup>84</sup> General Comment No. 15 (2002).

be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”<sup>85</sup> States party to the ICESCR should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.<sup>86</sup> States parties should also ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes.<sup>87</sup> The ESCR Committee has further recommended that States parties monitor and control the conversion of aquatic eco-systems into habitats for vectors of diseases.<sup>88</sup>

The ESCR Committee has identified several ways in which States violate the right to water, including:

- a) State parties’ interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health.
  
- b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction.<sup>89</sup>

The Committee has also emphasized the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water. The Committee recommended that public participation provisions be included as an integral part of any policy, program or strategy concerning water. It also urged that individuals and groups be given full and equal access to information held by public authorities or third parties concerning water, water services and the environment.<sup>90</sup>

The ESCR Committee has stated that the water required for all personal or domestic uses must be safe and, therefore, free from micro-organisms, chemical substances and radiological hazards that may constitute a threat to a person’s health.<sup>91</sup> It also urges States parties to the ICESCR to adopt comprehensive and integrated strategies and programs to ensure that there is sufficient and safe water for present and future generations.<sup>92</sup> These strategies and programs include:

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<sup>85</sup> General Comment No. 15 (2002) at para. 33.

<sup>86</sup> *Id.* at para. 8.

<sup>87</sup> *Id.* at para. 8.

<sup>88</sup> *Id.* at para. 9.

<sup>89</sup> General Comment No. 15 (2002) at para. 44.

<sup>90</sup> *Id.* at para. 48.

<sup>91</sup> *Id.* at para. 12(b).

<sup>92</sup> *Id.* at para. 28.

Reducing depletion of water resources through unsustainable extraction, diversion and damming; reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals and human excreta; monitoring water reserves; ensuring that proposed developments do not interfere with access to adequate water; assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity.<sup>93</sup>

The right to water articulates environmental norms not only through its emphasis on sanitation and sustainability but also by emphasizing the individual's right to demand it. This articulation forces governments to adopt a participatory framework and to improve their legal and policy framework to improve access to sanitation and water. This can be used by courts to promote the right to a clean and healthy environment.

### (x) Right to a Clean and Healthy Environment

**Principle:** *Every citizen has the right to a clean and healthy environment, one that permits the realization of a life of dignity and well-being. States have an obligation to take positive measures to safeguard and advance this right. In particular, States have a duty to prevent severe environmental pollution that could threaten human life and health, to remediate past harms, and to promote sustainable ecological systems and use of natural resources.*

#### Commentary

Although U.N. human rights treaties do not refer to the right to a clean and healthy environment, regional human rights conventions for Africa and the Americas and almost 60 national constitutions<sup>94</sup> recognize it.<sup>95</sup> The Protocol of San Salvador, the additional protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural rights, explicitly recognizes the right to a healthy environment. Article 11 states: "Everyone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment."<sup>96</sup> Article 24 of the African Charter on Human and Peoples' Rights states that "all peoples shall have the right to a general satisfactory environment favorable to their development." The African Charter expresses the right as one that belongs to peoples as a collective, rather than one that adheres to individuals.

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<sup>93</sup> *Id.*

<sup>94</sup> Fifty countries have explicitly recognized the right to a healthy environment in their constitution, and a further 30 constitutions recognized a duty to defend or protect the environment, <http://www.nepalnews.com/home/index.php/guest-column/19926-the-right-to-healthy-environment-.html>. See e.g., references to the right to a healthy environment in the following constitutions: Argentina, at art. 41; Belgium, at art. 23; Ecuador, at art. 89; Georgia, at art. 35; Norway, at art. 110(b); Paraguay, at art. 7(1); Portugal, at art. 66; and South Africa, at art. 24.

<sup>95</sup> David Boyd, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (UBC Press 2011).

<sup>96</sup> Organization of the American States, Additional protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural rights: "PROTOCOL OF SAN SALVADOR" at art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69 (1988), 28 I.L.M. 156 (1989), *entered into force* Nov. 16, 1999 [hereinafter PROTOCOL OF SAN SALVADOR].

The African Commission on Human and Peoples' Rights specifically adjudicated the right to a satisfactory environment in the case *SERAC v. Nigeria*. Two non-governmental organizations filed a petition on behalf of the people of Ogoniland, Nigeria, alleging that Nigeria had breached its obligations to respect, protect, promote and fulfill the right to a healthy environment guaranteed by the Charter. The Commission articulated the substantive aspects of article 24:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.<sup>97</sup>

The Commission held that the government violated this right by failing to monitor the activities of the infringing oil companies, to provide information to affected communities on health and environmental risks, and to conduct environmental impact studies. The Court urged the government to undertake independent social and environmental impact assessments before any future oil development.<sup>98</sup> This case highlights that governments have obligations not only to protect their citizens through appropriate legislation but also have positive obligations to protect them from acts that harm the environment perpetrated by third parties.

In countries that do not explicitly include the right to a healthy environment in their constitutions, constitutional courts have nonetheless found such a right to be implied in other enumerated rights. For example, the Supreme Court of India has adopted an expansive interpretation of the right to life clause in the Indian constitution. Article 21 of the Constitution provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>99</sup> The Court has interpreted this right to encompass human dignity, the right to a livelihood, the right to shelter and clothing, and environmental rights.<sup>100</sup> Although it is not articulated in the constitution, this expansive interpretation has the potential to shape policy and practice.

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<sup>97</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Comm'n on Human and Peoples' Rights, Comm. No. 155/96 (2001), at para. 52.

<sup>98</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 at para. 69 (2001).. See also Dinah Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L. & POL'Y 129, 146,190 (2006-2007).

<sup>99</sup> INDIA CONST., at art. .21.

<sup>100</sup> See e.g., *M.C. Mehta vs Union Of India & Ors* 1988 AIR 1115, SCR 530, 532-533 (“Whenever applications for licences to establish new industries are made in future, such applications shall be refused unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against the existing industries if they are found responsible for[sic] pollution of water. Having regard to the grave consequences of the pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution, we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment.”).

Procedurally the right to a clean and healthy environment encompasses other established participatory rights since it demands that citizens are informed about environmental hazards. However articulating it as a new fundamental right will obligate states to implement environmental standards that can reduce pollution and provide an enforcement mechanism for affected communities.

### (xi) Right to Culture

The right to culture is enshrined throughout international human rights law and recognized by a number of recent constitutions. The right generates both limitations on state actions that infringe on minority and indigenous rights and elaborates positive state duties to protect, cultivate, and enrich national culture and subcultures. The right to culture will be critically affected by climate change, and its protection will be central to states' duties to take mitigation and adaptation measures.

International human rights instruments have articulated diverse variants of cultural rights, connecting culture with the rights of minority communities and articulating cultural development and provision of cultural access as a state obligation. The Universal Declaration on Human Rights affirms everyone's "right freely to participate in the cultural life of the community." It also articulates cultural rights as an umbrella class of rights, charging states with a duty to realize the "economic, social, and cultural rights indispensable for [] dignity and the free development of [] personality."<sup>101</sup> Cultural rights appear four times in the UN Charter and in both of the foundational international human rights covenants.

The ICCPR articulates the right to culture as a limitation on State action that affects minority groups, providing that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."<sup>102</sup> In its General Comment No. 23(50), the Human Rights Committee, the body established under the ICCPR to monitor States' compliance with the treaty, also interpreted cultural rights as necessitating "positive legal measures of protection," particularly for indigenous peoples, "and measures to ensure the effective participation of members of minority communities in decisions which affect them."<sup>103</sup> The ICESCR reinforces the establishment of a class of cultural rights, affirming, for instance, "the equal right of men and women to the enjoyment of economic, social, and cultural rights."<sup>104</sup> Article 15 of ICESCR recognizes the "right of everyone ... [t]o take part in cultural life" and articulates an affirmative duty of member states to aid in the "conservation, development, and diffusion of science and culture." The right to culture can also be found in the International Convention on the Elimination of All Forms of Racial

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<sup>101</sup> Universal Declaration on Human Rights, at art. 22.

<sup>102</sup> ICCPR at art. 27.

<sup>103</sup> Human Rights Committee, General Comment No. 23, at art. 27, U.N. Doc. HRI\GEN\1\Rev.1 (1994) ("[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.").

<sup>104</sup> ICESCR at art. 3.

