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Climate Change, Human Rights, and the Right to Be Cold

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CLIMATE CHANGE, HUMAN RIGHTS, AND THE RIGHT TO BE COLD

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I. INTRODUCTION

In December 2005, the Inuit Circumpolar Conference (“ICC”) (re-named the Inuit Circumpolar Council in July 2006) publicly lodged a lengthy petition against the United States with the Inter-American Commission on Human Rights (the “Commission”),¹ a Washington D.C.-based organization that is one of two regional human rights bodies operating under the auspices of the Organization of American States (“OAS”). The petition alleged that the United States, as the world’s largest emitter of greenhouse gases, was committing various human rights violations against the Inuit residents of the Arctic through its climate change and global warming practices and policies, including its decision not to ratify *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (“Kyoto Protocol”).² In essence, the United States was to be sued for violating the human right to be cold. A year later (according to news reports since no verification can be found in the documentation posted on the website maintained by the Commission),³ the ICC received a letter of rejection from the Commission indicating that the ICC petition had failed to meet the basic requirements of admissibility for further

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1. Sheila Watt-Cloutier, *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*, http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf [hereinafter *ICC Petition*].

2. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22, Dec. 10, 1997 (entered into force Feb. 16, 2005).

3. See Inter-American Commission on Human Rights Home Page, <http://www.cidh.org> (last visited Dec. 9, 2007).

consideration within the inter-American human rights regime.⁴ According to the *Nunatsiaq News*, an English-Inuktitut weekly newspaper published in Canada, the ICC had received a letter advising that the Commission “will not be able to process your petition at present. . . . [T]he information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”⁵

Given the need to show a *prima facie* case for any international human rights complaint to pass the initial hurdle of admissibility before a consideration of the merits, one would normally surmise from the receipt of a letter of rejection that the Commission would not proceed to hear the claims made in the ICC’s petition. However, on March 1, 2007, the Commission held a public hearing on the subject of “Human Rights and Global Warming” that was broadcast to the public via the Internet and featured testimony from the (now former) Chair of the ICC, Sheila Watt-Cloutier, and the lawyers who had drafted the ICC’s petition against the United States.⁶ No State representative appeared before the Commission at this hearing, nor did any nongovernmental body that had not been involved with the petition. Only the lawyers representing the ICC and the two nongovernmental organizations that had worked with the ICC to draft the petition presented legal argument before the Commission.⁷

4. Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Organization of American States, to Paul Crowley, Legal Representative, Inuit Circumpolar Council (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

5. Jane George, *ICC Climate Change Petition Rejected*, NUNATSIAQ NEWS, Dec. 15, 2006, http://www.nunatsiaq.com/archives/61215/news/nunavut/61215_02.html; See also Andrew C. Revkin, *World Briefing Americas: Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, at A9; Deborah Zabarenko, *Climate Ills, Rights Linked; Global Warming Endangering Inuit “Sentinels,” Nobel Nominee Argues*, TORONTO STAR, Mar. 5, 2007, at A7 (confirming that the petition was rejected).

6. Press Release No 8/07, Inter-American Commission on Human Rights, *IACHR Announces Webcast of Public Hearings of the 127th Regular Period of Sessions*, Feb. 26, 2007, <http://www.cidh.org/Comunicados/English/2007/8.07eng.htm> [hereinafter Press Release No 8/07]; See Audio Recording: Audio of Public Hearings of the 127th Period of Sessions, held by the Inter-American Commission on Human Rights, May 1, 2007, <http://www.cidh.org/Audiencias/Audios%20hearings%20127%20PS.htm>.

7. The San-Francisco-based Earthjustice (formerly the Sierra Club Legal Defense Fund) and the Washington-based Center for International Environmental Law were the two nongovernmental organizations that worked with the ICC to develop the petition. Two of the three lawyers participating were previously

It would appear that the ICC Petition against the United States has unfortunately changed into what the Commission calls a “hearing of a general nature” to investigate the relationship between global warming and human rights. There is, however, very little transparency as to the procedural mechanism used to permit such a transition to occur. According to documents made public by Earthjustice, it would appear that the hearing in March 2007 came about as a result of a December 2006 request made by the three organizations responsible for the petition, namely the ICC, Earthjustice and the Center for International Environmental Law. This request was then renewed in mid-January 2007 and later granted by the Commission through a letter dated February 1, 2007, subsequently made public by Earthjustice.⁸ Included within the Commission’s letter were excerpts from the Commission’s Rules of Procedure indicating that the Commission intended to hold a “Hearing of a General Nature”, albeit that in subsequent media reports, it was reported that the Commission had done an “about face” and granted a hearing for the petition.⁹

Pursuant to Article 64 of the Commission’s Rules of Procedure, persons interested in presenting testimony or information to the Commission on the human rights situation in one or more OAS member states or on matters of general interest are permitted to make a request to the Executive Secretariat for a “Hearing of a General Nature.” However, in granting this particular request, the Executive Secretariat appears to have sent the requesting organizations an outdated copy of the relevant Rules. No mention is made in the February 2007 letter of the amendments made to these Rules in Oc-

guests of the *Fordham Environmental Law Journal*’s annual Symposium in 2005. Donald Goldberg of the Center of International Environmental Law and Paul Crowley of the Inuit Circumpolar Conference presented the Symposium’s opening remarks. See Symposium, *A New Legal Frontier in the Fight against Global Warming: Panel II*, 16 *FORDHAM ENVTL. L. REV.* 335 (2004-2005).

