

ESSAY

Climate Change and Human Rights Law

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INTRODUCTION

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

1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 82 (2007) [hereinafter IPCC, IMPACTS]; Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [hereinafter Inuit Petition].

2. IPCC, IMPACTS, *supra* note 1, at 9, 85–90.

3. *Id.* at 9, 104.

4. *Id.* at 9, 92–94.

If not abated, the effects of climate change will grow in severity and scope. The Intergovernmental Panel on Climate Change (IPCC) predicts with high confidence⁵ that projected trends in global warming will increase the number of people suffering death, disease, hunger, malnutrition, and injury from heat waves, floods, storms, fires, and droughts.⁶ It predicts with very high confidence⁷ that “[c]oasts will be exposed to increasing risks, including coastal erosion, over coming decades due to climate change and sea level rise.”⁸ The IPCC expects sea levels to continue to rise, cyclones to intensify, and storm surges to increase in size, all of which will have effects that are “virtually certain to be overwhelmingly negative” with respect to coastal regions.⁹ Without improved protection, coastal flooding could grow tenfold by the 2080s, affecting more than 100 million people annually.¹⁰ Eventually, small island states may become uninhabitable. The average height above sea level of the Maldives, for example, is less than two meters. An increase in sea level of one-half meter would cause a major portion of the Maldives’ most populous island to be inundated by 2025 and half of the island to be under water by 2100.¹¹

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

5. “High confidence” indicates about 80% confidence in being correct. *Id.* at 4.

6. *Id.* at 393.

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

8. *Id.* at 317.

9. *Id.*

10. *Id.* at 339.

11. SUBMISSION OF THE MALDIVES TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 19 (2008), available at http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf [hereinafter MALDIVES SUBMISSION].

12. See Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 321 (2004).

13. Duties directly placed on individuals include duties not to commit genocide, war crimes, and crimes against humanity. John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1, 27–28 (2008).

they do not require every state to respond to every threat to human rights, wherever it arises.

Whether or not climate change gives rise to legal duties under international human rights law, treating climate change as a threat to human rights in a moral sense has its own value. It establishes that climate change is a moral challenge as well as a technical and environmental one. Applying human rights rhetoric to climate change may draw attention to its effects on particular communities, convince those not yet directly affected that it threatens environmental disaster on an unprecedented scale, and make individuals and states more willing to make the hard choices needed to combat it.¹⁴

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

14. See, e.g., Svitlana Kravchenko, *Right to Carbon or Right to Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 514 (2008) ("If we come to see human-caused global climate change as violating fundamental human rights—as something as unacceptable as other gross violations of human rights—perhaps we can make the breakthrough in our politics that is essential."); *Panel: Climate Change*, 5 SANTA CLARA J. INT'L L. 462, 465 (2007) (statement of Martin Wagner) ("Putting an issue in the context of human rights creates a rhetoric that people can use that touches people's hearts in a way that talking about the science of it just does not."); Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND RESOURCES & ENVTL. L. 255, 271 (2007) ("[T]reating climate change as a human rights issue simply begins to imbue it with a sense of gravity and moral urgency that communicates to all of us: this is something different; this is an issue that must be understood to stand apart from the normal clatter and noise of day-to-day politics . . ."). Although a better understanding of how human rights law applies to climate change may help to inform moral arguments concerning climate change, this Essay is about legal rather than moral duties. Recent additions to the already vast literature on the moral aspects of climate change include Jonathan C. Carlson, *Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Order*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 45 (2009); Daniel A. Farber, *The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World*, 2008 UTAH L. REV. 377 (2008); Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L. J. 1565 (2008).

15. This Essay focuses on duties imposed by human rights treaties. Customary international law might also be relevant to states' duties regarding climate change, if it provides a backstop to

This Essay divides the overarching issue—what duties, if any, human rights law imposes with respect to climate change—into three questions. First, what duties has human rights law established with respect to environmental degradation generally? As Part I explains, although only two regional treaties explicitly recognize rights to a healthy or satisfactory environment, human rights bodies have developed an extensive environmental jurisprudence based on already recognized human rights, such as rights to life, health, and property.¹⁶ This jurisprudence takes a two-pronged approach. First, it sets out strict procedural duties, including prior assessment of environmental impacts, access to participation in decision-making, and judicial remedies, which states must follow in deciding how to strike the balance between environmental protection and other societal interests, such as economic development. Second, it defers to the substantive decisions that result from these procedures, as long as the decisions do not result in the reduction of human rights below minimum standards.

The second question, addressed in Part II, asks: how well does this jurisprudence apply to climate change? Although climate change undoubtedly interferes with human rights, any attempt to bring the law of environmental human rights to bear on it faces a formidable obstacle: the jurisprudence construing that law was developed in the context of harm that does not cross an international boundary. In that context, deference to a state's decision as to how much environmental harm to allow is justifiable because the benefits and the costs of the actions causing the harm are felt within a single polity. If that polity follows procedural safeguards to ensure that all those affected are able to participate fully in the decision-making process, then the resulting decision is

treaty law by placing duties on states that have not ratified a particular treaty or have done so with reservations, or if it imposes duties beyond those imposed by treaties. Although many human rights treaties have achieved close to universal acceptance, some important states have not ratified some critical treaties, and some rights discussed below, such as rights to property and to a healthy environment, appear only in regional agreements. The importance of customary human rights law in this context is limited, however, by the lack of consensus on how far it extends beyond a relatively small number of duties that are not obviously relevant to climate change. According to the Restatement, the duties of states under customary law are to not practice, encourage, or condone genocide; slavery or the slave trade; murder or causing individuals to disappear; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and “a consistent pattern of gross violations of internationally recognized human rights.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). Others take a broader view, arguing that all of the rights in the Universal Declaration of Human Rights have attained customary legal status, but there is no consensus on that position. Moreover, even if customary law does extend beyond the rights listed in the Restatement, the content of its duties is likely to be informed, if not determined altogether, by states' practice under human rights treaties.

16. For an early prediction that the law might develop in this way, see Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

entitled to a presumption of legitimacy. But those safeguards do not translate easily to environmental harms such as climate change, which are caused by and affect many different countries. Nevertheless, even in the absence of clear extraterritorial application, human rights law still imposes duties on states to address the internal effects of climate change and constrains their possible responses to it.

The third question, addressed in Part III, asks whether current environmental human rights jurisprudence may extend to address the global threat climate change poses to human rights. Of the potential legal bases for such an extension, this Essay concludes that the best is the duty to cooperate, which requires states to take joint action to promote and protect human rights. This duty requires states to create the equivalent of a single global polity to consider how to respond to the global threat to human rights posed by climate change. The duty to cooperate thus provides a workable basis for the application of the two-pronged environmental human rights jurisprudence to climate change. As long as the international community acts together to adopt decision-making procedures that assess the threat and provide informed access to affected communities, the resulting decisions should receive deference. This deference should not be absolute: even climate agreements that meet these procedural requirements must also satisfy minimum substantive standards for human rights protection.

I. THE HUMAN RIGHTS LAW OF ENVIRONMENTAL PROTECTION

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

At the risk of oversimplification, one can divide human rights into three categories: (1) civil and political rights; (2) economic, social, and

17. Two regional agreements do recognize environmental rights: the African Charter on Human and Peoples' Rights, June 27, 1981, art. 24, 1520 U.N.T.S. 217 (1982) [hereinafter African Charter], states that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development," and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, Nov. 17, 1988, art. 11, 28 I.L.M. 161 [hereinafter Protocol of San Salvador], recognizes the right of "everyone . . . to live in a healthy environment."

cultural rights; and (3) rights held by groups, or by individuals because of their membership in groups. The environmental human rights jurisprudence has drawn on each of these categories, as the following sections explain. Remarkably, even though the treaties appear to assign states different types of duties for different categories of rights, the jurisprudence has developed very similar requirements across the board. The jurisprudence construes the treaties as imposing duties on states to regulate not only their own behavior, but also that of private actors subject to their control. It sets out strict procedural duties that states must follow before causing or allowing environmental harm. And it gives states discretion to determine acceptable amounts of environmental harm, as long as the states follow the procedural requirements and their decisions do not result in the destruction of the protected rights.

A. Environmental Duties Arising from Civil and Political Rights

The most important source of legal obligations with respect to civil and political rights is the International Covenant on Civil and Political Rights (ICCPR).¹⁸ Other important sources are the three regional human rights treaties: the European Convention on Human Rights,¹⁹ the American Convention on Human Rights,²⁰ and the African Charter on Human and Peoples' Rights.²¹ Each of these agreements has a body with particular responsibility for interpreting it. The ICCPR has the Human Rights Committee, which reviews states' reports on their compliance under the agreement, decides individual claims of state non-compliance,²² and publishes General Comments interpreting the agreement.²³ The regional agreements have the European Court of Human Rights (ECHR or European Court), the Inter-American Commission and Court of Human Rights, and the African Commission and Court on Human and Peoples'

18. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

19. European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention].

20. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter American Convention].

21. African Charter, *supra* note 17.

22. The submissions may only be considered if they are directed against one of the 111 states that have accepted the First Optional Protocol to the ICCPR. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.

23. ICCPR, *supra* note 18, art. 40. General Comments are issued by a treaty body—the committee of experts established to oversee compliance with a human rights treaty—to provide guidance to states as to the views of the treaty body on particular provisions or cross-cutting issues under the treaty it supervises. Although General Comments are not binding, the committee reinforces its guidance when it reviews the reports states must periodically provide on their compliance with the treaty. The cumulative effect may be to influence states to bring their practice under the treaty into accord with the position expressed in the Comments.

Rights, respectively.²⁴ Most of the interpretations of civil and political rights in the context of environmental harm have come from the ECHR.²⁵

Although the language of these treaties varies, sometimes in important ways, they all recognize many of the same rights, including rights to life; liberty; freedom of expression, religion, movement, and residence; and respect for privacy, family, and home.²⁶ In addition, the three regional treaties, but not the ICCPR, recognize the right to property.²⁷ Of these rights, environmental degradation has been recognized as having the potential to interfere with the rights to life, property, and privacy, in particular. States' duties concerning the right to property have been elaborated chiefly by the Inter-American human rights system in the context of indigenous rights and are discussed in Part I.C; this Section addresses duties arising from the rights to life and privacy.

1. *Duties to Regulate State and Private Conduct*

Perhaps the clearest duty states have accepted in these treaties is to refrain from taking actions that directly violate the rights of persons within the treaties' coverage.²⁸ In the context of environmental degrada-

24. The ECHR, the Inter-American Commission, and the African Commission each have authority to receive communications from individuals claiming a party to the relevant treaty has failed to comply with its obligations. The ECHR's decisions bind the state party. The two commissions may only issue non-binding decisions, but they may also choose to bring a claim to the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights, which may issue decisions binding on states that have accepted the courts' jurisdiction. American Convention, *supra* note 20, art. 68; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 30, June 10, 1998, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>.

25. See generally MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT: PRINCIPLES EMERGING FROM THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (2006).

26. See African Charter, *supra* note 17, arts. 4, 6, 12, 18(1) (referring only to family, not privacy or home); American Convention, *supra* note 20, arts. 4(1), 7, 11(2), 22; ICCPR, *supra* note 18, arts. 6(1), 9, 12, 17(1); European Convention on Human Rights, Protocol No. 4, art. 2, Sept. 16, 1963, Europ. T.S. No. 5, 213 U.N.T.S. 22; European Convention, *supra* note 19, arts. 2(1), 5, 8(1).

27. African Charter, *supra* note 17, art. 14; American Convention, *supra* note 20, art. 21; European Convention on Human Rights, Protocol No. 1, art 1, Mar. 20, 1952, Europ. T.S. No. 5, 213 U.N.T.S. 221.

28. See Human Rights Comm., General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31]. For the ICCPR, the obligation rests on the language of Article 2(1) requiring each party to "respect" the rights recognized in the Covenant. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 36 (1993) ("The duty to respect . . . means that the States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed."). The regional agreements have identical or similar language. See, e.g., African Charter, *supra* note 17, art. 1; American Convention, *supra* note 20, art. 1(1); European Convention, *supra* note 19, art. 1.

tion, one would expect this duty to require a state to make sure that its own facilities do not emit pollutants or otherwise cause environmental harm at levels that would infringe the enjoyment of the protected rights. However, limiting emissions from government facilities would not be sufficient to protect these rights because much environmental harm results from private conduct. Although the human rights treaties do not bind private parties directly, they have been construed to require states to take steps to protect these rights from private conduct that interferes with their enjoyment.²⁹ As a result, the treaties would seem to require states to take the steps necessary to restrict private actors from causing environmental harm that interferes with protected rights. Finally, states might have other positive duties, such as ensuring adequate remedies, in the event that these measures were not sufficient to prevent harm from occurring.³⁰

To a large degree, this is the approach taken by the human rights bodies charged with interpreting the agreements. For example, in reviewing a complaint that the military government of Nigeria had exploited

29. For the ICCPR, the duty to protect has been traced to the requirement in Article 2(1) that states “ensure” the rights recognized in the treaty. *See* General Comment 31, *supra* note 28, ¶ 8; SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 24 (2000); NOWAK, *supra* note 28, at 38. Regional tribunals have interpreted the regional agreements to include the duty as well. *See, e.g.*, Commission Nationale de Droits de l’Homme et des Libertés v. Chad, Comm. No. 74/92, 2000 Afr. H.R. L. Rep. 66, 68, ¶ 20 (1995); *Z and Others v. United Kingdom*, 2001-V Eur. Ct. H.R. 1, 24–25; *Velásquez Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988). *See generally* Knox, *supra* note 13, at 20–23.

