

## CLI BACKGROUND PAPER NO. 8 (Executive Summary)

### International Environmental Law, Climate Change, and Intergenerational Justice

by Jonathan C. Carlson\*

Existing international environmental law is not adequate to address the challenge of global climate change. First, international environmental law does not impose any legal obligation on present generations to take the immediate steps needed to protect future generations from the risks of climate change, catastrophic or otherwise. Second, the current rules of the 1992 UN Framework Convention on Climate Change<sup>1</sup> and the 1997 Kyoto Protocol,<sup>2</sup> the only treaties in force that address climate change explicitly, are not adequate to mitigate climate change. Third, general principles of customary international environmental law are unlikely to provide a basis for effective legal action against States that refuse to cooperate in addressing climate change. Finally, general principles of environmental law derived from the world's different legal systems and addressed to climate are likely to be viewed as too exceptional or inchoate to serve either present or future generations effectively against the hazards of climate change. These facts highlight the need for further law-making activity to meet the demands of intergenerational justice.

Arguments for intergenerational rights and duties as legal rights and duties under international environmental law date back more than 110 years. In the famous *Bering Sea Fur Seal Arbitration* of 1893 between the United States and Great Britain,<sup>3</sup> the U.S., contending that both national and international jurisprudence placed limits on claimed property rights, bid the arbitrators to consider two legal principles:

First. No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.

Second. The title is further limited. The things themselves are not given him, but only the usufruct or increase. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.<sup>4</sup>

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\* Jonathan C. Carlson is Professor of Law and Senior Associate to the President at The University of Iowa. He thanks "many students whose work contributed enormously to this paper, though I am responsible for any errors contained herein." He also thanks his research assistants Matthew Donnelly, Jason Waltrip, and Kevin Burns who provided "invaluable assistance on many parts of the paper." Further, he thanks Jonathan DeCarlo, Vermont Law School '09, for a memorandum on the Common Heritage of Mankind principle "that usefully helped the discussion in this paper." He adds: "I was very lucky also to have generous and helpful feedback from Burns Weston in several drafts of this paper."

<sup>1</sup> Concluded, May 9, 1992. Entered into force, Mar. 21, 1994. 1771 U.N.T.S. 107, *reprinted in* 31 I.L.M. 849 (1992) and 5 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS V.E.19 (Burns H. Weston & Jonathan C. Carlson eds., 1994-) (hereinafter "Weston & Carlson").

<sup>2</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change. *Concluded*, Dec. 10, 1997. Entered into force, 16 Feb. 2005. FCCC/CP/1997/7/Add.1; *reprinted in* 37 I.L.M. 32 (1998) and 5 Weston & Carlson V.E.20d.

<sup>3</sup> See IX Fur Seal Arbitration 2-8 (Washington: Government Printing Office 1895), involving U.S. legislation aimed at protecting populations of fur-bearing animals, including fur-seals, from over-exploitation and interpreted by the U.S. Treasury to permit seizure of Canadian (British) vessels engaged in the hunting and killing of seals on the high seas at least 60 miles from the nearest U.S.-owned land at a time when today's exclusive economic zone (EEZ) was non-existent and the three-mile territorial sea rule applied.

<sup>4</sup> See IX Fur Seal Arbitration 66 (Washington: Government Printing Office 1895) (argument of the United States).

Thereafter, in a passage that could have been written with present-day greenhouse gases and climate change in mind, the U.S. expressed the ideal of intergenerational justice:

The second proposition above advanced, namely, that the title which nature bestows upon man to her gifts is of the usufruct only, is, indeed, but a corollary from that which has just been discussed, or rather a part of it, for in saying that the gift is not to this nation or that, but to mankind, all generations, future as well as present, are intended. The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to use the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants. The title of each generation may be described in a term familiar to English lawyers as limited to an estate for life; or it may with equal propriety be said to be coupled with a trust to transmit the inheritance to those who succeed in at least as good a condition as it was found, reasonable use only excepted. That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation.<sup>5</sup>

Regrettably, but perhaps understandably from an 1893 perspective, the arbitrators did not accept this U.S. argument. It was a “novel” argument, they said, insufficiently grounded in international law, so that the practical result of giving effect to it would be to rule that an international tribunal, bound by the terms of a treaty establishing it, can make new law and apply it retrospectively.

However understandable this 1893 ruling from a procedural standpoint, at this time when global climate change threatens severely, it would seem an unwise and potentially disastrous precedent from a substantive perspective. Yet, except for the theorizing of environmentally aware moral philosophers,<sup>6</sup> it was not until the 1970s and 1980s that the notion that present generations have a duty to protect the environment for the sake of future generations was again to emerge in international environmental law. Even then, however, expressions of concern for the interests of future generations, though powerfully stated, did not lead to the articulation of officially recognized international norms imposing a positive law duty on states to pursue intergenerational equity or justice in environmental policy.<sup>7</sup>

This is not to say that the idea of intergenerational justice has been irrelevant to the development of international environmental law. To the contrary, concern for future generations continues to be a motivating for international environmental lawmaking, and many international environmental treaties promote intergenerational justice by helping to preserve and protect important environmental resources. But intergenerational ecological justice has remained largely a policy goal, or perhaps even a general principle of international environmental law implemented through specific obligations directed at specific legal problems. While it certainly has some legal relevance—for example, in the interpretation of

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<sup>5</sup> *Id.*

<sup>6</sup> See Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL. L. 375 (2008), wherein the author endorses the pioneering work of Alfred North Whitehead. Weston’s essay is available also as Background Paper No. 2 in this Appendix A of the CLI Policy Paper.

<sup>7</sup> EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 30 (1989).

environmental treaties<sup>8</sup>—the governing elites of the world community appear so far not to have articulated or endorsed any general and independent legal rights or obligations relating to intergenerational ecological justice.

International legal developments from the 1990s to the present have only created more uncertainty about the nature and content of the duties of states to future generations. Four such developments are especially to be noted.

First, neither the 1992 UN Framework Convention on Climate Change (UNFCCC)<sup>9</sup> nor the Kyoto Protocol,<sup>10</sup> the only two existing treaties expressly and specifically directed at climate change, provides legal recourse against those states that insist on continuing to increase their GHG emissions. Although the UNFCCC obligates nations to adopt policies to limit climate change, that obligation is subject to the right of nations to maintain sustainable growth and is not specific about what steps must be taken. Under the Kyoto Protocol, developed nations that have ratified the Protocol have specific binding commitments, but the world's biggest greenhouse gas emitters—the United States and China—either have not ratified the protocol (the U.S.) or have no binding commitments under it (China).

Second, the emergence of the concept of sustainable development, which stresses that environmental policy and concerns for future generations “must be limited by the requirement that the important needs of present generations are considered,”<sup>11</sup> has created significant obstacles to the translation of intergenerational justice from a normative ideal into a clear legal obligation. Although the concept of sustainable development implies a balancing of environmental concerns with present developmental priorities, it is possible to argue that significant environmental harm in pursuit of development is appropriate, because of the economic and material benefits development brings to living and future human beings, even if it means that future generations will inherit a degraded environment as a result. As the world community has addressed the concept of sustainable development over the years, increasingly its emphasis has been on development for the benefit of lives in being and less on environmental protection for the benefit of future generations. The 2002 Johannesburg Declaration on Sustainable Development—referencing the interests of future generations only twice in 37 paragraphs and without mention in either instance of specifically environmental obligations to future generations—is a noteworthy case in point.<sup>12</sup>

Third, the concept of “the common heritage of mankind,” while containing elements that could be interpreted to protect future generations, has been narrowly accepted. A principle of the law of the sea relative at least to deep seabed resources, it was offered as a basis for climate protection in the 1980s. However, the world community of states has so far rejected application of the concept to climate change, opting instead to aver simply that climate change is a “common concern” of all states.

Fourth, an increasing emphasis in at least academic circles on the human rights dimensions of environmental degradation does not yet appear to have been widely or unambiguously accepted in the corridors of legal power. Despite forceful arguments by respected legal scholars and other commentators for recognition of a “third generation” or “third wave” human right claim to a “clean,” “healthy,” “ecologically balanced,” or “sustainable” environment (local and global), such a right appears far from having reached the point where it might be considered to impose specific obligations on states to take effective action against climate change. While other, more widely accepted human rights are also implicated by climate change, they are useful primarily in providing a means to call attention to the grave nature of the threats posed

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<sup>8</sup> See Philippe Sands, *Protecting Future Generations: Precedents and Practicalities in FUTURE GENERATIONS AND INTERNATIONAL LAW* 83, 86 (EMMANUEL AGIUS & SALVINO BUSITTIL, eds. 1998).

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Supra* note 2.

<sup>11</sup> ALEXANDER GILLESPIE, *INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS* 119 (1997).

<sup>12</sup> Johannesburg Declaration on Sustainable Development, Sept. 4, 2002, UN Doc A/CONF.199/20 at 1 (2002).

by climate change. It is too early to conclude that human rights claims will generate specific remedies that obligate state action to reduce greenhouse gas emissions or take other significant steps to mitigate the climate-change threat.

Finally, principles of international environmental law, such as customary law obligation to prevent transboundary harm and the general principle known as the precautionary principle are ineffective bases for international legal action against major greenhouse gas-emitting nations at present. The obligation to prevent transboundary harm is difficult to apply in the climate change context because of the near impossibility of attributing climate harm to the wrongful act of a particular country. The primary cause of global climate change is the increasing concentration of greenhouse gases in the atmosphere, and the human activities responsible for that increase are legion and widespread. Moreover, much of the near-term risk of climate change is the result of emissions that occurred long before the danger was understood. As for the precautionary principle, while it urges that states and private sector actors cannot use “lack of scientific certainty” as an excuse for inaction on climate change, lack of cost-effectiveness is an expressed reason for non-action<sup>13</sup> and a reason frequently offered by those who oppose significant current reductions in GHG emissions.<sup>14</sup>

These weaknesses in existing international environmental legal rules mean that the problem of global climate change cannot and will not be effectively addressed unless there is further law-making by the international legal community that recognizes the grave risks that global climate change poses for the planet—and the duty that current generations owe to future generations to begin addressing those risks now, before they materialize in planetary disaster.

For more extended discussion, see unabridged CLI Background Paper No. 8, next in this Appendix A of the CLI Policy Paper.

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<sup>13</sup> See Principle 15 of the Rio Declaration on Environment and Development (“lack of full scientific certainty shall not be used as a reason for postponing cost-effective” environmental action). Adopted. June 13, 1992. U.N. Doc. A/CONF.151/26 (vol I) (1992); reprinted in 31 I.L.M. 874 (1992) and 5 Weston & Carlson V.B.16.

<sup>14</sup> See generally BJORN LOMBORG, COOL IT (2007).

## CLI BACKGROUND PAPER NO. 8

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This CLI Background Paper addresses two sets of issues. First, does international law, in general, and international environmental law (IEL), in particular, recognize intergenerational rights and duties as *legal* rights and duties? And, if intergenerational rights and duties do have *legal* character, are they sufficiently well-defined in content to provide a basis for making effective legal claims in relation to global climate change? Second, are there other legal doctrines, principles, or rules in IEL that provide a basis for making such legal claims, even if concepts of intergenerational rights and duties are insufficiently recognized to support such claims?

Before addressing these issues in depth, it is important to clarify the focus of our concern. The goal of this discussion is to determine whether there are established doctrines, principles, and rules of international law generally or IEL specifically that can convincingly be construed (a) to require effective state action to combat climate change and/or (b) to warrant sanctions against States (including an award of reparations) for their contributions (or the contributions of their citizens) to global climate change. To the extent that such norms exist, the problem of combating climate change may be simply one of enforcing international law. If they do not exist, then the issue we face is prescriptive; we then must develop law that is adequate to the enormous task we face.

To this end, I take a strict interpretative approach to the content of international law. I seek to identify international legal norms (doctrines, principles, rules<sup>1</sup>) that are sufficiently clear and binding to provide the basis for decision in resolving international disputes and, in particular, the dispute over how States should respond to the challenge of global warming. While it is acknowledged that “in a rapidly developing field such as international environmental law, [so-called soft law instruments have] certain inherent advantages,”<sup>2</sup> those advantages are in the nature of promoting the progressive development of international law or assisting in the long-term formulation of sound international policy.<sup>3</sup>

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<sup>1</sup> Here I adopt Ronald Dworkin’s distinction between rules, which denote norms that supply a definite answer to a particular legal question if the facts stipulated by the rule are given, and principles, which provide reasons for ruling in one way or another that a decision-maker must consider, but do not necessarily control the outcome on any particular set of facts. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 24–26 (1977).

<sup>2</sup> P.W. BIRNIE & A.E. BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 17, 25–27 (2d ed. 2002). By “soft law,” I mean norms and principles that may be said to have some legal character but that are deliberately vague in their formulation and ambiguous. Birnie and Boyle observe that “the term ‘soft law’ is perhaps unfortunate since it insinuates that the approach is lacking in significance or that it is not law . . .” But, they go on to observe, soft law is “much more” than “vague legal norms.” It has “made an important contribution in establishing a new legal order” in international environmental law. *Id.* at 25–26.

<sup>3</sup> See D. HUNTER, J. SALZMAN & D. ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 376–377 (2d ed. 2002) for a useful discussion of the different functions of the “principles and concepts” of international environmental law, even when those principles are admittedly non-binding.

“Soft-law” norms are generally not intended to be applied against States as binding rules, and soft-law “standards are often so vague that third-party adjudication would be impossible even if it were provided for.”<sup>4</sup> Thus, I here eschew soft law and look for evidence of “hard law” norms that can be marshaled in support of action against global warming. At the same time, I recognize that there are instances deserving of attention and mention where soft law plays a significant role in shaping community expectations and thus is not easily distinguished from hard law. One prominent example is the 1948 Universal Declaration of Human Rights,<sup>5</sup> a resolution of the UN General Assembly, numerous provisions of which have been deemed binding notwithstanding that the UN Charter declares General Assembly resolutions to be non-binding.

This paper is restrictive in another sense. Despite my belief that non-State actors and actions play a significant and growing role in the modern global system and that they have a profound impact on the development and enforcement of international law, States, for good or ill, remain “the effective end of the road for man as a social animal.”<sup>6</sup> Accordingly, the focus of my discussion is on the law-making activities of States and other juridical or law-making bodies that States have created and endowed with international legal personality. Again, this is because my discussion is centered on the question of whether existing doctrines of international environmental law provide a *firm* foundation for action to address global climate change. I thus look primarily for norms that have been recognized by States as binding law whether through the treaty-making process, through their acceptance as norms of customary international law, or via other accepted law-making processes, including actions of international bodies empowered by States to recognize or create rules of international law.

## A. International Environmental Law and Intergenerational Rights and Duties

### 1. The Bering Sea Fur Seals Arbitration

To my best knowledge, the earliest effort to establish intergenerational justice as a *legal* imperative under international law was made by the United States in the 1893 *Bering Sea Fur Seals Arbitration*.<sup>7</sup> Although the U.S. failed to convince the arbitrators to recognize an intergenerational justice principle enforceable in law, the case is nonetheless instructive background to any discussion of the re-emergence of intergenerational justice as a key concept of international environmental protection in modern times.

The basic facts of the arbitration are simply stated. After acquiring the Alaska territory by purchase from Russia in 1867, the United States adopted legislation aimed at protecting populations of fur-bearing animals, including fur-seals, from over-exploitation. Acting on a broad interpretation of that legislation, the U.S. Treasury Department seized several British (Canadian) vessels that were engaged in the hunting and killing of seals on the high seas, at least 60 miles from the nearest U.S.-owned land. The seals being hunted by the British vessels were known to make their home on the Pribolof Islands, within US territory, and the evidence suggested that pelagic sealing by the British and others was decimating the seal herd. After lengthy negotiations, the U.S. and Great Britain agreed to submit their differences to arbitration.

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<sup>4</sup> Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 A.J.I.L. 259, 269 (1992).

<sup>5</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (Dec. 10, 1948), *reprinted in* 3 BURNS H. WESTON & JONATHAN C. CARLSON, *INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS III.A.1* (1994–) (hereinafter *Weston & Carlson*).

<sup>6</sup> RUPERT EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES* 96 (1960).

<sup>7</sup> *See I-XVI FUR SEAL ARBITRATION* (Washington, Gov't Printing Office 1895).

In the arbitral proceeding, the U.S. claimed that it had the authority to protect “its” seals from being eliminated as a species, even if providing such protection required it to interfere with high-seas sealing by the vessels of other nations. The difficulty for the United States was that the principle of freedom of the seas, including freedom to hunt and take wild animals, was widely recognized in international law at the time. The position of the U.S.—that it could interfere with high seas freedoms to prevent the extinction of an important species of wild animal—had virtually no support in either State practice or treaty law.

