Climate Change and Human Rights: A Case Study of the Canadian Inuit and Global Warming in the Canadian Arctic

by

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THESIS ABSTRACT

Climate change debates have typically centred around the environmental and economic effects of rising greenhouse gas emissions. The focus, however, has recently begun to shift towards acknowledging the human impacts of global climate change, especially in vulnerable regions and communities. This thesis considers whether human rights law can compensate for the inability of traditional, state-centred, environmental law and international law to address the human impacts of climate change. By using the situation of the Canadian Inuit as a case study, this thesis focuses on 'greening' existing human rights to address the environmental damage in the Canadian Arctic as a result of climate change. This study concludes that, although international human rights regimes provide potential forums for groups such as the Canadian Inuit, substantive environmental human rights are necessary in international law in order to best address the complex intersection of environmental degradation, such as climate change, and human rights.

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PART 1: INTRODUCTION

Climate change has been called one of the greatest challenges facing the world today.[1] The scientific, environmental and economic aspects of the phenomenon are well documented and generally dominate climate change debate. As scientific understanding of the causes and consequences of climate change become more clear, however, attention has shifted to the social dimensions of global warming and the impact it has on humans and living conditions. In its fourth report in 2007,[2] the Intergovernmental Panel on Climate Change (IPCC) stated unequivocally that without deep cuts to greenhouse gas emissions (GHG), there will be dramatic effects on water, ecosystems, food supplies, coastal areas and human health and security.[3]

[1] Meinhard Doelle, "Climate Change and Human Rights: The Role of International Human Rights in Motivating States to take Climate Change Seriously" (2004) 1 Macquarie J. Int'l & Comp. Envtl. L. 179 [Doelle 2004]; Sara C. Aminzadeh, "A Moral Imperative: The Human Rights Implications of Climate Change" (2006-2007) 30 Hastings Int'l & Comp. L. Rev. 231 [Aminzadeh].

[2] The Intergovernmental Panel on Climate Change, established by the United Nations Environment Programme and the World Meteorological Organization, is the leading body responsible for assessing climate change and providing the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences. The Fourth Assessment Report consists of reports from three working groups (WG I The Physical Science Basis, WGII Impacts, Adaptations and Vulnerability and WGIII Mitigation of Climate Change) and a Synthesis Report; IPCC, *Fourth Assessment Report: Climate Change 2007*, (2007), online: IPCC <http://www.ipcc.org> [IPCC]; Susan Solomon et al., eds., *Climate Change 2007: The Physical Science Basis, A Contribution of Working Group I to the Fourth Assessment Report of the IPCC* (New York: Cambridge University Press, 2007); Martin L. Parry et al. eds., *Climate Change 2007: Impacts, Adaptation and Vulnerability, A Contribution of Working Group II to the Fourth Assessment Report of the IPCC* (New York: Cambridge University Press, 2007)[IPCC WG II]; Bert Metz et al. eds., Climate Change 2007: Mitigation of Climate Change, *A Contribution of Working Group III to the Fourth Assessment Report of the IPCC* (New York: Cambridge University Press, 2007); Rajendra Pachauri et al. eds., *Climate Change 2007: Synthesis Report, A Contribution of Working Groups I, II and III to the Fourth Assessment Report of the IPCC* (2007) [IPCC Synthesis].

[3] IPCC Synthesis, *ibid*. at 48-53; John Crump, "Many Strong Voices: climate change and equity in the Arctic" (2008) 1-2 *Indigenous Affairs* at 24 [Crump]; Social Development Department, The World Bank, *Exploring the Social Dimensions of Climate Change* (Washington, D.C.: The World Bank, 2007), online: The World Bank <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1170428243464/SDV_Climate_Change_WP.pdf>.

The scientific consensus is clear that anthropogenic greenhouse gas emissions are the leading cause of global climate change.[4] Between 1970 and 2004, worldwide GHG emissions from human activities increased 70 percent.[5] According to Greenpeace, approximately two-thirds of human-induced GHG emissions come from energy production and use, including transport, heat and power.[6] In spite of these observations and predictions, the international response to combating climate change has been slow, no more so than in Canada. In response to international concern about the rise in man-made 'greenhouse gases,' the *United Nations Framework Convention on Climate Change* (UNFCCC)[7] was adopted in 1992. The UNFCCC's objective was to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference in the climate system."[8] Canada supported this aim by ratifying the agreement in 1992 and its only protocol, the 1997 *Kyoto Protocol*, which sets out binding emission reduction targets, in 2002.[9] Since then, however, Canada has shown little support for the international climate change regime, despite the fact that a 2˚C rise in global temperatures will have major implications on a wide range of human rights.[10]

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[4] IPCC Synthesis, *ibid*. at 39 and 72; A. Khalfan et al., "CISDL Legal Brief: Canada's International Legal Obligations with Regard to Climate Change," (25 November 2002) online: CISDL <http://www.cisdl.org/pdf/brief_climate.pdf> [CISDL].
[5] IPCC Synthesis, *ibid*. at 5.
[6] Greenpeace, "Human Rights and the Climate Crisis: Acting Today to Prevent Tragedy Tomorrow," online: Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Greenpeace_HR_ClimateCrisis.pdf> at 3 [Greenpeace].
[7] *United Nations Framework Convention on Climate Change*, 12 June 1992, 1771 U.N.T.S. 107 (entered into force 21 March 1994) [*UNFCCC*].
[8] *Ibid*. at art. 2.
[9] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UN.Doc.FCCC/CP/1997/L.7/Add.1, 10 December 1997 (entered into force 16 February 2005) [*Kyoto*]; Kyoto Protocol Status of Ratification (13 July 2010), online: UNFCCC <http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php>.
[10] See IPCC, *supra* note 2.

While international environmental law aims to reduce greenhouse gas emissions to levels that limit harm to the human population, these regulatory efforts are not sufficient enough to afford the necessary relief to individuals suffering from the human effects of climate change. The human impacts of global warming are already visible, particularly in the most vulnerable regions of the planet—those with the least capacity to adapt and the least historical responsibility for human-induced climate change.[11] The disparity in the way that climate change affects certain vulnerable regions and communities challenges basic human rights. Small island states are especially vulnerable to rising sea levels caused by rising temperatures, which will result in loss of land, threats to water supplies and damage to fragile ecosystems, among other things,[12] potentially displacing millions from their homes.[13]

However, scientific reports indicate that the most drastic human impacts of climate change have been felt, and will continue to be felt, by the Inuit in the Canadian Arctic region.[14] The Arctic Climate Impact Assessment (ACIA),[15] a comprehensive international evaluation of Arctic climate change and its impacts undertaken by hundreds

[11] Greenpeace, *supra* note 6 at 1; Office of the United Nations High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 (15 January 2009) at paras. 10 and 93 [OHCHR Report].

[12] IPCC WG II, *supra* note 2 at 694; "A Sinking Feeling," *Economist* (March 14, 2009) at 82; John Knox, "Linking Human Rights and Climate Change at the United Nations" (2009) 33 Harv. Envtl. L. Rev. 477 at 479-80 [Knox].

[13] Rebecca Elizabeth Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvula's Threat to Sue the United States in the International Court of Justice" (2005) 14 Pac. Rim L. & Pol'y J. 103 [Jacobs]; Knox, *ibid*.

[14] Although more than 50 percent of the Canadian Arctic population is non-indigenous, this paper focuses exclusively on the impacts of climate change on northern Canadian indigenous groups. Also, although the Arctic is home to several indigenous groups, this paper will use the term Inuit when referring to indigenous groups in northern Canada. See Christopher Furgal & Jacinthe Seguin, "Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities," *Environmental Health Perspective* (2006) 114:12 at 1964 [Furgal & Seguin].

[15] Arctic Climate Impact Assessment, *Impacts of a Warming Climate: Final Overview Report* (New York: Cambridge University Press, 2004) online: ACIA <http://www.acia.uaf.edu/> [ACIA Overview]; Arctic Climate Impact Assessment, *ACIA Scientific Report* (New York: Cambridge University Press, 2005) online: ACIA <http://www.acia.uaf.edu/>.

of scientists over four years, stated that the Arctic will feel the effects of climate change sooner and more severely than other regions.[16] It also predicted that, "… warming is likely to disrupt or even destroy [the Inuit's] hunting and food sharing culture as reduced sea ice causes the animals on which they depend on to decline, become less accessible, and possibly become extinct."[17] The fourth report by the IPCC echoed this finding: "Arctic human communities are already adapting to climate change, both external and internal stressors challenge their adaptive capacities."[18]

There is broad agreement that environmental degradation, and by extension climate change, negatively affects the realization of human rights.[19] On March 28, 2008 the United Nations Human Rights Council adopted Resolution 7/23 on human rights and climate change, which, for the first time in a U.N. resolution, explicitly recognized that climate change "has implications on the full enjoyment of human rights."[20] But the concept of environmental human rights is not new. As far back as 1972, the Stockholm Declaration recognized the interdependence and interrelatedness of human rights and the environment.[21]

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[16] ACIA Overview, *ibid*. at 4-5; See also *supra* note 12 and 13.
[17] ACIA Overview, *ibid*. at 16.
[18] IPCC WG II, *supra* note 2 at 15.
[19] OHCHR Report, *supra* note 11 at para. 23; Doelle 2004, *supra* note 1 at 189; Sheila Watt-Cloutier, "Climate Change and Human Rights" *Human Rights Dialogue* 2:11 (Spring 2004) at 10 [Watt-Cloutier]; International Council on Human Rights Policy, "Climate Change and Human Rights: A Rough Guide" online: ICHRP <http://www.ichrp.org/en/projects/136> at 3 [ICHRP]; Marc Limon, "Human Rights and Climate Change: Constructing a Case for Political Action" (2009) 33 Harv. Envt'l. L. Rev. 439 at 470 [Limon].
[20] United Nations Human Rights Council, *Resolution 7/23 on Human Rights and Climate Change*, Res. 7/23, UN Doc. A/HRC/7/78 (28 March 2008) [UNHRC 7/23].
[21] *Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment*, 16 June 1972, 11 I.L.M. 1416 (1972)[Stockholm] (Principle 1 states: "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he
bears a solemn responsibility to protect and improve the environment for present and future generations."); OHCHR Report, *supra* note 11 at para. 17. See also Louis B. Sohn, "The Stockholm Declaration on the Human Environment," (1973) 14 Harv. Int'l. L.J. 423 at 451-54..

The Inuit, like many indigenous groups, have an intimate relationship with their physical surroundings.[22] Their livelihood and culture depend on the natural environment, especially ice and snow, which gives them a special stake in the debate on human rights approaches to environmental protection. In 2005, the Inuit Circumpolar Conference (ICC),[23] on behalf of Canadian and American Inuit, launched a petition with the Inter-American Commission on Human Rights, alleging that the United State's failure to take action to control greenhouse gas emissions constitutes a violation of their pre-existing human rights.[24] Although the Commission dismissed the petition, the Inuit case, and other similar efforts,[25] introduced the idea that rather than being a global and intangible scientific phenomenon, climate change is a man-made process with demonstrable and

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[22] Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by the Acts and Omissions of the United States*, online: ICC <http://www.inuitcircumpolar.com/index.php?Lang=En&ID=316> [ICC Petition] at 1.

[23] See ICC Petition, *ibid.* at 1; ICC, online: <http://inuitcircumpolar.com/index.phpauto_slide=&ID=16&Lang=En&Parent_ID=&current_slide_num> (The ICC is an NGO that was founded in 1977 and now represents approximately 150,000 Inuit in Alaska, Canada, Greenland, and Russia. It holds Consultative Status at the United Nations. The petition was launched by Sheila Watt-Cloutier, the Chair of the ICC, on behalf of herself, 62 other named individuals and "all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change…").

[24] ICC Petition, *ibid*. at 5. See also Sheila Watt-Cloutier, "Don't Abandon the Arctic to Climate Change" *The Globe and Mail* (May 24, 2006) A19 (Although the ICC filed its petition against the United States, there are many other states, including Canada, that could be the subject of legal action as a result of climate change. In a 2006 editorial in *The Globe and Mail*, Sheila Watt-Cloutier addressed Canada's culpability in the context of its poor climate policies: "[w]e did not target Canada. Although Canada's 2005 climate change plan – 'Honouring Our Kyoto Commitment' – was late and weak, it was a start. Just as important, it allowed Canada to engage the developed and developing worlds on an issue that can only be addressed globally. Now where do we stand? Should we include Canada in our human rights action? Do we have any real choice?").

[25] See *Submission of the Maldives to the Office of the UN High Commission for Human Rights* (25 September, 2008) online: <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf>; *Kivalina v. ExxonMobile Corp.*, N.D. Cal. (26 February, 2008) online: Climate Laws <http://www.climatelaw.org/cases/country/us/kivalina/kivalina> (The Alaskan Native coastal village of Kivalina, which is being forced to relocate because of flooding caused by the changing Arctic climate, filed a suit in U.S. federal court on the basis that five oil companies, 14 electric utilities and the country's largest coal company were responsible for the village's problems. Kivalina's complaint states that "[g]lobal warming is destroying Kivalina through the melting of Arctic sea ice that formerly protected the village from winter storms… [and] the village thus must be relocated soon or be abandoned and cease to exist."); *Jona Gbemre v. Shell Petroleum* (Nigeria) Federal High Court of Nigeria, Benin Judicial Division (14 November 2005), Suit No. FHC/B/CS/153/05, online: Climate Law <http://climatelaw.org/cases> [*Gbemre*].

obvious implications on human welfare.[26] The movement towards linking environmental degradation with human rights is also a reaction to the failure of traditional instruments of international environmental law, notably multilateral treaty-making, to curb global warming.

This study looks at climate change from the perspective of the intersection of international human rights and international environmental law in order to determine whether the human rights paradigm can provide recourse to victims of climate change. The Inuit petition in the Inter-American Commission against the United States was one of the first attempts to articulate the human harms of climate change in legal terms. This study aims to extend the discourse prompted by the Inuit petition to explore how human rights discourse can deal with climate change and also how climate change is driving changes in international environmental law because of the challenges it creates. Using Canada as a case study, it looks at the feasibility of and obstacles to reconceptualizing an international environmental law claim as an international human rights claim. Specifically, it examines whether the Canadian Inuit can use human rights mechanisms to allege that Canada is guilty of violating the group's human rights by failing to comply with international environmental law commitments in emitting high levels of greenhouse gases.

Part 2 of this study provides an overview of the observed and projected impacts of climate change in the Arctic. It relies on the IPCC's fourth report and the ACIA as the scientific foundation to support the claim that rising temperatures caused by human-induced emissions are already having dangerous impacts on the Arctic, and could ultimately destroy the Inuit's ancient culture. Part 3 considers the limitations of

[26] Limon, *supra* note 19 at 441.

international environmental law mechanisms and general international law in addressing the human impacts of climate change. It considers forums for legal action or potential legal action against Canada, but rejects these options due to their inefficiency. Part 4 deals with the 'greening' of human rights approach, [27] which applies existing international human rights law to the human impacts of environmental damage. This approach does not rely on the right to a healthy environment *per se*, as it is not substantive enough to encompass the Inuit's claim,[28] but rather looks at the human impacts of environmental degradation as a violation of existing rights, such as the right to life or property. This part gives special consideration to third generation rights, including indigenous rights, and whether these well-established norms create any additional protection for the Inuit against environmental damage caused by climate change. Part 5 contemplates whether the Inuit could bring a 'greening' of human rights complaint against Canada within the human rights framework on the basis that it is causing dangerous climate change and violating the rights of the group.

PART 2: OBSERVED AND PROJECTED IMPACTS OF CLIMATE CHANGE IN THE ARCTIC

There is broad scientific consensus that climate change is disproportionately impacting the Arctic and the Inuit that inhabit the region. According to indigenous observations, climatologists and researchers, there is no doubt that the Arctic is

[27] Michael R. Anderson & Alan E. Boyle, *Human Rights Approaches to Environmental Protection* (New York: Oxford University Press, 1996) at 44 [Anderson & Boyle]; Aminzadeh, *supra* note 1 at 245. See also Philippe Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge: Cambridge University Press, 2003) at 229 [Sands].

[28] The 'greening' of rights approach is the method this study uses because, as will be discussed in section 4, the right to a healthy environment as a standalone right is yet to be fully developed beyond its recognition in regional human rights treaties.

experiencing extreme and pronounced effects of climate change[29] and that there is a causal link between human emissions and rising global temperatures.[30] Warming has been documented by the IPCC in its Fourth Assessment Report[31] as well as in the 2004 ACIA,[32] which provided the scientific basis for the Inuit's 2005 claim to the Inter-American Commission on Human Rights (Inter-American Commission).[33] The largest average increase in surface temperature has occurred in the polar regions,[34] though trends vary by region.[35] In the last five decades, the western and central Arctic has experienced a temperature increase of two to three degrees Celsius, while the eastern regions have more recently begun to see signs of warming.[36] For several decades, Arctic temperatures have risen at almost twice the rate of the lower latitude's increase.[37] At the same time, however, temperatures have decreased in certain regions of Arctic Canada, which indicates that climate change is a phenomenon that includes both global warming and global cooling.[38]

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[29] ACIA Overview, *supra* note 15; James D. Ford & Barry Smit, "A Framework for Assessing the Vulnerability of Communities in the Canadian Arctic to Risks Associated with Climate Change" *Arctic* 57: 4 (2004) at 389-400 [Ford & Smit]; Igor Krupnik & Dyanna Jolly, eds. *The Earth is Faster Now: Indigenous Observations of Arctic Environmental Change* (Alaska: Arctic Research Consortium of the United States, 2002) at vi; *Voices from the Bay: Traditional Ecological Knowledge of the Inuit and Cree in the Hudson Bay Bioregion* 29 (Canadian Arctic Resources Committee, 1997) at 28-29.
[30] IPCC WG II, *supra* note 2 at 656.
[31] IPCC, *supra* note 2.
[32] ACIA Overview, *supra* note 15; ICC Petition, *supra* note 22 at 2.
[33] ICC Petition, *ibid*. at 35.
[34] T. Nichols et al., "Climate Change and Sea Ice: Local Observations from the Canadian Western Arctic," *Arctic* 57:1 (2004) at 68-79 [Nichols].
[35] Mark Nuttall, "Indigenous Peoples and Climate Change Research in the Arctic," (2001) 4 *Indigenous Affairs* 26-35 [Nuttall].
[36] Furgal & Seguin, *supra* note 14 at 1965.
[37] Robert W. Corell, "Challenges of Climate Change: An Arctic Perspective," (2006) 35 *Ambio* 148 at 149; James D. Ford, "Dangerous climate change and the importance of adaptation for the Arctic's Inuit population" (2009) 4 *Environmental Research Letters* at 1 [Ford]; IPCC WG II, *supra* note 2 at 656.
[38] Nuttall, *supra* note 35.

In its 2005 petition, the ICC cited five key indicators of global warming in the Arctic as evidence of the disproportionate damage it is causing to the Inuit's environment. These symptoms are outlined below.[39]

Melting Sea Ice: Changes to sea ice are of particular concern to the Inuit. Warming Arctic temperatures have changed the timing of sea-ice breakup and freeze-up,[40] while simultaneously altering the thickness and extent of sea-ice due to melting.[41] The ACIA estimates an 8 percent decrease in the annual average amount of sea ice in the last 30 years, with percentages as high as 20 percent in regions close to the Atlantic Ocean.[42] In Sachs Harbour in the Northwest Territories, residents unanimously agree that the extent of multiyear ice has decreased and there was a general consensus that the melting of multiyear ice was beginning to occur earlier and more quickly.[43] According to the IPCC, "[s]atellite data since 1978 show that annual average Arctic sea ice extent has shrunk by 2.7 [2.1 to 3.3] % per decade, with larger decreases in summer of 7.4 [5.0 to 9.8]% per decade."[44] As a consequence, the stability of the Arctic ice is compromised and the total amount of open water is increased.[45] Changes in sea ice patterns also have impacts on the abundance and distribution of Arctic species, including the ringed seal and polar bear,[46] as well as salmon, cod, caribou and moose.[47]

Thawing Permafrost*:* Permafrost is defined as sub-surface earth materials that remain at or below 0˚C continuously for two or more years. It is most common in Arctic

[39] ICC Petition, *supra* note 22 at 23-27.
[40] Furgal & Seguin, *supra* note 14 at 1965.
[41] E. J. Stewart et al., "Sea Ice in Canada's Arctic: Implications for Cruise Tourism," 60 (2007) *Arctic* 370 at 374-75 [Stewart].
[42] ICC Petition, *supra* note 22 at 23.
[43] Nichols, *supra* note 34.
[44] IPCC Synthesis, *supra* note 2 at 30.
[45] Stewart, *supra* note 41.
[46] Nichols, *supra* note 34.
[47] Ford & Smit, *supra* note 29.

and high-mountain regions,[48] although it underlies 20-25 percent of the Northern Hemisphere's land area.[49] Ice formed during the annual cold seasons accounts for 20-30 percent of the permafrost's volume.[50] Warm temperatures due to climate change cause the ice to melt, which makes land, and infrastructure on land, unstable.[51] Melting permafrost has resulted in "deformed roads, railway lines, and airport runways, in addition to fracturing oil and gas pipelines."[52] It has implications on the health, safety, property and culture of the Inuit.[53]

Sea-level Rise*:* During the twentieth century, sea levels have risen at ten times the rate of the past three millennia.[54] Levels are projected to rise an additional half meter (with a projected range of 10 to 90cm) during this century.[55] The increase in sea-levels in the Arctic is projected to be greater than the global average.[56]

Melting Ice Sheets and Glaciers: Glaciers and ice sheets throughout the Arctic are melting due to warming. The Alaskan glaciers are retreating especially fast—they represent roughly half of the estimated loss of mass by glaciers worldwide.[57] The Greenland Ice Sheet is also melting in height at a rate of one meter per year.[58] In 2002, the area of melting near the Greenland Ice Sheet broke all previous records.[59]

[48] IPCC WG II, *supra* note 2 at 660.
[49] ICC Petition, *supra* note 22 at 24.
[50] *Ibid*.
[51] *Ibid*; IPCC WG II, *supra* note 2 at 661.
[52] ICC Petition, *ibid*. at 24.
[53] *Ibid*. at 49.
[54] *Ibid*. at 25.
[55] ACIA Overview, *supra* note 15 at 13.
[56] *Ibid*.
[57] *Ibid*.
[58] ICC Petition, *supra* note 22 at 25.
[59] ACIA Overview, *supra* note 15 at 13.

