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Litigating a Rights-Based Approach to Climate Change

Dinah L. Shelton
George Washington University Law School, dshelton@law.gwu.edu

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Abstract

Most discussions of a rights-based approach to the environmental crises facing the planet have centered on demanding that governments take action to prevent or mitigate environmental harm that diminishes, for those within their territory and jurisdiction, the enjoyment of internationally-guaranteed human rights.Yet, the consequences of pollution - especially anthropogenic climate change due to greenhouse gas emissions - are not confined within the boundaries of a single state: pollution knows no boundaries. Instead, throughout the world, individuals, communities and entire nations face significant threats to their well-being and even their lives from climate change and its effects

A key fact in the human rights dimension of climate change is that anthropogenic climate change has and will continue to have its most devastating impacts on poor and minority communities and countries, on those who are least responsible for creating the problem. These serious consequences already being felt demand consideration of whether governments commit violations of internationally recognized human rights when they fail to control or reduce greenhouse-gas emissions.

This paper attempts to assess two potential avenues for pressing rights-based claims, the first being individual or group petitions to international human rights bodies. The second potential proceeding is

*. Manatt/Ahn Professor of International Law, The George Washington University Law School. The opinions expressed in the article are the sole responsibility of the author who does not speak for the university, the law school, or the United States government.

an inter-state complaint on behalf of the human rights of affected individuals and communities joined to an action to protect national resources and territory.

Introduction

Most discussions of a rights-based approach to the environmental crises facing the planet have centered on demanding that governments take action to prevent or mitigate environmental harm that diminishes, for those within their territory and jurisdiction, the enjoyment of internationally-guaranteed human rights. Yet, the consequences of pollution - especially anthropogenic climate change due to greenhouse gas emissions - are not confined within the boundaries of a single state: pollution knows no boundaries. Instead, throughout the world, individuals, communities and entire nations face significant threats to their well-being and even their lives from climate change and its effects.[1]

A key fact in the human rights dimension of climate change is that anthropogenic climate change has and will continue to have its most devastating impacts on poor and minority communities and countries, on those who are least responsible for creating the problem.[2] Climate

1. *See, e.g.,* OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61,15 January 2009 [hereinafter OHCHR Report];Marguerite E.Middaugh, Comment 'Linking Global Warming to Inuit Human Rights,' *8 San Diego Int'l L.J.* (2006) (discussing global climate threats to Inuit peoples);Donald Goldberg and Martin Wagner 'Human Rights Litigation to Protect the Peoples of the Arcticle,'98 *Am.Soc'y.Int'l.L.Proc.*227(2004)(Inuit peoples).

2. At the beginning of the twenty-first century, the industrialized world, with 20 per cent of the global population, generated more than 80 per cent of the world's pollution and used about 80 per cent of global energy and mineral resources, but the environmental impacts that resulted from this production and consumption, particularly with respect to anthropogenic climate change, affected disproportionately the development of poorer countries. Developed countries also accounted for 83 per cent of the world's gross domestic product (GDP), with the gap between developed and

change is already having devastating impact on the lives and well-being of the Inuit, whose sea-ice is melting, and the inland pastoral nomads of Kenya, whose lands and herds have been decimated by persistent drought.The Arctic impacts were documented by Inuit villages in the amicus brief they filed in the U.S. Supreme Court case Massachusetts v. EPA.[3] The very existence of the inhabitants of the Arctic is threatened by climate-related disruptions of soils, water, vegetation, and wildlife. These are subsistence communities dependent on the ecosystem. Now, Arctic communities are hunting at their peril as the ice thins and changes. There is no practicable alternative food supply and even if alternative sources existed, the loss of traditional foods and the means of acquiring them, brings with it a loss of culture and religion. Arctic storms are growing more fierce and frequent;one village lost 15 meters of land overnight in a storm. Afterwards, the residents voted to leave the community they have inhabited for the past 4000 years. The April 2007 IPCC report on climate change impacts, adaptation and vulnerability confirmed what the Inuit already know, that "the poorest of the poor in the world - and this includes poor people in prosperous societies - are going to be the worst hit."[4]

They already are. The Red Cross estimates that 1998 was the first year in which the number of refugees from environmental disasters exceeded those displaced as a result of war.[5] Between 2000 and 2004,some 262 million people were affected by climate disasters and 98 percent of them were in the developing world.[6] In OECD countries,1 in 1500 persons was affected;in developing countries it was one in 19-79

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developing countries in per capita GDP increasing during the last thirty years of the twentieth century, making developing countries relatively poorer than before.

3. Brief of Amici Curiae Alaska Inter-Tribal Council et al in Support of Petitioners, Mass.v.EPA,127 S.Ct.1438 (No.05-1120).

4. IPCC (2007) *Climate Change 2007:Impacts, Adaptation, and Vulnerability* (IPCC, M.L. Parry et al.eds.2007).

5. International Committee of the Red Cross (1999) *Annual Report* (Geneva).

6. UNDP, World Development Report 2008,p.8.

times more. The impacts are especially felt by the most vulnerable:children born during a drought are 50-79 percent more likely to be malnourished.[7] Women born during a flood are nearly 20 percent less likely to attend primary school.

These serious consequences already being felt demand consideration of whether governments commit violations of internationally recognized human rights when they fail to control or reduce greenhouse-gas emissions.*If the answer is a plausible yes, can litigation based on national or international human rights guarantees and procedures help stimulate action to address anthropogenic causes of climate change? Who can bring such cases?* Do states have transboundary human rights obligations? What are the hurdles to litigating these issues and what results might be expected?*This paper attempts to assess two potential avenues for pressing rights-based claims, the first being individual or group petitions to international human rights bodies. The second potential proceeding is an inter-state complaint on behalf of the human rights of affected individuals and communities joined to an action to protect national resources and territory.*

A. Human Rights and Obligations

Human rights are maximum claims on society because rights are inherent attributes that must be respected in any well-ordered society.There are more than a dozen references to human rights in the UN Charter and member states have a clear obligation to take joint and separate action with the organization to promote respect for and observance of human rights and fundamental freedoms (UN Charter arts.55,56).The Universal Declaration of Human Rights set forth "a common standard of achievement for all peoples and all nations." The Declaration today represents an agreed definition of "human rights" as that term is used in the United Nations Charter.Respect for human rights is thus part of international law, contained in the nearly 100 global

7. Id.p.9.

human rights agreements in force today and the regional systems in operation or emerging around the world.

Each state has a consequent right and duty to ensure that its population can enjoy the full panoply of internationally-guaranteed human rights, even when the threats to them appear from another state.Article 2 of the ICCPR expresses the generic obligation:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...

In addition, State Parties must take steps to adopt laws or other measures so as to give effect to the rights in the Covenant.The Human Rights Committee (HRC) has interpreted the ICCPR to impose both negative and positive obligations on State Parties;thus, States must refrain from violating rights as well as take appropriate action to ensure the guaranteed rights.A failure to exercise due diligence in the prevention or redress of harm caused by other entities can amount to violation of the ICCPR.[8] ***Among the positive measures foreseen, the HRC has stated it would be "desirable for States parties to take all possible measures" to reduce death from environmental factors such as malnutrition and epidemics.***[9]

Similar positive and negative obligations are found in all major human rights treaties.The Convention on the Rights of the Child requires states parties to protect the lives of children, ensuring the survival and the development of the child "to the maximum extent possible." Article 2 of the ICESCR sets out the obligation of a Party to work toward progressive implementation of the Covenant rights:to "take steps...to the maximum of its available resources" and by "all appropriate means" to achieve the full realization of the stated rights. The Committee on Economic, Social, and Cultural rights has emphasized that the language of the ICESCR nonetheless imposes immediate

8. HRC General Comment No.31,2004. 9. HRC General Comment No.6,1982.

obligations on the Parties to take deliberate, concrete, non-discriminatory and targeted actions toward the realization of the rights.[10]

Significantly, the International Covenant on Economic, Social and Cultural Rights contains a statement of obligation that explicitly encompasses transnational action:"Each State Party...undertakes to take steps, *individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources,...*" to realize the rights contained in the Covenant.Article 11(2) reiterates the obligation to take measures individually and through international cooperation, in this instance to combat hunger, adding specific reference to the need for equitable distribution of world food supplies in relation to need, taking into account the problems of both food-importing and food-exporting countries. A third relevant statement is found in Article 15(4): The States parties recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

At a minimum, the stated obligations in the ICESCR encompass the duty "to take steps" in two ways:to cooperate and to provide international assistance. Cooperation can be viewed as an obligation of conduct, while the provision of international assistance, to the maximum of a state's available resources, constitutes an obligation of result. The obligation of conduct means that it is not necessary to show that specific harm results from breach of a duty to cooperate; it is enough that a state refuses or fails to fulfill its obligation to cooperate imposed by treaty or otherwise.[11] From the perspective of international responsibility, it does not matter whether the obligation is one of conduct or one of result, because a breach of either duty can be considered a wrongful act.[12]

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10. CESCR General Comment 3,1991.

11. ILC SR Articles, Commentary to art.2,para(9).*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase,* I.C.J. Rep.1950,p.228.

