INDIGENOUS PEOPLE AND ENVIRONMENTAL JUSTICE: THE IMPACT OF CLIMATE CHANGE

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The international dialogue on climate change is currently focused on a strategy of adaptation that includes the projected removal of entire communities, if necessary. Not surprisingly, many of the geographical regions that are most vulnerable to the effects of climate change are also the traditional lands of indigenous communities. This article takes the position that the adaptation strategy will prove genocidal for many groups of indigenous people, and instead argues for recognition of an indigenous right to environmental self-determination, which would allow indigenous peoples to maintain their cultural and political status upon their traditional lands. In the context of climate change policy, such a right would impose affirmative requirements on nation-states to engage in a mitigation strategy in order to avoid catastrophic harm to indigenous peoples. This article argues for a new conception of rights to address the unique harms of climate change. An indigenous right to environmental self-determination would be based on human rights norms in recognition that "sovereignty claims" by indigenous groups are not a sufficient basis to protect traditional ways of life and the rich and unique cultural norms of such groups. Similarly, tort-based theories of compensation for the harms of climate change have only limited capacity to address the concerns of indigenous peoples.

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INTRODUCTION

Who has the right to determine our environmental destiny? This seemingly basic question carries a multitude of dimensions given the global impacts of environmental degradation, the political relationships among the world's nation-states, and the differing needs and interests of citizens in those states. It is difficult to ignore the harsh realities of our present environmental condition: Superfund cleanup sites, poisonous fumes from industrial plants, the destruction of the rainforest, the hole in the ozone layer, and global warming. However, in our industrialized, fast-moving world of political compromise, corporate bottom-lines, technological innovation, and citizen action (or reaction, as the case may be), we often struggle with deciding what policies we ought to develop and who ought to develop them.[1]

Within the domestic arena, the battle between local and national control of the environment has engendered some of the fiercest battles over federalism within contemporary law.[2] The lines between federal, state, and tribal sovereignty over environmental conditions are still ambiguous. Within the international arena, however, the tension between sovereignty and responsibility is even more apparent. The nation-states have the governmental responsibility and authority to make environmental policy, but they must first reach agreement through treaties and conventions and consent to be bound by such structures. Centralized decision-making is virtually impossible at the international level, promoting a lack of coordinated policy efforts and an inability to locate legal responsibility for the negative global impacts of particular national practices and policies. For instance, multinational corporations operate across borders and, as private entities, have only limited legal liability. As a result, the consequences of this lack of

1. For example, domestic politics affect how information on global environmental issues is presented to the public. *See Museum Climate Exhibit Softened, Ex-Official Says*, ARIZ. REPUBLIC, May 22, 2007, at A2 (former associate director of the Museum of Natural History, Robert Sullivan, commenting that the Smithsonian Institution "toned down an exhibit on climate change in the Arctic for fear of angering Congress and the Bush administration").

2. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (holding that Congress lacks authority under the Commerce Clause to "compel" the states to provide for disposal of radioactive waste generated within their borders).

coordination and responsibility are increasingly apparent, particularly in the debate about climate change.

The legal issues engendered by the lack of consistency in domestic and international environmental policy are further compounded by issues of justice and equity. For at least two decades, the term "environmental justice" has been used to highlight the distributional impacts of the dominant society's environmental decision-making process on disadvantaged communities, including the poor and racial minorities. At the global level, such disparities are extended to the inequities between the North and the South, between developed and developing countries.[3] Within these divides, complex issues of economics, environmental integrity, and human rights get rolled into pithy terms such as "environmental racism,"[4] "radioactive genocide,"[5] and "ecocide."[6]

Where do indigenous peoples fit within the dialogue on environmental justice? In general, indigenous claims for environmental justice have fallen into two categories. The first category comprises Native claims for regulatory control over reservation lands.[7] These "sovereignty claims" constituted the focal point of the first generation of environmental justice claims within the domestic arena. The second category involves claims by indigenous peoples that they have unique interests and ought to be represented as "rights-holders" in national or international decision-making that impacts their

3. *See generally* Tseming Yang, *International Environmental Protection: Human Rights and the North-South Divide*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 87 (Kathryn M. Mutz, et al. eds., 2002).

4. *See, e.g.*, Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839–41 (1992) (defining the term).