Alterations in Species and Habitat: The rising temperatures threaten the habitat of thousands of plants and animals.[60] In Nunavut, hunters have noticed the appearance of bird species not typically native to the area.[61] As a result of the massive thinning and depletion of sea-ice, marine species, like seals, walruses and polar bears will be "pushed to extinction" by 2070-2090.[62]

Other Changes: Besides shifting temperatures, locals and researchers advise that additional transformations are occurring, including changes to "… river hydrology, geophysical processes and the distribution of marine and terrestrial species."[63] Residents in Sachs Harbour and the Inuit of Nunavut have commented on increased magnitude and duration of high winds, and in Sachs Harbour,[64] the occurrence of electrical thunderstorms is a new phenomenon.[65]

Although the current impacts of climate change in the Arctic are severe, the ACIA predicts that the projected impacts will be much worse, even if increases in greenhouse gas emissions are moderate.[66] For instance, warming will likely disrupt or completely destroy the Inuit's food sharing culture as sea ice becomes less accessible and unsafe.[67] The ACIA concluded that:

> [t]he Arctic is extremely vulnerable to observed and projected climate change and its impacts. The Arctic is now experiencing some of the most rapid and severe climate change on earth. Over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social and economic changes, many of which have already begun. Changes in arctic climate will also

[60] ICC Petition, *supra* note 22 at 26; ACIA Overview, *supra* note 15 at 14.
[61] Nuttall, *supra* note 35.
[62] Watt-Cloutier, *supra* note 19 at 10.
[63] Ford & Smit, *supra* note 29 at 390.
[64] *Ibid*; Nichols, *supra* note 34.
[65] Nichols, *ibid*.
[66] ICC Petition, *supra* note 22 at 4.
[67] *Ibid*. at 4-5.

> affect the rest of the world through increased global warming and rising sea levels.[68]

As the five indicators above demonstrate, global warming is profoundly changing the Inuit's environment to their detriment and will continue to do so in the absence of clear limits on GHG emissions. The following section describes the limited ability of international law to address the fact that the impacts of climate change have undercut the Inuit's ability to enjoy the benefits of traditional way of life and property, and have compromised Inuit health, safety, subsistence harvest and travel.[69]

PART 3: INTERNATIONAL ENVIRONMENTAL LAW, PUBLIC INTERNATIONAL LAW AND THE HUMAN IMPACTS OF CLIMATE CHANGE

This section considers the effectiveness of international environmental law, primarily MEAs, and public international law as a tool for addressing the current and future impacts of climate change in the Arctic. International law will be considered an effective tool for addressing the human impacts of climate change if it can provide a meaningful legal forum for aggrieved states or individuals (or groups) to seek redress or accountability from states responsible for either disproportionately contributing to climate change or impeding international efforts to address the phenomenon.[70] If such a forum did exist, the Inuit would not need to rely on human rights approaches to address the impact of climate change. However, international law is largely limited to state-to-

[68] ACIA Overview, *supra* note 15 at 10.
[69] ICC Petition, *supra* note 22 at 67.
[70] Patricia Birnie & Alan Boyle, *International Law and the Environment*, 2nd ed. (New York: Oxford University Press, 2002) at 9 [Birnie & Boyle] (Birnie and Boyle point out that an effective forum can mean: "Solving the problem for which the regime was established (for example avoiding further depletion of the ozone layer); achievement of goals set out in the constitutive instrument (for example, attaining a set percentage of sulphur emissions); altering behaviour patterns (for example moving from use of fossil fuels to solar or wind energy production); enhancing national compliance with rules of international agreement such as those restricting trade in endangered species.").

state interactions and therefore fails to provide a legal forum for groups such as the Inuit to launch a complaint against an offending state for the present and future harms associated with climate change.

3.1. International Environmental Law: The Climate Regime

The last few decades have seen a rapid increase in multilateral environmental agreements addressing various environmental concerns from climate change, biodiversity, and desertification to hazardous waste and chemicals.[71] These environmental law instruments are typically applied and enforced using domestic actions or compliance mechanisms set up to monitor whether states are carrying out their treaty obligations. In general, however, MEA compliance mechanisms are weak[72] and therefore MEAs are neither complied with nor enforced and are inadequately implemented.[73] Most MEAs lack serious sanctions, with the exception of the *Basel Convention*,[74] the *Montreal Protocol*[75] and the *Convention on the International Trade in Endangered Species*,[76] which use trade sanctions as measures for addressing non-compliance.[77]

More importantly, while international environmental law has become more robust in the last few decades, it still offers little recourse to individual victims of environmental

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[71] *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 293 (entered into force 22 September 1988); *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 3 (entered into force 1 January 1989) [*Montreal Protocol*].
[72] Svitlana Kravchenko, "Right to Carbon or Right to Life: Human Rights Approaches to Climate Change" (2007-2008) 9 Vt. J. Envt'l. L. 513 at 517 [Kravchenko].
[73] United Nations Environment Programme, "Envisioning the Next Steps for MEA Compliance and Enforcement," (21-22 January 2006) online: UNEP <http://www.unep.org/dec/support/mdg_meeting_col.htm>.
[74] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, March 22, 1989, 28 I.L.M. 657 at art. 9.
[75] *Montreal Protocol*, *supra* note 71.
[76] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, July 1, 1975 (entered into force 1 July 1975) 993 U.N.T.S. 243 at art. VIII.
[77] Kravchenko, *supra* note 72 at 518.

harm.[78] In most cases, because of the horizontal nature of public international law, only states may enforce environmental law or rely on its dispute-settlement mechanisms.[79] The climate regime consists of two MEAs that are especially relevant to regulating greenhouse gas emissions and climate change—the UNFCCC and the *Kyoto Protocol*—both of which are discussed herein. This section considers the limitations of the MEA route for the Canadian Inuit and the reasons that neither the UNFCCC nor Kyoto provides an option for individual or group complaints on the basis that a state is not complying with its MEA obligations.

3.1.1. United Nations Framework Convention on Climate Change

The UN General Assembly endorsed the establishment of the IPCC by the World Meteorological Organization and United Nations Environment Programme in 1988 to study global climate change.[80] The role of the IPCC was (and remains) to assess "…information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation."[81] Two years later, the General Assembly passed a resolution endorsing the creation of the Intergovernmental Negotiating Committee (INC) to begin developing a legal means of

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[78] Caroline Dommen, "How Human Rights Norms Can Contribute to Environmental Protection: Some Practical Possibilities within the United Nations System" in Romina Picolotti & Jorge Daniel Taillant, eds. *Linking Human Rights and the Environment* (British Columbia: UBC Press, 2003) at 105 [Dommen]; A. Kiss & D. Shelton, *International Environmental Law*, 3rd ed. (New York: Transnational Publishers, 2004) at 682 (Kiss and Shelton point out that "[a]n applicant normally cannot choose between bringing an international human rights complaint or an international environmental case because almost no forum exists for the latter.") [Kiss & Shelton].

[79] *Ibid*; John Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law" (2000) 25 Colum. J. Envt'l. L. 283 at 301 [Lee].

[80] UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind*, UN A/RES/43/53, UN GAOR, 70th Plen. Mtg. (1988).

[81] "About IPCC," online: Intergovernmental Panel on Climate Change <http://www.ipcc.ch/about/about.htm>.

addressing anthropogenic climate change.[82] The INC concluded negotiations in 1992 and the UNFCCC opened for signature on June 5 of that year at the UN Conference on Environment and Development (UNCED)[83] in Rio de Janeiro, Brazil. It entered into force two years later on March 21, 1994.

The Convention does not specify reduction targets or set firm timelines in which stabilization should occur.[84] As a framework convention, the UNFCCC does not create binding obligations,[85] although some argue that several articles create legal responsibility. For instance, article 2 requires state parties to:[86]

> … achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[87]

Article 4(2) may also be seen as creating legally binding obligations on developed states, collectively known as Annex I parties.[88] Each Annex I party is required to adopt national policies to mitigate climate change, including protecting greenhouse sinks, such as

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[82] UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind*, UN A/RES/45/212, UN GAOR, 71st Plen. Mtg. (1990).
[83] *United Nations Conference on Environment and Development*, GA Res. 44/228, 85th Plen. Mtg. (1989).
[84] The *UNFCCC* does not set out emissions reduction targets because states could not agree about whether the Convention should set strict reduction targets or simply provide a "bare bones skeleton Convention." As a result, some have called the Convention's commitments "weak." See Sands, *supra* note 28 at 359; Birnie & Boyle, *supra* note 70 at 524.
[85] *UNFCCC*, *supra* note 7 at art. 2.
[86] Kravchenko, *supra* note 73 at 517; Roda Verheyen, The Climate Change Regime After Montreal, (2007) 7 Y.B. of Eur. Envt'l L. at 237-38 [Verheyen]; Timo Koivurova, "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects" (2007) 22 J. Envt'l. L. & Litig. 267 at 275 [Koivurova].
[87] *UNFCCC*, *supra* note 7 at art. 2.
[88] Koivurova, *supra* note 86 at 275; *Parties and Observers*, online: The United Nations Framework Convention on Climate Change <http://unfccc.int/parties_and_observers/items/2704.php> ("Annex I Parties include the industrialized countries that were members of the OECD (Organisation for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States.").

oceans, forests and soil.[89] More importantly, they are required to submit detailed progress reports with an aim of reducing levels of anthropogenic emissions of carbon and other GHG not controlled by the *Montreal Protocol* to their 1990 levels by the year 2000, a goal they failed to meet.[90] The more widely held view, though, is that the UNFCCC was drafted as a soft law instrument and was never intended to be legally binding.[91]

While many of the goals and commitments made in the UNFCCC remain unmet, stronger enforcement of the Convention would not lead to compliance.[92] The UNFCCC's main goal is to assist and facilitate compliance, not to enforce or punish. The Convention has a Subsidiary Body for Implementation (SBI) "to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention."[93] The SBI's role, however, is primarily administrative: it advises the COP on all matters related to implementing the Convention, including financial matters, and it examines the information in the national communications and emission inventories submitted by parties in order to assess the Convention's overall effectiveness.[94] The SBI does not have any enforcement power. There is also a dispute settlement procedure within the UNFCCC that facilitates disputes between two or more parties "concerning the interpretation or application of the Convention."[95] Within the 'settlement of dispute' clause, parties may accept compulsory jurisdiction of their dispute to the International

[89] *UNFCCC*, *supra* note 7 at art. 4(2)(a).
[90] *Ibid*. at art. 4(2)(b).
[91] Birnie & Boyle, *supra* note 70 at 524-526; Sands, *supra* note 27 at 361-65; Koivurova, *supra* note 86 at 275.
[92] Kravchenko, *supra* note 72 at 517.
[93] *UNFCCC*, *supra* note 7 at art. 10.
[94] UNFCCC, *Essential Background: Conference Bodies*, online: UNFCCC <http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php>.
[95] *UNFCCC*, *supra* note 7 at art. 14(1).

Court of Justice (ICJ) or arbitration using procedures adopted by the COP.[96] This procedure is not open to individual or group complaints—only state parties may launch a complaint against a fellow state party. Regardless of the UNFCCC's limited implementation, it remains influential as the framework within which global climate policy is being pursued.

3.1.2. Kyoto Protocol

The first, and so far only, protocol under the UNFCCC is the *Kyoto Protocol*, which was signed in 1997 and entered into force in 2005.[97] The *Kyoto Protocol* was meant to give the Convention 'teeth' by setting firm strategies for achieving the UNFCCC's goal of reducing GHG emissions in the global environment.[98] It provides legally-binding emissions targets for states identified in Annex I of the UNFCCC, namely developed countries.[99] The targets, ranging from -8 percent[100] to +10 percent[101] of 1990 levels, are meant to be reached during the first commitment period from 2008 to 2012. The established targets vary for each party, but collectively states must reduce overall emissions of the six gases not covered by the Montreal Protocol[102] by at least 5 percent

[96] *Ibid*. at art. 14(2).
[97] *Kyoto*, *supra* note 9 at art. 25, (Article 25 required fifty-five parties to the Convention to ratify, including Annex I parties whose aggregate CO_2 emissions equaled 55 percent of global emissions).
[98] *Ibid.* at preamble.
[99] *Ibid.* at Annex B..(Annex I parties to the UNFCCC are listed in Annex B in the Protocol).
[100] *Ibid*. (EU-15, Bulgaria, Czech Republic, Estonia, Latvia, Liechtenstein, Lithuania, Monaco, Romania, Slavakia, Slovenia and Switzerland).
[101] *Ibid*. (Iceland).
[102] *Ibid.* at Annex A. (These six gases are: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_20), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6)).

below 1990 levels.[103] Canada, for instance, committed to reduce its GHG emissions by 6 percent below 1990 levels during the first commitment period.[104]

The *Kyoto* compliance mechanism, unlike the UNFCCC, "is one of the most comprehensive and rigorous amongst all MEAs,"[105] although it is only in early stages of operation.[106] At COP-7 in 2001, the parties agreed to the Marrakech Accords,[107] which set out a detailed non-compliance procedure to deal with parties that fail to meet their targets during the first commitment period, "thereby ensuring a level playing field and the achievement of the environmental goal of the Protocol."[108] The Compliance Committee[109] is the principal body that monitors and enforces compliance with the substantive provisions in *Kyoto*.[110] It functions through two branches, the facilitative branch and the enforcement branch, each with ten members.[111] The role of the facilitative branch is to advise and assist parties in meeting their targets.[112] The enforcement branch, on the other hand, is an adjudicative body, with the authority to conduct hearings, make decisions and impose penalties.[113] It differs from non-compliance bodies in other MEAs

[103] *Ibid.* at art. 3(1).
[104] *Ibid.* at Annex B and art. 3(1).
[105] Kravchenko, *supra* note 72 at 519.
[106] See Xueman Wang & Glenn Wiser, "The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol" (2000) 11 RECIEL 181 at 198.
[107] Marrakech Accords, Decision 24 CP.7 Procedures and mechanisms relating to compliance under the Kyoto Protocol in *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session*, U.N. Doc. FCCC/CP/2001/13/Add.3 (2002) <http://unfccc.int/resource/docs/cop7/13a03.pdf> [Marrakech Accords]; See also Davis A. Wirth, "The Sixth Session (Part Two) and Seventh Session of the Convention of the Parties to the Framework Convention on Climate Change" (2002) 96 Am. J. Int'l L. 648 at 650.
[108] Anita Halvorssen & Jon Hovi, "The nature, origin and impact of legally binding consequences: the case of the climate regime" (2006) 6 J. Int'l Envtl. Agr. Pol. L.& Econ. 157 at 158 [Halvorssen & Hovi].
[109] Marrakech Accords, *supra* note 107 at Annex, section II(3). Decisions by the Compliance Committee are made by consensus, however if a consensus cannot be reached, a three-quarters majority vote can be held. On the other hand, decisions by the enforcement branch require a three-quarters majority vote followed by the support of the majority of both industrialized and developing countries.
[110] *Ibid*. section II(1).
[111] *Ibid*. section II(2) and (3).
[112] *Ibid*. at section IV(4).
[113] *Ibid*. section V and IX.

"in that it has the power to actually apply the consequences, not just recommend action to the COP."[114]

Within the enforcement branch, however, the consequences of failing to comply with *Kyoto* are "fully predetermined."[115] If a state fails to observe its reporting requirements, emissions targets, or eligibility requirements under the *Kyoto* mechanisms, the enforcement branch declares the state as being non-compliant and applies specific penalties, including sanctions.[116] In other words, it simply makes a determination that a party has failed to comply with the Protocol and then applies the penalty or consequence, which range from punitive to facilitative, in a non-discretionary manner. For example, parties that fail to comply with their emissions target by the end of the first commitment period must make up the difference in the second commitment period (2012-2016), plus a 30 percent penalty.[117] Non-compliant parties are also suspended from selling surpluses under the emissions trading mechanism and must develop a compliance plan.[118]

The non-compliance process can be initiated by any state party against a fellow state party or by the Compliance Committee itself.[119] The benefit of the party-to-party trigger is that it "allows Parties that have a strong interest in seeing the Protocol enforced, such as small island states, to initiate compliance proceedings against other Parties."[120] The problem with this process is that it limits individual and group involvement in the compliance process, even though they may be the ones most affected by environmental degradation from climate change. However, despite having no recourse against Canada

[114] Halvorssen & Hovi, *supra* note 108 at 162.
[115] *Ibid*.
[116] Marrakech Accords, *supra* note 84 at section XV.
[117] *Ibid*. at XV(5)(a).
[118] *Ibid*. at XV (b) and (c).
[119] Halvorssen & Hovi, *supra* note 108 at 161.
[120] *Ibid*.

directly, the Inuit may petition competent nongovernmental organizations and intergovernmental organizations to "submit relevant factual and technical information to the relevant branch" after a preliminary examination has been conducted.[121] This means that, in addition to relying on information from official sources, such as COP reports, the Compliance Committee could consider evidence of non-compliant behaviour submitted by nongovernmental organizations on behalf of the Inuit.[122]

In any case, even if the Inuit did have standing to bring a complaint in the enforcement branch, the branch has limited ability to penalize Canada. Article 18 of *Kyoto* requires that any compliance mechanism "entailing binding consequences" be approved by amendment, requiring ratification by at least three-quarters of the protocol's parties.[123] As of yet, the parties to the Protocol have not managed to pass such an amendment. Furthermore, legal scholars point out that this requirement will be problematic because it could result in some parties ratifying the amendment, and being bound to the non-compliance procedure, while others refuse to ratify.[124] Although the Compliance Committee has been operating since 2006, scholars predict that an agreement to legally adopt the non-compliance procedure will not be reached before the first commitment period ends.[125] Furthermore, some speculate that even if the consequences of failing to comply with *Kyoto* were legally binding, some states would simply choose not to comply.[126]

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[121] *Rules of Procedure of the Compliance Committee of the Kyoto Protocol* at art. 20.
[122] Geir Ulfstein & Jacob Werksman, "The Kyoto Compliance System: Toward Hard Enforcement" in Olav Schram Stokke, Jon Hovi & Geir Ulfstein, eds., *Implementing the Climate Regime* (Virginia: Earthscan Publications Ltd., 2005) at 48-49.
[123] *Kyoto*, *supra* note 9 at art. 18.
[124] Halvorssen & Hovi, *supra* note 108 at 164; Meinhard Doelle "The Cat Came Back, or the Nine Lives of the Kyoto Protocol" (2006) 16 J. Envtl. L. Pol'y. 261 at 267 [Doelle 2006].
[125] Doelle 2006, *ibid*. at 268.
[126] Halvorssen & Hovi, *supra* note 108 at 170.

3.1.3. Conclusion

The climate regime falls short of providing a forum in which the Inuit can seek legal redress or accountability from Canada. This is true regardless of the legal status of *Kyoto*'s compliance mechanisms. The state-centric nature of international environmental law fails to provide individuals and groups with a legal system capable of addressing the human harms that result from rising GHG emissions. Therefore, complainants are forced to resort to other legal forums in order to hold states accountable.

3.2. International Law Generally

3.2.1. State Responsibility

An alternative path may lie in appealing to general principles of international law and the rules governing state responsibility. As the international legal system evolved, so did rules on international responsibility and accountability. State responsibility is now one of the most fundamental and well-recognized principles of public international law.[127] It concerns "what happens when things go wrong and states behave in a manner that is inconsistent with their international obligation."[128] The general theory of state responsibility asserts that every state that commits an internationally wrongful act is subject to responsibility.[129] The International Law Commission's codification of state responsibility, *Responsibility of States for Internationally Wrongful Acts (Draft Articles)*,[130] serves as a useful tool for examining whether a state's failure to protect the

[127] Sands, *supra* note 27 at 872; H. M. Kindred et. al. *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery Publications, 2006) at 601 [Kindred].
[128] Kindred, *ibid*.
[129] *Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, UN GAOR 56th Sess., Supp. No. 10 UN Doc. A/56/10 (2001) at art. 1 [ILC Draft Articles].
[130] *Ibid*.

environment from climate change and environmental degradation is a violation of state responsibility. Although not legally binding, the *Draft Articles*, as they are known, have been referenced by the ICJ[131] and articles 1 to 4 are generally recognized as customary international law.[132] Article 2 sets out a two-part test for determining whether a state has committed an internationally wrongful act.[133] It states that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: … [i]s attributable to the State under international law; and … [c]onstitutes a breach of an international obligation of the state."[134] The two requirements can be applied to the Canadian context.

(a) Breach of an International Obligation of the State

The first stage of the test involves finding that there was a breach of Canada's international obligation. The requirements for making this determination are set out in Chapter III of the *Draft Articles*. Article 12 states that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[135] The obligations referred to in Article 12 are primarily treaty obligations, especially in the

[131] *Case Concerning the Gabicikovo-Nagymaros Project* (*Hungary v. Slovakia*), [1997] I.C.J. Rep. 7 [*Hungary*].
[132] Kindred, *supra* note 127 at 604; Meinhard Doelle, *From Hot Air to Action: Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Thomson Carswell, 2005) at 322 [Doelle 2005].
[133] ILC Draft Articles, *supra* note 129 at art. 2. See also Kindred, *ibid*. (Kindred et. al. note that the reference to an "internationally wrongful act" in Article 1 of the ILC's Draft Articles should not be taken as an indication that only positive actions by a state may trigger its responsibility. Both actions and omissions are covered by the provision. Furthermore, some international obligations may be violated without any material or even identifiable moral damages to any other states. Such obligations include many flowing form human rights and environmental law standards.).
[134] ILC Draft Articles, *ibid.* at art. 2.
[135] ILC Draft Articles, *ibid.* at art. 12.

environmental law context.[136] Article 13, however, adds to article 12 by asserting that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[137] Even though Canada has been legally bound to *Kyoto* since it entered into force, its failure to meet its emissions target is not a violation of an obligation constituting an internationally wrongful act yet, because Canada will not officially breach the requirements in the Protocol until 2012 when the first commitment period ends.