Discrimination,<sup>105</sup> the Convention Against Discrimination in Education,<sup>106</sup> and the Declaration of the Rights of the Child.<sup>107</sup>

As expressed in the ICCPR, cultural rights are particularly important in relation to the rights of minority communities and indigenous groups. The UNESCO Universal Declaration on Cultural Diversity connects the promotion of cultural rights to national development as well as to the particular rights and interests of national minorities and indigenous groups.<sup>108</sup> In particular, it charges member States with “respecting and protecting traditional knowledge, in particular that of indigenous peoples” and “with regard to environmental protection and the management of natural resources.”<sup>109</sup> The ILO Indigenous and Tribal Peoples Convention and the UN Declaration on the Rights of Indigenous Peoples both elaborate the obligation of governments to respect and protect the cultural rights, values, sites, and institutions of indigenous groups.<sup>110</sup>

Regional human rights instruments and a number of post-WWII national constitutions prominently incorporate the right to culture. The American Declaration on the Rights and Duties of Man calls culture “the highest social and historical expression of [] spiritual development” and inscribes “the duty of man to preserve, practice, and foster culture by every means within his power.”<sup>111</sup> The Declaration also articulates an independent “right to the benefits of culture” belonging to every person.<sup>112</sup> South Africa’s Constitution provides a guarantee of the right to culture. Specifically, the Constitution provides that “[p]ersons belonging to a cultural . . . community may not be denied the right. . . to form, join and maintain cultural, religious and linguistic associations”<sup>113</sup> and that “[e]veryone has the right to use the language and to participate in the cultural life of their choice[.]”<sup>114</sup> The Colombian Constitution similarly “recognizes and protects the ethnic and cultural diversity of the

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<sup>105</sup> International Convention on the Elimination of Racial Discrimination, arts. 1, 2, 5(e)(vi), Dec. 21, 1965, 660 U.N.T.S 195 (“guaranteeing the “right to equal participation in cultural activities”).

<sup>106</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education at art. 5(c)(i) (Dec. 14, 1960), [hereinafter Convention Against Discrimination in Education] (affirming the right of minorities to carry on their own education provided that “his right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole.”).

<sup>107</sup> Declaration of the Rights of the Child, at art. 7 G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (Nov. 20 1959)(The child “shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities...”).

<sup>108</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), UNESCO Universal Declaration on Cultural Diversity, at art. 4 (Nov. 2, 2001).

<sup>109</sup> *Id.* Annex II, at objective 14.

<sup>110</sup> International Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 72 ILO Official Bull. 59, at arts. 2, 4-5, 7-10, 14-15, 22-23, 25, 27-28, 30, 32, entered into force Sept. 5, 1991; U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

<sup>111</sup> American Declaration on the Rights and Duties of Man, at Preamble.

<sup>112</sup> *Id.* at art. 13.

<sup>113</sup> S. AFR. CONST., at art. 31 1996.

<sup>114</sup> *Id.* at art. 30.

Colombian nation”<sup>115</sup> and discusses culture in relation to the rights of children,<sup>116</sup> the right to education,<sup>117</sup> fostering of national identity and heritage,<sup>118</sup> freedom of artistic expression,<sup>119</sup> indigenous rights,<sup>120</sup> and natural resource preservation and environmental protection.<sup>121</sup>

The right to culture has featured prominently in adjudication concerning environmental protection, sustainable use of natural resources, and climate change. A number of indigenous groups have employed the individual complaint mechanism of the UN Human Rights Committee to allege that a state’s exploitation of natural resources violates their cultural rights under ICCPR Article 27.<sup>122</sup> In the 2009 decision *Poma Poma v. Peru*, the Human Rights Committee found that water diversion projects by the Peruvian state degraded the indigenous Aymara community’s pasturelands in violation of Article 27 cultural rights.<sup>123</sup> The Inter-American Commission on Human Rights has also found violations of the cultural rights of indigenous groups resulting from state development projects and natural resource extraction programs in their traditional territories. In *Yanomami Community v. Brazil*, the Commission declared that Brazil’s construction of a trans-Amazonian highway through Yanomami territories, causing displacement and jeopardizing the group’s health and cultural heritage, violated Articles 1, 8, and 11 of the American Declaration of the Rights and Duties of Man. In finding these violations, the Commission specifically invoked the state’s duty, established by the Organization of American States, to “preserv[e] and strengthen...the cultural heritage of these ethnic groups.”<sup>124</sup> The Court also invoked cultural rights in finding

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<sup>115</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] at art. 7.

<sup>116</sup> *Id.* at art. 44.

<sup>117</sup> *Id.* at art. 67.

<sup>118</sup> *Id.* at art. 70 (“Culture in its diverse manifestation is the basis of nationality.”); Art. 72.

<sup>119</sup> *Id.* at art. 71.

<sup>120</sup> *Id.* at art. 330 (“Exploitation of natural resources in the indigenous (Indian) territories will be done without impairing the cultural, social, and economic integrity of the indigenous communities.”).

<sup>121</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] at art. 95 (articulating the duty of each person and citizen to “protect the country’s cultural and natural resources and watch over the conservation of a healthy environment.”).

<sup>122</sup> *See, e.g.*, UN Human Rights Committee, *Ivan Kitok v Sweden*, Comm No 197/1985, at para. 5 U.N. Doc CCPR/C/33/D/197/1985 (1988) (complaint by member of the Sami “ethnic minority” alleging the Sweden’s 1971 Reindeer Husbandry Act violated his Article 27 rights); UN Human Rights Committee, *Ilmari Lansmäen v Finland*, Comm No 511/1992, at para. 2 U.N. Doc CCPR/C/52/D/511/1992 (1994) (alleging that Finland had breached the Sami’s right to culture by destroying their reindeer breeding grounds through industrial quarrying, forestry, and expansion of roads to aid in natural resource exploitation); UN Human Rights Committee, *Jouni E Lansman et al v Finland*, Comm No 671/1995, at para. 12, U.N.Doc. CCPR/C/58/D/671/1995 12 (1996) (declining to find that natural resource exploitation violated the Sami’s right to culture); UN Human Rights Committee, *Anni Äärela and Jouni Näkkäljärvi v Finland*, Comm. No. 779/1997, at para. 4, U.N. Doc CCPR/C/73/D/779/1997 (2001).

<sup>123</sup> UN Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication No 1457/2006, U.N. Doc CCPR/C/95/D/1457/2006 (2009).

<sup>124</sup> *See Yanomami Community v. Brazil*, Case 7615, Inter-Am. Comm’n .H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.



that the Belizean government's grants of logging and oil concessions in tribal territories violated the rights to property and equality of the Maya indigenous communities.<sup>125</sup>

Cultural rights have been central in early examples of climate change adjudication. The Inuit Petition to the Inter-American Commission on Human Rights detailed the ways in which global warming existentially threatens the Inuit culture and traditional way of life.<sup>126</sup> Although cultural rights are not cognizable under U.S. law, harms to the cultural integrity of the native Alaskan inhabitants of Kivalina Island helped to motivate their suit against industrial contributors to climate change.<sup>127</sup> As climate change and recognition of rights to culture both gain momentum, linking the two will be increasingly important in future litigation, policymaking, and appeals to the public conscience.

## (xii) Indigenous Rights

Within the last several decades, recognition of a body of indigenous rights has steadily grown within international human rights law.<sup>128</sup> According to Special Rapporteur on the Rights of Indigenous Peoples James Anaya, the self-determination and right to property provisions in the UDHR, ICCPR, and ICESCR create a strong "affirmation of indigenous land and resource rights."<sup>129</sup> The ILO Indigenous and Tribal Populations Convention of 1957 (No. 107), ratified by 27 countries and still in force for 18 countries, represented the first multilateral convention on the "international obligations of States in respect to tribal populations."<sup>130</sup> Article 2(I) of the Convention gave governments "the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries."<sup>131</sup> Of particular relevance to climate change, the Convention recognizes indigenous groups' right of property ownership. It provided a limited prohibition against the non-consensual removal of indigenous groups from their habitual lands, allowing for displacement "for reasons relating

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<sup>125</sup> *Id.* See also, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case No. 79/01 Inter-Am. Ct. H.R. (Ser. C) No. 79 (August 31, 2001), available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>, para. 116, 140(f) (invoking cultural rights protected by the Constitution of Nicaragua).

<sup>126</sup> See Inuit Petition at 39, et. seq. ("Changes in ice and snow conditions have harmed the Inuit's subsistence harvest, travel, safety, health, and education, and have permanently damaged Inuit culture.").

<sup>127</sup> See Complaint for Damages Demand for Jury Trial, *Native Village of Kivalina v. Exxonmobile Co.*, 2008 WL 594713, at para. 184 (N.D.Cal. 2008) (assert that "[i]ndigenous communities are facing major economic and cultural impacts" from arctic climate change.).

<sup>128</sup> See James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L COMP. L. 1, 4 (1999) (describing the phenomenon by which "concern for groups identified as indigenous has assumed a prominent place on the international human rights agenda.").

<sup>129</sup> S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 346-347 (1993-1994).

<sup>130</sup> Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 107 I.L.O. 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959).

<sup>131</sup> *Id.* at art. 2(1).

to national security, or in the interest of national economic development or of the health of the said populations.”<sup>132</sup>

At the prompting of indigenous peoples, who alleged that the Convention reflected the assimilationist bias of the 1950s,<sup>133</sup> the Convention was replaced in 1989 by a new multilateral treaty, ILO Convention No. 169.<sup>134</sup> ILO Convention No. 169, which has been ratified by 22 countries, significantly extended indigenous rights and protections. Article 16 provided, for instance, that indigenous people “should not be removed from the lands which they occupy.” Where removal is “necessary as an exceptional measure, such relocation shall only take place with their free and informed consent.”<sup>135</sup> Article 4 of the Convention requires signatories to adopt “special measures ... as appropriate for safeguarding the persons, institutions, property, labour, cultures, and environment of the peoples concerned.”<sup>136</sup> The Convention elaborates on these requirements with strong prohibitions on discrimination and protections for indigenous cultural integrity and resources. It specifically requires governments to “take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”<sup>137</sup>

Such mandates that States protect indigenous cultural, land, and environmental resources necessarily entail obligations to mitigate climate change. In addition, Article 4 of ILO Convention 169 elaborates the participatory rights of indigenous communities, with requirements that they be included as participants in the design and implementation of all policies, land planning, and economic development activities that affect their interests.<sup>138</sup> As indigenous groups are and will continue to be among those most immediately and severely affected by climate change, participation by these communities will be essential to ensuring just and effective mitigation and adaptation measures.