5. *See, e.g.*, WARD CHURCHILL, STRUGGLE FOR THE LAND 261–308 (1993) (discussing the "radioactive colonization" of Native American peoples and lands and asserting that this process in fact constituted genocide for certain groups).

6. *See, e.g.*, DONALD GRINDE & BRUCE JOHANSEN, ECOCIDE OF NATIVE AMERICA (1995) (discussing the environmental destruction of ecosystems, or "ecocide," and arguing that indigenous peoples are the primary victims of ecocide).

7. In accordance with the most recent scholarship, this article uses the terms "Native Nations" and "Native peoples" to refer to "Native American" and "American Indian" peoples. The qualifying term "American" does not represent the true political identity of the Native Nations of this land. The term "indigenous peoples" is used consistently with its international use, broadly describing indigenous groups across the Americas, Asia, and Africa. *See, e.g.*, ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (5th ed. 2007).

communities. These claims for "environmental self-determination" rest upon the unique cultural and political status of indigenous peoples throughout the world and evoke a human rights-based set of norms, rather than a domestic sovereignty model. The second generation of indigenous environmental justice claims fits into this category.

Whereas the discussion about environmental justice in the 1990s focused on domestic efforts to protect tribal autonomy over the reservation environment, the contemporary discussion requires us to evaluate the global impacts of climate change on indigenous peoples in disparate and unique environments. The impact of climate change, while problematic for all peoples, falls disproportionately on Native peoples in regions such as the Arctic and Pacific, where the environment is closely tied to indigenous lifeways.[8] Indigenous communities whose members predominantly practice traditional lifeways are particularly vulnerable to climate change. However, because climate change is often thought to be the inevitable byproduct of industrialization, rather than an intentional policy of national governments, and because the triggering events generally do not take place on or near the reservation and are not within the control of Native peoples as governments, the discussion in this area must go beyond tribal sovereignty and evaluate the rights of indigenous peoples as unique cultural and political groups.

This article examines the impact of climate change on Native peoples and probes the ethical and legal arguments that might be used to protect indigenous peoples from the increasingly severe harms of climate change. Part I of the article provides a historical overview of environmental justice claims involving Native peoples. Part II discusses the contemporary claims for environmental justice by Native peoples, specifically in the context of climate change. Part III compares the legal frameworks available to redress environmental justice claims under domestic and international law. Part IV evaluates the moral arguments attendant to climate change and suggests an "intercultural framework" for an indigenous right to self-

8. This essay uses the term "lifeways" to describe the social, economic, and spiritual interaction of indigenous peoples with their traditional environments. Indigenous peoples possess distinctive epistemologies that associate ways of knowledge with the basic sources of life. *See* PEGGY V. BECK & ANNA L. WALTERS, THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE (1977) (presenting a comparative analysis of indigenous world views).

determination, concluding with an analysis of the petition filed against the United States by the Inuit Circumpolar Conference before the Inter-American Commission on Human Rights.

I. THE FIRST GENERATION OF ENVIRONMENTAL JUSTICE CLAIMS FOR NATIVE PEOPLES

The Environmental Justice Movement was a grassroots response to evidence that environmental hazards disproportionately affect the health and well-being of low-income communities and communities of color, as compared to other groups. Sociologist Robert Bullard was pivotal in documenting these inequities during the 1980s and then articulating a theory as to why minority and poor communities are more likely to be chosen as sites for "locally unwanted land uses" (LULUs).[9] In particular, proponents of environmental justice have asserted that discrimination exists in decisions to permit and site such facilities, as well as in the development of cleanup plans or environmental impact reviews.[10] Thus, the legal theories used to respond to such injustices were heavily premised on the intersection of environmental law and civil rights law.[11] During the 1980s and 1990s, this resulted in legal claims to control the emission of toxic pollutants and in the attempt to block further siting of hazardous industries in poor and minority communities.[12]

Proponents of the environmental justice movement during the 1980s and 1990s generally considered Native Americans to be victims of "environmental racism," similar to other racial minorities, based on their similar history of exclusion, stereotyping, and economic and political disenfranchisement.[13] In-

9. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 4 (1990). LULUs include hazardous and solid waste dumps, incinerators, and other industrial facilities that emit toxic pollutants. *Id.*

10. *See, e.g.*, Tom Stephens, *An Overview of Environmental Justice*, 20 T.M. COOLEY L. REV. 229, 230 (2003).