Nevertheless, Canada has a general obligation to implement any international treaties it ratifies in good faith. The basic principles governing the law of treaties are set out in the 1969 *Vienna Convention on the Law of Treaties,*[138] which Canada ratified.[139] The doctrine of "*pacta sunt servanda*" in article 26 of the *Vienna Convention*, states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[140] Furthermore, Canada could be seen as violating other international obligations that require it to put in place a plan to combat climate change by reducing GHG emissions. There are a number of norms and principles that can create binding international obligations on Canada with respect to the environment and climate change. Many of these are discussed here, though it is important to note that the legal status of these norms is unclear, which may impact their usefulness in the context of litigation.[141]

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[136] R.S.J. Tol & R. Verheyen, "State Responsibility and Compensation for Climate Change Damages – A Legal and Economic Analysis" (2004) 32 Energy Policy 1109 at 1114 [Tol & Verheyen].
[137] ILC Draft Articles, *supra* note 129 at art. 13.
[138] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*Vienna Convention*].
[139] See Status of Ratifications, United Nations Treaty Collection , online: Status of Ratification <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>.
[140] *Vienna Convention*, *supra* note 138 at art. 26.
[141] Jutta Brunnée, "Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection" (2004) 53 Int'l. & Comp. L. Q. 351 at 354.

i. Canada is violating its obligations under the UNFCCC and the Kyoto Protocol

Canada ratified the UNFCCC on December 4, 1992 and the Convention entered into force on March 21, 1994.[142] The objective of the UNFCCC is to stabilize "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[143] In ratifying the UNFCCC, Canada agreed to be guided by key environmental principles such as inter-generational equality,[144] the precautionary principle,[145] and the right of all parties to sustainable development,[146] as it implements its commitments under the Convention.[147] The UNFCCC also incorporates the principle of "common but differentiated responsibilities,"[148] a universally accepted rule that reflects the general principle of equity in international law.[149] It has been applied in *Kyoto,*[150] the UNFCCC [151] and soft law sources.[152] Common but differentiated responsibility places the onus of mitigating climate change on states that emit the most GHG, such as Canada, based on the assumption that those states have more technological and financial resources to contribute to the solution.[153] For instance, article 4(2) sets out more onerous obligations on developed states, collectively known as Annex I parties.[154] Each Annex I party is

[142] See *UNFCCC*, *supra* note 7.
[143] *Ibid*. at art. 2.
[144] *Ibid.* at art. 3(1).
[145] *Ibid*. at art. 3(3).
[146] *Ibid*. at art. 3(4).
[147] *Ibid*. at art. 4.
[148] *Ibid*. at preamble, art. 3(1) and 3(2).
[149] CISDL, *supra* note 4 at 2; OHCHR Report, *supra* note 11 at para. 11.
[150] *Kyoto*, *supra* note 9 at art. 3(1) and 10.
[151] *UNFCCC*, *supra* note 7 at preamble, art. 3(1) and 3(2).
[152] *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5 Rev. 1 (1992) at principle 2 [Rio Declaration]; Stockholm, *supra* note 21.
[153] Ved P. Nanda & George Pring, *International Environmental Law and Policy for the 21st Century* (New York: Transnational Publishers, Inc., 2003) at 39 [Nanda & Pring].
[154] "Parties and Observers," online: The United Nations Framework Convention on Climate Change <http://unfccc.int/parties_and_observers/items/2704.php>. ("Annex I Parties include the industrialized

required to adopt national policies to mitigate climate change, including protecting greenhouse sinks, such as oceans, forests and soil.[155] They are also required to submit detailed progress reports with an 'aim' of reducing levels of anthropogenic emissions of carbon and other GHGs not controlled by the *Montreal Protocol* to their 1990 levels by the year 2000.[156]

On December 17, 2002, Canada made a stronger legally-binding commitment to regulate GHG emissions when it ratified the *Kyoto Protocol*.[157] Canada pledged to reduce GHG emissions by 6 percent below 1990 levels during the first commitment period[158]—a reduction of approximately 240 MT from its "business-as-usual" emissions levels projected for 2010.[159] Since 2002, however, Canada's emission levels have been moving in the wrong direction. In its *Fifth National Report on Climate Change (2010),*[160] the government reported that its GHG emissions for 2007 had risen to 26 percent above 1990 levels or 747 MT, a gap of 32 percent over Canada's *Kyoto* target.[161]

The current government has been noncommittal to its current targets and in negotiating targets beyond the end of the first commitment period in 2012. In December 2009, COP/15 took place in Copenhagen, Denmark where parties attempted to negotiate a comprehensive and inclusive plan to move beyond the first commitment period. The outcome, at three-page plan called the Copenhagen Accord, recognizes the IPCC's

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countries that were members of the OECD (Organisation for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States").

[155] *UNFCCC*, *supra* note 7 at art. 4(2)(a).

[156] *Ibid*. at art. 4(2)(b).

[157] See *supra* note 9.

[158] *Kyoto*, *supra* note 9 at Annex B and art. 3(1).

[159] Environment Canada, *Climate Change Plan for Canada* (Ottawa: Environment Canada, 2002) at 11 [2002 Plan].

[160] Environment Canada, *Fifth National Communication on Climate Change: Actions to Meet Commitments Under the United Nations Framework Convention on Climate Change* (Ottawa: Environment Canada, 2010) [2010 Plan]

[161] *Ibid.* at 3 and 19.

threshold of a 2˚C increase in global temperatures, but is not legally binding and does not set long-term global targets for emissions reductions.[162] In response to COP-15, and in order to align itself with the United States, Canada announced a new reduction target of 17 percent below 2005 levels by 2020, a modest reduction from its 2007 target.[163] Canada's 2020 target remains the weakest of any *Kyoto* party and is far from the 40 percent reduction the latest science indicates is required from industrialized countries to stabilize GHG emissions.[164] In fact, several industrialized countries have made larger commitments than Canada: Australia and Japan have each strengthened their targets to a 25 percent reduction; the EU's target is to reduce emissions by 30 percent; and the UK, Sweden, Norway and Germany all have targets of at least 40 percent.[165]

Additionally, Canada is the only country to renounce outright its commitments under the *Kyoto Protocol*, calling them "impossible."[166] Indeed, the Canadian government has taken no steps to publish a plan capable of meeting its 2020 target and it has shelved its 2008 plan, "Turning the Corner."[167] In comparison, the United States, which made 2020 targets similar to Canada's, is considering comprehensive legislation that would both establish and implement a plan to clearly meet its goal,[168] even though it is not a party to *Kyoto* and has no legal obligation to reduce emissions. While the vast

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[162] "Climate talks end with sketchy deal" *CBC News* (19 December 2009), online: CBC News <http://www.cbc.ca/world/story/2009/12/19/copenhagen-accord.html>.
[163] Government of Canada, "Canada's Action on Climate Change," online: Government of Canada <http://www.climatechange.gc.ca/default.asp?lang=En&n=D6B3FF2B-1> [Government of Canada].
[164] David Suzuki Foundation, "Where does Canada stand on climate change?" online: David Suzuki Foundation < http://www.davidsuzuki.org/issues/climate-change/science/canada-climate-change/canadas-climate-change-action-and-positions/> [David Suzuki].
[165] *Ibid*.
[166] "'Impossible' for Canada to reach Kyoto targets: Ambrose" *CBC News* (7 April, 2006), online: CBC News < http://www.cbc.ca/canada/story/2006/04/07/kyoto060407.html>.
[167] Matthew Bramley & Clare Demerse, "UN Climate Negotiations in Copenhagen, Denmark" (December 2009) at 6, online: The Pembina Institute < http://www.pembina.org/pub/1935> [Pembina]; Government of Canada, *supra* note 163.
[168] Pembina, *ibid*.

majority of *Kyoto* parties will reach their targets, scientists are certain Canada will not be among them.[169] Despite the fact that the commitment period does not end until 2012, Canada's duty of good faith was triggered when the Protocol entered into force. Canada is therefore currently breaching an international obligation to implement treaties in good faith.

ii. Canada is violating its obligation to avoid transboundary harm and to respect the principle of sustainable development

States have an obligation to ensure that activities within their territory do not cause damage beyond the limits of their jurisdiction.[170] This fundamental and widely recognized customary international law norm is known as the principle of good neighbourliness[171] and it has been addressed by various tribunal decisions since 1938.[172] In the *Trail Smelter Arbitration*,[173] which dealt with damage to the United States as a result of sulphur dioxide emissions from a Canadian smelter, the arbitration tribunal defined the concept of state responsibility in the framework of environmental law and established that a state may be responsible for the environmental damage it causes in another state. The tribunal noted that "…under principles of international law…no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the industry of another or the properties or persons therein when the case is

[169] David Suzuki, *supra* note 164; See also Markus Gehring & Bradnee Chambers, "Canada's Experience in Emissions Trading and Participating in the Kyoto Mechanisms," in David Freestone & Charlotte Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (New York: Oxford University Press, 2005) at 492-510.
[170] Sands, *supra* note 27 at 235; Nanda & Pring, *supra* note 153 at 20.
[171] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 at art. 74 [UN Charter]; Nanda & Pring, *ibid*. at 19.
[172] ICC Petition, *supra* note 22 at 99.
[173] *Trail Smelter Arbitration (United States v. Canada)*, 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941) [*Trail Smelter*].

of serious consequence and the injury is established by clear and convincing evidence."[174]

The ICJ reaffirmed the good neighbourliness principle in several other cases,[175] most notably the *Corfu Channel Case*[176] and the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*,[177] in which it stated that "the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment."[178] Although this statement reflects only the dissenting opinion of one judge, it acknowledges that the obligation exists for states to ensure that activities within their jurisdiction do not cause extra-territorial harm. Several treaties[179] and soft law sources have also adopted variations on this principle. Principle 21 of the Stockholm Declaration, which was later codified in Principle 2 of the Rio Declaration, recognizes that states must "ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[180] Normally, declarations are not binding international law; however, following the decision in *Nuclear Weapons*

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[174] *Ibid*. at 1965.
[175] *Lac Lanoux Arbitration* (1957), 12 R.I.A.A. 281, 24 I.L.R. 101 [*Lac Lanoux*]; *Hungary*, *supra* note 131.
[176] *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4 at 17-23 [*Corfu Channel*].
[177] *Legality of the Threat of Nuclear Weapons*, Advisory Opinion [1996] I.C.J. Rep. 226 [*Nuclear Weapons*].
[178] *Ibid.* at 241.
[179] *United Nations Convention on the Law of Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994) at art. 194(2) and 235(1) [*UNCLOS*] (The *United Nations Convention on the Law of Sea* implicitly prohibits tans-boundary pollution, requiring that states "…ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other States and their environment…" Further, article 235(1) of *UNCLOS* provides that state responsibility is triggered when states fail to meet their obligation to protect the marine environment. This clause is relevant in the context of climate change because the IPCC has predicted a rise in sea level as a result of global warming.).
[180] Stockholm, *supra* note 21 at principle 21; Rio Declaration, *supra* note 152 at principle 2.

Advisory Opinion, Principle 21/Principle 2 have generally been considered to reflect customary international law.[181]

Transboundary pollution caused by climate change has already altered the Arctic environment. The impacts include melting sea ice and decreasing snow, unpredictable weather conditions and alterations in land and water conditions.[182] Canada's action and inaction with respect to climate change has contributed to these transboundary impacts. Canada has therefore violated its international responsibility to prevent activities within its jurisdiction from damaging the environment outside its borders, and arguably within its borders as well.

The country's failure to take effective action to minimize these impacts also violates the principle of sustainable development. The Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."[183] The International Institute for Sustainable Development (IISD) recognizes climate change as one of the most significant sustainable development challenges facing the international community.[184] The concept of sustainable development plays a key role in the climate regime, particularly in the *Kyoto Protocol*,[185] the Rio Declaration[186] and the UNFCCC, which encourages parties to promote sustainable development.[187] The IISD endorses

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[181] Sands, *supra* note 27 at 236; Doelle 2005, *supra* note 132 at 323; Nanda & Pring, *supra* note 153 at 21.
[182] ICC Petition, *supra* note 22 at 100.
[183] *Report of the World Commission on Environment and Development (Brundtland Commission), Our Common Future*, UN GAOR, 96th Plen. Mtg., A/RES/42/187 (1987) at 43 [Brundtland Report]; See also Commission on Human Rights, *Human Rights and the Environment as Part of Sustainable Development – Report of the Secretary-General*, UNESC, 61st Sess., 2005, UN Doc. E/CN.4/2005/96.
[184] "Climate Change," online: International Institute for Sustainable Development <http://www.iisd.org/climate/>[IISD].
[185] *Kyoto*, *supra* note 9 at arts. 2, 10, 12.
[186] Rio Declaration, *supra* note 152 at art. 3 and 11.
[187] *UNFCCC*, *supra* note 7 at art. 3(4).

Canada's commitment to the *Kyoto Protocol* and its recognition that the impact of GHG emitted today will be felt for generations to come.[188] Canada is arguably breaching its obligation to promote sustainable development by emitting high levels of GHG and destroying the Inuit's land for present and future generations.

iii. Canada is violating its obligation to act with precaution and to prevent environmental damage

The precautionary principle is another general principle of international environmental law that Canada is arguably breaching. Although it is not universally considered customary international law,[189] according to the Inuit petition, "the obligation of States to act cautiously in the face of scientific uncertainty is a well-established principle of international law."[190] This norm is articulated in the Rio Declaration[191] and the UNFCCC, both of which Canada supports. As per the UNFCCC, Canada has a general obligation to "take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect."[192] The Convention specifically addresses scientific uncertainty, noting: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures…"[193]

Canada's action and inaction in the face of established climate change science, whether conclusive or not, demonstrates a failure to take precautionary measures to reduce harm to the Inuit's environment. The Inuit petition notes that although there remains some uncertainty with respect to the nature and timing of sub-regional impacts,

[188] IISD, *supra* note 184.
[189] Kravchenko, *supra* note 72 at 521; Koivurova, *supra* note 86 at 278.
[190] ICC Petition, *supra* note 22 at 100.
[191] Rio Declaration, *supra* note 152 at principle 15.
[192] *UNFCCC*, *supra* note 7 at art. 3(3).
[193] *Ibid*.

there is no scientific uncertainty with respect to two facts: "the rapid and persistent warming in the Arctic as a result of the build-up of anthropogenic greenhouse gases in the atmosphere, and the highly adverse effect of this warming on the lives and culture of the Inuit."[194]

Canada is also failing to uphold the principle of preventative action, which is closely linked to the precautionary principle. The principle of preventative action, also known as the preventative principle, similarly shifts the focus away from managing pollution after it has been emitted, towards mitigating damage before it has occurred.[195] It has been endorsed by several international treaties[196] and declarations,[197] as well as implicitly supported by the ICJ in relation to transboundary air pollution.[198] The preventative approach is particularly important with respect to climate change because failure to halt GHG emissions could cause irreparable harm to the global environment.[199] Preventing pollution is the foundation of the UNFCCC and the *Kyoto Protocol*, whose shared objective is to prevent "dangerous anthropogenic interference with the climate system."[200] In addition to committing to this obligation internationally, Canada also endorses pollution prevention domestically, defining it as "the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health."[201] Prevention

[194] ICC Petition, *supra* note 22 at 102.
[195] Sands, *supra* note 27 at 246-47.
[196] *UNCLOS*, *supra* note 179 at art. 194(1); *Montreal Protocol*, *supra* note 71 at preamble.
[197] Stockholm, *supra* note 21 at principles 6, 7, 15, 18, 24; Rio Declaration, *supra* note 152 at principle 11; *Draft Principles of the Conduct for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States*, 10 March 1978, U.N. Doc. UNEP/GC.6/17 [UNEP Draft Principles].
[198] *Trail Smelter*, *supra* note 173; *Lac Lanoux*, *supra* note 175.
[199] Pembina, *supra* note 167.
[200] *UNFCCC*, *supra* note 7 at art. 2; *Kyoto*, *supra* note 9 at preamble.
[201] UNEP Draft Principles, *supra* note 197.

is also recognized as one of the primary purposes of the *Canadian Environmental Protection Act* [202] and it is the basis for Part 4 of the Act, which sets out detailed plans for pollution prevention.[203] Canada therefore has an obligation to prevent pollution both within its own territory and beyond.

iv. Canada has failed to cooperate with international efforts to reduce GHG emissions

Canada is also breaching its duty to cooperate.[204] In its 2009 report on climate change and human rights, the UN Human Rights Council emphasized that "[c]limate change can only be effectively addressed through cooperation of all members of the international community."[205] In terms of environmental law, cooperation is reflected in one of the UN Environment Programme's first acts, the adoption of its Draft Principles.[206] The principles recognize the duty of states to cooperate to eliminate adverse environmental effects and encourage states to adopt bilateral and multilateral agreements to "secure specific regulation of their conduct."[207] The duty to cooperate is also integrated throughout the Stockholm Declaration,[208] but specifically in article 24:

> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[209]

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[202] *Canadian Environmental Protection Act*, S.C. 1999, c. 33.
[203] *Ibid*. at part 4.
[204] Knox, *supra* note 12 at 478; ICC Petition, *supra* note 22 at 110.
[205] OHCHR Report, *supra* note 11 at para. 84.
[206] UNEP Draft Principles, *supra* note 197.
[207] Sands, *supra* note 27 at 44.
[208] Stockholm, *supra* note 21 at arts. 5, 7, 9, 12, 14, 26 and 27.
[209] *Ibid*. at art. 24. See also *ibid*. at art. 27.

Canada expressly endorsed the duty to cooperate when it ratified *Kyoto*[210] and the UNFCCC, which states that "Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country."[211] Canada has, however, violated its duty to cooperate—it has consistently failed to reduce emissions and it has obstructed the formulation of additional international measures beyond the first commitment period. The result is that temperatures in the Arctic continue to rise with dire consequences for the Inuit.

(b) Conduct Attributable to a State

The second step outlined in the *Draft Articles* is to determine whether the above-noted acts or omissions, which have resulted in harm to the Inuit's environment, can be attributed to Canada.[212] The criteria for determining when an act or omission will be attributed to a state are set out in Chapter II of the *Draft Articles*. Article 4 establishes that an act or omission by a state organ will be considered an act of the state.[213] The failure to mitigate the harm from climate change can clearly be attributed to Canada because it is the federal government that has opted not to comply with its international obligation. It is not as clear, however, whether the environmental harm occurring in the Arctic is directly attributable to Canada's failure to reduce GHG emissions. As the IPCC points out, climate change is a global phenomenon and millions of individuals are responsible for GHG emissions, not any one state.[214] Although it is apparent that Canada

[210] *Kyoto*, *supra* note 9 at arts. 2 and 10.
[211] *UNFCCC*, *supra* note 7 at art. 3(5).
[212] ILC Draft Articles, *supra* note 129 at art. 2.
[213] *Ibid*. at art. 4.
[214] OHCHR Report, *supra* note 11 at para. 96. (The OHCHR addresses the trouble with causation and transboundary environmental harm: "The physical impacts of global warming cannot easily be classified as

is responsible for contributing to climate change, it is equally apparent that it is not exclusively responsible.[215] Causation is an obvious hurdle that needs to be addressed at this stage. For the sake of this analysis, however, it will be assumed that climate change in the Arctic is attributable to Canada.

(c) Erga Omnes Obligation

It has been argued that lowering GHG emissions is an *erga omnes* obligation,[216] which is a legal obligation owed to the international community as a whole.[217] One author specifically notes that *Kyoto* obligations are *erga omnes* obligations and therefore even non-state parties can challenge non-compliant *Kyoto* parties.[218] Some have suggested, more generally, that because the global climate is ecologically interdependent, states have a collective interest in its preservation and a legal obligation to do so.[219] In the ICJ, Justice Weemarantry stated: "[t]here is substantial evidence to suggest that the general protection of the environment beyond national jurisdiction has been received as obligations erga omnes."[220]

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human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specified States.").

[215] Jonathan A. Patz et al., "Climate Change and Global Health: Quantifying a Growing Ethical Crisis" (2007) 4 *Ecohealth* 398 at 398-99. (Patz et al. outline the current disparities in the regional contributions to GHG emissions: "The imbalance of responsibility for global warming is striking when comparing across nations. Average global carbon emissions approximate one metric ton per year (tC/yr) per person. In 2004, U.S. per capita emissions neared 6 tC/yr (with Canada and Australia not far behind), and Japan and Western European countries' per capita emissions range from 2 to 5 tC/yr per capita. Yet developing countries' per capita emissions approximate 0.6 tC/yr, and more than 50 countries are below 0.2 tC/yr."); See also Crump, *supra* note 3 at 28.

[216] Tol & Verheyen, *supra* note 136 at 1115; See generally Sands, *supra* note 27 at 188-89; See also Jacqueline Peel, "New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context" (2001) 10 R.E.C.I.E.L. 82 [Peel].

[217] See ILC Draft Articles, *supra* note 129 at art. 48(1)(b); *Barcelona Traction Company (Belgium v. Spain)*, [1970] I.C.J. Rep. 4 at 32 [*Barcelona Traction*].

[218] R.S.J. Tol & R. Verheyen, "Liability and Compensation for Climate Change Damages – A Legal and Economic Assessment" (2001)online: University of Hamburg <http://www.uni-hamburg.de/Wiss/FB/15/Sustainability/liability.pdf> at 9.

[219] Sands, *supra* note 27 at 14; Nanda & Pring, *supra* note 153 at 36; *Hungary*, *supra* note 131 at para. 53.

[220] *Hungary*, *ibid*.

Indeed, provided it can be proven that protecting the environment by regulating GHG emissions is an *erga omnes* obligation, simply breaching the obligation by failing to reduce emissions triggers a legal wrongdoing on Canada's part[221] and any state could hold it responsible. The breach of the obligation would itself constitute the required "wrongdoing" sufficient to trigger the right to reparation. Article 48(1)(b) of the *Draft Articles* outlines when state responsibility may be invoked by a state other than an injured state; this clause could be used provided climate change and *Kyoto* obligations are "owed to the international community as a whole."[222] Pursuant to article 48(1)(a), state parties to the *Kyoto Protocol* can invoke the articles relating to *erga omnes partes* violations, which are "obligations owed to a group of States established for the protection of the collective interest."[223] However, while support is growing in favour of recognizing the protection of the environment as an *erga omnes* obligation, there are still instances of contrary state practice.[224] Furthermore, as will be discussed in section 3.2.2., it is unclear whether and to what extent 'uninjured' States are entitled to invoke the responsibility of another state when it violates an *erga omnes* obligation.

(d) Conclusion

Collectively, the environmental norms outlined above and their endorsement in cases and legal instruments have clarified the law of state responsibility and liability for environmental harm. According to one scholar, the state of customary law can be summarized as consisting of the following two principles:

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[221] Tol & Verheyen, *supra* note 136 at 1115.
[222] ILC Draft Articles, *supra* note 129 at 48(1)(b).
[223] Peel, *supra* note 216 at 85.
[224] Nanda & Pring, *supra* note 153 at 37. For instance, failure to take action against the former Soviet Union for the 1986 Chernobyl nuclear plant disaster. See also Peel, *ibid*. at 94.

> (i) States have a duty to prevent, reduce and control pollution and environmental harm; and
> (ii) States have a duty to cooperate in mitigating environmental risks and emergencies through notification, consultation, negotiation, and in appropriate cases, environmental impact assessment.[225]

Canada's failure to implement a plan to reduce GHG emissions *per se* is arguably a violation of its international obligation to ensure that activities within its territory do not harm other states. Furthermore, Canada is failing to cooperate with other states to limit harmful anthropogenic emissions, both present and future, to a standard that does not cause transboundary harm. In the process, Canada is breaching a number of international environmental law principles and human rights standards. Its failure to regulate emitting activities is ultimately a violation of its international obligations, whether *erga omnes* or otherwise, and it has therefore committed an internationally wrongful act, which triggers state responsibility. However, despite the fact that a number of violations exist, the Inuit have little recourse, as the next section highlights.

3.2.2. Limitations of State Responsibility

The discussion in this section assumes Canada is committing an internationally wrongful act and therefore the question becomes: what recourse do the Inuit have? There are several major barriers to the effective adjudication of the Inuit's claim against Canada for a violation of state responsibility. The first problem the Inuit would face in invoking state responsibility against Canada is a jurisdictional barrier. The possible forums for bringing the Inuit's complaint include the ICJ[226] and the *United Nations Convention on*

[225] Doelle 2005, *supra* note 132 at 32.
[226] *Statute of the International Court of Justice*, (1945) U.N.T.S. No. 993 at art. 92 [ICJ Statute].

the Law of the Sea (UNCLOS),[227] although, as this section explains, legal proceedings in both would be ineffective.

