

ABSTRACT for  
Climate Change and Human Rights Law  
by John H. Knox

In recent years, it has become clear that climate change is an enormous threat to the human rights of people all over the planet, from Inuit in the Arctic forced to relocate homes built on melting permafrost, to residents of the Maldives in the Indian Ocean facing the prospect of losing their islands to rising sea levels. It is much less clear, however, what duties international human rights law places on states to address the effects of climate change on human rights. This article seeks to identify those duties and provide a framework for further clarification of them.

To that end, it looks to the jurisprudence human rights tribunals have established to address other types of environmental harm to human rights. That jurisprudence sets out detailed duties, including prior environmental impact assessment, full participation in decisions by those affected, judicial recourse, and compliance with minimum human rights standards. This article argues that the duties can and should be extended to apply to global environmental harm such as climate change. It recognizes practical and legal obstacles to this extension, but it finds a feasible legal basis in the duty of states to cooperate to address common challenges to human rights, a duty rooted in the Charter of the United Nations and the International Covenant on Economic, Social and Cultural Rights.

Although the international effort to address climate change complies with human rights norms in some respects, states must do more to ensure that the ongoing climate negotiations result in an agreement that provides both for the reduction of greenhouse gases to levels that will not interfere with the human rights of those vulnerable to climate change, and for adaptation to unavoidable changes that would otherwise harm their human rights.



# Climate Change and Human Rights Law

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I.	The Human Rights Law of Environmental Protection . . . . .	6
	A. Environmental Duties Arising from Civil and Political Rights . . . . .	6
	B. Environmental Duties Arising from Economic, Social, and Cultural Rights. . . . .	16
	C. Environmental Duties Arising from Rights Held by Members of Groups, or by Groups Themselves . . . . .	26
II.	Applying the Environmental Human Rights Jurisprudence to Climate Change . . . . .	32
	A. Human Rights Affected by Climate Change. . . . .	32
	B. States' Duties under Current Environmental Human Rights Jurisprudence to Address the Effects of Climate Change . . . . .	36
	C. Constraints on States' Responses to Climate Change . . . . .	43
III.	Extending Environmental Human Rights Law to Climate Change. . . . .	44
	A. The Covenant on Civil and Political Rights . . . . .	45
	B. The Covenant on Economic, Social and Cultural Rights . . . . .	51
	C. The Duty of International Cooperation . . . . .	60
IV.	Conclusion . . . . .	64

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What duties, if any, does human rights law place on states to address climate change? It may seem obvious that climate change will violate many human rights, including rights to life, health, and property. Indeed, it is already doing so. By melting sea ice and permafrost, global warming has made survival more difficult for Inuit and other indigenous peoples that depend on the Arctic environment for their subsistence, forcing them to relocate homes and communities.<sup>1</sup> Melting glaciers have placed mountain communities at risk of flooding.<sup>2</sup> In the Sahel, south of the Sahara, warmer and drier weather has shortened the growing season and reduced crop production.<sup>3</sup> In many areas of the world, rising sea levels contribute to losses of coastal wetlands and damage from coastal flooding.<sup>4</sup>

If not abated, the effects of climate change will grow in severity and scope. The Intergovernmental Panel on Climate Change (IPCC) predicts with high confidence<sup>5</sup> that projected trends in global warming will increase the number of people suffering death, disease, and injury from heat waves, floods, storms, fires, and droughts, as well as the number experiencing hunger and malnutrition.<sup>6</sup> It predicts with very high confidence<sup>7</sup> that “[c]oasts will be exposed to increasing risks, including coastal erosion, over coming decades due to climate change and sea level rise.”<sup>8</sup> The IPCC expects sea levels to continue to rise, cyclones to intensify, and storm surges to increase in size, all of which will cause effects on coastal regions that are “virtually certain to be overwhelmingly negative.”<sup>9</sup> Without improved protection, coastal flooding could grow tenfold by the 2080s, affecting more than 100 million people a year.<sup>10</sup> Eventually, small island states may become uninhabitable. The average height above sea level of the Maldives, for example, a state composed of islands in the Indian Ocean, is only one

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<sup>1</sup> Intergovernmental Panel on Climate Change, *Climate Change - 2007: Impacts, Adaptation and Vulnerability* 82 (hereinafter IPCC 2007 Impact Assessment); Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) (hereinafter Inuit Petition), *available at* [www.inuitcircumpolar.com/files/uploads/ipcc-files/FINALPetitionICC.pdf](http://www.inuitcircumpolar.com/files/uploads/ipcc-files/FINALPetitionICC.pdf).

<sup>2</sup> IPCC 2007 Impact Assessment, *supra* note 1, at 9, 85-90.

<sup>3</sup> *Id.* at 9, 104.

<sup>4</sup> *Id.* at 9, 92-94.

<sup>5</sup> “High confidence” indicates about 80% confidence of being correct. *Id.* at 4.

<sup>6</sup> *Id.* at 393.

<sup>7</sup> “Very high confidence” indicates at least 90% certainty. *Id.* at 4.

<sup>8</sup> *Id.* at 317.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 339.

meter. An increase in sea level of one-half meter would cause a major portion of the Maldives' most populous island to be inundated by 2025 and half of the island to be under water by 2100.<sup>11</sup>

Even this partial list of the effects of climate change makes clear that it is an enormous threat to human rights. It is much less obvious, however, what legal duties arise as a result. Not all violations of human rights give rise to legal obligations; human rights may have ethical or moral import without having correlative duties under human rights law.<sup>12</sup> Climate change interferes with the enjoyment of rights recognized in human rights treaties, but a treaty's recognition of a human right does not mean that any interference with that right, by any actor, anywhere in the world, violates a legal duty. Human rights law places very few obligations directly on private actors such as individuals and corporations, and none of those obligations is likely to be triggered by climate change.<sup>13</sup> Human rights law places a far larger number of duties on states, but those duties are defined and limited by the law itself, and they do not require every state to respond to every threat to human rights, everywhere in the world.

Whether or not climate change gives rise to legal duties under international human rights law, treating climate change as a threat to human rights in a moral sense has its own value. It establishes that climate change is a moral challenge as well as a technical or environmental one, and that we have moral duties to those harmed by it. Applying human rights rhetoric to climate change may draw attention to its effects on particular communities, convince those not yet directly affected that it is a growing disaster on a scale similar to other great historical disasters, and make individuals and states more willing to take the hard choices needed to combat it.<sup>14</sup>

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<sup>11</sup> Submission of the Maldives to the Office of the High Commissioner for Human Rights 19, available at [www2.ohchr.org/english/issues/climatechange/docs/submissions/](http://www2.ohchr.org/english/issues/climatechange/docs/submissions/) (hereinafter Maldives Submission).

<sup>12</sup> See Amartya Sen, *Elements of a Theory of Human Rights*, 32 *Philosophy & Public Affairs* 315, 321 (2004).

<sup>13</sup> Duties directly placed on individuals include duties not to commit genocide, war crimes, and crimes against humanity. John H. Knox, *Horizontal Human Rights Law*, 102 *Am. J. Int'l L.* 1, 27-28 (2008).

<sup>14</sup> E.g., Svitlana Kravchenko, *Right to Carbon or Right to Life: Human Rights Approaches to Climate Change*, 9 *Vt. J. Env'tl. L.* 513, 514 (2008) ("If we come to see human-caused global climate change as violating fundamental human rights – as something as unacceptable as other gross violations of human rights – perhaps we can make the breakthrough in our politics that is essential."); Amy Sinden, *Climate Change and Human Rights*, 27 *J. Land, Resources & Env't. L.* 255, 271 (2007) ("treating climate change as a human rights issue simply begins to imbue it with a sense of gravity and moral urgency that communicates to all

Nevertheless, a better understanding of the relevant obligations under human rights law is important, for several reasons. Legal duties are binding in ways that moral duties are not. Although states' compliance with their duties under human rights law is far from perfect, they have at least taken formal steps to commit to those duties, and advocates may rely on such commitments to strengthen their arguments. And states' compliance with their legal obligations is often overseen by tribunals or other expert bodies, which may be able to bring added pressure on states to comply. In addition, the international community has examined the legal dimension of human rights much more closely than their ethical dimension. While moral claims arising from human rights are debated by philosophers and religious scholars, legal claims are the subject of negotiation by states and interpretation by authoritative international bodies. Their elaboration of legal duties may inform the nature and scope of moral duties as well.<sup>15</sup>

This article divides the overarching issue – what duties, if any, human rights law imposes with respect to climate change – into three questions. First, what duties has human rights law established with respect to environmental degradation generally? As Part I explains, although only two regional treaties explicitly recognize rights to a healthy or satisfactory environment, human rights bodies have developed an extensive

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of us: this is something different; this is an issue that must be understood to stand apart from the normal clatter and noise of day-to-day politics”).

<sup>15</sup> This article focuses on duties imposed by human rights treaties. Customary international law might also be relevant to states' duties regarding climate change, if it provides a backstop to treaty law by placing duties on states that have not ratified a particular treaty or have done so with reservations, or if it imposes duties beyond those imposed by treaties. Although many human rights treaties have achieved close to universal acceptance, some important states have not ratified some critical treaties, and some rights discussed below, such as rights to property and to a healthy environment, appear only in regional agreements. The relevance of customary human rights law in this context is limited, however, by the lack of consensus on how far it extends beyond a relatively small number of duties that are not obviously relevant to climate change. According to the Restatement, the duties of states under customary law are not to commit, encourage, or condone genocide, slavery or the slave trade, murder or causing individuals to disappear, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and “a consistent pattern of gross violations of internationally recognized human rights.” Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987). Others take a broader view, arguing that all of the rights in the Universal Declaration of Human Rights have attained customary legal status, but there is no consensus on such a broad position. Even if customary law does extend beyond the rights listed in the Restatement, the content of its duties is likely to be informed, if not determined altogether, by states' practice under human rights treaties.

environmental jurisprudence based on existing rights, such as rights to life, health, and property.<sup>16</sup> This jurisprudence takes a two-pronged approach. It sets out strict procedural duties, including prior assessment of environmental impacts, access to participation in decision-making, and judicial remedies, which states must follow in deciding how to strike the balance between environmental protection and other societal interests, such as economic development. Substantively, it defers to the decisions that result from these procedures, as long as the decisions do not result in the reduction of human rights below minimum standards.

Part II asks how well this jurisprudence applies to climate change. Although climate change undoubtedly interferes with human rights, the attempt to bring the law of environmental human rights to bear on it faces a formidable obstacle: the law was developed in the context of harm that does not cross an international boundary. In that context, its deference to a state's decision as to how much environmental harm to allow is justifiable, because the benefits and the costs of the actions causing the harm are felt within a single polity. If that polity follows procedural safeguards to ensure that all those affected are able to participate fully in the decision-making process, then the resulting decision is entitled to deference. But those safeguards do not translate easily to harms such as climate change, which are caused by and affect many different polities. Among other problems, states' extraterritorial obligations under human rights law are often unclear.

Part III examines whether and how current environmental human rights jurisprudence may extend to address the global threat climate change poses to human rights. Of the potential legal bases for such an extension, the article concludes that the best is the duty to cooperate, which requires states to take joint action to promote and protect human rights. This duty requires states to create the equivalent of a single global polity to consider how to respond to the global threat to human rights posed by climate change. On this basis, the two-pronged environmental human rights jurisprudence is again feasible. As long as the international community follows decision-making procedures that assess the threat, provide information and access to affected communities, and do not violate minimum human rights standards, the resulting decision should receive deference. Although the international effort to address climate change complies with these norms in some respects, more should be done to ensure that the climate negotiations result in an agreement that protects human rights from climate change.

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<sup>16</sup> For an early prediction that the law might develop in this way, see Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *Stan. J. Int'l L.* 103 (1991).

## **I. The Human Rights Law of Environmental Protection**

Most important human rights treaties do not refer to environmental protection.<sup>17</sup> The tribunals and quasi-tribunals that interpret the agreements have nevertheless developed a law of environmental protection based on the rights that the treaties do protect, including rights to life and health. The relevant jurisprudence is largely from regional bodies, but because of the similarity in the treaties' expressions of the rights, their interpretations are persuasive authority for similar interpretations of human rights treaties with universal membership, such as the international human rights covenants.

At the risk of oversimplification, one can divide human rights into three categories: civil and political rights; economic, social, and cultural rights; and rights held by individuals because of their membership in groups or held by the groups themselves. The environmental human rights jurisprudence has drawn on each of these categories, as the following sections explain. Remarkably, even though the treaties appear to assign states different duties for different categories of rights, the jurisprudence has developed very similar requirements across the board. It construes the treaties as imposing duties on states to regulate not only their own behavior, but also that of private actors subject to their control. It sets out strict procedural duties that states must follow before engaging or allowing environmental harm. And it gives states discretion in deciding how much environmental harm to allow, but limits the discretion in ways that prevent the right from being destroyed.

### **A. Environmental Duties Arising from Civil and Political Rights**

The most important source of legal obligations with respect to civil and political rights is the International Covenant on Civil and Political Rights (ICCPR).<sup>18</sup> Other important sources are the three regional human rights treaties: the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and

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<sup>17</sup> Two regional agreements do recognize environmental rights: the African Charter states that "[a]ll peoples have the right to a general satisfactory environment favorable to their development," African Charter on Human and Peoples' Rights, June 27, 1981, art. 24, 21 ILM 58 (1982); and the Protocol of San Salvador recognizes the right of "everyone to live in a healthy environment." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, art. 11 (hereinafter Protocol of San Salvador).

<sup>18</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (hereinafter ICCPR).

Peoples' Rights.<sup>19</sup> Each of these agreements has a body with particular responsibility for interpreting it: the ICCPR has the Human Rights Committee, which reviews states' reports on their compliance under the agreement, decides individual claims of state non-compliance,<sup>20</sup> and publishes General Comments interpreting the agreement;<sup>21</sup> and the regional agreements have the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court on Human and Peoples' Rights.<sup>22</sup> Most of the interpretations of civil and political rights in the context of environmental harm have come from the European Court.

Although the language of treaties protecting civil and political rights varies, sometimes in important ways, they all recognize many of the same rights, including rights to life, liberty, freedom of expression, religion, movement and residence, and respect for privacy, family, and home.<sup>23</sup> In addition, the three regional treaties, but not the ICCPR, recognize the right to property.<sup>24</sup> Of these rights, environmental degradation has been

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<sup>19</sup> European Convention on Human Rights, Nov. 4, 1950, 213 UNTS 221; American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123; African Charter, *supra* note 17.

<sup>20</sup> The submissions may only be considered if they are directed against one of the 111 states that have accepted the First Optional Protocol to the ICCPR.

<sup>21</sup> General Comments are issued by a treaty body – the committee of experts established to oversee compliance with a human rights treaty – to provide guidance to states as to the views of the treaty body on particular provisions or cross-cutting issues under the treaty it supervises. Although General Comments are not binding, the committee reinforces their guidance when it reviews the reports states must provide it periodically on their compliance with the treaty. The cumulative effect may be to influence states to bring their practice under the treaty into accord with the position expressed in the Comments.

<sup>22</sup> The European Court, the Inter-American Commission, and the African Commission each has authority to receive communications from individuals claiming a party to the relevant treaty has failed to comply with its obligations. The European Court's decisions bind the state party. The two Commissions may only issue non-binding decisions, but they may also choose to bring a claim to the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights, which may issue decisions binding on states that have accepted their jurisdiction. American Convention, *supra* note 19, art. 68; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, art. 30.

<sup>23</sup> See ICCPR, *supra* note 18, arts. 6(1), 9, 12, 17(1); European Convention, *supra* note 19, arts. 2(1), 5, 8(1), Protocol No. 4, art. 2; American Convention, *supra* note 19, arts. 4(1), 7, 22, 11(2); African Charter, *supra* note 17, arts. 4, 6, 12, 18(1) (referring only to family, not privacy or home).

<sup>24</sup> European Convention, Protocol No. 1, art. 1; American Convention, *supra* note 19, art. 21; African Charter, *supra* note 17, art. 14.

recognized as having the potential to interfere with the rights to life, property, and privacy. States' duties concerning the right to property have been elaborated chiefly by the Inter-American human rights system in the context of indigenous rights and are discussed in Part I.C below; this section addresses duties arising from the rights to life and privacy.

**1. Duties to Regulate State and Private Conduct**

Perhaps the clearest duty states have accepted in these treaties is to refrain from taking actions that directly violate the rights of persons within the treaties' coverage.<sup>25</sup> In the context of environmental degradation, one would expect that this duty would require a state to make sure that its own facilities do not emit pollutants or otherwise cause environmental harm at levels that would infringe the enjoyment of the protected rights. For states to refrain from taking such measures would often not be enough to protect the rights, however, since much environmental harm results from private conduct. Although the human rights treaties do not bind private parties directly, they have been construed to require states to take steps to protect the rights from private conduct that interferes with their enjoyment.<sup>26</sup> As a result, the treaties would seem to require states to take the steps necessary to restrict private actors from causing environmental harm that results in interference with protected rights. Finally, states might have other positive duties, such as ensuring adequate remedies, in the event that these measures

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<sup>25</sup> See Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6 (2004). For the ICCPR, the obligation rests on the language of Article 2(1) requiring each party to "respect" the rights recognized in the Covenant. See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 36 (1993) ("The duty to respect . . . means that the States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed."). The regional agreements have identical or similar language. European Convention, *supra* note 19, art. 1; American Convention, *supra* note 19, art. 1(1); African Charter, *supra* note 17, art. 1.