30. *See* General Comment 31, *supra* note 28, ¶¶ 6–7 (“The legal obligation under article 2, paragraph 1, is both negative and positive in nature. . . . Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”). Scholars and interpretive bodies have categorized human rights duties in different ways. There is widespread agreement that virtually all human rights treaties impose duties on states not only to respect human rights by not violating them, but also to protect against their interference by other actors. In addition, it seems clear that states have other positive duties under human rights treaties, although it is less clear how these other duties should be described. They have been called duties to *fulfill* rights, to *promote* them, and to *facilitate* them. *See* Soc. & Econ. Rights Action Ctr. v. Nigeria (*Ogoniland Case*), Comm. No. 155/96, ¶¶ 44–47 (Afr. Comm’n on Human & People’s Rights 2001); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment 12, *The Right to Adequate Food*, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter CESCR General Comment 12]; Manfred Nowak, *Extraterritorial Obligations of States to Prevent and Prohibit Torture*, in *UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* (Mark Gibney & Sigrun Skogly eds., forthcoming 2010); MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 157 (2003); SIGRUN SKOGLY, *BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION* 60–61 (2006); Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 *HUM. RTS. L. REV.* 81, 82 (2005). The differences between these formulations should not obscure the most important point in the present context: the treaties are recognized as imposing obligations on states not only to refrain from violating rights directly, but also to take positive steps to protect the rights, including from interference by third parties.

oil resources in the Ogoniland region “with no regard for the health or environment of the local communities,”³¹ the African Commission on Human and Peoples’ Rights found that the exploitation violated many human rights protected by the African Charter, including the right to life of the Ogoni people living in the area.³² The Commission emphasized that Nigeria’s duty was not simply to refrain from violating rights itself, but also to “protect [its] citizens . . . from damaging acts that may be perpetrated by private parties,” including Shell Oil, Nigeria’s partner in extracting the resources.³³

Similarly, in a 1997 report on human rights in Ecuador, the Inter-American Commission on Human Rights said that pollution from oil exploitation and mining in the Oriente region had caused grave health problems in local communities, and that these health problems adversely affected the inhabitants’ right to life.³⁴ Like the African Commission, it said that the state’s human rights obligations extended beyond its own agents’ contribution to the problem: the threat to life and health could “give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.”³⁵ The state must ensure that it has measures in place to prevent life-threatening harm from pollution, including from private sources, and “respond with appropriate measures of investigation and redress” when environmental contamination infringes its residents’ right to life.³⁶

The most detailed environmental jurisprudence built on civil and political rights comes from the ECHR. In cases construing the European Convention on Human Rights (European Convention), the European Court has made clear that while environmental harm may violate the right to life,³⁷ it need not do so to trigger state duties. Even if environmental degradation merely causes adverse effects on health and the

31. *Ogoniland Case*, Comm. No. 155/96, ¶¶ 44–47.

32. *Id.* ¶ 67.

33. *Id.* ¶ 57.

34. The Commission said that according to the government itself, “billions of gallons of untreated toxic wastes and oil have been discharged directly into the forests, fields and waterways of the Oriente.” Org. of American States [OAS], Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, at 91, OEA/Ser.L/V/II.96 doc. 10 rev. 1 (Apr. 24, 1997) [hereinafter *Ecuador Report*]. The Commission received evidence that residents were “exposed to levels of oil-related contaminants far in excess of internationally recognized guidelines,” which posed significantly increased risks of cancer and other health problems. *Id.* A survey of communities in the area found that roughly three-quarters of the residents had gastro-intestinal problems, half had headaches, and one-third had skin problems. *Id.* at 90.

35. *Id.* at 88.

36. *Id.* at 88, 92.

37. See *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 1, 115.

quality of life in the home, it may interfere with the right to privacy.³⁸ Although the adverse effects must attain a certain minimum level,³⁹ severe endangerment of health is not necessary. It is enough for the pollution to affect “individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”⁴⁰ If so, the state is under an obligation to take positive steps to protect against the harm,⁴¹ whether it caused the pollution directly or failed to protect against pollution from private actors.⁴² In either case, “the applicable principles are broadly similar.”⁴³

2. *Procedural and Substantive Standards*

Environmental human rights jurisprudence does not require states to prevent all environmental degradation. Only harm that infringes on human rights is covered at all, which leaves out environmental degradation that does not appreciably affect humans.⁴⁴ When environmental harm does affect human rights, the ECHR has allowed the state a great deal of discretion to find a “fair balance” between the rights of the individual and the interests of others in the broader community, whether the harm is caused by the state directly or by a private actor.⁴⁵ In determining whether the state has found an acceptable balance, the ECHR has looked to domestic law as an important consideration: for example, if the state has failed to meet domestic standards by allowing excessive levels of pollution,⁴⁶ or by failing to implement a domestic court’s deci-

38. *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 255, 281; *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 179, 205; *López Ostra v. Spain*, 20 Eur. H.R. Rep. 277, 295 (1994).

39. *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 277 (“The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects [and] . . . [t]he general context of the environment . . .”).

40. *López Ostra*, 20 Eur. H.R. Rep. at 295. See also *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189, 216 (“There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.”).

41. *Hatton*, 2003-VIII Eur. Ct. H.R. at 216.

42. *Id.* at 216–17.

43. *Id.*; See also *López Ostra*, 20 Eur. H.R. Rep. at 295.

44. This is an inherent shortcoming of human rights law as a basis for environmental protection. See Günther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in *DERECHOS HUMANOS, DESARROLLO SUSTENTABLE Y MEDIO AMBIENTE* 117, 138 (Antonio Augusto Cançado Trindade ed., 1995).

45. *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 255, 285; *Hatton*, 2003-VIII Eur. Ct. H.R. at 216–17; *López Ostra*, 20 Eur. H.R. Rep. at 295; see *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 179, 206.

46. See *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 281; *López Ostra*, 20 Eur. H.R. Rep. at 295. In *Fadeyeva*, the state also failed to implement its legislation providing for a residence-free zone around the polluting facility. See *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 288, 292.

sion to close a facility,⁴⁷ the European Court has virtually always found that the state has violated its international duties.⁴⁸ If, on the other hand, a state has complied with its own environmental law, the ECHR has usually upheld the state's actions.⁴⁹

More generally, the ECHR has emphasized that the state's decision-making process must be fair and "such as to afford due respect" to the interests protected by the European Convention.⁵⁰ It has set out the requirements that this process must meet:

Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them [sic] to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.⁵¹

If procedural requirements are met, "only in exceptional circumstances" will the ECHR "revise the material conclusions of the domestic authorities."⁵² Nevertheless, the ECHR has made clear that states' substantive decisions must meet minimum standards. In two cases, one concerning the failure of a state to prevent a mudslide that breached a dam and killed eight people,⁵³ and one involving a methane explosion at a

47. See *Giacomelli v. Italy*, App. No. 59909/00, at 17 (Eur. Ct. H.R. 2006), available at <http://www.echr.coe.int>; *Taşkin*, 2004-X Eur. Ct. H.R. at 189–90, 206.

48. Nevertheless, the ECHR has said that "domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a 'fair balance' . . ." *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 284.

49. See, e.g., *Hatton*, 2003-VIII Eur. Ct. H.R. at 224.

50. *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 285 (citation omitted).

51. *Taşkin*, 2004-X Eur. Ct. H.R. at 206–07 (citations omitted). The ECHR has said that these requirements apply to the right to life as well as to the right to privacy. *Budayeva v. Russia*, App. No. 15339/02, at 26 (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int>; *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 1, 115.

52. *Fadeyeva*, 2005-IV Eur. Ct. H.R. at 285. See also *Giacomelli*, App. No. 59909/00, at 17; *Hatton*, 2003-VIII Eur. Ct. H.R. at 217 (stressing that states have a "wide margin of appreciation" to set substantive standards).

53. *Budayeva*, App. No. 15339/02.

waste site,⁵⁴ the European Court ruled that states (1) must install a legal framework to effectively deter threats to the right to life, and (2) must require everyone involved to take practical measures to ensure the protection of those whose lives might be endangered.⁵⁵ In the mudslide case, the ECHR found that Russia ignored warnings that dangerous mudslides might occur, did not institute an early-warning system that would allow people to evacuate in time, and did not allocate funds for the repair of protective dams.⁵⁶ It concluded that Russia failed to establish the legal framework necessary to deter threats to the right to life, and thereby violated substantive obligations under the European Convention.⁵⁷

Although the Inter-American Commission on Human Rights has not developed a jurisprudence as detailed as that of the ECHR, it has taken a broadly similar approach to states' procedural and substantive duties regarding environmental threats to the right to life. In its report on human rights in Ecuador, for example, the Inter-American Commission said, rather vaguely, that states must take "reasonable measures" to prevent the risk of harm to life and health. Like the ECHR, it avoided setting out concrete limits on environmental degradation, noting that states have the freedom to develop their own natural resources. Instead, it emphasized procedural safeguards, explaining that protection of human rights in this context "may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights."⁵⁸ To that end, it stressed the importance of access to information, participation in relevant decision-making processes, and the ability to seek judicial recourse, the same procedural rights highlighted by the ECHR.⁵⁹

54. *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 1.

55. *Budayeva*, App. No. 15339/02, at 25–26; *Öneryildiz*, 2004-XII Eur. Ct. H.R. at 115.

56. *See Budayeva*, App. No. 15339/02, at 29–32.

57. *Id.* at 32. The ECHR also held that Russia's failure to conduct any investigation of the causes of the mudslide violated its duty to ensure that the framework set up to protect the right to life is properly implemented and that breaches of the right are adequately addressed. *Id.* at 34–35.

58. *Ecuador Report*, *supra* note 34, at ch. VIII.

59. *Id.* The same rights also appear in international environmental instruments, including the 1998 Aarhus Convention and Principle 10 of the 1992 Rio Declaration. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450 [hereinafter Aarhus Convention]; U.N. Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992).

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

The most important legal basis for state duties with respect to economic, social, and cultural rights is the counterpart to the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁰ Together with the ICCPR, the ICESCR was drafted to make the rights in the 1948 Universal Declaration of Human Rights legally binding. States drafted one agreement for each set of rights because they could not agree to include both in one treaty. The Covenants were negotiated during the same period, adopted by the UN General Assembly on the same day in 1966, and entered into force in 1976. In the European and Inter-American systems, economic, social, and cultural rights are also protected by separate agreements: the European Social Charter,⁶¹ and the Protocol of San Salvador to the American Convention.⁶² The African Charter incorporates such rights directly.⁶³

Although these four treaties vary in how they express the rights and, to a lesser degree, in which rights they include, there is a substantial amount of overlap. The ICESCR, joined in most instances by the regional agreements, recognizes rights to work, social security, an adequate standard of living (including adequate food, clothing and housing), the highest attainable standard of health, and to education, as well as rights to take part in cultural life, and to enjoy the benefits of scientific progress.⁶⁴ Uniquely, the Protocol of San Salvador includes a “right to live in a healthy environment” in its list of economic, social, and cultural rights.⁶⁵

60. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

61. European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35. The Council of Europe adopted a more detailed and extensive Social Charter in 1996, which has superseded the older version in whole or in part for countries that have ratified it. Some important parties to the 1961 Charter, however, including Austria, the Czech Republic, Denmark, Germany, Greece, Poland, Spain, and the United Kingdom, have yet to ratify the 1996 Charter. References to the Charter in this Essay will be to the 1961 version.

62. Protocol of San Salvador, *supra* note 17. The Protocol has fourteen parties, including Argentina, Brazil, Columbia, Mexico, and Uruguay. The American Convention refers to economic, social, and cultural rights, but only to say that the parties “undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS] Charter.” American Convention, *supra* note 20, art. 26.

63. African Charter, *supra* note 17, arts. 15–17.

64. Protocol of San Salvador, *supra* note 17, arts. 6–7, 9, 10, 12–14; African Charter, *supra* note 17, arts. 15–17; ICESCR, *supra* note 60, arts. 6–7, 9, 11–13, 15(1); European Social Charter, *supra* note 61, arts. 1–4, 11–12.

65. Protocol of San Salvador, *supra* note 17, art. 11(1). The African Charter also includes a specific right to a “satisfactory” environment, but as a right of peoples rather than individuals.

There are fewer authoritative interpretations of these rights in the context of environmental degradation because economic, social, and cultural rights have fewer opportunities to be clarified through case-by-case adjudication. The ECHR, whose interpretations of the European Convention have contributed so much to environmental jurisprudence, has no jurisdiction to decide cases concerning the European Social Charter. Similarly, the Inter-American Commission and Court cannot hear claims concerning the Protocol of San Salvador.⁶⁶ Furthermore, unlike the ICCPR Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts that oversees compliance with the ICESCR, currently has no authority to receive communications from individuals alleging violations of the agreement.⁶⁷

Nevertheless, the CESCR and the regional systems do have methods by which they may elaborate on states' duties with respect to economic, social, and cultural rights in decisions that, while not binding, may have significant persuasive effect. The CESCR reviews countries' reports on their own compliance with the ICESCR and provides interpretations of the Covenant in General Comments. An additional protocol to the Social Charter authorizes a committee of experts, the European Committee of Social Rights, to consider "collective complaints" submitted by non-governmental organizations concerning non-compliance by states that have accepted the protocol.⁶⁸ The Inter-American Commission can address the rights protected by the Protocol of San Salvador in its country reports.⁶⁹ Moreover, pursuant to its powers under the Organization of American States (OAS) Charter, the Commission can hear communications alleging "violations" of the formally non-binding American Declaration, which recognizes some economic, social, and cultural rights, in-

African Charter, *supra* note 17, art. 24; *see infra* Part I.C.

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

67. This is likely to change soon. In December 2008, the General Assembly adopted an optional protocol giving the CESCR the authority to receive and consider communications. G.A. Res. 63/117, art. 1, U.N. Doc. A/RES/63/117 (Dec. 10, 2008). The protocol will enter into force after ten states have ratified it. *Id.* art. 18.

68. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Sept. 9, 1995, Europ. T.S. No. 158. The Committee presents its conclusions as to whether the party in question "has ensured the satisfactory application of the provision of the Charter referred to in the complaint" to a committee of ministers. *Id.* art. 8(1). If the answer is negative, the ministerial committee may make a recommendation to the party. *Id.* art. 9(1). As of October 2008, fourteen states had accepted the protocol, including Belgium, France, Italy, and the Netherlands, but not Germany or the United Kingdom. Under the Charter itself, the Committee of Social Rights has a mandate to examine states' reports on their own compliance. European Social Charter, *supra* note 61, art. 24.