Of these forums, the ICJ is the most logical, at first glance, because it is the "principal judicial organ of the United Nations."[228] The ICJ's role is to settle legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.[229] However, a number of procedural challenges impede the Inuit from succeeding with a case against Canada in the ICJ.[230] First and foremost is the issue of standing. As non-state actors, the Inuit themselves cannot invoke state responsibility either in a suit before the ICJ or as a formal diplomatic demarche; [231] however, they may petition another state party to the *Statute of the International Court of Justice* to bring a complaint on the group's behalf.[232] The *Draft Articles* outline two situations in which a state, other than an injured state, may invoke responsibility;[233] for example, as discussed above, in situations where the

[227] *UNCLOS*, *supra* note 179; See also Jacobs, *supra* note 13 at 116-17; Andrew L. Strauss, "The Legal Option: Suing the United States in International Forums for Global Warming Emissions," (2003) 33 E.L.R. 10185-88 [Strauss].
[228] ICJ Statute, *supra* note 226 at art. 92.
[229] *Ibid*. at arts. 14 and 65.
[230] See Jacobs, *supra* note 13 at 105 (Jacobs discusses the challenges the island nation of Tuvalu would face if it attempted to file suit against the United States in the ICJ. The fact that Tuvalu, a state and therefore a recognized actor in international law, would face such substantial obstacles puts the Inuit's task into context.).
[231] ICJ Statute, *supra* note 226 at arts. 34(1) and 35(1) (The ICJ Statute stipulates that any party to the statute can appear before the court and the *Charter of the United Nations* clarifies that all Members of the United Nations are *ipso facto* parties to the Statute. See UN Charter, *supra* note 171 at art. 93(1). As a founding member of the UN, Canada is a party to the statute and can appear before the court); See also Strauss, *supra* note 227 at 10185.
[232] ICJ Statute, *ibid.* at art. 36(2). See also *Barcelona Traction*, *supra* note 217; *East Timor (Portugal v Australia)* [1995] ICJ Reports, 90.
[233] ILC Draft Principles, *supra* note 129 at arts. 42 and 48 (Article 48 states: "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole."); See also Peel, *supra* note 216 at 84.

obligation being breached is an *erga omnes* obligation.[234] If a non-injured state successfully argues that the duty to regulate GHG emissions is an *erga omnes* norm, it would have standing to respond to Canada's breach by instituting ICJ proceedings.[235] Non-injured complainants, however, are not entitled to the full spectrum of remedies from the responsible state; the non-injured state would only be entitled to request that Canada cease the internationally wrongful act and that it makes assurances of non-repetition.[236] Non-injured states may also claim reparation "in the interest of the injured State or of the beneficiaries of the obligation breached,"[237] though some claim that the "nationality of claims" rules[238] preclude "claims for reparation on behalf of victims of human rights violations."[239] In any case, as previously discussed, there is no consensus regarding what obligations are classified as *erga omnes* in the environmental law context,[240] and therefore, it is unlikely that a third party state could or would be able to initiate the Inuit's claim against Canada.

Further, even if a non-injured or third party state was able to establish standing, the Inuit's complaint would face an additional jurisdictional barrier. In accordance with the principle of state sovereignty, the ICJ's jurisdiction is confined to situations in which both disputing states accept the jurisdiction and arbitration of the Court.[241] One way the

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[234] ILC Draft Principles, *ibid*. at 48(1)(b).
[235] Jutta Brunnée, "International Legal Accountability Through the Lens of the Law of State Responsibility" (2005) XXXVI Nethl. Y.B. Int'l. L. 3 at 8 [Brunnée 2005].
[236] ILC Draft Principles, *supra* note 129 at art. 48(2)(a).
[237] *Ibid*.
[238] *Ibid*. at arts. 44(a) and 48(3).
[239] Brunnée, *supra* note 235 at 16.
[240] See Peel, *supra* note 216 at 94; See also *Nuclear Weapons*, *supra* note 177 at para. 29 (The ICJ confirmed that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Although this passage suggest that States are required to respect the global environment, it does not indicate whether States have standing to enforce the obligation.).
[241] Birnie & Boyle, *supra* note 70 at 530; ICJ Statute, *supra* note 226 at art. 36(1).

ICJ may gain compulsory jurisdiction of a matter is under article 36(2),[242] in which parties recognize a "general prospective acceptance" of the court in future cases.[243] Canada, however, rescinded its acceptance of the ICJ's compulsory jurisdiction in 1994.[244] The second way the ICJ may gain jurisdiction is in cases where parties have specifically provided for dispute resolution before the Court under a treaty.[245] For instance, the UNFCCC contains a clause that permits states to declare their acceptance of the ICJ as a dispute resolution mechanism,[246] though Canada has not made such a declaration. Furthermore, given Canada's position on the *Kyoto Protocol* and climate change generally, it is unlikely it would consent to having this dispute adjudicated by the ICJ under any circumstance.

As a *de facto* alternative, the Inuit could lobby for an ICJ advisory opinion, effectively bypassing the Court's jurisdictional consent requirement.[247] The ICJ can issue advisory opinions on almost any legal question put to it by specific UN bodies,[248] provided the request was made in accordance with article 96 of the UN Charter.[249] Individuals and groups are not permitted to request an advisory opinion; the request must come from the General Assembly, Security Council or another UN organ or specialized agency.[250] The Inuit would therefore have to convince a UN body to request an advisory opinion from the ICJ to clarify state responsibility for climate change. A request for an advisory opinion on climate change is not likely to come from the Security Council; the

[242] ICJ Statute, *ibid*. at art. 36(2).
[243] Strauss, *supra* note 227 at 10185.
[244] International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, online: ICJ <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=CA>.
[245] ICJ Statute, *supra* note 227 at art. 36(1).
[246] *UNFCCC*, *supra* note 7 at art. 14.
[247] Koivurova, *supra* note 86 at 280.
[248] UN Charter, *supra* note 171 at art. 96(2).
[249] *Ibid*. at art. 96.
[250] *Ibid*. at art. 96(2).

United States and China can exercise their veto power and would likely to do so as both countries have a large stake in the climate change debate.[251] Similarly, before the General Assembly can request an advisory opinion[252] it requires a two-thirds majority, which could be challenging, given the number of high GHG emitters who could implicate the legality of their own emissions by voting in favour of securing the opinion.[253] In an advisory opinion on the use of nuclear weapons, the General Assembly sent the case to the ICJ with less than a two-thirds majority;[254] however, even the lower threshold would be hard to achieve in this case, given the number of polluters that could suffer political consequences from an adverse ruling on state responsibility for global warming.[255]

The last method of obtaining an advisory opinion on climate change is by obtaining a request from a UN organ. Of these organs, the most likely to seek an advisory opinion on climate change are the World Health Organization (WHO), the United Nations Environment Program (UNEP), the Food and Agriculture Association and perhaps the International Labour Organization and UNESCO.[256] In an advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Nuclear Weapons)*,[257] the ICJ outlined a three-part test to determine whether the court can assume jurisdiction over a question brought by one of these specialized agencies:

1) the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court;

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[251] Strauss, *supra* note 227 at 10187.
[252] UN Charter, *supra* note 171 at art. 18.
[253] See Strauss, *supra* note 227 at 10187; Jacobs, *supra* note 13 at 115.
[254] UN Charter, *supra* note 171 at art. 18(3); See Strauss, *ibid*.
[255] Strauss, *ibid*; Koivurova, *supra* note 86 at 281 (Koivurova notes that achieving a majority within the General Assembly for an advisory opinion on climate change could be challenging for small island states, even though there are so many of them. She differentiates climate change from the nuclear weapons case, stating that "climate change is an issue that divides the state community in quite a different way than the legality of using nuclear weapons.").
[256] Strauss, *ibid*; Koivurova, *ibid*. at 282. See
[257] *Nuclear Weapons*, *supra* note 177.

2) the opinion requested must be on a legal question;
3) and this question must be one arising within the scope of the activities of the requesting agency.[258]

In the *Nuclear Weapons* case, the ICJ determined that the WHO passed the first two steps but failed the third.[259] With respect to an advisory opinion on climate change, the bodies identified above would likely face the same obstacle as the WHO because none of the organizations has a strictly environmental mandate, particularly one related to climate issues.[260] Thus, the ICJ fails to provide the Inuit with an effective forum for addressing climate change and its impact on environmental degradation in the Arctic.

The other potential forum, the dispute settlement mechanism in the UNCLOS, would provide a similarly unsatisfactory resolution for the Inuit. Although some have suggested that the definition of "pollution of the marine environment"[261] could cover damage resulting from rising sea level as a result of climate change,[262] the UNCLOS dispute resolution procedure has limited relevance to the Inuit. From a procedural perspective, like most other international dispute resolution mechanisms, only states can take advantage of this procedure; the Inuit would therefore have to solicit a state to initiate a complaint against Canada. Also, article 287 of the Statute allows states to choose a forum for resolving disputes.[263] Canada chose the International Tribunal for the Law of the Sea and an arbitral panel.[264] These methods are limited by the fact that they can only be utilized if both disputing parties agree to the same forum.[265] Even if the Inuit

[258] *Ibid*. at 71-72.
[259] *Ibid*. at 80.
[260] Strauss, *supra* note 227 at 10187.
[261] *UNCLOS*, *supra* note 179 at art. 1(4).
[262] Koivurova, *supra* note 86 at 284; Strauss, *supra* note 227 at 10188; Jacobs, *supra* note 13 at 116.
[263] *UNCLOS*, *supra* note 179 at art. 287.
[264] Canada's Declaration Made Upon Ratification (7 November 2003), online: UNCLOS <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Canada>.
[265] *UNCLOS*, *supra* note 179 at art. 287(5).

could overcome these procedural issues, the biggest obstacle the group faces is proving that the Convention applies to climate change issues.[266]

Thus, there is no reasonable international forum in which the Inuit may hold Canada accountable for the damage caused to the Arctic by climate change. This conclusion does not suggest that the Inuit's claim is not deserving of legal recognition, but rather that there is no mechanism in international law capable of considering the issue. Given the inability of public international law to address this complex intersection of laws and to hold a country such as Canada accountable for its international wrongdoing, the rest of this study focuses on using the human rights regime as a forum for the Inuit's case.

PART 4: LINKING HUMAN RIGHTS AND ENVIRONMENTAL DEGRADATION: THE 'GREENING' HUMAN RIGHTS APPROACH

Having identified the impact of climate change in the Arctic and the limitations of international environmental law and public international law in addressing the damage, this section turns to human rights and the 'greening' of rights approach. The first part of this section explores the scope and meaning of human rights generally. The second part highlights the debate around whether there is a substantive right to a healthy environment and it details the substantive human rights that have been 'greened' in the human rights system and may be implicated by the above-noted climate change-related impacts.

4.1. Overview of Human Rights

The term "human rights" refers to the core set of rights enshrined in international law on behalf of all individuals, regardless of "race, colour, sex, language, religion,

[266] Jacobs, *supra* note 13 at 116.

political or other opinion, national or social origin, property, birth or other status."[267] Human rights are universal rights that apply equally to all individuals.[268] Some consider that human rights evolved in three generations of rights: (1) civil and political rights; (2) economic, social and cultural rights, and; (3) solidarity rights.[269] The first generation—civil and political rights—include rights such as the right to life, liberty and security of the person, freedom from slavery and torture and the right to own property.[270] These rights impose negative obligations on states in that they limit states from carrying out certain acts. Second generation rights—economic, social and cultural rights—consist of rights such as the right to health, the right to social security and the right to education.[271] This group of rights imposes a positive obligation on states to ensure the rights are fulfilled. The third generation, commonly known as solidarity or group rights, include collective rights, such as the right to self-determination, the right to economic and social development, the right to peace and the right to a healthy environment.[272] Human rights exist, at their basic level, to counteract gross imbalances of power in society.[273] The failure of developed countries to reduce GHG emissions arguably stems from an imbalance of political and economic power, which has severe implications on the human rights of individuals in developing countries and at-risk communities. When considered in this way, the link between human rights and environmental degradation becomes clear.

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[267] *International Covenant on Civil and Political Rights*, 19 December 1996, 999 U.N.T.S. 171 at art. 2(1) (entered into force 23 March 1976) [*ICCPR*].
[268] Lee, *supra* note 79 at 287; *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess. Supp. No. 13, UN Doc. A/810 (1948) at art. 1 [*UDHR*].
[269] John Knox, "Climate Change and Human Rights Law" (2009) 50 Va. J. Int'l. L. 1 at 7 [Knox 2009]; Doelle 2004, *supra* note 1 at 184; Robin Churchill, "Environmental Rights in Existing Human Rights Treaties" in Michael R. Anderson & Alan E. Boyle, *Human Rights Approaches to Environmental Protection* (New York: Oxford University Press, 1996*)* at 89-104; Limon, *supra* note 19 at 439-40.
[270] Doelle 2004, *ibid*.
[271] *Ibid*.
[272] *Ibid*; Knox 2009, *supra* note 269 at 7.
[273] Amy Sinden, "Climate Change and Human Rights" (2008) 27 J. Land Resources & Envtl. L. 1 at 4 [Sinden].

4.2. What Substantive Human Rights are Implicated by Climate Change?

The part begins by reviewing the 'right to a healthy environment' as a right *per se*. Although there is debate about whether this right exists, with the exception of several regional sources, there is currently no substantive right to a healthy environment in international law. In the absence of this right, claimants like the Inuit are forced to rely on existing human rights to plead their case. Therefore, the second part of this section outlines the substantive human rights that have been invoked by claimants using the 'greening' of rights approach.[274] It details the broad range of internationally protected human rights that have been 'greened' or expanded in the human rights system to encompass environmental degradation.[275] Environmental human rights jurisprudence has drawn on all three generations of rights outlined above to find that environmental damage violates, for instance, the right to life, health, adequate standard of living, association, expression, information, political participation, personal liberty, equality and legal redress.[276] Those rights are reflected to varying degrees in UN and regional human rights instruments as well as in international environmental law instruments, including soft law sources.[277]

[274] ICHRP, *supra* note 19 at 3.
[275] Aminzadeh, *supra* note 1 at 245.
[276] Kiss & Shelton, supra note 78 at 682; ICC Petition, *supra* note 22 at 5.
[277] Stockholm, *supra* note 21 at principle 1; Rio Declaration, *supra* note 152 at principle 1; *Economic Commission for Europe (ECE) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention)* 25 June 1998, UN Doc. ECE/CEP/43 (1998) at preamble paras. 6 and 7 [*Aarhus Convention*] (The preamble states: "Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself… Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being…").

4.2.1. The Right to a Healthy Environment

(a) The Right to a Healthy Environment in Human Rights Treaties

This section will briefly canvas the international legal instruments and the judicial bodies that have explicitly recognized the right to a healthy environment. The bundle of rights contained in the *Universal Declaration of Human Rights* (UDHR),[278] *International Covenant on Civil and Political Rights* (ICCPR)[279] and *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[280] collectively known as the International Bill of Rights, are the primary source of international human rights law. Although none of the treaties in the UN human rights system contain a substantive environmental right, two of the regional human rights instruments do. The first is the *African Charter on Human and Peoples' Rights (Banjul Charter)*,[281] which is the primary human rights treaty in Africa. It recognizes that "all peoples shall have the right to a general satisfactory environment favourable to their development."[282] The Charter has been ratified by all members of the African Union.[283] The second, in the Inter-American system, is the *Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador)*,[284] which explicitly recognizes a right to a healthy environment and imposes a positive obligation on states to protect, preserve and improve

[278] *UDHR*, *supra* note 268.
[279] *ICCPR*, *supra* note 267.
[280] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [*ICESCR*].
[281] *African Charter on Human and Peoples' Rights (Banjul Charter)*, June 27, 1981, OUA Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October, 1986) [*African Charter*].
[282] *Ibid*. at art. 24 (See also article 16, which also implies there is a right to a healthy environment. It states: "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State Parties to the present Charter shall take the necessary measures to protect the health of their people…").
[283] See "List of Countries which have Signed, Ratified/Acceded to the African Union Convention on the African Charter on Human and Peoples' Rights" online: <http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf>.
[284] *Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador)*, Nov. 17, 1988, OAS Treaty Series No. 69 (entered into force Nov. 16, 1999) [*Protocol of San Salvador*].

the environment.[285] The Council of Europe considered a proposal to include a right to "the existence of a natural environment favourable to human health" in the *European Convention on Human Rights and Fundamental Freedoms*, but it ultimately failed.[286]

Article 24 of the African Charter is the only substantive right to a healthy environment that has been judicially interpreted. In *Social and Economic Rights Action Center v. Nigeria*,[287] the African Commission on Human and Peoples' Rights found that the Nigerian government facilitated the destruction of the Ogoni Peoples' land in the Niger Delta by allowing Shell Oil to exploit oil reserves with no regard for the health or environment of the local communities. As a result, Nigeria violated a number of rights protected in the African Charter,[288] including Article 24 and Article 16, the right to health. The Commission stated *inter alia* that,

> …the right to a healthy environment [under article 24] as it is widely known…imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[289]

Thus, the right to a healthy environment is only binding on the states that have ratified the African Charter and the Protocol of San Salvador. Given its limited application, the right can hardly be considered to have widespread application. This means that any universal recognition of a right to a healthy environment, beyond the regional human rights regimes, must be created by customary international law.

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[285] *Ibid*. at art. 11.
[286] Working Group for Environmental Law, *The Right to a Humane Environment: Proposal for an Additional Protocol to the European Human Rights Convention* (1973), reprinted in Allan Rosas et al. (eds.) *Human Rights in a Challenging East-West Perspective* (New York: Pinter Publishers, 1990) at 229.
[287] *Social and Economic Rights Action Center v. Nigeria*, (2001) Afr. Comm. on Hum. and Peoples' Rts. Comm. No. 155/96, Doc No. ACHPR/Comm/A044/1 [*SERAC*].
[288] *African Charter*, *supra* note 281 at arts. 2, 4, 14, 16, 18(1) and 21.
[289] *SERAC*, *supra* note 287 at para. 52; See also *Gbemre*, *supra* note 25 (The Court held that the right guaranteed in the Constitution as well as the African Charter "inevitably includes the right to clean poison-free, pollution-free and healthy environment.").

(b) The Right to a Healthy Environment as Customary Law

Although the right to a healthy environment is not recognized in internationally binding human rights treaties *per se*, some scholars have argued that it has emerged as a principle of customary international law,[290] although this view is not universal.[291] The *Statute of the International Court of Justice* outlines the main sources of international law that create legal obligations on states.[292] Pursuant to Article 38(1)(b), "international custom, as evidence of a general practice accepted as law" is among those sources.[293] Custom includes two elements: (1) sufficiently general and widespread state practice,[294] and; (2) evidence of *opinio juris* (states' feeling that the practice is obligatory).[295] State practice "is notoriously difficult to prove" and is discernible from various sources, including: ratifications of treaties; participation in treaty negotiations and other international meetings; national legislation; decisions of national courts; votes and other acts in the UN General Assembly and other international organization; statements by ministers and other governmental and diplomatic representatives; formal diplomatic notes; and legal opinions by government lawyers.[296] It must be general and consistent, but it can be relatively short-lived and not universally followed, provided it is widely accepted by most states.[297] The second element of custom, *opinio juris*, "requires evidence that a state has acted in a particular way because it believes that it is required to

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[290] See Lee, *supra* note 79; See also Prue Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 Geo. Int'l. Envtl. L. Rev. 309 at 351.
[291] N. Gibson, "The Right to a Clean Environment" (1990) 54 Sask. L. Rev. 5; Nanda & Pring, *supra* note 153 at 29.
[292] ICJ Statute, *supra* note 226 at art. 38(1).
[293] *Ibid*. at art. 38(1)(b).
[294] Sands, *supra* note 27 at 144; Lee, *supra* note 79 at 302-03.
[295] See Lee, *ibid*; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 at 108-109.
[296] Sands, *supra* note 27 at 144.
[297] Lee, *supra* note 79 at 303; *North Sea Continental Shelf Case (Germany v. Denmark)* (1969) I.C.J. Rep. 3 at para. 73 [*North Sea*].

do so by law."[298] This element is even harder to prove than state practice because it requires consideration of the motives underlying state activity.[299] The sources of *opinio juris* include: expressions or beliefs regarding acts of international organization and other international meetings; statements made by representatives of states; and the conclusion of treaties.[300] There is, therefore, no set test to determine whether a principle is customary international law.

Those who argue that the substantive right to a healthy environment is a principle of customary international law claim that it has sufficient state practice and *opinio juris* to elevate it to customary status.[301] The sources of law most cited to support this claim include treaty provisions, such as those mentioned in the previous and preceding sections, soft law sources, decisions of international tribunals and state practice in the form of widespread national constitutions that contain the right to a healthy environment.[302]

In terms of treaties, there is no explicit mention of a substantive right to a healthy environment in an international instrument, aside from the regional treaties discussed previously. However, as also mentioned below, several international human rights instruments incorporate the right to a healthy environment within other rights. Although these rights will not be repeated in their entirety, one example bears mentioning. The right to a healthy environment is directly referenced in relation to the right to health in the ICESCR: "[t]he steps to be taken by the States Parties to the present Covenant to achieve

[298] Sands, *supra* note 27 at 146.
[299] Sands, *ibid*.; *North Sea*, *supra* note 297 at 44.
[300] Sands, *ibid*.
[301] See Lee, *supra* note 79; Sumudu Atapattu, "The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law" (2002-2003) 16 Tul. Envtl. L. J. 65 at 74-87 [Atapattu].
[302] See Lee, *supra* note 79 at 305-319.

the full realization of this right shall include those necessary for . . . (b) The improvement of all aspects of environmental and industrial hygiene."[303]

In addition to hard law treaty provisions, a number of soft law sources recognize substantive environmental human rights.[304] The two most important sources of soft law are the Stockholm and Rio Declarations and their conferences.[305] Principle 1 of the Stockholm Declaration links environmental protection to human rights norms and comes close to declaring a right to a healthy environment:[306]

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[307]

The Stockholm Declaration also declares that "both aspects of man's environment, the natural and the man made, are essential to his well being and to the enjoyment of basic rights—even the right to life itself."[308] The Rio Declaration does not explicitly recognize the right to a healthy environment; however, it does state that human beings are "at the centre of concerns for sustainable development" and "they are entitled to a healthy and productive life in harmony with nature."[309] Also, the *Draft Principles on Human Rights and the Environment*[310] and the work of the Special Rapporteur indicate a willingness on

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[303] *ICESCR*, *supra* note 280 at art. 12(2).
[304] See *supra* note 277.
[305] Sands, *supra* note 27 at 36.
[306] Lee, *supra* note 79 at 308.
[307] *Ibid*. at principle 1.
[308] Stockholm, *supra* note 21 at preamble.
[309] Rio Declaration, *supra* note 152 at principle 1.
[310] *Draft Principles on Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994), annexed to Ksentini Final Report, infra [*Draft Principles*] (The Draft Principles sets out a series of general principles, including the human right to a secure and healthy environment (art. 2), the right to non-discrimination (art. 3) and the right to an environment adequate to meet the needs of the present generation without impairing the rights of future generations to meet their needs (art. 4). It further defines a series of substantive rights, including the human right to protection of the environment, the right to safe and healthy water (art. 8), the right to preservation of unique sites and the rights of indigenous peoples to land and environmental security (art. 14)).

the part of UN bodies to recognize a human right to a healthy environment.[311] A number of similar soft law sources, including declarations and statements, support the evolution of a substantive right to a healthy environment. [312]

In terms of international decisions, there have been none that explicitly recognize a substantive environmental right.[313] However, one ICJ case is worth noting. In the judgment in the case *Concerning the Gabicikovo-Nagymaros Project* (*Hungary v. Slovakia*),[314] the ICJ emphasized the importance of new environmental norms that have been developing, and the necessity for states to take these new norms into consideration.[315] In an un-joined and separate opinion, Justice Weeramantry stated that the people of Hungary and Slovakia are "entitled to the preservation of their human right to the protection of their environment."[316] Although this opinion is not legally binding, it

[311] See *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Preliminary Report Prepared by Mrs. Fatma Ksentini, Special Rapporteur, pursuant to Sub-Commission Resolutions 1990/7 and 1990/27,* U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, 43d Sess., Agenda Item 4 U.N. Doc.E/CN.4/Sub.2/1991/8 (1991); Ksentini reports; *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Progress Report Prepared by Mrs. Fatma Ksentini, Special Rapporteur, pursuant to Sub-Commission Resolutions 1991/24,* U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, 44th Sess. Agenda Item 4, U.N. Doc. E/CN.4.Sub.2/1992/7 (1992); *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Second Progress Report Prepared by Mrs. Fatma Ksentini, Special Rapporteur,* U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, 45th Sess. Agenda Item 5, U.N. Doc. E/CN.4/Sub.2/1993/7 (1993); *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Final Progress Report Prepared by Mrs. Fatma Ksentini, Special Rapporteur,* U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, 46th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1994/9, (1994) [Ksentini Reports].