Indigenous rights received a significant boost in 2007, when the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Although the Declaration is not legally binding, it has helped to create and extend international legal norms

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<sup>132</sup> *Id.* at art. 12.

<sup>133</sup> See DALEE SAMBO DOROUGH, STATE OF THE WORLD’S INDIGENOUS PEOPLES, 200 UNITED NATIONS, SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES (2009), available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Fen%2Fdocuments%2FSOWIP%2Fen%2FSOWIP\\_web.pdf&ei=T6zFVKmGL8WVNqymgtgP&usq=AFQjCNHqVvgD9EA1NYuxQO9CDG7FnFXy6g&bvm=bv.84349003,d.eXY](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Fen%2Fdocuments%2FSOWIP%2Fen%2FSOWIP_web.pdf&ei=T6zFVKmGL8WVNqymgtgP&usq=AFQjCNHqVvgD9EA1NYuxQO9CDG7FnFXy6g&bvm=bv.84349003,d.eXY)

<sup>134</sup> Convention No. 107, International Labour Organization, <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

<sup>135</sup> Convention Concerning Indigenous And Tribal Peoples In Independent Countries, at art. 16 169 I.L.O. 1989 (Sept. 5, 1991).

<sup>136</sup> *Id.* at art. 4(1).

<sup>137</sup> *Id.* at art. 7.

<sup>138</sup> See, e.g., *id.* at art. 2 (“Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”).

and standards around the treatment of indigenous peoples.<sup>139</sup> The Declaration contains many provisions relevant to climate change mitigation and adaptation obligations. Article 29, for instance, recognizes that indigenous peoples have “the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>140</sup> Article 32 requires states to “mitigate adverse environmental, economic, social, cultural or spiritual impact” of development activities and affirms indigenous rights to free and informed consent in any project affecting their lands or territories.<sup>141</sup> The Declaration also recognizes the rights of indigenous groups to cultural integrity and development, traditional lands and property, and participation in policies and development activities that affect their rights and well-being.<sup>142</sup>

Protections for indigenous rights and resources have more recently begun to be incorporated in domestic law. A series of Indian Supreme Court cases has recognized indigenous rights in the context of development projects that induce the displacement of tribal groups. A 2000 Indian Supreme Court ruling on the Sardar Sarovar Dam Project recognized Article 12 of ILO Convention No. 107 concerning property rights. The Court interpreted Article 12 as requiring that “when the removal of the tribal populations is necessary as an exceptional measure, they shall be provided with land of quality at least equal to the land of that previously occupied by them and they shall be fully compensated for any resulting loss or injury.”<sup>143</sup> By insisting that the displaced community receive an adequate “rehabilitation package” that provides them with “equal, if not better land than what they had,” the Court sought to comply with the ILO provision.<sup>144</sup> The Court also halted construction of the dam to ensure that the state was providing proper compensation.

As the corpus of indigenous rights grows in strength in international and domestic legal regimes, it will provide fruitful grounds to shape state and corporate obligations to mitigate climate change and ensure the just implementation of programs and allocation of resources for adaptation.<sup>145</sup> As the Inuit Petition to the Inter-American Commission on Human Rights explained, indigenous communities are among those most vulnerable to the effects of climate change. Not only do they often reside in regions, including low-lying island and coastal zones, that will be early and severely impacted by climatic changes, but the effects of climate change will likely compromise tribal identities and cultural survival as

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<sup>139</sup> See *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, UN PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

<sup>140</sup> UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, Annex, at art. 29, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

<sup>141</sup> *Id.* at art. 32.

<sup>142</sup> See, e.g., *id.* at art. 8 (providing that “[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture” and requiring states to “provide effective mechanisms” to prevent discrimination and destruction of indigenous culture, “lands, territories or resources.”).

<sup>143</sup> Supreme Court of India, *NARMADA BACHAO ANDOLAN Vs. UNION OF INDIA* (18/10/2000), at 19.

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. 865 (2008).

indigenous peoples are forced from traditional lands and into new communities and areas where their traditional ways of life become untenable. Faced with these potentially existential threats to the survival of indigenous communities, governments and civil society urgently need to fulfill their human rights obligations by creating opportunities to meaningfully involve indigenous communities in deciding on policies and priorities to help them adapt to and flourish in the new climatic order.

### 3) Principles creating duties for states and private actors based on those harms.

#### a) Limitations on sovereign rights of states to exploit natural resources

##### (i) Duties to Prevent Transboundary Harm

**Principle:** *States have an obligation to prevent violations of human rights under their control wherever they may take place. All states emitting pollutants that contribute to climate change therefore share responsibility for mitigating and helping communities adapt to the global effects of climate change.*

#### Commentary:

There is a developing international consensus across national, regional, and international courts and human rights bodies that human rights obligations – regardless of their specific source – apply wherever a state has “effective control” over individuals whose rights may be at risk.<sup>146</sup> If international human rights standards reflect the basic worth of all individuals, then states have an obligation to avoid violating these standards whenever they have the ability to do so. In other words, individuals have human rights simply because they are humans, not on account of their status as citizens of particular states or because they are located in a certain place.

The trend toward imposing extraterritorial obligations applies even when the text of international human rights treaties seems to point to a different conclusion. In one opinion, the Human Rights Committee found a violation of the ICCPR when Uruguayan agents carried out an abduction on Argentinian soil.<sup>147</sup> Although the language of the ICCPR seemed to limit the scope of obligations to each state’s own territory,<sup>148</sup> the Committee refused to interpret this language in a way that would allow a state “to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>149</sup> Further, extraterritorial violations need not harm citizens of the state in

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<sup>146</sup> Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 390 (2011). The United States, of course, has resisted the extraterritorial application of human rights obligations, but Hathaway et al. argue that it is an outlier in this respect.

<sup>147</sup> Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

<sup>148</sup> Art. 2(1) of the ICCPR provides: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”

<sup>149</sup> U.N. Human Rights Committee, Sergio Euben Lopez Burgos v. Uruguay, Comm No. R.12/52, at para. 12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

question.<sup>150</sup> The test is whether the individual is under the “power or effective control” of the state.<sup>151</sup> The Human Rights Committee has interpreted liability to arise whenever there is a risk that a violation could be a “foreseeable and necessary consequence” of a state’s action.<sup>152</sup> Thus, it does not matter for these purposes that other states also contribute to climate change or that the causal chain involved is complex; in *Munaf v. Romania*, Romania was not held liable for violations committed directly by U.S. and Iraqi forces in Iraq because it could not have reasonably foreseen the violations in the particular circumstances.<sup>153</sup> Had they been foreseeable, it would have been held liable.

It follows that state duties and liabilities arise from their contributions to the adverse effects of climate change even if such effects are largely extraterritorial. States have duties to mitigate climate change so long as they have control over their contributions to the problem. If a state would not be permitted to arbitrarily flood its own citizens’ homes, it is also not permitted to take actions that will foreseeably result in the flooding of the homes of citizens of other states.<sup>154</sup>

## (ii) Duties to Future Generations

**Principle:** *Obligations to future generations are implicit in customary and conventional international human rights law. States have a duty to respect the rights of future generations by taking immediate measures to prevent climate change and to address its consequences.*

### Commentary:

The United Nations Framework Convention on Climate Change (UNFCCC) recognizes future generations as appropriate beneficiaries of climate obligations: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>155</sup> This obligation to future generations can be understood as a logical extension of existing human rights obligations.

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<sup>150</sup> Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

<sup>151</sup> *Id.*

<sup>152</sup> UN Human Rights Committee, *Mohammad Munaf v. Romania*, Comm No. 1539/2006, at para. 14.2 U.N. Doc. CCPR/C/96/D/1539/2006 ( 2009).

<sup>153</sup> *Id.* at paras. 2.1; 14.4.

<sup>154</sup> When China built the Three Gorges Dam, it paid at least nominal compensation to the citizens it displaced. See *China Daily*, *Compensation for Three Gorges Resettled Residents*, <http://www.china.org.cn/english/2005/Jun/133259.htm> (June 27, 2005); Jill McGivering, *Three Gorges Dam’s Social Impact*, <http://news.bbc.co.uk/2/hi/asia-pacific/5000198.stm> (May 20, 2006). In the international context, the International Court of Justice declared Czechoslovakia’s diversion of the Danube (flowing into Hungary) an “internationally wrongful act,” and ordered Slovakia (Czechoslovakia’s successor) to pay compensation to Hungary for the damage caused. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 1997 ICJ 7, at paras. 78, 80.