69. Protocol of San Salvador, *supra* note 17, art. 19(7).

cluding the right to the preservation of health.⁷⁰ The African Commission can hear claims concerning all rights in the African Charter, including economic, social, and cultural rights.⁷¹

These bodies have confirmed that environmental degradation can interfere with economic, social, and cultural rights, including, in particular, the rights to the highest attainable standard of health⁷² and to components of an adequate standard of living, including rights to water⁷³ and food.⁷⁴ They have also indicated that, despite the fact that states apparently have weaker obligations under these agreements than under agreements protecting civil and political rights, the duties arising from

70. American Declaration of the Rights and Duties of Man, May 2, 1948, art. XI [hereinafter American Declaration]. When the OAS first established the Inter-American Commission in 1960, it gave the Commission a mandate to promote respect for human rights, as defined by the 1948 American Declaration. “The ‘non-binding’ American Declaration thus became the basic normative instrument of the Commission.” Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 439, 472 (Theodor Meron ed., 1984). Under this system, the Commission initially had the power only to prepare investigative reports on human rights problems and make recommendations to governments, but in 1965, it was also authorized to hear individual communications, receive information from governments in response, and make recommendations. The American Convention on Human Rights, which entered into force in 1978, assigned the Commission many of those same powers but grounded them in the Convention itself. American Convention, *supra* note 20, arts. 34–51. In addition, the Convention created the Inter-American Court of Human Rights and gave it a mandate to receive complaints by the Commission, based on communications it had received. *Id.* art. 61. Countries such as Belize, Canada, and the United States, which are parties to the OAS Charter but not the American Convention, are therefore subject to the jurisdiction of the Commission only with respect to its pre-Convention powers, and they are not at all subject to the jurisdiction of the Inter-American Court.

71. African Charter, *supra* note 17, arts. 55–56.

72. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health*, ¶ 4, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter CESCR General Comment 14] (“[T]he right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as . . . a healthy environment.”); Marangopoulos Found. for Human Rights v. Greece (*Marangopoulos Foundation*), Complaint No. 30/2005, ¶ 195, Eur. Comm. of Social Rights (2006) (holding that the right to protection of health “includ[es] the right to a healthy environment”).

73. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment 15, *The Right to Water*, U.N. Doc. E/C.12/2002/11 (2003) [hereinafter CESCR General Comment 15]. Although the ICESCR does not explicitly include the right to water, the Committee decided that the right falls within “the category of guarantees essential for securing an adequate standard of living,” and is “also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.” *Id.* ¶ 3 (citations and footnotes omitted). See also CESCR General Comment 14, *supra* note 72, ¶ 11 (stating the right to health extends “not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation”).

74. Soc. & Econ. Rights Action Ctr. v. Nigeria (*Ogoniland Case*), Comm. No. 155/96, ¶¶ 64–65 (Afr. Comm’n on Human & People’s Rights 2001). The African Commission accepted the claimants’ argument that the right to food, while not mentioned explicitly in the African Charter, is essential for the fulfillment of other rights, such as rights to health, education, and work. *Id.* ¶ 65.

the two types of rights are very similar in the environmental context. States are under obligations to regulate not only their own conduct that causes environmental harm, but also that of private actors. States must assess the potential environmental impacts of activities, monitor those impacts over time, and ensure that the affected public receives information about the activities and may participate in decisions concerning them. While these bodies have not set specific limits on environmental degradation, neither have they completely deferred to state decisions. They have made clear that states must protect against environmental harm that reduces the enjoyment of rights below minimally acceptable levels and must take effective steps to reduce pollution.

1. *Duties to Regulate State and Private Conduct*

Like civil and political rights, economic, social, and cultural rights have been construed as requiring states not only to refrain from violating the rights themselves, but also to take positive measures, including protecting against infringements of the rights by non-state actors. The CESCR has taken the lead in this respect. In a 1999 General Comment, it said that the right to food requires states not only to *respect* individuals' existing access to food by not taking any measures that prevent such access, but also to *protect* their access to food by ensuring that private actors do not deprive them of it.⁷⁵ The CESCR has also described a third type of duty, the obligation to *fulfill*, which it interprets as requiring the state to adopt appropriate measures towards the full realization of a right.⁷⁶

The CESCR has applied this approach to environmental degradation as well, most thoroughly in the context of its examination of the right to water. There, it said that a state's duty to *respect* the right to water requires it to refrain from interfering with the enjoyment of the right. Prohibited interference includes "unlawfully diminishing or polluting water, for example through waste from State-owned facilities."⁷⁷ A state's duty to *protect* the right requires that it adopt the necessary measures to restrain third parties from interfering with the enjoyment of the right,

75. CESCR General Comment 12, *supra* note 30, ¶ 15.

76. *See, e.g.*, CESCR General Comment 14, *supra* note 72, ¶ 33 ("[T]he obligation to *fulfill* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health."). In the context of the right to food, the duty to fulfill requires both that a state strengthen people's ability to secure their own food security, and that it provide food directly to those who are unable to enjoy their right to food by the means at their own disposal. CESCR General Comment 12, *supra* note 30, ¶ 15. The CESCR calls the first of these duties to fulfill the duty to *facilitate*, and the second the duty to *provide*. *Id.* In its general comment on the right to health, the CESCR later added a third sub-duty, the duty to *promote*. CESCR General Comment 14, *supra* note 72, ¶¶ 33, 37.

77. CESCR General Comment 15, *supra* note 73, ¶ 21.

including by pollution.⁷⁸ Other positive measures required by what the Committee calls the duty to *fulfill* include the adoption of comprehensive programs to ensure that “there is sufficient and safe water for present and future generations,” which may include impact assessment and the reduction and elimination of pollution.⁷⁹ In less detail, the CESCR has also indicated that a state’s duty to respect the right to health includes refraining from “unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities,”⁸⁰ and that its positive duties include adopting measures against environmental health hazards by formulating and implementing “national policies aimed at reducing and eliminating pollution of air, water and soil.”⁸¹

Regional bodies have taken similar positions. As noted above, the African Commission held Nigeria accountable not only for its own harmful actions in exploiting oil in Ogoniland, but also for its failure to adequately control Shell Oil.⁸² In a more recent decision, discussed below, the European Committee of Social Rights construed Greece’s duty under the European Social Charter to protect the right to health from air pollution as requiring Greece to regulate private actors. Specifically, the Committee said that even though the power company in question had “private law status” after its privatization by the state, “as a signatory to the Charter, Greece is required to ensure compliance with its undertakings, irrespective of the legal status of the economic agents whose conduct is at issue.”⁸³

2. *Procedural and Substantive Standards*

Except for the African Charter, the agreements protecting economic, social, and cultural rights characterize state duties differently from the agreements on civil and political rights. While the ICCPR requires its parties “to respect and to ensure . . . the rights recognized in the present Covenant,”⁸⁴ the ICESCR requires each of its parties to “undertake[] to take steps, individually and through international assistance and co-operation, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly

78. *Id.* ¶ 23.

79. *Id.* ¶ 28.

80. CESCR General Comment 14, *supra* note 72, ¶ 34.

81. *Id.* ¶ 36.

82. *See supra* note 31 and accompanying text.

83. Marangopoulos Found. for Human Rights v. Greece (*Marangopoulos Foundation*), Complaint No. 30/2005, ¶ 192, Eur. Comm. of Social Rights (2006). The question may have been moot in that case because the state still held a majority of the company’s shares. *Id.*

84. ICCPR, *supra* note 18, art. 2(1).

the adoption of legislative measures.”⁸⁵ The European and Inter-American agreements similarly distinguish between the two types of rights.⁸⁶ Only the African Charter imposes the same obligation with respect to both: to “recognize the rights” and “undertake to adopt legislative or other measures to give effect to them.”⁸⁷

But while language calling for the progressive realization of economic, social, and cultural rights appears on its face to provide states much more flexibility than the stricter duty to respect and ensure civil and political rights, the degree of difference between the two types of duties can be overstated. States’ obligations with respect to civil and political rights are often not absolute; they have discretion to limit many civil and political rights for specified reasons, including national security, public safety, and protection of the rights of others.⁸⁸ At the same time, states’ duties under the ICESCR are not so flexible that they lack content. The CESCR has stressed that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”⁸⁹ The Committee has pointed out that the Covenant includes a number of obligations capable of immediate application, such as the duty not to discriminate on the basis of gender in protecting the rights set out in the Covenant.⁹⁰ More generally, the Committee has noted that the requirement to “take steps” toward the progressive realization of the rights “is not qualified or limited by other considerations.”⁹¹ Therefore, “while the full realization of the relevant rights may

85. ICESCR, *supra* note 60, art. 2(1).

86. The American Convention and the Protocol of San Salvador closely track the language from the Covenants quoted in the text. *See* Protocol of San Salvador, *supra* note 17, art. 1 (requiring the parties “to adopt the necessary measures . . . to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively . . . the full observance” of economic, social, and cultural rights); American Convention, *supra* note 20, art. 1 (requiring its parties to respect and ensure civil and political rights). The European agreements distinguish the two types of duties differently. The European Convention simply requires its parties to “secure” the rights recognized in that agreement. European Convention, *supra* note 19, art. 1. The European Social Charter is more complicated. Part I lists rights and states that “[t]he Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised.” European Social Charter, *supra* note 61, pt. I. Part II sets out more concrete obligations, but leaves discretion to each party in deciding which of those obligations to accept. *Id.* art. 20.

87. African Charter, *supra* note 17, art. 1.

88. Knox, *supra* note 13, at 11–13.

89. U.N. High Comm’r for Hum. Rights, Comm’n on Econ., Soc. & Cultural Rights, General Comment 3, *The Nature of States Parties Obligations*, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter CESCR General Comment 3].

90. *Id.* ¶ 5.

91. *Id.* ¶ 2.

be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."⁹² Finally, and perhaps most importantly, in recent years the CESCR has examined individual rights in detail and specified "core obligations" on each state party "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."⁹³

An early regional decision examining economic, social, and cultural rights harmed by environmental degradation is *Social and Economic Rights Action Center v. Nigeria (Ogoniland Case)*, decided by the African Commission in 2001.⁹⁴ The Commission's conclusion that Nigeria had violated the rights of the Ogoni by allowing, and participating in, the exploitation of oil in their region may have been facilitated by the African Charter's inclusion of a people's right to a "general satisfactory environment,"⁹⁵ but the Commission analyzed that right together with the more universally recognized right to health.⁹⁶ In response to largely uncontested allegations that oil production had resulted in numerous oil spills and the disposal of toxic wastes directly into the environment, and that the resulting contamination had caused a wide range of short- and long-term health effects,⁹⁷ the Commission said that the rights to environment and health together "obligate governments to desist from directly threatening the health and environment of their citizens."⁹⁸ It held that to comply with the spirit of these rights, governments must order or at least permit "independent scientific monitoring of threatened environments," require studies of environmental and social impacts before any major industrial development, monitor projects, and provide communities with information and opportunities to participate in development decisions affecting these communities.⁹⁹

This emphasis on procedural measures as a way to safeguard environmental protection closely resembles the ECHR's approach to environmental harm affecting the rights to privacy and life. It allows states to decide for themselves, within wide parameters, how to balance environmental protection with other important societal goals, such as the

92. *Id.*

93. *Id.* ¶ 10. See CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Audrey Chapman & Sage Russell eds., 2002). But see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008) (providing several critiques of the concept of core obligations).

94. Comm. No. 155/96, ¶¶ 44–47 (Afr. Comm'n on Human & People's Rights 2001).

95. African Charter, *supra* note 17, art. 24.

96. *Id.* art. 16(1).

97. *Ogoniland Case*, Comm. No. 155/96, ¶ 2.

98. *Id.* ¶ 52.

99. *Id.* ¶ 53.

development of natural resources for economic growth.¹⁰⁰ Nevertheless, the discretion is not unbounded in this context, any more than it was in the context of the rights reviewed by the ECHR. The African Commission also found *substantive* violations of human rights in *Ogoniland*. In particular, it held that the destruction and contamination of food sources, both by Nigeria directly and by private parties with state authorization, had violated the Ogoni's right to food.¹⁰¹

The CDESCR has also specified procedural duties, very similar to those identified in *Ogoniland* and by the ECHR, to protect rights from environmental harm. The CDESCR General Comment on the right to water indicates that the relevant authorities must make sure that actions that interfere with the right to water meet basic procedural requirements, including: "(a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies."¹⁰² Like the other human rights bodies, the CDESCR has indicated that states also face minimum substantive standards. It has stated that a state does not necessarily violate its obligations under the ICDESCR by failing to prevent water pollution if the failure was despite its best efforts. If, however, the failure results in the infringement of "minimum essential levels" of the right to water, the state has violated a core obligation, and the state may not justify its non-compliance by claiming a lack of sufficient resources.¹⁰³

In the most important decision on the application of the right to health to environmental harm to come out of the European system, the European Committee of Social Rights concluded that Greece's policies toward lignite mines and power plants placed it in violation of its obligations under Article 11 of the European Social Charter, which requires states to take certain measures in furtherance of the right to health.¹⁰⁴

100. *See id.* ¶ 54 ("Undoubtedly and admittedly, the government of Nigeria . . . has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians.").

101. *Id.* ¶ 65.

102. CDESCR General Comment 15, *supra* note 73, ¶ 56.

103. *See id.* ¶ 40. Core obligations listed by the CDESCR include ensuring "access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease." *Id.* ¶ 37(a). To be safe, the water must be "free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health." *Id.* ¶ 12. In other words, the minimum substantive standard is that states must protect water used for domestic purposes from pollution that rises to the level of threatening personal health.

104. Specifically, states must take appropriate steps "(1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health . . . ; [and] (3) to prevent as far as possible epidemic, endemic and other diseases." European Social Charter, *supra* note 61, art. 11.

The Committee's decision emphasizes that states do not have unlimited discretion to balance away human rights in setting their environmental policies. In addition to concluding that Greece had failed to implement procedural safeguards,¹⁰⁵ the Committee chastised Greece for failing to make sufficient progress toward the goal of "overcoming pollution."¹⁰⁶ It found, *inter alia*, that Greece had too few inspectors; that its fines were insufficient to deter violations of its air quality standards; and that it had not shown that the power plants had adopted best available techniques to reduce pollution.¹⁰⁷ "[E]ven taking into consideration the margin of discretion granted to national authorities in such matters," the Committee stated, "Greece has not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest."¹⁰⁸

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

Most human rights are held by all people simply because they are human beings. Some rights, however, are held by individuals as members of a group, or held by a group itself. These rights fall into at least three categories, each of which may provide a basis for environmental protection.

First, individuals have a right not to be discriminated against because of their membership in certain groups. Both of the Covenants, as well as the American and European Conventions and the African Charter, prohibit discrimination by states on the basis of race, gender, and religion, among other grounds.¹⁰⁹ The United Nations has adopted treaties that reinforce and elaborate the right of everyone not to be discriminated against on racial grounds and the right of women not to be discriminated against on the basis of their gender.¹¹⁰ In general, state actions that dis-

105. Marangopoulos Found. for Human Rights v. Greece (*Marangopoulos Foundation*), Complaint No. 30/2005, ¶¶ 216–20, Eur. Comm. of Social Rights (2006).