11. *See, e.g.*, Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 28 (2002).

12. David Monsma, *Equal Rights, Governance and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 451 (2006).

13. *See, e.g.*, Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15–39 (Robert D. Bullard ed., 1993).

deed, ample factual support exists for the perspective that Native peoples live in vulnerable communities, beset by a multitude of hazardous conditions. For example, uranium mining on Indian reservations in the western United States has caused widespread radioactive contamination of land and water resources.[14] Several highly contaminated areas, such as the Hanford Nuclear Reservation, a nuclear waste site in the state of Washington, exist on or near Indian reservations.[15] Coal-fired power plants located on or near reservations also result in disproportionate levels of air and water pollution, affecting the health of tribal members.[16] In fact, the American Academy of Sciences has referred to Navajo lands in the Four Corners region as "national sacrifice areas," in reference to the permanent damage and pollution caused by coal strip-mining.[17] Hydroelectric dam projects in the Pacific Northwest and Canada have had a severe impact on Native communities, resulting in permanent loss of tribal lands, water resources, and fishing resources.[18] Moreover, the widespread attempts of private companies to locate hazardous and solid waste dumps on Indian reservations during the 1990s, due to the availability of raw land and relatively lower costs of siting, provided further support for the notion of Indians as victims of environmental racism.[19]

However, some tribal leaders and attorneys spoke out against the notion that Indian nations were victims of discrimination and social conditions beyond their control in the same way as other poor and minority communities.[20] They

14. *See* Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 269–70 (1994).

15. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH. L. REV. 1471, 1491 (1994). According to Professor Wood, the U.S. Department of Energy operates the Hanford Nuclear Reservation along the banks of the Columbia River, near the Yakama Reservation. Wood reports that the river and adjacent reservation lands were contaminated from the earlier open dumping of radioactive waste and from radioactive dust. *Id.* at 1491–92.

16. *See generally* GRINDE & JOHANSEN, *supra* note 6.

17. *Id.* at 125 (citing THADIS BOX ET AL., REHABILITATION POTENTIAL OF WESTERN COAL LANDS 85 (1974)).

18. *See, e.g.*, BOYCE RICHARDSON, STRANGERS DEVOUR THE LAND (1976).

19. *See, e.g.*, John Anner, *Protecting Mother Earth: Native Americans Organize to Stop the Merchants of Hazardous Waste*, THE MINORITY TRENDSETTER, Fall 1991, at 6.

20. *See, e.g.*, Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project*

also protested the efforts of environmental activists to portray Natives as a noble people who live in harmony with the land, insinuating that "real Indians" would not consider commercial endeavors, such as mining and solid waste dumps that were environmentally destructive.[21] The inference here, of course, was that any tribe that contemplated such an enterprise was a victim of corporate manipulation or federal collusion, or both. Kevin Gover, who was the attorney for the Campo Tribe at the time, noted that such stereotypes perpetuated an incorrect and paternalistic view of tribal self-governance and limited the tribes from engaging in economic development that made sense.[22] The power plants on the Navajo reservation, for example, provide significant sources of employment for tribal members as well as millions of dollars in tax revenue for the Navajo Nation.[23] The Campo Band of Mission Indians in California, which decided to locate a solid waste disposal on its reservation, asserted its own need to have a source of revenue for tribal members as well as access to waste disposal facilities for residents and businesses on the reservation.[24]

According to these Native leaders, tribal self-determination entailed the need for tribes to decide their own priorities for economic development and to assume authority as sovereigns over the reservation environment. Dean Suagee, a prominent Native attorney and scholar who developed the first Indian Country Environmental Justice Clinic, observed that for Indian tribes, "the concept of environmental justice is not very useful unless it is broader than just the intersection of civil rights and environmental law."[25] Instead, "in Indian country a vision of environmental justice must also include the tribal

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in Indian Country, 63 U. COLO. L. REV. 933 (1992); Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567 (1999).

21. *See* Gover & Walker, *supra* note 20, at 942–43.