8. Letter from Ariel E. Dulitzky, Assistant Executive Secretary of the Inter-American Commission on Human Rights, to Sheila Watt-Cloutier; Martin Wagner, Managing Attorney of Earthjustice; and Daniel Magraw, President of the Center for International Environmental Law (Feb. 1, 2007), http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf; See also Press Release, Earthjustice, *Inter-American Commission on Human Rights to Hold Hearing on Global Warming* (Feb. 6, 2007), <http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html>.

9. See *Human Rights Body Reconsiders Inuit Climate Change Petition*, CBC NEWS, Feb. 6, 2007, <http://www.cbc.ca/canada/north/story/2007/02/06/climate-hearing.html>.

tober 2006 to ensure the presence of the State at hearings concerning the human rights situation in that particular State.¹⁰ Article 64, as amended by the Commission at its 126th regular period of sessions held from October 16-27, 2006, now contains three sentences, rather than just one, with the added sentence requiring that: "In cases of hearings on the human rights situation in a State, they [the persons requesting a hearing of a general nature] also will indicate whether the respective State should be called to the hearing. If this is not specified in the request, the Commission shall presume that the presence of the respective State is desired."

On the other hand, perhaps the subject matter of the ICC Petition has become a topic for general study by the Commission, notwithstanding the prior claims of responsibility made by the ICC against a specific State. Yet, while it is true that the Commission has embarked on special studies of general topics in the past, these studies are often initiated by the adoption of some means, such as a resolution, indicating a wide interest in the subject matter among a number of OAS member states. Moreover, past methods for carrying out such special studies have been more inclusive; typically, the Commission convened a panel of independent experts to obtain timely and specialized information on the topic while also inviting the representatives of both member states and nongovernmental organizations to submit written observations.¹¹ The Commission has also made use of questionnaires as a means to gather information from both governmental and nongovernmental sources, while country-specific reports have typically involved in-country visits.

Apart from these procedural concerns, the lack of transparency from the Commission, and the general distaste associated with holding a generalized hearing into a particularized claim against an absent State before a body intended to be a paragon for best practices in the field of human rights, including rights of fair hearing and due process, the subject matter of the ICC Petition also raises substantive concerns within the field of international human rights law. The focus of this article will be on those concerns; however, in light of the lack of information provided by the Commission and the possibility of further hearings to acquire information from a balanced array of

10. Rules of Procedure of the Inter-American Commission on Human Rights art. 64(2), available at <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm>.

11. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Inter-Am. C.H.R. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (Oct. 22, 2002).

sources, these views must by necessity be of a preliminary nature. If nothing else, this review of the saga of the ICC Petition will at least hopefully encourage the Inter-American Commission on Human Rights to be more open and forthcoming in a timely manner with respect to the decisions it makes concerning petitions lodged.

II. THE ICC PETITION

The ICC is an international nongovernmental organization representing approximately 160,000 Inuit living in Alaska, Canada, Greenland and Chukotka (in the Russian Federation).¹² Founded in 1977, the ICC has national offices in each of the four locations mentioned as well as an international office known as the "Office of the Chair." At the time the ICC Petition was developed and lodged, the Chair of the ICC was Sheila Watt-Cloutier, a well-known Canadian Inuit who held the post of Chair from 2002-2006.¹³ The petition was submitted by Watt-Cloutier "on behalf of all Inuit of the Arctic regions of the United States and Canada" and specifically named sixty-two other Inuit living in these regions, only fourteen of whom were resident in the United States.¹⁴ Nevertheless, the petition was filed specifically against the United States and not Canada, largely on the basis of an argument that the United States, as the world's largest emitter of greenhouse gases, should take the greatest share of responsibility for Arctic warming and its impact on the Inuit way of life.¹⁵ The petition alleged that the rights to property, physical well-being, and cultural life of the individuals named in the petition had been adversely affected by the acts and omissions of the United States.

12. See Inuit Circumpolar Council (ICC), <http://www.inuit.org/index.asp?lang=eng&num=2> (last visited Dec. 9, 2007).

13. Watt-Cloutier has been a previous guest of the *Fordham Environmental Law Review's* annual symposium, providing a keynote address in 2005. See Sheila Watt-Cloutier, *A New Legal Frontier in the Fight against Global Warming*, 16 FORDHAM ENVTL. L. REV. 292 (2005). Watt-Cloutier is a recent recipient of the Order of Canada and was nominated for the 2007 Nobel Peace Prize, which was won by fellow-environmentalist Al Gore. *Gore: Nobel Prize Win Shows Climate Change a "Planetary Emergency,"* CBC NEWS, Oct. 12, 2007, <http://www.cbc.ca/world/story/2007/10/12/nobel-peace.html>.

14. *ICC Petition*, *supra* note 1, at 1, 9-12.

15. *Id.* at 68-69.

Clearly, the focus of the petition was intended to be on human rights. This is obvious from the fact that the petition was lodged with one of two supervisory bodies within the inter-American system charged with the regional promotion and protection of human rights. The competence of the Inter-American Commission on Human Rights to receive petitions alleging specific violations of human rights by the United States is premised on the membership of the United States in the OAS. As a member state of the OAS, the United States is bound by the terms of the *Charter of the Organization of American States* and thus accepts an obligation to protect the “fundamental rights” of the individual.¹⁶ The content of this obligation is then thought to be amplified by the *American Declaration of the Rights and Duties of Man*,¹⁷ a non-binding resolution adopted in 1948 during the same diplomatic conference in which the *OAS Charter* was adopted, which provides a listing of the civil, political, economic, social, and cultural rights and duties to be protected throughout the Western Hemisphere. Although the American Declaration is a non-binding conference resolution, it is said to have gained normative force indirectly through the obligations of the *OAS Charter*, according to the views of expert commentators¹⁸ and the case law of the Inter-American Commission and Court of Human Rights.¹⁹ As a

16. *Charter of the Organization of American States*, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 179 UNTS 3 (entered into force Dec. 13, 1951) [hereinafter *OAS Charter*]. The *OAS Charter* was amended by the *Protocol of Amendment to the Charter of the Organization of American States* (“Protocol of Buenos Aires”), Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. The fourth preambular paragraph of the *OAS Charter* refers to the need for “a system of individual liberty and social justice based on respect for the essential rights of man.” *OAS Charter* art. 3(k), May 2, 1948, 33 I.L.M. 987 (1994).