106. *Id.* ¶ 204.

107. *See id.* ¶¶ 208–10, 215.

108. *Id.* ¶ 221. In January 2008, the ministerial committee echoed the conclusion that Greece had violated the Social Charter but made no recommendations, instead only "welcom[ing] the measures already taken by the Greek authorities as well as further measures envisaged in order to ensure the effective implementation of the rights protected by the European Social Charter." Council of Europe Comm. of Ministers, Complaint No. 30/2005 by the Marangopoulos Foundation for Human Rights (MFHR) against Greece, Res. CM/ResChS(2008)1 (Jan. 16, 2008).

109. *See* African Charter, *supra* note 17, art. 2; American Convention, *supra* note 20, art. 1(1); ICCPR, *supra* note 18, arts. 2(1), 26; ICESCR, *supra* note 60, art. 2(2); European Convention, *supra* note 19, art. 14.

110. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) (entered into force on Sept. 3, 1981) [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimi-

criminate against individuals on these or other protected bases would violate their rights, as would state failure to protect against harm to individuals caused by private actors' discrimination.¹¹¹ Actions intentionally directed at individuals because of their membership in the group would be covered, and so might actions that disproportionately affect them.¹¹² Although there is little international case law on discrimination in the environmental context, there is no reason to think that discriminatory environmental harm would be treated differently from other types of discrimination.

Second, members of certain groups enjoy rights in addition to the right not to be discriminated against. For example, Article 27 of the ICCPR states that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."¹¹³ The Inter-American Commission and Court have recognized that, to protect the rights of minorities that rely on the natural environment, it is necessary to protect that environment.¹¹⁴ In this respect, they have looked to the right to property, which they have held may be exercised collectively by an indigenous or tribal community.¹¹⁵ The right to property is of particu-

ination, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter CERD]; see also Convention on the Rights of Persons with Disabilities, G.A. Res. 63/192, U.N. Doc. A/RES/63/192 (Dec. 13, 2006).

111. As already noted, the language of the Covenants and the regional agreements has been construed to give rise to a duty to protect against private infringement of the protected rights, as well as the duty of states to refrain from violating the rights directly. CERD and CEDAW spell out those two duties explicitly. In addition to requiring their state parties to refrain from discrimination, CERD requires them to "prohibit and bring to an end, by all appropriate means" and "take all appropriate measures to eliminate [discrimination]" and CEDAW requires them to prohibit racial discrimination and discrimination against women by any person or organization. CERD, *supra* note 110, art. 2(a), (d); CEDAW, *supra* note 110, art. 2(d), (e).

112. See CEDAW, General Recommendation No. 19, *Violence Against Women*, ¶ 6, U.N. Doc. A/47/8 (1992).

113. ICCPR, *supra* note 18, art. 27. For other human rights treaties providing additional rights to members of specific groups, see International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC].

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

115. See *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 113 (2004); *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007); *Indigenous Cmty. Yakyé Axa v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 143 (Jun. 17, 2005); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶

lar importance to such communities because without rights to the land and resources on which they rely, “the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people.”¹¹⁶ On this basis, the Inter-American Court has held that a community’s right to property includes not only the right to own the land that the community has traditionally occupied, but also the right to own the natural resources it has traditionally used.¹¹⁷

As in other environmental human rights cases, the Inter-American system has adopted procedural safeguards to protect this right. For example, the Inter-American Court has held that until the land traditionally occupied by a community is delimited and titled in consultation with the community, the state may not allow its “existence, value, use or enjoyment” to be affected, either by government agents or by third parties acting with the state’s acquiescence or tolerance.¹¹⁸ More generally, the Commission’s country reports have emphasized the importance of prior consultation with the affected communities before states may allow development of natural resources.¹¹⁹ In the *Maya Indigenous Community* case, the Commission found that Belize had violated the community’s right to property by failing to consult with it before granting oil and logging concessions.¹²⁰

Requiring prior consultation is a way to try to reconcile the interests of a state, which often takes the position that it owns valuable natural resources within its territory, with the interests of the community whose rights would be affected by the exploitation of the resources. By itself, however, the requirement of consultation leaves the final decision to the state. A key question, then, is whether the state must also obtain the

148 (Aug. 31, 2001).

116. *Saramaka People*, Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 121; see *Mayagna*, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 79, ¶ 149 (“[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”); Human Rights Comm., General Comment 23, *The Rights of Minorities*, ¶ 3.2, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (stating that the right of minorities to enjoy their own culture “may consist in a way of life which is closely associated with territory and use of its resources”).

117. *Saramaka People*, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 121. “[T]he natural resources found on and within tribal people’s territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.” *Id.* ¶ 122.

118. *Id.* ¶ 61.

119. See, e.g., OAS, Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 rev., ch. X, ¶ 39 (June 2, 2000) [hereinafter *Peru Report*]; OAS, Inter-Am. C.H.R., *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, doc. 9 rev. 1, ch. X (Feb. 26, 1999) [hereinafter *Colombia Report*].

120. *Maya Indigenous Cmty.*, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev., ¶ 113 (2004).

consent of the affected community before the state decides whether and how to exploit the resources.

The Commission's country reports have sometimes referred to the need to obtain prior consent from the affected communities without making clear whether consent was an absolute requirement.¹²¹ In its recent decision in *Saramaka People v. Suriname*, the Inter-American Court clarified this question.¹²² It held that although the protection of the right to property is not absolute and should not be construed to prevent the state from granting any concession at all for the extraction of natural resources within Saramaka territory, the state must ensure that any restriction on the community's right to property "does not deny their survival as a tribal people."¹²³ To that end, the state must consult with the community regarding any proposed concessions or other activities that may affect their lands and natural resources, ensure that no concession will be issued without a prior assessment of its environmental and social impacts, and guarantee that the community receives a "reasonable benefit" from any such plan if approved.¹²⁴ Moreover, with respect to "large-scale development or investment projects that would have a major impact within Saramaka territory," the state must do more than consult with the Saramaka; it must "obtain their free, prior, and informed consent, according to their customs and traditions."¹²⁵

The third type of group right is a right held by the group itself, rather than by its members individually. The ICCPR and ICESCR include only

121. *E.g.*, *Columbia Report*, *supra* note 119, at J(4) ("The State should ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations with and, *to the extent legally required*, consent from the affected indigenous communities.") (emphasis added); *Peru Report*, *supra* note 119, ¶ 39 (recommending that Peru "ensure, consistent with ILO Convention 169, that all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their habitat or culture [are] processed and decided on with the participation of and in consultation with the peoples interested, *with a view to obtaining their consent* and possible participation in the benefits") (emphasis added).

The ILO Convention to which the *Peru Report* refers requires states to consult with indigenous peoples before exploiting resources pertaining to their lands, but it does not require states to obtain their consent. General Conference of the International Labour Organisation, June 27, 1989, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art. 15(2). The UN Declaration on the Rights of Indigenous Peoples is stronger on this point, although it may still fall short of stating a clear requirement of consent. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 32(2), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) ("States shall consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.").

122. 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172.

123. *Id.* ¶¶ 126–28.

124. *Id.* ¶ 129.

125. *Id.* ¶ 134. For an analysis of *Saramaka People*, see Marcos A. Orellana, *International Decisions: Saramaka People v. Suriname*, 102 AM. J. INT'L L. 841 (2008).

one such right: the right to self-determination of a people.¹²⁶ Of the regional agreements, only the African Charter includes peoples' rights, including a somewhat more elaborate version of the Covenants' statement of the right to self-determination.¹²⁷ Although the precise contours of the right to self-determination remain unclear, the Covenants explicitly state that it includes the right of all peoples to "freely dispose of their natural wealth and resources," and that "[i]n no case may a people be deprived of its own means of subsistence."¹²⁸ It seems evident that environmental degradation so massive as to deprive a people, however defined, of its means of subsistence would violate the right to self-determination. In *Ogoniland*, the African Commission held that a state may breach the right not only by its own action, but also by failing to protect the right from private actors.¹²⁹

Ogoniland also addresses another right of a people, which only the African Charter recognizes: "the right to a general satisfactory environment favourable to . . . [a people's] development."¹³⁰ As discussed above, the Commission read this right together with the right to health.¹³¹ But it also based duties directly on the right to a satisfactory environment. In particular, the Commission said that it "requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."¹³² This specific environmental right thus reinforces, but does not significantly extend, the body of environmental human rights jurisprudence based on other rights, such as the right to health. In this sense, *Ogoniland* underlines that even without explicit recognition of "rights to the environment," human rights law may provide a robust basis for protection against environmental harm that affects humans.

126. ICCPR, *supra* note 18, art. 1(1); ICESCR, *supra* note 60, art. 1(1). Although the scope of the term "people" is not completely clear, it has been interpreted to include tribal or indigenous groups. *Saramaka People*, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶¶ 93, 95; *Soc. & Econ. Rights Action Ctr. v. Nigeria (Ogoniland Case)*, Comm. No. 155/96, ¶ 58 (Afr. Comm'n on Human & People's Rights 2001).

127. African Charter, *supra* note 17, arts. 20, 21.

128. ICCPR, *supra* note 18, art. 1(2); ICESCR, *supra* note 60, art. 1(2).

129. *Ogoniland Case*, Comm. No. 155/96, ¶ 58. The Commission emphasized not only "the destructive and selfish role-played [sic] by oil development in Ogoniland," but also that the development was "closely tied with repressive tactics of the Nigerian Government" and produced no material benefit to the local population. *Id.* ¶ 55.

130. African Charter, *supra* note 17, art. 24.

131. See *supra* notes 95–99 and accompanying text.

132. *Ogoniland Case*, Comm. No. 155/96, ¶ 52.

D. The Two-Pronged Environmental Human Rights Jurisprudence

International human rights bodies have held that environmental harm may implicate a wide range of human rights, which in principle give rise to different types of duties. Nevertheless, in the environmental context, tribunals have derived remarkably similar duties from these various rights. They require strict procedural safeguards, including prior assessment of environmental impacts, full and informed participation by those affected, and judicial recourse for states' failure to comply with their obligations. If a state follows these procedures, its decisions as to how to strike the balance between environmental protection and other interests receives deference.

The critical issue is how much deference such decisions should receive. One possibility is that the deference is virtually absolute. Alan Boyle describes the environmental human rights jurisprudence as suggesting that the contribution of international law to environmental protection is chiefly "the empowerment of individuals and groups most affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social and economic interests."¹³³ Absolute deference to the decisions that result from this "empowerment" would effectively create an international variant of John Hart Ely's "representation-reinforcing" approach to judicial interpretation of open-ended provisions in the U.S. Constitution, which calls for courts to protect participation by minorities in the political process, but otherwise to defer to the decisions of governments.¹³⁴

Whatever the merits of this approach domestically, there are serious problems with adopting it in the context of human rights. Human rights law protects a core of rights that society cannot decide to violate, even if it does so through an inclusive, informed process. To take an extreme example, a state's decision to torture suspected criminals would violate its obligations under human rights law even if the decision resulted from a well-informed, inclusive public debate. Similarly, if environmental harm to human rights were severe enough, it could give rise to duties that states could not avoid, even if their decisions to allow such harm met all procedural requirements.

133. Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 498 (2007).

134. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (describing his theory as "one that bounds judicial review . . . by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack").

Reflecting this concern, the environmental human rights jurisprudence does not completely defer to states' decisions on how to balance environmental protection and other interests, even if the decisions result from a satisfactory procedure. The human rights bodies have consistently stated that governments may not strike a balance that violates minimum substantive standards.¹³⁵ Understandably, the tribunals have not always defined these standards clearly. Courts are well-suited to safeguard procedural rights, but may lack the resources and expertise, as well as the political mandate, to determine specific levels of environmental protection.

Nevertheless, it seems evident that, at a bare minimum, states cannot decide to carry out or allow environmental harm that would destroy, rather than merely infringe, human rights on a large scale. For example, the Inter-American Court held in *Saramaka People* that while Suriname could restrict the Saramaka people's communal right to property, it could not do so in a way that denied their survival as a tribal people.¹³⁶ Proposed measures are often not certain to have such drastic effects, however. How should states decide whether to proceed with projects that threaten, but are not certain, to cause massive violations of human rights? The Inter-American Court answered this question by holding that with respect to proposed projects that would have a "major impact" in the territory of the Saramaka, Suriname would have to do more than consult with the Saramaka; it would have to "obtain their free, prior, and informed consent" before proceeding.¹³⁷

Requiring the consent of those most affected by measures that threaten enormous harm to human rights builds on, rather than supplants, the two-pronged approach developed by the environmental human rights jurisprudence. It is a procedural safeguard, of the type that courts are best suited to police. It avoids requiring tribunals to set detailed substantive standards, instead continuing to leave those standards to the political process. At the same time, the requirement of consent provides greater protection against measures that threaten to destroy, rather than merely infringe, human rights.

II. APPLYING HUMAN RIGHTS LAW TO THE DOMESTIC EFFECTS OF CLIMATE CHANGE

Because climate change is a type of environmental degradation, it may seem obvious that the environmental human rights jurisprudence

135. See *supra* notes 52–57, 100–103, 108 and accompanying text.

136. *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 128.

137. *Id.* ¶ 134 (emphasis added).

described above should apply to it. Certainly climate change can drastically affect human rights, as the first Section of this Part shows. As the second Section explains, however, this jurisprudence was developed in the context of harm that does not cross borders, and its two-pronged approach does not easily apply to transboundary harms like climate change. Nevertheless, even without such a broader application, human rights law: (1) requires states to address climate change harm to the extent that it infringes the human rights of people within their own territory; and (2) constrains states' possible responses to climate change.

A. *Human Rights Affected by Climate Change*

Two particularly vulnerable communities, the Inuit and the Maldivians, have shown in detail how climate change interferes with their human rights. In December 2005, the Inuit filed a petition with the Inter-American Commission on Human Rights alleging that the United States failed to comply with its obligations under human rights law, by failing to take effective measures to abate the effects of climate change on the rights of the Inuit.¹³⁸ The Maldivians' submission was in response to a March 2008 decision by the UN Human Rights Council to ask the Office of the High Commissioner for Human Rights (OHCHR) to conduct a study of the relationship between human rights and climate change.¹³⁹ That study, which the OHCHR released in early 2009, provides a useful description of the effects of climate change on human rights in general.¹⁴⁰

The Inuit petition describes how climate change is affecting the Arctic environment on which the Inuit depend.¹⁴¹ The petition explains how those effects interfere with many Inuit human rights, including rights to life, health, property, cultural identity, and self-determination. The Inuit's right to life, for example, is infringed because "[c]hanges in ice and

138. Inuit Petition, *supra* note 1. Because the United States is not a party to the American Convention, the petition relied on the rights set out in the American Declaration. See American Convention, *supra* note 20; American Declaration, *supra* note 70; Buergenthal, *supra* note 70.