<sup>26</sup> For the ICCPR, the duty to protect has been traced to the requirement in Article 2(1) for states to "ensure" the rights recognized in the treaty. See General Comment 31, *supra* note 25, ¶ 8; Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 24 (2000); Nowak, *supra* note 25, at 38. Regional tribunals have interpreted the regional agreements to include the duty as well. See, e.g., **Error! Main Document Only.** *Z v. United Kingdom*, App. No. 29392/95, 34 Eur. H.R. Rep. 3, ¶ 73 (2002); **Error! Main Document Only.** *Commission Nationale de Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, 2000 Afr. H.R. L. Rep. 66, 68, ¶ 20 (1995); **Error! Main Document Only.** *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988). See generally Knox, *supra* note 13, at 20-23.

were not enough to prevent the harm.<sup>27</sup>

To a large degree, this is the approach that the human rights bodies charged with interpreting the agreements have taken. For example, in reviewing a complaint that the military government of Nigeria had exploited oil resources in the Ogoniland region “with no regard for the health or environment of the local communities,”<sup>28</sup> the African Commission on Human and Peoples’ Rights found that the exploitation violated many human rights protected by the African Charter, including the right to life of Ogoni living in the area.<sup>29</sup> The Commission emphasized that Nigeria’s duty was not simply to refrain from violating rights itself, but also to “protect [its] citizens . . . from damaging acts that may be perpetrated by private parties,” including Shell Oil, Nigeria’s partner in extracting the resources.<sup>30</sup>

Similarly, in a 1997 report on the situation of human rights in Ecuador, the Inter-American Commission on Human Rights said that pollution from

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<sup>27</sup> See General Comment 31, *supra* note 25, ¶¶ 6, 7 (“The legal obligation under article 2, paragraph 1, is both negative and positive in nature. . . . Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”). Scholars and interpretive bodies have categorized human rights duties in different ways. There is widespread agreement that human rights treaties virtually all impose duties on states not only to respect human rights by not violating them, but also to protect against their interference by other actors. In addition, it seems clear that states have other positive duties under human rights treaties, although it is less clear how these other duties should be described. They have been called duties to *fulfill* rights, to *promote* them, and to *facilitate* them. See Manfred Nowak, Extraterritorial Obligations of States to Prevent and Prohibit Torture, in *Extraterritorial Obligations Under Human Rights Law* \_\_, \_\_ (Mark Gibney & Sigrun Skogly eds., 2009); Sigrun Skogly, Beyond National Borders: States’ Human Rights Obligations in International Cooperation 60-61 (2006); Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 Hum. Rts. L. Rev. 81 (2005); Magdalena Sepulveda, The Nature of the Obligations under the ICESCR 157 (2003); Social and Economic Rights Action Center v. Nigeria (*Ogoniland*), Comm. No. 155/96, ¶¶ 44-47 (2001); Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food*, ¶ 15 (1999). The differences between these formulations should not obscure the point of most importance in the present context: the treaties are recognized as imposing obligations on states not only to refrain from violating rights directly, but also to take positive steps to protect the rights, including from interference by third parties.

<sup>28</sup> *Ogoniland*, *supra* note 27, ¶ 2.

<sup>29</sup> *Id.* ¶ 67 (“Given the widespread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. . . . The pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government.”).

<sup>30</sup> *Id.* ¶ 57.

oil exploitation and mining in the Oriente region had caused grave health problems in local communities, which adversely affected the inhabitants' right to life.<sup>31</sup> Like the African Commission, it said that the state's human rights obligations extended beyond its own agents' contribution to the problem: the threat to life and health could "give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury," and the state must ensure that it has measures in place to prevent life-threatening harm from pollution, including from private sources, and to "respond with appropriate measures of investigation and redress" when environmental contamination infringes its residents' right to life.<sup>32</sup>

The most detailed environmental jurisprudence built on civil and political rights comes from the European Court of Human Rights. In cases construing the European Convention on Human Rights, the Court has made clear that while environmental harm may violate the right to life,<sup>33</sup> it need not do so to trigger state duties. Even if environmental degradation merely causes adverse effects on health and the quality of life in the home, it may interfere with the right to privacy.<sup>34</sup> Although the adverse effects must attain a "certain minimum level,"<sup>35</sup> severe endangerment of health is not necessary; it is enough for the pollution to affect "individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."<sup>36</sup> If so, the state is under an obligation to

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<sup>31</sup> The Commission said that according to the government itself, "billions of gallons of untreated toxic wastes and oil have been discharged directly into the forests, fields and waterways of the Oriente." Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10, rev. 1, 1997. The Commission received evidence that residents were "exposed to levels of oil-related contaminants far in excess of international recognized guidelines," which posed significantly increased risks of cancer and other health problems. A survey of communities in the area found that roughly three-quarters of the residents had gastro-intestinal problems, half headaches, and one-third skin problems.

<sup>32</sup> *Id.*

<sup>33</sup> *Öneryildiz v. Turkey*, 41 Eur. Ct. H.R. 20 (2004).

<sup>34</sup> *Fadeyeva v. Russia*, 45 Eur. Ct. H.R. 10, ¶ 88 (2005); *Taskin v. Turkey*, 42 Eur. Ct. H.R. 50 (2004); *López Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1994).

<sup>35</sup> *Fadeyeva*, *supra* note 34, ¶ 69. "The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city." *Id.*

<sup>36</sup> *López Ostra*, *supra* note 34, ¶ 51. See *Hatton and Others v. United Kingdom*, 37 Eur. Ct. H.R. 28, ¶ 96 (2003) ("There is no explicit right in the Convention to a clean and quiet

take positive steps to protect against the harm,<sup>37</sup> whether it caused the pollution directly or failed to protect against pollution from private actors.<sup>38</sup> In either case, “the applicable principles are broadly similar.”<sup>39</sup>

## 2. *Procedural and Substantive Standards*

The environmental human rights jurisprudence does not require states to prevent all environmental degradation. Only harm that infringes on human rights is covered at all, which leaves out environmental degradation that does not appreciably affect humans.<sup>40</sup> When environmental harm does affect human rights, the European Court has allowed the state a great deal of discretion to find a “fair balance” between the rights of the individual and the interests of others in the broader community, whether the harm is caused by the state directly or by a private actor.<sup>41</sup> In determining whether the state has found an acceptable balance, the Court has looked to domestic law as an important consideration: if the state has failed to meet domestic standards by, for example, allowing excessive levels of pollution<sup>42</sup> or failing to implement a domestic court’s decision to close a facility,<sup>43</sup> then it has virtually always been found to have violated its international duties.<sup>44</sup> If, on the other hand, a state has complied with its own environmental law, then the Court has generally upheld its actions.<sup>45</sup>

The Court has been reluctant to set substantive limits on pollution,

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environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* ¶ 98 (“Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.”).

<sup>39</sup> *Id.*; *López Ostra*, *supra* note 34, ¶ 51.

<sup>40</sup> This is an obvious, inherent shortcoming of human rights law as a basis for environmental protection. See Günther Handl, *Human Rights and Protection of the Environment: A Mildly ‘Revisionist’ View*, in *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente* (Antonio Augusto Cançado Trindade ed., 1995).

<sup>41</sup> *Hatton*, *supra* note 36, ¶ 98; *Taskin*, *supra* note 34, ¶ 116; *Fadeyeva*, *supra* note 34, ¶ 105; *López Ostra*, *supra* note 34, ¶ 51.

<sup>42</sup> *Fadeyeva*, *supra* note 34, ¶ 87; *Lopez Ostra*, *supra* note 34, ¶ 49. In *Fadeyeva*, the state also failed to implement its legislation providing for a residence-free zone around the polluting facility. *Fadeyeva*, *supra*, ¶¶ 116, 132.

<sup>43</sup> *Taskin*, *supra* note 34, ¶¶ 26, 117; *Giacomelli v. Italy*, ¶¶ 92-93 (2006).

<sup>44</sup> Nevertheless, the Court has said that “domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a ‘fair balance’.” *Fadeyeva*, *supra* note 34, ¶ 98.

<sup>45</sup> *Hatton*, *supra* note 36, ¶ 120.

much less to impose absolute prohibitions. On the contrary, the Court has emphasized that “the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 [protecting the right to privacy], and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.”<sup>46</sup> As this language suggests, the Court has been more willing to adopt specific standards with respect to procedure than substance.<sup>47</sup> Summing up its jurisprudence in this area, it has said:

Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The 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. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.<sup>48</sup>

Other cases have emphasized the importance of these procedural safeguards, including in particular the right to information. The Court has held that the failure to provide information about toxic emissions violates a state's obligations with respect to the right to privacy,<sup>49</sup> and has said that the right to information “may also, in principle, be relied on for the protection of the right to life.”<sup>50</sup> More generally, it has said that since “the scope of the

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<sup>46</sup> *Fadeyeva*, *supra* note 34, ¶ 105.

<sup>47</sup> It has repeatedly stressed that states have a “wide margin of appreciation” to set substantive standards, but it has not done so with respect to procedural safeguards. *See, e.g.*, *Giacomelli*, *supra* note 43, ¶ 80; *Hatton*, *supra* note 36, ¶ 100.

<sup>48</sup> *Taskin*, *supra* note 34, ¶ 119 (citations omitted). *See Giacomelli*, *supra* note 43, ¶ 83.

<sup>49</sup> *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998).

<sup>50</sup> *Öneryildiz*, *supra* note 33, ¶ 90. Alan Boyle has pointed out that this duty may go beyond a right of access to information, to include a duty to inform potential victims of environmental harm of their risk. Alan Boyle, *Human Rights or Environmental Rights? A*

positive obligations under Article 2 of the Convention [concerning the right to life] largely overlap with those under Article 8 [protecting the right to privacy] . . . the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life."<sup>51</sup>

The emphasis on procedural protections should not be overemphasized, however. Where activities posing a concrete danger to life are concerned, the European Court has not been willing to defer completely to states' decisions as to how much danger to allow. In *Budayeva v. Russia*, a case concerning the failure of a state to prevent a mudslide that breached a dam and killed eight people, the Court emphasized that "[t]he obligation on the part of the State to safeguard the lives of those within its jurisdiction has been interpreted so as to include both substantive and procedural aspects, notably a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial enquiry."<sup>52</sup> In that case and in an earlier case involving a methane explosion at the waste site, the Court said that states have a duty "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life" and regulate "the licensing, setting up, operation, security and supervision of the [dangerous] activity and make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."<sup>53</sup>

Although states have a margin of appreciation in choosing how to meet this obligation, the Court has made clear that it will not defer completely to the state's choices. In *Budayeva*, the Court found that Russia had ignored warnings that dangerous mudslides might occur, did not institute an early-warning system that would allow people to evacuate in time, and did not allocate funds for the repair of the protective dams.<sup>54</sup> It concluded that Russia failed "to establish a legislative and administrative framework

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Reassessment, 18 *Fordham Envtl. L. Rev.* 471, 491-92 (2007). Boyle also draws connections between the European Court's jurisprudence as to environmental information and the more specific obligations of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 *I.L.M.* 517.

<sup>51</sup> *Budayeva v. Russia*, ¶ 133 (2008).

<sup>52</sup> *Id.* ¶ 131.

<sup>53</sup> *Öneryildiz*, *supra* note 33, ¶¶ 89-90; *see Budayeva*, *supra* note 51, ¶ 132.

<sup>54</sup> *Id.* ¶¶ 147-58.

designed to provide effective deterrence against threats to the right to life” and thereby violated its substantive obligations.<sup>55</sup> Moreover, the Court has held that where lives have actually been lost “in circumstances potentially engaging the responsibility of the State,” the right to life “entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.”<sup>56</sup> In *Budayeva*, the Court found that Russia’s failure to conduct any investigation of the mudslide violated this duty.<sup>57</sup>

Although the Inter-American Commission on Human Rights has not developed as detailed a jurisprudence as that of the European Court of Human Rights, it has taken a broadly similar approach to states’ procedural and substantive duties regarding environmental threats to the right to life. In the Ecuador report, for example, the Inter-American Commission said, rather vaguely, that states must take “reasonable measures” to prevent the risk of harm to life and health. Like the European Court, it avoided setting out concrete limits on environmental degradation, noting that states have the freedom to develop their own natural resources and instead emphasized procedural safeguards: “In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The 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>58</sup> The Commission said that Ecuadorian law already provided rights in each of these respects but that those laws had not been implemented. Rather than telling the state to adopt stricter standards, it recommended that Ecuador should better comply with those it already had.<sup>59</sup>

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<sup>55</sup> *Id.* ¶¶ 159-60.

<sup>56</sup> *Öneryildiz*, *supra* note 33, ¶ 91. The Court went on to say, “the judicial system required by Article 2 [protecting the right to life] must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation.”).

<sup>57</sup> *Budayeva*, *supra* note 51, ¶ 165.

<sup>58</sup> Ecuador Report, *supra* note 31, at \_\_\_.

<sup>59</sup> *Id.*

In sum, jurisprudence on the application of civil and political rights to environmental harm indicates that states have obligations not only to avoid violating rights to life and privacy through environmental degradation, but also to take positive steps to protect against such violations by private actors. The jurisprudence gives some deference to policy decisions setting levels of environmental protection, but it holds the procedures that produce such decisions to stricter standards to ensure that those affected have access to information, decision-making, and judicial remedies.<sup>60</sup>

Alan Boyle has described this jurisprudence as suggesting that “what existing international law has most to offer with regard to environmental protection is the empowerment of individuals and groups most affected by environmental problems, and for whom the opportunity to participate in decisions in the most useful and direct means of influencing the balance of environmental, social and economic interests.”<sup>61</sup> Boyle calls this two-pronged standard of review – deference to substantive standards but strict review of procedural requirements – “tenable, and democratically defensible.”<sup>62</sup> Courts are well-suited to safeguard procedural rights but lack the resources and expertise, as well as the political mandate, to determine specific levels of environmental protection.

The danger of deferring too much to governments, however, is that it may allow them to balance away human rights in favor of other interests. Human rights tribunals have an important role to play not just in protecting access to political participation, but also in reviewing allegations that environmental degradation severely interferes with human rights.<sup>63</sup> It is

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<sup>60</sup> These are the same procedural rights recognized in Principle 10 of the Rio Declaration and, in more detail, the 1998 Aarhus Convention. Rio Declaration on Environment and Development, Principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992); Aarhus Convention, *supra* note 50.

<sup>61</sup> Boyle, *supra* note 50, at 498.

<sup>62</sup> *Id.* at 508. In essence, this is an international version of John Hart Ely’s “representation-reinforcing” approach to judicial interpretation of the U.S. Constitution, which calls for courts to defer to the view of democratically elected representatives as to the interpretation of open-ended constitutional language, but ensure that minorities are not excluded from the political process. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 181 (1980) (describing his theory as “one that bounds judicial review . . . by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack”).

<sup>63</sup> Boyle says that the distinction is “especially resonant in Western Europe and North America,” but may not be as defensible in other societies. “Given the evidence of unsustainable use of resources it is not surprising that some decisions of the African commission and the Inter-American commission go well beyond the more limited greening of convention rights embraced by the European Court.” Boyle, *supra* note 50, at 508.

important not to overlook the indications in the case law that states may not decide to adopt environmental policies that cause the destruction of human rights by, for example, refusing to take adequate measures to protect against threats to human life. By identifying actions that harm individuals' human rights in excess of any reasonable balance, the tribunals are developing a law that may play a role similar to that played by nuisance law and other tort doctrines in the United States, complementing regulatory environmental treaties as tort law complements environmental statutes.

### **B. Environmental Duties Arising from Economic, Social, and Cultural Rights**

The most important legal basis for state duties with respect to economic, social, and cultural rights is the counterpart to the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>64</sup> Together with the ICCPR, the ICESCR was drafted to transpose the rights in the 1948 Universal Declaration of Human Rights into binding legal obligations. States drafted one agreement for each set of rights because they could not agree to include both in one treaty. The Covenants were negotiated during the same period, adopted by the UN General Assembly on the same day in 1966, and entered into force in 1976. In the European and Inter-American systems, economic, social, and cultural rights are also protected by separate agreements: the European Social Charter<sup>65</sup> and the Protocol of San Salvador to the American Convention.<sup>66</sup> The African Charter incorporates such rights directly.<sup>67</sup>

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<sup>64</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (hereinafter ICESCR).