17. *American Declaration of the Rights and Duties of Man*, OEA/Ser.L.V/II.23, doc. 21, rev. 6 (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc. 6, rev.1, at 17 [hereinafter *American Declaration*].

18. See Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT’L. L. 828, 829 (1975). See also, Thomas Buergenthal, *International Human Rights in a Nutshell* 180, 194-95 (2d ed. 1995).

19. See *Baby Boy Case*, Inter-American Commission on Human Rights, Case No. 2141, OEA/Ser.L.V/II.54, Doc. 9 rev. 1. 16 October 1981 (holding that the international obligations of the United States are governed by the *OAS Charter*, that through the *OAS Charter* the American Declaration and other human rights instruments have gained binding force, and that the Commission as the regional organ entrusted with competence to promote human rights has competence to decide whether the United States has violated its obligations under the American Declaration); See also *Interpretation of the American Declaration within the*

result, the American Declaration, but not the *American Convention on Human Rights*,²⁰ can serve as the basis for grounding petitions before the Commission against the United States (and for that matter, Canada and many of the nations of the Caribbean) alleging specific violations of human rights. The United States, however, continues to take the position that the American Declaration is “a document that is not legally binding on the United States.”²¹

However, the ICC Petition is also more than a human rights petition. It is also intimately connected to matters of international environmental law, most specifically to the goals of the Kyoto Protocol²² to which Canada is a party but the United States is not. The timing of the petition’s debut emphasizes this point. After being at least two years in the making,²³ the petition was lodged with the Inter-American Commission on Human Rights on December 7, 2005. However, the announcement of its coming forth was *not* made in Washington D.C., where the Commission is headquartered, but rather in Montréal, Canada, amidst the deliberations of the Eleventh Conference of the Parties to the *United Nations Framework Convention on Climate Change*, which were then taking place.²⁴ This con-

Framework of Article 64 of the American Convention on Human Rights, OC 10/89 Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989) (holding that the American Declaration is a source of international obligation for OAS member states).

20. *American Convention on Human Rights*, 1144 UNTS 144, 9 I.L.M. 673, Nov. 22, 1969 (entered into force July 18, 1978). The United States has not ratified this treaty, thus no jurisdiction is accorded to the Commission to hear “cases” against the United States based on the Convention.

21. See e.g., *Response of the Government of the United States to October 10, 2002*, Case No. 11.140, *Mary Dann & Carrie Dann v. United States*, Inter-Am C.H.R., Report No. 53/02, available at <http://www.cidh.org/Respuestas/USA.11140.htm>.

22. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, *supra* note 2.

23. An ICC executive council resolution adopted in 2003 authorized the Office of the Chair to “[d]evelop a petition to the Inter-American Human Rights Commission (IAHRC) or another appropriate body(ies) seeking a declaration that the impacts in the Arctic of human-induced climate change infringes upon the environmental, subsistence, and other human rights of Inuit.” ICC Executive Council, Res. 2003-01, “Climate Change and Inuit Human Rights” (2003), <http://www.inuit.org/index.asp?lang=eng&num=244> (last visited Dec. 9, 2007).

24. A copy of the speech made by Sheila Watt-Cloutier announcing the petition can be found at: The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights, http://inuitcircumpolar.com/index.php?auto_slide=&ID=318&Lang=En&Parent_ID=¤t_slide_num=.

ference was a historic event, marking as it did the first meeting of the Conference of the Parties since the Kyoto Protocol came into force. It was also the largest inter-governmental climate conference to take place since the Kyoto Protocol's adoption in 1997 and had attracted over 10,000 participants. The Montréal conference was thus a venue very amenable to the publicization of an international petition alleging that failure of the United States to ratify the Kyoto Protocol was the cause of various human rights violations in the Arctic region.²⁵

As for the specific rights violations alleged, the ICC Petition claimed that the acts and omissions of the United States that had contributed to the effects of global warming in the Arctic violated a range of human rights held by the Inuit, including the rights to life, property, health, inviolability of the home, cultural benefits, and development.²⁶ The petitioners alleged that the failure of the United States to take effective action to reduce greenhouse gas emissions had damaged the subsistence way of life that was central to Inuit cultural identity, and thus denied the Inuit the right to enjoy the benefits of their culture. They also alleged that the acts and omissions of the United States with respect to climate change interfered with the Inuit use and enjoyment of their land and other forms of property, noting that “[c]limate change has made the Inuit’s traditional lands less accessible, more dangerous, unfamiliar, and less valuable to the Inuit.”²⁷ It was thus the petitioners’ view that the United States should be held responsible for the diminishing value of their property rights and for the damage caused to their places of residence by the environmental change taking place in the Arctic that the petitioners alleged had been caused by the actions and inactions of the United States with respect to climate change. The petition also alleged that the climate change caused by the regulatory actions and inactions of the United States was harmful to Inuit health and well-being and violated the Inuit rights to life, physical integrity and security. The petition also included a collective rights claim, arguing the United States had violated the Inuit right to their own means of subsistence.