139. See MALDIVES SUBMISSION, *supra* note 11, at 4.

140. Office of the UN High Comm'r for Human Rights [OHCHR], *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter *OHCHR Report*].

141. Inuit Petition, *supra* note 1, at 35–67. The Inuit claim received a great deal of scholarly attention. See, e.g., Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3 (2007); Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267 (2007); Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007). For a general description of the effect of climate change on the polar regions, see IPCC, *IMPACTS*, *supra* note 1, at 655–77.

snow jeopardize individual Inuit lives, critical food sources are threatened, and unpredictable weather makes travel more dangerous at all times of the year.”¹⁴² Individual lives are at risk because the sea ice on which the Inuit travel and hunt freezes later, thaws earlier, and is thinner; critical food sources are threatened because harvested species are becoming scarcer and more difficult for the Inuit to reach; the increase in sudden, unpredictable storms and the decrease of snow from which to construct emergency shelters have contributed to death and injuries among hunters; and the decrease in summer ice has caused rougher seas and more dangerous storms, increasing danger to boaters.¹⁴³

The Inuit community also argued that climate change affects the Inuit right to health: as sea ice disappears and local weather conditions change, the fish and game on which the Inuit rely for nutrition disappear; new diseases move northward; quality and quantity of drinking water diminishes; and the dramatic changes in the circumstances of their lives damage the Inuit’s mental health.¹⁴⁴ Furthermore, climate change also interferes with the Inuit’s ability to enjoy their right to property in their traditional lands. “Sea ice, a large and critical part of coastal Inuit’s property, is literally melting away.”¹⁴⁵ Coastal erosion and melting permafrost are forcing the Inuit to relocate homes and, sometimes, entire communities further inland.¹⁴⁶ By undermining the ability of the Inuit to sustain themselves, climate change also threatens their rights to enjoy their cultural identity, and deprives them of their means of subsistence in violation of their right to self-determination.¹⁴⁷

Despite the factual and legal support the petition provided for its assertions, the Inter-American Commission said that it was not possible to process the complaint “at present.”¹⁴⁸ In explanation, the Commission stated only that “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”¹⁴⁹ In March 2007, the Commission held a hearing on the connections between climate change and human rights, but it has taken no further action since then.

142. Inuit Petition, *supra* note 1, at 90.

143. *Id.* at 91.

144. *Id.* at 87–88.

145. *Id.* at 82.

146. *Id.* at 49, 51, 95.

147. *Id.* at 76, 92–93. The petition also says that climate change violates the Inuit’s rights to freedom of movement and inviolability of the home. *Id.* at 95–96.

148. Letter from Ariel E. Dulitzsky, Assistant Executive Sec’y, Inter-American Comm’n on Human Rights, to Paul Crowley, Legal Representative of the Inuit (Nov. 16, 2006) (on file with author).

149. *Id.*

The September 2008 submission by the Maldives to the OHCHR describes the threats climate change poses to the human rights of its people.¹⁵⁰ Climate change threatens harm to small island states like the Maldives by intensifying tropical storms and cyclones, changing patterns of precipitation, increasing temperatures, and, most importantly, causing sea levels to rise.¹⁵¹

Composed of small islands in the Indian Ocean, the Maldives has an average height above sea level of less than two meters. As its submission describes, sea levels have been rising at an accelerating pace.¹⁵² In 2007, the IPCC projected that the average rise in sea level will be between 0.19 and 0.58 meters by the end of the century,¹⁵³ but recent studies indicate that the Greenland and Antarctic ice sheets are melting more rapidly than previously realized, and project that sea levels will actually rise between 0.5 and 1 meter by 2100.¹⁵⁴ Rising sea levels exacerbate inundation, storm surges, and erosion.¹⁵⁵ An increase of 0.5 meters would inundate 15% of Malé, the most populous island in the Maldives, by 2025, and flood half of it by 2100.¹⁵⁶ A sea surge 0.7 meters higher than the average sea level, which would flood most of the islands in the Maldives, has been expected to occur only once per century, but by 2050 may occur at least annually.¹⁵⁷

Rising sea levels threaten many of the Maldivians' human rights. Because 42% of the population and 47% of the housing structures in the Maldives are located within 100 meters of the shoreline, "even partial flooding of the islands is likely to result in drowning, injury, and loss of life."¹⁵⁸ Flooding and the resulting loss of land interferes not only with the right to life, but also the rights to health, property, housing, and water, among others, by "eliminat[ing] the physical area necessary for the establishment of homes, services infrastructure, economic activities, and

150. MALDIVES SUBMISSION, *supra* note 11.

151. See generally IPCC, IMPACTS, *supra* note 1, 688–712. See also Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 111–16 (2003–04); Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1593–97 (2007); Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 105–08 (2005); Stephen Tully, *The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts Within the Pacific*, 5 N.Z. J. PUB. & INT'L L. 169, 170–74 (2007).

152. MALDIVES SUBMISSION, *supra* note 11, at 18.

153. *Id.*

154. *A Sinking Feeling*, ECONOMIST, Mar. 14, 2009, at 82.

155. IPCC, IMPACTS, *supra* note 1, at 689.

156. MALDIVES SUBMISSION, *supra* note 11, at 19.

157. *Id.* at 20.

158. *Id.* at 21.

the sites of all political, social, and cultural activities. Land is, in this sense, a fundamental pre-cursor to the enjoyment of all other rights.”¹⁵⁹ If sea level rise is not halted, it will eventually inundate so much of the Maldives that continued human existence there will no longer be possible. “The extinction of their State would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination.”¹⁶⁰

The Inuit and the Maldivians are not the only communities, or even the only types of communities, vulnerable to the effects of climate change. The OHCHR Report to the Human Rights Council, which was released early in 2009, describes the threat climate change poses to human rights on a global basis.¹⁶¹ Drawing on the work of the IPCC, the Report describes the current and projected effects of climate change on particular rights, including rights to life, health, food, water, housing, and self-determination.¹⁶²

The Report states, *inter alia*, that: the IPCC predicts “with high confidence” increases in death, disease, and injury as a result of heat waves, floods, storms, fires, and droughts caused by climate change; climate change is expected to affect the health of millions of people by increasing malnutrition, infectious diseases, and injuries from extreme weather; crop productivity at lower latitudes will decrease, “increasing the risk of hunger and food insecurity in the poorer regions of the world”; climate change will “exacerbate existing stresses on water resources and compound the problem of access to safe drinking water”; climate change is affecting and will continue to affect the right to housing by forcing people to relocate from vulnerable sites, such as those in the Arctic and on small island states; and sea level rise threatens “the habitability and, in the longer term, the territorial existence of a number of low-lying island States.”¹⁶³ The Report also indicates that the effects of climate change will be felt acutely by groups already vulnerable because of their poverty, gender, age, minority status, or disability.¹⁶⁴

The OHCHR Report concludes that climate change “has obvious implications for the enjoyment of human rights.”¹⁶⁵ Nevertheless, the report states that “it is less obvious whether, and to what extent, such ef-

159. *Id.*

160. *Id.*

161. *OHCHR Report, supra* note 140.

162. *Id.*

163. *Id.* at 9–14. See generally John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477 (2009) (analyzing the OHCHR Report and the process that led to its creation).

164. *OHCHR Report, supra* note 140, at 15.

165. *Id.* at 23.

fects can be qualified as human rights violations in a strict legal sense.¹⁶⁶ The Report cites difficulties in tracing the causal connections back from the adverse effects of climate change to particular state actions, and in disentangling the effects of climate change from other natural causes, which increase the difficulty of establishing legal responsibility for the effects of climate change on human rights. It also notes that many of the adverse effects of climate change are projections about future events, “whereas human rights violations are normally established after the harm has occurred.”¹⁶⁷ The refusal of the OHCHR to call climate change a human rights violation may disappoint advocates, but treating climate change as a *violation* of human rights law is not necessary in order to bring human rights law to bear on it, as the next Section explains.

B. States’ Duties to Address the Internal Effects of Climate Change

Some elements of the extensive environmental jurisprudence developed by human rights bodies apply directly to the harm from climate change. In particular, the jurisprudence makes clear that states have obligations not only to refrain from causing prohibited levels of environmental harm to human rights, but also to protect against harm from other sources.¹⁶⁸ A state’s duty to protect against environmental harm to human rights extends to harm not caused by the state itself or even by private actors with the acquiescence of the state. For example, in *Budayeva v. Russia*, the ECHR held that even though Russia did not cause a deadly mudslide, its failure to take steps to prevent the mudslide, or to warn those in its path, violated Russia’s duty to protect the right to life of those within its jurisdiction.¹⁶⁹ Whether climate change may be considered a violation of human rights by states is therefore less important than it may first appear. Either way, states have duties to protect human rights from harm caused by climate change.¹⁷⁰

But other elements of the environmental human rights jurisprudence do not translate well to climate change. The fundamental problem is that the jurisprudence was developed in the context of environmental harm that does not cross international boundaries. The general approach of

166. *Id.*

167. *Id.*

168. *See supra* Parts I.A.1, I.B.1.

169. *Budayeva v. Russia*, App. No 15339/00 (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int>; *see supra* notes 53–59 and accompanying text.

170. *See OHCHR Report, supra* note 140, at 24 (“Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.”).

the jurisprudence is to subject states to strict procedural requirements: they must assess potential environmental harm, provide information to those affected, allow them to participate in decision-making, and provide them access to judicial remedies for non-compliance. At the same time, states have discretion within wide limits to determine how to strike the balance between environmental harm and the benefits of the activities causing it, and, thus, to decide where to set levels of environmental protection. This deference to states' environmental policy decisions only makes sense if, and to the degree that, the procedural safeguards are in place to ensure that the policy decisions reflect the informed views of all those affected by it.

In other words, the environmental human rights jurisprudence is based on the premise that a single polity experiences both the benefits of economic development and the environmental harm that it engenders, and that it has the responsibility to decide where to strike the balance between the benefits and harms. But climate change is not subject to a single polity; it is inherently a transboundary problem on a global scale. Moreover, human rights law primarily imposes vertical duties, that is, duties owed by a state to those within its own jurisdiction. Extending those duties diagonally, to those outside the state's jurisdiction, may seem necessary in order to apply human rights law to the global aspects of climate change, but such an extension faces serious obstacles, both legal and practical.

Part III analyzes possible ways to overcome these obstacles. Apart from whether these approaches are successful, however, it is important to recognize that states still have duties under human rights law with respect to climate change. Even if human rights law does not require states to consider the effects of climate change outside their own jurisdictions, states would still have duties to protect those within their jurisdictions from its effects. Moreover, human rights law would still constrain the responses of states to climate change. The following sections explain each of these points.

1. *Obligations on Each State to Address the Effects of Climate Change Within Its Own Jurisdiction*

Considering climate change solely as a domestic problem, most states would probably not be obligated under human rights law to try to mitigate their own emissions of greenhouse gases. They would, however, be required to take steps to help their people adapt to climate change, and to try to convince other states to work toward a general agreement to reduce global emissions.

If they did not have to take into account the effects of climate change on other states, most states would not be required to try to reduce their own emissions in order to protect the human rights of their own people, because doing so would have virtually no effect by itself. The Maldives, for example, produces a tiny fraction of 1% of global emissions of greenhouse gases. Cutting its emissions to zero would make no appreciable contribution to the mitigation of global warming. Only China, the United States, and the European Union produce more than 6% of the world's greenhouse gases.¹⁷¹ Accordingly, one could argue that these states are obliged to cut their emissions by substantial amounts in order to protect the human rights of their own people, apart from whatever obligations they may have with respect to others.

On the other hand, even the largest emitters—China and the United States—each produce under 20% of the total.¹⁷² If either cut its emissions by 50% tomorrow, it would thus reduce total global emissions by less than 10%. That reduction would soon be offset by continued growth from other countries, unless they reduced their emissions as well. Cuts by an individual country phased in over a longer period of time would be even more swiftly offset by growth elsewhere unless, again, other countries agreed to reduce their emissions. In the absence of extraterritorial duties, then, it would be difficult to argue that a state must make significant reductions in its greenhouse gas emissions to protect the rights of its own people, except, perhaps, to the extent necessary to induce other states to agree to reduce their own emissions.

But whether or not a state's human rights duties to its own people require it to reduce emissions, they do require it to take steps to adapt to climate change. Even a country like the Maldives, which contributes a minuscule fraction of all greenhouse gas emissions, has a duty to adopt measures to protect everyone within its jurisdiction from the harmful effects of climate change, just as Russia was held to have an obligation to protect its people from mud slides. The fact that the state did not cause the threat does not excuse the state's failure to try to protect against it.¹⁷³

171. These numbers are based on 2005 data from the Climate Analysis Indicators Tool, <http://cait.wri.org/> (last visited Aug. 10, 2009). For additional support using data from 2000, see also KEVIN A. BAUMERT ET AL., WORLD RES. INST., NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY 12 (2005), available at http://pdf.wri.org/navigating_numbers.pdf.

172. Climate Analysis Indicators Tool, *supra* note 171.

173. The Maldives' submission to the OHCHR makes clear that it recognizes its obligations in this regard. It describes some of the steps it has taken, including constructing a three-meter sea wall around its capital, developing early warning systems, increasing its capacity for disaster response, and helping to relocate its population to those of its islands that are better protected from sea surges. MALDIVES SUBMISSION, *supra* note 11, at 44–45.

Moreover, a state unable to fulfill these duties with its own resources may be obliged to seek assistance from other states.¹⁷⁴

In addition, states have a duty to try to influence the international community to reduce global greenhouse gas emissions. This duty may be derived from the duty to request assistance, but it is also akin to states' obligations to regulate private sources within their control. States do not have control over one another, of course, any more than they have complete control over private actors, even those within their own jurisdiction. As a result, human rights law does not place an obligation of result on states with respect to private actors, but requires states to make best efforts—to undertake due diligence—to protect rights from interference by those actors.¹⁷⁵ Similarly, it should require states to exercise due diligence to protect rights from other actors, including states, that may adversely affect the human rights of their people.