22. *Id.*

23. In addition to its existing power plants, the Navajo Nation is currently developing the Desert Rock Energy Project, which is calculated to produce an additional 1400 jobs, both short- and long-term, and to provide an additional $50 million annually in tax revenue to the Navajo Nation. *See* Desert Energy Project: Navajo Nation, http://www.desertrockenergyproject.com/navajo_nation.htm.

24. *See* DAN MCGOVERN, THE CAMPO INDIAN LANDFILL WAR 105–10 (1995) (noting that in 1987, when the Campo tribe began considering a landfill, the tribal unemployment rate was nearly 80% and the tribal budget was a mere $15,000, mainly from lease revenue).

25. Suagee, *supra* note 20, at 572.

right of self-government."[26] This means that "tribal governments must be involved in performing the full range of functions that governments are expected to do in protecting the environment: making the law, implementing the law, and resolving disputes."[27] In other words, the injustice faced by federally recognized tribes was primarily caused by the federal government's failure to acknowledge the tribes' sovereign powers and by decades of paternalistic federal management policies, which had allowed reservation resources to be exploited without adequate compensation or mitigation.

As Professor Sarah Krakoff observes, "environmental justice for tribes must be consistent with the promotion of tribal self-governance."[28] To the extent that tribes are not supported in their efforts to control and improve the reservation environment, an injustice results.[29] In Krakoff's view, environmental justice is coextensive with recognition of tribal regulatory authority.[30] The Tribal Amendments to many of the major federal pollution control statutes enacted in the late 1980s and early 1990s validated this perspective, enabling Indian nations to set their own standards for water and air quality and assume regulatory authority over their reservation lands in partnership with the EPA.[31] These exercises of tribal authority have largely been upheld by the federal courts,[32] and today, the active exercise of tribal regulatory authority over the reservation environment is seen as an antidote to the perceived victimization of reservation communities by exploitive and environmentally hazardous industries. In fact, the EPA now houses an Advisory Council on Environmental Justice, which includes an Indigenous Peoples Subcommittee, charged with ensuring that Native peoples have a role in environmental decision-making.[33]

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26. *Id.*

27. *Id.*

28. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn M. Mutz et al. eds., 2002).

29. *Id.*

30. *Id.*

31. *See id.* at 164–65.

32. Krakoff discusses two of the main cases in this area: *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) and *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). *Id.* at 165–67.

33. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY 317 (2005).

The lesson that emerged from the first generation of environmental justice claims for Native peoples was that equality of status as governments was the key to justice, rather than the "equality of citizenship" that is the focus of civil rights-based environmental justice claims on behalf of poor and minority communities. Because of the sovereign status of Indian nations, the environmental justice sought by federally recognized Indian nations in the United States is different from that sought by other poor, minority communities. As the Campo landfill case demonstrates, although non-Native environmentalists used the rhetoric of "equal rights" to protest the siting of LULUs on tribal lands, this appeared to be a mechanism to advocate the environmentalists' own goals of preservation, rather than a means to empower tribal communities.[34]

Thus, the debate over the appropriate use and regulation of tribal lands exemplifies the conflicts within mainstream society between proponents of development and those advocating conservation. The reality, however, is that Indian nations, like all governments, must make hard decisions about appropriate land use and economic development on the reservation.[35] In some cases, these decisions support the goals of environmentalists, and in other cases, they do not. Sovereignty claims focus on the tribe's autonomy to choose, rather than on the substantive result of such a choice as favoring "preservation" or "development."

II. THE SECOND GENERATION OF ENVIRONMENTAL JUSTICE CLAIMS: THE IMPACT OF CLIMATE CHANGE ON INDIGENOUS PEOPLES

The concept of "climate justice" is leading the way in the second generation of environmental justice claims with the assertion that the global impacts of climate change will fall disproportionately on minority and low-income communities.[36] Climate change has been defined as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addi-

34. *See generally* MCGOVERN, *supra* note 24.