25. See United Nations Climate Change Conference (COP 11 and COP/MOP 1), http://unfccc.int/meetings/cop_11/items/3394.php. Included in the schedule of side events for the conference is a booking for the Inuit Circumpolar Conference for an event, “The Right to Be Cold: Inuit Defend Their Human Rights in the Face of Climate Change,” held on Dec. 7, 2005.

26. *ICC Petition*, *supra* note 1, at 70-95, 112-14.

27. *Id.* at 82.

Yet, despite the subtle pressures of the current “greening” of political discourse, one must also be mindful of the legal concerns raised by the content of the ICC Petition. These concerns range from the impact this petition and a potential response (if provided by the Commission) may have on the legitimacy of the inter-American system for the regional protection of human rights to the fundamental challenge raised by the petition’s apparent desire to downplay the role of State consent in the making of international obligations, particularly with respect to obligations made by treaty. There is also a disconcerting over-emphasis throughout the ICC Petition on the need for action at an international level to combat climate change – a view that discounts the wisdom of “thinking globally, acting locally” and runs contrary to the encouragement given to individuals as well as governments at the sub-national level to take action *within* a State to reduce greenhouse gas emissions.²⁸ Thus, for publicizing the impact of global warming on the indigenous peoples of the Arctic, the launching of the ICC Petition receives full marks, but the petition rightly fails with respect to its legal arguments.

III. A HUMAN RIGHTS CRITIQUE OF THE ICC PETITION

A key concern with the ICC Petition from the perspective of international human rights law was its scope. The vast majority of the

28. Consider, for example, California’s *Global Warming Solutions Act*, CAL. HEALTH & SAFETY CODE § 38500 (West Supp. 2007), or the Regional Greenhouse Gas Initiatives of the States of New York, New Jersey, Connecticut, Maine, Delaware and Vermont: Conn. Gen. Stat. Ann. § 22a-200 -201c (West 2006 and Supp. 2007); 38 ME. REV. STAT. ANN. tit. 38 § 579 (Supp. 2006-07); 30 VA. CODE ANN. § 255 (Supp. 2006); MD. CODE ANN., Envir. § 2-1002 (West 2007); *Global Warming Response Act*, N.J. STAT. ANN. § 26:2c-38 (2007); *New York Clean State and Clean City Act*, Bill A05038 § 19-1101-19 (Feb. 12, 2007). See also Del. S. Con. Res. 28, 144th Gen. Assembly (2007) (requesting the Secretary of the Department of Natural Resources and Environmental Control to convene a stakeholder’s workgroup to consider the Regional Greenhouse Gas Initiative); Jeffrey Rubin, *There’s A Better Way To Cap Carbon Emissions*, THE GLOBE AND MAIL, Feb. 27, 2007, at A19 (predicting that while the U.S. has not ratified the *Kyoto Protocol*, the vast majority of U.S. states will have carbon cap-and-trade systems by 2010). See also, the commitment of 141 mayors to meet or beat the Kyoto Protocol targets in their own communities, *U.S. Conference of Mayors Climate Protection Agreement*, <http://www.usmayors.org/climateprotection/agreement.htm>.

petitioners were Canadian Inuit, residing in Canada,²⁹ who, in tandem with fourteen Inuit residents in Alaska, authorized the lodging of a petition in their names against the United States alleging that the United States was violating their human rights. The goal of the petition was to hold the United States accountable for a range of alleged human rights violations that were taking place throughout the entire Arctic region within both the United States and Canada. In doing so, the petitioners ostensibly sought the Commission's approval for a major extra-territorial extension of the scope of application of an international human rights instrument without regard to the sovereign interests of other States in the Arctic, and without support from within international human rights law for such a major expansion.

International human rights instruments, including those in the form of declarations that may have gained normative force over time, have a scope or purview of application that holds a State Party accountable for those human rights violations that occur either within that State's territory or under that State's jurisdiction. In some human rights treaties, this notion of a "scope of application" is expressly stated in the operative paragraphs of the treaty, with the "scope of application" provisions typically linked to the corollary obligation of taking action domestically (and thus within a State's territory and jurisdiction) to ensure the implementation of the treaty's human rights obligations. Article 2 of the *International Covenant on Civil and Political Rights* ("ICCPR") provides a ready example.³⁰ Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹

29. Forty-nine of the sixty-three petitioners are listed as residing in Canada. See *ICC Petition*, *supra* note 1, at 1, 120-30.

30. *International Covenant on Civil and Political Rights*, 999 UNTS 171, 6 I.L.M. 383, Dec. 16, 1966 (entered into force Mar. 23, 1976). See further, Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed. (Oxford: Oxford University Press, 2004).

31. *Id.*

Article 2(2) then provides the corollary obligation of domestic implementation by providing:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.³²

While the obligations of the Covenant bind every State Party as a whole, provisions outlining the treaty's scope clearly limit the required action of an individual State Party to the geographic areas or territories under its control.³³

Similar language is found in the ICCPR's inter-American equivalent, the *American Convention on Human Rights* ("ACHR"),³⁴ with Article 1 of the ACHR containing the "Obligation to Respect Rights" and requiring all State Parties "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms," while Article 2 provides the corollary obligation of domestic implementation. Admittedly, the American Declaration does not contain an express "scope" provision akin to those found in Article 2 of the ICCPR and Article 1 of the ACHR.³⁵ However, the American Declaration's scope of application to an OAS member state's territory and jurisdiction must be implied by its very nature as an international human rights instrument, because it would be con-

32. *Id.*

33. This is also the view of the treaty monitoring body established by the ICCPR, known as the Human Rights Committee. See Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment No. 31*].