12. In the *Gabcikovo-Nagymaros Project* (Hung.v.Slovakia),ICJ Rep.1997,p.7,at p.77,para 135,the ICJ referred to the parties having accepted "obligations of conduct,

The Committee on Economic, Social, and Cultural Rights has repeatedly drawn attention to the essential role of international cooperation in achieving the full realization of ICESCR rights.[13] With respect to the right to health, the Committee has suggested that States must respect the enjoyment of the right to health in other countries and, where possible, protect this right from violation.The international community also has an obligation to facilitate access to essential health facilities, goods, and services, and "wherever possible" to provide such aid when it is needed. The Committee has defined a similar role for the international community with respect to the right to food, the right to water, and the right to work.[14] The Committee's discussion of the right to water has also indicated that State parties must refrain from actions that *indirectly* interfere with the enjoyment of rights in other countries[15] and that they have a "collective responsibility" to address threats to human rights that are transboundary in nature, such as certain diseases. In addressing these transboundary issues,"[t]he economically developed States parties have a special responsibility and interest to assist the poorer developing States..."[16]

The critical question is whether or not the duty to cooperate and to provide international assistance are specific enough that breaches can be identified and give rise to state responsibility? The duty to cooperate,

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obligations of performance, and obligations of result.See C.Tomuschat(1994) 'What is a 'Breach' of the European Convention on Human Rights?'in Lawson and de Blois, (eds.) *The Dynamics of the Protection of Human Rights in Europe:Essays in Honour of Henry G. Schermers*(Dordrecht, Nijhoff), p.315,at 328.

13. CESCR General Comment 3,1991.

14. CESCR General Comment 12,1999;CESCR General Comment 15,2002;CESCR General Comment 18,2005.

15. "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." CESCR General Comment 15,2002 at para 31.

16. CESCR General Comment 14,2000.

at least, has been held to give rise to enforceable rights in inter-state litigation. In the *Mox Plant Case* (Ireland v. United Kingdom), Ireland invoked a duty to cooperate in the field of protecting the marine environment. The International Tribunal on the Law of the Sea, in its order on provisional measures issued Dec.3,2001,*reprinted* 41 ILM 405 (2002),opined that the duty to cooperate is a fundamental principle in general international law, as well as one contained in the relevant treaty provisions, and that rights may arise therefrom which the Tribunal may protect.The ITLOS provisional order mandated that the parties cooperate to exchange further information about the environmental consequences of the proposed project and devise measures to prevent harm that could result from proceeding with the project.

The broad language of obligation has to be considered in conjunction with the list of guaranteed rights, and it is here that issues of climate change could encounter a difficulty. Most international human rights instruments were drafted before the emergence of international environmental law as a common concern. As a result, they do not mention the environment.On the global level, the U.N. Convention on the Rights of the Child, art.24,is unique in speaking of the provision of clean drinking water and the dangers and risks of pollution.[17]

Nonetheless, for nearly forty years, the international community has persistently recognized the relationship between environmental conditions and the enjoyment of fundamental human rights.At the 1972 UN Conference on the Human Environment, Principle 1 of the Stockholm Declaration made the link between human rights and the environment:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for

17. United Nations Convention on the Rights of the Child,20 Nov.1989,art.24,28 I.L.M. 1448(1989).

present and future generations.

Since then UN and regional treaties,[18] resolutions[19] and statements of principle[20] have recognized a human right to an environment of a certain quality has been made in. In 1986,the World Commission on Environment and Development considered the consequences for economic and social development of the deterioration of the human environment. An annex to Our Common Future, the Commission's

18. Article 21 of the African Charter of Human and People's Rights, adopted in 1989,recognizes that "all peoples shall have the right to a general satisfactory environment favorable to their development.";The 1998 adoption of the San Salvador Protocol to the American Convention on Human Rights included an individual right to environment in Article 11:"everyone shall have the right to live in a healthy environment and to have access to basic public services."

19. The heads of states of 24 countries signed the Hague Declaration in 1989("the right to live in dignity in a violable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.").The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Resolution 1988/26 (the movement and dumping of toxic and dangerous products "endangers basic human rights, such as...the right to live in a sound and healthy environment."). In 1990,the Commission on Human Rights in Resolution 1990/41, highlighted the link between environmental protection and promotion of human rights. In 1991,the Commission adopted Resolution 1991/41,stating:"all individuals are entitled to live in an environment adequate for their health and well-being." UN General Assembly Resolution 45/94,adopted in 1994,included the same language.In 2003,the Commission on Human Rights, resolution 2003/71 on Human Rights and the Environment as Part of Sustainable Development considered that "protection of the environment and sustainable development can also contribute to human well-being and potentially to the enjoyment of human rights," and recalling that "environmental damage can have potentially negative effects on the enjoyment of some human rights."

20. In 1994 the Draft Declaration of Principles on Human Rights and the Environment were adopted as an annex to the Report by the Special Rapporteur on Human Rights and the Environment by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

report, was compiled by an Expert Group on Environmental Law and set out as its first Principle:

> All human beings have the fundamental right to an environment adequate for their health and well-being.

The 1992 Rio Declaration at the UN Conference on Environment and Development, Principle 1, states that human beings "are entitled to a healthy and productive life in harmony with nature," while Principle 10 recognizes procedural rights related to activities that may impact the environment, including access to information, public participation in decision-making, and access to redress and remedy. The 1998 Aarhus Convention on Access to Information codified Principle 10, including in its preamble a confirmation of the human right to an environment adequate for maintaining one's well-being.

The link between human rights and the environment has been considered explicitly by UN Special Rapporteurs acting under various mandates, including the right to food, the right to housing, and the human rights effects of illicit traffic and dumping of toxic and dangerous products and wastes.[21] In 1990, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, appointed a Special Rapporteur on Human Rights and the Environment and assigned her the task of preparing a comprehensive report on the linkage between human rights and the environment.[22] Her 1994 Final Report concluded that environmental damage has direct effects on the enjoyment of a series of human rights and that human rights violations in turn may damage the environment.[23] Recently-adopted Human Rights Council resolutions, including resolution 7/23, and an accompanying study by the OHCHR on the link between human rights and climate change,[24]

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21. Commission Res.1995/181.

22. Sub-Commission Res.1990/7, endorsed by the Human Rights Commission in Commission Res.1991/44.

23. E/CN.4/Sub.2/1994/9.

24. OHCHR Report, supra n.2.

reaffirmed and extended the long-standing international concern for the impact of environmental deterioration on human rights.

Environmental protection undoubtedly is a pre-condition to the enjoyment of some internationally-guaranteed human rights, especially the rights to life, health, private and home life and cultural rights, but it also directly or indirectly impacts other rights as well.[25] Thus, all human rights bodies with jurisdiction to accept complaints have heard cases alleging that the rights their treaties enunciate have been violated by environmental degradation. Those that lack such jurisdiction have taken up environmental issues in the context of periodic state reporting. Regional tribunals--the Inter-American Commission on Human Rights, the European Commission and Court of Human Rights, the European Court of Justice, and the African Commission on Human Rights--have developed a jurisprudence that recognizes and enforces rights to environmental information and participation and, to a limited extent, environmental quality. The next section reviews some of the major jurisprudence on state obligations.

B. Human Rights Litigation

One advantage to a rights-based approach is accountability. International human rights treaty bodies receive and decide cases from applicants who allege that environmental conditions affecting them have deteriorated to the point that their internationally-guaranteed human

25. One study has estimated that 40 percent of the world's deaths can be attributed to environmental factors.Pimental, D.'Ecology of Increasing Diseases:Population Growth and Environmental Degradation,'Bioscience (October 1998).In addition, some 1.2 billion people in developing countries lack clean and safe drinking water, with the result that waterborne infections account for 80 percent of all infectious diseases worldwide.In many areas industrial and household wastes are dumped directly into rivers and lakes.Air pollution adversely affects the health of 4 billion people.Some 2.5 billion kg of pesticides used worldwide each year - a 50 fold increase over the past 50 years - resulting in about 3 million cases of human pesticide poisonings are reported annually.

rights have been violated. At the global level, UN human rights treaty bodies have indicated through General Comments,[26] observations on state reports, as well as decisions on individual complaints,[27] that they

26. The UN Covenants on human rights, as well as other UN human rights treaties, authorize their treaty bodies to issue General Comments, which constitute authoritative legal interpretations of the rights and obligations contained in the treaty. In General Comments on the right to life and on the minority rights provision of the Covenant on Civil and Political Rights, the U.N. Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics. See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, *in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies,* U.N. Doc. HRI/GEN/1/Rev.3 (1997)6-7 [hereinafter Compilation] and General Comment 23 para.7,9 in Compilation at 41. The General Comments of the Committee on Economic, Social and Cultural Rights that refer to environmental include those on the Right to Adequate Food, General Comment 12,E/C.12/1999/5,the Right to Adequate Housing, General Comment 4 of 13 Dec.1991, *Compilation,* HRI/GEN/1/Rev.3,63,para.5,and General Comment 14 "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Article 12)." U.N. CESCR, General Comment 14,U.N.Doc.E/C.12/2000/4(2000). Most recently and importantly, the Committee adopted its important General Comment No.15 on the right to water at its November 2002 session. ICESCR, Arts.11 and 12,E/C.12/2002/11,20 January 2003. The Committee had previously recognized, in its General Comment No.6,that Art.11 implies a right to water.