<sup>65</sup> European Social Charter, Oct. 18, 1961. The Council of Europe adopted a revised Social Charter in 1996, which has superseded the older version in whole or part for countries that have ratified it. The new Charter is more detailed and extensive than the old one, and it includes more rights. Some important parties to the 1961 Charter, however, including Austria, the Czech Republic, Denmark, Germany, Greece, Poland, Spain, and the United Kingdom, have yet to ratify the 1996 version. References to the Charter in this article will be to the 1961 version.

<sup>66</sup> Protocol of San Salvador, *supra* note 17. The Protocol has 14 parties, including Argentina, Brazil, Columbia, Mexico, and Uruguay. The American Convention refers to economic, social, and cultural rights, but only to say that the parties "undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS] Charter." American Convention, *supra* note 19, art. 26.

<sup>67</sup> African Charter, *supra* note 17, arts. 15-17.

Although these four treaties vary in how they express the rights and, to a lesser degree, in which rights they include, there is a substantial amount of overlap. The ICESCR, joined in most instances by the regional agreements, recognizes rights to work, to social security, to an adequate standard of living, including adequate food, clothing and housing, to the highest attainable standard of health, to education, to take part in cultural life, and to enjoy the benefits of scientific progress.<sup>68</sup> Uniquely, the Protocol of San Salvador includes a “right to live in a healthy environment” in its list of economic, social, and cultural rights.<sup>69</sup>

There are fewer authoritative interpretations of these rights in the context of environmental degradation because economic, social, and cultural rights have fewer opportunities to be clarified through case-by-case adjudication. The European Court of Human Rights, whose interpretations of the European Convention have contributed so much to environmental jurisprudence, has no jurisdiction to decide cases concerning the European Social Charter. Similarly, the Inter-American Commission and Court cannot hear claims concerning the Protocol of San Salvador.<sup>70</sup> And, unlike the ICCPR Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts that oversees compliance with the ICESCR, as yet has no authority to receive communications from individuals alleging violations of the agreement.<sup>71</sup> Nevertheless, the CESCR and the regional systems do have methods by which they may elaborate on states’ duties with respect to economic, social, and cultural rights in decisions that, while not binding, have significant persuasive effect. The CESCR reviews countries’ reports on their own compliance with the ICESCR and provides authoritative interpretations of the Covenant in General Comments. An additional protocol to the Social Charter authorizes a committee of experts, the European Committee of Social Rights, to consider “collective complaints” submitted by non-governmental organizations concerning non-compliance by states that have

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<sup>68</sup> ICESCR, *supra* note 64, arts. 6, 7, 9, 11, 12, 13, 15(1); European Social Charter, *supra* note 65, arts. 1-4, 11, 12; African Charter, *supra* note 17, arts. 15-17; Protocol of San Salvador, *supra* note 17, arts. 6, 7, 9, 10, 12, 13, 14.

<sup>69</sup> *Id.* art. 11(1). The African Charter also includes a specific right to a “satisfactory” environment, but as a right of peoples rather than individuals. *See* Part I.C *infra*.

<sup>70</sup> The only exceptions are claims concerning the right to education and certain labor rights. Protocol of San Salvador, *supra* note 17, art. 19(6).

<sup>71</sup> That is likely to change soon. In December 2008, the General Assembly adopted an optional protocol giving the CESCR that authority, which will enter into force after ten states have ratified it. G.A. Res. 63/117 (Dec. 10, 2008).

accepted the protocol.<sup>72</sup> The Inter-American Commission can address the rights protected by the Protocol of San Salvador in its country reports<sup>73</sup> and, pursuant to its powers under the OAS Charter, hear communications alleging “violations” of the formally non-binding American Declaration, which recognizes some economic, social, and cultural rights, including the right to the preservation of health.<sup>74</sup> And the African Commission can hear claims concerning all rights in the African Charter.<sup>75</sup> These bodies have confirmed that environmental degradation can interfere with economic, social, and cultural rights, including in particular the rights to the highest attainable standard of health<sup>76</sup> and to components of an adequate standard of

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<sup>72</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Sept. 9, 1995. The Committee presents to a committee of ministers its conclusions as to whether the party in question “has ensured the satisfactory application of the provision of the Charter referred to in the complaint.” *Id.* art. 8(1). If the answer is negative, the ministerial committee may make a recommendation to the party. *Id.* art. 9(1). As of October 2008, fourteen states had accepted the protocol, including Belgium, France, Italy, and the Netherlands, but not Germany or the United Kingdom. Under the Charter itself, the Committee of Social Rights has a mandate to examine states’ reports on their own compliance. European Social Charter, *supra* note 65, art. 24.

<sup>73</sup> Protocol of San Salvador, *supra* note 17, art. 19(7).

<sup>74</sup> American Declaration on the Rights and Duties of Man, May 2, 1948, art. XI. When the Organization of American States first established the Inter-American Commission in 1960, it gave the Commission a mandate to promote respect for human rights, as defined by the 1948 American Declaration. “The ‘non-binding’ American Declaration thus became the basic normative instrument of the Commission.” Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 439, 472 (Theodor Meron ed., 1984). Under this system, the Commission initially had the power only to prepare investigative reports on human rights problems and make recommendations to governments, but in 1965, it was also authorized to hear individual communications, receive information from governments in response, and make recommendations. The American Convention on Human Rights, which entered into force in 1978, assigned the Commission many of those same powers but grounded them in the Convention itself. American Convention, *supra* note 19, arts. 34-51. In addition, the Convention created the Inter-American Court of Human Rights and gave it a mandate to receive complaints by the Commission, based on communications it had received. *Id.* art. 61. Countries such as Belize, Canada, and the United States, which are parties to the OAS Charter but not the American Convention, are therefore subject to the jurisdiction of the Commission only with respect to its pre-Convention powers, and they are not subject at all to the jurisdiction of the Inter-American Court.

<sup>75</sup> African Charter, *supra* note 17, arts. 55, 56.

<sup>76</sup> CESCR, General Comment 14, *The Right to the Highest Attainable Standard of Health*, ¶ 4, U.N. Doc. E/C.12/2000/4 (2000) (“the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as . . . a healthy environment”); Marangopoulos v. Foundation for Human Rights v. Greece, Eur. Comm. Soc. Rts., No.

living, including rights to water<sup>77</sup> and food.<sup>78</sup> They have also indicated that, despite the fact that states apparently have weaker obligations under these agreements than under agreements protecting civil and political rights, the duties arising from the two types of rights are very similar in the environmental context. States are under obligations to regulate not only their own conduct that causes environmental harm, but also that of private actors. States must assess the potential environmental impacts of activities, monitor those impacts over time, and ensure that the affected public receives information about the activities and may participate in decisions concerning them. And while these bodies have not set specific limits on environmental degradation, neither have they deferred completely to state decisions. They have made clear that states must protect against environmental harm that reduces the enjoyment of rights below minimally acceptable levels and must take effective steps to reduce pollution.

**1. Duties to Regulate State and Private Conduct**

Like civil and political rights, economic, social, and cultural rights have been construed as requiring states not only to refrain from violating the rights itself, but also to take positive measures, including protecting against infringements of the rights by non-state actors. The CESCR has taken the lead in this respect. In a 1999 General Comment, it said that the right to food requires states not only to *respect* individuals' existing access to food by not taking any measures that prevent such access, but also to *protect* their access to food by ensuring that private actors do not deprive them of it.<sup>79</sup> The CESCR has also described a third type of duty, the obligation to *fulfil*,

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30/2005, ¶ 195 (2006) (the right to protection of health “includ[es] the right to a healthy environment”).

<sup>77</sup> CESCR, General Comment 15, *The Right to Water*, U.N. Doc. E/C.12/2002/11 (2003). Although the ICESCR does not explicitly include the right to water, the Committee decided that the right falls within “the category of guarantees essential for securing an adequate standard of living,” and is “also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and food.” *Id.* ¶ 3. *See also* General Comment 14, *supra* note 76, ¶ 11 (right to health extends “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”).

<sup>78</sup> *Ogoniland*, *supra* note 27, ¶ 65. The African Commission accepted the claimants' argument that the right food, while not mentioned explicitly in the African Charter, is essential for the fulfillment of other rights, such as rights to health, education, and work.

<sup>79</sup> General Comment 12, *supra* note 27, ¶ 15.

which it sees as requiring the state to adopt appropriate measures towards the full realization of a right.<sup>80</sup>

The CESCR has applied this approach to environmental degradation as well, most thoroughly in the context of its examination of the right to water. There, it said that states' duty to *respect* the right to water requires them to refrain from interfering with the enjoyment of the right, including through "unlawfully diminishing or polluting water, for example through waste from State-owned facilities,"<sup>81</sup> and their duty to *protect* the right requires that they adopt the necessary measures to restrain third parties from interfering with the enjoyment of the right including, again, by pollution.<sup>82</sup> Other positive measures required by what the Committee calls the duty to *fulfil* include the adoption of comprehensive programs to ensure that "there is sufficient and safe water for present and future generations," which may include impact assessment and the reduction and elimination of pollution.<sup>83</sup> In less detail, the CESCR has also indicated that states' duties to respect the right to health include refraining from "unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities," and that their positive duties include adopting measures against environmental health hazards, by formulating and implementing "national policies aimed at reducing and eliminating pollution of air, water and soil."<sup>84</sup>

The regional bodies have taken similar positions. As noted above, the African Commission held Nigeria accountable not only for its own harmful actions in exploiting oil in Ogoniland, but also for its failure to adequately control Shell Oil.<sup>85</sup> And in a more recent decision, discussed below, the European Committee of Social Rights construed Greece's duty under the European Social Charter to protect the right to health from air pollution as requiring it to regulate private actors. Specifically, the Committee said that

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<sup>80</sup> *E.g.*, General Comment 14, *supra* note 76, ¶ 33 ("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"). In the context of the right to food, the duty to fulfil requires both that a state strengthen people's ability to secure their own food security, and that it provide food directly to those who are unable to enjoy their right to food by the means at their own disposal. General Comment 12, *supra* note 27, ¶ 15. The CESCR calls the first of these duties to fulfil the duty to *facilitate*, and the second the duty to *provide*. *Id.* With respect to the right to health, the CESCR later added a third sub-duty, the duty to *promote*. General Comment 14, *supra* note 76, ¶¶ 33, 37.

<sup>81</sup> General Comment 15, *supra* note 77, ¶ 21.

<sup>82</sup> *Id.* ¶ 23.

<sup>83</sup> *Id.* ¶ 28.

<sup>84</sup> General Comment 14, *supra* note 76, ¶¶ 34, 37.

<sup>85</sup> See note 30 *supra* and accompanying text.

even though the power company in question had “private law status” after its privatization by the state, “as a signatory to the Charter, Greece is required to ensure compliance with its undertakings, irrespective of the economic agents whose conduct is at issue.”<sup>86</sup>

## 2. *Procedural and Substantive Standards*

Except for the African Charter, the agreements protecting economic, social, and cultural rights characterize state duties differently from the agreements on civil and political rights. While the ICCPR requires its parties “to respect and to ensure . . . the rights recognized in the present Covenant,”<sup>87</sup> the ICESCR requires each of its parties to “undertake[] to take steps, individually and through international assistance and co-operation, . . . 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>88</sup> The European and Inter-American agreements similarly distinguish between the two types of rights.<sup>89</sup> Only the African Charter imposes the same obligation across the board: to “recognize” the rights and “undertake to adopt legislative or other measures to give effect to them.”<sup>90</sup>

But while language calling for the progressive realization of economic, social and cultural rights appears to provide states much more flexibility

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<sup>86</sup> *Marangopoulos Foundation*, *supra* note 76, ¶ 192. The question may have been somewhat moot in that case, however, since the state still held a majority of the shares of the company. *Id.*

<sup>87</sup> ICCPR, *supra* note 18, art. 2(1).

<sup>88</sup> ICESCR, *supra* note 64, art. 2(1).

<sup>89</sup> The American Convention and the Protocol of San Salvador closely track the language from the Covenants quoted in the text. *See* American Convention, *supra* note 19, art. 1 (requiring its parties to respect and ensure civil and political rights); Protocol of San Salvador, *supra* note 17, art. 1 (requiring the parties “to adopt the necessary measures . . . to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively . . . the full observance” of economic, social and cultural rights). The European agreements distinguish the two types of duties differently. The European Convention simply requires its parties to “secure” the rights recognized in that agreement. European Convention, *supra* note 19, art. 1. The European Social Charter is more complicated. Its Part I lists rights and states that “[t]he Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised.” Part II sets out more concrete obligations, but leaves each party discretion in deciding which of those obligations to accept. European Social Charter, *supra* note 65, art. 20.

<sup>90</sup> African Charter, *supra* note 17, art. 1.

than the stricter duty to respect and ensure civil and political rights, the degree of difference between the two types of duties can be overstated. States' obligations with respect to civil and political rights are often not absolute; they have discretion to limit many civil and political rights for specified reasons, including national security, public safety, and to protect the rights of others.<sup>91</sup> Conversely, states' duties under the ICESCR are not without content. The CESCR has stressed that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect."<sup>92</sup> The Committee has pointed out that the Covenant includes a number of obligations capable of immediate application, such as the duty not to discriminate on the basis of gender in ensuring economic, social, and cultural rights.<sup>93</sup> More generally, it has noted that the requirement to "take steps" toward the progressive realization of the rights "is not qualified or limited by other considerations." Therefore, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."<sup>94</sup> Finally, and perhaps most important, in recent years the CESCR has examined individual rights in detail and specified "core obligations" on each state party "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."<sup>95</sup>

A particularly important regional decision examining economic, social, and cultural rights harmed by environmental degradation is *Social and Economic Rights Action Center v. Nigeria (Ogoniland)*, decided by the African Commission in 2001.<sup>96</sup> Its conclusion that Nigeria had violated the rights of the Ogoni by allowing, and participating in, the exploitation of oil in their region may have been facilitated by the African Charter's inclusion of a right to a "general satisfactory environment,"<sup>97</sup> but the Commission combined its analysis of that right with that of a more universally

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<sup>91</sup> Knox, *supra* note 13, at 11-13.

<sup>92</sup> CESCR, General Comment 3, *The Nature of States Parties Obligations*, ¶ 1 (1990).

<sup>93</sup> *Id.* ¶ 5.

<sup>94</sup> *Id.* ¶ 2.

<sup>95</sup> *Id.* ¶ 10. See Core Obligations: Building a Framework for Economic, Social and Cultural Rights (Audrey Chapman & Sage Russell eds., 2002). For a skeptical view of the utility of the core obligations, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *Yale J. Int'l L.* 113 (2008).

<sup>96</sup> *Ogoniland*, *supra* note 27.

<sup>97</sup> African Charter, *supra* note 17, art. 24.

recognized right, the right to health.<sup>98</sup> In response to largely uncontested allegations that oil production had resulted in numerous oil spills and the disposal of toxic wastes directly into the environment and that the resulting contamination had caused a wide range of short- and long-term health effects,<sup>99</sup> the Commission said that the rights to environment and health together “obligate governments to desist from directly threatening the health and environment of their citizens.”<sup>100</sup> It continued:

Government compliance with the spirit of [these rights] must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing 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>101</sup>

This emphasis on procedural measures as a way to safeguard environmental protection, which is very similar to the approach of the European Court in the context of the rights to privacy and life, may reflect a concern not to suggest that human rights law prohibits states from developing their resources.<sup>102</sup> Nevertheless, the African Commission also found *substantive* violations of human rights in *Ogoniland*. In particular, it held that the destruction and contamination of food sources, both by Nigeria directly and by private parties with its authorization, had violated the Ogoni’s right to food.<sup>103</sup>

The CESCR has also identified procedural duties to protect rights from environmental harm, and those duties are very similar to those identified in *Ogoniland* and by the European Court. Specifically, the CESCR General Comment on the right to water states, “Before any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant,

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<sup>98</sup> *Id.* art. 16(1).

<sup>99</sup> *Ogoniland*, *supra* note 27, ¶ 2.

<sup>100</sup> *Id.* ¶ 52.

<sup>101</sup> *Id.* ¶ 53.

<sup>102</sup> *See Ogoniland*, *supra* note 27, ¶ 54 (“Undoubtedly and admittedly, the government of Nigeria . . . has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians.”).

<sup>103</sup> *Id.* ¶ 65.

and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.”<sup>104</sup>

And, like the other human rights bodies, the CESCR has not relied on procedural safeguards alone. It has also said that states may not allow environmental protection to drop below minimum levels. Because states’ duties under the ICESCR are to take steps to the maximum of their available resources toward the full realization of the rights,<sup>105</sup> the extent to which a state’s failure to take steps to that end amounts to a violation of its obligations depends on the state’s available resources and its willingness to use them. In the context of the right to water, the CESCR has stated:

In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations . . . . A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, [its obligations].<sup>106</sup>

In general, then, a state has not necessarily violated its legal obligations by failing to refrain from, or to prevent others from refraining from, water pollution, if the failure was despite its best efforts. However, if the failure results in the infringement of “minimum essential levels” of the right to water, then the state has violated a core obligation, non-compliance with which the state may not justify by claiming a lack of sufficient resources.<sup>107</sup> The first core obligation listed with respect to the right of water is ensuring access to “the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.”<sup>108</sup> To be safe, the General Comment says that the water must be “free from micro-organisms,

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<sup>104</sup> General Comment 15, *supra* note 77, ¶ 56.

