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CLIMATE CHANGE AND THE REGIONAL HUMAN RIGHTS SYSTEMS

by Megan S. Chapman*

In last year’s Climate Law Reporter, Staff Writer Anne Parsons laid out the fundamental case for using a human rights framework to shift the burden for protecting individuals from the negative impacts of climate change to the state. The impetus for that piece was the UN Human Rights Commission’s adoption of Resolution 7/23. In the last year, with the flurry of preparation for the December 2009 round of UN Framework Convention on Climate Change negotiations in Copenhagen (“UNFCCC COP-15”), a number of institutions have joined the call for developing the nexus between human rights and climate change. The nexus is meaningful because demonstrating climate change’s numerous negative impacts on human rights, particularly for already vulnerable populations, is a way of measuring the harm. It is also meaningful because it connects this harm to obligations which the state has already undertaken. Thus, it reveals the potential for using developing supranational human rights legal systems to impose a duty on states to prevent further climate change and protect individuals from its negative impacts. This piece aims to briefly explore this latter angle on the human rights-climate change nexus: the likelihood that international human rights bodies, particularly the regional human rights systems, will in the foreseeable future hold states accountable for climate change.

International environmental law and climate change negotiations tend to be based on notions of state-to-state consensus and cooperation. However, there is nothing like the build-up of hopes and ultimate disappointment of the most recent UNFCCC COP-15 negotiations to leave individuals wishing for some club to hold over the heads of states. Aside from democratic processes or domestic legal remedies, where they exist, regional human rights systems may offer the best forum for individuals to confront states that fail to come to consensus or otherwise take steps to combat climate change.

This is not to say that regional human rights systems have been perfected. The European Court of Human Rights, the Inter-American Court of and Commission on Human Rights, and the African Commission on and newly operational Court of Human and Peoples’ Rights each face their own challenges: certain states that accept only limited jurisdiction or no jurisdiction at all; absence of regional enforcement mechanisms other than diplomatic or political pressure; and consequent reliance on states for compliance with recommendations and execution of binding judgments. Nevertheless, each regional system has developed a mechanism by which individuals may bring complaints against states for failing to respect, protect, or fulfill regionally guaranteed human rights.

In evaluating the potential fate of a petition based on human rights violations resulting from climate change, each of the three established systems has its own strengths. Unlike the foundational documents of the other two systems, the African Charter on Human and Peoples’ Rights actually recognizes a right to environment. Moreover, the African Commission on Human and Peoples Rights (“ACHPR”) has entertained petitions based on violations of this right and found states in violation of their associated obligations. In a resolution on human rights and climate change issued just prior to COP-15, the ACHPR referenced this “right of all peoples to an environment favourable to their development” under the Banjul Charter, along with other international instruments binding of member states of the African Union (“AU”). Using this right as a basis, it expressed concern that the COP-15 negotiations would unlikely incorporate human rights considerations and urged the heads of AU member states to ensure that human rights standards, particularly protections for vulnerable populations, be included in any climate change agreement resulting from the negotiations. The only indication of the ACHPR’s inclination to hold states accountable for climate change, however, was in noting that “climate change is principally the result of emissions of greenhouse gases, which remain relatively high in developed countries.”

The Inter-American Commission on Human Rights (“IACHR”) is the only of the regional bodies that has squarely faced a petition based on the human rights consequences of climate change. In 2005, Sheila Watt-Cloutier of the Inuit Circumpolar Conference filed a petition with the IACHR on behalf of “all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change.” The petition alleged that the United States, the leading greenhouse gas (“GHG”) emitter in the world, is the greatest contributor to climate change, which threatens the enjoyment of numerous human rights guaranteed by the American Declaration of the Rights and Duties of Man to the Inuit living in the arctic regions. The specific rights identified include their rights “to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.” The petitioners argued that U.S. government should be held accountable for these violations to the extent that they result from both its acts—enabling or contributing disproportionately to GHG emissions—and its omissions—failing to take meaningful steps to reduce GHG emissions and otherwise counteract climate change.

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This petition faced several notable challenges. First, because the United States has not accepted the jurisdiction of the Inter-American Court of Human Rights, the petition could only be brought before the IACHR, which may issue recommendations but not binding judgments. Secondly, as would be the case with any lawsuit relating to responsibility for climate change, it faced the tremendous burden of proving legally sufficient causation between the harm resulting from climate change and the acts and omissions of the U.S. government. The petition did an admirable job of laying out the scientific evidence for the connection between GHG emissions and climate change, the U.S. contribution to GHG emissions, the effects of climate change on the arctic environment, and the complete dependence of Inuit peoples on the arctic environment.