27. The International Covenant on Civil and Political Rights permits complaints to be filed pursuant to the provisions of its Optional Protocol against States Parties to the Covenant and Protocol, provided domestic remedies have been exhausted and other conditions of admissibility are met. Communications concerning environmental conditions include:*Communication No.67/1980,EHP v.Canada,*2 Selected Decisions of the Human Rights Committee (1990),20;*Communication No.645/1995,Bordes and Temeharo v. France,* CCPR/C/57/D/645/1995,30 July 1996;Communication No.511/1992 *Ilmari Lansman et al.v.Finland,* Human Rights Committee, Final Decisions,74, CCPR/C/57/1 (1996); *Kitok v. Sweden, Communication No.197/1985,II Official Records of the Human Rights Committee 1987/88,* U.N.Doc.CCPR/7/Add.1,at 442;*Communication No.431/1990,O.S. et al.v. Finland,* decision of 23 March 1994,and *Communication*

view environmental protection as a pre-requisite to the enjoyment of many of the internationally-guaranteed rights they monitor.An important new venue is likely to arise soon with the adoption of a Protocol establishing a complaints procedure for the International Covenant on Economic, Social and Cultural Rights.

The three fully operational regional human rights systems have examined the greatest number of the complaints that environmental deterioration has affected guaranteed human rights. These systems offer the best venues in most circumstances because they have functioning courts that can render binding judgments and afford reparations. In contrast, UN bodies can only make recommendations. The coming into force recently of the Arab Charter on Human Rights and the drafting of human rights clauses in the ASEAN Charter expands regional human rights systems into new areas and offers possibilities for lawyers to propose action that reflects and reinforces the jurisprudence of the other regions, just as the older systems have learned from each other.

- Europe

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms contains neither a right to health nor a right to environment, but cases have been brought for injury due to environmental harm, invoking the right to life (Art.2),the right to information (Art.10),and the right to privacy and family life (Art.8). Decisions of the former Commission and the current Court have held that environmental harm attributable to state action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Convention Article 8(1).The harm may be excused if it results from an authorized activity of economic benefit to the community in general, provided the principle of distributive justice is respected:i.e.,as long as there is no disproportionate burden borne by any particular individual or group. The court applies a three part test: the measure must have a legitimate aim, be lawfully enacted, and be

No.671/1995,Jouni E. Lansmann et al. v. Finland, decision of 30 October 1996.

proportional.[28] States enjoy a margin of appreciation or certain discretion in determining the legitimacy of the aim pursued, but the Court will hold the state to the level of environmental protection it has chosen and nearly always finds a violation if the state fails to enforce its own laws.[29]

In a judgment on the right to life, the Court reiterated that the Convention's Article 2 imposes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation extends to any activity, whether public or not,"in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous..."[30] The primary duty on the state is to put into place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.

In assessing state responsibility for deaths from such activities, the Court identified several factors as relevant:

-- the harmfulness of the phenomena inherent in the activity,

-- the contingency of the risk to which the applicant was exposed,

-- the status of those involved in bringing about the circumstances,

-- whether the acts or omissions attributable to them were deliberate.

When dangerous activities are undertaken, the state must enact regulations governing their licensing, setting up, operation, security and supervision and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose

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28. Many of the European environmental cases invoking the protection of privacy and home life involve noise pollution. See *Arrondelle v. United Kingdom,* (1980) 19 DR 186;(1982) 26 DR 5; *Powell & Raynor v. United Kingdom,*172 Eur.Ct. H.R.(1990);and *Hatton and Others v. The United Kingdom* (GC) 2003,37 EHRR 28,applying a "fair balance" test and finding no violation due to aircraft noise from Heathrow Airport.

29. See,e.g., *Okyay and Others v.Turkey,* App. no.36220/97,judgment of 12 July 2005;*Oneryildiz v. Turkey,* Nov.30,2004(GC).

30. *Oneryildiz v. Turkey,* judgment of Nov.30,2004,para.71.

lives might be endangered by the inherent risks.

Significantly, the public's right to information is among the preventive measure that the state must take to protect the right to life. The Court found that its interpretation of some substantive rights to include the right to information "is supported by current developments in European standards,"including Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment[31] and the Convention on the Protection of the Environment through Criminal Law.[32] These environmental measures in effect were incorporated into the human rights obligations of the state and made it obvious to the Court that public access to clear and full information about dangerous activities is a basic human right.

- The Americas

In the Western Hemisphere, the Inter-American Commission and Court have also devoted attention to environmental quality as it affects human rights.[33] The Inter-American Commission and Court have heard cases and the Commission has issued human rights country reports addressing environmental conditions in OAS member states, as those conditions have impacted rights guaranteed by the American Declaration on the Rights and Duties of Man (1948) or the American Convention on Human Rights (1969). Most commonly, applicants have

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31. Lugano,21 June 1993,EST No.150.

32. Strasbourg,4 November 1998,ETS No.172.The Court also cited Parliamentary Assembly Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087(1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste, as well as Committee of Ministers Recommendation R(96)12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment.

33. Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96,doc.10 rev.1 (1997) [hereinafter *Report on Ecuador*];Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil,* OEA/Ser.L/V/II.97,doc.29,rev.1(1997);Inter-Am. C.H.R., *Third Report on the Situation in Paraguay,* OEA/Ser.L/V/II.110,Doc.52,9 March 2001.

Convention on Human Rights (1969). Most commonly, applicants have asserted violations of the rights to life, health, property, culture, and access to justice, but some of them have also cited to guarantees of freedom of religion and respect for culture. Many of the cases have concerned resource exploitation on lands traditionally owned or used by indigenous peoples.

The Commission's general approach to environmental protection has been to recognize that a basic level of environmental health is required by the very nature and purpose of human rights law:

> The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[34]

The Commission has noted specifically that enjoyment of the rights to life and health depends on environmental conditions:

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.[35]

Positive obligations for the state to act derive from Convention Article 4,which guarantees an individual's right to have his or her life respected and protected by law.[36] Thus, the Commission added:

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34. *Report on Ecuador id,* at 92. 35. Id.at 88.

36. Art 4(1) reads:Every person has the right to have his life respects.This right shall be protected by law...No one shall be arbitrarily deprived of his life.

> States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case 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.[37]

As early as 1983,in its seventh report on human rights in Cuba,[38] the Commission recommended that the state take specific action and adopt environmental measures to comply with its obligation to ensure the right to health. The Commission called an environment conducive to a healthy population "essential" and noted that factors such as water supply, sanitation and waste disposal have a significant impact in this respect. The Commission concluded that environmental and industrial health practices required a great deal more attention from the government to combat increasing pollution of the soil, air and water.[39]

In its 1997 report on Ecuador, the Commission similarly insisted on the need for positive measures to protect life and health from contamination. It referred to the obligation of the state to respect and ensure the rights of those within its territory and the responsibility of the government to implement the measures necessary to remedy existing pollution and to prevent future contamination which would threaten the lives and health of its people, including through addressing risks associated with hazardous development activities, such as mining.[40]

The government thus is responsible not only for state action in violation of human rights, but also if it fails to take measures to prevent private actors from so doing.In the case of *Yanomami v. Brazil*[41] the Commission found that the government had violated various human

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37. Report on Ecuador, supra n.28 at 88.

38. *The Situation of Human Rights in Cuba,* Seventh Report,OEA/Ser.L/V/II.61,Doc.29 rev.1,4 October 1983,Chapter XIII (The Right to Health).

39. Id, paras.60-61.

40. Report on Ecuador supra n.28 at 94.

41. *Yanomami* Case, Res. No.12/85,Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985.*

right because it failed to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians"[42] in the face of private incursion into the indigenous group's territory. Other cases and country studies have specified that governments must enact appropriate laws and regulations to govern industrial and other activities, and then fully enforce them. This requirement includes compliance with and enforcement of the international agreements to which the state is a signatory, whether these are human rights instruments or ones related to environmental protection.

Anticipating concerns with economic development as a priority matter, the Commission has recognized a "right to development" and agreed that such a right implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. While the norms of the inter-American human rights system "neither prevent nor discourage development" regional human rights norms "do require that development take place under conditions that respect and ensure the human rights of the individuals affected." States thus are not exempt from human rights and environmental obligations in their development projects: "the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."[43] More recently, the Commission again acknowledged the importance of economic development for the prosperity of the populations of this Hemisphere, but insisted that "development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being."[44]

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42. Id. at 32

43. *Report on Ecuador,* supra n.28 at 89.

44. *Maya Indigenous Communities of the Toledo District v. Belize,* Report N° 40/04,Case

The Inter-American Court significantly extended the guarantees afforded indigenous and tribal peoples in its 2007 judgment in the case of the Saramaka People v. Suriname.[45] As with decisions by the Commission, the Court attempted to strike a balance between community land and resource claims and the state's decisions on economic development through concessions for the exploration and extraction of natural resources. The Court held that the right to property is not absolute and Article 21 of the Convention cannot be read to preclude all concessions for exploration and extraction in indigenous lands.[46] However, the Court will assess and give crucial weight to the question of "whether the restriction amounts to a denial of the [indigenous and tribal peoples'] traditions and customs in a way that endangers the very survival of the group and its members."[47]

The Court set forth three safeguards it deemed essential:(1) the state must ensure the effective participation of the members of the community, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within the territory;(2) the state must guarantee that the community will receive a reasonable benefit from any such plan within their territory; and (3) the state must ensure that no concession will be issued within the territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment.[48] These requirements parallel the Bonn Guidelines on Access and Equitable Benefit-Sharing, adopted pursuant to the Convention on Biological Diversity, although the Court did not cite them. The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21(2) of the Convention.[49] Most

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12.053 Merits), October 12,2004 [hereinafter Toledo Maya Case], para.150.