<sup>155</sup> United Nations Framework Convention on Climate Change, U.N. Doc. A/RES/48/189

Human rights obligations have not traditionally been phrased or applied in order to protect future generations. However, this deficiency may be because it was not thought necessary to look inter-generationally to secure effective enforcement and realization of human rights. In the abstract, it would appear that imposing a duty to protect the human rights of present generations does everything currently possible to protect the human rights of future generations; one can threaten future generations without threatening present generations only if one's actions have consequences in the future but not in the present. This attenuated timeframe may be true for climate change, but it was not true for much government activity affecting human rights in the past. Prior to an awareness of the threat of climate change and the movements for sustainable development and environment protection, there was no apparent need to explicitly protect future generations, who have no direct voice in politics and no direct ability to defend their interests. Protecting the rights of the present generation would preserve conditions in which future generations' rights could be protected, while also entrenching values favorable to human rights.

Nonetheless, future generations are intended beneficiaries of the international human rights framework. The Charter of the United Nations recognizes that the goal of the United Nations is to protect "succeeding generations" from war and to "promote social progress and better standards of life in larger freedom."<sup>156</sup> The preambles of international human rights treaties explicitly invoke the U.N. Charter Preamble's language: "*Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .*"<sup>157</sup> The principles proclaimed in the Charter include the goal of protecting succeeding generations. Thus, human rights treaties are enacted and enforced with respect to present generations at least partly in order to create societies (and a global system) that will protect generations to come. While the rights explicitly protected are those of the present generation, the entire U.N. system and the corpus of international human rights law are directed toward protecting future generations as well. In fact, the ICESCR notes that even when full protection is not possible in the present, governments should take steps to make it possible in the future.<sup>158</sup> In particular, the Committee on Economic, Social, and Cultural Rights has interpreted the "adequate food" provision in art. 11 of the ICESCR to include an obligation to ensure adequate food and water resources for future, as well as present, generations,<sup>159</sup> and the Inter-American Commission on Human Rights has recognized that indigenous property and cultural rights are essential to future generations.<sup>160</sup>

The special status of children in human rights law further supports the view that human rights are oriented at least in part toward future generations. The Universal

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(Jan. 20, 1994), art. III section 1, available at: <http://www.refworld.org/docid/3b00f2770.html> [accessed April 10, 2013].

<sup>156</sup> U.N. Charter, at Preamble.

<sup>157</sup> This language is in the preambles of both the ICCPR and ICESCR.

<sup>158</sup> ICESCR at art. 2.1.

<sup>159</sup> General Comment 12 at para. 7; General Comment 15 at para. 11.

<sup>160</sup> *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. Comm'n .H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. at 1 ¶ 114 (2004).

Declaration of Human Rights notes that “motherhood and children are entitled to special care and assistance.”<sup>161</sup> The Convention on the Rights of the Child is concerned with protecting children’s development. The preamble recognizes that “the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”<sup>162</sup> Children’s education is, in this sense, a vehicle for preserving important values in the future, and children are the future beneficiaries of these values. The Charter particularly protects societal interests by establishing a right to a standard of living adequate for a child’s “development”<sup>163</sup> and detailing the purposes of education – developing a child’s personal talents, respect for international and social norms, and ability to contribute to a free society.<sup>164</sup> These types of rights are largely instrumental; the child has a right to personal development and education not merely because of their intrinsic value, but because they will make possible the adult’s full enjoyment of rights as an autonomous individual in the future. The protection of children’s rights is thus, in effect, partly a protection of the rights of future generations. Children must be given a certain standard of living and education now in order to ensure that they will be able to fully enjoy rights as adults in the future. Future adults’ rights are being protected via enhanced protections for today’s children.

Future generations’ rights and interests have been explicitly recognized as relevant to states’ obligations in the present. For example, although it did not explicitly bar the use of nuclear weapons, the International Court of Justice (ICJ) determined that “[i]n view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements [namely, principles requiring necessity and proportionality in war]”.<sup>165</sup> In making this determination, the Court took into account the danger of “genetic defects and illness in future generations” that the use of nuclear weapons could engender.<sup>166</sup> Future generations would, of course, not be combatants in any present conflict, rendering the use of nuclear weapons inherently problematic insofar as it affects any future community’s lives and well-being. This analysis assumes that future individuals’ rights affect the analysis of the necessity and proportionality of the use of force.

The nuclear weapons’ case illustrates that human rights obligations apply to future generations even though future generations’ interests have little explicit protection in the existing human rights corpus. A particular use of nuclear weapons in an area where there are currently no civilians might still harm future generations. The state considering this use has an obligation to take these future generations into account in evaluating the necessity and proportionality of its actions; if it does carry out the attack, it is responsible for causing whatever radiation harms future generations suffer even if decades in the future. The same obligation to prevent or limit harm to future generations’ human rights is implicit in the

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<sup>161</sup> Universal Declaration of Human Rights at art. 25(2).

<sup>162</sup> Convention on the Rights of the Child, Nov. 20, 1989, at Preamble.

<sup>163</sup> *Id.* at art. 27(1).

<sup>164</sup> *Id.* at art. 29.

<sup>165</sup> Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 I.C.J 226, ¶95 (July 8), <http://www.icj-cij.org/docket/files/95/7495.pdf>.

<sup>166</sup> *Id.* at ¶35.

structure and purposes of the international human rights system. The fact that certain consequences of climate change may occur only in the relatively distant future, therefore, does not absolve states of responsibility for these consequences. Nothing in the ICJ opinion suggests that future consequences, including those arising from climate change, should be given less weight merely because they are in the future.

In sum, human rights obligations taken together make it clear that that states have a duty to ensure that future generations will be able to exist and to ensure, to the extent possible, that the rights of future generations will be secured. If actions taken now affect the rights that future generations will enjoy, states will be responsible for these impacts.

### (iii) Duties to Vulnerable Communities

**Principle:** *Human rights law recognizes and protects the equal worth of individuals and communities. States have a primary obligation to protect and advance the rights of vulnerable communities that are threatened by climate change.*

#### Commentary:

International law consistently obligates governments to be sensitive to the needs of vulnerable communities like women, children, minorities and other indigenous people. For example, regarding housing, the ESCR Committee's General Comment 4 states:

Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups."<sup>167</sup>

Similarly, although international law relating to refugees is not generally directly applicable to climate change, certain refugee-related principles and humanitarian norms convey government obligations that are relevant.<sup>168</sup> For example governments have positive obligations to provide refugees with food, shelter and security as they adapt to their environment.

In relation to climate change, governments should have an immediate obligation identify and protect those most vulnerable and provide them with resources to help them adapt. States should put vulnerable communities at the heart of climate change policy, since such communities are often disproportionately affected by climate change. Women produce 80% of the food grown in sub-Saharan Africa and 60% in Asia, and they spend additional hours fetching water.<sup>169</sup> When food is scarce, they usually forgo eating to enable other family

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<sup>167</sup> General Comment 4, at para. 8(e).

<sup>168</sup> Michelle Leighton, *Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons*, at 3 (June 2010).

<sup>169</sup> *Climate Wrongs and Human Rights, Putting People at the Heart of Climate-Change Policy*, at 7 OXFAM (September 2008).



members to eat. As a result, when climate impacts like droughts and floods occur, their rights to food, life and security are put at risk. Similarly, minorities and indigenous people often suffer the worst impact of changing climate and are often the last groups to be assisted when disasters occur. See section 2 above (rights of indigenous communities). Islands like the Maldives are likely to be submerged within the next century. States should, therefore, ensure that their mitigation activities do not undermine vulnerable communities' access to resources and should enable the most affected communities to participate in the design and implementation of adaptation initiatives so as to be able to safeguard their rights.<sup>170</sup>

**b) Assigning responsibility/accountability**

**(i) Causation by Omission**

**Principle:** *States have positive obligations to prevent foreseeable violations of human rights. The failure of States to take measures to prevent climate change-related harms is therefore itself a violation of human rights.*

**Commentary:**

A state's failure to act in order to protect and advance rights may constitute a human rights violation. The ICCPR explicitly creates both "negative" and "positive" obligations with respect to all of the rights it protects; states must both "respect" and "ensure" the rights of individuals under their control.<sup>171</sup> The obligation to ensure rights includes the obligation to prevent private parties from violating the rights of other individuals and groups.<sup>172</sup> The ICESCR affirms States' positive duties to advance the satisfaction of all enumerated rights in Article 2(1): "[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>173</sup> In particular, the CESCR has applied this type of positive obligation to the rights to food,<sup>174</sup> water,<sup>175</sup> and health,<sup>176</sup> finding, for instance, that States have a duty to limit pollution by private parties that can affect these rights.

The European Court of Human Rights has articulated positive State obligations to protect numerous rights enumerated in the European Convention on Human Rights, including those that, by their textual language, do not explicitly create affirmative duties.<sup>177</sup> The

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<sup>170</sup> *Id.* at 3-T1.

<sup>171</sup> ICCPR at art. 2.1.

<sup>172</sup> General Comment 31 at para. 8.

<sup>173</sup> ICESCR at art. 2.1.

<sup>174</sup> General Comment 12 at para. 15.

<sup>175</sup> General Comment 15 at para. 21.

<sup>176</sup> General Comment 14 at para. 34.