<sup>105</sup> ICESCR, *supra* note 64, art. 2(1).

<sup>106</sup> General Comment 15, *supra* note 77, ¶ 41.

<sup>107</sup> *Id.* ¶ 40.

<sup>108</sup> *Id.* ¶ 37(a). Other core obligations include ensuring access to water on a non-discriminatory basis, adopting and implementing a national water strategy, and monitoring the extent the right is realized. *Id.* ¶ 37(b), (f), (g).

chemical substances and radiological hazards that constitute a threat to a person's health."<sup>109</sup> This indicates a minimum substantive standard for states: they must protect water used for domestic purposes from pollution that rises to the level of threatening personal health.

The most important decision on the application of the right to health to environmental harm to come out of the European system was issued in December 2006. The European Committee of Social Rights reviewed an allegation by a human rights group that Greece's authorization of lignite mines and power plants placed it in violation of its obligations under Article 11 of the European Social Charter, which in furtherance of the right to health requires states "to take appropriate measures designed *inter alia*: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; [and] (3) to prevent as far as possible epidemic, endemic and other diseases."<sup>110</sup> Much of the complaint alleged that Greece had failed to follow procedural safeguards by failing to take sufficient account of the environmental impacts, to provide the affected population information about the environmental harm and involving them in the impact assessment, and to monitor environmental and health conditions.<sup>111</sup> The Committee noted that Greek law provided such safeguards, but that they had not been satisfactorily implemented.<sup>112</sup>

The complaint also alleged a substantive violation: that Greece had failed to take "all necessary steps" to reduce the environmental impact of the lignite mines and power plants.<sup>113</sup> In response, the Committee said that while "overcoming pollution is an objective that can only be achieved gradually," states must nevertheless "strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal."<sup>114</sup> Rather than defer to Greece's policy decisions, the Committee concluded that Greece had not shown such progress. It noted, *inter alia*, that Greece appeared to have too few inspectors; that its fines were insufficient to deter violations of its air quality standards; and that it had not shown that the power plants had adopted best

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<sup>109</sup> *Id.* ¶ 12.

<sup>110</sup> European Social Charter, *supra* note 65, art. 11. The complaint separately alleged that Greece had failed to comply with its duty to provide lignite miners safe and healthy working conditions.

<sup>111</sup> *Marangopoulos Foundation*, *supra* note 76, ¶¶ 11, 80-84, 86-87.

<sup>112</sup> *Id.* ¶¶ 216-20.

<sup>113</sup> *Id.* ¶ 11.

<sup>114</sup> *Id.* ¶ 204.

available techniques to reduce pollution.<sup>115</sup> It said, “even taking into consideration the margin of discretion granted to national authorities in such matters, . . . Greece has not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest,” and it concluded that Greece was in violation of its obligation to protect the right to health.<sup>116</sup> The Committee thus added another voice to the chorus of environmental human rights jurisprudence holding states to strict procedural requirements, and providing some but not complete deference to states’ policy judgments about levels of environmental protection.

### C. Environmental Duties Arising from Rights Held by Members of Groups, or by Groups Themselves

Most human rights are held by all people simply because they are human beings. But some rights are held by individuals as members of a group, or held by a group itself. These rights fall into at least three categories, each of which may provide a basis for environmental protection. Again, the most important contributions to environmental jurisprudence based on these rights have come from regional tribunals, but their interpretations are relevant to the understanding of universal agreements.

First, individuals have a right not to be discriminated against because of their membership in certain groups. Both of the Covenants, as well as the American and European Conventions and the African Charter, prohibit discrimination by states on the basis of gender, race, and religion, among other grounds.<sup>117</sup> The United Nations has adopted treaties that reinforce and elaborate the right of everyone not to be discriminated against on racial grounds<sup>118</sup> and the right of women not to be discriminated against on the

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<sup>115</sup> *Id.* ¶¶ 208-10, 215.

<sup>116</sup> *Id.* ¶ 221. In January 2008, the ministerial committee echoed that conclusion but made no recommendations, instead only “welcom[ing] the measures already taken by the Greek authorities as well as further measures envisaged in order to ensure the effective implementation of the rights protected by the European Social Charter.” Council of Europe Committee of Ministers, Res. CM/ResChS(2008)1 (Jan. 16, 2008).

<sup>117</sup> ICCPR, *supra* note 18, arts. 2(1), 26; ICESCR, *supra* note 64, art. 2(2); European Convention, *supra* note 19, art. 14; American Convention, *supra* note 19, art. 1(1); African Charter, *supra* note 17, art. 2.

<sup>118</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965.

basis of their gender.<sup>119</sup> In general, state actions that discriminate against individuals on these or other protected bases would violate their rights, as would state failure to protect against harm to individuals caused by private actors' discrimination.<sup>120</sup> Actions intentionally directed at individuals because of their membership in the group would of course be covered; so might actions that disproportionately affect them.<sup>121</sup> Although there is little international case law on discrimination in the environmental context, there is no reason to think that discriminatory environmental harm would be treated differently from other types of discrimination.

Second, members of certain groups enjoy rights in addition to the right not to be discriminated against. For example, article 27 of the ICCPR states that persons belonging to ethnic, religious, or linguistic 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>122</sup> The Inter-American Commission and Court have recognized that to protect the rights of minorities that rely on the natural environment, it is necessary to protect that environment.<sup>123</sup> In this respect, they have looked to the right to property, which they have held may be exercised collectively by an indigenous or tribal community.<sup>124</sup> The right to

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<sup>119</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979. *See also* Convention on the Rights of Persons with Disabilities (CPRD), Dec. 13, 2006.

<sup>120</sup> As already noted, the language of the Covenants and the regional agreements has been construed to give rise to a duty to protect against private infringement of the protected rights, as well as the duty on states to refrain from violating the rights directly. CERD and CEDAW spell out those two duties explicitly. In addition to requiring their state parties to refrain from discrimination, CERD and CEDAW require them to "prohibit and bring to an end, by all appropriate means" (CERD) and "take all appropriate measures to eliminate" (CEDAW) racial discrimination and discrimination against women by any person or organization. CERD, *supra* note 118, art. 1(a), (d); CEDAW, *supra* note 119, art. 2(d), (e).

<sup>121</sup> *See* Committee on the Elimination of Discrimination Against Women, General Recommendation 19, *Violence Against Women* ¶ 6 (1992).

<sup>122</sup> ICCPR, *supra* note 18, art. 27. For other human rights treaties providing additional rights to members of specific groups, see Convention on the Rights of the Child (CRC), Nov. 20, 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990.

<sup>123</sup> *E.g.*, Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Paraguay, OEA/Ser/L/VII.110 doc. 52, ch. IX, ¶ 50 (2001) (recommending that Paraguay "[a]dopt the necessary measures to protect the habitat of the indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities").

<sup>124</sup> *See* Saramaka People v. Suriname, Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 95 (2007); Indigenous Community Yakye Axa v. Paraguay, Inter-Am. Ct. H.R. (Ser. C) No. 146, ¶ 143

property is of particular importance to such communities because “without [rights to the land and resources on which they rely], the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people.”<sup>125</sup> On this basis, the Court recently held that a community’s right to property includes not only the right to own the land that the community has traditionally occupied, but also the right to own the natural resources it has traditionally used.<sup>126</sup>

As in other environmental human rights cases, the Inter-American system has adopted procedural safeguards to protect this right. For example, the Inter-American Court has held that until the land traditionally occupied by a community is delimited and titled in consultation with the community, the state may not allow its “existence, value, use or enjoyment” to be affected, either by its own agents or by third parties acting with its acquiescence or tolerance.<sup>127</sup> More generally, the Commission’s country reports have emphasized the importance of prior consultation with the affected communities before states may allow development of natural resources.<sup>128</sup> And in the *Maya Indigenous Community* case, the Commission found that Belize had violated the community’s right to property by failing to consult with it before granting oil and logging concessions.<sup>129</sup> Requiring prior consultation is a way to try to reconcile the interests of the community with the interests of the state, which often takes the position that it owns valuable natural resources and should have the final say on whether and how to exploit them. But consultation alone, even if

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(2005); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am.Ct.H.R. (Ser. C) No. 79, ¶ 148 (2001); *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, ¶ 113, Inter-Am.C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

<sup>125</sup> *Saramaka*, *supra* note 124, ¶ 121; *see Mayagna*, *supra* note 124, ¶ 149 (“the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”); Human Rights Committee, General Comment 23, *The Rights of Minorities*, ¶ 3.2 (the right of members of minorities to enjoy their own culture “may consist in a way of life which is closely associated with territory and use of its resources”).

<sup>126</sup> *Saramaka*, *supra* note 124, ¶ 121. Specifically, the resources in which they have a right to property “are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.” *Id.* ¶ 122.

<sup>127</sup> *Id.* ¶ 164.

<sup>128</sup> *E.g.*, Third Report on the Situation of Human Rights in Colombia, ch. X (1999); Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, ch. X, ¶ 39.

<sup>129</sup> *Maya Indigenous Community*, *supra* note 124, ¶ 144.

carried out in good faith, is unlikely to prevent a state from exploiting those resources.

A key question, then, is whether states may grant concessions in an indigenous community's land if they consult with it first, or whether the community's consent is also necessary. The Commission's country reports have sometimes referred to the need to obtain prior consent from the affected communities without making clear whether consent was an absolute requirement.<sup>130</sup> In its recent decision in *Saramaka People v. Suriname*, the Court clarified this question. It held that the protection of the right to property is not absolute and should not be construed to prevent the state from granting any concession at all for the extraction of natural resources within Saramaka territory.<sup>131</sup> To restrict the community's right to property, however, the state must ensure that the restriction "does not deny their survival as a tribal people."<sup>132</sup> To that end, the state must not only consult with the community regarding any proposed concessions or other activities that may affect their lands and natural resources, it must ensure that no concession will be issued without a prior assessment of its environmental and social impacts and guarantee that the community receives a "reasonable

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<sup>130</sup> *E.g.*, Columbia Report, *supra* note 128, at \_\_ ("The State should ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations and, *to the extent legally required*, consent from the affected indigenous communities.") (emphasis added); Peru Report, *supra* note 128, ¶ 39 (recommending that Peru "ensure, consistent with ILO Convention 169, that all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their habitat or culture [are] processed and decided on with the participation of and in consultation with the peoples interested, *with a view to obtaining their consent* and possible participation in the benefits").

The ILO Convention to which the Peru Report refers is the Convention on Indigenous and Tribal People, which states that governments must have procedures through which they consult indigenous peoples "with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of [state-owned] resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities." It does not require states to obtain consent before allowing the exploitation of such resources. The language of the UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, is stronger, although still perhaps short of a clear requirement of consent: "States shall consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources . . ." UN Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, art. 32(2).

<sup>131</sup> *Saramaka*, *supra* note 124, ¶¶ 126-27.

<sup>132</sup> *Id.* ¶ 128.

benefit” from any such plan if approved.<sup>133</sup> Moreover, if the proposed project would have a “major impact” in the community’s territory, the state must “obtain their free, prior, and informed consent, according to their customs and traditions.”<sup>134</sup>

The third type of group right is a right held by the group itself, rather than by its members. The Covenants describe only one such right: the right to self-determination of a people.<sup>135</sup> Of the regional agreements, only the African Charter includes peoples’ rights, including a somewhat more elaborate version of the Covenants’ statement of the right to self-determination.<sup>136</sup> Although the precise contours of the right remain unclear, the Covenants explicitly state that it includes the right of all peoples to “freely dispose of their natural wealth and resources,” and state that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>137</sup> It therefore seems evident that environmental degradation so massive as to deprive a people, however defined, of its means of subsistence would violate the right to self-determination, as would environmental harm that prevents a people from freely disposing of its own natural resources.

At least two environmental human rights cases have construed the right to self-determination to apply to tribal or indigenous groups. In *Saramaka*, the Inter-American Court said that the Saramaka community had the right to self-determination, and the Court relied on that right to support its conclusion that the Saramaka community had the right to enjoy its property communally in accordance with its tradition.<sup>138</sup> And in *Ogoniland*, the African Commission said that Nigeria had violated its duty to protect against the violation of the Ogoni people’s right to self-determination by “facilitat[ing] the destruction of the Ogoniland.”<sup>139</sup> The Commission emphasized not only “the destructive and selfish role played by oil development in Ogoniland,” but also that the development was “closely tied with repressive tactics of the Nigerian Government” and produced no material benefit to the local population.<sup>140</sup>

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<sup>133</sup> *Id.* ¶ 129.

<sup>134</sup> *Id.* ¶ 134. For an analysis of *Saramaka*, see Marcos A. Orellana, *Saramaka People v. Suriname*, 102 Am. J. Int’l L. 841 (2008).

<sup>135</sup> ICCPR, *supra* note 18, art. 1(1); ICESCR, *supra* note 64, art. 1(1).

<sup>136</sup> African Charter, *supra* note 17, arts. 20, 21.

<sup>137</sup> ICCPR, *supra* note 18, art. 1(2); ICESCR, *supra* note 64, art. 1(2).

<sup>138</sup> *Saramaka*, *supra* note 124, ¶¶ 93, 95.

<sup>139</sup> *Ogoniland*, *supra* note 27, ¶ 58.

<sup>140</sup> *Id.* ¶ 55.

Finally, *Ogoniland* addressed another peoples' right obviously relevant to environmental protection, which only the African Charter recognizes: "the right to a general satisfactory environment favourable to [a people's] development."<sup>141</sup> As discussed above, the Commission derived some state duties from reading this right together with the right to health.<sup>142</sup> But it also based duties directly on the right to a satisfactory environment. In particular, the Commission said that 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>143</sup>

Perhaps the most remarkable aspect of the African Commission's reference to the African Charter's right to a satisfactory environment is that it seems to add little to the state duties the Commission derived from other rights, such as the right to health. In this sense, *Ogoniland* is yet another indication that even without explicit rights to the environment, human rights law provides a robust basis for protection against environmental harm that affects humans.

In general, the duties established with respect to group rights are remarkably similar to those described earlier. They require strict procedural safeguards, including prior assessment of environmental impacts, full and informed participation by those affected, and remedies for unlawful harm. And while they give states deference as to how to strike a balance between development and environmental protection, they do not defer completely to their decisions, even when codified into national law;<sup>144</sup> the human rights tribunals have also set minimum substantive standards that states' policy decisions must meet.

Those minimum standards vary from right to right. For example, the European Court has held that Russia failed to comply with its obligation to secure the right to life by failing to take basic steps to protect against and warn people of an imminent environmental danger; the CDESCR has said that to protect and fulfill the right to water, states must at a minimum provide their people safe water to drink; and, as this section explains, the Inter-American Court has held that to respect and ensure the communal right to

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<sup>141</sup> African Charter, *supra* note 17, art. 24.

<sup>142</sup> See notes 97-101 *supra* and accompanying text.

<sup>143</sup> *Ogoniland*, *supra* note 27, ¶ 52.

<sup>144</sup> In *Saramaka*, for example, Suriname law provided the community no property rights in the contested natural resources; on the contrary, its constitution declared that they were owned by the state. *Saramaka*, *supra* note 124, ¶ 119.

property of tribal communities, states may not authorize major development in their land without their consent. The common theme is that states may undertake or authorize environmental degradation that limits some human rights (as long as they follow procedural requirements), but they may not under any conditions allow degradation that destroys such rights completely.

## **II. Applying the Environmental Human Rights Jurisprudence to Climate Change**

Harm caused by climate change is closely akin to harm caused by other forms of environmental degradation, and at first the environmental human rights jurisprudence would appear to apply to it. Certainly there is no difficulty in showing that climate change can drastically affect human rights, as the first section of this Part explains. And, to the extent that climate change is similar to other forms of environmental degradation, it should give rise to the same types of duties on the part of states to take steps to address its actual and potential harm to human rights. The difficulty with simply extrapolating current environmental human rights law to climate change, however, is that it was developed to address harm that does not cross borders, and it therefore does not translate easily to a type of harm that is global in scope. As the second section shows, however, the jurisprudence does shed light on the duties of states to address climate change harm to the human rights of people within their own jurisdiction. Finally, the third section describes ways that human rights law constrains states' *responses* to climate change.