Of course, the ability of a state to influence the conduct of other states is much less than its ability to influence the conduct of private actors within its jurisdiction. However, its relatively weaker level of influence does not excuse a state from using those tools that it has to reduce harmful emissions to safe levels. States may, for example, try to influence one another through persuasion or bargaining. They may also have legal rights vis-à-vis other states based on treaties of alliance or friendship, or more general norms of international law. Because meaningful reductions in global emissions require action by more than one state, as a practical matter this obligation may require each state to seek an effective international agreement to reduce greenhouse gas emissions to levels that protect its own people from the adverse effects of climate change. In that context, its duties to its own people may obligate it to commit to reductions in its own emissions, as part of its effort to obtain such a global agreement.

2. *Constraints on States' Responses to Climate Change*

Human rights law not only calls for states to undertake measures in response to climate change, it also constrains the responses they may take. The environmental human rights jurisprudence described in Part I would give each state discretion on how to strike the balance between environmental degradation and other societal interests, as long as its de-

174. The CESCR has stated that states have a duty to seek assistance, if necessary, to meet their obligations under the ICESCR, based on Article 2(1) of that agreement. CESCR General Comment 14, *supra* note 72, ¶ 47; CESCR General Comment 12, *supra* note 30, ¶ 17; see SKOGLY, *supra* note 30, at 145. In addition, the general duty on states to protect the human rights of their people might also provide a basis for a duty to seek assistance when needed.

175. See Knox, *supra* note 13, at 21–23.

cision-making process met the procedural requirements set out above, and the end-result did not fall below minimum substantive standards. A small island state, for example, could reasonably decide whether and where to build sea walls, but it could not exclude those affected from participating in the decision, or decide to build walls that would protect only favored ethnic groups.

In this respect, all human rights may be relevant, not just those likely to be directly affected by climate change. For example, agreements setting out civil and political rights provide basic protections for those accused of crimes, rights to freedom of religion, expression, and association, and rights to participate in the government,¹⁷⁶ none of which seems likely to be infringed by climate change. Nevertheless, these rights, along with others, might be *constraints* on states' possible responses to climate change. A state could not, for instance, prohibit criticism of its climate change policy or forbid individuals from joining associations designed to influence that policy. Similarly, a state could not respond to climate change in ways that discriminate against groups on the basis of sex, race, religion, or other status.¹⁷⁷

Could the importance of stemming the consequences of climate change justify a relaxation of any of these constraints? The human rights agreements provide that some rights, such as the rights to freedom of movement and residence, religion, expression, and association, may be limited as prescribed by law and as necessary to protect national security; public safety, order, health, or morals; or the rights and freedoms of others.¹⁷⁸ A state could conceivably justify limitations on free movement and residence, for example, if necessary to prevent individuals from going to areas in danger from rising sea levels. But climate change would no more justify limits on rights to religion or expression than would any other natural disaster. Moreover, other rights, including crim-

176. African Charter, *supra* note 17, arts. 7–10, 13; ICCPR, *supra* note 18, arts. 9, 10, 14, 15, 18, 19, 22, 25; American Convention, *supra* note 20, arts. 4, 7–9, 12, 13, 16, 23; European Convention on Human Rights, Protocol 1, art. 3, Mar 20, 1952, Europ. T.S. No. 5, 213 U.N.T.S. 221; European Convention, *supra* note 19, arts. 5–7, 9–11.

177. *E.g.*, African Charter, *supra* note 17, art. 2; American Convention, *supra* note 20, art. 1; ICCPR, *supra* note 18, art. 2(1); ICESCR, *supra* note 60, art. 2(2); European Convention, *supra* note 19, art. 14.

178. The precise language of the permissible limitation varies from right to right and agreement to agreement. For example, “[t]he European Convention generally, and the ICCPR and the American Convention with respect to some of the rights, also require limits to be ‘necessary in a democratic society.’” See Knox, *supra* note 13, at 11–12. For a discussion of the limits in the ICCPR, see Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290* (Louis Henkin ed., 1981). For a comparison of the limits in the ICCPR with those in the European Convention, see Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 *BRIT. Y.B. INT’L L.* 281, 283–85 (1978).

inal protections and freedom from discrimination, do not include such clawback clauses.

What if the effects of climate change on a state threaten to be catastrophic? The ICCPR and two of the regional agreements allow governments to derogate from their obligations with respect to certain rights in a public emergency that threatens the life of the nation, which may be an accurate description of the threat climate change poses to small island states.¹⁷⁹ But this excuse has limits: the derogation may extend only as far as “strictly required by the exigencies of the situation,” is not available at all with respect to some rights, and, perhaps most relevantly in this context, cannot involve illegal discrimination.¹⁸⁰ Even if faced with an existential threat from climate change, a state may not adopt a response that discriminates on grounds—such as race, religion, or gender—that are prohibited by international human rights law.

III. APPLYING HUMAN RIGHTS LAW TO THE GLOBAL EFFECTS OF CLIMATE CHANGE

As Part II explains, the two-pronged environmental human rights jurisprudence does not apply well to transboundary environmental harm, such as climate change, because it assumes a single polity that experiences both the benefits and the costs of environmental policies. For human rights law to require states to address the entire range of harms caused by climate change, it must impose duties on states with respect to those living outside their territory and, indeed, everywhere in the world. This Part analyzes two different bases for applying the human rights law to climate change globally: extending the environmental human rights jurisprudence extraterritorially, and basing that jurisprudence on the international duty of cooperation. It concludes that of the two approaches, the latter is more feasible.

A. *Extending Environmental Human Rights Law Extraterritorially*

One way to bring human rights law to bear on transboundary harm to human rights would be to extend it extraterritorially. Specifically, both prongs of the environmental human rights jurisprudence could be ex-

179. See ICCPR, *supra* note 18, art. 4(1); American Convention, *supra* note 20, art. 27(1); European Convention, *supra* note 19, art. 15(1). Again, the language varies somewhat from agreement to agreement. The American Convention refers to “public danger or other emergency that threatens the independence or security of a State Party.” American Convention, *supra* note 20, art. 27(1). The African Charter contains no derogation provision.

180. ICCPR, *supra* note 18, art. 4(1); see also American Convention, *supra* note 20, art. 27(1). The requirement of non-discrimination is included in the ICCPR and the American Convention, but not the European Convention.

tended beyond the country where the harm originates. With respect to the first prong (imposing strict procedural requirements), a state would have to conduct an environmental impact assessment of transboundary harm originating in the state and give all those affected, including non-residents, the ability to participate in the decision-making process. With respect to the second prong (providing deference to substantive decisions), a state could argue that its decisions regarding transboundary harm should be entitled to as much deference as its decisions regarding internal harm, because extending the procedural safeguards ensures that the state takes into account the full range of costs and benefits of its actions.¹⁸¹

Does human rights law provide a legal basis for such an extraterritorial extension of the environmental human rights jurisprudence? Arguably, human rights law requires states to respect the rights of those outside their own territory. As the first Section below describes, however, the extraterritorial application of the two most important global human rights treaties, the ICCPR and the ICESCR, is often contested and unclear.¹⁸² Moreover, extending the environmental human rights jurisprudence in this way faces formidable practical obstacles, as the second Section explains.

1. *Legal Bases for Extraterritorial Duties in Human Rights Law*

Article 2(1) of the ICCPR requires each of its parties “to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”¹⁸³ This language probably does not apply to the right of self-determination, but with re-

181. See Boyle, *supra* note 133, at 502–03 (suggesting that the ECHR adopt this approach in its environmental jurisprudence). As Boyle points out, the extraterritorial extension of procedural safeguards in this way would write into human rights law procedural requirements now included in European environmental agreements. See Aarhus Convention, *supra* note 59, art. 3(9) (requiring access to information, participation in decision-making, and access to legal remedies in the environmental context “without discrimination as to citizenship, nationality or domicile”); Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 34028 (requiring transboundary environmental impact on a non-discriminatory basis); see also John H. Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS, *supra* note 30.

182. To the extent that the Covenants do apply, however, there is no doubt that they each protect multiple rights affected by climate change. See, e.g., ICCPR, *supra* note 18, arts. 1 (self-determination), 6 (life), 17 (privacy); ICESCR, *supra* note 60, arts. 1 (self-determination), 11 (standard of living), 12 (health). Although neither treaty has universal membership, the ICCPR has 164 parties and the ICESCR has 160. The major contributors to global warming are party to both agreements, with the exception of China, which has signed but not ratified the ICCPR, and the United States, which has signed but not ratified the ICESCR. Many states vulnerable to climate change, including Bangladesh and the Maldives, belong to both.

183. ICCPR, *supra* note 18, art. 2(1) (emphasis added).

spect to the other rights protected by the ICCPR, it has been interpreted to limit states' duties to individuals or territory over which the states have "effective control." Arguing that the extraterritorial harm caused by climate change meets the "effective control" test would be difficult, but it might not be impossible in extreme cases.

In contrast, Article 2(1) of the ICESCR requires each party "to take steps, individually *and through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."¹⁸⁴ The ICESCR thus provides a clearer basis for extraterritorial duties, although developed countries have resisted the proposition that it imposes duties on them to help other countries meet their obligations under the Covenant.

a. The International Covenant on Civil and Political Rights

A natural reading of the word "and" in Article 2(1)'s limitation of a state's duties to "all individuals within its territory and subject to its jurisdiction" would be that the requirements of both territory *and* jurisdiction must be met for the ICCPR obligations to apply.¹⁸⁵ The dominant view, however, adopted by the International Court of Justice, the Human Rights Committee, and most scholars, is that the language should be read disjunctively, to require each party to respect and ensure the rights of both those within its territory *and* those subject to its jurisdiction.¹⁸⁶

Who falls within the extraterritorial jurisdiction of a state? In its General Comment on Article 2(1), the Human Rights Committee said that "a State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party."¹⁸⁷ Power or

184. ICESCR, *supra* note 60, art. 2(1) (emphasis added).

185. See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122–25 (2005).

186. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9); U.N. Human Rights Comm., *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex XIX, ¶ 12.3, U.N. Doc. A/36/40 (Sept. 29, 1981); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 79 (1995).

187. General Comment 31, *supra* note 28, ¶ 10 (emphasis added). Martin Scheinin, a former member of the Human Rights Committee, has argued for an expansive interpretation of the "effective control" test that would look at whether the state has effective control over the *situation* that causes a violation of the human right, rather than over the *individual* whose right is violated.

effective control can be established with respect to individuals if, for instance, they are arrested or kidnapped by a state. Control may also extend more broadly. The Human Rights Committee has suggested that a state's military control of territory beyond its own boundaries triggers its obligations under the ICCPR,¹⁸⁸ and the International Court of Justice (ICJ) followed that view in an opinion concerning Israeli construction of a wall in Palestinian territory.¹⁸⁹

No authoritative body has addressed whether transboundary environmental harm may bring its victims within the effective control of the state where the harm originates.¹⁹⁰ However, the ECHR and the Inter-American Commission on Human Rights have examined whether other types of extraterritorial harm fall within the jurisdictional limits in the European and American Conventions, which are similar to those of the ICCPR.¹⁹¹

Like the Human Rights Committee, the regional bodies look to whether the state has effective control (or "authority," in the case of the Inter-American Commission) in deciding whether it has jurisdiction, but they have varied in their application of the test to transboundary harm.

Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 73, 76–77 (Fons Coomans & Menno T. Kamminga eds., 2004). This test may go too far, however; it risks finding that Article 2(1) is satisfied whenever a chain of causation exists between a state's actions and extraterritorial harm, which would effectively write the limitation out of Article 2(1).

188. See Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra* note 187, at 41, 63–65 (discussing the Committee's application of the ICCPR to occupying forces in Somalia, Croatia, the West Bank, and the Gaza Strip).

189. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, ¶ 111.

190. One might be tempted to argue that transboundary environmental harm such as climate change raises no issues of extraterritorial duties, because the source of the harm is within the territory and jurisdiction of the originating state. Writing of the European Convention, which has a jurisdictional limit similar to that of the ICCPR, Alan Boyle suggests that "the Convention could arguably have extra-territorial application if a state's failure to control activities causing environmental harm affects life, private life or property in neighbouring countries," because "[t]hese activities are within [states'] jurisdiction in the obvious sense of being subject to their own law and administrative controls. Only the effects are extraterritorial." Boyle, *supra* note 133, at 500. The problem is that the European Convention, like the ICCPR, makes clear that the question is not whether the *actions taken* by the state are within its jurisdiction, but whether the *individuals affected* by those actions are within its jurisdiction. If they are not, then the state apparently owes them no duties, whether or not it has jurisdiction over the sources of harm.

191. Compare ICCPR, *supra* note 18, art. 2(1) ("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 . . .") with European Convention, *supra* note 19, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."), and American Convention, *supra* note 20, art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .").

In *Bankovic v. Belgium*, the ECHR rejected the argument that the NATO bombing of Serbia in 1999 amounted to effective control of the places bombed.¹⁹² The Court was evidently concerned that accepting the allegation would have meant that “anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State,” a reading that would have deprived the limitation of any meaning.¹⁹³ The Inter-American Commission, however, has taken a more expansive view. In 1999, it held that by shooting down an unarmed plane over international waters, agents of the Cuban government “placed the civilian pilots . . . under their authority,” thereby satisfying the jurisdictional requirement of the American Convention.¹⁹⁴

It is hard to see how transboundary harm caused by climate change could meet the standard employed by the ECHR. If aerial bombardment does not give states effective control of the places affected, it seems unlikely that such control would result from the less immediate and drastic measure of allowing greenhouse gases to cross international borders. The Inter-American Commission’s test appears less strict, but it remains uncertain how it would apply to transboundary environmental harm.

Clearly, not all transboundary harm could qualify as “effective control,” or the jurisdictional limits on states’ obligations under the ICCPR and the regional treaties would be meaningless. To successfully argue that the effects of climate change amount to an exercise of extraterritorial jurisdiction, one would have to focus on concrete ways that climate change places those affected under the control of the states causing the harm. Although that argument would be very difficult to make in many contexts, it might be possible with respect to particularly extreme impacts, such as the effect of climate change on small island states. If global warming displaces affected individuals from their own land, causing them to lose control over their own lives, it could subject them to the control of others, including (perhaps) the states contributing most to the warming. Residents of islands or other low-lying areas that become uninhabitable as a result of rising ocean levels could fall within this category. As their territory literally disappears, they are arguably at the mercy of the larger, more powerful countries that have caused the harm.

192. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

193. *Id.* at 356–57.

