

GLOBAL WARMING AND HUMAN RIGHTS

A Case Study from the Arctic[†]

Donald M. Goldberg

Center for International Environmental Law
Washington, DC

ENVIRONMENTAL LAW GROUPS ASKED:

1. Does public international law provide a substantive basis for holding one State responsible for the impacts of its greenhouse gas emissions on the global environment and on the environment of another State?
2. If so, by what judicial or quasi-judicial international procedures (i.e., “litigation”) could this substantive obligation be recognized and/or enforced?
3. What set of facts presents the best case for holding a State responsible?

CUSTOMARY INTERNATIONAL LAW

The International Court of Justice (ICJ), in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, confirmed that the “existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

Annex I Parties to the UNFCCC committed to the common objective of “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”

[†] Presented at the Kagawa University Symposium on Common but Differentiated Responsibilities, December 2002

POSSIBLE JUDICIAL PROCEDURES

- International Court of Justice
 - Compulsory dispute settlement
 - Advisory opinion
- UNFCCC Conciliation Commission
- US domestic court
 - Treaty violation
 - Tort
- Human rights systems
 - UN system
 - Inter-American system

ICJ – Compulsory Dispute Settlement

- Key countries are not subject to compulsory and binding dispute resolution by ICJ.
- Process can only be initiated by a State, not by private parties.

ICJ – Advisory Opinion

- Can only be requested by the General Assembly, the Security Council or a UN agency authorized by the General Assembly
- Effect is non-binding

UNFCCC Conciliation Commission

- Procedure can be initiated only by a Party
- Effect is non-binding
- Rules remain to be adopted by the COP

US Domestic Court

Treaty violation – The US government can be sued for violating its treaty obligations only if the treaty is “self-executing”

Tort – The U.S. government can be sued for tort “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The government is not subject to suit, however, for acts or omissions that are the result of *discretionary* functions

Human Rights Systems

Two international human rights regimes are available to bring a claim against the United States:

- U.N. human rights system
- Inter-American human rights system (OAS)

U.N. Human Rights System

US has not signed the U.N. Optional Protocol to the International Covenant on Civil and Political Rights, by which states accept the jurisdiction of the Human Rights Committee to consider the human rights claims of private individuals

INTER-AMERICAN HUMAN RIGHTS SYSTEM

Advantages

- Inter-American Commission on Human Rights (“Commission”) has the authority to receive petitions by private citizens directed against any OAS member state
- Commission has recognized the relationship between human rights and the environmental impacts of development activities
- Commission has wide-ranging power to look at new developments in human rights law, even if they arise in other systems.

Limitations

- Commission does not have the authority to force countries to curtail their emissions, nor can it compel states to compensate individuals for human rights violations
- The Inter-American Court does have such power, at least in theory, but two barriers bar access to the Court by Arctic inhabitants:
 - Convention does not permit a private citizen to submit a case directly to the Court
 - United States has not ratified the Convention, hence is not subject to the jurisdiction of the Court.

THE PLIGHT OF THE INDIGENOUS PEOPLES OF THE ARCTIC

During the past several decades, the Arctic has warmed 2-3°C, and it is projected to continue to warm by as much as 10°C by 2100.

This far exceeds the rate and extent of previous warming, according to geological records.

Warming is so rapid that adaptation is nearly impossible, leaving migration as only solution.

Migration means abandonment of ancestral homeland and loss of a way of life

Warming Trend Has Had a Devastating Impact on Arctic Ecosystems

- Melting sea ice
- Thawing permafrost
- Insect infestation
- Fire

Sea Ice

Most indigenous Arctic inhabitants reside along coastlines and in river valleys

Their subsistence, health and culture depend on the harvest of fish, marine mammals, and other wildlife.

Populations of marine mammals, caribou, polar bears are declining

- Reduced “platform” for seals and walruses to rest
- caribou are falling through once solid sea ice.
- hunters are increasingly at risk of falling through thinning ice
- shorter hunting season due to a shorter freezing period

Thawing Permafrost

Damages houses, roads, airports and pipelines

Causes landscape erosion, slope instability and landslides.