To overcome that problem, the U.S. began its argument by insisting that although the actual practice and usages of nations are the best evidence of what is agreed upon as the law of nations, it is not the only evidence. These prove what nations have *in fact* agreed to as binding law. But, in the absence of evidence to the contrary, nations are to be *presumed* to agree upon what natural and universal justice dictates. It is upon the basis of this presumption that municipal law is from time to time developed and enlarged by the decisions of judicial tribunals and jurists which make up the unwritten municipal jurisprudence. Sovereign states are presumed to have sanctioned as law the general principles of justice, and this constitutes the authority of municipal tribunals to declare the law in cases where legislation is silent. . . . So also in international law, if a case arises for which the practice and usages of nations have furnished no rule, an international tribunal like the present is not to infer that no rule exists. The consent of nations is to be presumed in favor of the dictates of natural justice, and that source never fails to supply a rule. . . .<sup>8</sup>

Absent any treaty, even absent proof of actual state practice, the U.S. argued, international law still includes, as enforceable norms, those “principles and rules which both nations and all the Arbitrators alike acknowledge; that is to say, those which are dictated by that *general standard of justice* upon which civilized nations are agreed.”<sup>9</sup> “All law,” the U.S. said,

whether it be that which governs the conduct of nations, or of individuals, is but a part of the great domain of ethics. It is founded, in each case, upon the nature of man and the environment in which he is placed. The formal rules may indeed be varied according to the differing conditions for which they are framed, but the spirit and essence are everywhere and always the same. . . . This original and universal source of all law is variously designated by different writers; sometimes as “the law of nature,” sometimes as “natural justice,” sometimes as “the dictates of right reason;” but, however described, the same thing is intended. . . .<sup>10</sup>

Thus, the U.S. contended, “the sources to which we are to look for the international standard of justice” include the same ethical principles on which one relies in domestic legal disputes where there is no legislation or clearly established rule to resolve a dispute.

Having established this foundational justification for looking beyond State practice and treaty norms to “the dictates of right reason,” as ascertained by an examination of “the nature of man and the environment in which he is placed,” the U.S. proceeded to construct an elaborate justification for its seizure of British vessels on the high seas, an act that seemed clearly contrary to established international law. The U.S. argument was lengthy and detailed, and it cannot

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<sup>8</sup> *Id.* at 7–8.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 3–4.

be fully canvassed here. What is important for present purposes is the role that the concept of intergenerational justice played in the development of the argument.

The central element of the U.S. argument was its claim to ownership of the seals—a property right. To support its claim, the U.S. offered a narrow analysis, rooted in established municipal and international doctrines of property law. But, recognizing the strength of the counter-argument (that wild animals are owned by no one until they are taken and are therefore subject to capture by all), the U.S. spent much of its written argument justifying its claim of a property right by means of a policy analysis rooted in natural law reasoning.

“Why is it that society chooses to award, through the instrumentality of the law, a right of property in anything?” asked the United States.<sup>11</sup> The answer, it asserted, was clear. At least at the outset, society creates and protects rights of property out of necessity—if it did not protect property rights, society could not exist because its members would be in constant war with one another for control over resources. As society matures, the justification for property changes, so that in modern society the primary justification is that respect for property encourages individuals to undertake to improve themselves by increasing their possessions. Those individual efforts to acquire property are socially sanctioned because “the improvement of society, it has been found, can be effected, or best effected, only through the improvement of its individual members.” Society’s

progress and advancement—that is to say, civilization—demands that individual effort should be encouraged by offering as its reward the exclusive ownership of everything which it can produce. In these two principal necessities of human condition, the peace of society, and its progress and advancement in wealth and numbers, both founded upon the strongest desires of man’s nature, the institution of property has its foundation. . . .<sup>12</sup>

Thus, property rights are granted to serve social ends.

So how does this understanding of the institution of property help the U.S. claim with regard to the seals from the Pribilof Islands? , If we acknowledge that property is instituted by societies to serve social ends—i.e., property is a construct of society, not a pre-existing right that societies simply respect—then we also see that societies have always and everywhere placed limitations on property rights as necessary to protect social interests. And, in particular, not only are property rights given *for the benefit* of society at large, but there is a general recognition that they must be exercised in light of that purpose.

Thus, said the U.S., the arbitrators should consider two *legal* principles found in both municipal (i.e., national) and international jurisprudence that place limits on claimed property rights.

First. No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a *trust for the benefit of mankind*.

Second. The title is further limited. The things themselves are not given him, but only the *usufruct* or *increase*. He is but the custodian of the stock, or principal thing, *holding it in trust for the present and future generations of man*.<sup>13</sup>

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<sup>11</sup> *Id.* at 49.

<sup>12</sup> *Id.* at 52–53.

<sup>13</sup> *Id.* at 59 (emphasis added).

The following passage, although more than 100 years old, might have been written today, and is eloquent in its statement of the intergenerational justice ideal:

The second proposition above advanced, namely, that the title which nature bestows upon man to her gifts is of the *usufruct* only, is, indeed, but a corollary from that which has just been discussed, or rather a part of it, for in saying that *the gift is not to this nation or that, but to mankind, all generations, future as well as present, are intended*. The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to use the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants. The title of each generation may be described in a term familiar to English lawyers as limited to an estate for life; or it may with equal propriety be said to be coupled with a trust to transmit the inheritance to those who succeed in at least as good a condition as it was found, reasonable use only excepted. That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation.<sup>14</sup>

From this principle, the U.S. drew the following conclusion. No nation, it argued, could claim a right to itself, or to its citizens, to destroy utterly a useful species of animal. And any claimed property rule—such as the rule concerning the taking of wild animals—that would lead to the extinction of a species must give way to an alternative property right that would protect that species. Moreover, to the extent that a different property rule could serve the end of protecting the interests of future generations, then that property rule should be favored in international law and in the decision of the tribunal:

[T]he possession and control of, and over, this race of animals [is] bestowed upon the United States in virtue of their ownership of the lands to which it resorts. This ownership carries with it the *power to destroy* the race almost at a single stroke. It carries with it also, if interference by other nations is withheld, the power to forever preserve. The power to destroy is shared by other nations. The power to use, and at the same time to preserve, belongs to the United States alone. This power carries with it the highest

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<sup>14</sup> *Id.* at 66. And further, at 67:

A large share of the legislative policy of civilized states is devoted to making provision for future generations. Taxation is sought to be limited to the annual income of society. Permanent institutions of science are established for the purpose of acquiring a fuller knowledge of natural laws, to the end that waste may be restricted, the earth be made more fruitful, and the stock of useful animals increased. The destruction of useful wild animals is sought to be prevented by game laws, and the attempt is even made to restock the limitless areas of the seas with animal life which may be made subservient to man.

And yet more, at 67:

The same policy is observable in the ordinary municipal law of states. Whenever the possessor of property is incapable of good husbandry, and therefore liable to waste or misapply that part of the wealth of society which is confided to him, he is removed from the custody, and a more prudent guardian substituted in his place. Infants, idiots, and insane persons are deprived of the control of their property, and the state assumes the guardianship. This policy is adopted not merely out of regard to the private interests of the present owner, but in order also to promote the permanent objects of society by protecting the interests of future generations.

I am grateful to John Davidson for the observation that these arguments closely echo those made by Thomas Jefferson in a letter to James Madison written in 1789. In that letter, Jefferson argued “that the earth belongs [only] in usufruct to the living” and that present generations should not be able to contract debts or pass laws to bind future generations lest by their laws and debts they “eat up the usufruct of the lands for several generations to come . . .” Thomas Jefferson, *Letter to James Madison, 6 September 1789, reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 392* (Julian P. Boyd, ed. 1958).

obligation to use it for the purpose for which it was bestowed. It is in the highest and truest sense a trust for the benefit of mankind. The United States acknowledge the trust and have hitherto discharged it. Can anything be clearer as a moral, and under natural laws, a legal obligation than the duty of other nations to refrain from any action which will prevent or impede the performance of that trust?<sup>15</sup>

I have devoted considerable space to reciting the arguments of the U.S. in the *Fur Seals Arbitration* for two reasons. First, it is impossible to read these arguments without being struck by their contemporary flavor and relevance. In many respects they anticipate the arguments made today on behalf of intergenerational justice. The ethical foundations of the U.S. argument are similar if not identical to the ethical arguments made by modern theorists,<sup>16</sup> as is the evidence used by the U.S. advocates to demonstrate social acceptance of intergenerational rights and duties (e.g., the references to legal doctrines of trust as well as legislative policies aimed at protecting the rights of future generations).<sup>17</sup>

Second, and unfortunately, the U.S. argument is instructive because, despite its persuasive power, it failed. The arbitrators rejected the U.S. claim (albeit in a split decision) and for a reason that is also very contemporary in tone: their role, as they saw it, was to affirm existing positive international law as recognized by the custom and practices of States. To go beyond that law, as explained by one of the U.S. arbitrators (Senator Morgan, who dissented), would be to exceed their warrant as arbitrators:

My colleague [Justice Harlan] and I concurred in the view that the [arbitral] treaty presented [the question of the right of the U.S. to protect the seals] in its broadest aspect [including the question of the equity of the situation]. Our honorable colleagues [on the Tribunal], however, did not so construe the scope of the duty prescribed to the Tribunal by the treaty. They considered that these questions of the right of property and protection in respect to the fur-seals were to be decided upon the existing state of the law, and, finding no existing precedent in the international law, they did not feel warranted in creating one.

As the rights claimed by the United States could only be supported by international law, in their estimation, and inasmuch as that law is silent on the subject, they felt that under the treaty they could find no legal foundation for the rights claimed that extended beyond the limits of the territorial jurisdiction of the United States.<sup>18</sup>

However, having ruled against the U.S. on its property claim, the Tribunal exercised its authority (under the arbitration agreement) to establish regulations, binding on both Britain and the U.S., to limit their taking of fur seals in the Bering Sea.

Alphonse De Courcel, President of the Tribunal and one of the arbitrators who ruled against the U.S., explained why the U.S. property claim failed, and what the Tribunal's ruling might mean for the future:

We have felt obliged to maintain intact the fundamental principles of that august law of nations, which extends itself like the vault of heaven above all countries, and which borrows the laws of nature

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<sup>15</sup> *Id.* at 92–93.

<sup>16</sup> For convenient summary, see Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 Vt. J. ENVTL. L. 375 (2008).

<sup>17</sup> IX Fur Seal Arbitration, *supra* note 7, at 59–67.

<sup>18</sup> I Fur Seal Arbitration, *supra* note 7, at 73.

herself to protect the peoples of the earth, one against another, by inculcating in them the dictates of mutual goodwill....

Hitherto the nations were agreed to leave out of special legislation the vast domain of the seas, as in times of old, according to the poets, the earth itself was common to all men, who gathered its fruits at their will, without limitation or control. You know that even to-day dreamers believe it possible to bring back humanity to that golden age. The sea, however, like the earth, has become small for men, who, like the hero Alexander, and no less ardent for labor than he was for glory, feel confined in a world too narrow. Our work is a first attempt at a sharing of the products of the ocean, which has hitherto been undivided, and at applying a rule to things which escaped every other law but that of the first occupant. If this attempt succeeds, it will doubtless be followed by numerous imitations, until the entire planet—until the waters as well as the continents—will have become the subject of a careful partition. Then, perhaps, the conception of property may change amongst men.<sup>19</sup>

Lest the Tribunal President's point be too subtly made, its thrust seems to be as follows:

*We've upheld the traditional rule that wild animals on the high seas can be taken by anyone "without limitation or control." We know this rule is no longer suited to the conditions of the world. We hope that our effort to regulate the activities of the US and Britain will lead to similar efforts elsewhere on the planet and then, perhaps, "the concept of property may change amongst men.*

In other words, the Tribunal seems to have concluded that it is for the world's sovereign States, through their agreements and practices, to change the traditional concept that the resources of the sea are available to the first taker. It is not for the Tribunal to change that rule, even if the rule is inconsistent with the preservation of the resources for both present and future generations and even if the rule is no longer consistent with precepts of natural law.

In sum, the Arbitral Tribunal was unwilling to derive a new rule of international law from the notion that existing humans have an obligation to preserve renewable resources for the benefit of future generations. It was given, however, the power to regulate the taking of fur seals in the event that it concluded that the U.S. had no right to limit high-seas sealing. And, significantly, the Tribunal exercised that power specifically to ensure that the number of fur seals taken by the U.S. and Great Britain did not exceed the capacity of the seal herds to sustain themselves. Thus, at the end of the day, the concept of intergenerational justice failed to generate a new legal rule of general applicability, but did serve as at least the ethical or moral foundation for the adoption of rules designed to preserve a particular species from over-exploitation in a particular context.

## **2. Intergenerational Justice in Modern International Environmental Law**

Intergenerational justice re-emerged as a policy justification for the adoption of binding rules of treaty law in 1946. In that year, 15 whaling nations signed the International Convention for the Regulation of Whaling,<sup>20</sup> explicitly invoking "the interests of the nations of the world in safeguarding for future generations the great natural resources represented by the

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<sup>19</sup> *Id.* at 71–72.

<sup>20</sup> Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, reprinted in 5 Weston & Carlson V.H.2, *supra* note 5.

whale stocks” in the Convention’s Preamble. Previous international efforts to regulate the taking of whales had mentioned the desirability of maintaining whale stocks only “to secure the prosperity of the whaling industry.”<sup>21</sup>

In the 1970s, following the first Earth Day in 1970, expressions of concern for intergenerational justice became a regular part of international environmental policy and legal discourse.<sup>22</sup> Principle 1 of the 1972 Stockholm Declaration expressed humankind’s “solemn responsibility to protect and improve the environment for present and future generations.”<sup>23</sup> Many environmental treaties of the era similarly referenced the protection of future generations as among the motivations for adoption of the treaty. And the 1974 UN Charter on the Economic Rights and Duties of States made a first step toward implying the existence of an international legal duty of intergenerational justice: “The protection, preservation and the enhancement of the environment for the present and future generations is the responsibility of all states.”<sup>24</sup> That statement was subsequently echoed in a number of U.N. General Assembly Resolutions, including resolutions relating to climate change.<sup>25</sup> In some cases the language used was the language of duty, as in the “responsibility of States for the preservation of nature for present and future generations.” In other cases, the desirability of preserving nature “for the benefit of present and future generations” is invoked without any explicit statement of a duty to do so.<sup>26</sup>

In light of these developments, it was natural that the question of whether the concept of intergenerational justice is an enforceable principle of international law should again become a concern of the international community. The issue was taken up by Edith Brown Weiss in her 1984 article, *The Planetary Trust: Conservation and Intergenerational Equity*.<sup>27</sup> Arguing that a “fiduciary obligation to future generations” ought not only to be reflected in customary international law but also to be considered a norm *erga omnes*, Brown Weiss nonetheless concluded that the many international expressions on this point were not sufficiently clear in their statement of a duty or sufficiently precise in their explication of the content of that duty to generate customary law.

<sup>21</sup> The Preamble of the predecessor 1937 International Agreement for the Regulation of Whaling (June 8, 1937, 52 Stat. 1460, 190 L.N.T.S. 79) did not mention future generations, stating only that the Agreement was aimed at “secur[ing] the prosperity of the whaling industry and, for that purpose, [maintaining] the stock of whales.”

<sup>22</sup> See *infra* notes 24–27. It is perhaps worth noting that concern for intergenerational justice in the use of environmental resources is hardly a new concept. It is at least as old as the Old Testament of the Judeo-Christian Bible; see Book of Leviticus, Ch. 25. Indeed, a general philosophy of intergenerational justice (or equity) has been expressed in both Western and non-Western political and social thought for many centuries. See ALEXANDER GILLESPIE, *INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS* 110–111 (1997); Weston, *supra* note 16. See also C.G. WEERAMANTRY, *UNIVERSALISING INTERNATIONAL LAW* 434–35, 438–44 (2004) (discussion focused focusing on concerns for sustainable development in ancient non-Western civilizations, but clearly including considerations of respect for the interests of future generations).

<sup>23</sup> Principle 1, Stockholm Declaration of the United Nations Conference on the Human Environment., princ. 1, UN Doc. A/CONF. 48/14 (1972).

<sup>24</sup> Art. 30, Charter of Economic Rights and Duties of States, art. 30, UNGA Res. 3281 (XXIX) (1974). [ Dec. 12, 1974, GA Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975), *and in* 4 Weston & Carlson IV.F.5, *supra* note 5.

<sup>25</sup> See U.N. Resolution on the Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, para. 1, G.A. Res. 35/8 on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, para. 1, U.N. Doc A/35/8 (1980); U.N. General Assembly Resolution 37/7 adopting a World Charter for Nature, pmb. & para. 5, G.A. Res. 37/7 (Annex), U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982), *reprinted in* 22 I.L.M. 455 (1983) and 5 Weston & Carlson V.B.11, *supra* note 5; G.A. Res. 43/53 Resolution on the Protection of the Global Climate for Present and Future Generations of Mankind, G.A. Res. 43/53, U.N. Doc A/44/862 (1989). See generally GILLESPIE, *supra* note 22, at 107-10 (1997).