45. Case of the Saramaka People v. Suriname, judgment of Nov.28,2007.

46. Id. at paras.125-126. 47. Id. at para.128.

48. Id. at para.129.

49. Article 21(2) provides that [n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the

importantly, the Court held that large-scale development or investment projects that would have a major impact within indigenous territory can only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.

In its admissibility decision in the case of *Community of San Mateo De Huanchora and its Members v. Peru,*[50] the Commission indicated the circumstances in which the Commission will issue precautionary measures to address environmental emergencies, a decision that has particular relevance to climate change litigation.The applicants claimed that the State's failure to address toxic waste sludge was responsible for violating the Convention-guaranteed rights to life, humane treatment, personal liberty, a fair trial, protection of honor and dignity, freedom of association, protection of the family, rights of the child, property, freedom of movement and residence, to participate in government, equal protection before the law, judicial protection, and progressive development of economic, social, and cultural rights enshrined in the American Convention.[51]

The petitioners requested precautionary measures, claiming that the severity of the environmental pollution had triggered a public health crisis, especially for children, and that every day the risk associated with exposure to the metals in the sludge was increasing.On August 17,2004, the Commission adopted precautionary measures, requesting the government to report, within 15 days, that it was (1) starting up a health assistance and care program for the population of the community, in

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cases and according to the forms established by law.

50. Admissibility, Report N° 69/04,Petition 504/03 (Oct.15,2004).

51. The petitioners also asserted that the mining company violated Peruvian law. The petitioners claimed that the mining concession infringed legal provisions for the mining sector, especially Law 27015 on mining concessions in urban areas and urban expansion, because it was granted in a zone of urban expansion, did not observe the provisions requiring submittal of an environmental impact assessment (EIA) study on the effects of the mining, and was not authorized by the respective municipal permit from the office of the mayor.

order to identify those persons who might have been affected by the pollution so that they could be given relevant medical care; (2) drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste; (3) starting the work required to treat and transfer the sludge to a safe site, where it will not produce pollution, in line with the technical conditions set forth in the impact study, once the study was completed; (4) drawing up a timetable of activities to monitor compliance with the measure adopted by IACHR and (5) taking due account of the community and its representatives. The Commission also declared the application admissible.

- Africa

Finally, in the African human rights system, *SERAC v. Nigeria*[52] contains a full exposition of the implications of a rights-based approach to environmental protection, based on the African Charter of Human and Peoples Rights. The communication alleged that oil production activities supported by the government caused environmental degradation and health problems. The Commission held that the government had breached its obligations with respect to, inter alia, the right of peoples to a "general satisfactory environment favorable to their development" (Article 24).[53] The obligations were found to contain four separate but overlapping duties:to respect,[54] protect,[55] promote,[56] and

52. Decision regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1(Afr. Comm'n Hum. & Peoples' Rts.May 27,2002),at<http:// www .umn. edu/ humanrts/ africa/ comcases/allcases.html> [hereinafter Decision].

53. The Commission also found violations of the right to non-discrimination (Article 2),the right to life (Article 4), the right to property (Article 14),the right to health (Article 16),the right to housing (implied in the duty to protect the family, Article 18(1)),the right to food (implicit in Articles 4,16 and 22),and the right of peoples to freely dispose of their wealth and natural resources (Article 21).

54. Respect for rights entails refraining from interference with the "enjoyment of all fundamental rights." With regard to socioeconomic rights, in particular, respect means that " [t]he State is obliged to respect the free use of resources owned or at the disposal

fulfill[57] the guaranteed right entailing "a combination of negative and positive duties."[58] The Commission concluded its analysis by emphasizing that environmental rights and economic and social rights are essential elements of human rights in Africa, that the Commission intends to apply them, and that "there is no right in the African Charter that cannot be made effective."[59]

Does the jurisprudence of the human rights bodies support litigation to confront state action/inaction on climate change? On December 7,2005, indigenous Inuit peoples of the Circumpolar Conference filed a petition with the Inter-American Commission on Human Rights, in which they argued that the failure of the United States government to regulate the causes of global climate change had violated their internationally recognized human rights. The Inuit alleged that their way of life, including fundamental aspects such as hunting and travel, have been and are being jeopardized by melting Arctic ice caused by global warming. This petition marked the first attempt by a group to directly link internationally recognized human rights to global climate

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of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs." Id.,para.45.

55. Protection of rights requires legislation and provision of effective remedies to ensure that rights-holders are protected "against other subjects" and "political, economic, and social interferences." Id.para.46.

56. Promotion involves such actions as "promoting tolerance, raising awareness, and ... building infrastructures."Id.

57. Fulfillment of rights and freedoms requires the state to move its "machinery" toward the actual realization of rights - for example, by directly providing, as necessary,"basic needs such as food or resources that can be used for food (direct food aid or social security)."Id.,para 47.

58. Id., para.44 citing Asbjørn Eide,(1995) 'Economic, Social and Cultural Rights as Human Rights,' in Asbjørn Eide, Catarina Krause, & Allan Rosas (eds.) *Economic, Social and Cultural Rights:A Textbook 21 [hereinafter Economic, Social and Cultural Rights].*

59. Id., para.68.

change. The treatment of the case reveals the problems of standing, justiciability, ripeness and causality that are encountered when individuals seek to vindicate their environmental rights through human rights litigation.

The Inuit people's petition argued that the United States government failed to adequately regulate greenhouse gas emissions within its jurisdiction.As a result, the United States has contributed significantly to the phenomenon of global climate change, the consequences of which have impacted the Arctic environment and resulted in violations of the Inuit people's right to life, the right to property and home, the right to health and well-being, and freedom of movement, all contained in the American Declaration on the Rights and Duties of Man.[60] The petition also asserted that the United States has breached its obligations under several international environmental instruments to which it is party, including the U.N. Framework Convention on Climate Change.

The petitioners asked the Commission for a declaration that the United States has violated the Inuit people's human rights guaranteed by the Declaration. They also asked the Commission to recommend that the United States take remedial measures, including:the adoption of mandatory reductions of greenhouse gas emissions; the modification of the decision-making process for all major government actions to include consideration of the impacts of any resulting greenhouse gas emissions on the Arctic environment and the Inuit peoples;the establishment and implementation of a plan to protect Inuit culture and resources and to mitigate any harm to these resources caused by U.S. greenhouse gas emissions;and the implementation of a plan to assist the Inuit people with adapting to the inevitable changes caused by climate change.

In November 2006,the Commission dismissed the Inuit people's petition as inadmissible.The Commission, however, granted the Inuit

60. The United States is not a party to the American Convention.

people's request for a hearing, March 1,2007,[61] to allow them to present more evidence demonstrating the connection between global climate change and international human rights.There were several problems with the petition.First, it included Canadian petitioners, specifically raising the issue of transboundary obligations which the Commission has thus far not considered. Second, the problem of causality and apportioning responsibility may have raised concerns for the Commission. Thirdly, some authors have pointed out that climate change may actually benefit some Arctic dwellers and improve their living conditions, requiring consideration of whose rights and which rights should be preferred.[62] Most importantly, the Commission may have felt it lacked the necessary expertise to understand, much less design remedies for, global climate change based on the petition that was filed.

Despite the inadmissibility of the Inuit petition, there are advantages to such complaints. As already mentioned, a rights-based approach enhances accountability by allowing utilization of international petition procedures to bring international pressure to bear when governments lack the will to prevent or halt environmental harm that threatens human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation. Even when the action fails to result in specific recommendations, a hearing like that held by the Inter-American Commission serves to educate and enhance the visibility of climate change issues. Petition procedures can help to identify problems and

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61. Press Release, Inter-American Commission on Human Rights to Hold Hearing on Global Warming (Feb.2,2007),available at http:// www. earthjustice. org/ news/ press/ 007/ inter- american-commission-on-human-rights-Hearing-on-Global-Warming.html See Inter-Am. Comm'n on Hum. Rts, Org. of Am. Sts., Public Hearings of the 127 Period of Sessions, Thur., Mar.1,2007,Hearing on Human Rights and Global Warming, http:// www .cidh .org/ audiencias/ select.aspx.

62. See:Sara C. Aminzadeh, Note,'A Moral Imperative:The Human Rights Implications of Climate Change,'30 *Hastings Int'l & Comp.L.Rev.*(2007)231 at pp.262-63.

encourage their resolution, including by the provision of technical assistance. The availability of individual complaints procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.

There are significant litigation hurdles, however. Litigants must make out a prima facie case that greenhouse gas emissions from the defendant government have caused them specific harm. Making the link between specific climate events or changes in ecosystems and greenhouse gas emissions from a particular country may be legally difficult.One answer could be application of the precautionary principle - reversing the burden of proof to demand that a state prove there is no causation.

A second caution is necessary: human rights bodies have limited mandates in respect to remedies.The European Court can award monetary damages, but has little power to order injunctive relief or mandate specific action.Thus, rights may be vindicated with money for the applicants to move away from the environmental harm, but it is not clear that the environmental conditions themselves are improved in the short term. Moreover, decisions of the Inter-American Commission, the African Commission, and the UN bodies are recommendations that lack the binding force of judgments of the regional courts. While good faith cooperation with international bodies given monitoring power and the authority to hear complaints suggests that states should comply, some governments take the view that mere recommendations need not be strictly followed.