194. *Alejandre v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, Doc. 6 rev. ¶ 25 (1999).

Although the jurisdictional limit in Article 2(1) of the ICCPR constrains the extraterritorial application of most of the rights in the Covenant, it does not seem to apply to the right of self-determination. First, the right of self-determination is defined in Article 1 of the agreement, which sets out the duties pertaining to that right without jurisdictional limit.¹⁹⁵ Second, although it is not completely clear what groups qualify as the “peoples” that enjoy the right to self-determination, it seems indisputable that however defined, a people may be constituted as a state.¹⁹⁶ In that case, to be meaningful, the right to self-determination must give rise to extraterritorial duties on the part of *other* states.¹⁹⁷ Third, the Human Rights Committee has read the right as giving rise to duties on the part of all states, not just the particular state in which a “people” is found.¹⁹⁸ Finally, Article 1 of the ICCPR is repeated verbatim in the ICESCR, which includes no jurisdictional limit.¹⁹⁹ It would have been pointless for the drafters to constrain the scope of the right in one Covenant but not the other.

As a result, it seems clear that states have extraterritorial duties with respect to the right to self-determination. As explained above, although those duties are unclear in many respects, Article 1 explicitly includes the right of all peoples to “freely dispose of their natural wealth and resources,” and provides that “[i]n no case may a people be deprived of its own means of subsistence.”²⁰⁰ The obligation of states to “respect” the right would therefore seem to require, at a minimum, that they not interfere with other states’ ability to use their own resources, or deprive them of their means of subsistence. As climate change causes sea levels to rise and low-lying areas to become uninhabitable, small island states such as the Maldives will lose their natural resources and their means of

195. ICCPR, *supra* note 18, art. 1(3) (“The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”).

196. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123–24, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970) (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”).

197. *See* Malcolm Langford, *A Sort of Homecoming: The Right to Housing*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS, *supra* note 30 (“[I]t is abundantly clear from the text that these rights are against the world . . .”).

198. *See* U.N. Human Rights Comm., General Comment 12, *The Right of Self-Determination of Peoples*, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1 (Mar. 13, 1984) (describing the aspect of the right detailed in article 1(2) as entailing “corresponding duties for all States and the international community”).

199. *See* ICESCR, *supra* note 60, art. 1.

200. ICCPR, *supra* note 18, art. 1(2).

subsistence as they lose their land. Other states therefore have a duty to take the steps necessary to avoid that outcome.

This duty may provide a basis for the extension of the environmental human rights jurisprudence: states may be required to extend procedural safeguards (such as transboundary environmental impact assessments) to ensure that they take into account the possible effects of their policies on this right and, if they do, they may still have wide discretion to decide for themselves which policies to adopt.

b. The International Covenant on Economic, Social and Cultural Rights

The ICESCR has two strong interpretive bases for extraterritorial obligations. The first is that, unlike the ICCPR, the ICESCR does not include language limiting states' duties to individuals within their jurisdiction. In *Bosnia & Herzegovina v. Yugoslavia*, the ICJ held that Yugoslavia could be held responsible under the Genocide Convention for acts committed in Bosnian territory because the obligation of each state "to prevent and to punish the crime of genocide is not territorially limited by the Convention."²⁰¹ Matthew Craven cites this result as raising the possibility "that, absent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect."²⁰² The second, more explicit basis for extraterritorial obligations is the requirement in Article 2(1) of the ICESCR that each state party "take steps, individually *and through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights" recognized in the Covenant.²⁰³

201. Application of the Convention on the Prevention & Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), 1996 I.C.J. 595, 616 (July 11).

202. Matthew Craven, *Human Rights in the Realm of Order: Sanctions and Extraterritoriality*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra* note 187, at 233, 251; *see also* Rolf Künemann, *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra* note 187, at 201, 201 ("In fact there is nothing in the ICESCR which would limit the rights recognised . . . to persons within a state party's territory. This limitation or any 'territorial/extraterritorial' distinction is simply not made.").

203. ICESCR, *supra* note 60, art. 2(1) (emphasis added). Several other provisions in the ICESCR also refer to international assistance or cooperation. *See id.* arts. 11(2), 15(4), 22, 23. For an example of another human rights treaty that includes an explicit basis for international cooperation, see CERD, *supra* note 110, art. 32. Several human rights treaties do not have general jurisdictional limits or bases for extraterritorial application. *See, e.g.*, CRC, *supra* note 113; CEDAW, *supra* note 110; CERD, *supra* note 110. However, some of the specific provisions of these agreements do speak to jurisdiction or international cooperation. *E.g.*, CRC, *supra* note 113, art. 24(4) (requiring states "to promote and encourage international co-operation" toward the progres-

In virtually every General Comment it has adopted in recent years on particular rights, including rights to health, water, and food, the CESCR has relied on the reference to “international assistance and co-operation” to set out extraterritorial obligations.²⁰⁴ Its approach has been followed in this respect by UN special rapporteurs, including the rapporteurs on the right to food and right to health,²⁰⁵ as well as by the OHCHR in its report on climate change and human rights.²⁰⁶ Nevertheless, the ICJ suggested in the *Wall* case that the Covenant’s absence of a provision on the scope of its application might be due to “the fact that this Covenant guarantees rights which are essentially territorial.”²⁰⁷ The ICJ did not explain the apparent contradiction between this statement and its *Bosnia* decision, or the contrary interpretations by the expert committee charged with overseeing the ICESCR, or even note the specific reference to international assistance and cooperation in Article 2(1).

On the whole, then, it seems plausible, at the very least, that the ICESCR imposes extraterritorial duties. The contours of those duties remain unclear, however. One possible interpretation is that while the primary responsibility for meeting the obligations under the ICESCR remains on the state with jurisdiction over the people concerned, states in a position to assist other states to meet those obligations are required to do so. On this basis, the CESCR has identified obligations both to provide long-term assistance and to respond to emergencies.²⁰⁸ It has said that the obligation depends on the availability of resources, and that

sive realization of children’s right to “enjoyment of the highest attainable standard of health”); CERD, *supra* note 110, art. 3 (requiring parties to prevent, prohibit, and eradicate racial segregation in territories under their jurisdiction).

204. In addition, the CESCR has questioned states about the fulfillment of their extraterritorial duties and has included its assessment of states’ compliance with these duties in its concluding observations on the states’ reports. SKOGLY, *supra* note 30, at 152.

205. For a detailed description of the views of Paul Hunt, the first Rapporteur on the Right to Health, on this topic, see Judith Bueno de Mesquita & Paul Hunt, *The Human Rights Responsibility of International Assistance and Cooperation in Health*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS UNDER HUMAN RIGHTS LAW, *supra* note 30.

206. See OHCHR Report, *supra* note 140, ¶¶ 69–74, 79.

207. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9).

208. For example, with respect to the rights to food and health, the CESCR has said that states should facilitate access to food, essential health facilities, goods, and services, and provide the necessary aid when required. States also have the “responsibility . . . to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.” CESCR General Comment 14, *supra* note 72, ¶¶ 39, 40; CESCR General Comment 12, *supra* note 30, ¶¶ 36, 38. More generally, the Committee has regularly emphasized that it is “particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfil their core and other obligations.” CESCR General Comment 14, *supra* note 72, ¶ 45; see also CESCR General Comment 3, *supra* note 89, ¶ 14.

each state should contribute in accordance with its ability.²⁰⁹ As applied to climate change, the implication of this interpretation is that the requirement to assist other states requires richer countries to help poorer states pay the costs of adaptation and (perhaps) mitigation.

Unsurprisingly, developed states have refused to accept the proposition that the ICESCR requires them to provide international financial assistance. The United States has been particularly vocal,²¹⁰ but other developed countries have also resisted the idea.²¹¹ The resistance may be due in part, at least, to the open-ended nature of the potential obligation and its imposition of positive, rather than negative, duties. In the three-part categorization of duties adopted by the CESC, a duty to provide international assistance may be an extension of the duty to *fulfill*,²¹² which may have less political support than more widely accepted duties to *respect* or *protect*.²¹³ The debate over international financial assistance, however, should not obscure other possible extraterritorial duties under the ICESCR, which may have more political support.²¹⁴

209. CESC General Comment 14, *supra* note 72, ¶ 39; CESC General Comment 12, *supra* note 30, ¶ 38. In its review of states' reports, the CESC asks developed states about their levels of official development assistance. Similarly, the Special Rapporteur on the Right to Health has taken the position that "[t]he human rights responsibility of international assistance and cooperation includes a duty on high-income States to urgently take deliberate, concrete and progressive measures toward devoting a minimum of 0.7 per cent of their gross national product (GNP) to development assistance." Bueno de Mesquita & Hunt, *supra* note 205, at 15.

210. For example, at the 2004 and 2006 sessions of the Human Rights Commission, the United States stated that the right to food did not give rise to international obligations and that the UN Special Rapporteur on the Right to Food "should be chastised for his 'irresponsible and unfounded statements' in that regard." Matthew Craven, *The Violence of Dispossession: Extraterritoriality and Economic, Social, and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 71, 77 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

211. For example, the 2005 report of the working group charged with negotiating the optional protocol to the ICESCR included a statement by Canada, the Czech Republic, France, Portugal, and the United Kingdom that they "believed that international co-operation and assistance was an important moral obligation but not a legal entitlement, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid." *Id.* at 77 n.24 (quoting ECOSOC, Comm'n on Human Rights, Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the Int'l Covenant on Econ., Soc. & Cultural Rights, *Report on Economic, Social and Cultural Rights*, ¶ 76, U.N. Doc. E/CN.4/2005/52 (Feb. 10, 2005)); see also Smita Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 737 (2006) ("The articulation of the obligation [of international cooperation] in a manner that includes a duty to fulfill social and economic rights in other countries may also be met with a great deal of political resistance by states that do not wish to cast their aid-giving in legal obligation terms.").

212. See SKOGLY, *supra* note 30, at 71.

213. See Amanda Cahill, *Protecting Rights in the Face of Scarcity: The Right to Water*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS, *supra* note 30; Wouter Vandenhoe, *EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights*, in CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS 85, 97 (Margot E. Salomon et al. eds., 2007).

214. SKOGLY, *supra* note 30, at 18 ("[T]he discussion on whether this [language] implies a

For example, Matthew Craven suggests that one approach to the question of extraterritorial application of the ICESCR would be to recognize that while “a state is not necessarily directly responsible for conditions elsewhere in the globe, and . . . each state assumes primary responsibility for the well-being of the local populace,” each state is also required “to ensure that it does not undermine the enjoyment of rights of those in foreign territory.”²¹⁵ In other words, a state must not interfere with other states’ ability to meet their obligations.²¹⁶ This duty would essentially be an extraterritorial extension of the duty to *respect* human rights, perhaps the most basic human rights obligation.²¹⁷ The CESCR has regularly applied this duty of non-interference, with particular reference to the rights to health, food, and water.²¹⁸ Similarly, the duty to *protect* rights from interference by private parties could be extended extraterritorially by requiring each state to prevent private actors under its jurisdiction or control from harming human rights in other states.²¹⁹

Together, these duties could provide a legal basis for the extension of environmental human rights jurisprudence to climate change. Pursuant to that jurisprudence, a state may comply with its obligations to respect and protect those within its own territory by satisfying procedural safeguards and making substantive decisions that do not destroy human rights. If the duties to respect and protect rights extend extraterritorially, a state presumably may comply with them in the environmental context by extending extraterritorially the procedural safeguards developed in the environmental human rights jurisprudence. As already noted, that would require the state to undertake transboundary environmental impact assessments, provide information to everyone whose human rights might be affected by the actions under its jurisdiction, and allow them to participate in the decision-making process. Accordingly, a state that fol-

right/obligation with regard to receiving/providing development assistance is only one aspect of a much more complex understanding of what ‘international assistance and cooperation’ implies, and this debate should not overshadow other important elements of these concepts.”).

215. Craven, *supra* note 210, at 253.

216. *See, e.g.*, Cahill, *supra* note 213 (“This provision should be interpreted to include not only an obligation to refrain from actual actions and activities which are detrimental to the enjoyment of the right to water, but also encompass an obligation to refrain from formulating and implementing policies which ‘can be foreseen as having negative effects’ upon the right to water.”).

217. *See* SKOGLY, *supra* note 30, at 68–69.

218. *See* CESCR General Comment 15, *supra* note 73, ¶ 31; CESCR General Comment 14, *supra* note 72, ¶ 41; CESCR General Comment 12, *supra* note 30, ¶ 37.

219. SKOGLY, *supra* note 30, at 70. Although a state’s duty to protect those within its own jurisdiction is well-established, its duty to protect others has received less attention. *But see* CESCR General Comment 14, *supra* note 72, ¶ 39 (“States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means . . .”) (emphasis added).

lowed these procedures would have wide discretion to strike a balance between environmental protection and other policies, as long as its decisions did not result in the destruction of the human rights of those outside, as well as within, its jurisdiction.

2. *Practical Obstacles to Extending the Environmental Human Rights Jurisprudence Extraterritorially*

Even if legal bases exist for extending the environmental human rights jurisprudence extraterritorially, such an extension faces substantial political and practical difficulties. First, the legal bases themselves are contested. As noted above, developed states have strongly resisted the proposition that they have duties to assist other states to fulfill the rights protected by the ICESCR.²²⁰ Although the duty not to interfere with other states' ability to meet their obligations under the ICESCR might be thought to be relatively straightforward, arising from general principles of good faith in the performance of international legal obligations,²²¹ this duty has been met with resistance from developed countries as well.²²² In principle, the existence of an extraterritorial dimension of the right to self-determination may be less controversial, but its scope and nature, particularly outside the context of colonialism, remain far from clear, and attempts to apply it to particular issues have also met with opposition.²²³

220. See *supra* Part III.A.1.b.

221. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). Even signatories that have not ratified a treaty (such as China with respect to the ICCPR, and the United States with respect to the ICESCR) are obligated "to refrain from acts which would defeat [its] object and purpose." *Id.* art. 18. See also Cahill, *supra* note 213, at 352 (arguing that as a negative duty, the duty of non-interference should be less controversial than the positive duty to assist).

222. Some of the resistance may stem from the CESCR's application of the duty to international economic sanctions. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment 8, *The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, ¶ 7, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997) (with respect to economic sanctions, the "international community" as well as the state concerned must "do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State").