34. *American Convention on Human Rights*, *supra* note 20.

35. American Declaration, *supra* note 15. The closest provision is a preambular paragraph stating that: "The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable" (emphasis added).

trary to our basic understanding of such instruments to assume that the omission of a scope provision from a 1948 listing of rights and duties meant that the OAS member states agreed to entertain an obligation to ensure the non-violation of human rights within the territory and jurisdiction of another State. After all, respect for the territory of another State and the obligation of non-interference in another State's domestic affairs are basic tenets of the international legal system, as affirmed expressly as key principles by the member states of the OAS through their ratification of the *OAS Charter*.³⁶

Thus, while transboundary air pollution, by definition, knows no bounds, international human rights instruments clearly do have boundaries, and while there is pressure on these boundaries to accommodate a certain degree of extra-territorial reach, current jurisprudence does not support the extent attempted by the authors of the ICC Petition. As indicated above, the obligation on a State Party to ensure respect for the rights contained in an international human rights instrument applies within the territory and area of jurisdiction of the State Party to that instrument. The use of both "territory" and "jurisdiction," or simply "jurisdiction" on its own, suggests that the instrument is not restricted in its application to simply the territory of a State Party, and thus it is accepted that a human rights instrument may well have a degree of extra-territorial reach. It is, however, also accepted that there is a limit to the extent of this extra-territorial reach, with notions of power or effective control being suggested as determinative factors.³⁷ Thus, as a general principle, areas outside a State's territory that are nonetheless subject to that State's power or effective control, such as through occupation or colonization, can also fall within the scope of application of that State's obligations under an international human rights instrument.

Canada, however, remains a sovereign country that is neither controlled by the United States, nor subject to its jurisdiction. Canada is also not a blank slate, with no contributions of its own to global warming. Thus, a Commission decision granting admissibility to the claims of 49 Canadian Inuit against the United States for rights violations taking place within the territory and jurisdiction of Canada could have been viewed as pushing the boundaries of current thinking about the "scope of application" of a human rights instrument too far, with consequences for the credibility of the inter-American

36. See *OAS Charter*, *supra* note 14, at arts. 3(b) and 3(e).

37. See *General Comment No. 31*, *supra* note 33, at para. 10.

human rights system. Such a decision would have also ignored Canada's recognized jurisdiction over Canadian territory in the Arctic region, while also raising the question as to why, if the human rights concerns are indeed paramount, Canada was not sued by the Canadian Inuit for its contributions to global warming. While Canada is a party to the Kyoto Protocol, it is nevertheless a contributor to the planet's greenhouse gas emissions, and, with such contributions being the focal point of the ICC Petition, there is a certain logic in an extension to Canada. But the chosen focus of the ICC Petition was the United States and, more specifically the U.S. failure to ratify the Kyoto Protocol, suggesting that more is at play than a legal complaint. It would appear that the petition is also an attempt to use the language of human rights to impose pressure, in moral and political terms, on the State to ratify an international treaty, notwithstanding the discretion afforded by international law to the domestic organs of a State with respect to such a decision.

It would be wrong, however, to conclude this discussion of scope of application without mentioning that jurisprudential developments within the field of international human rights law have confirmed that *some* decisions made within a State that later lead to a rights violation taking place outside of the State can incur State responsibility under an international human rights instrument. This development has played out most notably within the context of extradition and deportation.³⁸ In these cases, it is now generally accepted that a sending State can incur State responsibility for the violations of an individual's human rights that take place outside that State's territory and beyond its jurisdiction when the violations are shown as being the direct result of a State's decision to send the individual to face such treatment in the other State. There is, however, an onerous burden of proof on the human rights complainant, with jurisprudence requiring that the State knew or ought to have known that there was a real and substantial risk that a serious human rights violation would occur in the other State as a direct and foreseeable result of its actions.³⁹ Moreover, the actions taken by the State in these situa-

38. See generally Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 QUEEN'S L.J. 82, 82-134 (2006) [hereinafter Harrington].

39. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 29 I.L.M. 1063 (1989); *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/48/D/470/1991; *Report of the Human Rights Committee*, UN GAOR, 48th Sess., Supp. No. 40, UN Doc. A/48/40, vol. 2 (1993) annex XII.U, reprinted in 98

tions are not, in fact, extra-territorial since State responsibility is incurred as a result of deliberate actions taken within the State to extradite, deport, or otherwise remove the individual from that State to another. Lastly, the grounds for this extension of State responsibility are also limited, at least under present jurisprudence, with successful cases resting on violations of such rights as the right to life and the prohibition on torture and other forms of serious ill treatment and possibly gross breaches of the right to a fair trial.⁴⁰ The facts alleged in the ICC Petition do not come near to meeting these requirements of foreseeability and deliberate action within the State being sued, even if the Commission was willing to extend this jurisprudence beyond the surrender context and for rights other than the right to life and the prohibition on torture. The ICC would have had to argue that the United States knew or ought to know that specific actions undertaken by a multitude of governmental and non-governmental actors within the state's jurisdiction and territory would lead to the specific violations alleged in the specific geographic location at issue in the ICC Petition.