<sup>26</sup> *E.g.*, World Charter for Nature, Oct, 28, 1982, G.A. Res. 37/7 (Annex), U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1983), *reprinted in* 22 I.L.M. 455 (1983) and 5 Weston & Carlson V.B.11, *supra* note 5.

<sup>27</sup> 11 *ECOLOGY LAW Q.* 495 (1984).

While [many international documents] express deep concern for future generations and implicitly assume some duty toward them, taken alone they do not suffice to establish a fiduciary duty to future generations as an existing norm of customary international law. Moreover, the duty they create has not been defined with sufficient precision to be treated as a rule of customary international law.<sup>28</sup>

Brown Weiss therefore concluded that the “fiduciary obligation to future generations” was merely “*de lege ferenda*,” a concept proposed as law, but not yet carrying legal force.<sup>29</sup> In her 1988 elaboration of the intergenerational justice concept (she used the term “equity”), Brown Weiss again observed that “the translation of the expressed concern for future generations into normative obligation . . . to protect future generations still needs to be done.”<sup>30</sup>

Other contemporary proponents of the concept of intergenerational justice shared Brown Weiss’s perspective that it had not then attained legal status, but they did not necessarily share her belief that the future of the concept was as an *erga omnes* obligation of customary international law. Thus, Lothar Gündling of the Max Planck Institute argues that the problem of identifying the “concrete obligations” that must be fulfilled “to meet our responsibility to future generations is “a matter for treaty law” and, moreover, that those obligations had to consider “the unequal development that exists [in the world today]” and include “principles of allocation designed to overcome that inequality.” Thus Gündling writes:

We need universal and unequivocal recognition of the duty to protect the interests of future generations, as well as of the principles necessary to implement that duty. This recognition cannot be left to the development of customary law but, rather, has to be achieved on the basis of a treaty. I would therefore like to join all those who argue for a universal convention on the basic obligations of states to protect the environment; the duty to future generations should have a prominent place in the framework of this convention. . . . In addition, the convention would have to allow for the economic development of the states of Africa, Asia and Latin America so as to meet the requirement of equity within our present generation and to solve the problems of poverty-based environmental degradation.<sup>31</sup>

But developments from the late 1980s to the present have not yet resulted among the world’s governing elites in any clear principles or rules of international environmental law designed to impose specific legal duties on present generations to respect the interests of future generations. Although it certainly is possible to identify many new and specific principles and rules of international environmental law that require the preservation of environmental resources in ways that will, in fact, protect both present and future generations,<sup>32</sup> in many cases these rules do not expressly rest

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<sup>28</sup> *Id.* at 543–44.

<sup>29</sup> *Id.* at 542.

<sup>30</sup> EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 30 (1989).

<sup>31</sup> Lothar Gündling, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Responsibility to Future Generations*, 84 AM. J. INT’L L. 207, 210, 212 (1990).

<sup>32</sup> For example, modern treaty and customary rules concerning the taking of living resources from the oceans expressly require States to set limits on such takings so as to ensure sustainability. *See, e.g.*, 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 5, 2167 U.N.T.S. 3, *reprinted in* 34 I.L.M. 1542 (1995), *and in* 5 Weston & Carlson V.H.24, *supra* note 5.

on principles of intergenerational justice nor are they necessarily consistent with such principles.<sup>33</sup> In customary law, there has been no explicit translation of “expressed concern for future generations into normative obligation.”<sup>34</sup> Nor has the interstate community agreed upon specific treaty rules that produce clear rights and obligations relating to intergenerational justice.<sup>35</sup>

To the contrary, the emergence and development of the concept of sustainable development has created, if anything, even more uncertainty about the content of a duty to future generations, how that duty should be implemented, and what countervailing considerations might warrant sacrificing the environmental interests of the future for the developmental needs of the present. Thus, the Rio Declaration does not affirm the existence of any duty to preserve the environment for future citizens of the planet or of any right in those future generations to inherit environmental resources of a particular quality. Instead, it expresses a “right to development” which “must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>36</sup> While this passage does speak of the “environmental needs of . . . future generations,” it does not use legal language of rights or duties. By contrast, it speaks of the “developmental needs . . . of future generations,” but it also invokes legal language to affirm the existence of a “right to development.” The implication is that environmental fairness toward future generations, while it is a relevant consideration influencing state action, is not a matter of legal obligation or rights.

The two main treaties associated with the Rio Conference—the U.N. Framework Convention on Climate Change and the Convention on Biological Diversity—both recite at the end of their preambles that the contracting parties are “determined to protect the climate system [to conserve and sustainably use biological diversity] for the benefit of present and future generations.”<sup>37</sup> But there is no translation of that objective into a legally-binding objective toward *future* generations in particular. The Climate Change Convention also states as a matter of principle that “the Parties *should* protect the climate system for the benefit of present and future generations of humankind.” The Biodiversity Convention similarly states that “sustainable use” of biological resources is an objective and obligation of the Parties, and

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<sup>33</sup> For example, the rule of sustainability in Article 5(b) of the Fish Stocks Agreement—maximum sustainable yield—does not necessarily mandate turning fish stocks over to future generations in the shape that they were received or even in a state that preserves to future generations the same access of present generations. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 5, 4 August 1995, 2167 U.N.T.S. 3, 34 I.L.M. 1542 (1995). Harvesting fish to the point of the maximum catch consistent with sustainability may reduce the overall stocks to such an extent that future generations will find it costlier to fish and will be forced to restrict access to new fishermen representing new, larger populations.

<sup>34</sup> BROWN WEISS, *supra* note 30.

<sup>35</sup> However, the objective of protecting the environment for the benefit of future generations continues to be frequently stated in regional agreements aimed at environmental protection, and is sometimes included in the operative provisions of the agreements as well as in their preambulatory material preambles. See, e.g., Framework Convention for the Protection of the Marine Environment of the Caspian Sea, pmbl., Nov. 4, 2003, available at <http://www.caspianenvironment.org/newsite/index.htm>; Black Sea Biodiversity and Landscape Conservation Protocol, art. 1.2, June 14, 2002, available at <http://www.blacksea-commission.org>; Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (Antigua Convention), arts. 1 & 3.1, Feb. 10, 2002, available at [http://www.unep.org/regionalseas/programmes/nonunep/nepacific/instruments/nep\\_convention.pdf](http://www.unep.org/regionalseas/programmes/nonunep/nepacific/instruments/nep_convention.pdf); Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, pmbl. & art. 4.2, 10 June 10, 1995, 1999 O.J.E.U. (L322) 34; Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), pmbl., 22 Sept. 22, 1992, reprinted in 32 I.L.M. 1072 (1993).

<sup>36</sup> Principle 3, Rio Declaration on Environment and Development, princ. 3, June 13, 1992, U.N. Doc. A/CONF.151/26 (vol I) (1992), reprinted in 31 I.L.M. 874 (1992), and in 5 Weston & Carlson V.B.16, *supra* note 5 [hereinafter Rio Declaration].

<sup>37</sup> United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 1771 U.N.T.S. 107, U.S. Treaty Doc. 102–38, reprinted in 31 I.L.M.849 (1992), and in 5 Weston & Carlson V.E.19; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, U.S. Treaty Doc. 103-2, reprinted in 31 I.L.M. 818 (1992), and in 5 Weston & Carlson V.H.22.

it defines “sustainable use” as use “that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.” But these varied references merely recite the goals of environmental protection—to benefit *both* present and future humans; they are far from defining any legal obligation owed by present generations to future humankind.<sup>38</sup>

This does not mean that concern for future generations is legally irrelevant. The principle of intergenerational equity would appropriately be taken into account in the interpretation of treaties that are designed to protect the environment for the benefit of future generations.<sup>39</sup> And this means that it could play a role in the judicial interpretation and clarification of ambiguous provisions of such important climate-related treaties as the U.N. Framework Convention on Climate Change,<sup>40</sup> despite the weak way in which the principle was stated in the text of that treaty.<sup>41</sup> But apart from the possibility that the principle of intergenerational equity might play a role in treaty interpretation, it appears not yet sufficiently established or defined in international environmental law as to permit it to be used to generate specific substantive international environmental obligations, absent the creation of such obligations through further prescriptive action by States.<sup>42</sup>

I stated earlier that the concept of sustainable development, while motivated in part by concern for future generations, might actually be considered to have made it harder to articulate clear and enforceable legal obligations of intergenerational justice. In the famous Brundtland Report of 1987, the World Commission on Environment and Development defined sustainable development as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>43</sup> By most estimations, the Commission’s work had a profound impact on the Rio Conference, as sustainable development became the theme of the Conference. From the perspective of some observers, the emphasis on development in an environmental conference was unfortunate. From the perspective of a concern for intergenerational justice, the emphasis on sustainability could be interpreted to include some very strict conservation requirements, perhaps including Brown Weiss’s suggested obligations of conservation of options, conservation of quality, and conservation of access.

But, in fact, as defined in the Brundtland Report and articulated in the various international instruments generated at Rio, the concept of sustainable development is problematic from an intergenerational justice perspective, at least as that concept was previously defined. Protecting the environment to the extent necessary to “avoid compromising

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<sup>38</sup> In the UNFCCC, references to future generations are limited to the its Preamble and to Article 3 (entitled *Principles*). There are no such references in the articles dealing with commitments. During negotiations over the Convention, there was considerable debate about Article 3. The U.S. United States resisted including any statement of principles in the body of the Convention, arguing that such statements either simply reflected “the intentions of the parties” and belonged in the Preamble or belonged in the commitments section if they were meant to be legally binding commitments. Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 501 (1993). In the end, the principles article was included in the treaty, but weakened in various ways. In particular, the provision on future generations was phrased in terms of what the Parties to the Convention “should” do, and a *chapeau* to the provision of principles was added to specify that the principles were to “guide” the parties in their actions, scarcely the stuff of firm legal obligations. *Id.* at 502.

<sup>39</sup> Philippe Sands, *Protecting Future Generations: Precedents and Practicalities*, in FUTURE GENERATIONS AND INTERNATIONAL LAW (Emmanuel Acius & Salving Basidial ed., 1998).

<sup>40</sup> *Id.* at 86 (“one might rely on the future generations principle in support of the argument that [Articles 4.2(a) and (b) of the UNFCCC] established a binding obligation on states to return their emissions of carbon dioxide and other greenhouse gases to 1990 levels by the year 2000 . . .”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> WORLD COMM’N ON ENV’T AND DEV., OUR COMMON FUTURE 8, 43 (1987).

the ability of future generations to meet their own *needs*<sup>44</sup> may be far from “maintain[ing] the quality of the planet so that it is passed on in no worse condition than the present generation received it.”<sup>45</sup> A vastly degraded environment could still be suitable for future generations to meet their needs, especially if the environmental degradation is undertaken to promote economic development and raise living standards.<sup>46</sup>

More fundamentally, the concept of sustainable development invites us to introduce a new dimension to intergenerational justice: fairness to future generations is not defined merely by the quality of the environmental resources we pass on to them. It is defined by the environmental needs of the present generation versus the needs of future generations. And it is also defined by the entire stock of assets that present generations will bequeath to future generations as a result of development, including the physical and social infrastructure of human society. Actions that permanently degrade the environment may nonetheless be warranted by strong benefits to living human beings (especially those living in impoverished conditions) and such action might especially be warranted (equitable) if the value of the assets that are produced by environmental degradation (and that thereby become available to future generations to assist them in meeting their needs) exceeds the value of an environment preserved in the state in which it was received. As one recent commentator observed:

We set ourselves a difficult task when we try to provide for future generations. I, for example, find it hard to believe myself worse off for the industrial revolution, although it undoubtedly degraded much of Europe’s natural environment, and few environmentalists would argue that it constituted a ‘sustainable’ form of development.<sup>47</sup>

The point is that the introduction into international discourse of the concept of sustainable development, with its focus on “needs” and development, created significant obstacles to the translation of intergenerational justice from a normative ideal into a clear legal obligation. The concept of sustainable development only complicates the question of what “justice” means in intergenerational relations.<sup>48</sup>

More recent international developments have further reduced the prospects that international discussions of the interests of future generations will inevitably lead to the development of legally enforceable intergenerational rights or duties. In environmental protection conventions, references to the interests of future generations continue, but rarely as a primary motivation and always unaccompanied by any clear statements of legal obligation or legal right.<sup>49</sup> The negotiation

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> BROWN WEISS, *supra* note 30, at 38.

<sup>46</sup> See also ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS, *supra* note 22, at 119 (“Any theory of future generations must be limited by the requirement that the important needs of present generations are considered.”).

<sup>47</sup> MARIA LEE, EU ENVIRONMENTAL LAW: CHALLENGES, CHANGE AND DECISION-MAKING 29 (2005).

<sup>48</sup> Bjørn Lomborg is perhaps the most well-known of those who argue that intergenerational equity or justice will sometimes mandate that we should *not* take action to address environmental problems. For several years he has made this argument explicitly in relation to global warming:

[T]he developing world will experience by far the most damage from global warming. Thus, when we spend resources to mitigate global warming we are in fact and to a large extent helping future inhabitants in the developing world. However, if we spend the same money directly in the Third World we would be helping present inhabitants in the developing world, and through them also their descendants.

BJØRN LOMBERG, THE SKEPTICAL ENVIRONMENTALIST 322 (2001). See also BJØRN LOMBERG, COOL IT (2007).

<sup>49</sup> For example, in the Preamble to the Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, U.N. Doc. UNEP/POPS/CONF 2, S. Treaty Doc. 107–5, reprinted in 40 I.L.M. 278 (2001), and in 5 Weston & Carlson V.I.14c, *supra* note 5, reference is made to the fact that these pollutants pose particular risks to as yet unborn children. But the reference is made with an

of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>50</sup> could have been the occasion for serious steps toward international implementation of a principle of intergenerational justice. For example, if intergenerational justice were accepted as an international legal obligation, one might have expected the Convention to acknowledge the obligation and to require some form of representation for future generations in environmental decision-making. Instead, the Convention acknowledged only the “right of every person of present and future generations to live in an environment *adequate* to his or her health and well-being.”<sup>51</sup> As far as environmental justice is concerned, “every [living] person” has the right and “the duty . . . to protect and improve the environment for the benefit of present and future generations.”<sup>52</sup> But there is no suggestion that those future generations themselves have any right to representation or even consideration in environmental decisions made today.

The international community’s most recent comprehensive statement on sustainable development, the Johannesburg Declaration on Sustainable Development,<sup>53</sup> is almost entirely silent on the question of the rights of future generations. In the entire 37-paragraph document, there are but two references to responsibilities to “future generations.” In Paragraph 6, there is a declaration of “our responsibility to one another, to the greater community of life and to our children.” In Paragraph 37, the conferees “solemnly pledge to the peoples of the world and the generations that will surely inherit this Earth that we are determined to ensure that our collective hope for sustainable development is realized.” Neither the declaration of responsibility “to our children” nor the pledge to “the generations that will surely inherit this Earth” implies the existence of any duty—moral or legal—to preserve the environment for their benefit.

For purposes of the CLI Policy Paper it ought to be clear that the development of the concept of intergenerational justice in international law has not reached a point where, though acceptable in theory,<sup>54</sup> it can be persuasively contended to exist as a *legal* claim relating to global warming in the positive law sense.<sup>55</sup> Nonetheless, there are continuing efforts within intergovernmental organizations and in the negotiation of international agreements to further develop the concept of intergenerational justice and concern for future generations as a fundamental responsibility of present generations.<sup>56</sup>

## B. Common Heritage of Mankind

Although the precise meaning of “common heritage of mankind” is subject to disagreement, the international community’s declaration of an area as subject to common heritage principles generally entails the conclusions that (a)

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emphasis on the present. The Parties express their awareness “of the health concerns . . . resulting from local exposure to persistent organic pollutants, in particular impacts upon women and, through them, upon future generations.”

<sup>50</sup> Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, *reprinted in* 5 Weston & Carlson V.B.18, *supra* note 5.

<sup>51</sup> *Id.* art. 1. Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

<sup>52</sup> *Id.* pmbl.

<sup>53</sup> Sept. 4, 2002, U.N. Doc A/CONF.199/20, at 1 (2002).

<sup>54</sup> *See, e.g.*, Weston, *supra* note 16.

<sup>55</sup> *See also* Lakshman D. Guruswamy, *Book Review: Ved P. Nanda & George Pring, International Environmental Law and Policy for the 21st Century* (2003), 16 COLO. J. INT’L ENVTL. L. & POL’Y 229, 232 (2005) (praising authors for astute analysis of putative principles of international environmental law and for conclusion that “intergenerational and intragenerational equity do not qualify as full-blown principles of law”).