223. For example, the UN General Assembly and the Commission on Human Rights have adopted resolutions condemning unilateral sanctions regimes as contrary to the right of self-determination, as well as to the right to development and other international norms, including those codified in the UN Charter. See, e.g., Comm. on Human Rights Res. 2004/22, U.N. Doc. E/2004/23-E/CN.4/2004/127 (Apr. 16, 2004); Comm. on Human Rights Res. 2003/17, U.N. Doc. E/CN.4/2003/L.11/Add.3 (Apr. 22, 2003); G.A. Res. 57/222, U.N. Doc. A/RES/57/222 (Dec. 18, 2002); Comm. on Human Rights Res. 2002/22, U.N. Doc. E/CN.4/2002/22 (Apr. 22, 2002). The United States, Japan, and Western European states have generally opposed such resolutions, while most other states have supported them.

A second difficulty has to do with the nature of the environmental human rights jurisprudence itself. Its reliance on procedural safeguards to protect the human rights of those outside the jurisdiction of the source countries has an obvious drawback: unless the extraterritorial victims of transboundary harm are given rights equivalent to those of the residents of the source country, including the right to vote, the source country will retain the sole authority to decide whether to proceed with the activities threatening transboundary harm. In other words, requiring a state merely to take into account the extraterritorial effects of its decisions on human rights mitigates, but does not completely solve, the single-polity problem with applying the environmental human rights jurisprudence to transboundary harm. The single polity still does not include all of those affected by its decisions.

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

Finally, the most fundamental problem with the extraterritorial extension of the environmental human rights jurisprudence to climate change is that it would treat climate change as a series of individual transboundary harms, rather than as a global threat to human rights. It would require each state to assess its own contribution to climate change and take into account the resulting external (as well as internal) harm in making its policy decisions. The state-by-state consideration of extraterritorial effects of domestic actions would not, however, clearly require states to coordinate their responses with one another. This is an obvious shortcoming with respect to a problem whose sources and victims are all over the world. Without assurances that other states are also reducing their emissions of greenhouse gases, it makes little sense for any state to reduce its own emissions, since doing so would impose economic burdens on the state with little prospect of compensating environmental benefits. Successfully addressing the global problem of climate change

thus requires international cooperation. The next Section examines whether human rights law provides a legal basis for this international cooperation.

B. Basing Environmental Human Rights Law on the Duty of International Cooperation

The most feasible basis for extending current environmental human rights jurisprudence to climate change is the duty to cooperate. That duty is grounded in both the ICESCR and the UN Charter. It provides a sturdy basis for the environmental human rights jurisprudence to apply on a global basis. It overcomes the single-polity problem by, in essence, requiring the international community to act as a single polity with respect to the global threat to human rights posed by climate change.

The duty to cooperate is stated in Article 2(1) of the ICESCR, which requires each state party to take steps not only individually, but also “through international . . . cooperation,” toward the progressive realization of the rights recognized in the Covenant.²²⁴ The duty has deeper roots, however. The ICESCR draws on, and makes more explicit, a requirement for international cooperation contained in the Charter of the United Nations.²²⁵ Article 55 of the Charter requires the United Nations to promote, *inter alia*, “universal respect for, and observance of, human rights and fundamental freedoms for all,” and in Article 56, “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”²²⁶ As Sigrun Skogly has pointed out, reading Article 56 to mean only that states should work with the UN Organization toward these ends does not do justice to its language, which provides that the action that shall take place “in co-operation with the Organization” shall itself be “joint.”²²⁷

With respect to many challenges to human rights, international cooperation need play only a subordinate role. Particular threats to human rights typically arise within a state, and they can and should be addressed primarily by that state. Some human rights problems are inherently global, however, and require coordinated action on a global scale to solve. For example, the ICJ has noted “the universal character both of the condemnation of genocide and of the co-operation required ‘in order

224. ICESCR, *supra* note 60, art. 2(1).

225. See CESCR General Comment 3, *supra* note 89, ¶ 14.

226. U.N. Charter arts. 55–56. Article 55 also requires the United Nations to promote “solutions of international economic, social, health, and related problems,” which would seem to include the problems created by climate change.

227. SKOGLY, *supra* note 30, at 76.

to liberate mankind from such an odious scourge.”²²⁸ Climate change is the paradigmatic example of such a global threat. Because greenhouse gases emitted anywhere on the planet contribute to global warming everywhere on the planet, it is impossible to effectively mitigate climate change without coordinated international action. In this instance, international cooperation must take the primary, rather than the secondary, role.

As applied to climate change, what does the duty to cooperate require of states? At the most general level, it simply requires that states work together to protect the people of the world from the effects of climate change on their human rights. To that end, states will have to negotiate and implement international agreements,²²⁹ but human rights law does not require the negotiation to take place in a human rights forum; there is no reason why it should not continue under the auspices of the conference of parties to the Framework Convention on Climate Change, which has near-universal membership, with 192 parties, and the necessary experience and expertise. Rather than providing the forum, human rights law provides the standard that the negotiation should strive to meet: to protect against the adverse effects of climate change on human rights. To that end, the agreements must provide both for the reduction of greenhouse gases to levels that will not interfere with the human rights of those vulnerable to climate change, and for adaptation to unavoidable changes that would otherwise harm their human rights.

At this level of generality, the application of the duty to cooperate to climate change may be subject to three criticisms. First, the duty may appear not to apply to the United States, which is not a party to the ICESCR. Because the United States is a signatory, however, it must “refrain from acts which would defeat the object and purpose” of the Covenant.²³⁰ Refusing to participate in a global effort to protect human rights from a threat such as climate change would arguably defeat the object and purpose of the Covenant. More importantly, the duty to coo-

228. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (quoting the Convention on the Prevention and Punishment of the Crime of Genocide pmbl., Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277).

229. The ICESCR itself specifies that the duty to cooperate contemplates the negotiation and implementation of international agreements. ICESCR, *supra* note 60, art. 23 (“[I]nternational action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions”); *see also* CESCR General Comment 14, *supra* note 72, ¶ 39 (“States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments.”); CESCR General Comment 12, *supra* note 30, ¶ 36 (“States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.”).

230. Vienna Convention on the Law of Treaties, *supra* note 221, art. 18.

perate rests firmly on the UN Charter itself, which requires all members of the United Nations, including the United States, to work together to combat global threats to human rights.

A second criticism is that, if taken only as a general exhortation, the duty to cooperate may seem to contribute little to efforts to solve the problem of climate change. After all, states already recognize that international action is necessary to combat climate change, and they have engaged in comprehensive negotiations. However, placing the necessary international cooperation in the broader framework of human rights helps to clarify the ultimate goal of those negotiations. As the report on the relationship between climate change and human rights for the OHCHR states in its closing words, “[i]nternational human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.”²³¹ Treating climate change as a human rights problem subject to a legal duty of cooperation helps ensure that governments do not lose sight of the effects climate change has on real people and communities, including those in other countries. Moreover, human rights law clarifies not only the standard that a climate agreement must meet, but also the process leading to that agreement.

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

As this Essay has made clear, however, human rights law does give states such discretion. The environmental human rights jurisprudence described in Part I defers to states’ policy decisions on levels of environmental protection, as long as states follow procedural requirements designed to ensure that the decision-making process was informed and inclusive. Recognizing that states have a duty to cooperate with one

231. *OHCHR Report*, *supra* note 140, ¶ 99.

another to address the effects of climate change on human rights would provide the legal basis to apply the norms of that jurisprudence globally. Doing so would make clear that applying human rights standards to efforts to combat climate change would still allow the international community to set standards of protection that take into account the costs as well as the benefits of abating climate change.

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

Doing so would not require a complete redirection of the efforts of the international community. In some important respects, states' collective response to climate change already accords with these requirements. For example, the environmental human rights jurisprudence requires states to carry out prior assessments to predict and evaluate the effects of actions that might degrade the environment and thereby harm individuals' rights,²³² and to make such assessments available to the public so that it can "assess the danger to which [it is] exposed . . ." ²³³ The work of the IPCC is a global effort to assess the environmental impacts of climate change and make the assessments public so that they can inform consideration of policy options. The IPCC's assessments may not have paid enough attention to the effects of climate change on human rights, but with that exception, they would seem to satisfy the requirement for assessment and public information.

The other procedural requirements of the environmental human rights jurisprudence are not as clearly met. The jurisprudence states that those affected must be able to participate in a full and informed manner in the international decision-making process as to how much environmental harm to allow.²³⁴ Furthermore, judicial remedies must be available to

232. See Soc. & Econ. Rights Action Ctr. v. Nigeria (*Ogoniland Case*), Comm. No. 155/96, ¶ 53 (Afr. Comm'n on Human & People's Rights 2001); *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 179, 206–07; *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007).

233. *Taşkin*, 2004-X Eur. Ct. H.R. 179, 206–07; see also *Ogoniland Case*, Comm. No. 155/96, ¶ 53; CESCR General Comment 15, *supra* note 73, ¶ 56; *Ecuador Report*, *supra* note 34, at ch. VIII.

234. See *Ogoniland Case*, Comm. No. 155/96, ¶ 53; *Saramaka People*, 2007 Inter-Am. Ct.

allow those affected to ensure that proper procedures are followed.²³⁵ The only entities entitled to participate in the decision-making process at the international level, and to trigger the compliance mechanisms so far created under the auspices of the Framework Convention on Climate Change, are states. While the participation of states may be unavoidable as a practical matter, one may question whether states always adequately represent the interests of those most vulnerable to climate change. The jurisprudence would suggest that the decision-making process should be more accessible to the public, especially to vulnerable communities, which should have a place at the negotiating table. Moreover, the negotiators should understand the human rights standards that provide the framework for the international cooperation in which they are engaged. To this end, the human rights and climate change regimes should work together more closely to examine and clarify the implications of climate change for human rights.²³⁶

If the international community followed these procedures, environmental human rights jurisprudence indicates that its decisions on how best to strike the balance between environmental protection and economic development should receive deference. The deference should not be absolute, however, any more than it is in the context of internal environmental harm.²³⁷ The international community may not decide to address climate change in ways that allow its effects to violate minimum human rights standards. Although those standards need further examination, they seem clear in some respects. In particular, states could not jointly agree on a climate change policy that would result in the foreseeable destruction of the human rights of substantial numbers of people by, for example, allowing global warming to continue at levels that would inundate small island states.

In *Saramaka People*, the Inter-American Court of Human Rights required a state to follow procedural requirements, including assessing environmental impacts and consulting with the community directly affected, before allowing development that would affect its rights.²³⁸ The

H.R. (ser. C) No. 172, ¶ 129; CESCR General Comment 15, *supra* note 73, ¶ 56; *Ecuador Report*, *supra* note 34, at ch. VIII.

235. See *Taşkin*, 2004-X Eur. Ct. H.R. at 206–07; CESCR General Comment 15, *supra* note 73, ¶ 56; *Ecuador Report*, *supra* note 34, at ch. VIII.

236. For an examination of some pragmatic measures that could be taken in that regard, see CTR. FOR INT’L ENVTL. LAW, PRACTICAL APPROACHES TO INTEGRATING HUMAN RIGHTS AND CLIMATE CHANGE LAW AND POLICY (2009).

237. See *supra* Part I.D; see also *Marangopoulos Found. for Human Rights v. Greece (Marangopoulos Foundation)*, Complaint No. 30/2005, ¶ 221, Eur. Comm. of Social Rights (2006); *Budayeva v. Russia*, App. No. 15339/02, at 32 (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int>; CESCR General Comment 15, *supra* note 73, ¶ 37.

238. *Saramaka People*, 2007 Inter-Am. C.H.R. (ser. C) No. 172, ¶ 129.

Court recognized, however, that informed consultation might not be enough. Without more, safeguarding the rights of a minority community to participate in a national decision-making process may not prevent the majority from violating the minority's rights. The Court responded not by trying to set out specific substantive environmental standards, but rather by requiring the state to obtain the "free, prior, and informed consent" of the community before proceeding with projects that would have major effects on its land and resources.²³⁹ In the context of climate change, that approach would mean that states' decisions to emit levels of greenhouse gases that would cause major adverse consequences on vulnerable states would require prior consent by those vulnerable states.

Applying *Saramaka People* to climate change would be the equivalent of giving those threatened by a nuisance the right to enjoin it. The veto of the most vulnerable would be available only in extreme cases, to protect against interference that could otherwise destroy the rights of those affected, such as through obliteration of a state by rising sea levels. Before the international community decided to adopt decisions on greenhouse gas emissions that could cause a state to disappear, it would have to receive that state's consent.²⁴⁰ This approach would ensure the protection of the human rights of the most vulnerable communities in the world, as human rights law requires.

The idea that human rights law obligates the climate negotiations to give the most vulnerable states a veto may seem unrealistic. Neither those states nor any international bodies have the power to prevent other states from entering into an agreement. Moreover, even if they were able to do so, the resulting lack of an agreement would probably result in even worse effects on human rights. To be effective, then, this veto power seems to contemplate an equally unlikely ability to force the largest emitting states to reach an agreement that requires reductions of greenhouse gases to levels that adequately protect human rights.

But the point of this Essay is not that human rights law gives the vulnerable states control over other states in the climate negotiations, but rather that it places certain obligations on all states concerning climate change. States cannot be forced to comply with the obligations, any more than they can be forced to comply with their other obligations under human rights law. They may sometimes be induced to comply, however, as a result of pressure from other states, non-governmental organizations, human rights bodies, and their own citizens. Given the massive threat climate change poses to human rights, it is not unrealistic

239. *Id.* ¶¶ 131(2), 134.

240. In determining the difficult question of whether threatened harm required such consent, both the level of uncertainty of the harm and its potential severity could be taken into account.

to imagine that states will accept that they have a duty to cooperate to address it, that the content of the duty is informed by the jurisprudence of human rights bodies on environmental harm, and that at a minimum human rights law requires states not to cause the widespread destruction of the human rights of those most vulnerable to climate change.

CONCLUSION

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

The environmental human rights jurisprudence has developed strong procedural requirements and deferential substantive standards, which make sense in the context of a single polity experiencing the costs and benefits of activities that cause environmental degradation, but which do not easily apply to transboundary harm. The duty of cooperation would require states to try to act as a single polity at a global level to address the global threat of climate change. It would thus provide a basis for the application of the environmental human rights jurisprudence. That jurisprudence would allow states some flexibility as to the substance of their joint decisions, but only if they follow procedures designed to ensure full, well-informed participation by those most affected. Moreover, the substance of decisions that result from such processes would not be entitled to complete deference: under no conditions could states allow climate change to destroy the human rights of the most vulnerable.