<sup>177</sup> *L.C.B. v. the United Kingdom*, App. No. 23413/94, para. 36 Eur. Ct. H.R. (1998); *See generally* COUNCIL OF EUROPE, *MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT* (2012), [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual\\_Env\\_2012\\_nocover\\_Eng.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf).

obligations include an affirmative duty act (both by implementing legislation and by taking appropriate enforcement steps) in order to prevent private parties from causing rights violations. Under these circumstances, a State that fails to act when an affirmative duty to act exists fails to fulfill its human rights obligations. There are also obligations to provide private remedies<sup>178</sup> and to ensure popular participation in decisionmaking on important environmental issues.<sup>179</sup>

The European Court of Human Rights has affirmed that member-States have an affirmative duty to mitigate or prevent harm caused by foreseeable natural disasters.<sup>180</sup> Thus, even if states do not accept that climate change is anthropomorphic or that their actions meaningfully contribute to atmospheric change, they still have obligations to take steps to mitigate or prevent harm that will be foreseeably caused by climate change. These obligations may include putting in place effective policies and regulations to reduce carbon emissions across all sectors of the economy as a way of offsetting known climate change trends.

## (ii) Cooperation Principle

**Principle:** *States have a duty to cooperate to prevent violations of human rights, including those that result from circumstances for which no single State is entirely responsible. In particular, States have a duty to cooperate to find and implement solutions to climate change and other global challenges to human rights.*

### Commentary:

Perhaps the greatest challenge to creating human rights obligations with respect to climate change is that all but the largest emitters play a very small causal role in the overall effects of climate change. This diffuse causation problem makes it hard to assign liability to any singular State or actor, most of whom exert relatively little control over the overall climactic cycle. Control exists on a collective level, but less so on the level of individual actors. This dynamic creates a collective action problem: it is difficult to establish liability for failures to mitigate by any individual state, whereas the community of states certainly has an obligation to act.

However, the international human rights regime has anticipated collective action problems in relation to the realization of human rights. The United Nations Charter provides that states must cooperate with each other and the UN in promoting fundamental rights.<sup>181</sup> The ICESCR makes explicit a duty to cooperate in ensuring the protection and advancement of economic, social, and cultural rights.<sup>182</sup> Cooperation is necessary precisely to resolve coordination and collective action problems. When market dynamics cause a collective action problem to block solutions to a right violation, the state has an obligation to cooperate to

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<sup>178</sup> Balmer-Schafroth and Others v. Switzerland, App. No. 22110/93, para. 40 Eur. Ct. H.R. (1997); Taskin and others v. Turkey, App. No. 46117/99, at para. 130 Eur. Ct. H.R. (2004).

<sup>179</sup> Taskin and others v. Turkey, App. No. 46117/99, at para. 119 Eur. Ct. H.R. (2004).

<sup>180</sup> Budayeva and others v. Russia, App. No. 15339/02 Eur. Ct. H.R. (2008).

<sup>181</sup> United Nations Charter at art. 56, 55(c).

<sup>182</sup> ICESCR at art. 2(1).

solve the problem.<sup>183</sup> States could incur liability not only by failing to adequately regulate greenhouse gas emitters, but also by failing to cooperate with other states in regulating greenhouse gas emitters. Realistically, while there is a duty to cooperate, it would be very difficult to bring a case against a single outlier state that has refused to cooperate with the international community.<sup>184</sup> Any judgment in such a case would depend on an analysis of which side actually failed to cooperate sufficiently, a question that may be difficult to answer. A better approach might be to use a state's failure to cooperate to justify imposing liability even though that state's emissions were just a fraction of total global emissions. The state's small direct causal role is magnified by its failure to cooperate with other states in avoiding the overall effect. The refusal of the United States to ratify the Kyoto Protocol and productively engage in international and domestic climate policymaking is a preeminent example of a failure to fulfill the principle of cooperation.

**(iii) Human Rights Approach to Common but Differentiated Responsibilities**

**Principle:** *States' foremost obligation is to ensure basic, minimum human rights protection to all people. States must share the responsibility to prevent climate change and provide remedies for individuals and communities affected by it in ways that ensure equal enjoyment of their rights.*

- a. States have a duty to act as expeditiously and to the maximum extent possible to mitigate contributions to climate change.*
- b. States must cooperate through technology and resource transfers to ensure that human rights are protected during the transition to less carbon-intensive societies.*
- c. States must cooperate to help vulnerable communities adapt in a way that maximally respects and protects their human rights as climate change impacts occur.*

Commentary:

Human rights law can play a critical role in elaborating the social justice and equity dimensions of global climate change responsibilities. The issue of equity in assigning state duties to mitigate climate change and assist in climate adaptation has come to the forefront of global climate change negotiations and the evolving legal framework. The principle of "common but differentiated responsibilities" (CBDR), as articulated in Principle 7 of the Rio Declaration on Environment and Development<sup>185</sup> and Article 3 of the U.N. Framework

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<sup>183</sup> For a more detailed argument to this effect, see John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 212 (2009).

<sup>184</sup> SIOBHAN MCINERNEY-LANGFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS, at 49 (WORLD BANK, 2011).

<sup>185</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, principle 7 (Aug. 12, 1992) [*hereinafter* Rio Declaration on Environment and Development].

Convention on Climate Change (UNFCCC),<sup>186</sup> embodies these equity dimensions. It acknowledges common responsibilities shared by all States for protecting the global environment, the need to take into account the differing levels of historical and present contributions to the climate change problem, and States' differing capacities to respond to climate change effects. The content of this principle has become a highly contested battleground in climate negotiations, particularly between developed and developing nations. As human rights law is a prominent terrain through which the international community elaborates norms of social justice and equity, it can help to provide formal content for and operationalize this principle.

There are at least five prominent types of justice claims that have been raised in the context of allocating responsibility for climate change mitigation and adaptation. The International Council on Human Rights Policy (ICHRP) lays out these categories of claims in its report on *Human Rights and Climate Change*.<sup>187</sup> The first of the claims is rooted in the notion of corrective justice and insists that those who have caused and are causing climate change harms should "(i) desist from these harmful actions and (ii) compensate [those affected] for any injuries experienced."<sup>188</sup> This principle seeks to account for responsibility for past harms. A second justice claim concerns "loss of future capacities and potential."<sup>189</sup> It rests on the premise that developed countries have aggregated wealth through their reliance on and exploitation of a carbon-based economy. If developing countries are not permitted to benefit from similar technologies, climate change governance may "tend to lock in vast wealth disparities between groups in different regions, without offering any obvious or reliable means of reducing the gap in the future."<sup>190</sup> This claim thus mandates solutions that will facilitate a global transition to reduced dependence on greenhouse gases, which also helps to reduce global wealth disparities. A third claim, rooted in distributive justice, asks how the burden of solving the global problem of climate change should be distributed. This claim invokes the "polluter pays" principle, which requires parties to contribute to climate change mitigation and adaptation in proportion to their respective contributions to atmospheric pollution.<sup>191</sup> This third claim also involves a "participatory justice" notion, requiring a fair process for allocating responsibility regardless of differences among parties' international bargaining power. A fourth justice claim acknowledges the responsibility of present parties to prevent and mitigate harms to unrepresented future generations.

Finally, a fifth claim summons the notion of historical entitlements and is embodied in carbon trading regimes, in which existing emissions levels play into the allocation of pollution permits. This claim exists in tension with the first four claims, which see atmospheric pollution as a source of responsibility rather than rights to pollute. By contrast, parties that make this fifth type of claim assert that those polluters who have taken part in a carbon-intensive economy have caused global atmospheric harms without knowledge of

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<sup>186</sup> United Nations Framework Convention on Climate Change, at art. 3.

<sup>187</sup> INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008), [http://www.ichrp.org/files/reports/45/136\\_report.pdf](http://www.ichrp.org/files/reports/45/136_report.pdf).

<sup>188</sup> *Id.* at 55.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 56.

<sup>191</sup> The Trail Smelter arbitration is generally credited with importing the "polluter pays" principle into international law. *See* Trail Smelter Arbitration (United States v. Canada) at 3 RIAA 1907 (1941).

future deleterious consequences. In the process, entire populations have become dependent on such carbon-intensive economies and their products. This dependence generates entitlements: Ironically, those who have contributed most to climate change can draw from these contributions a property right to either continue polluting or to be compensated for new legal abatement requirements.

Article 3 of the UNFCCC channels these justice-related concerns into the framework of common but differentiated responsibilities (CBDR). The CBDR principle acknowledges three key differences between developing and developed countries: 1) differing historical and present levels of greenhouse gas emissions and, therefore, differing contributions to global atmospheric degradation, 2) differing likely impacts of global climate change, with poorer nations and vulnerable communities facing disproportionate harms, and 3) differing capacities as between poorer and wealthier nations to contribute to climate change solutions and adaptation needs. Article 3 of the UNFCCC reflects all three concerns, insisting:

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of human kind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities. Accordingly, the developed country Parties should take the lead in combating climate change and adverse effects thereof.
2. The specific needs and circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.<sup>192</sup>

Unsurprisingly, the principle of common but differentiated responsibilities has generated considerable discord, with claims rooted in all five notions of justice. For instance, while there is “agreement that capacity differentials, especially between developing and industrialized States are relevant, ... [s]tark disagreements remain on whether or not historical and per capita emission are appropriate criteria for differentiation.”<sup>193</sup> In addition, there is contestation on “the temporal element, i.e. when should major emitters have ‘known’ that their emissions were causing harm, and is this relevant to determining current and future responsibility and obligations?”<sup>194</sup> Similarly, developing countries have consistently claimed that the CBDR principle requires assistance in technology transfer and adaptation responses, a linkage that developed countries have resisted.