<sup>56</sup> *See, e.g.*, *Declaration on the Responsibilities of the Present Generations Toward Future Generations*, Resolution 44 of the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its 29th Session on 12 November 1997, 29 C/Resolution 44, UNESCO Records of the General Conference, 29th Sess., vol. 1, p. 72 (1997).

ownership of the area may not be claimed by any individual or government and the area is to be available for use by all on a basis of equality, (b) the area must be used for peaceful purposes only, and (c) any benefits from exploitation of the resources of a common heritage area must somehow be shared globally.<sup>57</sup> It also has been said that the notion of “heritage” within the “common heritage” concept contemplates the preservation of the area for the benefit of future generations.<sup>58</sup>

When the issue of climate change was first raised in the U.N. General Assembly, it must be noted, the notion of the “common heritage of mankind” was brought forward by way of an agenda item proposed by Malta and titled “Declaration proclaiming climate as part of the common heritage of mankind.”<sup>59</sup> To date, however the concept has been adopted as binding international law only in treaties dealing with Antarctica,<sup>60</sup> the deep sea bed,<sup>61</sup> and outer space.<sup>62</sup>

Yet it is not surprising that efforts have been made to advance the idea that the climate system—a good example of a commons area<sup>63</sup>—might usefully be viewed as part of the “common heritage of mankind.”<sup>64</sup> Common heritage principles could provide a basis on which to argue that any “uses” of the climate system must be to the benefit of the planet as a whole and must respect the interests of future generations in climate stability.

However, despite the potential value in conceiving of the climate system in common heritage terms, the law has not so far developed in that direction. In response to Malta’s 1988 proposal,<sup>65</sup> the General Assembly did adopt a

<sup>57</sup> Lists of common heritage principles differ, but those I’ve identified above seem to me common to most treaties that adopt this concept. *See also* Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT’L & COMP. L. Q. 190 (1986); Christopher C. Joyner, GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION 222–24 (1998). *See generally* Barbara Ellen Heim, Note, *Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica*, 23 VAND. J. TRANSNAT’L L. 819 (1990); Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise*, 21 WISC. INT’L L. J. 409 (2003); Daniel A. Porras, *The Common Heritage of Outer Space: Equal Benefits for Most of Mankind*, 143 CA WEST. INT’L J. 160 (2006).

<sup>58</sup> Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, *supra* note 58, at 195–96 (“In legal terms, the concept of ‘common heritage’ would require that serious scrutiny be given to every activity in the area in order to prevent resource waste and to preclude environmental abuse.”).

<sup>59</sup> Bodansky, *supra* note 38, at 465.

<sup>60</sup> Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71, 12 U.S.T. 794, T.I.A.S. 4780, *reprinted in* 19 I.L.M. 860 (1980), *and in* 5 Weston & Carlson V.D.1.

<sup>61</sup> Declaration of the Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, Dec. 17, 1970, G.A. Res. 2749, U.N. GAOR, 25th Sess., Supp. No. 28, at 24, U.N. Doc A/RES/2749(XXV), *reprinted in* 10 I.L.M. 220 (1971), *and in* 5 Weston & Carlson V.F.10; U.N. Convention on the Law of the Sea, art. 136, Dec. 10, 1982, 1833 U.N.T.S. 3, U.S. Treaty Doc. 103-39, *reprinted in* 21 I.L.M. 1261 (1982), *and in* 5 Weston & Carlson V.F.22, *supra* note 5.

<sup>62</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, arts. 1 & 2, Jan. 27, 1967, 610 U.N.T.S. 205 18 U.S.T. 2410, T.I.A.S. 6347, *reprinted in* 5 Weston & Carlson V.E.21; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, art. 11(1), Dec. 5, 1979, 1363 U.N.T.S. 3, *reprinted in* 18 I.L.M. 1434 (1979), *and in* 5 Weston & Carlson V.E.23, *supra* note 5.

<sup>63</sup> James C. Wood, *Intergenerational Equity and Climate Change*, 8 GEO. INT’L ENV’T L. REV. 293, 307–25 (1996)

<sup>64</sup> *See* PRUE TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW (1998) (proposing that climate change be addressed by recognizing the ‘common heritage of life’ as a fundamental principle upon which to develop law to address climate change); Lakshman Guruswamy, *Global Warming: Integrating United States and International Law*, 32 ARIZ. L. REV. 221, 275–278 (1990) (arguing that “common heritage” ideas should be applied to the climate); Donald A. Brown, *Thinking Globally and Acting Locally: the Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK J. ENVTL. L. & POL’Y 175, 182, 192–93 (1996) (asserting that the atmosphere is commonly viewed as “common heritage of mankind”).

<sup>65</sup> *See supra* note 60 and accompanying text.

resolution on climate change.<sup>66</sup> But “most countries . . . felt that . . . the ‘common heritage of mankind’ concept . . . was inappropriate in the context of climate.”<sup>67</sup> Instead, the resolution that the General Assembly adopted, titled “Protection of global climate for present and future generations of mankind,” recognized climate as a “common concern of mankind.”<sup>68</sup> The “common heritage” concept simply has not been extended beyond those areas—Antarctica, the deep seabed, and outer space—in which it was articulated originally.<sup>69</sup>

By contrast, States have been willing to invoke the concept of “common concern” as justification for their taking action to address global environmental problems.<sup>70</sup> And thus justified the concept has been offered as a general norm of international environmental law.<sup>71</sup> However, it is primarily a “norm . . . that . . . helps the international community to justify collective action, and to overcome the presumption that a particular issue should be addressed domestically.”<sup>72</sup> While it might serve to justify the development of treaty rules governing particular areas, it lacks the depth and specific content of the common heritage concept and does not by itself (i.e., absent specific treaty implementation) provide principles that could govern State conduct affecting the climate system.<sup>73</sup>

### C. Human Rights and Climate Change

There is a growing trend among scholars and courts to view environmental issues through a human rights lens.<sup>74</sup> Three distinct but interdependent approaches have been taken in this regard.

One approach, following the admonition in Principle 10 of the Rio Declaration that “[e]nvironmental issues are best handled with the participation of all concerned citizens at the relevant level,”<sup>75</sup> is to ensure that international environmental law incorporates individual rights to participate in environmental decision-making, thus helping to ensure that individuals have the opportunity to call upon governments to address environmental issues in political and judicial fora.<sup>76</sup> A second approach treats severe environmental degradation as violative of discrete human rights (e.g., the right to life, to health, to property, to home and family life, to an adequate standard of living, to the fulfillment of basic needs) that are well established in particular global, regional, or national human rights regimes.<sup>77</sup> Finally, there is a longstanding

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<sup>66</sup> G.A. Res. 43/53 (Protection of global climate for present and future generations of mankind), U.N. GAOR, 43rd Sess., Supp. No. 49, at 133, U.N. Doc. A/43/49 (1988).

<sup>67</sup> See Bodansky, *supra* note 38, at 465.

<sup>68</sup> *Id.*

<sup>69</sup> See Dan Tarlock, *The Great Lakes as an Environmental Heritage of Mankind: An International Law Perspective*, 40 U. MICH. J. L. REFORM 995, 1006 (2007).

<sup>70</sup> See, e.g., Convention on Biological Diversity, *supra* note 38, at preamble, para. 3.

<sup>71</sup> See INT’L UNION FOR THE CONSERVATION OF NATURE, IUCN DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT; Armin Rosencranz, *The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT’L & COMP. L. REV. 309, 320 (2003).

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

<sup>73</sup> But see Paul G. Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L. J. 27, 29 (1999) (insofar as the climate system is a “common concern of humankind,” States must have a responsibility to protect it).

<sup>74</sup> See generally LINKING HUMAN RIGHTS AND THE ENVIRONMENT (Romina Picolotti & Daniel Taillant, eds., University of Arizona 2003); HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL LAW (Alan E. Boyle & Michael R. Anderson eds., Oxford 1996); Sumudu Atapattu, *The Public Health Impact of Global Environmental Problems and the Role of International Law*, 30 AM. J. L. & MED. 283 (2004).

<sup>75</sup> Rio Declaration, *supra* note 36, princ. 10.

<sup>76</sup> See generally ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 668–81 (3d ed. 2004).

<sup>77</sup> See, e.g., Lopez Ostra v. Spain, 303–C Eur. Ct. H.R. (Ser. A) at 46 (1994) (environmental problems caused by waste treatment facility near applicant’s home violated her right to privacy and family security under Article 8 of the European Convention on Human

effort among scholars and some governments to secure specific recognition at the international level of a broader, independent, and holistic human right to a clean and healthy environment.<sup>78</sup>

Each of these human rights approaches to environmental issues can make a positive contribution in the struggle to force governments to take serious and effective action against climate change. Consider, first, the important role that three widely recognized procedural rights<sup>79</sup>—the right to information,<sup>80</sup> the right to participation in decision-making,<sup>81</sup> and the right to access to justice<sup>82</sup>—can play in the effort to induce governmental action to address climate change.

Rights or ECHR); *Oneryildiz v. Turkey* (GC), 2004-XII, Eur. Ct. H.R. 657 (government's failure to take safety measures to protect residents from hazards of nearby garbage dump violated ECHR right to life when a methane gas explosion from garbage dump killed several members of applicant's family); *Mayagna Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001) (environmentally destructive logging practices violate indigenous group's right to property and judicial protection under national constitution). See generally KISS & SHELTON, *supra* note 77 at 681–08.

<sup>78</sup> See VED NANDA & GEORGE PRING, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY* 456–65, 468–476 (2003); KISS & SHELTON, *supra* note 76, at 709–24. See also Michael H. Depledge & Cinnamon P. Carlarne, *Environmental Rights and Wrongs, 2007–2008 ENVTL. SCI. & TECH.* 990, 993 (2008); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Human Rights*, 24 *STAN. ENVTL. L. J.* 71 (2005) (arguing for greater coordination among advocacy efforts around the globe in or to promote the development of “a systematic jurisprudence” of environmental rights); J. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 *DUKE J. COMP. & INT'L L.* 351 (1993). Some commentators believe that a right to a clean and healthy environment will invariably emerge from the normative activities of courts, commissions, and other actors that are called upon to address the impact of environmental degradation on human well-being. See Barry E. Hill, Steve Wolfson, & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 *GEO. INT'L ENVTL. L. REV.* 359, 400 (2004).

<sup>79</sup> All three of these rights are recognized in the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, *supra* note 50, which is open for signature by the 55 members of the UNECE and which has so far been ratified by 39 states. For a comprehensive evaluation of all three of these procedural rights in international environmental law, see KISS & SHELTON, *supra* note 76, at 668–81.

<sup>80</sup> A right to information is recognized in many international agreements, including the Climate Change Convention, *supra* note 38, which provides in Article 6 that parties “shall promote and facilitate . . . public access to information on climate change” and “public participation in addressing climate change . . .” See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic (22 Sep 1992), Sept. 22 1992, art. 9, 32 *I.L.M.* 1069; International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, (71 June 1994 June 17, 1994, arts. 10(2) (e) & 19(3), 1954 U.N.T.S. 3, S. Treaty Doc. 104–29, *reprinted in* 33 *I.L.M.* 1328 (1994), *and in* 5 *Weston & Carlson V.G.4, supra* note 5 [hereinafter “International Convention to Combat Desertification”]; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 Sep 1998 Sept. 10, 1998, art. 15(2), 2244 U.N.T.S. 337, S. Treaty Doc. 106-21, *reprinted in* 38 *I.L.M.* 1 (1999), *and in* 5 *Weston & Carlson V.G.5, supra* note 5; Stockholm Convention on Persistent Organic Pollutants, *supra* note 50, art. 10(1).

<sup>81</sup> The desirability of public participation in environmental decision-making is recognized in many international declarations and policy documents. See, e.g., World Charter for Nature, *supra* note 27, princ. 23; Rio Declaration, *supra* note 36, principles 10, 20–22. International conventions on environmental issues frequently obligate the parties to facilitate public involvement in decision-making related to the subject matter of the treaty. For example, the Framework Convention on Climate Change obligates parties to “promote and facilitate . . . public participation in addressing climate change,” United Nations Framework Convention on Climate Change, *supra* note 37, art 6(a)(iii). See also International Convention to Combat Desertification, *supra* note 81, art 5(d), 9(1), 10(2) (f); Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 10 Sept. 10, 1997, art 2(6), 1989 U.N.T.S. 309, *reprinted in* 5 *Weston & Carlson V.B.15, supra* note 5; Convention on Biological Diversity, *supra* note 37, art. 14(1)(a) (public participation in environmental impact assessment); North American Agreement on Environmental Cooperation, 14 Sept. 14, 1993, art. 7(b), 14 art. 7(b), *reprinted in* 32 *I.L.M.* 1480 (1993), *and in* 5 *Weston & Carlson V.C.13, supra* note 5; Stockholm Convention on Persistent Organic Pollutants, *supra* note 50, art. 10(1)(d).

<sup>82</sup> Principle 10 of the Rio Declaration calls upon States to provide individuals with “effective access to judicial and administrative proceedings, including redress and remedy . . .” Rio Declaration, *supra* note 36, princ. 10. Some treaties provide that States must give individuals means to seek compensation or other relief with respect to environmental damage. See, e.g., United Nations Convention on the Law of the Sea, *supra* note 62, art. 235(2). Other treaties provide that states must give non-nationals equal access to whatever

One of the most difficult challenges in combating any environmental problem is to generate enough public support for action to overcome the opposition of those with a vested right in continuing environmentally harmful activities. This has been a particular problem in the context of climate change,<sup>83</sup> as oil companies and others with a vested interest in the continuing use of fossil fuels have waged extensive campaigns to convince the public that climate change is an illusion or, at least, a problem without serious consequence.<sup>84</sup> The individual and group procedural rights that are enshrined in international environmental law can help combat the political power of these vested interests. To the extent that states fulfill their obligations to make environmental information available, and to “facilitate and promote” public awareness of climate change, citizens are more likely to understand the magnitude of the climate threat and the actions that are needed to combat it. Although an informed citizenry will not necessarily support political action to address climate change, the likelihood of such action is enhanced to the extent that the nature and scope of the problem is widely understood.

A parallel problem is getting correct information in front of relevant decision-makers and ensuring that decision-makers hear all views. Here, non-governmental organizations have historically played a critical role.<sup>85</sup> International recognition of the right of citizens to participate in decision-making allows for the views of NGOs and other elements of civil society to be heard in the corridors of power and thus increases the likelihood that the powerful will respond to environmental challenges.

The right of access to justice is potentially the most powerful procedural right of all. If individuals or groups can seek judicial and administrative remedies for harm they suffer as a result of climate change, they have the ability, at the very least, to call attention to the deleterious impact of climate change. Even if they fail to secure a remedy, the formal processes followed in administrative and judicial adjudications, including the processes of presenting evidence and written arguments, provide a unique opportunity to attract media attention and change public opinion.<sup>86</sup> Furthermore, administrative and judicial tribunals may view the climate change issue with more honest eyes than governmental bodies that are more subject to direct political influence. Thus, judicial and administrative opinions or reports issued in response to individual demands for justice may have substantial credibility and significant impact on public opinion.<sup>87</sup>

The procedural right of access to justice is obviously strongest when the individuals or groups appearing before a tribunal can legitimately claim a violation of their substantive rights or an infringement of some legally protected interest. International human rights law is useful in this context as well. Indeed, as noted earlier, this is a second important way

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administrative or judicial remedies are provided to nationals. Espoo Convention, *supra* note 82; Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 2105 U.N.T.S. 457, *reprinted in* 31 I.L.M. 1330 (1992), *and in* 5 Weston & Carlson V.I.14a, *supra* note 5.

<sup>83</sup> See Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND RESOURCES & ENVTL. L. (forthcoming 2008).

<sup>84</sup> *Id.* (describing “a massive disinformation campaign orchestrated by the fossil fuel industry” on the subject of climate change).

<sup>85</sup> KISS & SHELTON, *supra* note 76, at 163.

<sup>86</sup> See, e.g., Inuit Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) [hereinafter Inuit Petition]. This Petition attracted extensive public attention and caused the Inter-American Commission to initiate a study of the link between human rights and climate change. *Id.*

<sup>87</sup> See, e.g., *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007) (U.S. Supreme Court opinion concluding that evidence of climate change is strong and impacts potentially severe).

in which environmental protection and human rights intersect. It is well recognized by scholars,<sup>88</sup> activists,<sup>89</sup> and courts<sup>90</sup> that environmental deprivations can also be deprivations of well-established human rights. As the Inter-American Commission on Human Rights has observed:

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.<sup>91</sup>

This is nowhere a more serious problem than in the context of climate change. As many have pointed out, unmitigated climate change will lead to profoundly deleterious consequences for hundreds of thousands, perhaps millions, of people across the planet.