### **A. Human Rights Affected by Climate Change**

Two particularly vulnerable communities, the Inuit and the Maldives, have explained in detail how climate change interferes with their human rights. The Inuit filed a petition in December 2005 with the Inter-American Commission on Human Rights alleging that the United States had failed to comply with its obligations under human rights law by failing to take effective measures to abate the effects of climate change on the rights of the Inuit.<sup>145</sup> The Maldives submission was in response to a March 2008 decision by the UN Human Rights Council to ask the Office of the High Commissioner for Human Rights (OHCHR) to conduct a study of the relationship between human rights and climate change. That study, which

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<sup>145</sup> Inuit Petition, *supra* note 1. Because the United States is not a party to the American Convention, the petition relied on the rights set out in the American Declaration. *See* note 74 *supra*.

the OHCHR released in early 2009, provides a useful description of the effects of climate change on human rights generally.

The Inuit petition describes how climate change is affecting the Arctic environment on which the Inuit depend. The petition explains how those effects harm many of their human rights, including rights to life, health, property, cultural identity, and self-determination. Their right to life, for example, is infringed because “[c]hanges in ice and snow jeopardize individual Inuit lives, critical food sources are threatened, and unpredictable weather makes travel more dangerous at all times of the year.”<sup>146</sup> Individual lives are at risk because the sea ice on which the Inuit travel and hunt freezes later, thaws earlier, and is thinner; critical food sources are threatened because harvested species are becoming scarcer and more difficult for the Inuit to reach; the increase in sudden, unpredictable storms and the decrease of snow from which to construct emergency shelters have contributed to death and injuries among hunters; and the decrease in summer ice has caused rougher seas and more dangerous storms, increasing danger to boaters.<sup>147</sup>

Climate change affects the Inuit’s right to health for many reasons: as sea-ice disappears and local weather conditions change, the fish and game on which the Inuit rely for nutrition disappear; new diseases move northward; quality and quantity of drinking water diminishes; and the dramatic changes in the circumstances of their lives damage the Inuit’s mental health.<sup>148</sup> It also interferes with their ability to enjoy their right to property in their traditional lands. “Sea ice, a large and critical part of coastal Inuit’s property, is literally melting away.”<sup>149</sup> Coastal erosion and melting permafrost are forcing Inuit to relocate homes and sometimes entire communities further inland.<sup>150</sup> By undermining their ability to sustain themselves, climate change also threatens Inuit rights to enjoy their cultural identity, and deprives them of their means of subsistence in violation of their right to self-determination.<sup>151</sup>

Despite the thorough, well-researched factual and legal support the petition provided for its assertions, the Inter-American Commission said that it was not possible to process the complaint “at present.” In explanation, the

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<sup>146</sup> Inuit Petition, *supra* note 1, at 90.

<sup>147</sup> *Id.* at 91.

<sup>148</sup> *Id.* at 87-88.

<sup>149</sup> *Id.* at 82.

<sup>150</sup> *Id.* at 49, 51, 95.

<sup>151</sup> *Id.* at 76, 92-93. The petition also says that climate change violates the Inuit’s rights to freedom of movement and inviolability of the home. *Id.* at 95-96.

Commission stated only that “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”<sup>152</sup> In March 2007, the Commission held a hearing on the connections between climate change and human rights, but it has taken no further action since then.

A September 2008 submission by the Maldives to the UN Office of the High Commissioner for Human Rights describes the threats climate change poses to the human rights of its people.<sup>153</sup> While the gravamen of the harm to the rights of the Inuit is rising temperatures, the most severe harm to the Maldives is due to rising waters. Climate change will harm the Maldives by increasing the intensity of tropical storms and cyclones, changing patterns of precipitation, and increasing temperatures as well, but the gravest threat is increasing sea levels.

Composed of small islands in the Indian Ocean, the Maldives has an average height above sea level of just one meter. As its submission describes, sea levels have been rising and their rise is accelerating.<sup>154</sup> As measured at sites in the Maldives, the sea level is rising there at an average rate of about 4 millimeters per year.<sup>155</sup> The Intergovernmental Panel on Climate Change (IPCC) projects that globally, the average rise in sea level will be between 0.19 meters and 0.58 meters, not taking into account the possibility of a faster increase due to melting ice sheets.<sup>156</sup> Even that project is probably too optimistic; studies conducted since the IPCC assessment indicate that the Greenland and Antarctic ice caps are melting at an accelerating rate, causing sea levels to rise much more quickly than had been expected. Projections now are that they will rise between 0.5 and 1 meter by 2100.<sup>157</sup> Rising sea levels will exacerbate inundation, storm surges, and erosion.<sup>158</sup> “Under a scenario in which the sea-level rose by .49 meters, 15% of Male’ [the most populous island in the Maldives, with over 100,000 people] would be inundated by 2025, and half of the island flooded by 2100.”<sup>159</sup> Apart from inundation, rising sea levels may cause more frequent sea surges. A sea surge 0.7 meters higher than the average sea

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<sup>152</sup> Letter from Ariel E. Dulitzsky to Paul Crowley, Legal Representative of Sheila Watt-Cloutier *et al.*, Nov. 16, 2006.

<sup>153</sup> Maldives Submission, *supra* note 11, at 43.

<sup>154</sup> *Id.* at 18.

<sup>155</sup> *Id.* at 19.

<sup>156</sup> *Id.*

<sup>157</sup> *A sinking feeling*, *The Economist* 82 (Mar. 14, 2009).

<sup>158</sup> IPCC 2007 Impact Assessment, *supra* note 1, at 689.

<sup>159</sup> Maldives Submission, *supra* note 11, at 19.

level would flood most of the islands; it now is expected only once a century, but by 2050, “such surges are expected to occur at least annually.”<sup>160</sup>

Rising sea levels threaten many of the Maldivians’ human rights. Because 42% of the population of the Maldives and 47% of its housing structures are located within 100 meters of the shoreline, “even partial flooding of [its] islands is likely to result in drowning, injury, and loss of life.”<sup>161</sup> Flooding and the resulting loss of land interferes not only with the right to life, but also the rights to health, property, housing, and water, among others, by “eliminat[ing] the physical area necessary for the establishment of homes, services infrastructure, economic activities, and the sites of all political, social, and cultural activities. Land is, in this sense, a fundamental pre-cursor to the enjoyment of all other rights.”<sup>162</sup> If sea level rise is not halted, it will eventually inundate so much of the Maldives that continued human existence there will no longer be possible. “The extinction of their State would violate the fundamental right of the Maldivians to possess nationality and the right of the Maldives people to self-determination.”<sup>163</sup>

The Inuit and the Maldives are not the only communities, or even the only types of communities, vulnerable to the effects of climate change. Indeed, if climate change continues unabated, it will eventually affect the human rights of virtually every community and person on the planet. The OHCHR report to the Human Rights Council, which was released early in 2009, takes a broader approach to the effect of climate change on human rights. Drawing largely on the work of the IPCC, the report describes the effects of global warming on particular rights, including the rights to life, health, food, water, housing, and self-determination. The report notes that the IPCC projects “with high confidence” increases in death, disease, and injury as a result of heat waves, floods, storms, fires, and droughts caused by climate change; it expects climate change to affect the health of millions of people by increasing malnutrition, infectious diseases, and injuries from extreme weather; it cites estimates that crop productivity at lower latitudes will decrease, “increasing the risk of hunger and food insecurity in the poorer regions of the world”; it states that climate change will “exacerbate existing stresses on water resources and compound the problem of access to

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<sup>160</sup> *Id.* at 20.

<sup>161</sup> *Id.* at 21.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

safe drinking water, currently denied to an estimated 1.1 billion people”; it states that climate change is affecting and will continue to affect the right to housing by forcing people to relocate; and it says that sea-level rise threatens “the habitability and, in the longer term, the territorial existence of a number of low-lying island States.”<sup>164</sup> The report also says that the effects of climate change will be felt particularly acutely by groups who are already vulnerable because of their poverty, gender, age, minority status, or disability, whose rights are often subject to particular protection.<sup>165</sup>

Perhaps surprisingly, the report states that “[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.”<sup>166</sup> As justification for this conclusion, the report points to difficulties in entangling causal relationships and the fact that many of the adverse effects of climate change are projections about future events.<sup>167</sup> While this conclusion may be challenged, it is less relevant than it may first appear to whether states have obligations to protect against the effects of climate change, as the next section explains.

### **B. States’ Duties under Current Environmental Human Rights Jurisprudence to Address the Effects of Climate Change**

As Part I explains, human rights bodies have developed an extensive environmental jurisprudence. Some aspects of that jurisprudence apply easily to harm from climate change. It makes clear, for instance, that states have obligations not only to refrain themselves from causing prohibited levels of environmental harm to human rights, but also to protect against harm from other sources.<sup>168</sup> A state’s obligation to protect against environmental harm to human rights extends to harm not caused by the state itself or even by private actors with the acquiescence of the state. In *Budayeva v. Russia*, for example, the European Court of Human Rights held that even though Russia did not cause a deadly mudslide, its failure to take steps to prevent it or to warn those in its path violated Russia’s duty to

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<sup>164</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 8-13 (2009) (hereinafter OHCHR Report). For a more complete analysis of the OHCHR report and the process that led to it, see John H. Knox, *Linking Human Rights and Climate Change*, 33 Harv. Envtl. L. Rev. \_\_ (2009).

<sup>165</sup> OHCHR Report, *supra* note 164, at 13-16.

<sup>166</sup> *Id.* at 20.

<sup>167</sup> *Id.*

<sup>168</sup> See Parts I.A.1, I.B.1 *supra*.

protect the right to life of those within its jurisdiction.<sup>169</sup> Whether or not climate change may be considered a violation of human rights by states, therefore, is in some ways beside the point. Either way, states have duties to protect human rights from harm caused by climate change.<sup>170</sup>

But many aspects of the environmental human rights jurisprudence do not translate well to climate change. The fundamental problem is that the jurisprudence was developed in the context of purely domestic environmental harm – that is, harm that does not cross international boundaries. The general approach of the jurisprudence is to subject states to strict procedural requirements: they must assess potential environmental harm, provide information to those affected, allow them to participate in decision-making, and provide them access to judicial remedies for non-compliance. At the same time, states have discretion within wide limits to determine how to strike the balance between environmental harm and the benefits of the activities causing it, and thus to decide where to set levels of environmental protection. This deference to states' environmental policy decisions only makes sense if, and to the degree that, the procedural safeguards are in place to ensure that the policy decisions reflect the informed views of all those affected by it.

In other words, the environmental jurisprudence is based on the premise of a single polity that experiences both the benefits of economic development and the environmental harm that it engenders, and has the responsibility to decide where to strike the balance between them. But climate change is inherently a transboundary problem on a global scale. The environmental human rights jurisprudence would apply neatly to climate change only if the world were governed by one government. It applies much less well to a world divided into roughly 200 states, which emit different amounts of greenhouse gases and experience widely different benefits and costs of doing so.

A response to this problem would be to extend the procedural safeguards by, for example, requiring states to conduct transboundary environmental impact assessment of transboundary harm, and to provide information to, and allow participation by, affected populations outside the country where the harm originates. European countries have adopted an

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<sup>169</sup> *Budayeva*, *supra* note 51; *see* notes 52-57 *supra* and accompanying text.

<sup>170</sup> *See* OHCHR Report, *supra* note 164, at 20 (“Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.”).

agreement requiring transboundary environmental impact assessment on a non-discriminatory basis,<sup>171</sup> and an environmental agreement requiring access to information, participation in decision-making, and access to legal remedies that makes clear that its obligations must be met “without discrimination as to citizenship, nationality or domicile.”<sup>172</sup> Alan Boyle has suggested that the European Court of Human Rights should essentially duplicate those requirements in its environmental jurisprudence.<sup>173</sup>

One problem with this approach is technical: while it might work in the context of transboundary harm whose sources and victims are in a small number of states, it is harder to see what duties it would place on states with respect to a problem whose sources and victims are all over the world. In response, one might argue that most greenhouse gases come from relatively few states: seven (counting the EU as a single entity) produce two-thirds of the total, and no other state produces as much as 2%.<sup>174</sup> The vast majority of countries in the world each produce well under 1% of total emissions. Concentrating on the major emitters might simplify the necessary procedural requirements, although it would ignore other problems, such as whether it is equitable to treat India, whose per capita emissions of carbon dioxide are under two, in the same category as the United States, whose per capita emissions are about 24. Apart from those problems, there is another difficulty with relying on procedures to protect the rights of those outside the jurisdiction of the source countries: unless the extraterritorial victims of transboundary harm are given rights to vote in the source country on the activities potentially causing the transboundary harm, which no rule of international law requires, the procedural protections are very unlikely to work as well for transboundary as for domestic harm, because the polity of the source country will retain the authority to decide whether to proceed with the activity.

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<sup>171</sup> Espoo Convention on Environmental Impact in a Transboundary Context, Feb. 25, 1991, 30 ILM 800 (1991). See generally John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 Am. J. Int'l L. 291 (2002).

<sup>172</sup> Aarhus Convention, *supra* note 50, art. 3(9). See John H. Knox, *Diagonal Environmental Rights*, in Gibney & Skogly, *supra* note 27; Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 Col. J. Int'l Envtl. L. & Pol. 1 (2007).

<sup>173</sup> Boyle, *supra* note 50, at 502-03.

<sup>174</sup> Not including land-use changes, the seven states that emit the most greenhouse gases are China (18.7% of the total), the United States (18.3%), the EU (13.8%), Russia (5.1%), India (4.8%), Japan (3.6%), and Brazil (2.7%). Their emissions amount to 67% of the total. The next largest emitter, Canada, produces 1.9% of the total.

Another way the environmental human rights jurisprudence might respond to the problem of transboundary harm would be to defer less to states' policy decisions. Human rights bodies could recognize that in cases of transboundary harm, relying on procedural safeguards alone is unlikely to provide adequate protection to those outside the jurisdiction of the source countries. As a result, they could defer less to states' policy decisions as to where to set the levels of environmental protection. Human rights bodies have already set minimum substantive standards for environmental protection; they could seek to make those standards more specific for transboundary harm. The difficulty here is that even if procedural flaws make reliance on states' substantive environmental decisions problematic, there are other good reasons for human rights tribunals to hesitate to adopt highly specific environmental standards. They are the same reasons why courts hesitate to set such standards at the national level: they usually have neither the technical expertise nor the political mandate to do so.

Still another way for the jurisprudence to respond to the lack of a unitary polity in cases of transboundary harm would be to adopt the approach taken by the Inter-American Court of Human Rights in *Saramaka People v. Suriname*.<sup>175</sup> In that case, the Court required the state to follow procedural requirements, including assessing environmental impacts and consulting with the community directly affected. But the Court recognized that the consultation might not suffice for the state to protect the rights of a minority community with its own traditional culture. The Court responded not by trying to set out specific substantive environmental standards, but rather by requiring the state to obtain the free and informed consent of the community before proceeding with projects that would have major effects on its land and resources. In the context of climate change, that approach would mean that states' decisions to emit levels of greenhouse gases that would cause major adverse consequences on vulnerable states would require prior consent by those states.

Above, I suggested that human rights tribunals were developing a kind of nuisance law to accompany the regulatory multilateral environmental agreements. Applying *Saramaka* to climate change would be the equivalent of giving those harmed by a nuisance the right to enjoin it. It would help to fulfill the unmet promise of international environmental law that states "ensure that activities within their jurisdiction or control do not cause

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<sup>175</sup> *Saramaka*, *supra* note 124. See notes 131-34 *supra* and accompanying text.

damage to the environment of other States.”<sup>176</sup> As in the domestic law of nuisance, the veto would be available only in extreme cases, to protect against interference that would otherwise destroy the rights of those affected. Complete destruction of a state by rising sea levels would certainly qualify. If states wanted to emit greenhouse gases at levels that would cause a state to disappear, it would have to receive that state’s consent.<sup>177</sup> This approach would perhaps go farthest to ensure the protection of the human rights of the most vulnerable communities in the world.

Nevertheless, it would face serious political objections. While in *Saramaka*, the projects subject to the community’s veto were yet to be proposed, greenhouse gases have been emitted at increasing levels since the Industrial Revolution. In *Saramaka*, the projects were important to Suriname’s economy, but it did not depend on them in the myriad ways that countries depend on activities that produce greenhouse gases. Many states would be reluctant, to say the very least, to agree that their levels of greenhouse gas emissions should depend on the consent of the world’s most vulnerable communities.

One can argue that such political concerns should be ignored; were political objections allowed to constrain human rights, there would be no human rights law at all. But apart from these objections and the practical difficulties described above, there are also *legal* problems with adapting *Saramaka* to climate change in this way and, indeed, with all of the above methods of extending current environmental human rights jurisprudence to transboundary harm. As the next part of this article explains, much human rights law is primarily vertical rather than diagonal: it imposes duties on each state to respect and protect the rights of those within its jurisdiction, not those who fall outside it. If states do not have extraterritorial (or, more accurately, extrajurisdictional) duties under human rights law, then none of these potential approaches – strengthening transboundary procedural safeguards, deferring less to states’ substantive decisions, or requiring the consent of severely affected communities – would have the necessary legal basis. States would be required only to address climate change harms felt by those within their jurisdiction.