Despite these efforts, the IACHR dismissed the petition without prejudice on November 16, 2006. Nevertheless, the IACHR did invite the petitioners, along with the Center for International Environmental Law (“CIEL”) and Earthjustice to a thematic hearing on the issue of global warming and human rights in the Americas on March 1, 2007. This hearing offers perhaps the best indication of the challenges that future litigation over human rights violations as consequence of climate change will face before a regional human rights body. The questions from the commissioners addressed (1) how to attribute or divide responsibility among states in the region or even states that are not members of the OAS; (2) how the rights violations suffered by the Inuit could be tied more closely to concrete acts or omissions of specific states; (3) whether the petitioners had exhausted domestic remedies, a requirement for admissibility in any of the regional human rights systems; and (4) what examples of good practices undertaken by states could guide the Commission in making recommendations.

Counsel for the three organizations responded to each of the questions deftly. To the first, they explained the principle of “common but differentiated responsibility,” as a key component of state responsibility under international economic law. To the third, the question of exhaustion of domestic remedies, they explained why there is no comparable legal remedy available in the United States or Canada that would require the government to pay compensation for human rights violations associated with climate change. To the fourth question, counsel from CIEL pointed to good practices to counteract global warming in several states in the Americas, particularly Brazil.

The second question, as articulated by Commissioner Victor Abromovich, seemed to remain most unresolved at the end of the hearing:

Is there a precise form in which the impact you have described very well on fundamental rights can be tied to the actions or omissions of the particular states? [In all cases . . . considered by the Inter-American system, there have existed direct actions . . . or the failure to act by the state in the face of a concrete situation, for example . . . forestry in an indigenous territory. Now, the problem you are laying out, without doubt, links to state and non-state actors, but the relationship is much . . . less direct. So, I would like clarification about how there can be a relationship—not just any relationship, a legal relationship, a relationship of responsibility—of the states for violations of the rights that you have very clearly described.

This causal connection question presents the greatest gap between precedent cases on environmental damage that have been accepted by the regional human rights bodies and the issue of climate change and resulting human rights violations. Like other current frontiers in regional human rights law, resolution of this question might require either meeting a nearly impossible quantum of proof or bringing a petition against several or all states in a region.

One possible way forward may lie in the approach taken by the European Court on Human Rights (“ECtHR”) in a series of precedents recently identified in a Council of Europe (CoE) report on climate change and human rights. Although the European (Rome) Convention on Human Rights does not affirmatively guarantee a right to the environment, the ECtHR has held states accountable for human rights violations resulting from environmental damage in a number of cases. Most often, these cases hold the state accountable for failure to protect individuals from actions of third parties, often corporations, and tie the environmental damage to violations of Article 8 (right to family and private life), Article 2 (right to life), and Article 1 (right to property), although other rights have also been implicated. As the CoE report pointed out, these cases demonstrate a state’s positive obligation where “inaction would exacerbate [a threat to human rights]” of which the state is aware. This obligation could also attach in the climate change context, even though the causal connection between GHG emissions and human rights may be difficult to prove.

Endnotes: Climate Change and the Regional Human Rights Systems

1 Anne Parsons, Human Rights and Climate Change: Shifting the Burden to the State?, SUSTAINABLE DEV., L. & Pox’r’s Winter 2009, at 22.
See IPCC Reference Document, supra note 24, at 11.


26 See Letter from Andrew Yatilman, supra note 3, at 2.

27 The BREF BAT range for thermal efficiency of an existing pulverized combustion (“PC”) lignite plant ranges from 36%-40% or an incremental improvement of more than 3%. The current efficiency level of Pruněrov II lignite plant is 33%. See supra, note 24, at 269; Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env’t, Ministerstvo životního prostředí Nechá Posoudit Obnovu Uhelné Elektrárny Pruněrov Nezávislým Mezinárodním Týmem (Jan. 26, 2010), available at http://www.mzp.cz/cz/news_tz/100126/prunover_posouzeni_brifink (translation unavailable).

28 See Letter from Andrew Yatilman, supra note 3, at 2; Press Release, Ladislav Kriz, supra note 1.

29 See IPCC Reference Document, supra note 24, at 269.

30 See Letter from Andrew Yatilman, supra note 4, at 2.


32 Id.

33 Id.

34 See generally Press Release, Jan Dusík, supra note 29; see also Michael Kahn, supra note 29. But see Letter from Andrew Yatilman, supra note 4, at 1.