Finally, the most politically-charged aspect of climate change litigation may be the potentially vast expansion of the territorial scope of state obligations.Presently, human rights instruments require each state to respect and ensure guaranteed rights "to all individuals within its territory and subject to its jurisdiction." This geographic limitation reflects the reality that a state normally will have the power to protect or the possibility to violate human rights only of those within its territory and jurisdiction. Nature recognizes no political boundaries, however. A state polluting the atmosphere may cause significant harm to individuals

thousands of miles away. States that permit or encourage GHG emissions or depletion of forests contribute to global warming that threatens the entire biosphere.

Ultimately, climate change litigation requires consideration of substantive environmental standards to restrict harmful air pollution and other types of emissions. Although human rights bodies and international tribunals in general may be reluctant to engage in such determinations -- and face opposition from some states if they do so -- such regulation is by no means impossible. Rights to an adequate standard of living and to social security are sometimes defined in international accords such as the European Social Charter or Conventions and Recommendations of the International Labor Organization. States implement these often flexible obligations according to changing economic indicators, needs, and resources. Similarly, substantive standards for environmental quality are a necessary complement to procedural rights. Otherwise, a human rights approach to environmental protection will be ineffective in preventing serious environmental harm. Nonetheless, it is more appropriate for these technical requirements to be negotiated and regulated through international environmental norms and standards, which can then be applied by human rights bodies, rather than having the human rights bodies themselves decide on the appropriate level of greenhouse gas emissions for a particular state. This does not preclude a human rights tribunal faced with a climate change complaint from holding that a given state is violating human rights when it fails to take any meaningful action to limit greenhouse gas emissions.

C.An Alternative Strategy: Inter-State Human Rights and Resource Litigation

Another rights-based approach is explored herein, whereby the government of a state may, and indeed arguably has the duty to, assert and defend the rights of its inhabitants, rather than remaining passive

and ultimately defending itself for alleged rights-violating acts and omissions.The premise of the approach is that in the international community of sovereign and juridically-equal states, governments exist for the purpose of protecting the rights of the state and the human rights of their inhabitants, present and future.When transboundary harm occurs it may be possible to merge the law of state responsibility for environmental harm with international human rights law to achieve the goals of prevention and accountability.Rather than individuals attempting to vindicate their rights, plaintiff states may represent those individuals as well as future generations in bringing claims against the responsible states, thus utilizing state sovereignty as a vehicle for implementing international human rights law and international environmental law. The potential and problems with this rights-based approach are explored in this section.

Sovereign equality, including permanent sovereignty over natural resources,[63] is a basic constitutional principle of the international legal system.[64] It implies non-intervention or non-interference with decisions taken by each government concerning matters exclusively within the state's territory or jurisdiction.Traditional international law respects each state's exclusive jurisdiction over its territory.Yet, acts which take place or originate on the territory of one state may cause damage or infringe upon the sovereignty of another state, giving rise to conflict between the sovereign rights of the two states. When the acts involve environmental harm, the conflict can be looked at from two perspectives: that of the state on whose territory the pollution originates and that of the state whose territory is affected by the pollution.

The polluter state might argue the theory of absolute state sovereignty, but this approach has been repudiated in a world where states are increasingly obliged to cooperate.[65] Doctrine and

63. See, e.g. Declaration on Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII) of 14 Dec.1962.

64. See I Brownlie *Principles of International Law* 287 and n.1 (6th ed.2003).

65. Absolute sovereignty is identified with the "Harmon Doctrine," named for the United

international practice are virtually unanimous in condemning claims of absolute state sovereignty, which offers no legal means to reconcile the equal rights of two opposing states, especially when the conflict is over use of a shared natural resource. Instead, equitable balancing and norms of transboundary conduct have been enunciated in international litigation and have emerged in state practice. The International Court of Justice, in its judgment in the 1949 Corfu Channel case, referred to "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other states."[66] The same year, the United Nations Survey of International Law concluded that there is "general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law."[67]

Principle 21 of the 1972 Stockholm Declaration on the Human Environment affirmed the general principles of state sovereignty in the environmental context. It began by proclaiming that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies."[68] The reference to the UN Charter and principles of international law indicates that state sovereignty is exercised within international law and with respect for the rights of others.State sovereignty within international law implies, in

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States Attorney General who, in 1885,officially claimed that the Mexican government had no right to protest water pollution in the boundary Rio Grande River, which lowered water quality in Mexico and damaged Mexican agriculture, thereby harming Mexican farmers.Harmon contended that the rules, principles, and precedents of international law imposed no obligation or responsibility on the United States to protect Mexico from pollution.Therefore any harm to Mexico was a political rather than a legal question.21 Op.ATT=Y GEN.274,at 280-83(1895).

66. I.C.J. Rep.,(1949) p.22.

67. U.N. Doc. A/CN.4/1/Rev.1(U.N.Pub.V.1(1)),at 34(1949).

68. Stockholm Declaration on the Human Environment, Principle 21,in Report of the United Nations Conference on Human Environment,
U.N.Doc.A/CONF.48/14/Rev.1(1972).

particular, that each state's resource utilization must not harm other states. Principle 21 explicitly requires this as it balances the principle of permanent sovereignty with each state's responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This balance reflects the equitable principle of abuse of right or good neighbourliness among equal subjects of the international legal system.[69] It goes beyond courtesy or comity in being a normative principle regulating relations between states.[70]

The doctrine of abuse of right thus bars a state from exercising a sovereign right without an acceptable motivation or benefit when the activity undertaken causes harm to another state. Assessing whether the exercise of a right is abusive involves judging whether the harmful consequences produced outside the territory outweigh the benefits to those within. An agreement between Finland and Sweden concerning boundary waters expresses this concept:

> Where the construction would result in a substantial deterioration in the living conditions of the population or cause a permanent change in natural conditions such as might entail substantially diminished comfort for people living in the vicinity or a significant nature conservancy loss or where significant public interests would be otherwise prejudiced, the construction shall be permitted only if it is of particular importance for the economy or for the locality or from some other public standpoint.[71]

The language of this agreement demonstrates the importance of sovereignty to the states involved, but also the limits:each state requires

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69. Australia relied upon its sovereign rights to protest acts having detrimental impacts within its territory in bringing its action against France in the Nuclear Tests case.See ICJ Pleadings, Nuclear Tests, I;479-90, Brownlie refers to this as invoking "the international law equivalent to trespass." Brownlie, supra n.5 at 275 (6th ed.2003).

70. A.C. Kiss *Abus de Droit en Droit International* (1953).

71. Art.3(2),Agreement Concerning Frontier Rivers between Finland and Sweden (Sept.16,1971).

that the other accept some inconveniences and deterioration in conditions as a result of utilizing the common resource for economic development, but creates a presumption that permission should be denied for an activity when it would cause "substantial" or "significant" harm. Another way of expressing this concept, utilizing human rights language, is that one state's projects aimed at the fulfillment of economic and social rights may proceed if there is no significant impairment of the human rights of individuals in another state.[72]

The principle of abuse of right thus requires balancing the interests of the acting and impacted states and respecting proportionality in conduct.[73] The OECD Principles on Transfrontier Pollution explicitly refer in their introduction to "a fair balance of the rights and obligations among countries concerned by transfrontier pollution."[74] The text states that "countries should seek, as far as possible, an equitable balance of their rights and obligations as regards the zones concerned by transfrontier pollution."[75]

Today it is generally accepted that the principle forbidding abuse of right, whose origin lies in Roman law (sic utere iure tuo ut alterum no laedas - i.e. use your own so as not to injure another) forms part of international law.[76] Treaties and judicial decisions apply the abuse of right principle to transfrontier pollution.[77] According to Art.5(1) of the

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72. A balancing of economic and social rights often occurs within a single state, as a government with scarce or limited resources must allocate the resources among, inter alia, education, science, housing and health.

73. The legal principles drafted by the panel of independent experts for the Brundtland Commission reflect this concept. See Art.12,p.28.

74. OECD, Principles Concerning Transfrontier Pollution, C(74)224 of Nov.14, 1974, Introduction. 75. Id.

76. See, e.g. Corfu Channel Case, supra n.7;Kiss, supra.n.11.See also Restatement (Third) Foreign Relations Law of the United States, sec.601(A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances to ensure that activities within its jurisdiction and control do not cause significant injury e.g. to the environment of another state or of areas beyond the limits of national jurisdiction.).

77. As early as 1911,in reference to international watercourses, the Institute of

UN Convention on the Law of the Non-Navigational Uses of International Watercourses:[78]

> Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

The widespread adoption of the concept of equitable utilization in treaty law and state practice could be deemed to create a specific rule of international law directly forbidding significant transfrontier pollution as a *prima facie* case of abuse of right. In other words, the very fact of such pollution may be deemed per se a violation of the principle of equitable utilization and thus prohibited by international law. Jurisprudence, especially the famous *Trail Smelter* arbitration,[79] holds that:

> under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the

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International Law stated that neither state bounded by a river may "on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc., thereof." Scott, *Resolutions of the Institute of International Law Dealing with the Law of Nations* 169(1916).