The IPCC's most recent assessment of the impacts of climate change, for example, predicts that "between 75 million and 250 million people" in Africa will face declining water supplies and increasing water stress and that "yields from rain-fed agriculture could be reduced by up to 50%."<sup>92</sup> On a continent already afflicted with extreme poverty, inadequate agricultural productivity, and expanding desertification, these projected impacts will certainly undermine, if not destroy, the ability of national governments and the international community to guarantee such well-established human rights as the right to water,<sup>93</sup> the right to food,<sup>94</sup> and even the right to life.<sup>95</sup> And it is not merely that people are hungry or thirsty; it is that the actions of other people (e.g., those whose profligate consumption of fossil fuels contributes most significantly to climate change) will, inevitably, deny a substantial portion of the world's population even the opportunity to have adequate food and water.

Other consequences of climate change will similarly undermine human well-being in ways that implicate human rights. Sea-level rise will affect millions of people who live in densely populated and low-lying coastal areas, and in countries where adaptive capacity is limited. Some people will be driven from their homes and deprived of their

<sup>88</sup> Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3 (2007); Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231 (2007).

<sup>89</sup> See Inuit Petition, *supra* note 86.

<sup>90</sup> See cases cited in *supra* note 77.

<sup>91</sup> Inter-American Court of Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, at 88 (1997).

<sup>92</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, UNEP, IPCC FOURTH ASSESSMENT REPORT, WORKING GROUP II REPORTS, SUMMARY FOR POLICYMAKERS, Part C, 13 (2007) [hereinafter IPCC REPORT].

<sup>93</sup> See, e.g., Committee for Economic, Social and Cultural Rights, General Comment No. 15, Nov. 26, 2002, E/C.12/2002/11 (recognizing a right to water, in part, as emanating from the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 14(2), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980), *and in* 3 Weston & Carlson III.C.13, *supra* note 6; Convention on the Rights of the Child, Nov. 20, 1989, art. 24(2), 1577 U.N.T.S. 3, *reprinted in* 28 I.L.M. 1448 (1989), *and in* 3 Weston & Carlson III.D.3, *supra* note 5.

<sup>94</sup> A right to food is expressly recognized as part of the right to an adequate standard of living in the Universal Declaration of Human Rights, art. 25, G.A. Res. 217 A (III), U.N. GAOR, 3rd Sess., Pt. I, at 71, U.N. Doc. A/810 (1948), *reprinted in* 3 Weston & Carlson III.A.1, *supra* note 5. It is also recognized Article 11 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. (1967), *and in* 3 Weston & Carlson III.A.2, *supra* note 5.

<sup>95</sup> Universal Declaration of Human Rights, art 3.

traditional livelihoods, and small island nations may effectively disappear.<sup>96</sup> IPCC studies suggest that the consequences of climate change in some regions of the world will include increased malnutrition, increased mortality and injury from “heatwaves, floods, storms, fires and droughts” and increased diarrhoeal and cardio-respiratory diseases.<sup>97</sup> The implications for the human rights to life and health are obvious and troubling.

Indigenous groups have particularly strong claims to make in this regard. Our understanding of the human rights of indigenous groups includes a recognition of the right of those groups to preserve and practice their cultural traditions and to do so in a particular location.<sup>98</sup> In many cases, climate change will make that impossible. So, for example, the destruction of the historical climate patterns of the northern polar regions will surely destroy the traditional lifestyles of the Inuit peoples of the north.<sup>99</sup> To the extent that States have an obligation to respect and protect the ability of indigenous peoples to preserve their traditional way of life, that obligation cannot be fulfilled absent concerted State action to mitigate climate change.

Finally, some scholars contend that international law recognizes a broad human right to an environment of a certain quality, for example to a “clean, healthy, ecologically-balanced, and sustainable environment.”<sup>100</sup> If such a right exists (a point I will discuss shortly), climate change will seriously threaten the ability of governments to secure that right for most of the world’s population. Indeed, unmitigated climate change probably will put a healthy and ecologically-balanced environment out of reach for most people.

Climate change will have a profound and disruptive impact on ecosystems around the globe. Current evidence already establishes that major changes are occurring in natural systems across the globe, including changes in “arctic and Antarctic ecosystems” that are affecting both “sea-ice biomes” and “predators high in the food chain”; impacts on “terrestrial biological systems,” including “shifts in ranges in plant and animal species”; “range changes and earlier migration of fish in rivers”; “shifts in ranges and changes in algal, plankton and fish abundance in high-latitude oceans.”<sup>101</sup> These changes are disrupting the ecological balance in nearly every part of the planet. What’s more, although some changes could be beneficial to humans in some parts of the world,<sup>102</sup> for the bulk of the world’s population, especially in the poorer areas of the globe, the impacts of climate change will be harmful, even devastating. Warmer and drier conditions in Africa will disrupt crop production; flooding in low-lying coastal areas of Asia will push millions from their homes; changes in the distribution and size of ocean fisheries will adversely impact the food sources for millions of people. In short, the changes in planetary ecosystems that are already being triggered by climate change pose a profound threat to the ability of both current and future generations to live in a healthy and ecologically balanced environment. And unless serious action to mitigate climate change is taken soon, millions of people will most certainly live in conditions that deprive them of this basic right.

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<sup>96</sup> IPCC REPORT, *supra* note 92, at 12.

<sup>97</sup> *Id.* But see Karen MacDonald, *Sustaining the Environmental Rights of Children: An Explanatory Critique*, 18 FORDHAM ENVTL. L. REV. 1 (2006) (asking what illnesses would cause a breach, and what quality of life would be acceptable).

<sup>98</sup> See, e.g., Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), June 27, 1989, art 14.1, ILO Official Bull. 59, reprinted in 28 I.L.M. 1382 (1989) and 3 Weston & Carlson III.F.2; Inter-Am. C.H.R., Proposed American Declaration on the Rights of Indigenous Peoples, art. 18.2, 29, OEA/Ser.L./V.II.110, Doc. 22 (Mar. 2001); U.N. Declaration on the Rights of Indigenous Peoples, arts. 10-13, 25, 26, 32, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

<sup>99</sup> See Inuit Petition, *supra* note 86.

<sup>100</sup> Weston, *supra* note 16, at 419. See generally HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 21–22 (Alan E. Boyle & Michael R. Anderson, eds., 1996).

<sup>101</sup> IPCC REPORT, *supra* note 92, at 8.

<sup>102</sup> For example, in some high-latitude areas, warmer winters may mean fewer deaths from cold and longer growing seasons may mean higher crop yields. *Id.* at 11–12.

But is there, in fact, a general human right to an environment of a certain minimal quality that is separate from the specific human rights, e.g. the rights to health and life, that may be violated by environmental degradation? Certainly there has been considerable activity at the international level that suggests that States and international organizations recognize such a right.<sup>103</sup> For example, Principle 1 of the Stockholm Declaration provides:

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.<sup>104</sup>

Similarly, the legal principles for environmental protection adopted by World Commission on Environment and Development (WCED) Experts Group in 1986 begin with the statement that “[a]ll human beings have the fundamental right to an environment adequate for their well-being.” The 1989 Declaration of the Hague on the Environment also recognizes the “right to live in dignity in a viable global environment.”<sup>105</sup> And a 1990 U.N. General Assembly Declaration states that “all individuals are entitled to live in an environment adequate for their health and well-being.”<sup>106</sup> The IUCN’s proposed International Covenant on Environment and Development states that “all persons have the fundamental right to an environment adequate for their dignity, health and well-being.”

In addition to these global declarations, a right to a healthy environment has also been recognized at the regional and national levels. A collective (not individual) right to “a general satisfactory environment” is proclaimed in the African Charter on Human and People’s Rights.<sup>107</sup> And Article 11 of the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights specifically provides for a “right to live in a healthy environment.”<sup>108</sup> Many national constitutions also recognize a right to a healthy environment.<sup>109</sup>

But other developments suggest that States, at least, are not so ready to endorse a broad-ranging right to a healthy environment as they might once have been and that, at best, one might say that such a right is emerging as part of international law but has not yet arrived.<sup>110</sup> It cannot be ignored, for example, that the Rio Declaration, while

<sup>103</sup> See generally VED P. NANDA & GEORGE PRING, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21st CENTURY* 456 (2003); PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 294 (2d Ed. 2003); BIRNIE & BOYLE, *supra* note 3, at 254; KISS & SHELTON, *supra* note 76, at 709.

<sup>104</sup> Stockholm Declaration, *supra* note 23, princ. 1.

<sup>105</sup> Declaration of the Hague on the Environment, 11 Mar. 11, ch 1989, U.N. Doc. A/44/340, *reprinted in* 28 I.L.M. 1308 (1989), *and in* 5 Weston & Carlson V.E.13, *supra* note 5.

<sup>106</sup> U.N. Resolution on the Need to Ensure a Healthy Environment for the Well-Being of Individuals, Dec. 14, 1990, G.A. Res. 45/94, U.N. GAOR, 45th Sess., Supp. No. 49, at 123, U.N. Doc. A/45/94 (1991), *reprinted in* 5 Weston & Carlson V.B.14, *supra* note 5.

<sup>107</sup> African Charter on Human and Peoples’ Rights, art. 24, 27 June 27, 1981 art 24, OAU Doc. CAB/LEG/67/3 Rev 5, *reprinted in* 3 Weston & Carlson III.B.1, *supra* note 5.

<sup>108</sup> Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights, Nov. 17, 17 Nov 1988, OASTS No. 69, *reprinted in* 3 Weston & Carlson III.B.25, *supra* note 5.

<sup>109</sup> See generally KISS & SHELTON, *supra* note 76, at 711–12; SANDS, *supra* note 103, at 296.

<sup>110</sup> See generally M.A. Fitzmaurice, *International Protection of the Environment*, 293 RECUEIL DES COURS 13, 330 (2001) (“[N]either the existence of the substantive right to a clean or decent environment has been fully acknowledged nor is there any agreement as to what type of human right it is.”). See also LAKSHMAN D. GURUSWAMY, BOOK REVIEW, *Ved P. Nanda & George Pring, International Environmental Law and Policy for the 21st Century* (2003), 16 COLO. J. INT’L ENVTL. L. & POL’Y 229, 232 (2005) (right to “a clean, healthful environment” does not “qualify as [a] full-blown principle of law”). But see Armin Rosencranz, *The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT’L & COMP. L. REV. 309, 310–311 (2003) (referencing as a ‘norm’

recognizing that human beings are “entitled to a healthy and productive life in harmony with nature,”<sup>111</sup> did not use the “rights” language of the Stockholm Declaration. And the community of States has refused opportunities to explicitly and definitively recognize a human right to a clean and healthy environment,<sup>112</sup> with recent international discussions tending to undermine rather than support the view that past normative initiatives have created a general right to a clean and healthy environment.<sup>113</sup>

Furthermore, some scholars, while acknowledging that the recognition of a human right to a healthy environment would bring certain advantages to the battle against environmental degradation,<sup>114</sup> express concerns about the utility of such a right from a policy perspective. They regard the question of what level of environmental quality is satisfactory as virtually impossible to answer outside of particular contexts, and they doubt the ability of human rights bodies to provide a meaningful answer to that question.<sup>115</sup> There is also fear that a focus on environmental quality as a human right gives an undesirable anthropocentricity to environmental protection and could lead to policies that are excessively protective of human well-being and insufficiently respectful of ecosystem needs or the interests of other

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the “broadly-held belief that the environment is a human right”); 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*, 16 TUL. ENVTL. L. J. 65 (2002).

<sup>111</sup> Rio Declaration, *supra* note 36, princ. 1.

<sup>112</sup> For example, in 1994, a group of human rights experts prepared a Draft Declaration on Principles of Human Rights and the Environment that included recognition of a human right to an “ecologically sound environment.” That Declaration was made a part of a report on the connections between human rights and the environment that was prepared by Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. Final Report 90, U.N. Doc. E/CN.4.Sub.2/1994/9, Annex I (1994). The General Assembly took no action to adopt the Draft Declaration, and the United Nations has not, to date, recognized a human right to a healthy environment. *Cf.* African Charter of Human and Peoples Rights, art. 24, 27 June 27, 1981, art. 24 OAU Doc CAB/LEG/67/3 Rev 5, *reprinted in* 3 INTERNATIONAL LAW & WORLD ORDER: BASIC DOCUMENTS, DOCUMENT III.B.1 (B. Weston & J. Carlson III.B.1, eds 1994–) (recognizing a human right to a healthy environment).

<sup>113</sup> See, e.g., *Report of the World Summit on Sustainable Development, Plan of Implementation*, Sept 4, 2002, annex, U.N. Doc A/ Conf.199/20/Annex (“Johannesburg plan of action recommends only that States “acknowledge *the consideration being given* to the possible relationship between environment and human rights.”).

<sup>114</sup> Birnie and Boyle observe that “an autonomous right to a decent environment” would give “enhanced status” to “environmental quality when balanced against competing objectives and other human rights.” BIRNIE & BOYLE, *supra* note 2, at 255. It would also draw attention to “the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights.” *Id.* Michael Anderson observes that a rights-based approach to environmental protection has certain inherent advantages over other approaches, including that a rights claim is “a strong claim . . . theoretically immune to the lobbying and trade-offs which characterize bureaucratic decision-making. Its power lies in its ability to trump individual greed and short-term thinking.” Moreover, rights claimants frequently have greater access to justice remedies those whose claims are not based on rights violations. And rights claims may mobilize citizen action more effectively than other types of claims. Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 21–22 (Alan E. Boyle & Michael R. Anderson, eds., 1996).

<sup>115</sup> See, e.g., Gunter Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117–18 (A.A. Cançado Trindade ed., 1994); BIRNIE & BOYLE, *supra* note 2, at 256–58. See also MacDonald, *supra* note 98.

species.<sup>116</sup> And, finally, some contend that there is no work to be done by a “human right to a decent environment” that is not already done, better, by existing “international environmental law and policy.”<sup>117</sup>

In the end, I think human rights approaches to environmental protection—including arguments based on the emerging right to a clean and healthy environment—provide a useful tool in the effort to construct a global policy that can effectively address the climate-change problem. Human rights arguments have a unique ability draw attention to the seriousness of the threats we are facing and to motivate people, and shame governments, into taking action. Moreover, human rights approaches also provide access to judicial and other remedies that would otherwise not be available, e.g., the ability to bring claims before human rights bodies. Though these bodies may not be able to take steps that solve the problem, the ability to debate climate change and its impact in a judicial or quasi-judicial forum is, at the very least, powerful and influential political theatre.

But while attention can be drawn to the gravity of environmental problems, including climate-change threats, by calling attention to their human rights implications,<sup>118</sup> international human rights law by itself will not produce the legal and policy actions necessary to mitigate climate change. One problem is that the effectiveness of international human rights law still depends to a large extent on the voluntary action by nations to comply with human rights norms and/or to make those norms an enforceable part of their domestic legal systems.<sup>119</sup> At the global level, there are no legal or political mechanisms by which an acknowledgment of human rights violations can be translated into specific mandates or rules for the remedying of those violations. The UN Human Rights Council, like its predecessor UN Human Rights Commission, has the authority to address human rights violations and promote respect for human rights, but not the power to enforce the law or remedy violations.<sup>120</sup>

At the regional level, the situation is more mixed. While some regional bodies have only the power to investigate and make recommendations,<sup>121</sup> certain regional human rights courts do have the authority to adjudicate claims and order

<sup>116</sup> *Id.* BIRNIE & BOYLE, *supra* note 2, at 257 (addressing environmental degradation as a human rights problem looks “at the problem in moral isolation from other species” and thereby “may reinforce the assumption that the environment and its natural resources exist only for human benefit, and have no intrinsic worth in themselves.”). For general discussions in this vein, see Marc Pallermaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW 1 (Philippe Sands ed., 1994); Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability*, 13 FORDHAM ENVTL. L. J. 343, 347 (2002) (a human rights approach subjugates the needs of the environment to the needs of humanity).

<sup>117</sup> BIRNIE & BOYLE, *supra* note 2, at 259.

<sup>118</sup> *See, e.g.*, Port Hope Environmental Group v. Canada, Communication No. 67/1980, 2 SELECTED DECISIONS OF THE UN HUMAN RIGHTS COMMITTEE 20 (1990); Ominayak & the Lubicon Lake Band v. Canada, UNHRC No. 167/1984, Rept. Human Rights Committee (1990), GAOR A/45/40, vol. II; Yanomami Indians v. Brazil (1985), Decision 7615, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 264 (1985).

<sup>119</sup> *See* Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. J. 1397 (1999). *See generally* *International Approaches to Human Rights Implementation* in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 325–69 (Richard Pierre Claude & Burns H. Weston, eds., 3d ed. 2006).