[312] Brundtland Report, *supra* note 183 at 348 (The Brundtland Report states that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being."); *1989 Hague Declaration on the Environment*, 11 March 1989, 28 I.L.M. 1308 (1989) (The preamble guarantees the "right to live in dignity in a viable global environment…").

[313] Aside from the regional cases previously mentioned that have either explicitly recognized the right, in the case of Africa, or made a link towards recognizing a substantive environmental right in the Inter-American System.

[314] *Hungary*, *supra* note 131.

[315] *Ibid*. at para. 140; See also Lee, *supra* note 79 at 312.

[316] *Hungary*, *ibid*. at para. 204.

shows that the ICJ is willing to recognize the right to a healthy environment in certain circumstances.[317]

From the perspective of state practice, the recognition of the right to a healthy environment in state laws and constitutions has been cited as evidence of a developing norm of customary law.[318] As many as 118 countries have either recognized the right to a healthy environment or recognized a duty to defend the environment in their constitutions.[319] In Latin America, for example, national jurisprudence contains widespread and explicit recognition of environmental rights.[320] These cases show that courts have not only begun moving the right to a healthy environment up the hierarchy of human rights by recognizing it as a fundamental right but they are also increasingly defining the content and nature of the right to a healthy environment through landmark decisions.[321] Furthermore, Principle 1 of the Rio Declaration has been "reproduced verbatim, and accepted without reservation" in domestic laws on a mass scale, which has been cited as evidence of state practice.[322] However, as one scholar cautions: "[i]f a nation's environmental practices are not undertaken with a sense of international legal obligation based on its recognition of a right to a healthy environment, the practices fail

[317] Lee, *supra* note 79 at 312.
[318] *Ibid*. at 314.
[319] See Kiss & Shelton, *supra* note 78 at 711. Countries that constitutionally recognize the right to a healthy environment include: South Korea, South Africa, Ecuador, Hungary, Peru, Portugal and the Philippines. Other countries recognize the right to a healthy environment in their national legislation, such as Mexico and Indonesia.
[320] Adrianna Fabra & Eva Arnal, "Review of jurisprudence on human rights and the environment in Latin America," Geneva: Background Paper #6 (14-16 January 2002) online: <http://www2.ohchr.org/english/issues/environment/environ/bp6.htm>.
[321] *Ibid*.
[322] Lee, *supra* note 79 at 308.

to create a right to a healthy environment as a principle of customary international law."[323]

In any case, while a strong case can be made for the emergence of the right to a healthy environment as a principle of customary international law, it has not received universal acceptance. Therefore, in order for the substantive right to a healthy environment to become legally binding it must be created as a standalone right or be inferred through the 'greening of rights' approach outlined below.

4.2.2. Civil and Political Rights

(a) Right to Life

The right to life is arguably the most important human right that has been 'greened' by human rights bodies. It is protected in several international and regional human rights instruments.[324] The Human Rights Committee has described the right to life as a "supreme right," "basic to all human rights," which can never be derogated from even in a public emergency.[325] Without basic amenities, such as clean air, clean water, food, and a habitable climate, human beings cannot survive on this planet. Therefore, there is a strong link between preserving the environment and the right to life. The WHO has stated that climate change, in particular, impacts upon the right to life. It estimates

[323] *Ibid*. at 315.
[324] *UDHR*, *supra* note 268 at art. 3; *ICCPR*, *supra* note 267 at art. 6; *Convention on the Rights of the Child*, 20 November 1989, 28 I.L.M. 1448 (entered into force 2 September 1990) at art. 24 [*CRC*]; *American Declaration on the Rights and Duties of Mankind*, O.A.S. Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Columbia, March 30-May 2, 1948 at art. I [*American Declaration*]; *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978) at art. 4 [*American Convention*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953) at arts. 2 and 5 [*European Convention*].
[325] Human Rights Committee, *General Comment 6 on the Right to Life* (1983) at para. 5 in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 128 [General Comment 6].

that, since the 1970s, deaths caused by the impacts of climate change are roughly 150,000 per year.[326]

Various judicial bodies have acknowledged that environmental degradation can violate the right to life.[327] The ICJ has drawn a link between environmental harm and the right to life. In the 1997 judgment *Concerning the Gabicikovo-Nagymaros Project* (*Hungary v. Slovakia*),[328] a case of treaty interpretation between Hungary and Slovakia, the ICJ emphasized the importance of developing environmental norms and the necessity for states to take these norms into consideration.[329] Although the Court did not indicate that any of these norms impose obligations on states,[330] in a separate opinion, Justice Weeramantry stated:

> The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[331]

The ICJ and international arbitral tribunals made several other noteworthy decisions related to the human right to life and environmental protection.[332]

In the regional human rights systems, both the Inter-American and the European human rights regimes linked the right to life with environmental harms. The Inter-American Commission, in particular, has dealt with a number of claims by aboriginal

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[326] Greenpeace, *supra* note 6 at 4.
[327] See *Yanomani v. Brazil* (1985), Inter. Am. Comm. H.R. No. 7615, OAE/Ser.L/VII.66.doc.10 rev.1, 24 [*Yanomani*]; *Case of the Mayagna (Sumo) Awas Tingni Indigenous Community v. The Republic of Nicaragua*, Judgment of 31 August, 2001, Inter-Am. Ct. H.R. Series C, No. 79 [*Awas Tingni*]; *Öneryildiz v. Turkey*, (Grand Chamber), 41 Eur. Ct. H.R. 20 (2004) [*Öneryildiz]*.
[328] *Hungary, supra* note 131.
[329] Lee, *supra* note 79 at 312.
[330] *Ibid*.
[331] *Hungary*, *supra* note 131 at para. 204.
[332] *Trail Smelter, supra* note 173; *Lac Lanoux, supra* note 175; *Corfu Channel, supra* note 176; *Nuclear Weapons, supra* note 177; *Barcelona Traction, supra* note 217.

communities where the right to life was implicated.[333] In the 1985 *Yanomami* case,[334] the Commission established that environmental quality can impact the right to life. It found that Brazil violated the rights of the Yanomami Indians by constructing a highway through their territory and exploiting the territory's resources. As a result of the highway, an influx of sickness from non-indigenous travellers brought contagious diseases to the group, causing death and illness.[335] The Commission found Brazil's failure to protect the Yanomami lands violated the group's right to life, among other rights. The *Yanomami* case set a precedent for subsequent cases in the Inter-American system.

In its 1997 report on Ecuador, the Commission considered whether the Huaorani peoples' rights were violated by the Ecuadorian government as a result of oil development in their territory.[336] The complaint alleged that these activities threatened the physical and cultural survival of the Huaorani as an indigenous people. The fundamental harm being claimed was that oil exploitation activities would contaminate the water, soil and air that form the physical environment of these communities, to the detriment of the health and lives of the inhabitants. Among the rights alleged to be violated were the right to life, security of the person and the right to preservation of health and well-being.[337] In the Ecuador report, the Commission linked human rights and environmental concerns by stating:

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[333] Doelle 2004, *supra* note 1 at 189.
[334] *Yanomani*, *supra* note 327.
[335] ICC Petition, *supra* note 22 at 89.
[336] *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev.1 (1997) at Chapter VIII, section 2, online: <http://www.cidh.org/countryrep/ecuador-eng/chaper-8.htm#THE HUMAN RIGHTS SITUATION OF THE INHABITANTS OF THE INTERIOR OF ECUADOR AFFECTED BY DEVELOPMENT ACTIVITIES> [Ecuador Report]; See also Adriana Fabra, "Indigenous Peoples, Environmental Degradation, and Human Rights: A Case Study" in Michael R. Anderson & Alan E. Boyle, *Human Rights Approaches to Environmental Protection* (New York: Oxford University Press, 1996) at 245.
[337] *Ibid*. at 88.

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.[338]

The Inter-American Court[339] and the European Court of Human Rights similarly endorsed the view that the right to life is linked to environment protection. The European Court of Human Rights held that environmental degradation violates article 2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[340] right to life. In *Öneryildiz v. Turkey*, the Court found that the state violated the right to life because it failed to stop a methane gas explosion that killed 39 people.[341] Three years later, the court found the Russian government guilty of failing to warn about the potential risk of a mudslide in *Budayeva v. Russia*.[342]

(b) Right to be Free of Interference with One's Home and Property

The human right to property is protected in the UDHR as well as in several other international and regional instruments.[343] It has also been judicially interpreted in several

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[338] *Ibid*. See also IACHR Communique 24, which discusses the link between the right to life and the environment: "Water is life and in eastern Ecuador the people drink, bathe in and water their animals from the same source. If water is adversely affecting life and health, government inaction could constitute a violation of Article 4 of the Convention"; Amici Curiae in *Awas Mayagna (Sumo) Indigenous Community v. The Republic of Nicaragua*, online: <http://www.cedha.org.ar/docs/curiae1.htm>.

[339] *Moiwana Community v. Suriname (I)*, Inter-Am. Ct. H.R. (Ser. C) No. 124 (15 June 2005) [*Suriname I*]; *Moiwana Community v. Suriname (II)*, Inter-American Court of Human Rights, Inter-Am. Ct. H.R. (Ser. C) No. 145 (8 February 2006) [*Suriname II*]; *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 172 (28 November 2007) [*Saramaka*].

[340] *European Convention, supra* note 324.

[341] *Öneryildiz, supra* note 327.

[342] *Budayeva v. Russia*, [2008] ECHR 15339/02 & Ors (20 March 2008); See also *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. HR. (Ser. A) 1995 at para. 62 (The Court found that responsibility for environmental harm extends beyond state borders); *Guerra and others v. Italy*, 26 Eur. Ct. H.R., App. No. 14967/89 [1998] ECHR 7, 19 February 1998 at paras. 63 and 75 [*Guerra*] (Judge Jambrek in a concurring opinion noted that the protection of health and physical integrity was related to the "right to life.").

[343] *UDHR, supra* note 268 at arts. 12 and 17(2); *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*, 72 ILO Official Bull. 59 (entered into force 5 September, 1991) at art. 4(1) [*ILO Convention 169*]; *Convention on Biological Diversity*, June 5, 1992, 1760 U.N.T.S. 79, 143;

cases. Both the Inter-American Commission and Court have held that the right to property can be exercised collectively by indigenous or tribal communities.[344] In *Mayagna (Sumo) Awas Tingni Indigenous Community v. The Republic of Nicaragua*,[345] the Inter-American Court of Human Rights broadly interpreted property rights to include personal property, intellectual property and intangible rights of access.[346] It held that, by ignoring and rejecting the territorial claim of the community and granting a logging concession within the traditional land of the community without consultation, Nicaragua breached a number of rights enshrined in the *American Convention*, including the right to property. The Court said: "… article 21 of the Convention protects the right to property in a sense that includes, among others, the rights of members of the indigenous communities within the framework of communal property…[347] Similarly, in *Saramaka People v. Suriname*,[348] the Court recognized that property rights are particularly important to indigenous communities because, without rights to the land and resources on which they rely, "the very physical and cultural survival of such people is at stake."[349] The Court made similar rulings in subsequent cases.[350]

The Commission has also found that environmental degradation caused by a state's action or inaction, which deprives an individual or group of the use and enjoyment

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31 I.L.M. 818 (1992) at art. 8(j) [*CBD*]; *American Convention, supra* note 324 at art. 21; *European Convention, supra* note 324 at art. 8.

[344] *Indigenous Community Yakye Axa v. Paraguay*, 2005 Inter-Am. Ct. H. R. (ser. C) No. 146 at para. 142 (June 17, 2005); *Maya Indigenous Communities of the Toledo District (Belize Maya)*, Case 12.053, Inter-Am. C. H.R. Report 40/04 (2004) (Belize) [*Belize Maya*].

[345] *Awas Tingni, supra* note 327.

[346] *Ibid*. at para. 144.

[347] *Ibid*. at para 148.

[348] *Saramaka, supra* note 339.

[349] *Ibid.* at para. 121.

[350] *Suriname I, supra* note 339; *Suriname II, supra* note 339; *Saramaka, supra* note 339.

of personal property, can constitute a violation of the human right to property.[351] In the *Belize Maya*[352] case, the Commission noted that "the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property."[353]

A number of European Court of Human Rights cases have interpreted Article 8 of the *European Convention on Human Rights and Fundamental Freedoms,*[354] the right to respect for private and family life, to include environmental rights. In *Lopez Ostra v. Spain,*[355] the applicant and her daughter suffered serious health problems resulting from emissions from an improperly licensed tannery and waste treatment plant near their home.[356] The Court found that severe environmental pollution can affect an individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life. In determining that there was a violation of article 8, the Court recognized that environmental degradation can violate human rights without causing actual harm to the victim's health:

> Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State—to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8—as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the

[351] ICC Petition, *supra* note 22 at 83.
[352] *Belize Maya*, *supra* note 344.
[353] *Ibid*. at para. 140.
[354] *European Convention*, *supra* note 324.
[355] *Lopez-Ostra v. Spain*, 303C Eur. Ct. H.R. (ser.A) (1994) [*Lopez-Ostra*]; See also Philippe Sands, "Human Rights, Environment and the *Lopez-Ostra* Case: Context and Consequences" (1996) 6 E.H.R.L.R. 597.
[356] *Ibid*. at para. 6-9.

> individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation.[357]

The Court made similar rulings in a number of other cases, including *Guerra v. Italy* where it held that "severe environmental pollution may affect individuals' well being and prevent them from enjoying their home in such a way as to affect their private life."[358] In *Hatton v. United Kingdom*,[359] a case dealing with noise pollution from Heathrow Airport, the Court seemed to backtrack, finding that there was no breach of article 8. However, two years later the Court revisited *Lopez Ostra* in *Fadeyeva v. Russia*[360] and found that pollution violated article 8.[361]

4.2.3. Economic, social and cultural rights

(a) Right to Health

The right to the highest attainable standard of mental and physical health is entrenched in article 12 of the ICESCR and addressed in a number of other international and regional human rights instruments.[362] It is recognized in international health and

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[357] *Ibid*. at para. 51.

[358] *Guerra*, *supra* note 342 at para. 60 (A group of applicants who lived 1km from a "high risk" chemical factory that emitted toxins brought a complaint. The court found the factory violated article 8. The court confirmed its finding from *Ostra* that "environmental pollution that adversely affects the enjoyment of one's home and family life violates the right to privacy under Article 8 of the Convention, and extended its application to include access to information which might enable individuals to assess the risks of living in proximity to a polluter"); In *Giacomelli v. Italy* (2006), App. No. 59909/00, 45 EHRR 871 pollution from a waste storage and treatment plant was found to violate Article 8. This case was decided on procedural not substantive basis but still a violation of article 8; See also *Taşkin v. Turkey,* App. No. 46117/99 [2004] Eur. Ct.H.R. 621 (2004).

[359] *Hatton and others v. United Kingdom,* Application No. 36022/97, Judgment of 8 July, 2003 [*Hatton*].

[360] *Fadeyeva v. Russia,* App. No. 55723/00, [2005] ECHR 376 (9 June 2005) [*Fadeyeva*] (In this case the Court found that pollution caused by steel production violated article 8.).

[361] *Ibid*. at para. 88

[362] *UDHR*, *supra* note 268 at art. 25; *CRC*, *supra* note 324 at art. 12(a), art. 24); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 at art. 12 and 14 [*CEDAW*]; *American Declaration*, *supra* note 324 at art. XI; *African Charter*, *supra* note 281 at art. 16; *European Social Charter*, 529 U.N.T.S. 89 (entered into force 26 February 1965) [*Social Charter*] at part I and art. 11of Part II; *Protocol of San Salvador*, *supra* note 284 at art. 10.

environmental law as well as in various iterations.[363] For instance, the preamble to the Constitution of the WHO recognizes that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being."[364] The WHO has specifically recognized the link between health and the environment on numerous occasions, including in *Our Planet, Our Health*, in which it calls on states to protect people against threats to their health and the environment.[365] The UN General Assembly has also acknowledged the link between health and the environment in a resolution called, *Need to Ensure a Healthy Environment for the Well-Being of Individuals*.[366]

The close relationship between health and environmental protection has also been documented by several international human rights bodies and experts. The Committee on Economic, Social and Cultural Rights (CESCR) has defined the right broadly to include equal access to appropriate health care and to goods, services and conditions that enable a person to live a healthy life. Also, the CESCR noted that the "[u]nderlying determinants of health include adequate food and nutrition, housing, safe drinking water and adequate sanitation, and a healthy environment."[367] Special Rapporteur Fatma Zohra Ksentini prepared a series of reports for the U.N. Sub-Commission on Prevention of

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[363] *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, MP.WAT/2000/1 EUR/ICP/EHCO 020205/8Fin (18 October 1999) UN Economic and Social Council (WHO Protocol on Water and Health aims "to promote at all appropriate levels, nationally as well as in transboundary and international contexts, the protection of human health and well-being, both individual and collective."); *Rio Declaration*, *supra* note 152 at principle 14 recognizes the importance of controlling "any activities and substances that…are found to be harmful to human health."

[364] *Constitution of the World Health Organization*, July 22, 1946, 14 U.N.T.S. 185 at 186.

[365] World Health Organization, *Our Planet, Our Health-Report of the WHO Commission on Health and Environment* (1992), online: Columbia University < http://www.ciesin.columbia.edu/docs/001-012/001-012.html>.

[366] *Need to Ensure a Healthy Environment for the Well-Being of Individuals*, G.A. Res. 45/94, UN GAOR, 45th Sess., UN Doc. A/RES/45/94 (1994).

[367] OHCHR Report, *supra* note 11 at para. 31; See also CESCR, *General Comment 12 on the Right to Adequate Food*, E/C.12/1999/5 reproduced in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 63 [CESCR Comment 12].

Discrimination and Protection of Minorities.[368] In her final report, she identified the right to health as a fundamental right under customary law and she found that "[i]n the environmental context, the right to health essentially implies feasible protection from natural hazards and freedom from pollution."[369] Special Rapporteur Rodolfo Stavenhagen of the UN Commission on Human Rights recently drew a connection between human health and the effects of climate change in the Arctic. He said: "the effects of global warming and environmental pollution are particularly pertinent to the life chances of Aboriginal people in Canada's North, a human rights issue that requires urgent attention at the national and international levels, as indicated in the recent Arctic Climate Impact Assessment."[370] Similarly, Paul Hunt, the UN Special Rapporteur on the right to health warned that a failure of the international community to confront the health threats posed by global warming will endanger the lives of millions of people.[371]

Several judicial decisions that address the right to life also recognize that the right to health can be violated by environmental degradation.[372] For instance, in the *Yanomami* case, the Commission recognized that harm to individuals as a result of environmental degradation violates the right to health in article XI of the American Declaration.[373] In that case, Brazil's failure to prevent environmental degradation stemming from road

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[368] Ksentini Reports, *supra* note 311.
[369] *Ibid*.
[370] Economic and Social Council, Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, Rodolfo Stavenhagen, Addendum, Mission to Canada, U.N. Doc. E/CN.4/2005/88/Add.4 at para. 94.
[371] Paul Hunt, Special Rapporteur, *Right of Everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/62/214, para. 102. See also *Human Rights and Climate Change*, Background Paper, Human Rights and Equal Opportunities Commission at. 6. (In 2003, a joint study by the World Health Organization and the London School of Hygiene and Tropical Medicine revealed that "global warming may already be responsible for more than 160,000 deaths a year from malaria and malnutrition; a number that could double by 2020.").
[372] See for example *Belize Maya*, *supra* note 344 at 154-156.
[373] *Yanomani*, *supra* note 327 at para. 8.

construction led to death and disease, which violated the right to health. Specifically, the Commission stated: "…by reason of the failure of the Government of Brazil to take timely and effective measures [on] behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the…right to the preservation of health and to well-being."[374]

The African human rights regime has also considered a link between environmental damage and the right to health. In *Free Legal Assistance Group and Others v. Zaire*,[375] the African Commission found that the government's failure to provide "basic services such as safe drinking water…constitutes a violation of Article 16 [the right to health]."[376]

(b) The Right to Food and Water

The right to food is explicitly recognized in a number of international human rights instruments, most notably the ICESCR.[377] In addition to a right to adequate food, the ICESCR guarantees "the right of everyone to be free from hunger."[378] This right is also implied in several additional treaties.[379] The CESCR has clarified that the right to adequate food requires the adoption of "appropriate economic, environmental and social

[374] *Ibid*.
[375] *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights (1995), Comm. No. 25/89, 47/90, 56/91, 100/93 (1995).
[376] *Ibid*. at para. 48.
[377] *ICESCR*, *supra* note 280 at art. 11; *CRC*, *supra* note 324 at art. 24(c); *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 at art. 25(f) and art.28(1).
[378] *ICESCR*, *ibid*. at art 11(2).
[379] *CEDAW*, *supra* note 362 at art. 14(2)(h); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 5 I.L.M. 350 (entered into force 4 January 1969) at art. 5(e) [*ICERD*].

policies" and that "the right to health extends to its underlying determinants, including a healthy environment."[380]

The right to water, though not expressly noted in the ICESCR, is intricately linked to the right to health and the right to food. The right to water is expressly articulated in the *Convention on the Rights of the Child* (CRC)[381] and the *Convention on the Elimination of All Forms of Discrimination Against Women*.[382] In 2002, the CESCR recognized the right to water as an independent right.[383]

4.2.4. Group Rights

(a) Indigenous Human Rights and the Right to Self-determination

This section addresses the right to culture and subsistence and movement as part of the bundle of rights that comprise indigenous rights. It also considers the right to self-determination in its own right as a fundamental principle of international law.[384] The right to self-determination is enshrined in article 1 of both the ICCPR[385] and the ICESCR[386] as well as in the UN Charter[387] and article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*.[388] By virtue of this right, indigenous groups "shall freely

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[380] CESCR Comment 12, *supra* note 367 at para. 4; CESCR, *General Comment 14 on the Right to the Highest Standard of Health* in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 86.
[381] *CRC*, *supra* note 324 at art. 24.
[382] *CEDAW*, *supra* note 362 at art. 14(2)(h).
[383] CESCR, *General Comment 15 on the Right to Water*, 26 November 2002 in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7 (2004) at 106 [General Comment 15]; See also Ignacio J. Alvarez, "The Right to Water as a Human Right," in Romina Picolotti & Jorge Daniel Taillant, eds. *Linking Human Rights and the Environment* (British Columbia: UBC Press, 2003).
[384] OHCHR Report, *supra* note 11 at para. 39.
[385] *ICCPR*, *supra* note 267 at art. 1.
[386] *ICESCR*, *supra* note 280 at art. 1.
[387] UN Charter, *supra* note 171 at arts. 1 and 55.
[388] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. A/RES.61/295, U.N. Doc. A/61/L.67 (13 September 2007) at article 3 [Indigenous Declaration].