The second human rights concern with the ICC Petition relates to the general question of causation and State responsibility. The Commission's decision to reject the ICC Petition on preliminary grounds is admirable, because although there is no doubt that human activities are contributing to global warming, it is not clear that the State bears all responsibility for these activities. After all, there is a notion of individual responsibility that is applicable to environmental matters that encourages individuals to recognize the impact of their activities on the planet and to act accordingly. Moreover, it is too simplistic to say that a State that contributes twenty-five percent of the world's greenhouse gas emissions bears twenty-five percent of the blame. (A similar logic infuses a current joke that, if Americans contribute the most greenhouse gas emissions, then Americans should be subject to a carbon tax.) However, this logic would suggest that every State within the OAS should be held responsible by the Inter-American Commission on Human Rights for the human rights violations that flow from global warming, assum-

I.L.R. 426, (1993), 14 HUMAN RIGHTS L.J. 307 (1993); see also *Judge v. Canada*, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998; U.N. GAOR, *Report of the Human Rights Committee*, 58th Sess., Supp. No. 40, UN Doc. A/58/40, vol. 2, reprinted in 42 I.L.M. 1214 (2003).

40. See Harrington, *supra* note 388, at 116-30.

ing that such causation can be proven, according to their percentage contribution to global emissions levels. Apart from discounting the contributions to global warming by States not part of the OAS, would this approach to human rights law also mean that a State would be less responsible for its human rights violations if it reduced its emissions one year, but more responsible if its emissions increased in another year?

Such a sliding-scale approach to State responsibility does not accord well with our understanding of the nature of international human rights violations. International human rights bodies, whether entrusted to provide binding or non-binding decisions, either hold a State responsible or not responsible when faced with a complaint that the State has violated an individual's human rights. There is no notion of contributory responsibility, although there may be some discussion of various contributing factors when evaluating the State's justifications for infringing the human rights guarantees under discussion, assuming that the human right under discussion is not an absolute guarantee. However, once a State is found in violation of its human rights obligations, there is no sliding scale of responsibility. The State is found responsible.

This is neither to deny the argument made by the petitioners with respect to the potential horizontal application of many human rights guarantees, nor to reject outright the petitioners' arguments simply on the basis that many of the greenhouse gas emissions causing adverse effects in the Arctic are the result of actions taken not by States but by private corporations. As a general principle, many international human rights guarantees can be both vertical and horizontal in application, (sometimes referred to as negative and positive in application),⁴¹ with the right to life, for example, requiring the State to abstain from taking the life of a private person while also requiring the State to take measures, or act positively, to prevent one private person from taking the life of another private person. The first example illustrates a negative or vertical approach to human rights analysis, focussing on the relationship between the government and a private party, while the second example illustrates a positive or horizontal approach, requiring positive action from the government to ensure the protection of human rights as between two private parties. This "positive as well as negative" approach to the interpretation of existing international human rights guarantees offers much potential

41. See *General Comment No. 31*, *supra* note 333, at para. 6.

for the use of these guarantees to address environmental concerns, with the European Court of Human Rights leading the way.⁴²

The jurisprudence of the European Court of Human Rights has evolved to support the use of a “positive rights” approach to the application of existing human rights, such as the right to respect for private and family life, home and correspondence found in Article 8 of the *European Convention on Human Rights*,⁴³ to address the impacts and consequences of environmental hazards, even when the creation of the environmental hazard cannot be directly attributed to the State and even when the Convention and its Protocols lack a specific “right to a healthy environment”. In the landmark case of *López Ostra v. Spain*,⁴⁴ the Court held that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”⁴⁵ so as to ground a violation by the State on the basis of a positive duty to take necessary measures to secure respect for the individuals’ rights. In this case, the human rights complainant had been unable to obtain relief under Spanish law from the noxious emissions of a waste treatment plant constructed near her home; thus, the state was found to have failed to take measures to protect the complainant’s human rights as against the actions of the operators of the treatment plant. However, the crucial word in the Court’s holding is “may” with the Court also acknowledging that there is a need to strike a fair balance between the economic interests at play and an individual’s interest in the effective enjoyment of his or her rights.⁴⁶

Since the *López Ostra* decision, however, a similar balancing exercise has weighed in favour of the promotion of economic development, suggesting that the *López Ostra* decision may be the high water mark for this jurisprudential approach. In *Hatton v. United Kingdom*, a Grand Chamber of the European Court of Human Rights reconsidered an earlier decision by one of its smaller Sections concern-

42. See further, Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT’L L. 263 (1995).

43. Eur. T.S. No. 5, 213 UNTS 222, Nov. 4, 1950 (entered into force Sept. 3, 1953).

44. *López Ostra v. Spain*, 303-C Eur. Ct. H.R. 41 (1994), 20 Eur. H.R. Rep. 277 (1995). See also *Fadeyeva v. Russia*, App. no. 55723/00, Eur. Ct. H.R. (June 9, 2005) (concerning pollution produced in a densely populated town by the largest iron smelter in Russia).

45. *Id.* at para. 51.

46. *Id.* at para. 58.

ing a complaint about noise pollution arising from night flights at London's Heathrow Airport.⁴⁷ While the impact of the noise was felt by the complainants, notwithstanding the various noise abatement measures undertaken by the state and the regulations imposed on the private airport authority, the Grand Chamber held, by 12 votes to 5, that a fair balance had been struck, taking into account the economic well-being of the country and the economic significance of the airport. The express over-turning of the earlier decision appears to send a message by the Court to watch the development of its "environmental" jurisprudence.