<sup>120</sup> Resolution on the Human Rights Council, 15 Mar. 2006, UNGA Res. 60/251, A/RES/60/251. For a good discussion of the U.N. system pertaining to human rights enforcement, see Stephen P. Marks, *The United Nations and Human Rights*, reprinted in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 341–43 (Richard Pierre Claude & Burns H. Weston 3d ed., 2006).

<sup>121</sup> For example, the Inter-American Commission on Human Rights, while it has some power to investigate alleged human rights violations and to make recommendations to States, has no authority to construct or order remedies for human rights violations. *See* Statute of the Inter-American Commission on Human Rights, art. 18–20, OAS GA Res. 447 (October 1979).

remedies within the context of a particular regional human rights regimes.<sup>122</sup> But even these more powerful regional bodies are of limited utility in addressing climate change, first because the substantive rules they apply may not fully protect environmental human rights,<sup>123</sup> and second because important greenhouse gas-emitting States (e.g., the United States) are not subject to these systems.<sup>124</sup> Thus, as matters stand, even if human rights claims can persuasively be made against States that fail to take action against climate change, in some cases there will be no judicial or administrative arena in which those claims can be effectively pressed.<sup>125</sup>

A second problem is that many of the human rights that are most likely to be implicated by climate change (e.g., rights to food, health, life) are “economic and social rights” that have “been less widely accepted” by the international community than other human rights.<sup>126</sup> Under any circumstances, “translating general economic and social rights into specific environmental standards” will be difficult.<sup>127</sup> The problem is especially difficult, however, if States that are major contributors to the environmental problem have not even accepted the binding character of the human rights in question. This is the case, for example, with respect to the United States, which has not ratified any international instrument pertaining to economic and social human rights,<sup>128</sup> and which is both the largest greenhouse gas polluter in the world (although China may recently have surpassed it) and the State that has been most reluctant to cooperate with international efforts to combat climate change.

One also cannot count on national enforcement mechanisms to implement international human rights norms. Nations differ dramatically in the extent to which they implement international norms in their domestic legal systems. Some States may make norms directly enforceable by their courts. Others preclude judicial enforcement of norms except, and only to the extent that, those norms have been implemented into domestic law by executive or legislative action.<sup>129</sup> Even when States permit direct enforcement of international norms by their courts, a variety of domestic legal doctrines

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<sup>122</sup> See, e.g., Statute of the Inter-American Court of Human Rights, art 1, OAS GA Res 448 (October 1979); Protocol (No. 11) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 11, 1994, ETS No. 155, *reprinted in* 3 Weston & Carlson III.B.16a, *supra* note 5.

<sup>123</sup> For example, while the European Human Rights Court has held that environmental degradation can result in human rights violations, it has also said that the protection of individual human rights must be balanced against the economic interests of the community as a whole. See discussion in *BIRNIE & BOYLE*, *supra* note 2, at 260. Furthermore, none of the European human rights instruments contain an express right to an environment of a particular quality or to environmental protection. Any human rights violations are the result of the impact of environmental degradation on other rights. *KISS & SHELTON*, *supra* note 76, at 713.

<sup>124</sup> The United States has signed but not ratified the American Convention on Human Rights and so is not subject to the enforcement authority of the Inter-American Court of Human Rights. See 3 Weston & Carlson, Appendix I, at 14–15 (status of ratifications of American Convention on Human Rights).

<sup>125</sup> I recognize that nations obey international law for many reasons that have nothing to do with available judicial or administrative remedies, and that pressure to conform to international norms can be exerted in many arenas. See generally *LAKSHMAN D. GURUSWAMY, SIR GEOFFREY W.R. PALMER, BURNS H. WESTON & JONATHAN C. CARLSON, INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 171–227* (2d ed. 1999). But this paper is focused on the question whether existing law provides practical and enforceable obligations that can be marshaled to press States toward serious action on climate change, so one must consider the question whether there are judicial or quasi-judicial remedies for climate-change related human rights violations.

<sup>126</sup> *SANDS*, *supra* note 103, at 297.

<sup>127</sup> *Id.*

<sup>128</sup> E.g., the United States has ratified neither the International Covenant on Economic, Social and Cultural Rights nor the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. See 3 Weston & Carlson, Appendix I, at pages 1–17 for status of U.S. ratification of international human rights instruments, including instruments relating to economic and social rights.

<sup>129</sup> See generally *National Approaches to Human Rights Implementation*, in *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES & ACTION 371–412* (Richard Pierre Claude & Burns H. Weston eds., 3d ed. 2006); *GURUSWAMY, PALMER, Weston & Carlson*, *supra* note 125, at 206–17.

may make enforcement difficult.<sup>130</sup> And domestic courts may be reluctant to enforce norms against their governments in cases where content, legal status, and appropriate application of international norms are unclear.<sup>131</sup>

Finally, I perceive (though others may not) some conceptual difficulties with the application of human rights principles to the climate change problem, at least if the goal is to force States to take steps to mitigate future climate change. One difficulty has to do with time scales. The environmental impacts of the conduct that causes climate change (e.g., greenhouse gas emissions) arise decades after the conduct occurs.<sup>132</sup> That means two things. First, by the time environmental impacts are obvious and severe enough to violate human rights, neither the harmful conduct nor the adverse impact can be reversed. What's done is done and, from a human rights perspective, the logical remedies at that point are to compensate the victims or to assist them in adapting to the environmental change. Second, it is not clear that a human-rights tribunal would have any authority at that point to order or recommend current action to mitigate future climate change (e.g., a reduction in greenhouse gas emissions) because such action would do nothing to rededicate or eliminate the current human rights violations that are the foundation for the tribunal's authority to act. A mitigation recommendation would be appropriate only if a tribunal had the authority to defend the human rights of future generations as well as to address present human rights violations.

A second difficulty has to do with the geography of climate change. Although there is a very real possibility that global climate change will have catastrophic consequences that adversely impact every State, the most recent IPCC impact projections suggest that some people and places will experience benefits from climate change.<sup>133</sup> On the basis of present scientific assessments, therefore, we must concede the possibility that, for some States, climate change could improve the quality of human life, even as it diminishes in other States.

What are the responsibilities of States in which climate change will improve human life? Would such a State have an obligation to contribute to an international effort to stop climate change even though success in that effort could mean a lower quality of life for future generations within that State's own territory?

The answer may well be that a State does have an obligation to "balance the rights of persons in other states against its own economic benefit," and that it "must adopt and enforce environmental protection laws" for the benefit

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<sup>130</sup> In the United States, for example, a variety of legal doctrines may lead courts to conclude that they cannot or should not hear a case alleging violations of international law. *See generally* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 39–106 (2003). Thus, a court may conclude that the claimants in the case do not have a sufficient stake in the action (standing) to warrant judicial intervention. Or the court may believe that the case raises a "political question" or "act of state" issue on which the court is not competent to pass judgment. *Id.*

<sup>131</sup> *See, e.g.,* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L. Ed.2d 718 (2004) (holding that federal courts exercising jurisdiction over international law claims pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350, can only proceed with claims that are based upon "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigm" causes of action for "offenses against ambassadors, violations of safe conduct . . . [and] piracy."); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002) (concluding that international agreement "that human life, health, and sustainable development are valuable and should be respected," and "international concern over the impact of environmental pollution on humanity" do not establish that "high levels of environmental pollution, causing harm to human life [and] health" are violative of sufficiently "well-established rules of customary international law" to support judicial action).

<sup>132</sup> *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SCENARIO CONSISTENCY AND REPORTING (Dec. 3, 2007), [http://www.ipcc-data.org/ddc\\_reporting.html](http://www.ipcc-data.org/ddc_reporting.html) (3 Dec. 2007) (last visited on Mar. 14, 2008) ("The climate has a lag time of several decades in its response to an equivalent CO2 doubling.").

<sup>133</sup> *See, e.g.,* IPCC, 2007: Summary for Policymakers, *in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, (M.L. Parry et al eds. 2007)., O.F. Canziani, J.P. Palutikof, P.J. van der Linden & C.E. Hanson, eds., Cambridge University Press, Cambridge, UK, 7–22.

of citizens of other jurisdictions as well as its own.<sup>134</sup> Although some human rights treaties impose obligations on states only with respect to people within their own territory,<sup>135</sup> other instruments—especially those recognizing economic, social, and cultural rights—are not so limited,<sup>136</sup> and the European Court of Human Rights, at least, has held States responsible for the effects of their action outside their territory.<sup>137</sup> Furthermore, international environmental law has long recognized the responsibility of States to prevent conduct within their territory from having a serious adverse effect on the environment in other States.<sup>138</sup>

But the possibility of positive as well as negative impacts from climate change poses difficulties in determining the appropriate response to the human rights implications of climate change. Can a State be required to participate in mitigation efforts if the consequences of climate change for its population will be largely positive? Or does it simply have an obligation to assist in providing relief to people within and outside its borders who are adversely impacted by climate change? And if it does take steps that mitigate climate change, what are its obligations to those future generations whose life chances are diminished by the absence of climate change? For example, IPCC estimates suggest that the future benefits from climate change for people living in higher latitudes will include milder winters, fewer deaths and injury from cold, longer growing seasons and resulting higher agricultural productivity. To the extent that a State participates in action that deprives its future citizens of those benefits, does it owe them any compensation? Do other States also owe compensation?

I do not claim that these concerns mean that a human-rights approach to climate change is not useful. I do claim that they confront us with a challenge. A human-rights approach treats environmental protection as “instrumental, not an end in itself.”<sup>139</sup> The goal of such an approach is to enhance human well-being. But if we accept current IPCC analysis, the implications of climate change for human well-being will vary depending on where people live. Can a human rights approach tell us which group of humans we should prefer in formulating policy, and thus direct us to adopt all necessary measures to mitigate climate change? And can a human rights approach tell us whether to prefer mitigation or adaptation/remediation as a response to the adverse consequences of climate change? Or does a human-rights approach simply help us understand the seriousness of the problem we face, leaving it to further political action to resolve the question of appropriate response and to address the clash of interests between those humans whose well-being will be hurt by climate change and those whose well-being will be enhanced?

## D. International Climate Change Law

The fact that the international legal community has not developed doctrines, principles, or rules that elaborate the concept of intergenerational justice does not mean that international law has neglected the policy goal of protecting future generations. To the contrary, the past twenty years have seen spectacular growth in international environmental law, and the treaty commitments accepted by nations in the environmental realm have undeniably improved the global

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<sup>134</sup> BIRNIE & BOYLE, *supra* note 2, at 265–66.

<sup>135</sup> *E.g.*, International Covenant on Civil and Political Rights, Dec. 16, 16 December 1966, art. 2, 999 U.N.T.S. 171, *reprinted in* 3 Weston & Carlson III.A.3, *supra* note 5.

<sup>136</sup> *E.g.*, International Covenant on Economic, Social and Cultural Rights, *supra* note 95, art. 2 (imposing an obligation, without geographic limit, on State Parties to “take steps, individually and through international assistance and co-operation . . .” to achieve “progressively the full realization of the rights recognized in the present Covenant . . .”).

<sup>137</sup> *See* BIRNIE & BOYLE, *supra* note 2, at 265.

<sup>138</sup> *See, e.g.*, Rio Declaration, *supra* note 36, princ. 2.

<sup>139</sup> Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals* 1, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT.

environment in ways that will benefit future generations as much or more than they benefit the present.<sup>140</sup> Two of these treaties are directed at the problem of climate change—the UN Framework Convention on Climate Change<sup>141</sup> and the Kyoto Protocol.<sup>142</sup> The question addressed in this section is whether these treaties, as they currently exist, provide a legal basis for making claims against any States that fail to take the steps necessary to avoid serious human induced climate problems and thereby benefit future generations.

Adopted in 1992 and now ratified by virtually every nation in the world, the UN Framework Convention on Climate Change [UNFCCC] was meant to be a first step toward “protect[ing] the climate system *for present and future generations*.”<sup>143</sup> As its name implies, however, the Convention was not intended to solve the problem of climate change. Rather, it was designed to serve simply as framework for future action. Calling upon States to cooperate in the scientific study of climate change and to gather and share information, including information about their greenhouse gas emissions, it established an institutional structure to facilitate the review and implementation of the Convention. It was understood from the outset that scientific knowledge about climate change was relatively undeveloped, and therefore the Convention was drafted to allow for the adoption of protocols to the Convention that would impose any additional legal obligations necessary to achievement of the Convention’s objectives.

Although the drafters of the Convention understood that significant limits on the emission of greenhouse gases probably would be required to combat climate change, the UNFCCC does not include any clear obligation on the State-parties to restrict their GHG emissions.<sup>144</sup> Its objective is to “stabiliz[e] greenhouse gas concentrations . . . at a level that [will] prevent dangerous anthropogenic interference with the climate system.” As noted, parties are admonished to “protect the climate system for the benefit of present and future generations.” And developed countries actually agree to “adopt national policies and take corresponding measures on the mitigation of climate change, by limiting [their] anthropogenic emissions of greenhouse gases and protecting and enhancing [their] greenhouse gas sinks and reservoirs” with the “aim” of returning emissions to 1990 levels. But there is no actual commitment to *reduce* (as opposed to limit) emissions. And even the general commitment on limiting emissions is qualified by consideration for “differences in these Parties’ starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances.” In short,

[t]he UNFCCC . . . lacked any real vision of how signatories would implement their goals; in 1992, nations were simply not sure what it would take to prevent damaging anthropogenic interference [with the climate]. The UNFCCC thus created a Conference of Parties (COP) that would meet at least once

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<sup>140</sup> It is widely acknowledged, for example, that the Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293, T.I.A.S. 11097, U.S. Treaty Doc 99–9, *reprinted in* 26 I.L.M. 1529 (1987), *and in* 5 Weston & Carlson V.E.5, along with the various protocols to that Convention, including its well-known and its Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, U.S. Treaty Doc 100–10, *reprinted in* 26 I.L.M. 1541 (1987), *and in* 5 Weston & Carlson V.E.9, has led states to ban or limit the use of ozone-depleting chemicals with the result that catastrophic depletion of the ozone layer has been avoided and the atmosphere appears to be repairing itself in this regard. Similarly, numerous treaties on the protection of fish stocks, if they are successful, will preserve those stocks for future as well as present humans.

<sup>141</sup> United Nations Framework Convention on Climate Change, *supra* note 37.

<sup>142</sup> Kyoto Protocol, Dec. 10, 1997, FCCC/CP/1997/7/Add.1, *reprinted in* 37 I.L.M. 32 (1998), *and in* 5 Weston & Carlson V.E.20d, *supra* note 5.

<sup>143</sup> UNFCCC, *supra* note 37, preamble para. 11 (emphasis added).

<sup>144</sup> Stronger commitments had been proposed, but “[d]uring the negotiations, these proposals were slowly pared away . . . or watered down, and the general commitments became general not only in their application to all parties, but also in their content.” Daniel Bodansky, *supra* note 39, at 508.

a year in an effort to promote the effective implementation of the Convention. The UNFCCC [also provided] for the introduction of protocols to the Convention.<sup>145</sup>

As Philippe Sands observes, “the most that can reasonably be said of [the commitments in Article 4 of the Convention] is that they establish soft targets and timetables with many loopholes.”<sup>146</sup>

Strong arguments have been made<sup>147</sup> that the failure of the United States to make significant progress toward reducing GHG emission levels is a violation of its commitment “to adopt national policies and take corresponding measures on the mitigation of climate change” that will “demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention”<sup>148</sup> to “prevent dangerous anthropogenic interference with the climate system.”<sup>149</sup> Moreover, so long as the U.S. fails to take any steps to actually reduce the quantity of its emissions, it is arguably in violation of an implied commitment that its policies will have “the aim of returning . . . to [its] 1990 levels” of GHG emissions.<sup>150</sup>

Ultimately, however, the claim that the UNFCCC is violated by developed countries that fail to take substantial steps to reduce the GHG emissions is problematic. When the UNFCCC was being negotiated, many countries pushed for clear timetables and emission limitation goals, but those efforts failed. The European Community, for example, “supported an immediate commitment by developed countries to stabilize carbon dioxide emissions at 1990 levels.”<sup>151</sup> However, Articles 4(1) and 4(2) were written in “highly ambiguous” and “heavily qualified” ways precisely because the negotiators could not agree on targets and timetables.<sup>152</sup> The U.S. interpretation of the Convention at the time was that “there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time.”<sup>153</sup> Although it is certainly appealing to interpret the language of the Convention so that the failure seriously to pursue or achieve certain targets is a violation, such an interpretation seems inconsistent with the widespread understanding at the time of the negotiations that the Convention failed to create any legally-binding target or timetable.<sup>154</sup>

On the other hand, there are legally-binding targets and timetables in the Kyoto Protocol,<sup>155</sup> which was negotiated and adopted precisely because the “existing commitments” in the UNFCCC were understood to be “inadequate to meet the Conventions ultimate objective.”<sup>156</sup> The Kyoto Protocol clearly obligates parties to it to reduce their greenhouse gas emissions significantly below 1990 levels. The provisions of the agreement give parties some options regarding how they accomplish this goal (including the option of “purchasing” emission reductions that are implemented by others, rather than meeting their commitments entirely on their own). But there is no ambiguity about what

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<sup>145</sup> Anastasia Telesetsky, *International Law Treaties: The Kyoto Protocol*, 26 *ECOLOGY L. Q.* 797 (1999)

<sup>146</sup> SANDS, *supra* note 103, at 365.