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<sup>176</sup> U.N. Conference on the Human Environment, Stockholm Declaration, U.N. Doc. A/CONF.48/14, Principle 21 (June 16, 1972), 11 ILM 1416 (1972).

<sup>177</sup> Determining when such harm was likely enough to require consent could be difficult, of course, just as it is in the domestic context, but the level of uncertainty could be considered along with the potential severity of the harm.

After analyzing these legal constraints, Part III concludes that states do have extraterritorial duties under human rights law, although they are contested and need elaboration, and returns to the question of how to adapt existing environmental human rights jurisprudence to the transboundary problem of climate change. It should be noted here, however, that even if states had no extraterritorial duties, they would still have duties to protect the human rights of those within their own jurisdiction from climate change.

For most states, these duties would probably not require them to take meaningful steps to reduce their own emissions. The Maldives, for example, produces a tiny fraction of one percent of global emissions of greenhouse gases. Even if it cut its emissions to zero, it would make no appreciable contribution to mitigating global warming. Only China, the United States, and the EU produce more than 5% of the world's total of greenhouse gases; one could argue that they are obliged to cut their emissions by substantial amounts in order to protect the rights of their own people, apart from whatever obligations they may have with respect to others. On the other hand, even China and the United States, the largest producers of greenhouse gases, each produce under 20% of the total. If either made drastic short-term cuts on the order of 50%, for example, it would reduce total emissions only by 10%. And that reduction would soon be offset by continued growth in emissions from other countries, unless those countries reduced their emissions as well. Immediate reductions by an individual country on such a scale are probably politically infeasible in any event, and cuts by a country phased in over a longer period of time would be even more overwhelmed by growth elsewhere unless, again, other countries agreed to reduce their emissions as well. In the absence of extraterritorial duties, then, there would be little basis under current environmental human rights jurisprudence for an argument that a state must make significant reductions in its greenhouse gas emissions to protect the rights of its own people.

But even if states' human rights duties to their own people do not require them to reduce emissions, they do require them to take steps to adapt. Even a country like the Maldives, which contributes a minuscule fraction of all greenhouse gas emissions, has a duty to adopt measures to protect everyone within its jurisdiction from the harmful effects of climate change, just as Russia had an obligation to protect its people from mud slides. The fact that the state did not cause the initial threat cannot excuse its failure to try to protect against it. The Maldives' submission to the OHCHR makes clear that it recognizes its obligations in this regard and

describes some of the steps it has taken, including constructing a three-meter sea wall around its capital, developing early warning systems, increasing its capacity for disaster response, and helping to relocate its population to those of its islands that are better protected from sea surges.<sup>178</sup>

A state unable to fulfill these duties with its own resources is obliged to seek assistance from other states. This duty is particularly clear with respect to states' duties under the ICESCR, because article 2(1) of that agreement provides an explicit basis for it.<sup>179</sup> But a state's general duty to take steps to protect all human rights would also provide a basis for a duty to seek assistance whenever needed.

States also have duties to try to influence the international community to reduce global greenhouse gas emissions. This duty may be derived from the duty to request assistance, but it is also akin to states' obligation to regulate private sources within their control. States do not have control over one another; but nor do they have complete control over private actors, even those within their own jurisdiction. As a result, human rights law does not place an obligation of result on states with respect to private actors, but requires them only to make best efforts – to undertake due diligence – to protect rights from those actors.<sup>180</sup> Similarly, it requires states to exercise due diligence to protect rights from other actors that may adversely affect the rights. There is no reason why those other actors may not include states.

Of course, the ability of a state to influence the conduct of other states is much less than its ability to influence the conduct of private actors within its jurisdiction. But its relatively weaker level of influence does not excuse it from trying to protect the rights of its people from the threats; it is required to use those tools that it has to reduce harmful emissions to safe levels. At a minimum, tools available to influence other states include persuasion, bargaining, negotiation, and so forth. States may also have more effective methods of influence. For example, if they have legal rights vis-à-vis other states based on treaties of alliance or friendship, or based on more general norms of international law, human rights law would require them to employ those tools as well.

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<sup>178</sup> Maldives Submission, *supra* note 11, at 44-45.

<sup>179</sup> See General Comment 12, *supra* note 27, ¶ 17; General Comment 14, *supra* note 76, ¶ 47; Skogly, *supra* note 27, at 145.

<sup>180</sup> See Knox, *supra* note 13, at 21-23.

### C. Constraints on States' Responses to Climate Change

Human rights law not only calls for states to undertake measures in response to climate change, it also constrains the responses they make take. States may not violate human rights in order to try to protect human rights, but they do have some discretion to take actions that may restrict the exercise of some rights in order to pursue valid ends. In this respect, all of the rights protected by the agreements are relevant, not just those likely to be directly affected by climate change. For example, the agreements on civil and political rights provide basic protections for those accused of crimes, rights to freedom of religion, expression, and association, and rights to participate in the government,<sup>181</sup> none of which seem likely to be infringed by climate change. Nevertheless, these rights, along with the others, might be *constraints* on states' possible responses to climate change. A state could not, for instance, prohibit criticism of its climate change policy or forbid individuals from joining associations designed to influence that policy. In the context of climate change, the most important of these limits may be the duties human rights treaties impose on their parties not to discriminate on the basis of sex, race, religion, or other status.<sup>182</sup> States may not respond to climate change by favoring some groups over others, at least with respect to rights protected by the agreements.

Could the importance of stemming the consequences of climate change justify a relaxation of any of these constraints? The agreements provide that some rights, such as the rights to freedom of movement and residence, religion, expression, and association, may be limited as prescribed by law and as necessary to protect national security, public safety, order, health, or morals, or the rights and freedoms of others.<sup>183</sup> A state could conceivably

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<sup>181</sup> ICCPR, *supra* note 18, arts. 9, 10, 14, 15, 18, 19, 22, 25; European Convention, *supra* note 19, arts. 5-7, 9-11, Protocol No. 1, art. 3; American Convention, *supra* note 19, arts. 4, 7-9, 12, 13, 16, 23; African Charter, *supra* note 17, arts. 7-10, 13.

<sup>182</sup> *E.g.*, ICCPR, *supra* note 18, art. 2(1); ICESCR, *supra* note 64, art. 2(2); European Convention, *supra* note 19, art. 14; American Convention, *supra* note 19, art. 1; African Charter, *supra* note 17, art. 2.

<sup>183</sup> The precise language of the permissible limitation varies from right to right and agreement to agreement. For example, the European Convention generally, and the ICCPR and American Convention with respect to some of the rights, also require limits to be "necessary in a democratic society." See Knox, *supra* note 13, at 11-12. For a discussion of the limits in the ICCPR, see Alexandre Charles Kiss, *Permissible Limitations on Rights, in The International Bill of Rights: The Covenant on Civil and Political Rights* 290 (Louis Henkin ed., 1981); for a comparison of the limits in the ICCPR with those in the European Convention, see Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 *Brit. Y.B. Int'l L.* 281, 283-85 (1978).

justify limitations on free movement and residence, for example, if necessary to prevent individuals from going to areas in danger from rising sea levels. But climate change would no more justify limits on rights to religion or expression than would any other natural disaster. Moreover, other rights, including criminal protections and freedom from discrimination, do not include such clawback clauses.

What if the effects of climate change on a state threatened to be catastrophic? The ICCPR and two of the regional agreements allow governments to derogate from their obligations with respect to certain rights in a public emergency that threatens the life of the nation, which may be an accurate description of the threat climate change poses to small island states.<sup>184</sup> But this excuse has limits: the derogation may extend only as far as “strictly required by the exigencies of the situation,” is not available at all with respect to some rights, and, perhaps most relevantly in this context, cannot involve discrimination on any of the enumerated grounds, including race, sex, language, religion, or social origin.<sup>185</sup> Even if faced with an existential threat from climate change, a state may not choose to derogate from the rights of one group but not another if doing so distinguishes between them on prohibited grounds.

### III. Extending Environmental Human Rights Law to Climate Change

For human rights law to require states to address the entire range of harms caused by climate change, it must impose duties on states with respect to those living outside their territory and, indeed, everywhere in the world. Of the human rights treaties with global reach, the two most comprehensive are the two Covenants, the ICCPR and the ICESCR, each of which protects multiple rights affected by climate change.<sup>186</sup> Both

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<sup>184</sup> ICCPR, *supra* note 18, art. 4(1); European Convention, *supra* note 19, art. 15(1); American Convention, *supra* note 19, art. 27(1). Again, the language varies somewhat from agreement to agreement. The American Convention refers to public danger or other emergency that “threatens the independence or security of a State Party.” The African Charter contains no derogation provision.

<sup>185</sup> The requirement of non-discrimination is included in the ICCPR and the American Convention, but not the European Convention.

<sup>186</sup> *See, e.g.*, ICCPR, *supra* note 18, arts. 1 (self-determination), 6 (life), 17 (privacy); ICESCR, *supra* note 64, arts. 1 (self-determination), 11 (standard of living), 12 (health). Neither treaty has universal membership, but the ICCPR has 164 parties and the ICESCR 160. The major contributors to global warming are party to both, with the exception of China, which has signed but not ratified the ICCPR, and the United States, which has signed but not ratified the ICESCR. Many states vulnerable to climate change, including Bangladesh and the Maldives, belong to both agreements.

agreements provide potential legal grounds for extending the human rights law of environmental protection to climate change. The ICESCR is clearly the stronger of the two, although relying on it would still face practical and political difficulties. A better approach is to look to the duty to cooperate, which requires states to take joint action to promote and protect human rights. That duty is based on the ICESCR as well, but it has deeper roots in the Charter of the United Nations. It provides a secure basis for extending environmental human rights jurisprudence to climate change.

#### **A. The Covenant on Civil and Political Rights**

Article 2(1) of the ICCPR requires each of its parties “to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”<sup>187</sup> This language does not limit states’ extraterritorial obligations to respect the right of self-determination. It has been interpreted, however, to limit states’ duties with respect to other rights to territory or individuals over which they have “effective control.” Arguing that the extraterritorial harm caused by climate change meets the “effective control” test would be difficult, if not impossible.

##### **1. The Right to Self-Determination**

Although the language of Article 2(1) refers to “the rights recognized in the present Covenant,” which would seem to include the right to self-determination recognized in Article 1, there are several reasons to conclude that the jurisdictional limit does not apply to that right. First, the ICCPR separates the right of self-determination from the other rights in the treaty, all of which define individual rights. The right of self-determination is alone in Part I of the agreement; all other rights are listed in Parts II and III. The general obligation in Article 2(1) is included at the beginning of Part II, at the start of the list of individual rights, and it would be reasonable to read it as speaking of them, not necessarily the right of self-determination. Second, Article 1 includes its own statement of state duties, specific to the right of self-determination: “The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”<sup>188</sup> That language includes no jurisdictional limit.

Third, although it is not completely clear what groups qualify as the “peoples” that enjoy the right to self-determination, it seems indisputable

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<sup>187</sup> ICCPR, *supra* note 18, art. 2(1).

<sup>188</sup> *Id.* art. 1(3).

that however defined, a people may be constituted as a state.<sup>189</sup> In that case, to be meaningful, the right to self-determination must give rise to extraterritorial duties on the part of *other* states.<sup>190</sup> In its only General Comment on the right to self-determination, the Human Rights Committee said that the right gives rise to duties on the part of all states, not just the particular state in which a “people” is found.<sup>191</sup> Finally, Article 1 of the ICCPR is repeated verbatim in the ICESCR, which includes no jurisdictional limit. It would have been pointless for the drafters to have limited the jurisdictional scope of the right in one treaty, but not the other.

As a result, it seems indisputable that states have extraterritorial duties with respect to the effect of climate change on the right to self-determination. As explained above, although those duties are unclear in many respects, Article 1 explicitly includes the right of peoples to “freely dispose of their natural wealth and resources,” and states that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>192</sup> The obligation on states to “respect” the right would therefore require, at a minimum, that they not interfere with other states’ ability to use their own resources, or deprive them of their means of subsistence. As the effects of climate change worsen, precisely those effects will occur to small island states such as the Maldives. Other states therefore have a duty to take the steps necessary to avoid that outcome.

## 2. *Civil and Political Rights*

With respect to other rights in the ICCPR, the question is how to interpret Article 2(1)’s limitation of a state’s duties to “all individuals within its territory and subject to its jurisdiction.” A natural reading of the word “and” would suggest that the requirements of both territory *and* jurisdiction have to be met for the ICCPR obligations to apply, and Michael Dennis has

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<sup>189</sup> See Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, Oct. 24, 1970 (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”).

<sup>190</sup> See Malcolm Langford, *A Sort of Homecoming: Extraterritorial Obligations and the Right to Housing*, in Gibney & Skogly, *supra* note 27, at [6] (“it is abundantly clear from the text that these rights are against the world”).

<sup>191</sup> See Human Rights Committee, General Comment 12, *The Right of Self-Determination*, ¶ 5 (1984) (describing the aspect of the right detailed in article 1(2) as entailing “corresponding duties for all States and the international community”).

<sup>192</sup> *Id.* art. 1(2). See notes 136-37 *supra* and accompanying text.

argued that the legislative history supports that interpretation.<sup>193</sup> Other scholars, however, have argued that the language should be read disjunctively, to require each party to respect and ensure the rights of both those within its territory *and* those subject to its jurisdiction.<sup>194</sup>

The Human Rights Committee and the International Court of Justice (ICJ) have adopted the latter view. Early in its history, the Committee heard a complaint that Uruguay, at the time under military dictatorship, had kidnapped a trade unionist in Argentina and returned him to a secret prison in Uruguay, where he was tortured. The Committee stated that Article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.”<sup>195</sup> Citing this and similar decisions of the Committee and noting the purposes of the ICCPR, the ICJ held in its advisory opinion in the *Israeli Wall* case that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>196</sup>

The question then becomes: What counts as an extraterritorial exercise of jurisdiction by a state? In its General Comment on Article 2(1), the Human Rights Committee said that “a State Party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party.”<sup>197</sup> This statement appears to be a complete (rather than an illustrative) description of the bases for extraterritorial exercises of jurisdiction. If so, the Committee’s view is that a state has extraterritorial jurisdiction over individuals if, but only if, it has power or effective control over them. Power or effective control can be established on an individual basis: clearly, kidnapping or arresting someone places him or her under the power and effective control of the state. Effective control may also be established for residents of an entire territory: the Committee has said that a state’s military control of territory beyond its own boundaries triggers its

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<sup>193</sup> Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int’l L. 119 (2005).

<sup>194</sup> Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *The International Bill of Human Rights* 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int’l L. 78, 79 (1995).

<sup>195</sup> *Lopez Burgos v. Uruguay*, No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

<sup>196</sup> **Error! Main Document Only.** Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9).

<sup>197</sup> General Comment 31, *supra* note 25, ¶ 10.

obligations under the ICCPR,<sup>198</sup> and the ICJ followed that view in the *Wall* case.

What about cases, such as transboundary environmental degradation, in which the act is committed within the jurisdiction and the harm is felt extraterritorially? Neither the Human Rights Committee nor any other international tribunal interpreting the ICCPR has addressed a case involving solely extraterritorial harm. The difficulty is in devising a test that would impose some obligations on states for causing extraterritorial violations of human rights law, but would not drain the “within its territory and subject to its jurisdiction” language of all content. If *any* extraterritorial harm that would be a violation of the ICCPR if committed within the state’s territory would trigger the state’s legal responsibility, then the limitation has little if any meaning. It seems doubtful that an interpretive body would accept a reading that would have that effect.

There are several different approaches that might be taken to this issue. First, as a complete alternative to the “effective control” test, one might be tempted to argue that transboundary environmental harm is not truly extraterritorial at all, because the source of the harm is within the territory (and jurisdiction) of the originating state. Writing of the European Convention, which has a similar jurisdictional limit, Alan Boyle has said that “the Convention could arguably have extra-territorial application if a state’s failure to control activities causing environmental harm affects life, private life or property in neighboring countries. . . . These activities are within [states’] jurisdiction in the obvious sense of being subject to their own law and administrative controls. Only the effects are extraterritorial.”<sup>199</sup> But this reading of the ICCPR faces an insurmountable obstacle in the language of Article 2(1) itself, which indicates that the question is not whether the *actions taken* by the state are within its territorial jurisdiction, but whether the *individuals affected* by those actions are within its jurisdiction. If they are not, whether the state has territorial jurisdiction over the sources of harm may be irrelevant.

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<sup>198</sup> See Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *Extraterritorial Application of Human Rights Treaties* 41, 63-65 (Fons Coomans & Menno T. Kamminga eds., 2004).