determine their political status and freely pursue their economic, social, and cultural development."[389] The right also includes the right of all people 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."[390] Self-determination includes recognizing indigenous rights over land, hunting and fishing grounds and mineral resources.[391] The intrinsic link between indigenous peoples and land is particularly important. The right to self-determination is being threatened by global warming in that changes in the climate threaten to deprive the Inuit of their traditional territories and sources of livelihood.[392]

In the international human rights law area, there have been a number of attempts to quantify indigenous rights as such. These include the *OAS American Declaration on the Rights of Indigenous Peoples*,[393] the *United Nations Declaration on the Rights of Indigenous Peoples*[394]and the ILO Convention on *Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169).[395] Indigenous rights, however, are closely linked

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[389] *ICESCR*, *supra* note 280 at art. 1. See also Indigenous Declaration, *ibid*. at arts. 5, 9 and 11.
[390] *ICCPR*, *supra* note 267 at art. 1(2); *ICESCR*, *ibid*. art. 1(2).
[391] See generally Lawrence Watters, ed., *Indigenous People, the Environment and Law* (Durham, N.C.: Carolina Academic Press, 2004).
[392] OHCHR Report, *supra* note 11 at 14; See also Doelle 2005, *supra* note 132 at 251 (Doelle highlights the link between indigenous rights and environmental rights: "there are clear indicators that the move toward formal recognition of a right to a healthy environment may be influenced by an increasing acknowledgement of indigenous human rights, given their special relationship to the environment and their unique social, cultural and economic dependence on nature.").
[393] *American Declaration on the Rights of Indigenous Peoples*, CP/doc.2878/97 corr.1 (1997), § III at art. XIII (I) ("Indigenous peoples are entitled to a healthy environment, which is an essential condition for the enjoyment of the right to life and well-being.") [OAS Indigenous Declaration].
[394] *Indigenous Declaration*, *supra* note 388 *(*This treaty protects a number of important rights, including: the right to self determination (art. 3); the right to effective mechanisms for prevention of, and redress for, actions which have the aim or effect of disposing them of their lands, territories or resources (art. 8); the principle of free, prior and informed consent (art. 19); the right to the conservation and protection of the environment and indigenous lands and territories (art. 29); the right to maintain, control, protect and develop their cultural heritage and traditional knowledge and cultural expressions (art. 31)).
[395] *ILO Convention 169*, *supra* note 343 (Article 4(1) states that "[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned" and article 7(4) notes that "[g]overnment shall take measures in co-operation with the people concerned to protect and preserve the environment of the territories they inhabit." Note that Canada has not ratified this treaty.).

to cultural rights, which are protected in several major human rights instruments, including the UDHR,[396] the ICESCR[397] and the ICCPR.[398] In a General Comment, the UN Human Rights Committee interpreted minority rights broadly to include the protection of indigenous land and culture from environmental degradation:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them …The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[399]

The American Declaration similarly guarantees indigenous groups the benefits of culture[400] and the American Convention recognizes the importance of cultural freedom to human dignity in its protection of freedom of association[401] and progressive development.[402] Both the Inter-American Court and Commission have recognized that environmental degradation caused by a state's action or inaction can violate the right to the benefits of culture, particularly in the context of indigenous cultures. In 2001, the

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[396] *UDHR*, *supra* note 268 at art.27.1.
[397] *ICESCR*, *supra* note 280 at art. 15(1).
[398] *ICCPR*, *supra* note 267 at art. 27; See also the *World Conference on Human Rights: Vienna Declaration and Programme of Action*, U.N. GAOR, U.N. Doc. A/Conf. 157/23 (1993) at art. I.20 and I.5. ("The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development.")
[399] Office of the High Commissioner for Human Rights, *General Comment 23: The Rights of Minorities (art. 27)*, CCPR/C/21/Rev.1/Add.5 at para. 7 and 9, online: OHCHR <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> [GC Minority Rights].
[400] *American Declaration*, *supra* note 324 at art. XIII.
[401] *American Convention*, *supra* note 324 at arts. 16 and 48.
[402] *Ibid*. at art. 26.

Court issued a seminal ruling on a petition filed by the Awas Tingni indigenous community in Nicaragua.[403] The Awas Tingni had historically occupied a significant area of rainforest along the Atlantic coast.[404] For years the group attempted to have its collective right to the land recognized by domestic courts. In 1995, the government of Nicaragua granted a 30-year concession to a Korean company to log more than 62,000 hectares of land that was subject to the indigenous claim.[405] In response, the Awas Tingni petitioned the Inter-American Commission, which found in favour of the petitioners and referred the matter to the Court. The Court agreed with the Commission's finding that the Awas Tingni community's rights had been affected by the licence, particularly the collective rights of indigenous peoples to their traditional lands, resources and environment. [406] It found that the government's failure to prevent environmental damage to indigenous lands caused significant harm to indigenous peoples because "the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally depends on the collective, communitarian existence and maintenance of the land."[407] Following *Awas Tingni*, the Inter-American system referenced the relationship between human rights and the environment in several decisions.[408]

[403] *Awas Tingni*, *supra* note 327. See also S. James Anaya, "The Mayagna Indigenous Community of Awas Tingni and Its Efforts to Gain Recognition of Traditional Lands: The Community's Case before the Human Rights Institutions of the Organization of American States," in Romina Picolotti & Jorge Daniel Taillant, eds. *Linking Human Rights and the Environment* (British Columbia: UBC Press, 2003) [Anaya].
[404] Anaya, *ibid*. at 185.
[405] Doelle 2004, *supra* note 1 at 202.
[406] *Awas Tingni*, *supra* note 327 at para. 149; See also Doelle 2004, *ibid*.
[407] *Awas Tingni*, *ibid*. at para. 83(k).
[408] *Belize Maya*, *supra* note 344 at para. 148; *Yanomani*, *supra* note 327.

The strong link between the rights of indigenous peoples and environmental protection also finds expression in the environmental law realm, including in both the Rio Declaration[409] and *Agenda 21*.[410] Principle 22 of the Rio Declaration states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[411]

Another environmental instrument with relevance in the context of indigenous rights is the *Convention on Biological Diversity*,[412] which provides the main source of protection for indigenous peoples from exploitation of intellectual property rights[413] as well as protection for the ecosystem by providing that states shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements."[414]

PART 5: WHERE CAN THE INUIT BRING A CLAIM AGAINST CANADA FOR VIOLATIONS OF HUMAN RIGHTS?

Once the Inuit establish that anthropogenic climate change violates one or more of the group's human rights, the question then becomes: where can the Inuit assert their claim? The section above discussed how the state-centric nature of international

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[409] Rio Declaration, *supra* note 152 at principle 22.
[410] *Agenda 21*, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (vol. I and vol. I/Corr.1, vol. II, vol. III and vol.III/Corr.1) [Agenda 21].
[411] Rio Declaration, *supra* note 152 at principle 22.
[412] *CBD*, *supra* note 343 at art. 7(e) (This treaty also draws links between sustainable use of biological diversity and the rights of indigenous peoples at articles 8 and 10).
[413] *Ibid*. at 8(j) ("Subject to its national legislation [each Contracting Party shall, as far as possible and appropriate], respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.").
[414] *Ibid*. at art. 10.

environmental law prevents the Inuit from adequately addressing the human impacts of environmental degradation through traditional international law routes. This section explains how international human rights mechanisms may be used to fill in some of the gaps left by traditional international law in addressing the human impacts of environmental damage. There are two main regimes for international human rights adjudication that will be reviewed in this part: the United Nations human rights system and the Inter-American human rights system within the Organization of American States (OAS). Both provide potential forums for the Inuit to bring a claim against Canada for causing dangerous climate change and violating numerous human rights. This section details these two forums, explains the substantive and procedural aspects of each, and analyzes the likelihood of success in a claim by the Inuit.

5.1. The United Nations Human Rights System

Within the United Nations human rights regime there are a large number of international human rights principles and norms.[415] These norms are set out in a complex system of instruments that outline the substance of the norms as well as the mechanisms necessary to implement and enforce them.[416] These mechanisms fall into one of two categories: UN charter-based bodies and bodies created under the international human rights treaties and comprising independent experts mandated to monitor state parties' compliance with their treaty obligations. This section explores both dimensions of the UN human rights regime in order to determine which avenue provides the best recourse for the Inuit's claim against Canada.

[415] Doelle 2004, *supra* note 1 at 184.
[416] *Ibid*.

5.1.1. Overview of the UN Human Rights Charter-based Bodies

The United Nations Commission on Human Rights (CHR) was established by the U.N. Economic and Social Council (ECOSOC) in 1946 to promote and protect human rights and fundamental freedoms.[417] The Commission allowed NGOs to make oral and written submissions on environmental human rights issues, provided they fell within the scope of the Commission's agenda for its annual meeting.[418] The CHR was assisted by a Sub-Commission, which was set up in 1947 to undertake studies and make recommendations to the CHR concerning "the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, religious, and linguistic minorities."[419] This mandate was interpreted broadly, which allowed the Sub-Commission to address a broad spectrum of human rights issues.[420] The Sub-Commission was instrumental in placing issues related to minorities, indigenous peoples, slavery and disappearances on the UN agenda.[421]

Both the Commission and the Sub-Commission considered environmental issues under various agenda items, including those concerned with indigenous people, economic, social and cultural rights, and the right to development and scientific and

[417] Linda A. Malone & Scott Pasternack, "Exercising Environmental Human Rights and Remedies in the United Nations System" (2002-2003) 27 Wm. & Mary Envtl. L. & Pol'y. Rev. 365 at 392 [Malone & Pasternack]; UN Charter, *supra* note 171 at art. 68; Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by The United Nations' Human Rights Mechanisms" (1998-1999) 11 Geo. Int'l. Envtl. L. Rev. 1 at 30 [Dommen 1998].
[418] Malone & Pasternack, *ibid*. at 392.
[419] Sub-Commission on the Promotion and Protection of Human Rights, Final report of the fifty-eighth session (7-25 August 2006) online: Office of the UN High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/subcom/index.htm>.
[420] Malone & Pasternack, *ibid*. at 394.
[421] *Sub-commission on Prevention and Discrimination and Protection of Minorities Meets in Geneva from 1 to 26 August*, U.N. Info. Serv., U.N. Doc. HR/CN/57 (July 29, 1994).

technological developments.[422] In 1982, the Sub-Commission created a working group on indigenous populations, which drafted a declaration on the rights of indigenous peoples. The draft ultimately led to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* by the General Assembly on September 13, 2007.[423] The CHR and the Sub-Commission also considered environmental issues in the context of specific countries, such as Tibet, Burma, Nigeria, Ecuador and Peru.[424] In 1989, the Sub-Commission initiated a process that led to a study of the impacts of environmental issues on human rights. The study was carried out by Fatma Zohra Ksentini who prepared four reports that included a number of recommendations.[425] For instance, Ksentini advised that the CHR appoint a Special Rapporteur on human rights and the environment and she expressed hope that the UN would adopt a set of norms formalizing the right to a satisfactory environment.[426] Specifically, she advocated that the Commission adopt the *Draft Principles On Human Rights and the Environment*,[427] which was annexed to her final report.[428]

In 1995, Ksentini was appointed Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.[429] This appointment was a positive step in recognizing the link between environmental harm and human rights. Ksentini's work, however, was criticized for its focus on "generalities surrounding the issue of illicit movements and dumping of dangerous products and wastes, which are already within the mandate of

[422] Dommen, *supra* note 78 at 107.
[423] Indigenous Declaration, *supra* note 388.
[424] Dommen 1998, *supra* note 417 at 32.
[425] Ksentini Reports, *supra* note 311.
[426] Dommen, 1998, *supra* note 417 at 33.
[427] *Draft Principles*, *supra* note 310.
[428] Dommen, 1998, *supra* note 417 at 33.
[429] *Ibid*. at 34-35.

other more competent and better financed bodies, [rather] than on specifically human rights-related aspects of such activities."[430]

On March 15, 2006, the CHR was replaced by the Human Rights Council (HRC), which was created to address human rights violations and make recommendations to remedy any deficiencies.[431] Although it has only been operating a short time, the HRC has undertaken several initiatives to recognize that climate change-related impacts have a range of implications on the effective enjoyment of human rights. In 2008, the Council adopted Resolution 7/23 on human rights and climate change, which explicitly recognized that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights."[432] The resolution requested that the Office of the United Nations High Commission on Human Rights "conduct a detailed study of the relationship between climate change and human rights, taking into account the views of States and other stakeholders."[433] The result was the January 2009 *Report of the Office of the United Nations High Commission on Human Rights on the relationship between climate change and human rights*,[434] which reached several important conclusions: "(1) climate change threatens the enjoyment of a broad array of human rights; (2) climate change does not, however, necessarily violate human rights; (3) human rights law nevertheless places duties on states concerning climate change; and (4) those duties include an obligation of international cooperation."[435] As a follow up to the report, in Resolution 10/4 the HRC

[430] Dommen, *supra* note 78 at 117.
[431] *Human Rights Council*, GA Res. 60/251, UNGAOR, 60th Sess., UN Doc. A/60/L.48 (2006).
[432] UNHRC 7/12, *supra* note 20 at preamble.
[433] OHCHR Report, *supra* note 11 at para. 1.
[434] *Ibid*.
[435] Knox, *supra* note 12 at 477.

encouraged its special mandate-holders to address climate change within their specific mandate.[436]

The Commission on the Status of Women is another charter-based UN body that was established by ECOSOC to study, report and make recommendations on human rights and related issues as they affect women. It will not be considered for the purposes of this paper because its mandate is limited to women.[437]

(a) Human Rights Council –1503 Complaint Procedure

The Human Rights Council's complaint procedure, also called the 1503 procedure, provides a possible forum for the Inuit's case against Canada. This procedure was first established pursuant to ECOSOC Resolution 1503 in 1970.[438] In 2006, when the Human Rights Council replaced the Human Rights Commission, the complaints procedure was reviewed.[439] The purpose of the complaint procedure remains, however, "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."[440] The procedure functions through two working groups, the Working Group on Communications and the Working Group on Situations.

The 1503 procedure does not deal with individual cases but rather addresses "situations" that affect a large number of people over a prolonged period of time within a particular state.[441] Individuals, groups and NGOs are permitted to file a complaint,

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[436] *United Nations Human Rights Council, Resolution 10/4 on Human Rights and Climate Change*, Res. 10/4, UN Doc. A/HRC/10/L.11 (31 March 2009).
[437] See Malone & Pasternack, *supra* note 417 at 395.
[438] ECOSOC resolution 1503 (XLVIII) of 27 May 1970.
[439] Human Rights Council Complaints Procedure, online: UN Human Rights Council <http://www2.ohchr.org/english/bodies/chr/complaints.htm>. On 18 June 2007, the Human Rights Council adopted the President text entitled "UN Human Rights Council: Institution Building" (resolution 5/1).
[440] *Ibid*.
[441] Dommen 1998, *supra* note 417 at 44.

provided they have "direct and reliable knowledge" of systemic violations.[442] Nevertheless, the outcome of this forum is not likely to have a satisfactory resolution for the Inuit. Once a complaint is received by the Council, complainants will not be informed about the steps taken or the outcome of the Council's investigation. Communication from the Council is limited to a letter confirming receipt of the complaint. Also, the submission process is anonymous and confidential, which some say makes it ineffective.[443] Even so, "NGOs have found it useful to turn to the 1503 procedure in cases where criticism of human rights violations by a politically strong country…is sought."[444] Thus, the 1503 procedure is a viable option for the Inuit's complaint against Canada, though only to the extent that it may put political pressure on Canada to comply with its international environmental obligations.

5.1.2 Overview of the UN Human Rights Treaty Bodies

The right to a healthy environment *per se* is not protected by the United Nations' human rights treaties, but the treaty bodies can provide a useful channel of recourse for environmental harm because these treaties recognize rights, such as the right to life and health, that closely relate to environmental issues.[445] The most recognized substantive international human rights instrument is the UDHR,[446] which was adopted by the General Assembly on December 10, 1948.[447] The UDHR recognizes a number of first generation rights that intrinsically link human rights to environmental rights, including the right to

[442] Malone & Pasternack, *supra* note 417 at 399.
[443] Dommen 1998, *supra* note 417 at 44.
[444] *Ibid*.
[445] Dommen, *supra* note 78 at 108.
[446] *UDHR*, *supra* note 268.
[447] Doelle 2004, *supra* note 1 at 185.

life, liberty and security of the person,[448] the right to freedom of religion, association and expression,[449] and the prohibition of torture and slavery.[450] The Declaration also includes second generation rights, such as the right to property and the right not to be arbitrarily deprived of such property.[451] Article 25 guarantees that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security…"[452]

The UDHR is supplemented by two other key human rights instruments, the ICESCR[453] and the ICCPR[454] and its Optional Protocols.[455] In addition to embracing the Declaration, both Conventions contain second generation rights that link human rights with environmental health. State parties to the ICESCR "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions…"[456] The Covenant also guarantees the right to health, including mental and physical health.[457] The right to a healthy environment is directly referenced in relation to the right to health. Article 12(2) notes that included in the right to health is "[t]he improvement of all aspects

[448] *UDHR*, *supra* note 268 at art. 3.
[449] *Ibid*. at arts. 18 and 19.
[450] *Ibid*. at arts. 4 and 5.
[451] *Ibid*. at art. 17.
[452] *Ibid.* at art. 25(1).
[453] *ICESCR*, *supra* note 280.
[454] *ICCPR*, *supra* note 267.
[455] *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), (entered into force 23 March, 1976) [*ICCPR OP I*]; *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989) (entered into force 11 July 1991).
[456] *ICESCR*, *supra* note 280 at art. 11.
[457] *Ibid*. at art. 12(1).

of environmental and industrial hygiene."[458] The ICCPR explicitly sets out the right to life,[459] but does not reference the environment, and it preserves the right of ethnic, religious or linguistic minorities to enjoy their culture.[460] There are several other binding human rights instruments that contribute to the global recognition of the link between environmental and human rights. The UN Human Rights system also encompasses several other seminal international human rights treaties, such as those dealing with the rights of children[461] and the elimination of racial discrimination.[462]

The UN Human Rights System has created eight human rights treaty bodies, which are committees of independent experts that monitor implementation of the core international human rights treaties.[463] They are created in accordance with the provisions of the treaty they monitor. There are four bodies that are generally considered relevant in the environmental human rights context:[464] the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Rights of the Child, and the Committee on the Elimination of Racial Discrimination (CERD).[465] The primary means of assessing state compliance with the treaty regimes is the state reporting feature, although three of these bodies—HRC, CERD and the CESCR—also have individual complaints procedures.[466] The four bodies also adopt "General Comments," which "provide what has been said to be authoritative

[458] *Ibid*. at art. 12(2)(b).
[459] *ICCPR*, *supra* note 267 at art. 6.
[460] *Ibid*. at art. 27.
[461] *CRC*, *supra* 324 at art. 24 the right to health, "taking into consideration the risks of environmental pollution" and art. 30 the right of children of minorities and indigenous populations to enjoy their own culture; See also UN Charter, *supra* note 171 at arts. 19, 55 and 56.
[462] *ICERD*, *supra* note 379; See also *CEDAW*, *supra* note 362 at art. 14.
[463] Office of the High Commissioner for Human Rights, "Human Rights Bodies," online: OHCHR <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.
[464] Doelle 2005, *supra* note 132 at 222.
[465] Dommen 1998, *supra* note 417 at 7.
[466] Dommen, *supra* note 78 at 110; Doelle 2005, *supra* note 132 at 222; Dommen 1998, *ibid*.

interpretations of the general obligations and rights embodied in the different treaties."[467] Several general comments have addressed important environmental issues.[468]

(a) Human Rights Committee

The Human Rights Committee (HRC) was established by the ICCPR to monitor state compliance with the Covenant.[469] Although the HRC is not a judicial body, the first Optional Protocol grants the HRC adjudicative functions, which establish the right to individual petitions.[470] Individuals and groups may present environmental human rights claims to the Committee in four ways: filing an individual petition under the first Optional Protocol;[471] making an *amicus* submission to any article 41 and 42 dispute; encouraging a state to initiate an inter-state dispute;[472] or submitting a critique of article 40 reports.[473] All domestic remedies must be exhausted in order for the HRC to consider an individual complaint.[474] The review process under the Optional Protocol has two stages. In the first stage, the HRC decides on the admissibility of the complaint.[475] At the second stage, once a complaint is deemed admissible, the HRC informs the state of the matter and the state has six months to respond to the charges.[476]

Despite offering individuals and groups four methods to present environmental human rights claims, the Committee has limited jurisdiction. Individual complaints may only be filed against state parties to the ICCPR that have also ratified the first Optional

[467] Dommen 1998, *supra* note 417 at 8.
[468] General Comment 6, *supra* note 325; General Comment 15, *supra* note 383.
[469] *ICCPR*, *supra* note 267 at art. 28.
[470] *ICCPR OP I*, *supra* note 455 at art. 5.
[471] *Ibid*. at art. 2.
[472] *Ibid*. at arts. 41 and 42.
[473] *Ibid*. at art. 40.
[474] *Ibid*. at arts. 2 and 5(b).
[475] *Ibid* at arts. 2 and 5
[476] *Ibid*. at art. 5(4).

Protocol.[477] The Optional Protocol grants individuals the right to make communications against state parties. In the 2005 Inuit case, the ICC was unable to submit a petition to the HRC because the United States was not a party to the Protocol. Canada, however, acceded to the Optional Protocol and therefore the Committee would have jurisdiction to receive a complaint by the Inuit against Canada.[478] Given that the ICCPR protects a number of rights implicated by climate change, the HRC provides the Inuit with an important forum for a human rights complaint against Canada, based on the harms associated with climate change.