78. New York, May 21,1997.

79. The Trail Smelter Arbitration,1931-1941, 3 U.N.R.I.A.A.1905,wherein the tribunal asserted a general duty on the part of a state to protect other states from injurious acts by individuals within its jurisdiction. It also noted the difficulty of determining what constitutes an injurious act.Swiss domestic courts had concluded, and this tribunal agreed, that precautions taken by a state should be the same as those it would take to protect its own inhabitants.See also Lake Lanoux Arbitration (France-Spain), Arbitral Tribunal (1957) 12 R.I.A.A.281.An English translation of the award appears in Y.B. of the I.L.C.,1974,Vol. II (Part Two), pp.194-99,U.N. Doc. A/5409,paras.1055-1068;53 AJIL 156-71(1959);and International Law Reports, pp.101-42(1957).

properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[80]

It is difficult to overestimate the importance of the *Trail Smelter* arbitration.[81] The arbitral Convention itself constitutes a noteworthy precedent, insofar as it announced two principles. First, it recognized the responsibility of a state for acts of pollution having their origin on its territory and causing damage on the territory of other states, even if the polluting acts are not imputable to the state itself or its organs. Thus, the state may be responsible for not enacting necessary legislation, for not enforcing its laws against those within its jurisdiction or control, for not preventing or terminating an activity, or for not sanctioning the person responsible for it. Second, the Convention transcended international responsibility to resolve the conflict before it, aiming towards a common regulation of the issue. The award itself affirmed the existence of a rule of international law imposing liability for failing to prevent significant transfrontier air pollution, a fact of fundamental importance to future action on climate change.[82] The Tribunal also

80. 3 U.N.R.I.A.A. 1938,1965.

81. The case continues to be invoked.In 1972,Canada referred to the judgment when an oil spill in Washington polluted beaches in British Colombia.11 *Can.Y.B.Int'l.L.* 333-34 (1973).It was referred to by both parties in the Gabcikovo/Nagymaros Project case at the ICJ, [1997] ICJ 3 (Sep.25).Most recently, Pakootas v. Tech Cominco Metals, Ltd.,452 F.3d 1066(2006) imposed liability on the owner of the Trail Smelter, which continues to operate, for unpermitted toxic waste disposal. The Ninth Circuit held that the disposal occurred within the United States, where the toxic substances leached from the waters in which they were discharged, and therefore there was no need to consider the case as one of transboundary pollution.

82. There remain difficult problems in utilizing the Trail Smelter case. While the imposition of liability implies that a wrongful act occurred, the tribunal did not discuss the standard of care or indicate whether the case was one of strict liability, negligence or intentional wrong. Canada had acted (issuing permits for the smelter to operate) and failed to act (not regulating or taking mitigating actions).Whether the government would have escaped liability by showing "due diligence" to reduce harmful emissions is

claborated a framework for the future, recognizing the necessity of further cooperation between the interested states, and, in particular, indicating the maximum emissions permitted under various meteorological conditions. In requiring mitigating or preventive regulation, the award indicated that polluters cannot always pay, but may be required to halt serious pollution according to the evolution of the situation and knowledge of it.

Stockholm Principle 21 fundamentally restated these international obligations and added duties owed the international community as a whole.Thus, the duty to not cause damage to the environment exists not only towards other states, but also towards the "areas beyond the limits of national jurisdiction:"the high seas and the airspace above them, the deep seabed, outer space, the Moon and other celestial bodies, and Antarctica.

Principle 21 of the Stockholm Declaration, although part of a non-binding text, is now recognized as a rule of customary international law.It has been reaffirmed in declarations adopted by the United Nations, including the Charter of Economic Rights and Duties of States[83] and the World Charter for Nature,[84] and has been adopted by other international organizations and conferences.[85] Its content is inserted in the Convention on the Law of the Sea.[86] The 1979 Geneva

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unclear;however, it seems most likely from the opinion that the government could pay for the harm caused and allow to smelter to continue to operate - unless the harm became so severe that it would be inequitable to allow it to continue. Note, too, that the EPA argued in Massachusetts v. EPA that greenhouse gas emissions are not "pollutants" as defined by the US Clean Air Act.

83. Charter of Economic Rights and Duties of States, G.A.Res.3281,Dec.12,1974,29 U.N.GAOR Supp. No.31(A/9631).

84. World Charter for Nature, G.A.Res.37/7,37 U.N.GAOR Supp,(No.51) at 17,U.N.Doc.A/37/51(1982).

85. See e.g., Preliminary Declaration of a Program of Action of the European Communities in respect to the Environment, O.J.C 112/1,Dec.20,1973;Final Act, Conference on Security and Cooperation in Europe, Helsinki, Aug.1976.

86. UNCLOS Art.194(2).

Convention on Long Range Transboundary Air Pollution reproduces Principle 21 stating that the Principle "expresses the common conviction that States have" on this matter. Principle 21 as restated in the 1992 Rio Declaration also appears in the preamble of the 1992 UN Framework Convention on Climate Change and Art.3 of the Convention on Biological Diversity, to which virtually all the states of the world are contracting parties. Finally, the International Court of Justice recognized in an advisory opinion that "[t]he existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment".[87] This statement was repeated in the judgment concerning the *Gabçikovo-Nagymaros Project,* in which the Court also "recall[ed] that it has recently had occasion to stress . . . the great significance that it attaches to respect for the environment, not only for states but also for the whole of mankind." [88]

D.Inter-State Climate Change Litigation:*Massachusetts v. EPA*

The landmark Trail Smelter arbitration[89] relied on interstate cases in federal systems to come to its conclusions.The Tribunal specifically noted that the decisions of the United States Supreme Court on which it relied were decisions in equity,[90] but also indicated that standing to sue was based on the sovereign legal interests of each state.The leading decision on point was *Georgia v.Tennessee Copper Company and*

87. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996,pp.241-242,para 29.

88. Gabcikovo/Nagymaros Case,1997 I.C.J.Rep.(Sept.25),para 53.

89. Trail Smelter (U.S.v.Can.)(1941) RIAA iii.1905 at 1965;Ann. Digest (1938-40) no.104.

90. The cases relied heavily on the law of nuisance, which involves an equitable balancing of benefits and burdens to the parties.

Ducktown Sulphur, Copper and Iron Company, Ltd.[91] This case defined the nature of the suit as one brought by the state in its capacity as quasi-sovereign, a capacity that gives it an interest "independent of and behind the titles of its citizens, in all the earth and air within its domain." The Supreme Court found that,

> it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

The court's reference to pollution "on a great scale" implicitly requires that states in a community (either federal or international) accept a certain amount of pollution incidental to normal activities, a notion also inherent in the concept of abuse of right.

Air pollution is a cause of anthropogenic climate change and like other air pollution results, inter alia, in the destruction of forests, mountains, crops and orchards.It thereby deprives individuals of their property and may otherwise reduce the enjoyment of their human rights.If not addressed, climate change threatens the ultimate sovereign and human right, since the very existence of some states and individuals is threatened by rising sea levels. But even more than the earlier pollution cases, climate change poses complex issues of proof sufficient to impose state responsibility and demand mitigation by those responsible for the polluting activities.

The recent US Supreme Court judgment of *Massachusetts v. EPA*[92] considered these difficult issues, relying in part on the same case utilized by the Trail Smelter arbitral panel. Aspects of the litigation may

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91. *Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company, Ltd.*,206 U.S.230 (1907).

92. Massachusetts v. EPA,549 U.S. 497(2007).

suggest possible avenues for pursuing a rights-based approach to climate change in international or national tribunals: instead of human rights litigation brought by individuals, the affected states could litigate to protect their resources, and to vindicate the human rights of present and future generations of their citizens.

A dozen states in the United States[93] joined by American Samoa, the District of Columbia, the cities of New York and Baltimore,[94] and a host of non-governmental organizations[95] brought suit in federal court

93. California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. Delaware filled a brief amicus curiae in support, noting that "as a low-lying coastal state, [it] experiences daily the effects of global warming. These effects include increased flooding and coastal erosion, increased ocean temperature, and heightened damage to the environment, the property and the people of Delaware."Five other states also submitted a brief in support of the petitioners:Arizona, Iowa, Maryland, Minnesota and Wisconsin.

94. The U.S. Conference of Mayors, National Association of Counties, International Municipal Lawyers Association, American Planning Association, the City of Seattle, the City of Albuquerque, the City of Burlington, and the City and County of San Francisco filed as amici curiae in support of the petitioners.In their statement of interest they reported that over 18 months, mayors of 275 cities in 42 states signed the U.S. Mayors Climate Protection Agreement (available at http://www.ci.seattle.wa.us/mayor/climate/). They agreed to reduce greenhouse gas emissions in their communities to seven percent below 1990 levels by 2012.

95. The non-governmental organizations were:Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and the U.S. Public Interest Research Group. Calpine Corporation, a clean energy company, filed an amicus curiae brief in support of the petitioners, as did the Aspen Skiing Company and Entergy Corporation, one of the nation's largest owners and operators of electric-generating power plants. Entergy has undertaken a voluntary emissions reduction program and argued that incentives had to be given for other companies to do the same.In addition, the company argued that regulation of GHG's would stimulate innovation in research and development of energy sources.

in the United States to challenge the federal government's failure to regulate greenhouse gases under the authority of the federal Clean Air Act.[96] The petitioners alleged that the Environmental Protection Agency (EPA) had abdicated its responsibility to regulate the emissions of four greenhouse gases (GHG),including carbon dioxide.[97] The EPA was joined in its defense by ten states[98] and six trade associations representing the automotive and energy sectors of the economy.[99]

As in earlier cases concerning transboundary environmental harm, the states argued in part that they have a unique interest in the federal response to climate change because that response will have a significant effect on the impact of climate change on state resources. They posited that there will be more GHG emissions if states regulate individually than if there is national regulation, leading to greater harm to the states. The states'interests were asserted to include preventing loss of unique state lands and unique resources and bodies of water;preventing harm from more frequent and intense storm surges and floods;and protecting shrinking water supplies. Respondents and the intervening states countered that because a large percentage of worldwide CO_2 emissions comes from outside the United States, it would be futile for the EPA to regulate such emissions and any such regulation would result in requiring states to achieve the impossible.