35. *See generally* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

36. Monsma, *supra* note 12, at 489.

tion to natural climate variability observed over comparable time periods."[37] This type of climate change is caused in large part by "greenhouse gases" such as carbon dioxide, methane, and nitrous dioxide, which are the byproducts of industrialization.[38] Historically, the greatest proportion of these pollutants came from the developed countries, including the United States, Russia, Japan, Germany, and the United Kingdom, with the United States leading the group.[39] In 1990, for example, the United States had a staggering 36.1% of all emissions, compared to 8.5% for Japan and 4.3% for the United Kingdom.[40] However, the more recent trend has been that the aggregate emissions from developing countries like China are growing much more rapidly than the aggregate level in developed countries.[41] As a result, the overall level of production of greenhouse gases has dramatically increased, with correlated documented changes in the earth's temperature.[42] The higher temperatures contribute to the rapid melting of glaciers, frequency and intensity of droughts, higher sea levels, and other significant changes across aquatic, marine, and terrestrial environments.[43]

The Environmental Justice Movement thus came to focus on the impacts of climate change on vulnerable communities. In August 2002, a group of environmental justice advocacy organizations jointly released a set of "Ten Principles" to accomplish "Just Climate Change Policies in the United States,"[44] and articulated a set of common themes they wanted presented and adopted at the World Summit on Sustainable Development.[45] This statement identified the concept of Climate Justice as an integral connection between "human rights and eco-

37. Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 108 (2003/2004) (citing the United Nations Framework Convention on Climate Change, May 9, 1992, art. 1, 31 I.L.M. 849.

38. *Id.*

39. *Id.* at 108–09.

40. *Id.* at 109.

41. *Id.*

42. *Id.* at 110 (noting that the current scientific evidence of global warming is "consistent with" theories of climate change).

43. *Id.*

44. ANSJE MILLER & CODY SISCO, TEN ACTIONS OF CLIMATE JUSTICE POLICIES 2 (2002), *available at* http://www.ejrc.cau.edu/summit2/SummIIClimate Justice%20.pdf.

45. Monsma, *supra* note 12, at 489.

logical sustainability, recognizing that communities bearing the greatest share of environmental and social problems associated with polluting industries are also at the front lines in the battle against climate change."[46] Thus, the overall focus of a Climate Justice policy would be to assist such communities and their members in adapting to the impacts of climate change and in ensuring adequate access to resources. The Ten Principles included the need to empower and protect vulnerable communities, including "[l]ow-income workers, people of color, and Indigenous Peoples," from the impacts of climate change.[47]

Likewise, the International Climate Justice Network, a consortium of fourteen groups from five continents, released the "Bali Principles of Climate Justice" in 2002.[48] This set of "action principles" is specifically directed toward local communities affected by climate change. The Consortium noted that local communities, including indigenous communities, are not part of the global process to address climate change even though they are the most affected.[49] The Consortium also asserted that these communities should have a central role in developing potential solutions to the problems.[50]

The impacts of climate change on indigenous peoples are particularly visible in the Pacific Islands and in the Arctic due to the great interdependence of the people with their local environments and the centrality of traditional lifeways to basic survival in these regions. Although these environments are radically different from one another, there are many harms common to the affected indigenous communities in both regions, in part because both environments are extremely susceptible to climate change and in part because of the close, synergistic relationship between the people and the local environment.

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46. *Id.*

47. *Id.* at 489–90 (citing press release from Environmental Justice and Climate Change Initiative).

48 International Climate Justice Network, *Bali Principles of Climate Justice* (Aug. 29, 2002), http://www.ejnet.org/ej/bali.pdf.

49. *Id.*

50. *Id.*

A. The Pacific

Small island developing states (SIDS) have been increasingly recognized as vulnerable to climate change and thus deserving of special attention.[51] International attention to the special status of these states began during the 1992 Earth Summit and is reflected in the 1994 Programme of Action for Sustainable Development of Small Island Developing States as well as the 2002 Plan of Implementation from the World Summit on Sustainable Development.[52] Both documents recognize that most SIDS require specific assistance to meet the economic, social, and environmental challenges associated with sustainable development, but they also recognize that climate change is the paramount environmental threat to success in these areas.[53]

Given their lack of industrial capacity, SIDS such as the Marshall Islands and Tonga contribute very little to global climate change in terms of greenhouse gas emissions. However, the SIDS are vulnerable to the catastrophic impacts of rising sea levels.[54] Some of the smaller islands could perish altogether, but even the larger islands are in jeopardy. The adaptive capacity of humans and ecological systems on these islands is minimal because of their unique and fragile environment and limited area.[55] In these island areas, coastline erosion, loss of land and property, dislocation of people, and saltwater intrusion into freshwater resources could be catastrophic.[56] With the loss of adequate drinking water and agricultural crops from increased salinity, there would be no way for the people to survive without massive international aid.[57] In addition, an increased prevalence and severity of storms linked to climate change would be especially devastating in such regions, as would be the inevitable loss of biodiversity for ocean species,