<sup>147</sup> See Inuit Petition, *supra* note 86.

<sup>148</sup> UNFCCC, *supra* note 37, art. 4(2)(a).

<sup>149</sup> *Id.* art. 2.

<sup>150</sup> *Id.* art. 4(2)(b). See Inuit Petition, *supra* note 86.

<sup>151</sup> Bodansky, *supra* note 38, at 513–14.

<sup>152</sup> *Id.* at 513–517.

<sup>153</sup> *Id.* at 517, citing Letter from Mr. Clayton Yeutter to Representative John Dingell, Chair of the House Energy and Commerce Committee, *quoted in* Rose Gutfield, *How Bush Achieved Global Warming Pact with Modest Goals*, *WALL ST. J.*, May 27, 1992, at A1.

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

<sup>155</sup> Kyoto Protocol, *supra* note 142.

<sup>156</sup> Clare Breidenich, Daniel Magraw, Anne Rowley, & James W. Rubin, *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 *AM. J. INT'L L.* 315, 318 (1998).

commitments are made by parties to the Protocol, about what must be done to meet those commitments, or about the nature and extent of the reduction in greenhouse gas emissions that is required by the agreement.

The accomplishment of the international community in adopting and securing the entry into force of both the UNFCCC and the Kyoto Protocol should not be diminished. Nonetheless, it is clear that, as they stand, these agreements are inadequate.

First, forget about reducing greenhouse gas emissions. These agreements, by themselves, provide no legal recourse against those states that insist on continuing to increase their emissions, despite their knowledge of the profound threat such increases pose to the global climate system and to future generations.

Consider the case of China, which is now the largest greenhouse gas emitter nation on Earth. China has ratified both the UNFCCC and the Kyoto Protocol. Yet, as a developing country, its ratification creates no obligation to limit its greenhouse gas emissions. The Kyoto Protocol's emission restrictions apply only to developed-country parties.<sup>157</sup> The Protocol states explicitly that it does not "introduc[e] any new commitments" for developing countries but merely "reaffirm[s] existing commitments in Article 4, paragraph 1 [of the UNFCCC]."<sup>158</sup> While those commitments include an obligation to "take climate change considerations into account, to the extent feasible, in their relevant social economic and environmental policies and actions,"<sup>159</sup> this is far from an obligation to reduce or even to restrict the growth of greenhouse gas emissions.

Developed nations, of course, do have binding commitments under Kyoto, but only if they have ratified the Protocol. The world's now second biggest greenhouse gas emitter, the U.S., has not done so. For that reason, the Kyoto commitments are inapplicable to it. Does the UNFCCC provide the basis for legal action against the U.S. if it continues to increase its greenhouse gas emissions without regard for planetary consequences? It is not likely. Although the U.S. is obliged, as a party to the UNFCCC, to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs," the United States can (and does) claim to have adopted such policies and measures and to have "limited" emissions in the sense of reducing the greenhouse gas intensity of economic activity in the U.S.<sup>160</sup> Moreover, any obligation the U.S. has is qualified by its right to "maintain strong and sustainable economic growth" and to expect to make only "equitable and appropriate contributions . . . to the global effort" to reduce greenhouse gas emissions.<sup>161</sup> U.S. political leaders have always contended that Kyoto-level cuts in emissions would undermine economic growth and place an inequitable burden on developed nations given the exclusion of developing nations from the need to undertake any emissions reductions or limitations at all. Finally, there is the problem of enforcing the obligations of the UNFCCC, assuming it can be said that the U.S. has violated them. Absent U.S. consent, the ICJ would have no jurisdiction, and the Convention itself establishes no binding dispute settlement procedure that could be invoked to enforce its rules.<sup>162</sup>

A second flaw in the UNFCCC/Kyoto system is that it cannot and will not stop or even significantly delay global climate change. The reduction commitments made by the developed countries are too small and will in any event be swamped by emission increases on the part of developing countries. These facts were front and center at the

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<sup>157</sup> Developed country parties are described in the Protocol as "Parties included in Annex I," meaning Annex I of the UNFCCC.

<sup>158</sup> Kyoto Protocol, *supra* note 142, art. 10.

<sup>159</sup> UNFCCC, *supra* note 37, art. 4:1(f).

<sup>160</sup> See The White House (President George W. Bush), *Global Climate Change Policy Book*, <http://www.usgcrp.gov/usgcrp/Library/gcinitiative2002/gccstorybook.htm> (2002) (accessed on May 12, 2008).

<sup>161</sup> UNFCCC, *supra* note 37, art. 4:2(a).

<sup>162</sup> *Id.* art. 14.

Conference of the Parties to the UNFCCC, held in Bali, Indonesia in December 2007. The goal of the Conference was to launch a new round of negotiations aimed at producing a new Protocol to take effect when the Kyoto obligations end in 2012. The high stakes in the discussions were clear to all: “deep cuts in global emissions will be required” to avoid the real risk of severe climate change impacts on human society.<sup>163</sup> Yet the outcome of the Conference provided no real guarantee that the international community will be able to reach agreement on a new protocol that can produce those required “deep cuts in emissions.”

To the contrary, the negotiations envisioned by the Bali Action Plan will focus on articulating a “long-term global goal for emission reductions,” but without any promise of the rapid, dramatic action that many believe is essential if we are to avoid catastrophic climate change. The negotiations will consider further “quantified emission limitation and reduction” goals for developed countries, but developing countries will consider only “mitigation actions” to be taken “in the context of sustainable development.” There is no mention even of an effort to negotiate emission reductions by developing nations, except with respect to “emissions from deforestation and forest degradation.”<sup>164</sup> For those who might have hoped that the preambular acknowledgement of the “urgency” of the situation would have been reflected in the negotiating agenda, the so-called Bali “roadmap” is disappointing.<sup>165</sup>

What is perhaps not surprising, in light of what already has been said about the state of intergenerational justice in international law, is that the Bali Action Plan makes no reference whatsoever to the need to protect the environment for the benefit of future generations. None. Instead, among the three pillars of sustainable development—economic development, social development, and environmental protection—only economic and social development are mentioned as “global priorities” in the Action Plan. To the extent that there is any discussion that even hints at why the international community should care about climate change, that discussion is in the context of a call for “enhanced action on adaptation” to climate change. It ignores environmental concerns in general and future generations more specifically, and it focuses on the (admittedly serious and severe) adverse impacts that climate change is likely to have on developing countries, calling for cooperation on adaptation actions that “tak[e] into account the urgent and immediate needs of developing countries that are particularly vulnerable to the adverse effects of climate change . . .”<sup>166</sup>

The point is not that the international community should not care about development and adaptation to climate change. The point is that the balance of the discussion has shifted very far from the pillar of environmental protection, much less of protection of future generations, and dramatically toward the promotion of development. There is no plan even to discuss the prospects of securing emission reduction commitments from developing countries. Nor is there any clear indication that the negotiators will be seeking dramatic emission reductions even from developed countries. As matters stand, it would be foolhardy to conclude that the UNFCCC process will produce legal obligations mandating States to undertake the extensive reductions in greenhouse gas emissions that are urgently needed for the safety of the planet.

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<sup>163</sup> Bali Action Plan, Dec. 15, 2007, pmb. & para. 4, Decision 1/CP.13, U.N. Doc. FCCC/CP/2007/6/Add.1, at 3 (2008).

<sup>164</sup> *Id.* para. 1.

<sup>165</sup> The United States was widely viewed as having played an obstructionist role in the negotiations on the Bali Action Plan, and the weakness of the plan may in large part reflect the compromises necessary to ensure U.S. participation. See Thomas Fuller & Andrew C. Revkin, *Climate Plan Looks Beyond Bush's Tenure*, N.Y. TIMES (December 16, 2007), <http://www.nytimes.com/2007/12/16/world/16climate.html> (accessed on May 13, 2008).

<sup>166</sup> Bali Action Plan, *supra* note 163, para. 1(c)(I).

## E. Other Norms of International Environmental Law

Even if the Bali process succeeds beyond the expectations expressed here, assume that there will continue to be States—China and the United States today—that continue to emit ever-increasing volumes of greenhouse gases with little apparent regard for the impact of their actions on the planet. The preceding sections have argued that the principle of intergenerational justice is insufficiently developed in law to create the basis for a claim against such States. Moreover, action against climate change is not required by either the “common heritage of mankind” doctrine or human rights principles. Current treaty norms directed at global warming provide no basis for addressing the activities of States that currently refuse to participate in serious emission-reduction efforts, and new norms would apply only to those States that accept them.

But perhaps there are other principles and rules of general international environmental law that could underwrite legal claims against such states? That is the question to be addressed briefly in this concluding section. Two principles of international environmental law are considered—the precautionary principle and the customary law obligation not to cause significant transboundary harm—both of which are sometimes said to be violated by States that fail to take significant action to curb greenhouse gas emissions.<sup>167</sup>

### 1. The Precautionary Principle

The precautionary principle is an obvious candidate in this regard.<sup>168</sup> As expressed in the Rio Declaration, the precautionary “approach” teaches that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>169</sup> It has been argued that there is a “natural affinity between the precautionary principle and climate change.” There are great uncertainties about climate change—how much will the climate alter, how fast will it alter, how well will we adapt? We know, however, that the potential risks are enormous, even catastrophic. It seems a perfect situation for acting cautiously and undertaking “cost-effective measures to prevent environmental degradation.”<sup>170</sup>

There are at least three serious obstacles to using the precautionary principle as the basis for an international legal claim against major GHG-emitting nations. First, it is not at all clear that the precautionary principle is, in fact, a principle of customary international environmental law. It is undeniable that the principle has been invoked in many international environmental instruments, including treaties. There also is no doubt that many States follow it in domestic practice and invoke it in international discourse. But the Rio Declaration referred to a “precautionary *approach*,” not a precautionary principle, a move that was made in direct response to U.S. unwillingness to acknowledge a legal obligation to act with precaution.<sup>171</sup>

The second point is related. Even if the precautionary principle is a principle of customary international law, it will not bind the U.S.—one of the largest of all GHG emitters. The U.S. has consistently refused to accept the legally-

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<sup>167</sup> See Inuit Petition, *supra* note 87, Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 99–102 (December 7, 2005).

<sup>168</sup> The principle is referenced frequently in Chapters II–IV of the CLI Policy Paper to which this CLI Background Paper is appended.

<sup>169</sup> Rio Declaration, *supra* note 36, princ. 15.

<sup>170</sup> See Philippe H. Martin, “If You Don’t Know How to Fix It, Please Stop Breaking It!” *The Precautionary Principle and Climate Change 2*, in 1997 FOUNDATIONS OF SCIENCE 263 (1997).

<sup>171</sup> Junta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT’L L. 617–649 (2004).

binding character of the principle (outside the context of particular treaties).<sup>172</sup> As a persistent objector, it would not be subject to the rule.<sup>173</sup>

Third, in the context of global climate change, it is not at all clear that State inaction represents a violation of the principle. There is no doubt that one key element of the principle is present in this scenario: climate change does pose threats “of serious or irreversible damage” to the environment. But consider what the principle does not reach when States are faced with such threats. As articulated in the Rio Declaration, the principle says one particular reason for inaction, “scientific uncertainty,” can not be used as an excuse for failing to take “cost-effective measures” to reduce the environmental threat. Similarly, the U.N. Framework Convention on Climate Change demands action to address the environmental threat, stating that the Parties “should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>174</sup> But the U.N. Convention, in keeping with the Rio Declaration, also provides that those measures should be “cost-effective so as to ensure global benefits at the lowest possible cost” and that they “should take into account different socio-economic contexts,” thus opening the door to the consideration of economic factors in the determination of what measures to take.<sup>175</sup>

In other words, the problem with arguing that the precautionary *approach* requires State action against climate change is that, except among a few skeptics, no one offers “lack of full scientific certainty” as a justification for non-action on climate change. The current rationale for inaction is, rather, that deep cuts in GHG emissions will not be “cost-effective” given the profound impact they are likely to have on economic growth and development and given also the possibility that adaptation and future mitigation will be more cost-effective than the lowered economic growth that would flow from immediate cuts in fossil fuel use. This rationale—lack of cost-effectiveness—is, under the precautionary approach of Rio and the precautionary principle in the UNFCCC, a perfectly valid reason for non-action. What is more, so long as benefits to future generations are discounted (a standard technique of cost-benefit analysis), it would be difficult ever to prove that emission cuts are cost-justified.<sup>176</sup> And not only does the precautionary principle not forbid a refusal to take action on cost-benefit grounds, it says nothing about how the cost-benefit analysis should be constructed so that we can be sure that discounting would be an implicit or explicit aspect of any large emitter’s decision to refrain from participation in significant emission cuts. As long as a nation has a reasonable claim that its inaction is due to its assessment of costs and benefits, and not because it doubts the reality of global warming, the precautionary principle would not appear to be implicated.

## 2. The Obligation To Prevent Transboundary Harm

The well-known *Trail Smelter Arbitration*<sup>177</sup> addressed the question of Canadian liability for environmental damage caused in the United States by emissions from a smelter plant owned by a Canadian corporation and operated at Trail, British Columbia, seven miles from the United States. Applying principles of international law, as well as the law

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<sup>172</sup> *Id.*

<sup>173</sup> Many commentators believe that customary international law is based ultimately based on the consent or acquiescence (express or implied) of States. It is frequently said, therefore, that a State that objects to a particular practice from the outset will not be bound by that practice, even if it develops into a norm of customary international law. See, e.g., David H. Ott, PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD 15–16 (1987). In the *Anglo-Norwegian Fisheries Case*, Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (1951), the ICJ seemed to accept the proposition that a State that is a persistent objector to a particular custom is therefore not bound by it.

<sup>174</sup> UNFCCC, *supra* note 37, art. 3(3).

<sup>175</sup> *Id.*

<sup>176</sup> See generally RICHARD A. POSNER, CATASTROPHE: RISK & RESPONSE 150–155 (2004) (arguing against traditional discounting in cost-benefit analyses of responses to catastrophic risk, in part because discounting at market interest rates will “obliterate the interests of remote future generations”).

<sup>177</sup> *Trail Smelter Arbitration* (U.S. v. Can.), 3 U.N.R.I.A.A. 1905 (1949).

and practice followed in dealing with cognate questions in the United States, the Tribunal ruled in favor of the U.S. and ordered Canada to pay compensation for the damage:

Under the 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 territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Thirty years after *Trail Smelter*, the 1972 Stockholm Declaration expressed the principle adopted in *Trail Smelter* in terms of a positive obligation on States that exists as a limitation on a State's sovereign authority over its territory and resources and its freedom to choose its own environmental policies:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to the own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>178</sup>

Since 1972, Principle 21 of the Stockholm Declaration has been so often reiterated<sup>179</sup> as to be regarded by most commentators as undeniably a "part of the corpus of international law relating to the environment."<sup>180</sup>

The support given to the rule reflected in Principle 21 [of the Stockholm Declaration] by states, by the ICJ and by other international actors over the past three decades indicated the central role now played by the rule. . . . The scope and application of the rule, in particular to the difficult question of what constitutes 'environmental harm' (or damage) for the purposes of triggering liability and allowing international claims to be brought [is considered elsewhere]. At the very least, Principle 21 and Principle 2 [of the Rio Declaration] confirm that the rights of states over their natural resources in the exercise of permanent sovereignty are not unlimited . . . Beyond that, the rule may provide a legal basis for bringing claims under customary law asserting liability for environmental damage.<sup>181</sup>

As much as it is a limitation on the polluting State's sovereignty, Principle 21 may equally be considered as a protection of the sovereign integrity of other States. The intrusion of pollution from outside a state's borders, and the damage caused by that pollution, can be seen as "an infringement of [the damaged state's] right to territorial and . . . decisional sovereignty [and] . . . a breach of [its] undoubted sovereign right to territorial integrity."<sup>182</sup>

Assuming the rule expressed in Principle 21 is now an established part of customary international law, what are its implications for the problem of global climate change? In particular, does this rule provide a legal basis for proceeding against States that, like the U.S. and China, continue to emit huge quantities of greenhouse gases, heedless of the implications of those emissions for the global climate and indifferent to the adverse impacts of climate change on other States now and in the future? While Principle 21 confirms that States have an obligation (the "responsibility") to ensure

<sup>178</sup> Stockholm Declaration, *supra* note 23, princ. 21

<sup>179</sup> *E.g.*, Charter of Economic Rights and Duties of States, *supra* note 24, art. 30; Rio Declaration, *supra* note 36, princ. 2; Convention on Biological Diversity, *supra* note 37, art. 3.