35 On February 9, 2010, the Czech Environmental Minister Jan Dusík, announced that the ministry selected Norwegian firm DNV to review the planned expansion of the Pruněrov II plant. DNV will review: (1) the BAT as detailed in the BREF for large combustion sources and energy efficiency; (2) the EIA process as it pertains to completeness, accuracy, and transparency; and (3) calculate and evaluate the difference in CO₂ emissions from the proposed plant and the plant conforming to the higher BAT level. The finalization of the EIA final opinion will use DNV’s report, expected in mid March of 2010, as an advisory document. See Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env’t, Mezinárodní Posouzení Záměru Komplexní Obnova Elektrárny Pruněrov 3 × 250 MWc“ Zpracuje Konzultační Firma DNV (based on a translated version) (Feb. 9, 2010), http://www.mzp.cz/cz/news_100208_prunover; see also Jason Hovet, Czechs tap Norwegian firm for coal plant, Reuters (Feb. 9, 2010) http://uk.reuters.com/article/idUKTRE5181UV20100209. On March 18, 2010, the Czech Environmental Minister Jan Dusík resigned after Prime Minister Jan Fischer put pressure on him to approve state-owned CEZ’s planned expansion of the Pruněrov II plant. Duskin referenced DNV’s report indicating CEZ’s renovation wouldn’t use best available technology (“BAT”) and thus refused to approve the project. “I am not convinced that it is possible to give any positive or negative opinion with a clear conscience now, with regards to the situation in which the EIA (“Environmental Impact Assessment”) process is presently in,” Dusik said. “That’s why I decided to resign.” See Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env’t, Elektrárně Pruněrov: Ministr Dusík Ocházi Z Vlády (Mar. 18, 2010), http://www.mzp.cz/cz/news_TZ_100318; see also Press Release Tisková Zpráva A Studie DNV K Záměru Obnovy Uhelné Elektrárny Pruněrov (Mar. 18, 2010), http://www.mzp.cz/cz/news_TZ_100318_DNV; Czech Enviro Minister Resigns Over Power Plant, Business Week (Mar. 18, 2010), http://www.businessweek.com/ap/financialnews/DVHE185080.htm; Jason Hovet, Czech Minister Quits Over Controversial Power Plant, Reuters (Mar. 18, 2010), http://uk.reuters.com/article/ idUKLDE62H22D20100318.

4 In response to Human Rights Council Resolution 7/23, the Office of the UN High Commissioner for Human Rights conducted a detailed analytical study, inviting submissions from states, intergovernmental and nongovernmental organizations, national human rights organizations, and other experts, on the implications of climate change for the enjoyment of human rights. The results were submitted with its annual report to the Human Rights Council, with Part II using this means of measuring of consequences. See Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61, Jan. 15, 2009, pt. II.

5 See, e.g. id. pt. III (detailing the relevant national and international human rights obligations of states).


7 Council of Europe, supra note 3, at 4 (describing international environmental law as “a law of co-operation, in which States undertake commitments to support each other[] to address global concerns”).


9 For example, the United States has not ratified the American Convention on Human Rights and does not accept the jurisdiction of the Inter-American Court of Human Rights.


11 See, generally, Kidanemariam, supra note 10.


14 ACHPR Resolution, supra note 3.

15 Id.

16 Id.

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ENDNOTES: INDUSTRY CRIES FOUL to EPA’S ATTEMPT to REGULATE GHG EMISSIONS USING the CLEAN AIR ACT continued from page 42


8 Mass. v. EPA, 549 U.S. 497, 533 (2007) (stating that EPA “can avoid taking further action . . . if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion,” but “not reach[ing] the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding”).

9 Id. at 535 (emphasis added).


12 See Memorandum, supra note 6.

13 See Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44,354 (explaining that the classification of GHGs individually or as a class has impacts on the determination of BACT requirements).


15 See EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act (Dec. 18, 2009), http://www.epa.gov/climatechange/endangerment.html (last visited Feb. 28, 2010) (clarifying that though the finding does not impose new requirements, it is a prerequisite to regulation).


18 Id.

19 See id. (citing Ala. Power Co. v. Costle, 636 F.2d 323, 353 (D.C. Cir. 1979)).

20 Id.


22 See, e.g., H.R. REP. NO. 95-294, at 144-45 (1977); S. REP. NO. 95-172, at 96-97 (1977) (“Such a [permitting] process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually.”). See also Ala. Power Co., 636 F.2d at 353-54 (stating that Congress’s “intention [in passing the CAA] was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation’s air . . . . [A] further look at the legislative history reveal[s] that Congress was concerned with large industrial enterprises—major actual emitters of air pollution. It would be irrational for the draftsmen were of the view that certain small industrial facilities within these categories might actually and potentially emit less than the threshold amount.”). Id.


24 See, e.g., S. REP. NO. 94-717, at 23 (1976) (noting that Congress did not intend to simply create delays or impair economic growth). See Clean Air Act, 42 U.S.C. § 7470 (1990) (The PSD program was intended “to ensure that economic growth will occur in a manner consistent with the preservation of existing clear air resources.”); H.R. REP. NO. 95-294, at 154 (1977) (legislation “not only