51. *See* Gillespie, *supra* note 37, at 111–16.
52. *Id.* at 107–08.
53. *See id.*
54. *See generally id.*; *see also* Gary Kubota, *Micronesia Vanishing as Climate Warms Up*, HONOLULU STAR BULL., Mar. 4, 2007, http://starbulletin.com/print/2005.php?fr=/2007/03/04/news/story05.html.
55. Gillespie, *supra* note 37, at 113–14.
56. *Id.*
57. *Id.*

including the loss of coral reefs and the fisheries in these areas.[58]

In a recent set of communications, members of various Pacific Island nations shared their fear about the ongoing impacts of climate change and their frustration that policymakers on the "continents" have not begun to express appropriate concern.[59] Ben Namakin, an official with the Conservation Society of Pohnpei, claimed that rising ocean levels during the last five years consumed a sandy islet a couple of miles south of Pohnpei and split another islet.[60] Namakin, who lives on the atoll of Kiribati, which has a mean elevation of less than ten feet, expressed concern that the ocean could consume Micronesia, which consists of more than 2000 islands, atolls, and islets and is the home of more than 60,000 residents.[61] Rihse Anson, another resident of the Federated States of Micronesia, asserted that the sea has risen by about a foot in the area where her home is, and is now just a few inches below her house floor, which she has raised several times after the ocean flooded her home about ten years ago.[62] She would like to move, but lacks the monetary resources to do so.[63] William Kostka, director of the nonprofit Micronesia Conservation Trust, pointed out that ocean levels are predicted to rise by seven to twenty-three inches by 2100, and this will cause a devastating loss of farmland.[64] If the polar ice sheets melt more quickly than anticipated, the ocean will rise above the maximum twenty-three inch projection.[65] In addition, global warming is likely to increase the severity of storms, contributing to the risk of flooding and attendant destruction of farmland.[66]

The loss of land from climate change will exacerbate other development pressures on the islands. For example, farmers are now planting their crops in the upper elevations of islands like Pohnpei, causing the loss of the watershed forest in these areas.[67] If this deforestation continues, it will also contribute

58. *Id.* at 114–16.
59. *See* Kubota, *supra* note 54.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

to a significant change in the island's ecosystem.[68] The Conservation Society of Pohnpei is supporting an initiative called "The Micronesian Challenge" to conserve at least twenty percent of the forest and thirty percent of marine areas by 2020.[69] The initiative has also been adopted by other government entities in Micronesia, including Guam, the Commonwealth of the Northern Marianas, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.[70] Native leaders in these communities are charged with monitoring the preservation areas.[71]

The environmental harms experienced in SIDS are accompanied by a range of associated cultural harms. For example, there is an ancient cultural tradition of navigation and voyaging among the nations of Micronesia.[72] The loss of the islands gravely impacts this ancient tradition, as does the contamination of many of the islands by the United States during its missile testing and past nuclear bomb testing on the northern atolls of Bikini and Enewetak.[73] Without land and without their traditions, Alson Kelon, a member of a local sailing group, asks, "Where are the grandchildren going to live?"[74] Kelon's question leads to another: does the United States have any duty to protect the island peoples of the South Pacific?

In light of the environmental degradation the United States' actions have caused to these island communities, the answer to this question is clearly yes. This responsibility is particularly apparent in light of the United States' long history of exploiting the Pacific Islands, which extends beyond the nuclear testing of the 1950s. Notably, the United States was complicit in the forcible overthrow of the Hawaiian Kingdom in 1893 by a group of American insurgents.[75] In 1993, the United States Congress issued a Joint Resolution apologizing for this

68. *Id.*
69. *Id.*
70. *Id.*.
71. *Id.*
72. *See* Dirk H. R. Spennemann, *Traditional and Nineteenth Century Communication Patterns in the Marshall Islands*, 4 MICR. J. HUMAN. & SOC. SCI 25, 25 (2005), *available at* http:/marshall.csu.edu.au/MJHSS/Issue2005/MJHSS2005_103.pdf.
73. Kubota, *supra* note 54.
74. *Id.*
75. *See* Joint Resolution Acknowledging Overthrow of Hawaii, S.J. Res. 19, 103rd Cong., 107 Stat. 1510 (1993) (apologizing for U.S. overthrow of Hawaiian Kingdom).