Human rights law both bolsters the CBDR principle and helps to provide standards that can give it operational meaning in the context of such contestations. The U.N. Office of the High Commissioner for Human Rights (OHCHR), in a report to the General Assembly on

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<sup>192</sup> United Nations Framework Convention on Climate Change, at art. 3.

<sup>193</sup> International Law Association, *Sofia Conference: Legal Principles Related to Climate Change*, 11 (2012).

<sup>194</sup> *Id.*

the relationship between human rights and climate change, affirmed that “[h]uman rights standards and principles are consistent with and further emphasize ‘the principle of common but differentiated responsibilities’ contained in the [UNFCCC].”<sup>195</sup> The Commissioner interpreted the CBDR principle as requiring that “developed country Parties (annex I) commit to assisting developing country Parties (non-annex I) in meeting the costs of adaptation to the adverse effects of climate change and to take full account of the specific needs of least developed countries in funding and transfer of technology.”<sup>196</sup> This interpretation prioritizes substantive and distributive justice considerations in allocating responsibility for mitigation and adaptation.

Second, the human rights lens situates all human beings, in equal measure, as rights bearers. As the OHCHR has explained, “the human rights framework complements the Convention by underlining that ‘the human person is the central subject of development,’ and that international cooperation is not merely a matter of obligations of a State towards other States, but also of the obligations toward individuals.”<sup>197</sup> This human rights ethic sharpens the need for the global climate framework to account first for the needs of those vulnerable groups that will be most immediately and dramatically affected by climate change. With regard to the adaptation obligations of States, the human rights framework creates a positive requirement that each State use its resources to help its most vulnerable members adapt, in accordance with human rights principles, and that wealthier States assist poorer nations in their adaptation and technological needs.<sup>198</sup> The cooperation principle within human rights law underscores the need for resource and technology flows from wealthier to poorer nations to assist in mitigation and adaptation.

In fact, a principle already exists within human rights law that complements the CBDR principle. Article 2 of the ICESCR imposes a duty on all parties to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>199</sup> ESCR Committee General Comment No. 3 clarified that the “progressive realization” dimension of Article 2 “imposes an obligation [on State parties] to move as expeditiously and effectively as possible toward

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<sup>195</sup> U.N. High Comm’r for Human Rights [OHCHR], Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

<sup>196</sup> *Id.* at para. 87.

<sup>197</sup> *Id.*

<sup>198</sup> The International Council on Human Rights Policy report notes that Article 3 was narrower in scope than the CBDR principle articulated in Principle 7 of the Rio Declaration. The Rio Declaration made clear that “richer countries are more at fault for ‘global environmental degradation’ and should therefore play a greater role in mitigating the damage elsewhere while also contributing to ‘sustainable development.’” By contrast, the wording in UNFCCC Article 3 “skews contributions towards funding mitigation in developing countries, rather than adaptation (where human rights needs are most urgent.” A human rights approach applied to CBDR can help to rectify this distortion by renewing the emphasis on distributional equity in adaptation as well as mitigation responses. INTERNATIONAL COUNCIL ON HUMAN RIGHTS, CLIMATE CHANGE AND HUMAN RIGHTS A ROUGH GUIDE at 62 (International Council on Human Rights Policy, 2008).

<sup>199</sup> ICESCR at art. 2.

that goal.”<sup>200</sup> Comment 3 also clarifies that Article 2 contains a floor on rights satisfaction: “The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”<sup>201</sup> Finally, the Comment affirms the importance of international cooperation, assistance, and resource transfers to facilitate the universal realization of economic, social, and cultural rights. The Committee emphasized that the UN Charter, the ICESCR, and well-established principles of international law make it “incumbent on those States which are in a position [to do so,] to assist others in” realizing these rights within their respective jurisdictions.<sup>202</sup> As a corollary, each State is obliged to draw on its own resources, as well as those made available through international assistance, to facilitate “the full realization of the relevant rights.”<sup>203</sup> With respect to CBDR, Article 2 emphasizes that responsibilities for mitigation and adaptation should be allocated in a manner that will result in the greatest degree of human rights protection. State should expeditiously mitigate greenhouse gas emissions to the maximum extent possible, and the international community should cooperate in making funding available to ensure that human rights are protected as States transition to less carbon-intensive economies. The international community must also cooperate to provide resource transfers, assistance with resettlement of displaced populations, and other forms of adaptation assistance to ensure progress on human rights as climate change impacts accrue.

Human rights law may also help to operationalize the polluter pays principle. While human rights law applies most directly to State actors, it also charges States with safeguarding the welfare of their people and their natural environment. States that participate in environmental contamination, including by facilitating pollution by private actors, are responsible under human rights law for preventing ongoing violations. They are also responsible for ensuring that existing contamination is remediated and that communities are able to adapt to the altered environment. The African Commission on Human & Peoples’ Rights operationalized this approach when it held that the Federal Republic of Nigeria was in violation of seven articles of the African Charter on Human and Peoples’ Rights. The Commission found that the Nigerian government had abetted the Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation, in causing “environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.”<sup>204</sup> The Commission found, in addition to direct abuses by the Nigerian military, that the “government of Nigeria facilitated the destruction of Ogoniland” by giving “the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.”<sup>205</sup> The Commission then charged the Nigerian government with remedying the

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<sup>200</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), at para. 9, U.N. Doc. E/1991/23, annex III at 86 (1991), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

<sup>201</sup> *Id.* at para. 10.

<sup>202</sup> *Id.* at para. 14.

<sup>203</sup> *Id.* at para. 13.

<sup>204</sup> 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, African Comm’n on Human & Peoples’ Rights, Ref. ACHR/COMM/A044/1 (May 27, 2002).

<sup>205</sup> *Id.* at para. 58.

situation, including by “stopping all attacks on Ogoni communities,” “ensuring adequate compensation to victims of human rights violations .., and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations.”<sup>206</sup> The Commission refused to allow the Nigerian government to shield its responsibility behind the private actors that most directly perpetrated the harms. The Nigerian government’s complicity requires it to prevent and pay for damage. At the same time, this remedy gives the government an incentive to bring suit against the private actors in order to collect from them in proportion to their contribution to the harms. Such an approach may also have bearing in the climate change context, affirming States’ responsibility for redressing atmospheric harms that they have caused and giving them an incentive to collect from large private emitters within their jurisdictions and to enforce abatement obligations against them.

The Inuit Petition to the Inter-American Commission on Human Rights also helped to situate the CBDR principle within a human rights framework. The Petitioners alleged that the United States is responsible for violating the human rights of the Inuit people by virtue of its role as “the world’s largest contributor to global warming,” its obscuring of climate science, and its failure “to cooperate with international efforts to reduce greenhouse gas emissions.”<sup>207</sup> Although dismissed by the Commission, the Petition suggested that a human rights lens can help to apportion a state’s responsibility for mitigation measures and extraterritorial adaptation assistance by virtue of both its historical and its present greenhouse gas emissions. In a subsequent hearing on the Petition, the Petitioners’ lawyer, Martin Wagner, urged the Commission to find that “each state is responsible separately as well as jointly.”<sup>208</sup> In its submission to the OHCHR study on human rights and climate change, the United States acknowledged, along these lines, that “novel theories of responsibility” could be “devised.”<sup>209</sup> As human rights adjudication bodies hear future climate change-related claims, they may be able to assign State responsibility for mitigation and adaptation measures in a way that overcomes the challenge of diffuse causation in tort liability. A human rights approach emphasizes the obligation of all States to cooperate in mitigation and adaptation with maximum urgency and to the maximum extent possible to ensure the progressive realization of human rights as the climate change threat progresses.

#### (iv) Procedural Rights

**Principle: *Individuals and communities have a right to participate in decisions affecting the environment in which they live. States have a duty to respect this right as they make decisions regarding climate change mitigation and adaptation.***

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<sup>206</sup> *Id.* at 15.

<sup>207</sup> Inuit Petition at v.

<sup>208</sup> Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT’L & COMP. L. 543, 555 (2010).

<sup>209</sup> Submission of U.S. to OHCHR Report, Observations by the United States of America on the Relationship Between Climate Change and Human Rights, at para. 26 (2008), <http://www2.ohchr.org/English/issues/climatechange/docs/submissions/USA.pdf>.