<sup>199</sup> Boyle, *supra* note 50, at 500. Similarly, Dominic McGoldrick has written that cases where the state takes measures within its own territory that have an extraterritorial effect “are interesting but not that problematic. Properly understood, the violations . . . only appear to occur in the territory of another state. In fact, the [state’s] obligations are clearly grounded in measures it has taken within its own territory.” McGoldrick, *supra* note 197, at 52.

Second, Martin Scheinin, a Finnish law professor and former member of the Human Rights Committee, has argued for an expansive interpretation of the “effective control” test that would extend beyond control of territory and individuals. He notes that the Committee has occasionally applied the ICCPR without addressing whether the victims fall within the jurisdiction of the state, and in that sense seems open to a generous reading of “effective control.”<sup>200</sup> He proposes “a contextual assessment of the state’s factual control in respect of facts and events that allegedly constitute a *violation* of a human right. Under this approach . . . the interpretation of a right and the determination of its extraterritorial effect . . . must be addressed parallel to each other and through a contextual assessment of a concrete case or situation.”<sup>201</sup> Barbara Frey has characterized his position as stating, “when a State takes affirmative steps to put the lives of persons outside its territory at risk it creates legal obligations under the Covenant that are proportionate to the risk.”<sup>202</sup> In other words, Scheinin proposes looking at whether the state has effective control over the *situation* that causes a violation of the human right, rather than over the *individual* whose right is violated. Again, this test risks justifying a finding that Article 2(1) is satisfied whenever a chain of causation exists between a state’s actions and extraterritorial harm, writing the limitation out of Article 2(1) altogether.

Finally, one might grasp the nettle and argue that transboundary environmental degradation places the affected individuals or territory under the effective control of the state causing the transboundary harm. In this respect, one might look at the experience of the European Court of Human Rights and the Inter-American Commission on Human Rights, each of

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<sup>200</sup> He cites a 1989 decision by the Committee in which it found that France was discriminating against retired soldiers of its military, of Senegalese nationality and residence, in providing them a lower pension than retired soldiers of French nationality. The Committee said without discussion that “the [submitters] are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights.” Ibrahim Gueye et al. v. France, No. 196/1985, UN Doc. CCPR/C/35/D/196/1985. He also mentions the Committee’s 1993 condemnation of Iran’s pronouncement of a death sentence on Salman Rushdie, who was neither a national nor a resident of Iran. Again, the Committee did not address how the extraterritorial aspects of the situation might affect its interpretation of Iran’s obligations. Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in *Extraterritorial Application of Human Rights Treaties*, *supra* note 197, at 73, 74-75.

<sup>201</sup> *Id.* at 76-77.

<sup>202</sup> Barbara Frey, *Extraterritorial Obligations to Protect the Right to Life: Constructing a Rule of Transfer Regarding Small Arms and Light Weapons*, in Gibney & Skogly, *supra* note 27, at [32].

which has addressed cases of extraterritorial harm (although not extraterritorial *environmental* harm). The agreements they interpret – the European Convention on Human Rights and the American Convention on Human Rights – contain jurisdictional limits on the duties of the state parties expressed in language similar to that of the ICCPR.<sup>203</sup> Like the Human Rights Committee, they have employed an “effective control” (or “authority,” in the case of the Inter-American Commission) test in addressing cases of extraterritoriality.

The European Court has interpreted the test strictly. In *Bankovic v. Belgium*, it rejected the argument that the NATO bombing of Serbia in 1999 amounted to “effective control” of the places bombed, saying, “the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. The Court is inclined to agree with the Governments’ submission that the text of Article 1 does not accommodate such an approach to ‘jurisdiction’.”<sup>204</sup> If dropping bombs on a city does not amount to “effective control” of its occupants, allowing pollution to move across an international border almost certainly would not. Construing a similar test, the Inter-American Commission has taken a more expansive view. In 1999, it held that by shooting down an unarmed plane over international waters, agents of the Cuban government “placed the civilian pilots . . . under their authority,” thereby satisfying the jurisdictional requirement of the American Convention.<sup>205</sup> It remains unclear, however, whether the Commission would view extraterritorial pollution as a similar exercise of authority over those affected by it.

To use the “effective control” test without implying that the jurisdictional limit on the state’s obligation is meaningless, one would have to focus on particularly extreme extraterritorial harm and on concrete ways that the harm is placing its victims under the control of the states causing the harm. Although that argument would be very difficult to make in many

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<sup>203</sup> See European Convention, *supra* note 19, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section ( of this Convention.”); American Convention, *supra* note 19, art. 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free exercise of those rights and freedoms.”).

<sup>204</sup> *Bankovic et al. v. Belgium and 16 Other Contracting States*, 44 Eur. Ct. H.R. 5 (2001).

<sup>205</sup> *Alejandre v. Cuba*, No. 86/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.106 Doc. 3 rev. at 586, ¶ 25 (1999).

contexts, it might be possible with respect to the effect of climate change on small island states like the Maldives. If global warming displaces affected individuals from their own land, causing them to lose control over their own lives, it could well subject them to the control of others, including the state or states contributing to the warming. Residents of islands or other low-lying areas that become uninhabitable as a result of rising ocean levels could fall within this category. As their countries literally diminish, they are arguably at the mercy of the larger, more powerful countries that have caused the harm.

### **B. The Covenant on Economic, Social and Cultural Rights**

Like Article 2(1) of the ICCPR, Article 2(1) of the ICESCR sets out the central obligation on state parties concerning the rights protected by the Covenant.<sup>206</sup> On their face, the two provisions take very different approaches to the extraterritorial scope of states' obligations. While the ICCPR limits the obligation to "individuals within [the state's] territory and subject to its jurisdiction," the ICESCR includes no explicit limit at all. Instead, it requires each state party "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."<sup>207</sup>

This language strongly suggests that the parties to the ICESCR do have extraterritorial duties, and the ESC Committee has identified such duties with respect to particular rights. The nature of the obligations remains unclear in many respects, and developed countries have objected to the proposition that they have extraterritorial obligations under the Covenant. Nevertheless, as explained below, there are legal bases for concluding that states have duties to assist one another in meeting their obligations, to avoid

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<sup>206</sup> That is, the rights other than the right to self-determination recognized in Article 1. For the reasons already explained, the right to self-determination does place extraterritorial duties on states that may be relevant in the context of climate change. *See* Part III.A.1 *supra*.

<sup>207</sup> ICESCR, *supra* note 64, art. 2(1). For an example of another human rights treaty that includes an explicit basis for international cooperation, see CPRD, *supra* note 119, art. 32. Several human rights treaties do not have general jurisdictional limits or bases for extraterritorial application. *See, e.g.*, CERD, *supra* note 118; CEDAW, *supra* note 119; CRC, *supra* note 122. However, some of the specific provisions of these agreements do speak to jurisdiction or cooperation. *E.g.*, CERD, *supra*, art. 3 (requiring parties prevent, prohibit and eradicate racial segregation in territories under their jurisdiction); CRC, *supra*, art. 24(4) (requiring states "to promote and encourage international cooperation" toward the progressive realization of children's right to health).

interfering (or allowing private actors to interfere) with other states' efforts to meet their obligations, and, most important, to cooperate with one another to fulfill the rights protected by the Covenant. These duties provide bases for extending the environmental human rights jurisprudence to climate change.

At the outset, it should be noted that any argument for extraterritorial obligations must contend with problematic language in the ICJ's advisory opinion in the *Wall* case. In holding that the ICESCR places Israel under obligations with respect to occupied Palestinian territory, the ICJ said that the Covenant "contains no provision on its scope of application."<sup>208</sup> Rather than conclude that state obligations under the ICESCR were therefore not bounded territorially, the ICJ said, "This [omission] may be explicable by the fact that this Covenant guarantees rights which are essentially territorial," and said that the ICESCR "applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."<sup>209</sup> The Court did not clarify the difference, if any, between "territorial jurisdiction" and "effective control," the test employed for the ICCPR, but the language it used for the ICESCR might suggest that, in the Court's view, the ICESCR may only apply extraterritorially to territory (as opposed to individuals) over which the state has effective control.

The ICJ did not explain what it meant or provide any further basis for its statement. Even under this narrow reading of Article 2(1), one might still argue (as outlined above with respect to the ICCPR) that extreme harm caused by climate change could have the effect of bringing a state's territory under the effective control of other states, thus triggering the ICESCR obligations. But a better approach would be to reject this interpretation altogether. Although few would dispute that the *primary* duty-holder under the ICESCR is normally the state with territorial jurisdiction, there are serious flaws in the suggestion that it has the *only* responsibility under the Covenant. Most important, this interpretation has no support in the text of the ICESCR. If the drafters wanted to include a jurisdictional limit along the lines of article 2(1) of the ICCPR, they easily could have done so. Governments negotiated the two Covenants at the same time, in the same forum. It seems strange, to say the least, for later interpreters to insert a limit that the drafters did not include. Nor does this interpretation follow from the nature of the rights, which can be adversely affected by states other

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<sup>208</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 195, ¶ 112.

<sup>209</sup> *Id.* (emphasis added).

than those with territorial jurisdiction over the individuals concerned, the context of the Covenant, which refers repeatedly to the importance of international cooperation in meeting its obligations,<sup>210</sup> or the text of article 2(1) itself. It also runs contrary to interpretations by the CESCR and other UN human rights bodies, which have taken a much broader view of extraterritorial obligations under the Covenant.<sup>211</sup>

There are two interpretive bases for the conclusion that the ICESCR gives rise to extraterritorial obligations. The first relies on the absence of any limiting language in the Covenant. In *Bosnia and Herzegovina v. Yugoslavia*, the ICJ held that Yugoslavia could be held responsible under the Genocide Convention for acts committed in Bosnian territory because the obligation of each state “to prevent and punish the crime of genocide is not territorially limited by the Convention.”<sup>212</sup> Matthew Craven cites that result as raising the possibility “that, absent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect.”<sup>213</sup>

The second, more explicit basis for extraterritorial obligations is the requirement in Article 2(1) that each party take steps not only individually, but also “through international assistance and cooperation.” In virtually every General Comment the CESCR has adopted in recent years on particular rights, including rights to health, water, and food, it has relied on this language to set out extraterritorial obligations. Consistent with that approach, the Committee has questioned states about their fulfillment of their extraterritorial duties and has included their assessment of states’ compliance with these duties in its concluding observations on their

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<sup>210</sup> See, e.g., ICESCR, *supra* note 64, arts. 11(2), 15(4), 22, 23.

<sup>211</sup> Supporters of a narrow interpretation of the scope of the ICESCR might point to its optional protocol, adopted in December 2008, which authorizes the CESCR to receive complaints only from individuals or groups “under the jurisdiction” of the state party against which the complaint is directed. But the fact that the *protocol* is limited jurisdictionally does not suggest that the *Covenant* is limited in the same way. The protocol also does not allow complaints regarding self-determination, but no one would conclude that as a result the right is not protected by the Covenant.

<sup>212</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), 1996 ICJ Rep. 3, ¶ 31.

<sup>213</sup> Matthew Craven, *Human Rights in the Realm of Order: Sanctions and Extraterritoriality*, in *Extraterritorial Application of Human Rights Treaties*, *supra* note 197, at 233, 251; see Rolf Künemann, *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *id.* at 201 (“In fact there is nothing in the ICESCR which would limit the rights recognized . . . to persons within a state party’s territory. This limitation or any ‘territorial/extraterritorial’ distinction is simply not made.”).

reports.<sup>214</sup> Its approach has been followed in this respect by UN special rapporteurs on ESC rights, including the rapporteurs on the rights to food and health,<sup>215</sup> and by the Office of the High Commissioner for Human Rights in its report on climate change and human rights.<sup>216</sup>

Although the legal bases for extraterritorial obligations under the ICESCR seem fairly secure, serious questions remain as to the contours of those obligations. Duties under Article 2(1) may already appear difficult to determine with specificity. *Extraterritorial* duties under Article 2(1) may seem even more difficult to define. If each state's duties are unbounded jurisdictionally, how should a state divide its efforts between its own people and those outside its jurisdiction? And how should individual state responsibility be apportioned if every state has some responsibility to respond to every threat to rights?<sup>217</sup>

The text of the Covenant, the General Comments of the CESCR, and common sense suggest several answers to these questions: (1) while the primary responsibility for meeting the obligations under the ICESCR remains on the state with jurisdiction over the people concerned, states in a position to assist other states meet those obligations are required to do so; (2) states must themselves avoid, and prevent private actors under their control from, interfering with other states' ability to meet their obligations under the ICESCR; and (3) states are required to cooperate internationally to address threats to the enjoyment of the rights protected by the ICESCR.

As applied to climate change, these interpretations would mean that: (1) richer states are obligated to assist poorer states in mitigating and adapting to the effects of climate change; (2) states should not allow the emission of greenhouse gases within their jurisdiction to interfere with the ability of other states to meet their own obligations; and (3) states are required to negotiate and implement effective international agreements to address the global threat climate change poses to human rights. The remainder of this section addresses the implications of the first two duties. The third has

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<sup>214</sup> See Skogly, *supra* note 27, at 151-53. For an analysis of the Committee's General Comment on the right to water, with particular reference to its treatment of extraterritorial obligations, see Amanda Cahill, *Extraterritorial Obligations and the Right to Water*, in Gibney & Skogly, *supra* note 27, at \_\_\_.

<sup>215</sup> For a detailed description of the views of the first rapporteur on the right to health, Paul Hunt, on this topic, see Judith Bueno de Mesquita & Paul Hunt, *The Human Rights Responsibility of International Assistance and Cooperation in Health*, in Gibney & Skogly, *supra* note 27, at \_\_\_.

<sup>216</sup> OHCHR Report, *supra* note 164, at 23-24, 26.

<sup>217</sup> See Craven, *supra* note 212, at 252-53.

deeper roots and broader applicability, and receives its own treatment in the next section.

### 1. *International Assistance*

The language in Article 2(1) refers specifically to international assistance, and Article 23 reiterates that “[t]he States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as . . . the furnishing of technical assistance.”<sup>218</sup> The CESCR has identified obligations both to provide long-term assistance and to respond to emergencies. For example, with respect to the rights to food and to health, it has said that states have an obligation to facilitate access to food and to essential health facilities, goods, and services, and to provide the necessary aid when required, and also “to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.”<sup>219</sup> More generally, the Committee has regularly emphasized that it is “particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfil their core and other obligations.”<sup>220</sup>

The Committee sees this obligation as falling primarily on richer countries. It has said that the obligation depends on the availability of resources, and that each state should contribute in accordance with its ability.<sup>221</sup> In its review of states’ reports, it asks developed states about their levels of official development assistance. Similarly, the special rapporteur on the right to health has taken the position that “[t]he human rights responsibility of international assistance and cooperation includes a duty on high-income States to urgently take deliberate, concrete and progressive measures toward devoting a minimum of 0.7 per cent of their gross national product (GNP) to development assistance.”<sup>222</sup> As applied to climate change, the implication of this interpretation is that the requirement to assist other states should include assistance to help poorer states pay the costs of adaptation and (perhaps) mitigation.

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<sup>218</sup> ICESCR, *supra* note 64, art. 23.

<sup>219</sup> General Comment 12, *supra* note 27, ¶¶ 36, 38; General Comment 14, *supra* note 76, ¶¶ 39, 40.

<sup>220</sup> *Id.* ¶ 45; *see also* CESCR, General Comment 3, *supra* note 92, ¶ 14.

<sup>221</sup> General Comment 14, *supra* note 76, ¶ 39; General Comment 12, *supra* note 27, ¶ 38.

<sup>222</sup> Bueno de Mesquita & Hunt, *supra* note 214, at [15].

Unsurprisingly, developed states have long resisted the idea that the ICESCR requires them to provide international financial assistance. The United States has been particularly vociferous in this respect, stating at the 2004 and 2006 sessions of the Human Rights Commission that the right to food did not give rise to international obligations and that the UN special rapporteur on the right to food “should be chastised for his ‘irresponsible and unfounded statements’ in that regard.”<sup>223</sup> Less loudly, other developed countries have also resisted the idea. The 2005 report of the working group charged with negotiating the optional protocol to the ICESCR, for example, included a statement by Canada, the Czech Republic, France, Portugal, and the United Kingdom that they “believed that international co-operation and assistance was an important moral obligation but not a legal entitlement, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid.”<sup>224</sup>

This resistance may be due in part, at least, to the open-ended nature of the potential obligation and its imposition of positive rather than negative duties. In the three-part categorization of duties adopted by the CESCR, a duty to provide international assistance may be an extension of the duty to *fulfill*,<sup>225</sup> which may have less support than more widely accepted duties to *respect* or *protect*.<sup>226</sup> The debate over international financial assistance, however, should not obscure the other possible duties implicit in the Covenant’s references to international assistance and cooperation. As Sigrun Skogly has written, “the discussion on whether this [language] implies a right/obligation with regard to receiving/providing development

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<sup>223</sup> Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, in *Economic, Social and Cultural Rights in Action* 71, 77 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

<sup>224</sup> Report of the Open-Ended Working Group, UN Doc. E/CN.4/2005/52, ¶ 76, quoted in Craven, *supra* note 222, at 77 n.24. See also Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 *Colum. J. Trans. L.* 691, 737 (2006) (“The articulation of the obligation [of international cooperation] in a manner that includes a duty to fulfill social and economic rights in other countries may also be met with a great deal of political resistance by states that do not wish to cast their aid-giving in legal obligation terms.”); Bueno de Mesquita & Hunt, *supra* note 214, at \_\_\_ (“In our experience, many developing states agree [that international cooperation for development is a binding obligation under the ICESCR.] However, developed States have refuted this claim.”).