wrongdoing and promising to participate in a "reconciliation" process with the Hawaiian people.[76] In 2000, Senators Akaka and Inouye sponsored a bill, a version of which is still pending in Congress, which would formalize a trust relationship with the Native Hawaiian people, in response to the United States' promise of reconciliation.[77] The United States has already established a separate political relationship with several SIDS, including Guam and the Republic of Palau, both of which retain aspects of their original autonomous political status.[78]

B. The Arctic

Some of the most dramatic effects of climate change have occurred in the Arctic, which comprises another unique and fragile environment. The evidence of climate change has been apparent in this region since the 1970s, and currently, the increase in average annual temperatures in the Arctic is double the increase in global average temperatures.[79] The direct result of this warming has been an unprecedented rise in sea lev-

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76. *Id.*

77. Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007), *available at* http://akaka.senate.gov/public/documents/S310.pdf (last visited Sept. 12, 2007). The United States is considered to be in a "trust relationship" with federally recognized Indian tribes, which means that the U.S. government has the power to pass special legislation on behalf of such tribes and their members and may also protect tribal lands and resources by imposing legal restrictions on the alienation of such resources (reservation lands, for example, are held in trust status for Indian tribes by the United States), or by managing such resources for the benefit of the Indian owners. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 392 (Nell Jessup Newton et al. eds, 2005) (discussing trust lands); *id.* at 418–22 (explaining trust responsibility); *id.* at 428–29 (discussing management responsibility and liability for mismanagement). Although the United States has passed legislation on behalf of Native Hawaiians, it has thus far refused to accord Native Hawaiian people the political status of federally recognized tribes. *Id.* at 371–73 (discussing political status); *id.* at 374–84 (discussing trust lands and benefits). The proposed Akaka Bill seeks to remedy some of these issues.

78. See Rebecca Tsosie, *What Does it Mean to "Build a Nation"? Re-Imagining Indigenous Political Identity in an Era of Self-Determination*, 7 ASIAN-PAC. L. & POL'Y J. 38, 60–61 (2006) (discussing the trust relationship between the U.S. and its protectorates and distinguishing that relationship from the "Indian trust").

79. *See* Center for International Environmental Law (CIEL), Climate Change and Arctic Impacts, http://www.ciel.org/Climate/Climate_Arctic.html (citing Union of Concerned Scientists, *Early Signs of Global Warming: Arctic and Antarctic Warming*, http://www.ucsusa.org/warming/gw<uscore>arctic.html) (last visited Sept. 12, 2007).

els caused by the melting of sea ice and glaciers, with resultant erosion, sedimentation, and flooding.[80] The delicate environment which results from the interconnections between sea ice, permafrost, forests, and tundra is greatly affected by the warming trend and is documented in reports issued by the Alaska Native Science Commission. According to the Commission's findings, the permafrost is melting and is no longer "permanent."[81] The glaciers have receded by fifteen percent each decade.[82] The impacts to this ecosystem have affected populations of marine polar bears, caribou, walrus, and killer whales, all of which have great significance to the Native peoples who depend on these species for their survival.[83]

The effects of climate change on Native subsistence cultures are devastating.[84] The Native peoples of the Arctic region continue to live their traditional subsistence lifeways and are dependent upon the environment, including many species of marine and terrestrial animals, for their cultural and material survival.[85] The Commission documents that "climate change is already profoundly affecting the lives and culture of people who depend on traditional ways of acquiring and storing their food."[86] Not only are the animals and lake fish disappearing, but hunters face hazardous conditions, such as the danger of falling through thin sea ice. According to Jerry Wongittilin, Sr. (Savoonga):

> There have been a lot of changes in the sea ice currents and the weather. Solid ice has disappeared and there are no longer huge icebergs during fall and winter. The ice now comes later and goes out earlier, and it is getting thinner. The current is stronger and it is windier on the island. We had a bad hunting season with lots of high winds. Our eld-