- a. *States have a duty to make information publicly accessible about the anticipated impacts of climate change and contemplated response measures.*
- b. *States have a duty to ensure that affected individuals and communities take part in decisions about climate change responses and to respect principles of consultation and free, prior, and informed consent, particularly with regards to adaptation measures.*
- c. *States have a duty to ensure that individuals and communities who suffer severe harms from climate change have access to justice forums through which they can seek an appropriate remedy.*

Commentary:

Procedural rights – and, more specifically, participatory rights – within international human rights law have been relied upon to advance environmental protection and sustainability. These rights include the freedom of information, the right to take part in the decision-making process and the right to seek remedy. These rights have now formed the basis for a distinct regional environmental convention: the Aarhus Convention.<sup>210</sup> However, these rights are applicable independent from a distinct environmental treaty, as they are already deeply engrained in international human rights law. Article 1 of the Aarhus Convention stipulates that the procedural rights are guaranteed in order to assure every member of present and future generations the right to an adequate environment.<sup>211</sup> The major role in environmental protection that the Convention contemplates for the public is participation in decision-making. The right to participation includes the right to be heard and the right to influence decisions.<sup>212</sup> Many rural communities, particularly indigenous groups, have sustainably managed their environment for centuries.<sup>213</sup> As the natural resources, on which their ways of life depends are threatened, local participation in decision-making and management of resources is critical.

The Universal Declaration of Human Rights,<sup>214</sup> the American Declaration of the Rights and Duties of Man,<sup>215</sup> the American Convention,<sup>216</sup> the African Charter,<sup>217</sup> and the

<sup>210</sup> AARHUS CONVENTION, 2161 UNTS 447; 38 ILM 517(1999).

<sup>211</sup> *Id.* at preamble.

<sup>212</sup> Dinah Shelton, *A Rights-Based Approach to Public Participation and Local Management Of Natural Resources*, 219, 222, available <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fpub.iges.or.jp%2Fmodules%2Fenvirolib%2Fupload%2F1503%2Fattach%2F3ws-26-dinah.pdf&ei=CJfFVKPrH8yaNoXBgbAD&usg=AFQjCNHr8I-Ygyo4a6inLKKqpDbqg4SViQ&bvm=bv.84349003,d.eXY>.

<sup>213</sup> *Id.*

<sup>214</sup> Universal Declaration of Human Rights, at art. 21.

<sup>215</sup> American Declaration of the Rights and Duties of Man, art. 20, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>216</sup> American Convention on Human Rights at art. 23.

<sup>217</sup> African Charter on Human and Peoples' Rights at art. 13.

International Covenant on Civil and Political Rights<sup>218</sup> affirm the right to participation. The international community, through the 1992 U.N. Conference on Environment and Development at Rio, emphasized public participation in Agenda 21. The Preamble to Chapter 23 states:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.<sup>219</sup>

Principle 10 of Annex 1 of the Rio Declaration obligates public authorities to release information about the environment, particularly information on hazardous materials and activities in their communities. It also recommends that individuals be provided the opportunity to participate in decision-making processes. States shall “facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”<sup>220</sup> Section III of Agenda 21 identifies major categories of people and entities whose participation is needed, including “women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers.”<sup>221</sup> Agenda 21 emphasizes the need for public participation in environmental impact assessment procedures and participation in decisions concerning the communities in which individuals and identified groups live and work.<sup>222</sup>

Regional human rights bodies have relied on the notion of participatory rights to promote a healthy environment. In *SERAC v. Nigeria*, the African Commission held that the government failed to monitor the activities of polluting oil companies, provided no information to local communities, conducted no environmental impact studies, and prevented scientists from undertaking independent assessments.<sup>223</sup> The Court emphasized:

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<sup>218</sup> ICCPR at art. 25.

<sup>219</sup> Rio Declaration on Environment and Development, Chapter 23, at Preamble.

<sup>220</sup> Report of the United Nations Conference on Environment and Development, Annex 1(Rio de Janeiro, 3-14 June 1992), Accessed <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

<sup>221</sup> Dinah Shelton, *A Rights-Based Approach To Public Participation and Local Management Of Natural Resources* at 222.

<sup>222</sup> *Id.*

<sup>223</sup> The military government of Nigeria was involved in oil production through Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation and the communication they submitted to the African Court of Human Rights alleged that their operations contaminated the environment of the Ogoni people. The companies had exploited the

Government compliance with the spirit of Articles 16[the right to health] and 24 [the right to a general satisfactory environment] of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>224</sup>

The Commission required the state to adopt various techniques of environmental protection, such as environmental impact assessment, public information-dissemination public participation mechanisms, access to justice for environmental harm, and monitoring of potentially harmful activities.

Efforts under international law to incorporate procedural and participatory rights have been mostly regional. The strongest support for using participatory and procedural rights to advance environmental matters has been in Europe. In *Guerra and Others v. Italy*, the applicants asserted that the authorities' failure to inform the public about the hazards created by a factory and about the procedures to be followed in the event of a major accident, infringed their right to freedom of information guaranteed by Article 10 of the European Convention on Human Rights. Although the European Court of Human Rights found that Article 10 did not independently produce an obligation for States to collect, process, and disseminate environmental information, it held that freedom to receive information under Article 10 prohibits public authorities from impeding a person's access to necessary information.<sup>225</sup> The Court further elaborated on this in the *Case of Taskin and Others v Turkey*,<sup>226</sup> holding that, based on article 8 (right to respect for private and family life), whenever a state must determine complex issues of environmental and economic policy, the decision-making process must include appropriate investigations and studies in order to be

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Ogoni's oil reserves, disposed of toxic wastes in violation of applicable international environmental standards and caused many avoidable spills in the proximity of villages. The government had facilitated this by giving the oil companies military forces to use to displace people that protested. The government refused to monitor the operations of these companies, did not require them to implement safety measures, withheld information on possible risks from the community and barred scientists and non profit organizations from entering to investigate the environmental impacts of the companies' activities. As a result of this exploitation, there were "long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems." The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 at paras. 1-5 (2001).

<sup>224</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Comm'n on Human and Peoples' Rights, Comm. No. 155/96 at para. 53. (2001).

<sup>225</sup> *Guerra and others v. Italy*, App. No 116/1996/735/932, at para. 52 Eur. Ct. H.R.(1998) (stating that the "provision of information to the public was now one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk. Consequently, the words '[t]his right shall include freedom ... to receive ... information...' in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment.")

<sup>226</sup> *Taskin and others v. Turkey*, App. No. 46117/99, Eur. Ct. H.R. (2004).

able to predict and evaluate the effects. Referring to *Guerra and Others v Italy*, the Court stressed that the “[t]he importance of public access to the conclusions of such studies and to information, which would enable members of the public to assess the danger to which they are exposed, is beyond question.”<sup>227</sup>

European governments are obligated to release information about their projects. In the European Union an individual generally has the right to be informed about the environmental compatibility of products, of manufacturing processes, and of industrial installations.<sup>228</sup> The European Commission publishes the information “after prior consent has been obtained from the Member State concerned.”<sup>229</sup> However, the need for consent “may limit the information provided, undermining its ‘objective’ nature.”<sup>230</sup> The European Community also requires that information be provided to those who may be particularly at risk from certain activities or products. For example, Framework directive 89/391 on the protection of workers against risks at the workplace calls for informing and consulting with employees regarding the working environment and safety of the workers when new technology is used.<sup>231</sup> Access to public information enables people to protect their well-being and health.

In South America, support for these procedural rights is weaker than in Europe. However, the Inter-American Commission has emphasized the importance of these procedural rights in regard to the environment. In its Report on Ecuador, it stated that “[t]he quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.”<sup>232</sup> It also reiterated this in *Maya Indigenous Communities of the Toledo District v. Belize*, holding that the state “failed to take appropriate or adequate measures to consult with the Maya people concerning the concessions.”<sup>233</sup> It stated that the state had violated the right to property of the Maya people by failing to provide clear standards for consultation, including “information that must be shared with the communities concerned.”<sup>234</sup> The Commission also found that the state violated the “‘right to consultation’

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<sup>227</sup> *Id.* at para. 119.

<sup>228</sup> Dina Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENV. J. INT'L L. & POL'Y, 129, 135 (2006-2007) (quoting Council Directive 76/160, pmbl, art. 13, 1976 O.J. (L 31) 1 (“public interest in the environment and in the improvement of its quality is increasing . . . [t]he public should therefore receive objective information on the quality of bathing water.”))

<sup>229</sup> *Id.*

<sup>230</sup> ALEXANDRE KISS & DINAH SHELTON, 2 MANUAL OF EUROPEAN ENVIRONMENT LAW 74 (1997).

<sup>231</sup> Council Directive 89/391, art. 1, 1989 O.J. (L 183) 1(EC); *See also* Council Directive 83/477, at arts. 3-4, 1983 O.J. (L 263) 25 (EC) (noting that mining and fishing or to specific hazards, such as asbestos, require information be given to workers about the risks they face).

<sup>232</sup> *Report on Ecuador*, at 92 and 93.

<sup>233</sup> *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at ¶ 143 (2004).

<sup>234</sup> *Id.* The petition had asserted that Belize had denied the Maya Communities meaningful consultation in connection with the logging concessions in the Toledo district, concessions that undermined their food sources and threatened the contamination of their water. In particular, the Petitioners argued that “the right to be consulted in a meaningful way about any decision that may affect Maya interests in lands and natural resources is implicit in the human rights provisions that protect these interests, including Article 27 of the ICCPR, the right to participate in government under

implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of self-determination.”<sup>235</sup>

Procedural rights are entrenched in traditional human rights law and by insisting on access to information and facilitating participation in decision-making, they empower people particularly vulnerable groups to protect their environment.