In the opening paragraphs of its judgment, the Supreme Court acknowledged that it had accepted to hear the case based on the "unusual importance of the underlying issue"of global warming. As a

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96. 42 U.S.C.7602.

97. The states might also have brought action directly against the major emitters, the power companies and auto manufacturers, but jurisdiction and proof of causation might have been more difficult and multiple lawsuits would have been required to reach all the major actors.

98. Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas and Utah.

99. Alliance of Automobile Manufacturers, National Automobile Dealers Association, Engine Manufacturers Association, Truck Manufacturers Association, CO2 Litigation Group, and Utility Air Regulatory Group.

matter of statutory analysis, the case was relatively straightforward. The Clean Air Act requires the EPA Administrator to prescribe standards applicable to the emission "of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[100] The statute defines "welfare" to include effects on weather and climate,[101] while "pollutant" is broadly defined to include any substance or matter emitted into or entering the ambient air.[102] Based on these provisions, nineteen private organizations filed a petition in 1999 with the EPA to obtain regulation of four greenhouse gases:carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.After fifteen months of consideration, the EPA requested public comment on the petition in 2001.EPA received over 50,000 comments during the subsequent five months.[103]

During the comment period, the White House commissioned its own climate change study[104] which concluded that anthropogenic climate change is occurring.Despite the evidence, the EPA denied the petition on Sept.8,2003,giving two reasons:(1) the Clean Air Act does not authorize EPA to issue mandatory regulations concerning greenhouse gases;(2) even if the authority did exist, it would be "unwise" to issue regulations, given "residual uncertainty" about a causal link between greenhouse gases and climate change, as well as the "economic and political significance" of the issue.[105] Separately, the EPA stated that it "disagrees with the regulatory approach urged by petitioners,"[106]

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100. Sec.202(a)(1),Clean Air Act, added by Pub. L.89-272,sec.101(8),79 Stat.992,and as amended by, inter alia,84 Stat.1690 and 91 Stat.791,42 U.S.C.sec.7521(a)(1).

101. 42 U.S.C.7602(h). 102. 42 U.S.C.7602(g).

103. Pet. App. A63.

104. *National Research Council, Climate Change:An Analysis of Some Key Questions* (2001). 105.68 Fed. Reg.52922.

106. The EPA preferred instead "near-term voluntary actions and incentives" and "programs aimed at reducing scientific uncertainties and encouraging technological development." Pet;App.A82.

and that it would not be "effective or appropriate for EPA to establish GHG standards for motor vehicles at this time" in part because motor vehicles are only one of many sources of air pollutants associated with climate change. Subsequently EPA argued that no one had standing to challenge the agency's decision.

The applicants sought judicial review of the EPA's denial of their petitions. A divided Court of Appeals[107] upheld the EPA's decision, each judge in the majority doing so on a different ground.The petition to the Supreme Court followed, leading to a flurry of interventions and amici curiae on both sides.[108]

Two points are of particular interest in the case.The first notable point is the Court's acknowledgement of the reality of climate change, giving a judicial imprimatur to scientific findings on the impact of greenhouse gases. At least equally important is the Court's discussion of standing, for its holding and rationale on this issue might support future

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107. *Masachusetts v.* EPA,415 F.3d 50 (D.C. Cir.,2005).

108. See supra notes 10-12 for a partial listing of the amici curiae.In addition to those previously mentioned, other notable briefs were filed in the case. Four former EPA administrators supported the petitioners, showing the past practice of the EPA to protect the public from new pollutants and emerging health threats, based on available scientific information. The Alaska Inter-Tribal Council and other Alaskan indigenous groups argued on behalf of the petitioners that the impacts of climate change threaten the physical and cultural survival of Alaska natives. Impacts of global warming are already affecting their members because of thinning sea ice, increased coastal erosion, melting permafrost, and changes in plant and animal distributions, thus depleting the subsistence resources of the indigenous peoples. The position of these amici directly opposed that of the state of Alaska, which intervened in support of the EPA's position. A brief by major religious organizations, including the National Council of the Churches of Christ, Church World Service and National Catholic Rural Life Conference, focussed on the religious dimensions of combating climate change, relying on Christian tenets of stewardship for the natural world. A very large coalition of groups concerned with wildlife conservation, including sporting and conservation organizations, the Association of Zoos and Aquariums, religious organizations and professional associations, joined in a brief that addressed the impact of climate change on wildlife and ecosystems.

international inter-state cases similarly based on the infringement of sovereign rights and the human rights of a state's inhabitants.[109]

The Supreme Court's judgment was close (5-4). The majority opinion began with a review of the emergence of concern with climate change from the enactment of the Clean Air Act to the present, including the adoption of the UN's Framework Convention on Climate Change and the Kyoto Protocol,[110] as well as the reports of the Intergovernmental Panel on Climate Change.

The petitioners, supported by numerous briefs filed by amici curiae, argued that global warming is not merely a future threat, but a present reality, with deadly public health consequences, storm surges and intense hurricanes.They asserted that standing does not demand waiting until there is a catastrophic level of global warming, but only requires some present actual or imminent injury.In their view "EPA distorted two statutory terms ("air pollutant" and "judgment") and ignored a third ("welfare") in order to inject its own policy preferences into a statute that does not embody them."[111]

The plaintiffs conceded that EPA action on motor vehicles will not stop global warming altogether but could reduce the concentration of greenhouse gases in the atmosphere and thereby delay and moderate, to a significant extent, the impacts of global warming.A brief filed by an alliance of environmental organizations from western states[112]

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109. The first level proceeding at the DC Circuit Court noted that only one of the plaintiffs needed to demonstrate standing and held that Massachusetts had plainly demonstrated that it had standing.Hence the focus on that state's interest and injury in the Supreme Court judgment.Amici briefs nonetheless recounted "numerous and profound, particularized and imminent"injury to the other plaintiffs, including more frequent and more damaging storms, more flooding, more erosion, and an increase in summer-season heat stress morbidity and mortality.. Mayors brief at 24.

110. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Mar.16,1998,37 ILM 32. 111. Pet. Brief, p.2.

112. The groups joining the brief were North Coast Rivers Alliance, Desert Protection Society, Westside Association to Save Agriculture, California Sportfishing Protection Alliance, Save Medicine Lake Coalition, Klamath Forest Alliance, San Joaquin Audubon

supported the petitioners, arguing that although the effects of global warming are generalized, they have had specific adverse impacts on the petitioners, who have suffered particular, concrete, actual, imminent and redressable harms due to the failure to regulate carbon dioxide emissions.[113] Moreover, because certain vulnerable segments of the population suffer a disproportionate share of the harm inflicted by global warming, while others remain uninjured, the political process is unlikely to adequately address the injuries.

The EPA argued that the plaintiffs lacked standing because the widespread nature of the harm alleged from greenhouse gas emissions presented an insurmountable jurisdictional barrier.[114] The plaintiffs'injury could not be distinguished from that of the public at large and therefore there was no "injury in fact." The EPA also argued that the petitioners failed to establish that the injuries they allege from global warming are traceable to greenhouse gas emissions from new vehicles in the United States, rather than to greenhouse gas emissions from other sources in the United States, to greenhouse gas emissions from vehicles or other sources elsewhere in the world, or to entirely different factors.[115] Third, the petitioners failed to show that a decision to require regulation of emissions of greenhouse gases from new motor vehicles in the United Sates would redress their injuries.[116] Thus, according to the EPA, the petitioners failed to show either injury in fact, causation, or that the injury would be redressed by a favorable decision.

The Court disagreed with the EPA, after testing whether the

Society and the North Cascades Conservation Council.

113. The nature and scope of real and imminent injuries to coastal states was addressed more fully in an amicus brief filed by a coalition of individuals and groups concerned with ocean and coastal conservation. Those signing the brief included, inter alia, the Ocean Conservancy, Jean-Michel Cousteau, the Marine Conservation Biology Institute, and Ocean Futures Society. 114. Resp. Brief, pp.7-8,10-20.

115. EPA cited figures indicating that as much as 80 percent of all greenhouse gas emissions emanate from countries other than the United States.Further;the U.S. transportation sector is responsible only for about 7% of worldwide greenhouse has emissions.Id.at 13. 116. Fed.Resp.Cert.App.at 12.

plaintiffs had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues" to be decided.[117] The judgment quoted from an earlier opinion by Justice Kennedy, which noted that "it does not matter how many persons have been injured by the challenged action" so long as there is concrete and personal injury to the party bringing suit. This concrete and particularized injury can be actual or imminent, but must be "fairly traceable to the defendant." Finally, it must be shown that a favorable decision would likely redress the injury.[118]

The Court stressed the "special position and interest of Massachusetts." According to the Court, "it is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in [an earlier environmental case] a private individual."[119] Quoting from *Georgia v. Tennessee Copper Co.*[120] - the major case relied upon in the Trail Smelter arbitration - the Court noted that the suit was being brought by the state "in its capacity of quasi-sovereign" and that "in that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."A full century after the earlier judgment, the Court thus reaffirmed that states have a sovereign interest in the environment sufficient to support standing, based on the state's well-founded desire to preserve its sovereign territory today."[121] To emphasize the point, the Court quoted from another judgment affirming

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117. Massachusetts v. EPA at 14,citing Baker v. Carr,369 U.S.186,204(1962).