Villages of Shishmaref and Kivalina have been forced to relocate; others likely will follow

Shishmaref may be forced to move to the outskirts of a large town, a step that may extinguish their subsistence lifestyle culture.

Insect Infestation

Rising temperatures have allowed spruce bark beetles to reproduce at twice their normal rate.

Sustained outbreak of the beetles on the Kenai Peninsula has caused over 2.3 million acres of tree mortality, the largest loss from a single outbreak recorded in North America.

Outbreaks of other defoliating insects in the boreal forest, such as spruce budworm, coneworm, and larch sawfly, also have increased sharply in the past decade.

Fire

Climate warming and insect infestations make forests more susceptible to forest fire.

Since 1970, the acreage subjected to fire has increased steadily from 2.5 million to more than 7 million acres per year.

As many as 200,000 Alaskan residents may now be at risk from such fires, with the number increasing as outlying suburban development continues to expand.

The increase in forest fires also harms local wildlife, such as caribou, that native Arctic peoples depend on for subsistence.

BRINGING A CASE IN THE INTER-AMERICAN SYSTEM

Greenhouse gases are accumulating in Earth's Atmosphere as a result of human activities, causing global mean surface air temperatures to rise.

U.S. Climate Action Report 2002

PROCEDURAL ISSUES

Failure to Act

States are responsible for acts *or omissions* that violate applicable human rights

Exhaustion of Domestic Remedies

Commission must “verify, as a prior condition to the exercise of [its authority to accept a petition], whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.”

- Commission has recognized a number of exceptions to the exhaustion requirement, including the absence of effective remedies and, in certain circumstances, the inability of the petitioner to exhaust remedies for lack of resources
- The U.S. government can be sued for tort only “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred
- The government is not subject to suit, however, for acts or omissions that are the result of discretionary functions

Extraterritorial Claims

Do all inhabitants of the Arctic have rights to bring claims in the Inter-American system?

- Arctic includes parts of the United States, Canada, Greenland/Denmark, Iceland, Norway, Sweden, Finland, and Russia.

Article 1 of the American Convention:

“The States Parties...undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free exercise of those rights and freedoms, without any discrimination....”

- The American Declaration of the Rights and Duties of Man contains no similar limitation, but the Commission has implied one
- Commission recognizes that in certain circumstances states must protect the rights of people outside their territory

“[A] state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which *produce effects or are undertaken outside that state’s own territory.*”

Saldaño v. Argentina

SOME RELEVANT RIGHTS

- Right to life (Art. I)
- Right to residence and movement (Art. VIII)
- Right to inviolability of the home (Art. IX)
- Right to the preservation of health and to well-being (Art. XI)
- Right to the benefits of culture (Art. XIII)
- Right to work and to fair remuneration (Art. XIV)
- Right to Property (Art. XXIII)

Right to Property

Article XXIII of the American Declaration provides:

“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

A notable feature of the right to property is the obligation to pay “just compensation” when the state deprives a person of property.

The Right to Culture, Especially for Indigenous Peoples

Commission has recognized that”

- “Certain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival”
- “Displacement ...or damage to these lands invariably leads to serious loss of life and health and damage to the cultural integrity of indigenous peoples”
- “For historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states”
- “Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”

Commission has found that involuntary relocation of indigenous peoples due to development activities constituted a human rights violation that could be justified only in time of war or national emergency

REMEDIES

Commission has no authority to force the United States to mitigate or compensate

Compensation and mitigation are politically difficult

Appropriate and Practical Remedies

- Declaration that global warming violates human rights
- Recommendation that US reduce GHG emissions to Kyoto levels
- Recommendation that US pay compensation and assist adaptation

CONCLUSION

Report by the Commission recognizing link between global warming and human rights could have a powerful impact on worldwide efforts to address global warming

May establish a legal basis for holding responsible countries that have profited from inadequate greenhouse gas regulation

Could provide a strong incentive to all countries to participate in effective international response efforts