#### (v) Precautionary Principle

**Principle:** *States have an obligation to take steps to reduce or eliminate threats to the protection of fundamental human rights even if the degree of threat is uncertain. States therefore have a duty to act expeditiously to mitigate climate change contributions and to prepare, in advance, effective adaptation strategies.*

#### Commentary:

The precautionary principle aims to anticipate the way in which actions, decisions, and omissions will affect the environment. States’ sovereign right to utilize their own resources is limited by their obligation to manage them in a rational and safe way so as to contribute to the development of their people. The precautionary principle within domestic, regional, and international environmental law articulates an obligation to act in the face of uncertainty in order to prevent potential future harms to public health and welfare that can be reasonably foreseen.<sup>236</sup> For example the European Commission recognizes the precautionary principle in its guidelines and states that in

those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications that through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection. . . .The Commission affirms, in accordance with the case law of the Court that requirements linked to the protection of public health should undoubtedly be given greater weight than [sic] economic considerations.<sup>237</sup>

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Article XX of the American Declaration, and the principle of self-determination. The Petitioners argue that for indigenous peoples, this principle establishes, at a minimum, the right to be genuinely involved in all decision-making that affects them.” *Id.* at ¶155.

<sup>235</sup> *Id.* at ¶154.

<sup>236</sup> World Summit on Sustainable Development, *Precaution In International Sustainable Development Law* at 3, CENTRE FOR INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW, (Johannesburg, South Africa, 26 August - 4 September, 2002), [http://cisdl.org/public/docs/news/brief\\_precaution2.pdf](http://cisdl.org/public/docs/news/brief_precaution2.pdf).

<sup>237</sup> Communication From The Commission On The Precautionary Principle /\* COM/2000/0001 final \*/

[http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=52000DC0001&lg=en](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=52000DC0001&lg=en).

The precautionary principle is particularly relevant to the climate change context, where the probability of monumental future harms remains contested and these harms can be mitigated only at substantial present cost.

Although the subject requires greater attention, the human rights regime may give force to the obligation of state and non-state actors to take precautions to mitigate climate change contributions and prepare, in advance, effective adaptation strategies. The European Court of Human Rights has applied the precautionary principle particularly when possible environmental violations will affect peaceful enjoyment of private and family life. In *Hatton and others v. the United Kingdom*<sup>238</sup>, the petitioner Ruth Hatton, who lived near Heathrow Airport, asserted that article 8 of the European Convention<sup>239</sup> had been violated because night flights interfered with her sleep. Although the Court could not determine to what extent night flights disturb sleep and whether Hatton and the others were victims of the violation or not, it held, notwithstanding the uncertainty regarding the damage, that there had been a violation of Article 8. The Court recognized that although the airport was not owned by the government, the State “had a positive duty to take reasonable and appropriate measures to secure the applicants’ rights under Article 8”<sup>240</sup> and to strike a fair balance between “the competing interests of the individual and of the community as a whole.”<sup>241</sup> The Court also applied the precautionary principle in its judgment on the validity of the Commission’s decision banning the exportation of beef from the United Kingdom to reduce the risk of Bovine spongiform encephalopathy (commonly known as mad cow disease) transmission.<sup>242</sup> The Court stated, “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”<sup>243</sup> The Court reasoned,

That approach is borne out by Article 130r(1) of the EC Treaty, according to which Community policy on the environment is to pursue the objective inter alia of protecting human health. Article 130r(2) provides that that policy is to aim at a high level of protection and is to be based in particular on the principles that preventive action should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies.<sup>244</sup>

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<sup>238</sup> *Hatton and others v. The United Kingdom*, App. No. 36022/97, Eur. Ct. H.R. (2001). This case was appealed, and the appeal was not decided in the petitioner’s favor. See *Hatton and others v. The United Kingdom*, App. No. 36022/97, Eur. Ct. H.R. (2004).

<sup>239</sup> “The right to respect one’s family and life.”

<sup>240</sup> *Hatton and others v. The United Kingdom*, at para. 95.

<sup>241</sup> *Id.* at para. 96.

<sup>242</sup> See judgments of 5 May 1998. Case C-157/96, *The Queen v Ministry of Agriculture, Fisheries and Food et al.*, 1998 E.C.R. I-02211; Case C-180/96, *United Kingdom of Great Britain and Northern Ireland v Comm’n* 1998. E.C.R I-02265.

<sup>243</sup> Case C-180/96, *United Kingdom of Great Britain and Northern Ireland v Comm’n* 1998 E.C.R I-02265, para. 99. See *id.* at para. 63.

<sup>244</sup> *Id.* at para. 100. See also *Öneryıldız v. Turkey*, App. No. 48939/99 Eur. Ct. H.R (2002). The applicant was suffering from environmental pollution and the Court’s opinion had elements of precautionary language.

These cases show that the precautionary principle can be used as a tool to force governments to make better environmental and public health decisions with a focus on prevention rather than mitigation.

It is worth noting that for possible violations to life and property, the European Court of Human Rights has often required evidence of damage or, at least, the imminence of damage. For example, in *Balmer-Schafroth and others v. Switzerland*,<sup>245</sup> the Court rejected the petitioner's demand to refuse to extend the operating licence of a power station because the petitioners failed to prove a direct connection between the operation of the nuclear power station and the alleged violation of their rights. It did not find that the petitioners were personally placed in "specific, grave, and imminent danger."<sup>246</sup> However, a dissenting opinion signed by seven judges, based *expressis verbis* on the precautionary principle, stated that it is necessary to guarantee human rights not only in cases involving imminent danger, but also in situations where there were possible dangers and risks.<sup>247</sup> This reflects a growing recognition of the importance of prevention.

The precautionary principle may play an important role in encouraging states to take measures to safeguard the rights of the individual in spite of the interests of the community or State in the benefits of the activity. It places public health and environmental concerns at the center of national policies and decisions.

#### (vi) Horizontal Application: Binding States, Corporations

**Principle:** *States have an obligation to regulate private parties in order to prevent them from causing violations of protected human rights through their contributions and responses to climate change. Where a State fails to impose or enforce adequate regulations, private parties, including corporations, nevertheless have an obligation to avoid violating basic human rights.*

#### Commentary:

International human rights law primarily binds states. As such, it creates responsibilities for states to regulate third parties, as discussed above. However, it does not directly impose enforceable obligations on third parties. Nonetheless, if states fail in their responsibilities to regulate corporations, the corporations clearly have an independent moral obligation not to engage in activities that ought to be prohibited.<sup>248</sup> This obligation is not

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<sup>245</sup> Petitioners lived within the first emergency zone of the Mühleberg nuclear power station. They argued that on the basis of articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights, necessary safety measures must be applied as a preliminary measure before the power station could operate. They asserted that the power station did not meet safety requirements, and as a result of the mistakes made in constructing the station, there was a higher risk of accidents at this station than usual. *Balmer-Schafroth and others v. Switzerland*, App. No 67/1996/686/876 Eur. Ct. H.R. (1997).

<sup>246</sup> *Id.* at para. 40.

<sup>247</sup> *Balmer-Schafroth and others v. Switzerland*, App. No 67/1996/686/876 Eur. Ct. H.R. (1997) (Pettiti, J., dissenting).

<sup>248</sup> For a detailed exposition of this view, see John Ruggie, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations

generally enforceable through international human rights instruments directly, but it follows clearly from the general principle of human dignity that undergirds international human rights. In the climate change context, assuming that states have an obligation to regulate emissions, corporations have a (non-enforceable) obligation in the absence of such regulation to limit their own emissions. At the very least, they have a duty to limit their emissions within the bounds of commercial reasonability and invest in research into ways of reducing emissions further.

Companies' obligations have been enforced by at least one domestic court. The Federal High Court of Nigeria in the Benin Judicial Division held that gas flaring by oil companies violated local residents' rights to life and dignity, guaranteed by the Nigerian Constitution and "reinforced" by the African Charter on Human and Peoples' Rights.<sup>249</sup> As a remedy, the court issued an injunction barring further gas flaring by the oil companies and an injunction ordering the Attorney General to put in motion legislation to ban gas flaring.<sup>250</sup> The Court held that the fundamental rights enshrined in the Nigerian Constitution – which are expressed in general terms – create obligations for private parties as well as for the government.<sup>251</sup> This dual remedy ensured an immediate end to the rights violation, while also maintaining the executive and legislative branches' obligation to protect the affected rights. This type of approach may be particularly effective when injunctive relief is sought. The slight duplication inherent in the court's relief is not problematic, whereas apportioning financial liability between the government and the oil companies certainly would be.

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"Protect, Respect and Remedy" Framework, U.N. Doc A/HRC/ 17/31  
<http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

<sup>249</sup> *Gbemre v. Shell Petroleum Development Co. Nigeria Ltd.*, FHC/B/CS/53/05 (Nigeria, 2005), at 6.

<sup>250</sup> *Id.* at 6(5), 6(6).

<sup>251</sup> *Id.* at 5(4); CONSTITUTION OF NIGERIA (1999), art. 33(1), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.