In any event, this line of cases from a regional human rights court does suggest that while an existing international human rights guarantee may well be able to ground a complaint in an environmental-emissions case, regardless of whether the hazard was directly caused by the State or whether State responsibility arose from a failure to regulate adequately the activities of the private sector, a key consideration will continue to be the fair balance achieved between the competing interests of economic development and individual rights. Nowhere in the ICC Petition is this need to consider the economic benefits of the pollution source in the fair balance with individual rights adequately addressed, notwithstanding the pages spent explaining the rights that have been violated by the failure of the State to take action to curb greenhouse gas emissions.⁴⁸ Reference, however, is made to the *López Ostra* case,⁴⁹ but the challenge posed by the Grand Chamber's decision in *Hatton* is not addressed head-on.⁵⁰ It would have been interesting if the ICC Petition had addressed directly the implication in *Hatton* that the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city, and argued this as a distinguishing factor with respect to global warming in the Arctic.

The third concern of a general nature to note with respect to the ICC Petition is the kitchen-sink approach taken with respect to the use of authorities in the field of international human rights law.⁵¹ The petition tries to bolster its claims by reference to a wide variety

47. See *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189, 37 Eur. H.R. Rep. 28 (2003) (overruling an earlier decision by the Third Section of the European Court of Human Rights).

48. See *ICC Petition*, *supra* note 1 at 74-96.

49. *Id.* at 95.

50. The *Hatton* case is not mentioned in the ICC Petition.

51. See *ICC Petition*, *supra* note 1 at 96-102.

of sources ranging from non-binding declarations to treaties neither signed nor ratified by the United States, and from the non-binding case law of the Inter-American Commission on Human Rights and the U.N. Human Rights Committee to the jurisprudence of the Inter American Court of Human Rights, while along the way making reference to the reports by Special Rapporteurs as well as drafts of instruments under negotiation and thus not yet adopted as political commitments by States.⁵² This approach has the effect of compounding the existing complexities of a multi-faceted human rights complaint and fails to recognize the non-legal or non-binding nature, and thus weaknesses, of many of the sources invoked to support the petition's claims. It must, however, be noted that the Commission is equally at fault here, encouraging counsel to make such citations through its own reference to non-binding, and as yet, incomplete, "sources" such as the "Proposed" American Declaration on the Rights of Indigenous Peoples.⁵³

There are references throughout the petition to various non-binding sources including sources from outside the inter-American system, which could easily confuse the lay reader as to their relative importance while also raising expectations to a level impossible to fulfil. Besides the rights catalogued in the American Declaration, the petitioners also invoke rights and principles based on international treaties to which the United States is not a party, such as the *American Convention on Human Rights*⁵⁴ and the International Labour Organization's Convention No. 169,⁵⁵ as well as instruments still in

52. *Id.* at 73; *Proposed American Declaration of the Rights of Indigenous Peoples, Inter-American Commission on Human Rights, Inter-Am C.H.R., OEA/Ser/L/V/II.95 doc. 6* (1997), available at <http://www1.umn.edu/humanrts/instree/indigenousdecl.html>. Reference is also made to the then "Draft United Nations Declaration on the Rights of Indigenous Peoples," U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), available at <http://www1.umn.edu/humanrts/instree/declra.htm>. Adopted on September 13, 2007, the final text of the *United Nations Declaration on the Rights of Indigenous Peoples* differs from the version cited, illustrating the danger if counsel and courts refer to drafts: see U.N. Doc. A/RES/61.295 (Oct. 2, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

53. *Case of Mary and Carrie Dann*, Report N° 75/02, Case 11.140 (United States), Inter-Am. C.H.R. (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm> (last visited Dec. 10, 2007).

54. *Supra* note 20.

55. *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, 28 I.L.M. 1382, available at <http://www.unhchr.ch/html/menu3/b/62.htm> (last visited Dec. 10, 2007).

draft form, such as the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁶ They also invoke rights found in international treaties to which the United States is a party, but to which the States Parties as a whole have given no role of adjudication to an international human rights body, let alone the Inter-American Commission on Human Rights.⁵⁷ An example of the latter is the invocation of a people's right not to be deprived of their own means of subsistence,⁵⁸ which is a collective right found within the right of self-determination in common Article 1 of the two International Covenants but is a right that cannot form the basis for a claim before the U.N. Human Rights Committee.⁵⁹ It should therefore not be permitted as the basis for a claim before the Inter-American Commission on Human Rights since doing so allows for an end-run around the U.N. system for the protection of human rights, while also breaching the principle of State consent underpinning – and giving strength to – the very right of petition in the international human rights system.

The inter-American human rights bodies have often paid heed in their decisions to wider developments in international human rights law and public international law in general. It is also accurate to note and to require these human rights bodies to encourage “due regard” for other rules of international law that are relevant and applicable to the State against which a complaint has been lodged. The question, however, for further discussion is what is the “due regard” to be paid to specific treaty rules that have not received the State's consent, to non-binding declarations that have yet to be finalized, and to treaty rights provisions that fall outside the purview of the right of individual petition under international law. There is, at least, an argument that these “sources” should not be invoked in a petition based on the American Declaration and the claims made in the ICC Petition based on these provisions appear to have been rightly declared inadmissible by the Commission's rejection of the petition.⁶⁰

56. *ICC Petition*, *supra* note 1 at 80 and 93, for example.

57. *Id.* at 97-99.

58. *Id.* at 92-93.

59. *See*, for example, *Ivan Kitok v. Sweden*, Communication No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988) at para. 6.4. *See further*, Joseph, Schultz & Castan, *supra* note 30, ch. 7.

60. *See generally* George, *supra* note 3.