<sup>225</sup> See Skogly, *supra* note 27, at 71.

<sup>226</sup> See Wouter Vandenhoe, *EU and Development: Extraterritorial Obligation under the International Covenant on Economic, Social and Cultural Rights*, in *Casting the Net Wider: Human Rights Development and the New Duty-Bearers* 97 (Margot Salomon *et al.* eds., 2007); Cahill, *supra* note 213, at \_\_\_.

assistance is only one aspect of a much more complex understanding of what ‘international assistance and cooperation’ implies, and this debate should not overshadow other important elements of these concepts.”<sup>227</sup>

## 2. *Avoidance of Interference*

Matthew Craven suggests that one approach to the question of extraterritorial application of the ICESCR rights would be to acknowledge that “a state is not necessarily directly responsible for conditions elsewhere in the globe, and that each state assumes primary responsibility for the well-being of the local populace,” but recognize that each state is at the same time required “to ensure that it does not undermine the enjoyment of rights of those in foreign territory.”<sup>228</sup> In other words, states must not interfere with other states’ ability to meet their obligations.<sup>229</sup>

This duty would essentially be an extraterritorial extension of states’ duties to *respect* human rights.<sup>230</sup> Because this obligation is negative rather than positive, one might expect its extraterritorial application to be relatively uncontroversial.<sup>231</sup> Similarly, the duty to *protect* rights from interference by private parties could be extended extraterritorially by ensuring that private actors under the jurisdiction or control of a state do not harm human rights in other states.<sup>232</sup> Although a state’s duty to protect those within its own jurisdiction is well-established, its duty to protect others has received less attention. One exception is the CESCR’s General Comment on the right to health, which states: “To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, *and to prevent third parties from violating the right in other countries*, if they are able to influence these third parties by way of legal or political means.”<sup>233</sup>

More generally, the CESCR has emphasized that states have duties not to interfere with the enjoyment of rights in other countries, with particular

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<sup>227</sup> Skogly, *supra* note 27, at 18.

<sup>228</sup> Craven, *supra* note 212, at 253.

<sup>229</sup> See, e.g., Cahill, *supra* note 213, at \_\_\_ (“This provision should be interpreted to include not only an obligation to refrain from actual actions and activities which are detrimental to the enjoyment of the right to water, but also encompass an obligation to refrain from formulating and implementing policies which ‘can be foreseen as having negative effects’ upon the right to water.”) (quoting Jean Zeigler, Report of the Special Rapporteur on the Right to Food, U.N. Doc. E/CN.4/2005/47).

<sup>230</sup> Skogly, *supra* note 27, at 68-69.

<sup>231</sup> Cahill, *supra* note 213, at \_\_\_.

<sup>232</sup> Skogly argues that this duty naturally follows from the obligation not to discriminate on the basis of nationality. Skogly, *supra* note 27, at 70.

<sup>233</sup> General Comment 14, *supra* note 76, ¶ 39 (emphasis added).

reference to the rights to health, food, and water.<sup>234</sup> Concerning the right to water, for example, the Committee has said, “States parties have to respect the enjoyment of the right in other countries. International cooperation requires states parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”<sup>235</sup> The Committee’s lengthiest examination of extraterritorial duties may have come in its 1997 General Comment on the relationship between economic sanctions and the enjoyment of human rights, which emphasized that the “international community” as well as the state concerned must “do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State.”<sup>236</sup>

The duty not to interfere could provide a legal basis for the extension of environmental human rights jurisprudence to climate change. Part II.B above describes three ways that the jurisprudence could be extrapolated to transboundary environmental harm: by extending the procedural safeguards extraterritorially but continuing to defer to the policy decisions that result from those procedures; by deferring less to state policy decisions and specifying in more detail the minimum substantive environmental standards states must adopt; and by requiring the consent of vulnerable communities to actions that drastically interfere with their human rights. The duty not to interfere provides a justification for any of these approaches. If states were obligated to respect and protect rights in other countries, not just in their own, then it would follow that human rights law would impose the same restrictions on their actions (or failures to act) that cause extraterritorial environmental harm as it does with respect to such harm when felt internally.

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<sup>234</sup> *Id.* ¶ 41; General Comment 12, *supra* note 27, ¶ 37; General Comment 15, *supra* note 77, ¶ 31.

<sup>235</sup> *Id.* ¶ 31.

<sup>236</sup> CESCR, General Comment 8, *The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, ¶ 7 (1997). The CESCR specified several obligations on the “party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States,” including taking the rights “fully into account when designing an appropriate sanctions regime,” undertaking effective monitoring, and taking steps “to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.” *Id.* ¶¶ 11-14.

Such an extension would likely be controversial. Although the duty not to interfere with other states' ability to meet their obligations under the ICESCR might be thought to be fairly straightforward, arising from general principles of good faith in the performance of international legal obligations,<sup>237</sup> it has met with resistance from developed countries, much of which undoubtedly stems from the early, explicit application of the duty to sanctions regimes.<sup>238</sup>

In addition to political objections, relying on a duty not to interfere with other states as a basis for extending the environmental human rights jurisprudence would face practical problems. Applying the existing jurisprudence to climate change by any of the above methods would treat climate change as a series of individual transboundary problems, rather than as a single global problem. This approach would place duties on states to assess their own contributions to climate change harm extraterritorially as well as internally and take into account those effects in making its policy decisions as to how much harm to allow (or, in the last option, in negotiating with affected communities in order to obtain their consent). But it would not require states to coordinate their responses with one another. This is an obvious shortcoming. Successfully addressing the global problem of climate change requires global coordination. Without assurances that other states are also reducing their emissions of greenhouse gases, it makes little sense for any state to reduce its own emissions substantially, since doing so would impose economic burdens on it with no prospect of compensating environmental benefits. The duty to cooperate, discussed in the next section, provides a more useful basis for extending environmental human rights law to climate change.

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<sup>237</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26 ("Every treaty in force is binding on the parties to it and must be performed by them in good faith."). Even signatories that have not ratified a treaty are obligated "to refrain from acts which would defeat [its] object and purpose." *Id.* art. 18.

<sup>238</sup> Unilateral sanctions regimes have been particularly controversial. The Human Rights Commission and the General Assembly have adopted resolutions condemning such regimes as contrary to human rights law, as well as the UN Charter. See, e.g., G.A. Res. 57/222 (2002); UNHRC Res. 2002/22, 2003/17, 2004/22. The United States, Japan, and Western European states have generally opposed such resolutions, while most other states have supported them. The emphasis of the resolutions has been on the effect of sanctions on rights to self-determination and development, however, rather than on economic, social, and cultural rights.

### C. The Duty of International Cooperation

The most feasible basis for extending current environmental human rights jurisprudence to climate change is the duty to cooperate. The duty is stated in Article 2(1) of the ICESCR, which requires each state party to take steps not only individually, but also “through international . . . cooperation,” toward the progressive realization of the rights. But the duty has deeper roots. The ICESCR draws on and makes more explicit a requirement for international cooperation contained in the Charter of the United Nations.<sup>239</sup>

Article 55 of the Charter requires the United Nations to promote, *inter alia*, “universal respect for, and observance of, human rights and fundamental freedoms for all,” and in Article 56, “[a]ll members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”<sup>240</sup> As Sigrun Skogly has pointed out, reading Article 56 to mean only that states should work with the U.N. Organization toward these ends does not do justice to its language, which provides that the action that shall take place “in cooperation with the Organization” shall itself be “joint.”<sup>241</sup> Moreover, “[t]his joint action has a clear extraterritorial element to it: only one of the states acting ‘jointly’ may at any given time address the promotion of respect for human rights domestically – all the other states involved in the joint action will logically be addressing human rights in another state.”<sup>242</sup>

With respect to many challenges to human rights, international cooperation need play only a subordinate role. Particular threats to human rights typically arise within a state, and they can be and should be addressed primarily by that state. But some human rights problems are inherently global, which require coordinated action on a global scale to solve. For example, the ICJ has noted “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’.”<sup>243</sup> Climate change is the paradigmatic example of such a global threat. Because greenhouse gases

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<sup>239</sup> See General Comment 3, *supra* note 92, ¶ 14.

<sup>240</sup> Charter of the United Nations, June 26, 1945, arts. 55, 56. Article 55 also requires the United Nations to promote “solutions of international economic, social, health, and related problems,” which would seem to include the problems created by climate change.

<sup>241</sup> Skogly, *supra* note 27, at 76.

<sup>242</sup> *Id.*

<sup>243</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) (quoting Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, pmb.).

emitted anywhere on the planet contribute to global warming everywhere on the planet, it is impossible to mitigate climate change effectively without coordinated international action. In this instance, the duty of international cooperation must take the primary rather than the secondary role.

As applied to climate change, what does the duty to cooperate require of states? At the most general level, it requires simply that states work together to protect the people of the world from the effects of climate change on their human rights. To that end, states will have to negotiate and implement international agreements,<sup>244</sup> but human rights law does not require the negotiation to take place in a human rights forum; there is no reason why it should not continue under the auspices of the conference of parties to the Framework Convention on Climate Change, which has near-universal membership, with 192 parties, and the necessary experience and expertise. Rather than providing the forum, human rights law provides the standard that the negotiation should strive to meet: to protect against the adverse effects of climate change on human rights. To that end, the agreements must provide both for the reduction of greenhouse gases to levels that will not interfere with the human rights of those vulnerable to climate change, and for adaptation to unavoidable changes that would otherwise harm their human rights.

At this level of generality, this standard is subject to three criticisms. First, to the extent it is based on the ICESCR, it would seem to leave out the United States, which is not a party to that treaty. The United States is a signatory, however, which requires it “to refrain from acts which would defeat the object and purpose” of the Covenant.<sup>245</sup> Refusing to participate in a global effort to protect human rights from a threat such as climate change would arguably defeat the object and purpose of the Covenant. More important, the duty to cooperate rests firmly on the UN Charter itself. It requires all members of the United Nations, including the United States, to work together to combat global threats to human rights.

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<sup>244</sup> The ICESCR itself specifies that the duty to cooperate contemplates the negotiation and implementation of international agreements. ICESCR, *supra* note 64, art. 23 (“international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions”). *See also* General Comment 14, *supra* note 76, ¶ 39 (“States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments.”); General Comment 12, *supra* note 27, ¶ 36 (“States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.”).

<sup>245</sup> Vienna Convention on the Law of Treaties, *supra* note 236, art. 18.

A second criticism is that, if taken only as a general exhortation, the duty to cooperate may seem to contribute little to efforts to solve the problem of climate change. After all, states already recognize that international action is necessary to combat climate change and they have engaged in comprehensive negotiations. However, placing the necessary international cooperation in the broader framework of human rights helps to clarify the ultimate goal of those negotiations. As the report of the Office of the High Commissioner for Human Rights on climate change and human rights states in its closing words, “International human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.”<sup>246</sup> Treating climate change as a human rights problem subject to a legal duty of cooperation helps to ensure that governments do not lose sight of its effects on real people and communities, including those in other countries.

The third criticism of looking to human rights law to set a standard for climate negotiations is not that it adds too little, but that it tries to add too much. The proposition that the agreements must protect the human rights of those vulnerable to climate change may seem to ignore the trade-offs that may be necessary between efforts to combat climate change and needs for economic and social development. For example, China could make a significant contribution to reductions of greenhouse gases by immediately halting production of new coal-fired electric power plants. But doing so could also have adverse effects on the health and standard of living of millions of people. Even if states have obligations under human rights law to address climate change, those obligations should not be absolute; states must have discretion to decide for themselves how to balance the benefits and costs of climate change mitigation and adaptation.

This is where the environmental human rights jurisprudence described in Part I becomes of great importance. That jurisprudence defers to states’ policy decisions as to levels of environmental protection, as long as states follow procedural requirements designed to ensure that the decision-making process was informed and inclusive. Recognizing that states have a duty to cooperate with one another to address the effects of climate change on human rights would provide the legal basis to extend the norms of that jurisprudence internationally. Doing so would make clear that applying

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<sup>246</sup> OHCHR Report, *supra* note 164, at 26.

human rights standards to efforts to combat climate change would still allow the international community discretion to set standards of protection that take into account the costs as well as the benefits of abating climate change.

The previous section described the practical problems with having each state expand its own polity to include those affected by transboundary harm, on the basis of duties not to interfere with human rights in other states. The duty to cooperate avoids those problems. Rather than trying to improve the procedural safeguards of multiple polities, the duty to cooperate requires the international community to try to act as a *single* polity as it addresses climate change as a global problem. As a consequence, the international community *as a whole* would be required to follow the norms developed by human rights bodies in applying human rights law to environmental harm. Those norms include both procedural and substantive requirements.

Procedurally, the environmental human rights jurisprudence requires states to carry out prior assessment to predict and evaluate the effects of actions that might degrade the environment and thereby harm individuals' rights.<sup>247</sup> Such assessments must be made available to the public so that they can assess the danger to which they are exposed.<sup>248</sup> Those affected must be able to participate in a full and informed manner in the decision-making process as to how much environmental harm to allow.<sup>249</sup> And judicial remedies must be available to ensure that the proper procedures are followed.<sup>250</sup>

If the international community followed these procedures, its decisions on how best to strike the balance between environmental protection and economic development should receive deference. The deference would not be absolute, any more than it is the context of internal environmental harm.<sup>251</sup> The international community should not be able to decide to address climate change in ways that allow its effects to violate minimum human rights standards. Although those standards need further examination, they seem clear in some respects. For example, states could not jointly

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<sup>247</sup> *Taskin*, *supra* note 34, ¶ 119; *Ogoniland*, *supra* note 27, ¶ 53; *Saramaka*, *supra* note 124, ¶ 129.

<sup>248</sup> *Taskin*, *supra* note 34, ¶ 119; *Ogoniland*, *supra* note 27, ¶ 53; Ecuador Report, *supra* note 31, at \_\_; General Comment 15, *supra* note 77, ¶ 56.

<sup>249</sup> *Ogoniland*, *supra* note 27, ¶ 53; Ecuador Report, *supra* note 31, at \_\_; General Comment 15, *supra* note 77, ¶ 56; *Saramaka*, *supra* note 124, ¶ 129.

<sup>250</sup> *Taskin*, *supra* note 34, ¶ 119; Ecuador Report, *supra* note 31, at \_\_; General Comment 15, *supra* note 77, ¶ 56.

<sup>251</sup> See *Budayeva*, *supra* note 51, ¶¶ 159-60; General Comment 15, *supra* note 77, ¶ 37; *Marangopoulos Foundation*, *supra* note 76, ¶ 221.

agree on a climate change policy that would result in the foreseeable destruction of the human rights of substantial numbers of people by, for example, allowing global warming to continue at levels that would inundate small island states.<sup>252</sup>

The extension of environmental human rights law in this way would not require a complete redirection of the efforts of the international community. On the contrary, states' collective response to climate change already accords with these requirements in some respects. In particular, the work of the IPCC is a serious global effort to assess the environmental impacts of climate change and make the assessment public so that it can inform consideration of policy options. But the present approach falls short in other respects. The IPCC assessments have not paid enough attention to the human impacts of climate change; the decision-making process should be more accessible to the public, especially to vulnerable communities, which should have a place at the negotiating table; and the negotiators should understand the human rights standards that provide the framework for the international cooperation in which they are engaged. To this end, the human rights and the climate change regimes should work together to examine and clarify the implications of climate change for human rights.<sup>253</sup>

#### IV. Conclusion

This article seeks to provide a basis for a better understanding of how human rights law applies to climate change. Its aim is to establish some fundamental points: that climate change already interferes with the human rights of vulnerable communities and is an enormous threat to human rights everywhere; that human rights law imposes duties on states to respond to climate change regardless of whether they can be held responsible for "causing" it; that human rights law also constrains states' responses; and, most important, that the jurisprudence human rights tribunals have developed in the context of domestic environmental harm may be applied to global environmental harm such as climate change, on the basis of the duty of international cooperation.

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<sup>252</sup> At least, the international community could not do so without the "free, prior, and informed consent" of the states concerned. *See Saramaka, supra* note 124, ¶ 134.

<sup>253</sup> For an examination of some pragmatic measures that could be taken in that regard, see Center for International Environmental Law, *Practical Approaches to Integrating Human Rights and Climate Change Law and Policy* (Feb. 19, 2009).