Additionally, the HRC has considered environmental rights in the past in two types of cases: (1) those that relate to nuclear weapons or radioactive material, and; (2) those that relate to the rights of indigenous or minority groups.[479] The most relevant decisions for the purposes of this paper fall into the second group. In 1994, the HRC adopted a General Comment on Article 27 of the ICCPR, which protects minority rights.[480] The HRC stated, "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."[481] Several prior and subsequent cases support the view that resources should be preserved in such a way that allows indigenous groups to enjoy their culture. For instance, in *Bernard Ominayak and the Lubicon Lake Band v. Canada*,[482] the HRC found that oil exploration on Lubicon territory was threatening the

[477] *Ibid*. at art. 1.
[478] Canada ratified the Optional Protocol on May 19, 1976.
[479] Dommen, *supra* note 78 at 110.
[480] GC Minority Rights, *supra* note 399.
[481] *Ibid*.
[482] *Bernard Ominayak and the Lubicon Lake Band v. Canada*, U.N. Human Rights Committee, Communication No. 167/1984, U.N. Doc. CCPR/C/38D/167/1984 (26 March 1990).

way of life and culture of the Lubicon Lake Band, breaching minority rights contrary to article 27 of the ICCPR. Even in cases in which the HRC has decided against the petitioner, it has shown sympathy for the types of issues that arise in the environmental context with respect to indigenous and minority rights. In a series of complaints against Finland, the HRC determined that, although there had been no violation of article 27, interim measures were necessary to protect the Sami indigenous group.[483]

The HRC has also commented on and considered the right to life in the context of environmental protection, particularly with respect to nuclear weapons and radioactive materials. In a General Comment on article 6, the HRC clarified that the right to life imposes an obligation on states to take positive measures for its protection, including taking measures to reduce infant mortality, malnutrition and epidemics.[484] It also confirmed that nuclear weapons "are amongst the greatest threats to the right to life."[485] In *E.H.P. v. Canada*,[486] a communication was submitted to the Commission on behalf of present and future generations on the basis that radioactive waste near the applicants' residences was a threat to the right to life. Although the communication was deemed inadmissible because the complainants had failed to exhaust domestic remedies, the HRC went out of its way to point out that the complaint "raised serious issues with regard to

[483] *Ilmari Länsman v. Finland* (I), U.N. Human Rights Committee, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (28 October 1994); *Sara v. Finland*, U.N. Human Rights Committee, Communication No.431/1990, 50th Sess., U.N. Doc. CCPR/C/50/D/431/1990 (24 March 1994); *Jouni E. Länsman v. Finland,* U.N. Human Rights Committee, Communication No. 671/1995, U.N. CCPR, 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (1996) (The Sami indigenous people of Scandinavia alleged that road construction and other development on their territory would disrupt their traditional reindeer herding, thus violating their right under article 27; although the HRC determined that interim measures were necessary, it found that there had been no violation of the ICCRP).
[484] General Comment 6, *supra* note 325 at para. 5.
[485] *General Comment 14 on Nuclear weapons and the right to life (Art. 6)*, CCPR General Comment No. 14 (11 September 1984) at para. 4, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/tbs/doc.nsf/0/9c882008fd898da7c12563ed004a3b08?Opendocument>.
[486] *E.H.P. v. Canada (also known as Port Hope Environmental Group case)*, Communication No. 67/1980, U.N. Human Rights Committee (27 October 1982).

the obligation of State Parties to protect life."[487] The Commission came to a similar conclusion in subsequent cases.[488]

(b) Committee on Economic, Social and Cultural Rights

A second potential forum for the Inuit's claim is the Committee on Economic, Social and Cultural Rights (CESCR), which carries out duties under the ICESCR.[489] The CESCR is a body of independent experts whose primary function is to monitor compliance with the Covenant. States must report initially within two years of accepting the ICESCR and then every five years.[490] The reports must outlines the steps state parties have taken to observe the rights in the ICESCR. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations." Although the Committee's concluding observations, in particular suggestions and recommendations, do not carry legally binding status, they are indicative of the opinion of the only expert body entrusted with and capable of commenting on the Convention's implementation. Therefore, if a state party ignores or fails to act on such views, it would show bad faith in implementing their obligation to the Covenant. The Committee can also issue General Comments to clarify ambiguities in the language of the Covenant.[491]

The ICESCR is distinguished from the ICCPR in that it allows progressive implementation. State parties are required to "take steps…with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all

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[487] *Ibid*. at para. 8.
[488] *E.W. v. Netherlands*, *Communication* No. 429/1990, U.N. Doc. CCPR/C/47/D/429/1990 (1993); *Bordes Temeharo v. France*, Communication No. 645/1995, U.N. Human Rights Committee.
[489] *ICESCR*, *supra* note 280.
[490] *Ibid*. at arts. 16(1) and 17.
[491] Malone & Pasternack, *supra* note 417 at 384.

appropriate means, including particularly the adoption of legislative measures."[492] However, the Committee has clarified that certain rights must be implemented immediately, despite the progressive implementation clause. For instance, the non-discrimination provisions and the obligation of state parties to refrain from actively violating economic, social and cultural rights or withdrawing legal and other protection relating to those rights, must be implemented upon ratification.[493]

There are several ways the Inuit can use the CESCR to voice a complaint against Canada for the harms related to climate change. First, since 1993, NGOs have been permitted to submit written comments to the Committee.[494] In the Inuit's case, an NGO on behalf of the group could use a comment in two ways: (1) it could submit a comment alleging that particular environmental degradation related to climate change is adversely affecting the Inuit's economic, social and cultural rights, or; (2) the comment could critique Canada's state report to the Committee on the basis that it materially misrepresents an environmental human rights issue.[495] Both approaches were used by the Center for Economic and Social Rights in its report to the Committee on the gold mining industry in Honduras and the *General Mining Law*.[496] The report alleged that by passing the law Honduras violated a number of rights protected in the ICESCR, including article

[492] *ICESCR*, *supra* note 280 at art. 2(1).
[493] *Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights*, Vienna Declaration and Programme of Action (Part 1, para. 5), adopted by the World Conference on Human Rights (25 June 1993) A/CONF. 157/24 (Part 1, chap. III), online: Office of the High Commissioner for Human Rights <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.
[494] *NGO Participation in Activities of the Committee on Economic, Social and Cultural Rights*, U.N. ESCOR, 8th Sess., at para. 354, U.N. Doc. E/1994/23 (1993); See also *Rules of Procedure of the Committee on Economic, Social and Cultural Rights*, U.N. ESC, 3d Sess. at rule 69, U.N. Doc. E/C.12/1990/4/Rev.1 (1989).
[495] Malone & Pasternack, *supra* note 417 at 385; Dommen, *supra* note 78 at 109.
[496] *Center for Economic and Social Rights, The Price of Gold: Gold Mining and Human Rights Violations in Honduras*, Report to the U.N. ESC (2001), online: Center for Economic and Social Rights <http://www.cesr.org/downloads/Complete%20Honduras%20Report%20Revised.pdf>.

12, the right to health and a healthy environment.[497] The Committee considered the Center for Economic and Social Rights' report in its concluding observations for Honduras.[498]

A second way the Inuit could use the CESCR to bring a complaint against Canada is via the newly-developed complaints mechanism, which is set out in the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.[499] Parties to the Optional Protocol recognize the jurisdiction of the CESCR to receive and consider complaints from individuals or groups who claim their rights under the Covenant have been violated.[500] Complainants must have exhausted all domestic remedies and complaints cannot be made based on rights violations that occurred before a particular state ratified the optional protocol.[501] The Committee can request information from and make recommendations to a party.[502] State parties may also opt to permit the Committee to hear complaints from other state parties, rather than just groups and individuals.[503] The Optional Protocol also includes an inquiry mechanism. States can grant the Committee permission to investigate, report and make recommendations on "grave or systematic violations" of the ICESCR, though this process is optional.[504]

The Optional Protocol was adopted by the UN General Assembly on December 10, 2008, and opened for signature on September 24, 2009. It requires ten ratifications in

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[497] *Ibid*. at 3.
[498] *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras*, U.N. ESCOR, 25th mtg., U.N. Doc. E/C.12/1/Add.57 (2001).
[499] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, G.A. Res., A/RES/63/117 (5 March, 2009).
[500] *Ibid*. at art. 1.
[501] *Ibid*. at art. 3.
[502] *Ibid*. at arts. 6, 8 and 9.
[503] *Ibid*. at art. 10.
[504] *Ibid*. at art. 11.

order to come into force.[505] At present, only 33 countries have signed the Optional Protocol and none have ratified or acceded.[506] Therefore, this mechanism is presently unavailable for the Inuit. At this point Canada has not even signed the Optional Protocol. However, the individual complaints mechanism may provide an important avenue for recourse in the environmental context in the future. The HRC has linked rights in the ICESCR to the right to environmental protection. In its report on climate change and human rights, it suggested that all state parties to the ICESCR have a legal obligation through international cooperation to reduce emissions levels consistent with the full enjoyment of human rights.[507]

5.2. The Inter-American Human Rights System

The Inter-American Human Rights (IAHR) system is the most likely forum for a claim by the Inuit against Canada on the basis that its failure to address climate change constitutes a violation of human rights. As one commentator notes, the IAHR system "offers a unique forum for individuals to litigate to defend against violations of their rights, including rights that relate to the environment."[508] Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have a robust history of considering and affirming claims by aboriginal groups that environmental degradation amounts to a violation of human rights.

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[505] *Ibid*. at art. 18.
[506] Status of Ratification, online: *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> (accessed July 21, 2010).
[507] OHCHR Report, *supra* note 11 at para. 86; Limon, *supra* note 19 at 455.
[508] Jorge Daniel Taillant, "Environmental Advocacy and the Inter-American Human Rights System," in Romina Picolotti & Jorge Daniel Taillant, eds. *Linking Human Rights and the Environment* (British Columbia: UBC Press, 2003) at 121 [Taillant].

In December 2005, a group of Inuit filed a petition with the Commission alleging that the United States' failure to mitigate the effects of climate change violated the group's human rights, including the rights to life, health, culture, means of subsistence, and property.[509] Although the Commission said it was not possible to process the complaint "at present," it is significant for being the first attempt to 'green' human rights in the context of climate change. Most prior cases focused on narrower causes of environmental damage, such as exploitation of land and pollution caused by natural resource exploration. Indeed, the Inuit case opened the door to future claims on similar issues.[510] This section begins with an overview of the IAHR regime. It discusses procedural issues, such as who has standing to bring a claim and on what conditions, and it provides an overview of the Inuit's substantive claim against Canada.

5.2.1. Overview of the Inter-American Human Rights System

The IAHR system is rooted in the OAS, which was founded in 1948.[511] It is comprised of 35 member states, including Canada.[512] There are two primary human rights treaties in the Inter-American system—the *American Declaration of the Rights and Duties of Man* (American Declaration)[513] and the *American Convention on Human Rights*

[509] ICC Petition, *supra* note 22 at 1.
[510] Knox 2009, *supra* note 269 at 32 (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 the rights protected by the American Declaration."); See also Ford, *supra* note 37 at 3 (Ford notes that "[w]hile the petition was rejected 'without prejudice' in 2006 due to the inability of the Commission to determine if human rights were being violated, the case in all likelihood represents a portent of future action as nations and groups adversely affected by climate change seek legal redress.").
[511] Taillant, *supra* note 508 at 125.
[512] Member States, online: Organization of American States <http://www.oas.org/en/member_states/default.asp>.
[513] *American Declaration*, *supra* note 324.

(American Convention).[514] These documents are interpreted by two organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The IAHR regime has significantly evolved since the OAS was formed in 1948. The American Declaration, which coincided with the adoption of the OAS Charter to bring the OAS into existence, was initially intended to be soft law and not a treaty *per se*; however, it has since been recognized as a source of international obligation for OAS member states.[515] In 1959, the Inter-American Commission was created under the OAS Charter "to promote the observance and protection of human rights."[516] The American Convention, which established the Inter-American Court, was signed in 1969 and entered into force in 1978 after it was ratified by 11 members of the OAS. Today, 25 of the 35 OAS member states have ratified the Convention and 22 of those states have accepted the jurisdiction of the Inter-American Court.[517]

Substantively, these instruments protect a number of rights relevant to linking climate change and human rights. The American Declaration, which has universal jurisdiction and is binding on all states, recognizes the right to life, liberty and security of the person,[518] the right to protection against abusive attacks,[519] the right to residence and movement,[520] the right to inviolability of the home,[521] the right to the preservation of health and well being,[522] the right to the benefits of culture,[523] and the right to property.[524]

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[514] *American Convention*, *supra* note 324.
[515] Doelle 2004, *supra* note 1 at 190; ICC Petition, *supra* note 22 at 70, footnote **.
[516] *Charter of the Organization of American States*, 119 U.N.T.S. 3 (entered into force 13 December 1951) at art. 106 [*OAS Charter*].
[517] Status of Ratification, *American Convention on Human Rights*, online: OAS <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.
[518] *American Declaration*, *supra* note 324 at art. I.
[519] *Ibid*. at art. V.
[520] *Ibid*. at art. VIII.
[521] *Ibid*. at art. IX.
[522] *Ibid*. at art. XI.

The American Convention similarly protects the right to life,[525] and the right to property.[526]

In addition to the American Declaration and the American Convention, there are also several other substantive documents that are relevant to the connection between environmental health and human rights:

- *The Charter of the Organization of American States* (OAS Charter)[527]
- *The Protocol of San Salvador on Human Rights in the Area of Economic, Social and Cultural Rights* (San Salvador Protocol) [528]
- *Draft Declaration on the Rights of Indigenous Peoples*[529]

The OAS Charter aims to strengthen cooperation and advance common interests among OAS members and to promote good governance, foster peace and security, expand trade and strengthen human rights.[530] In terms of protecting environmental human rights, the Charter requires member states to "refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States."[531] It also recognizes the right to material well-being and spiritual development "under circumstances of liberty, dignity, equality of opportunity, and economic security."[532]

More significantly, the San Salvador Protocol explicitly recognizes the right to a healthy environment. It was adopted in 1988 and came into force in 1999, although only

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[523] *Ibid*. at art. XIII
[524] *Ibid*. at art. XXIII.
[525] *American Convention*, *supra* note 324, at art. 4.
[526] *Ibid*. at art. 21.
[527] *OAS Charter*, *supra* note 516.
[528] *Protocol of San Salvador*, *supra* note 284.
[529] *OAS Indigenous Declaration*, *supra* note 393.
[530] *OAS Charter*, *supra* note 516.
[531] *Ibid*. at art. 35.
[532] *Ibid*. at art. 45(a).

15 members states have ratified the Protocol.[533] Article 11 provides protection for the right to healthy environment and it obligates states to "promote the protection, preservation, and improvement of the environment."[534] In addition, the Protocol preserves the right to health,[535] the right to food,[536] and the right to the benefits of culture.[537]

The *Draft Declaration on the Rights of Indigenous Peoples* was approved by the Commission in 1997. Although the proposed Declaration is not yet adopted or binding, it provides an interesting link between environmental protection and human rights in the context of indigenous rights. The Draft Declaration recognizes that indigenous people depend on the environment for cultural, social and economic reasons. It protects the right to belong to an indigenous people,[538] limited self-governance,[539] protection from assimilation[540] and cultural integrity.[541] It also explicitly recognizes the right to a healthy environment: "Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being."[542]

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[533] Status of Ratification, *The Protocol of San Salvador on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)*, online: OAS <http://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>.
[534] *Protocol of San Salvador*, *supra* note 284 at art. 11(2).
[535] *Ibid*. at art. 10.
[536] *Ibid*. at art. 12.
[537] *Ibid*. at art. 14.
[538] *OAS Indigenous Declaration*, *supra* note 393 at art. III.
[539] *Ibid*. at art. XV.
[540] *Ibid*. at art. V.
[541] *Ibid*. at art. VII.
[542] *Ibid*. at art. XVIII.

The status of these instruments ranges from binding to non-binding in Canada. The OAS Charter and the American Declaration are binding on all OAS members.[543] The American Convention and the San Salvador Protocol, however, are only binding on states that have ratified these agreements. Canada has not ratified either the American Convention or the San Salvador Protocol and it has not accepted jurisdiction of the Court. The Inuit would therefore have to base a claim on a violation of the OAS Charter or the American Declaration. However, the Commission has acknowledged that the American Convention "may be considered to represent an authoritative expression of the rights contained in the American Declaration, and is therefore properly considered in interpreting the Declaration's provisions."[544] In the 2005 Inuit petition, the ICC relied on the American Convention and the San Salvador Protocol, despite the fact that the United States had neither accepted jurisdiction of the Court nor ratified the additional protocol.

As noted, the *Proposed Declaration on the Rights of Indigenous Peoples* has not yet been adopted. However, if it becomes binding on Canada, the Draft Declaration will provide an alternative legal basis for the Inuit's claim, given that it provides special protection for the right to a healthy environment to indigenous groups.

[543] 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" (2007) 26 Stan. Envtl. L. J. 3 at 38 [Abate]; Doelle 2004, *supra* note 1 at 192.
[544] *Mary and Carrie Dann v. United States*, (2002), Inter-Am. Comm. H.R. No.75/02, Doc. 5 rev. 1, 860 at paras. 95-97 [*Dann*]; Koivurova, *supra* note 86 at 290.

5.2.2. Procedural Issues

In terms of procedure, the following documents outline the respective roles of the Inter-American Commission and the Inter-American Court in overseeing and implementing the substantive documents outlined above:[545]

- *Statute of the Inter-American Commission on Human Rights*[546]
- *Rules of Procedure of the Inter-American Commission on Human Rights*[547]
- *Statute of the Inter-American Court of Human Rights*[548]
- *Rules of Procedure of the Inter-American Court of Human Rights*[549]

The Commission has a wide mandate of observing and defending human rights in the entire OAS[550]—individuals can therefore file a petition with the Commission even if the state in question has not ratified the American Convention.[551] The Commission is responsible for ensuring compliance with all human rights instruments in the OAS system, including the American Declaration, the American Convention and the San Salvador Protocol.[552] The Inter-American Court's compulsory jurisdiction, on the other hand, is limited to those states that are parties to the American Convention or who consent to the Court's jurisdiction. The Court's role is to interpret and apply the American Convention.

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[545] See Taillant, *supra* note 508; Doelle 2004, *supra* note 1 at 193-197.
[546] *Statute of the Inter-American Commission on Human Rights*, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. I at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980) [*IA Commission Statute*].
[547] *Rules of Procedure of the Inter-American Commission on Human Rights*, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992) [*IA Commission Rules*].
[548] *Statute of the Inter-American Court of Human Rights*, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. I at 98, Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980).
[549] *Rules of Procedure of the Inter-American Court of Human Rights*, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc. 7 at 18 (1992).
[550] *IA Commission Statute*, *supra* note 546 at art. 1.
[551] Inter-American Commission on Human Rights, online: OAS <http://www.cidh.oas.org/what.htm>.
[552] *IA Commission Statute*, *supra* note 546 at art. 1.

(a) Do the Inuit have standing?

The analysis here focuses on the Inter-American Commission since complaints must initially be brought before the Commission and can only be subsequently referred to the Inter-American Court under appropriate circumstances.[553] The *Rules of Procedure of the Inter-American Commission on Human Rights* state that any person or group of persons or nongovernmental entity legally recognized in one or more of the OAS member states may submit a petition to the Commission with respect to an alleged violation of a human right recognized under the IAHR regime.[554] A petition can be brought by an individual on his or her own behalf or by a third person or organization on behalf of an individual whose rights have allegedly been violated.[555] The Inuit therefore have standing. They can bring a claim themselves or choose a nongovernmental organization to file a petition with the Commission on their behalf, like the ICC in the case against the United States. The Inuit also have the right to designate an attorney or other person to represent them before the Commission.[556]

(b) Can the Inuit bring a claim against Canada?

A claim can only be brought before the Commission against a member state bound by the substantive obligations under the IAHR regime that the claimant alleges have been violated.[557] As previously mentioned, as a member of the OAS, Canada is bound by OAS Charter and the American Declaration. It may also be bound by the American Convention by extension as well—the ICC in its petition to the Commission applied the American Convention to the United States, despite the fact that it has not

[553] *IA Commission Rules*, *supra* note 547; Doelle 2004, *supra* note 1 at 194.
[554] *IA Commission Rules*, *ibid*. at art. 23.
[555] *Ibid*; See also Taillant, *supra* note 508 at 135.
[556] *IA Commission Rules*, *ibid*.
[557] Doelle 2004, *supra* note 1 at 195.

ratified the Convention. The Rules of Procedure and past practice recognize that the rights and obligations in the American Declaration may apply even when states are not formally bound by the treaty.[558] In any case, provided the Inuit base their claims on violations of substantive obligations Canada is bound not to breach, they can successfully launch a claim against the state.

5.2.3. The Inuit's Case against Canada

Some say an environmental human rights complaint will not persevere unless it satisfies three conditions: (1) an environmental degradation; (2) a nation-state action or omission that results in or contributes to the environmental degradation; and (3) a deprivation of human rights that results from the environmental degradation.[559] Using this three-part test, the discussion of salient human rights law now turns towards outlining the merits and challenges of the Inuit's case against Canada.

As a member of the OAS, Canada is bound by the American Declaration, which protects a number of relevant rights. It bears mentioning as a preliminary matter that when interpreting and applying the American Declaration, the Inter-American Court and Commission have consistently recognized the relevance of broader developments in the field of international law in their analysis of rights, duties and violations.[560] The Inter-American Commission has specifically stated that there are "developing norms and principles governing the human rights of indigenous peoples"[561] and that these rights contained in the Declaration ought to be interpreted broadly, which includes

[558] Aminzadeh, *supra* note 1 at 240.
[559] Malone & Pasternack, *supra* note 417 at 367.
[560] *Dann*, *supra* note 544 at paras. 96-97, 124; ICC Petition, *supra* note 22 at 96.
[561] *Dann*, *ibid*. at para. 124.

consideration of the *Draft Declaration on the Rights of Indigenous Peoples*, even though it is not yet in force.[562] In the Inuit petition, the ICC noted that human rights instruments other than the American Declaration were relevant to the issue in that case, including the American Convention, the ICCPR, the ICESCR, regional human rights conventions, ILO Convention 169, and the official interpretation of these instruments by human rights bodies, including the Inter-American Court.[563] Thus a similar approach will be taken in the present analysis when considering Canada's obligations, keeping in mind these rights have already been discussed in detail above.

(a) Evidence of Environmental Degradation in the Arctic

As outlined in section 2, the effects of global warming have already visibly and drastically transformed the Arctic environment.[564] According to the ACIA, "[r]ecords of increasing temperatures, melting glaciers, reductions in the extent and thickness of sea ice, thawing permafrost, and rising sea levels all provide strong evidence" of recent global climate change.[565] The Inuit petition cited similar symptoms in support of its claim that global warming, caused by the United States' emissions, is destroying the Arctic environment.[566] The ACIA also referenced ten key findings in its comprehensive study that outline the changes and impacts to the Arctic environment as a result of climate change:

1. Arctic climate is now warming rapidly and much larger changes are projected.
2. Arctic warming and its consequences have worldwide implications.

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[562] *Ibid*. at para. 129.
[563] ICC Petition, *supra* note 22 at 96-97.
[564] James D. Ford, Barry Smit & Johanna Wandel, "Vulnerability to climate change in the Arctic: A case study from Arctic Bay, Canada" (2006) 16 Global Environmental Change 145 at 145-46 [Ford, Smit & Wandel].
[565] ACIA Overview, *supra* note 15 at 22.
[566] ICC Petition, *supra* note 22 at 23-27.

3. Arctic vegetation zones are very likely to shift, causing wide-ranging impacts.
4. Animal species' diversity, ranges, and distribution will change.
5. Many coastal communities and facilities face increasing exposure to storms.
6. Reduced sea-ice is very likely to increase marine transport and access to resources. (Sovereignty, security and safety issues, as well as social, cultural, and environmental concerns are likely to arise as marine access increases).
7. Thawing ground will disrupt transportation, buildings, and other infrastructure.
8. Indigenous communities are facing major economic and cultural impacts.
9. Elevated ultraviolet radiation levels will affect people, plants, and animals.
10. Multiple influences interact to cause impacts to people and ecosystems.[567]

While some of these changes are undoubtedly caused by natural cycles, the ACIA recognizes the "international scientific consensus" that human activities, primarily the burning of fossil fuels, are responsible for the warming observed in the last half-century.[568] These temperature changes significantly impact the Inuit in two key ways: by threatening the food sources they rely on for sustenance and cultural identity and by making travel to pursue food and sustenance unsafe.[569]

(b) How is Canada violating the Inuit's Rights?