<sup>180</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226, 242 (July 8).

<sup>181</sup> SANDS, *supra* note 103, at 246.

<sup>182</sup> *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 431 (July 25) (dissenting opinion of Judge Barwick).

that activities within their borders do not cause serious damage to other States, does that necessarily mean that States face liability under international law when activities that they allow within their borders lead to environmental harm elsewhere?

The central problem with assuming liability in this case is that the activities that cause global warming (like activities that cause transboundary environmental harm) are activities that are otherwise perfectly lawful under international law. Indeed, they are activities that the injured States themselves certainly permit within their borders. Thus, the primary cause of global climate change is the increasing concentration of greenhouse gases in the atmosphere, and the human activities responsible for that increase are legion and widespread. The chief culprits occur all over the world: power generation, cement manufacture, transportation (cars, trucks, airplanes), deforestation, and agriculture. Indeed, humans could not survive without emitting greenhouse gases (we all exhale CO<sub>2</sub>).

These facts create serious obstacles to using Principle 21 as the legal basis for a claim under customary international law seeking damages or other remedies against major GHG-emitting States on behalf of present and future generations.<sup>183</sup> The remainder of this section discusses two of the most significant problems. First is the problem of defining the point at which otherwise lawful activities within a State are made “unlawful” by virtue of their possible impact on the problem of global climate change. Second is the problem of assessing liability for climate-change-related harm when activities in all States have contributed to that harm.

While it is clear that Principle 21 places a duty on States to avoid transboundary environmental harm, it is much less clear when and whether the violation of that duty can serve as the basis for liability under international law.<sup>184</sup> The international law of State responsibility makes States liable for their “internationally wrongful” acts only. International wrongfulness requires both that an act is “attributable to the State” (i.e., as State action) and that it is a “breach of an international obligation of the State.”<sup>185</sup>

So what does that mean for activities that are otherwise lawful, indeed common, but that may cause a transboundary impact? One answer is that trivial or insignificant transboundary impacts are to be ignored. Principle 21 speaks of “damage to the environment”; *Trail Smelter* suggested that liability would obtain only “when the case is of serious consequence” and the Experts Group on Environmental Law of the World Commission on Environment and Development suggested that obligation to “prevent or abate any transboundary environmental interference” applies only to interferences which “cause substantial harm—i.e., harm which is not minor or insignificant.”<sup>186</sup>

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<sup>183</sup> I know of no case since *Trail Smelter*, *supra* note 178, in which liability was imposed on a State for transboundary environmental harm. Implementation of Principle 21 has proceeded primarily by States providing private remedies for such harm, see, e.g., OECD Council Recommendation for the Implementation of a Regime of Equal Right of Access and Non-discrimination in Relation To Transfrontier Pollution, OECD Doc. C(77)28/Final (May 17, 1977), *reprinted in* 16 I.L.M. 977 (1977), or by States taking action to avoid or reduce such harm when it becomes clear that it is occurring; see, e.g., Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217, *reprinted in* 18 I.L.M. 1442 (1979), and in 5 Weston & Carlson V.E.3, *supra* note 5.

<sup>184</sup> For readers who find it difficult to conceive that a State could be said to have a “duty,” but that it would not necessarily be responsible for breach of that duty, it might be helpful to consider domestic law analogies. In the United States, for example, the President has the constitutional obligation to “take care that the laws be faithfully executed.” But that the President has such an obligation does not mean that there will be a judicial remedy, much less a remedy in damages, for its breach.

<sup>185</sup> Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Dec. 12, 2001) (corrected by U.N. Doc. A/56/49(Vol.I)/Corr.4), *reprinted in* I Weston & Carlson I.G.4, *supra* note 5.

<sup>186</sup> WCED Experts Group on Env’tl. Law, *Legal Principles for Environmental Protection and Sustainable Development*, June 20, 1986, art. 10, U.N. Doc. WCED/86/23/Add1 (1986) & U.N. Doc. A/42/427/Annex (Aug. 4, 1987), *reprinted in* 5 Weston & Carlson V.B.12, *supra* note 5.

This helps to some extent. We know that the environmental damage caused by global climate change will be substantial. The question is no longer whether climate change (if not mitigated) will cause serious harm, the question is whether the harm will be merely serious or actually catastrophic. In addition, the requirement of serious harm may permit us to distinguish between major greenhouse gas emitting States and minor emitters.

But there still is a problem. Granting that States have the responsibility to stop activities within their borders from causing significant harm, and granting that the harm caused by major GHG-emitting nations is significant, at what point does inaction become a wrongful act? At what point is it a violation of international law for a State to fail to limit GHG-emitting activities? The U.S. might argue, for example, that there is no violation of international law in its failure to restrict GHG emissions so long as it is taking steps to address the threatened harm from those emissions. And, indeed, it is taking such steps—through research programs and other activities aimed at reducing or abating emissions in the long-term.

In its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the International Law Commission undertook to articulate rules applicable to “activities not prohibited by international law” that nonetheless involve a risk of significant transboundary harm.<sup>187</sup> The Draft is based on the assumption that Principle 21 (as developed and expressed in subsequent international practice, including in the Rio Declaration and the I.C.J. advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*<sup>188</sup>) expresses a “duty of prevention or due diligence” that is part of international law. The task of the Draft Articles is to flesh out the content of that duty.

For present purposes, Article 3 of the I.L.C. draft is the most significant:

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.<sup>189</sup>

Based explicitly on the authority of Principle 21, this article establishes a “principle of prevention” with respect to otherwise lawful activities that involve a risk of significant transboundary harm. It reads Principle 21 to imply a general duty on States to take maximal action to avoid known and serious risks of transboundary harm or, at least, to minimize or “reduc[e] to the lowest point the possibility of harm.”<sup>190</sup> And it suggests the possibility of a breach of this obligation (and, hence, the basis of a legal claim under the doctrine of State responsibility) if a state fails to take “all appropriate measures” to avoid the harm, a due-diligence obligation on a State to “exert its best possible efforts to minimize the risk.”<sup>191</sup>

This formulation of the principle of prevention in the Draft Articles does not go very far toward answering the question of whether or not a major GHG-emitting country is violating international law by failing to restrain its emissions. Consider the United States and assume it is obligated to exercise due diligence to avoid harmful climate change. Due diligence means the taking of “appropriate measures,” and the U.S. is, in fact, taking some measures—it has laws in place that reduce GHG emissions below the levels they’d reach without those laws, and it supports research aimed at achieving greater reductions later. Moreover, further measures by the U.S. would have, at best, a trivial impact

<sup>187</sup> Int’l Law Comm’n, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 1, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess., Supp. No. 10, at 146, U.N. Doc. A/56/10 (2001).

<sup>188</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996 I.C.J. 226 (July 8). For a thorough analysis of this opinion, see Burns H. Weston, *Nuclear Weapons and the World Court: Ambiguity’s Consensus*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 371 (1997).

<sup>189</sup> Int’l Law Comm’n, *supra* note 187, art. 3.

<sup>190</sup> *Id.* art. 3, cmt. 3.

<sup>191</sup> *Id.* cmt. 7.

on climate risks. No country or group of countries can solve the problem alone if GHG emissions continue elsewhere, and it is obvious, at present, that the U.S. is not the only nation that intends to continue increasing its GHG emissions. So how can the U.S. be said to have failed to exercise its duty of due diligence to prevent harm when there are no steps it individually could take to significantly impact climate change and it is, in fact, taking action aimed at finding a long-term solution to the problem? Obviously, much depends on how one defines “appropriate,” and a good argument could be made that the U.S. efforts on climate change are far from adequate. But the point is that the Draft Articles do not provide an easy or obvious answer to the question of the *legal* responsibilities of a State in the position of the United States, despite the fact that most of us would have no difficulty concluding that it should do far more than it has done as an ethical and policy matter.

Additionally, consider China. It, too, is taking some steps to reduce GHG emissions, but its overall emissions are still growing at a tremendous rate. And like the U.S., it refuses to accept any international limitations on its rate of emissions growth. Is it failing to exercise due diligence? China might point out that global climate change and its harms are the inevitable products of past emissions and that nothing China does today will change that. Moreover, the standard of due diligence with respect to environmental matters is variable and depends, in part, on the “economic level of States.”<sup>192</sup> Thus, it requires freedom to emit to meet its challenging developmental problems. Indeed, China might observe, international climate change law expressly recognizes that developing countries do not have any immediate obligation to reduce their emissions, despite the clear risks of rising atmospheric GHG concentrations. So how can a failure to reduce emissions that is countenanced by climate change law be considered a sufficient failure to exercise due diligence to prevent transboundary harm as to warrant deeming it an “internationally wrongful act” for purposes of asserting legal claims against China?

The point is not that there is not a case to be made against the United States or China or other large emitters of greenhouse gases who fail to take serious steps to limit their emissions. The point is that the case is very problematic *under the existing state of the law*. The fact is that climate change is not the kind of problem that gave rise to the rule embodied in Principle 21. The difficulty is perhaps best illustrated by the distinction that the draft articles on prevention drawn between the “State of origin” and the “State likely to be affected.” Under the draft articles, the State of origin—the State where risky activities are undertaken—has a duty of due diligence toward the State likely to be affected. But the reality of climate change is that there is no particular State of origin and no particular affected State. All States are States of origin of greenhouse gases and all States are affected States. Under the circumstances, it is unlikely that invocation of a State’s duty to prevent serious transboundary harm would provide the basis for a legal claim under the doctrine of State responsibility against States that are major GHG emitters.<sup>193</sup>

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<sup>192</sup> *Id.* art. 3, cmt. 13.

<sup>193</sup> The draft articles suggest that the responsibility entailed by Principle 21 is a responsibility to avoid activities with “transboundary physical consequences which, in turn, result in significant harm.” *Id.*, art. 1, cmt. 17. There might be some question about whether GHG emissions satisfy this requirement. We know, certainly, the causal chain by which GHG emissions could cause significant environmental harm in States other than the States where they occur. But can we show that particular GHG emissions themselves have “transboundary physical consequences?” Is the causal chain simply too long and complex to warrant attributing harm to GHG emissions from a particular State at a particular time? Issues of causation are common in the law, and there are legal tools, especially in common law tort systems, for addressing causation issues of this sort. Whether the international community would adopt them is another question.

It is not impossible to conceive of a particular State being singled out for liability under such circumstances—a State’s efforts to address climate change might fall so far below the norm of the international community<sup>194</sup> and its contribution to the greenhouse gas concentrations might be so significant that an international tribunal would be willing to overlook the difficulties noted above and find that the failure to implement significant greenhouse-gas-reducing measures is an “internationally wrongful act” triggering liability under the doctrine of State responsibility.<sup>195</sup> The point is that current liability and compensation rules do not invite such an approach. Thus comments one observer:

In cases of environmental damage that result from the cumulative effect of various harmful actions engaged in by several states, it is not easy to assign responsibility in order to seek any compensation or remedial action. . . . No individual state can assume responsibility for the environmental damage which results from the actions of many states. . . .

The international legal order has not yet devised rules addressing situations involving multiple-causes and multiple-state damage to the environment. . . . Establishing a causal link between state conduct and the resultant environmental damage, which is a condition precedent to the initiation of an action for compensation, is not easy in the absence of a clear regime of rules in such situations. An international rule of several or joint state liability, in cases of multiple-cause and multiple-state damage to the environment, is not feasible.<sup>196</sup>

Holding large GHG emitters liable would be more likely if there were a clear international consensus on the precise duties of States with regard to the avoidance of climate change and if implementation of those duties would significantly mitigate the risks of climate change. One would then have a much stronger case against States that did not comply with those duties, both in terms of their lack of due diligence and in terms of attributing the resulting damage to them. Unfortunately, there is not yet such a consensus, and irrespective whether the potential claimants are from the present or future generations. Rather than attempting to invoke the rule of Principle 21 against the (many) recalcitrant GHG-emitting nations, efforts ought to be focused on securing international agreement that there is an urgent and compelling legal duty to reduce GHG emissions.

Finally, it is important to note, in the context of this paper, that the traditional doctrine of State responsibility for transboundary harm was a backward-looking doctrine. States had an obligation to compensate other States for environmental injury of serious consequence when the injury was established by clear and convincing evidence.<sup>197</sup> But compensation clearly required proof of past or current injury. The doctrine articulated in *Trail Smelter* did not necessarily require steps to prevent harm from occurring in the future (although the Tribunal in *Trail Smelter* did, in fact, require Canada to take such steps). This makes the traditional doctrine of state responsibility for environmental harm somewhat problematic if our interest is primarily to protect unborn generations from harm that will occur, if at all, in the distant future.

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<sup>194</sup> The question of whether a State has exercised due diligence is, ultimately, a question that is answered by measuring its behavior against the behavior of other States. Due diligence is “the degree of care . . . that is expected of a good Government” for a State with the material and human resources of the State in question. *See id.* art. 3, cmt. 17.

<sup>195</sup> This is essentially the argument made in the Inuit Petition; *see supra* note 87.

<sup>196</sup> Francis D.P. Situma, *The Efficacy of International Environmental Law: A Personal Reflection*, 2 ILSA J. INT’L & COMP. L. 61, 85-86 (1995). *But see* International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, *supra* note 185, art. 47 (discussing responsibility of States when “several States are responsible for the same internationally wrongful act.”). This provision does not clearly address the situation where several States engage in both wrongful and lawful conduct, and the cumulative effect of that conduct is undifferentiated harm.

<sup>197</sup> *Trail Smelter Arbitration*, *supra* note 177.

Modern formulations of international rules regarding transboundary harm do move toward overcoming this problem by stating the international rule in terms of a duty to *prevent* harm.<sup>198</sup> Moreover, a State that is engaged in unlawful conduct (assuming one could establish that unrestrained GHG emissions were unlawful) has a duty under the modern law of State responsibility to cease that conduct, and without regard to whether injury has actually occurred or not.<sup>199</sup> Nonetheless, there are restrictions that could make it difficult to invoke these doctrines on behalf of future generations in some circumstances. Most critically, to “invoke the responsibility of another State,” the invoking State must be “an injured State”<sup>200</sup> or the obligation that has been breached must be an obligation owed to a collectivity or owed *erga omnes*.<sup>201</sup>

In the particular context of climate change, if we could identify legal obligations that were being violated by States that fail to take serious steps to reduce its emissions of GHGs, then I believe it is very likely that the obligations being violated would, in fact, be *erga omnes* obligations.<sup>202</sup> In general, international norms aimed at prohibiting States from harming shared planetary resources (e.g., the oceans or the atmosphere or the climate system) create obligations that are owed to all other States which have an undifferentiated claim to the relevant planetary resource. Obligations to avoid serious harm to the climate system would, from this perspective, clearly be *erga omnes*. This conclusion is strongly supported by the international community’s endorsement of the proposition that “change in the Earth’s climate and its adverse effects are a common concern of humankind.”<sup>203</sup>

Thus, if one could establish that GHG-emitting States are in violation of obligations aimed at *preventing* planetary climate change, all other States would be able to raise claims asserting the responsibility of those States that were acting wrongfully. One might then be able to use the doctrine of State responsibility to pursue legal action aimed at forcing States to take current action to respect the environmental interests of future generations. The problem, as discussed earlier, is in establishing that unrestrained GHG emissions are, in fact, a violation of existing international law. While creative arguments to this effect have been made, and the law could evolve in this direction, it is my conclusion that, at this point in time, States like China and the United States are not in violation of international law despite their continuing failure to place serious restraints on their enormous GHG emissions. It is not just the behavior States that must be changed. It is also the law.

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<sup>198</sup> International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, *supra* note 188, art. 3.

<sup>199</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, *supra* note 185, art. 30.

<sup>200</sup> *Id.* art. 42.

<sup>201</sup> *Id.* art. 48.

<sup>202</sup> An *erga omnes* legal obligation is an obligation that is owed by a State to the international community as a whole, as opposed to an obligation that is owed to a particular individual state. See *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 32 (Feb. 5). I’ve also done some things of my own (e.g., added a separate section relating to accused students rather than trying to fit them in to the draft). There is no definitive list of *erga omnes* obligations; one must consider the context and nature of a particular obligation as well as the context in which it is violated. For example, we would not ordinarily think of the obligation to prevent transboundary harm as being *erga omnes*. The obligation is owed to every state (because it is part of customary international law), but it is owed to those states individually—the obligation, in its traditional context, is to prevent harm to particular states.

<sup>203</sup> UNFCCC, *supra* note 37, pmb. at para. 1