IV. THE BROADER QUESTIONS RAISED BY THE ICC PETITION

The role of State consent in international law has long been recognized as a crucial component of the international legal system, and it remains the necessary component in the making of international law by treaty.⁶¹ It is a fact that the United States is not a party to the Kyoto Protocol. Although individuals and political movements may seek to lobby the decision-makers within the State to change its position, international law must also respect that a State that has declined to ratify a treaty has not given its consent to be bound by the obligations contained in that treaty. A human rights petition to a non-binding part-time regional body cannot force a State to ratify a treaty – especially a treaty unrelated to the competences of that particular body.

The ICC Petition, however, attempts to bypass this denial of State consent by invoking a media-friendly mixture of human rights and international environmental law in an attempt to establish, if not create, a legal imperative for the State to take action at the international level that would in turn compel the mandatory reduction of greenhouse gas emissions. But such an approach ignores a fundamental aspect of international law, namely that international law affords a State discretion with respect to the means to be used within the State to implement a treaty's commitments. Within the context of the Kyoto Protocol, in particular, there are various ways in which a State Party may meet its treaty obligations, not all of which would either directly, or immediately, address the consequences of global warming and greenhouse gas emissions in the geographic region of the Arctic. (The ability to earn carbon emission credits through an emissions trading scheme, or through investment in a clean development mechanism, are two examples specific to the Kyoto Protocol regime, which could in fact permit overall global emissions to rise.) In addition, the approach taken within the ICC Petition also discounts the potential benefits to be secured for the Arctic region by the encouragement of national action within the State, at various governmental levels, with the petitioners taking the view that "State and Local Measures are not enough."⁶² And yet, the purpose of international law is neither to displace national laws, nor to suggest that international law has a higher quality, but rather to provide a means

61. See generally, Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007).

62. *ICC Petition*, *supra* note 1 at 108.

of making legal commitments and resolving disputes at the inter-State level. Even if the fundamental causation argument underlying the ICC Petition could be proven, it is not a foregone conclusion that international, as opposed to national or intra-State, efforts would be the remedy.

Reading the petition, it is evident that the ICC recognizes that the Inter-American Commission on Human Rights does not have the power to force the United States to ratify the Kyoto Protocol.⁶³ Nevertheless, the ICC executive and its counsel take the view that a report by a part-time seven-member body examining the connection between global warming and human rights could have a significant impact,⁶⁴ instigating dialogue and publicizing the impact of global warming in the Arctic region. There is, however, within the petition a hope that a Commission report would lead to the creation of new international law – a hope that is expressed without thought as to who are the law-makers in the international legal system and the illegitimacy of a non-binding Commission acting as such. Much emphasis is placed within the petition on the impact of “soft law” and so-called evolving standards when what is really intended is the displacement of State consent with the collected views over time from various human rights Commissions, Committee and Special Rapporteurs. And yet, State consent is the ingredient that gives some measure of strength to the international human rights system by allowing States to be held accountable for their human rights guarantees precisely because they consented to be bound.

In light of these realities, the primary achievement of the ICC Petition has to publicize the cause and viewpoint of the Inuit in the Arctic. It is not known what the impact of the receipt of this creative exercise may have had on the existing caseload before a part-time Commission of seven members, but as a human rights lawyer and scholar, it is difficult to not be concerned with the possible politicization of the Commission that this petition may have spurred and the possible harm that the hearing may have caused to the reputation of the Inter-American human rights regime as a whole. One cannot blame the petitioners for this. Nevertheless, there is a spectre of politicization now present with respect to the Commission, given its perceived reversal of the decision to reject the ICC Petition and its allowance of a hearing to take place without the participation of any

63. *Id.* at 118.

64. *See id.*

alternative viewpoint, let alone the State that was initially sued by the petitioners for causing serious violations of human rights in the Arctic.⁶⁵

V. CONCLUSION

While links have been made between the fields of human rights and the environment in both international and domestic law, and there is case law to suggest that a State's lack of action with respect to environmental hazards may form the basis for holding a State responsible for a human rights violation under an applicable international human rights instrument,⁶⁶ the ICC Petition tries to push this jurisprudence one step too far. It is a creative petition that serves its cause well in terms of publicity. But its scope of application discounts the sovereignty of other States within the Arctic region, its arguments do not address head-on the difficult hurdle of proving causation as between the omission of the State and the unjustifiable violation of rights by way of global warming, and its claims of rights violations should have stayed more focused on the American Declaration so as to give the petition a greater chance for success. The ICC Petition also tries to achieve what many feel was not achieved during the negotiation of the Kyoto Protocol, namely the development of an enforcement mechanism to focus on States that are not reducing their emissions.⁶⁷ However, the non-binding nature of the Commission's ultimate output also makes the Commission an inadequate substitute, while risking damage to its credibility if the Commission was to be encouraged to pursue such a role.

In short, while I admire the legal creativity of the ICC Petition, and its ability to publicize a cause, there are a few "inconvenient truths" that the petitioners must also address, such as the need to directly address the balancing of the general societal interest in economic development with the human rights claims of individuals. The Commission has rightly, in my view, rejected the ICC Petition for lack of admissibility;⁶⁸ however, the Commission's lack of transparency with respect to the petition's apparent evolution into a "Hearing of a General Nature" on the relationship between global warming

65. See Press Release No 8/07, *supra* note 4.

66. E.g., *López Ostra v. Spain*, *supra* note 44.

67. See generally *ICC Petition*, *supra* note 1 at 96-102.

68. Press Release No 8/07, *supra* note 4.

and human rights remains a concern, especially given the lack of participation in such an inquiry by those with competing views, including the State that had initially been sued, as well as any other State likely to be viewed as a contributor to global warming in the Arctic. Hopefully further details will be forthcoming from the Commission for the sake of the Commission's own ability to serve as a role model for due process within the Western Hemisphere.