118. The Court noted that these requirements are relaxed when Congress has granted a procedural right of action to protect the litigant's interests.In such case, the litigant has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.That procedural right to challenge agency action unlawfully withheld was in fact granted by Congress.42 U.S.C. 7607(b)(1). 119. Id. at 15.

120. 206 U.S.230,(1907),See also *Nebraska v. Wyoming*,515 U.S.1,20(1995).

121. Id. at 16.

that states in the U.S. federal system retain the dignity, though not the full authority, of sovereignty.[122] On this basis, Massachusetts and the other petitioners, especially those coastal states threatened with the loss of territory by global warming, were afforded standing to sue the federal government.

The Court's discussion of the states'sovereign rights and duties resonates on the international level.The Court pointed out the limited options available to a state seeking to address climate change or other transboundary environmental harm: it cannot lawfully invade another state to force reductions in greenhouse gas emissions; it cannot legislate a reduction in motor vehicle emissions outside its own jurisdiction.Yet there are important sovereign interests at stake of concern to the state as a whole, including protection against any substantial impairment of the health or prosperity of the individuals within its boundaries.These persons are protected in part by entitling states to "special solicitude" in the standing analysis.The same analysis can apply to independent states in the international system, who are obligated by human rights law to promote and protect the human rights of their inhabitants and whose recourse to force is limited by law.Where individuals may lack procedural capacity to enforce their rights against the acts or omissions of a foreign sovereign, their state can do so on their behalf and can ensure that the state's resources are protected for them and their descendants.

In finding injury to the states, the Court accepted that the harms associated with climate change are "serious and well-recognized" and that significant harm has already been inflicted.[123] Citing petitioners'

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122. *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment,*477 U.S.41,51n.17 (1986).Arizona, Iowa, Maryland, Minnesota, and Wisconsin, as amici curiae in support of the petitioners, had cited to the case to assert that states have standing to sue whenever they allege an interest in preserving their sovereignty and that interest has been interfered with or diminished. Brief of Arizona, et al, p.20.

123. The harms identified include "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated

experts,the Court specifically mentioned sea level rise and increases in the spread of disease, finding that sea level rise has already begun to swallow Massachusetts'coastal land.State ownership of a substantial portion of the coastline gives the state a particularized interest in obtaining EPA action.

A key element in the litigation was whether or not EPA regulation of greenhouse gases would redress any harm to the petitioners. EPA argued that its regulation of new motor vehicles in the US would be so insignificant that it could not provide any realistic possibility of mitigating global climate change and remedy the injury to petitioners.The agency specifically pointed to rising greenhouse gas emissions from developing nations like China and India. This "offset" meant no effective relief could be obtained. The Court rejected the EPA's defense, accepting that incremental action could be sufficient and therefore required by the statute.[124] Moreover, even if China and India are increasing greenhouse gas emissions, a reduction in domestic emissions would slow the pace of global increases, no matter what happens elsewhere.

The final step in the standing analysis was the question of remedy: whether the court could direct EPA to take steps to slow or reduce vehicle emissions, acknowledging that such a step would not reverse global warming.The Court again referred to the "enormity of the potential consequences associated with man-made climate change" noting that the more drastic the injury the lesser the increment in probability necessary to support standing.It concluded that "the rise in sea levels associated with global warming has already harmed and will

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rate of rise and sea levels during the 20th century relative to the past few thousand years." Id at 18,citing NRC Report,16.

124. The Court did not seem particularly convinced that regulating greenhouse gases from new motor vehicles would be an insignificant step.It called emissions from the transportation sector "an enormous quantity,"noting that they account for more than 6% of worldwide carbon dioxide emissions.Id.at 21.Regulating these emissions would "make a meaningful contribution to greenhouse gas concentrations.

continue to harm Massachusetts.The risk of catastrophic harm, though remote, is nevertheless real.That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition."

On the merits, the EPA presented several reasons for the failure to regulate, in addition to its primary contention that it lacked statutory authority over GHGs.The Court rejected the EPA arguments and remanded the case to the EPA with directions to evaluate the regulation of greenhouse gases according to the legal standards set forth in the Clean Air Act.

The Supreme Court's discussion of standing in *Massachusetts v. EPA* is of considerable interest to states contemplating the possibility of international judicial action to mitigate GHG emissions that increase climate change to their detriment. Although the petitioners were component states of a federal union suing the federal government rather than each other, the basis of their standing was the assertion of permanent sovereignty over their natural resources, with clear parallels to and an origin in international law.They also asserted the right and duty to protect their inhabitants. These same bases of jurisdiction could support an inter-state action before the ICJ, the Law of the Sea Tribunal, or a human rights tribunal, depending on the factual allegations.There is some support, in addition to the Trail Smelter arbitration, to suggest that an international tribunal could grant either interim measures of protection or injunctive relief to prevent actual or imminent harm.[125]

Assuming that jurisdiction and standing exist, what is the appropriate legal basis for determining inter-state responsibility and redress for injury caused or threatened by climate change?Thus far, transboundary pollution cases decided by international tribunals have largely relied on principles of equity, such as the abuse of rights doctrine, to assess and balancing sovereign rights. Other equitable

125. See, e.g. ICJ Rep.(1974),312-71 and 494-523.

principles could be invoked, such as common but differentiated responsibilities, as these have emerged in international instruments. Furthermore, international human rights law, missing thus far in the inter-state claims presented for transboundary environmental harm, could add an important normative framework for judging the lawfulness of state acts and omissions. It is the addition of this framework that constitutes the proposed rights-based approach discussed below.

E. Conclusions: Equity, Human Rights and Climate Change

Vast wealth disparities around the globe have resulted in great variation in the nature of environmental problems, the contribution of each state to anthropogenic climate change, and each state's ability to prevent and remedy the consequent harm to its inhabitants and environment. The first principle governing the 1992 Climate Change Convention is that the parties should protect the climate system for the benefit of present and future generations of humankind "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities" (Article 13).This principle not only calls for equity generally but identifies several factors to be taken into account in deciding what is equitable. A second principle adds the factor of need as a further element, reflecting a widespread emphasis on addressing the marginalized and most vulnerable.

Equity is often used as a synonym for fairness or justice, both in procedure and substance.[126] The procedural aspect is concerned with reaching decisions by the 'right process,'while the substantive dimension aims at distributive justice.[127] Distributive justice is compatible with and can further the goals of promoting and protecting human rights. Any allocation of benefits and burdens that makes vulnerable populations worse off, even if the harm is felt outside the boundaries of the state,

126. Thomas Franck, for example, considers equity as subsumed in the concept of fairness, which in his view has both procedural and substantive dimensions. T.Franck (1995) *Fairness in International Law and Institutions* (Oxford:Clarendon Press) at 7-9.
127. Id. at 7.

cannot be regarded as equitable or in conformity with international human rights law. States may invoke both their sovereign rights to exist and to freedom from significant environmental harm, as well as the human rights of their inhabitants, to demand reduction of greenhouse gas emissions by those states most responsible for anthropogenic climate change. Thus, in weighing the various factors to achieve an equitable balance, international human rights obligations play a role.

`Sustainable development'incorporates this understanding of equity as distributive justice, in its effort to strike a fair balance between the goals of short term economic development and long term environmental and human rights protection. Moreover, a rights-based approach to equitable distribution of benefits and burdens is the one that best serves to merge the three pillars of sustainable development: economic development, environmental protection, and human rights. International human rights law emphasizes each individual's right to a certain quality of environment because it is linked to the enjoyment of a host of internationally and domestically guaranteed rights that cannot be exercised otherwise. Former U.N. Secretary-General Kofi Annan in his 1998 Annual Report on the Work of the United Nations Organization spoke in favour of a rights-based approach to environmental protection because it "describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals."

Existing norms indicate how the FCCC's reference to equity can serve to adjust international benefits and burdens and incorporate the human rights dimension. For example, the norm of equitable utilization of transboundary waters by riparian states ensures the possibility of modifying the otherwise obligatory equal allocation of a shared resource between riparian states to ensure a 'fair' distribution.The concept of fairness may, and in the case of watercourses does, import human rights law as a critical factor in determining what is equitable allocation and utilization. Thus, the UN Convention on the Law of the

Non-Navigational Uses of International Watercourses[128] provides in article 10 that in weighing competing uses of freshwaters, "special regard" is to be given to the requirements of vital human needs. In other words, equity cannot be achieved without respect for human rights.

The environmental law principle of common but differentiated responsibilities reflects a similar multifaceted approach, with most formulations referring to different historical responsibilities as well as to different capacities and needs. Affected states may stress the polluter pays principle, the principle of good neighbourliness, or the human rights of their peoples as a basis for limiting harmful activities in other states. Such states may invoke the rights of those persons within their jurisdiction, the duty to protect those rights, and their sovereign right to be free from significant transboundary pollution as determinative factors in equitably allocating responsibility for addressing anthropogenic climate change.

In sum, one can couple the duty not to cause or allow significant transboundary environmental harm with the duty to respect and ensure international human rights to develop a coherent rights-based approach to climate change. This approach builds on the discussion of standing in Massachusetts v. EPA to view state sovereignty not as a barrier to the implementation of human rights, but as a vehicle for ensuring their enforcement and enjoyment. Calling on responsible states to reduce greenhouse gas emissions and assist in adaptation, by litigation if necessary, is a clear application of such a rights-based approach.

128. G.A.Res.51/299,May 21,1997,reprinted in 26 I.L.M. 700(1997).