This part considers whether Canada has committed an act or omission that has caused or contributed to the effects of climate change outlined in part (a). In analyzing Canada's acts and omissions related to climate change, it is possible to take into account the specific rights provisions in the American Declaration and the American Convention, as well as other relevant obligations Canada has assumed under international treaties and customary international law. Canada's breach of any of these obligations reinforces the conclusion that it is violating human rights protected by the American Declaration. A similar approach was used by the ICC in its petition before the Inter-American

[567] ACIA Overview, *supra* note 15 at 10-11.
[568] *Ibid*. at 2.
[569] Abate, *supra* note 543 at 32.

Commission to establish the United States' culpability.[570] Section 3.2.1. on state responsibility concluded that Canada has contributed to the impacts of climate change through various acts and omissions[571]—the same conclusion can be drawn here. These acts and omissions, which will not be repeated, violate the Inuit's fundamental rights protected in the American Declaration and other international instruments. The specific human rights violations are detailed in the following section

(c) What Human Rights has Canada Violated?

The final condition in establishing an actionable human rights claim is proof that an actual human right was violated. The Inuit petition details the human rights they allege the United States violated by contributing to the effects of climate change listed above. This section uses the petition as a guide to outline the rights Canada is violating with respect to the Canadian Inuit.[572] Given the extensive discussion of the 'greening' of human rights approach in section 4, this part will only briefly canvas the rights Canada is violating and detail how those rights relate to environmental degradation in the Arctic.

i. Civil and Political Rights –Life and Freedom from Interference with One's Home and Property

The fundamental right to life is well protected in various human rights treaties, including the American Declaration.[573] Canada has consistently shown its willingness to

[570] ICC Petition, *supra* note 22 at 97-101.
[571] See section 3.2.1. above; See also David Suzuki, "Kyoto Protocol: Canada's Emissions," online: David Suzuki Foundation <http://www.davidsuzuki.org/Climate_Change/Kyoto/Canadian_Emissions.asp>. (Canada accounts for 2.2 percent of total global GHG emissions, despite only containing 0.5 percent of the world's population).
[572] Submission of Canada to the OHCHR under Human Rights Council Resolution 7/23 (2008), online: OHCHR <http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf> (Canada has also refused to unequivocally acknowledge that climate change impacts human rights. In its submission in response to the OHCHR study, Canada only acknowledged that "there can be an impact on the effective enjoyment of human rights as a result of situations arising from environmental degradation and amplified by climate change.").
[573] *American Declaration*, *supra* note 324 at art. I; *ICCPR*, *supra* note 267 at art. 5 ("[e]very human being has the inherent right to life. The right shall be protected by law."); *UDHR*, *supra* note 268 at art. 3

be bound to this right by ratifying a number of human rights conventions that protect the right to life, such as the ICCPR and the CRC, and by adopting the American Declaration and the OAS Charter. The right to life is also legally protected in Canada's own *Charter of Rights and Freedoms*.[574] Canada thus has an obligation to protect the Inuit's human right to life, and as noted in the Inuit petition, "[t]his obligation includes the duty not to degrade the arctic environment to such an extent that the degradation threatens the life and personal security of the Inuit people."[575]

Canada's failure to regulate global climate change violates the Inuit's right to life on a number of fronts. Observed and projected effects of climate change pose direct and indirect threats to the lives of the Inuit. The melting sea-ice and decrease in ice distribution, stability and duration, due to unpredictable weather, has increased the frequency and severity of accidents while hunting and traveling, resulting in injury, death and psychosocial stress.[576] Changes in air pollution have increased the incidences of respiratory and cardiovascular disease[577]and alterations to ice and snow have jeopardized critical food sources.[578] According to the ICC petition, "[d]amage to the Inuit's

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("Everyone has the right to life."); *American Convention*, *supra* note 324 at art. 4.1 ("Every person has the right to have his life respected. This right shall be protected by law…"); *European Convention*, *supra* note 324 at art. 2.1 ("Everyone's right to life shall be protected by law."); The CESCR has also commented on the right to adequate housing in CESCR, General Comment No. 4 on the Right to Adequate Housing in *Compilation of General Comments and General Recommendation adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 19.

[574] *Canadian Charter of Rights and Freedoms*, R.S.C. 1982, c. 11, at s. 7; See also *Ontario v. Canadian Pacific* [1995] 2 S.C.R. 1031 at 1074-1076. The Supreme Court of Canada endorsed a passage from the Law Commission report that linked the right to life in section 7 of the Charter with the right to a healthy environment. The Court stated: "a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we shall refer to as the right to a safe environment." The Court endorsed this view two years later in *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at 124.

[575] ICC Petition, *supra* note 22 at 90.

[576] Furgal & Seguin, *supra* note 14 at 1966; ICC Petition, *ibid*.

[577] *Ibid*.

[578] ICC Petition, *ibid*.

subsistence harvest violates their right to life."[579] Sudden, intense and unpredictable storms threaten the Inuit's lives and physical security. They are no longer able to predict weather patterns and are often stranded on hunting or fishing expeditions without adequate shelter, resulting in injury and death.[580]

The human right to property is protected in several international and regional instruments,[581] including the American Convention and the *Draft Declaration on the Rights of Indigenous Peoples*. The Draft Declaration guarantees,

> the right to the recognition and full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property…as well as special measures to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations."[582]

The Inuit's human right to protection of their personal and intellectual property is therefore guaranteed in international law. Indeed, Canada has an obligation not to interfere with the Inuit's use and enjoyment of their property by failing to reduce GHG emissions.

Climate change has vast impacts on the Inuit's ability to enjoy their tangible and intangible property without interference. For instance, it diminishes the values of their personal property, such as clothing, hides and equipment like sled and skidoo runners, due to lack of snow.[583] Melting and improperly formed sea ice prevents certain communities from carrying on commercial fishing businesses and destroys vital

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[579] ICC Petition, *ibid*. at 91.
[580] *Ibid*.
[581] *UDHR*, *supra* note 268 at arts. 12 and 17(2); *ILO Convention 169*, *supra* note 343 at art. 4(1); *CBD*, *supra* note 343 at art. 8(j); *American Convention*, *supra* note 324 at art. 21; *European Convention*, *supra* note 324 at art. 8.
[582] OAS Indigenous Declaration, *supra* note 393 at art. 20.
[583] ICC Petition, *supra* note 22 at 84.

equipment.[584] The Inuit have spent millennia developing a system of knowledge from one generation to the next that has tremendous value to the Inuit's survival and culture.[585] Climate change devalues the Inuit's traditional knowledge (*Inuit Qaujimajatuqangit*)—the rapidly changing weather patterns and temperatures have made much of the Inuit's traditional knowledge inaccurate, making it impossible for the Inuit to "use, share, market and bequeath that [knowledge] to future generation."[586] The drastic change in weather has compromised the ability of Inuit populations to accurately predict ice conditions and hunt safely and successfully.[587]

ii. Economic, Social and Cultural Rights – Health, Food and Water

The American Declaration provides that "[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."[588] The right to health and to food and water are protected in a number of other international and regional human rights instruments as well.[589] Thus both rights are widely recognized in international law. The Commission, and various international human rights bodies and experts, have drawn a link between the right to health, including the right to food and water, and environmental protection.[590] The right to the "preservation" of health in the American Declaration therefore includes a prohibition on environmental degradation to

[584] *Ibid*.
[585] *Ibid*.
[586] OAS Indigenous Declaration, *supra* note 393 at art. 29; ICC Petition, *ibid*.
[587] Ford, Smit & Wandel, *supra* note 564; See also Ford & Smit, *supra* note 29.
[588] *American Declaration*, *supra* note 324 at art. XI.
[589] *UDHR*, *supra* note 268 at art. 25 and art. 12(a); *CRC*, *supra* note 324 at art. 24; *CEDAW*, *supra* note 362 at arts. 12 and 14(2)(h); *African Charter*, *supra* note 281 at art. 16; *Social Charter*, *supra* note 362 at Part I and Article 11 of Part II; *Protocol of San Salvador*, *supra* note 284 at art. 10; *ICERD*, *supra* note 379 at art. 5(e)); *ICESCR*, *supra* note 280 at art. 11.
[590] See section 4.2.3. (a) above,

the point that human health and well-being are threatened.[591] Canada has an international obligation not to infringe on this well-documented right by degrading the Inuit's physical environment.

Climate change poses significant risks to the Inuit's right to health. Warmer temperatures have changed the Arctic's ecology—new parasites in the Inuit's environment expose them to vector borne diseases and increased incidences of diarrheal and other infectious diseases.[592] Drastic shifts in species distribution due to warming temperatures subject the Inuit to allergies, animal-borne diseases and mosquito bites, which have the potential to cause infection.[593] The melting permafrost has created structural instability, which has decreased the stability of public health, housing and transportation infrastructure.[594] As noted, changes in air pollution have increased incidences of respiratory and cardiovascular disease.[595] Global warming also impacts the Inuit's mental health by reducing the ability of individuals to practice aspects of traditional lifestyles[596] and important cultural activities like "subsistence harvesting, passing on traditional knowledge to younger generations, weather forecasting, and igloo building."[597] Damage to infrastructure has also caused displacement and dislocation, which can have psychological impacts.[598]

There is a clear link between the right to food and the effects of climate change on the Inuit's environment. The decrease in ice distribution and stability limits the Inuit's

[591] ICC Petition, *supra* note 22 at 87.
[592] Furgal & Seguin, *supra* note 14 at 1966.
[593] ICC Petition, *supra* note 22 at 88.
[594] Furgal & Seguin, *supra* note 14 at 1966.
[595] *Ibid*.
[596] *Ibid*. at 1968.
[597] ICC Petition, *supra* note 22 at 88-89.
[598] *Ibid*. at 89.

access to food due to difficulty in travel and changes in game location.[599] This has led to decreased food security and the erosion of social and cultural values associated with food preparation, sharing and consumption.[600] Rising sea levels also have an impact on access to food, by rendering coastal land unusable and causing fish species to migrate. Reduced quality of food sources, such as diseased fish and dried up berries, may force the Inuit to shift to a more Western diet, which carries the risk of increased diabetes, obesity and cardiovascular disease.[601] Warming temperatures caused by anthropogenic emissions also jeopardize the Inuit's right to water. Weather extremes, such as droughts and flooding, will impact the global water supply, including the Inuit's.[602] In the Arctic, low water levels in some creeks or brooks have decreased available sources of good natural (raw) drinking water.[603]

iii. Group Rights – Indigenous Rights

As noted, indigenous rights are comprised of a bundle of related rights, such as the right to culture, self-determination, subsistence and residence, movement and inviolability of the home.[604] The right to culture and self-determination are closely linked, though only the right to culture will be applied in this analysis.[605] The American Declaration guarantees the Inuit's right to the benefits of culture[606] and the OAS Charter

[599] *Ibid*. at 91.
[600] Furgal & Seguin, *supra* note 14 at 1955.
[601] ACIA Overview, *supra* note 15 at 16.
[602] OHCHR Report, *supra* note 11 at 11.
[603] Furgal & Seguin, *supra* note 14 at 1967.
[604] See Fergus MacKay, "The Rights of Indigenous Peoples in International Law" in Lyuba Zarsky, ed., *Human Rights & the Environment* (London: Earthscan Publications Ltd., 2002).
[605] Note that the right to self-determination is also protected in a number of instruments Canada has ratified, such as *ICCPR*, *supra* note 267 at art. 1; *ICESCR*, *supra* note 280 at art.1; UN Charter, *supra* note 171 at art. 1 and 55).
[606] *American Declaration*, *supra* note 324 at art. XIII.

and the American Convention protect similar cultural rights.[607] Cultural rights are also protected in other major human rights instruments that Canada has ratified, including the UDHR,[608] the ICCPR[609] and the ICESCR.[610] The Inter-American Commission and the Inter-American Court have repeatedly emphasized the "need to take into account the unique context of indigenous culture and history"[611] and have long recognized that environmental degradation caused by a state's inaction or action can violate the human right to the benefits of culture, particularly in the context of indigenous cultures.[612] The right to culture is thus guaranteed in the Inter-American system and affirmed by other sources of international law. Indigenous peoples' right to culture is inseparable from the condition of the lands they have traditionally occupied, including their right to their own means of subsistence.[613] Canada therefore has a clear duty not to destroy the Arctic environment to the extent that it infringes on the Inuit's human right to enjoy the benefits of their culture.

Canada's failure to reduce GHG emissions violates the Inuit's right to the benefits of culture. Climate change is compromising every aspect of the Inuit's life from their diet, to the way they communicate traditional knowledge, to where they are able to live.[614] Their subsistence way of life is threatened by human-induced climate change. According to the Inuit petition: "[c]hanges in ice, snow, weather, seasons and land have

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[607] *OAS Charter*, *supra* note 516 at arts. 2(f), 3(m), 30 and 48; *American Convention*, *supra* note 324 at arts. 16 and 48.
[608] *UDHR*, *supra* note 268 at art. 27.1.
[609] *ICCPR*, *supra* note 267 at art. 27.
[610] *ICESCR*, *supra* note 280 at art. 12.
[611] ICC Petition, *supra* note 22 at 70; See *Awas Tingni*, *supra* note 327; *Dann*, *supra* note 544 at para. 125 ("[E]nsuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience.").
[612] *Belize Maya*, *supra* note 344 at para. 171.
[613] ICC Petition, *supra* note 22 at 76 and 92.
[614] *Ibid*. at 76.

combined to deprive the Inuit of their ability to rely exclusively on the subsistence harvest, violating their right to their own means of subsistence."[615]

The American Declaration guarantees every person "the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."[616] It also grants every person "the right to inviolability of his home."[617] The rights to residence and movement and inviolability of the home are guaranteed in a number of human rights instruments Canada supports, such as the UDHR,[618] the ICCPR [619] and the American Convention,[620] and a number it does not.[621] Canada thus has an obligation not to infringe on the Inuit's rights to residence and movement and inviolability of the home by destroying the land on which they have build their homes.

Canada's failure to regulate global warming violates the Inuit's right to residence and movement; climate change threatens the Inuit's ability to maintain residence in their own community. Melting permafrost is damaging building foundations of Inuit homes and community structures, which is forcing coastal Inuit to relocate their communities and homes farther inland.[622] The Inuit petition claims that this "forced relocation goes to the heart of the rights to residence and movement and inviolability of the home."[623]

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[615] *Ibid*. at 93.
[616] *American Declaration*, *supra* note 324 at art. VIII.
[617] *Ibid*. at art. IX.
[618] *UDHR*, *supra* note 268 at arts. 12 and 13(1).
[619] *ICCPR*, *supra* note 267 at arts. 12 and 17.
[620] *American Convention*, *supra* note 324 at arts. 11 and 22.
[621] *European Convention*, supra note 324 at art. 2.1 and 8; *African Charter* art. 4, 12.1
[622] ICC Petition, *supra* note 22 at 95.
[623] *Ibid*. at 96.

5.2.4. Challenges for the Inuit

Assuming the Inuit meet the three-part test for establishing an environmental human rights complaint, the petition before the Commission would still face two major hurdles, one procedural and two substantial. In terms of procedure, the IACHR *Rules of Procedure* set out when a petition will be admissible.[624] The Executive Secretariat conducts a three-part inquiry to determine the admissibility of a complaint: (1) the accused state must have violated one of the rights established in the Inter-American human rights regime;[625] (2) the claimant must have exhausted domestic remedies,[626] and; (3) the complaint must not be subject to any other international procedure.[627] Steps one and three are not likely to pose a challenge for the Inuit. As outlined above, a number of rights in the American Declaration and the American Convention are implicated by Canada's contribution to global warming and the harm it has caused the Inuit. Also, given that there are no other international legal proceedings on the same matter, step three poses no problems. Step two, on the other hand, presents a possible procedural hurdle in the Inuit's case. The exhaustion of domestic remedies requirement, can however be waived in circumstances where either:

> (a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
> (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
> (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.[628]

[624] *IA Commission Rules*, *supra* note 547 at arts. 30-37.
[625] *Ibid*. at art. 24.
[626] *Ibid*. at art. 31.
[627] *Ibid*. at art. 33.
[628] *Ibid*. at art. 31(2).

Thus, provided the Inuit can construct compelling arguments to establish that Canadian tort and environmental law fails to address the harms alleged, the claim could move forward on procedural grounds.

However, even if the Inuit's petition succeeds on procedural grounds, it would still face challenging substantial problems at the merits phase. The first issue is whether the Commission would be willing to accept the claim given that much of the harm to the Inuit's environment from climate change will be future harm. In general, complaints procedures in human rights treaties are designed to provide redress for human rights violations that have already occurred. However, this evidentiary burden will not necessarily derail the Inuit's claim. In the *Awas Tingni* case, the Inter-American Commission and subsequently the Court accepted a case that dealt at least in part with a claim of future harms.[629] The present harm was the interference with the community's land claim rights whereas the future harm was the resulting interference with the indigenous group's traditional lands, resources and environment.[630] As one commentator put it, "[t]he fact that there is a delay between the decisions being made today and any future climate change impacts that result from those decisions will…not impede a claim under the IAHR regime, as long as the harm leading to a human rights claim can be supported by sufficient evidence."[631] The question then is whether the scientific predictions on future harms are concrete enough for a finding that rights are currently

[629] Doelle 2005, *supra* note 132 at 242; Doelle 2004, *supra* note 1 at 202-203; See also *Noel Narvii Tauira and Eighteen Others v. France*, App. No. 28204/95, Eur. Comm. H.R. (4 December 1995) (The Commission found: "… it is only in exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the convention owing to a future violation … [i]n order for an applicant to claim to be a victim in such a situation, he must, however, produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.").
[630] Doelle 2004, *ibid*.
[631] *Ibid*. at 202-203.

being violated. The IPCC and the ACIA clearly identify future harms in the Arctic as a result of rising global temperatures. However, even if the Inuit were limited to impacts that have already occurred, their claim would arguably succeed. The current damage to the Arctic is sufficient enough to make out a human rights complaint in the IAHR regime.

The second substantive obstacle for the Inuit is causation.[632] Even if the Inter-American Commission is willing to find that climate change is violating the Inuit's rights, it must also be able to attribute those rights abuses to Canada. Part of the problem is the complexity of global warming itself; it is both a natural and a human-induced phenomenon. The 'greenhouse effect' is a naturally occurring process that regulates the temperature on Earth. Greenhouse gases absorb and transmit solar energy, warming the Earth's surface.[633] Without GHG, the Earth's average temperature would be -18˚C, which is too cold to sustain most forms of human life.[634] Although these gases occur in natural concentrations, since the nineteenth century the release of anthropogenic emissions[635] has led to increased amounts of GHG. These added emissions trap even more of the sun's heat, resulting in a slow rise in the Earth's temperature.[636]

The Human Rights Council, in its report on climate change and human rights articulated the trouble with causation in the context of climate change: "[t]he physical impact of global climate change cannot easily be classified as human rights violations,

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[632] Eric. A. Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal," University of Chicago Law & Economics, Olin Working Paper No. 329, University of Chicago, Public Law Working Paper No. 148 (January 2007) at 3; Limon, *supra* note 19 at 457.
[633] Canada, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons*, (Ottawa: Office of the Auditor General of Canada, 2006) at 26, online: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2006menu_e.html>.
[634] Canada, *Canada's Third National Report on Climate Change: Actions to Meet Commitments Under the United Nations Framework Convention on Climate Change* (Ottawa: Environment Canada, 2001).
[635] *Ibid*. (According to the IPCC, human activity accounts for only 5 percent of global GHG emissions (with natural processes accounting for the remainder). However this is enough to upset the balance of GHGs, resulting in changes to the climate).
[636] Peter G. Davies, "Global Warming and the Kyoto Protocol" (1998) 47 I.C.L.Q. 446 at 447.

not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States."[637] The United States made a similar argument in its response to the Human Rights Council's study: "climate change is a highly complex environmental issue characterized by a long chain of steps between the initial human activities that produce greenhouse gas emissions and the eventual physical impacts that may result from those emissions."[638] Thus the degree of remoteness is important in determining whether a sufficient nexus exists between Canada's inaction on global warming and violations of the Inuit's human rights.[639] For instance, if remoteness is narrowly interpreted, Canada could escape liability based on the fact that despite being a high emitter, its total emissions are currently less than three percent of global emissions.[640] The success of the Inuit's case therefore depends on the Inter-American Commission's willingness to accept the unique nature of causation in the case of the human impacts of climate change.

PART 6: CONCLUSION

At COP-12 in Nairobi, Kenyan Environment Minister Kivutha Kibwana remarked that climate change is "rapidly emerging as one of the most serious threats that humanity may ever face."[641] The accelerated pace of warming is putting the lives of present and future generations in danger, particularly in vulnerable regions like the Arctic where

[637] OHCHR Report, *supra* note 11 at para. 96.
[638] Submission of the United States to the OHCHR under Human Rights Council Resolution 7/23 (2008) at paras. 18-19, online: OHRCH <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/USA.pdf>.
[639] Koivurova, *supra* note 86 at 289.
[640] Doelle 2004, *supra* note 1 at 214.
[641] UNFCCC Press Release, "Nairobi United Nations Climate Change Conference opens with warning that climate change may be most serious threat ever to face humankind" (6 November 2006) online: <http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20060111_6_november_release_english_kk.pdf>.

fragile ecosystems are sensitive to alterations in the physical environment. As part 2 of this study highlights, the Arctic region is already feeling the dramatic impacts of warming temperatures, which are threatening longstanding traditions and ways of life for the Inuit people. The current and predicted impacts of climate change in the Arctic are evidence that climate change is as much about human rights and equity as it is about environmental preservation. The international legal system, however, has not evolved to address this link. Part 3 of this thesis provides an overview of the inability of international environmental law and international law generally to address the human impacts of environmental damage for indigenous groups like the Inuit. As non-state actors without standing, the Inuit unable to use international legal forums in any meaningful way. Further, even if they could seek accountability for climate change in international law, the Inuit would be faced with the insurmountable task of pinning responsibility for environmental degradation in the Arctic on Canada.

In light of the limitations discussed in part 3, parts 4 and 5 outline how existing international human rights laws and mechanisms may provide a forum for redress for victims of human rights abuses associated with climate change. Through the practice of 'greening' existing human rights, such as the right to life, health and culture, international human rights law can fill the gap left open by international environment law and international law more generally. The Inuit can use this approach to show that Canada's failure to take remedial action to limit the effects of climate change constitutes a violation of the group's human rights. Part 5 specifically considers two forums and approaches through which environmental damage may be challenged as a violation of human rights. Both the UN human rights system and the Inter-American system provide feasible

options, however a claim in each forum would be plagued by procedural and substantive barriers the Inuit must overcome.

In conclusion, although the impacts of climate change on the Inuit may be successfully reconceptualised as international human rights claims, there is immense value in establishing a well-defined and widely accepted international right to a healthy environment *per se*, beyond merely customary international law. The 'greening' of existing rights approach is limited in application and may not be accepted by human rights bodies; as mentioned, the Inter-American Commission did not accept the ICC's Inuit petition seeking a declaration in international law that the destruction of the Inuit's way of life resulting from climate change amounts to a violation of fundamental human rights. Clarifying a set of justiciable rights and obligations vis-à-vis the environment and human rights would ensure that groups, like the Inuit, have recourse against states who fail to comply with their international obligations. In the absence of a justiciable right to a healthy environment, the Arctic region and the Inuit's home will be destroyed beyond recognition.

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