80. *Id.*

81. Alaska Native Science Commission, Impact of Climate Change on Alaska Native Communities, http://www.nativescience.org/issues/climatechange.htm (follow "Impact of Climate Change on Alaska Native Communities" hyperlink) (last visited Sept. 12, 2007).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

> ers tell us that our earth is getting old and needs to be replaced by a new one.[87]

The imbalance in the environment has also given rise to pests, such as spruce beetles, which are decimating the forest areas.[88] The rising sea levels and severe storms in the region have caused shore erosion. This erosion has resulted in the loss of homes, necessitated the relocation of other homes, and also poses a threat to a regional airstrip, which can only be relocated at great expense.[89] Moreover, concentrations of pollutants are found in the snow and ice, causing documented abnormalities in animals and fish.[90] In other areas, the temperature changes have resulted in drought conditions in coastal forests, with an increased risk of catastrophic wildfires.[91]

It is ironic that the most sustained attention to the impact of climate change in the Arctic has come not in relation to the Native peoples of the region, but in relation to the documented harm to polar bears in the region. Undoubtedly, polar bears qualify as the "charismatic megafauna" of the Arctic, attracting many tourists and inspiring countless products for purchase, including t-shirts, cartoon characters, and stuffed animals. It therefore came as somewhat of a shock to people around the world when it was reported in 2005 that scientists had found evidence that polar bears are drowning because climate change is melting the Arctic ice shelf.[92] According to the researchers, polar bears must now swim up to sixty miles across the open sea to find food.[93] Although they are strong swimmers when close to shore, they are not adapted to long sea voyages and

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87. *Id.*

88. *Id.*; *see also* Elizabeth Weise, *Alaska the 'Poster State' for Climate Concerns*, USA TODAY, May 30, 2006, http://www.usatoday.com/weather/ climate/2006-05-29-alaska-globalwarming_x.htm.

89. *See* Climate Change and Arctic Impacts, *supra* note 79 (observing that in Shisharef, Alaska, a small Inuit village in the Chukchi Sea, seven houses have fallen into the sea, and the remaining 600 could fall into the sea in the next couple of decades, and noting that the airstrip that serves the community is perilously close to disappearing into the sea).

90. *Id.*

91. *Id.*

92. *See, e.g.*, Jim Carlton, *Is Global Warming Killing the Polar Bears?*, WALL ST. J., Dec. 14, 2005, at B1; Will Iredale, *Polar Bears Drown As Ice Shelf Melts*, TIMES ONLINE, Dec. 18, 2005, http://www.timesonline.co.uk/tol/news/uk/article 767459.ece.

93. *See* Iredale, *supra* note 92.

tend to perish from exhaustion, hypothermia, or drowning.[94] Prior to 2004, polar bear drowning had not been documented except as a result of rare and unexpected circumstances.[95] Researchers have also documented the first known instances of cannibalism among bears competing for food supplies.[96] The effects of global warming on polar bear populations have been most significant in Canada's western Hudson Bay, where there has been a twenty-two percent drop in the polar bear population from 1987 to 2004.[97] This directly correlates to the rapidly receding ocean ice in that area.[98]

The Alaska Inter-Tribal Council, a consortium of the federally recognized tribes within the state, took the scientific report on the polar bears as indicative of serious emergent harm and immediately issued a resolution urging the United States government to enact a mandatory program to reduce global warming.[99] The Council's action reflects the much more nuanced understanding that the Native people of this region have about climate change due to their daily experience in this environment over thousands of years. In fact, other scientific studies corroborate the observations of the Native hunters about the current harm to all species in the area. A study published by researchers at the University of Alberta produced a comprehensive assessment of the challenges of polar bear "adaptation" to climate change.[100] Not only are they dependent for their survival on sea ice, but they have characteristics as a species, such as delayed maturation, small litter sizes, vulnerability of females to loss of specific den areas and loss of available prey, that make their "adaptability" to climate change much more difficult than some would imagine.[101] The researchers also

94. *Id.*

95. Carlton, *supra* note 92, at B1.

96. Iredale, *supra* note 92.

97. Iredale, *supra* note 92; Carlton, *supra* note 92, at B1.

98. Carlton, *supra* note 92, at B1. Scientists currently estimate that there are approximately 20,000 polar bears in the world, and the species has not yet been listed as "endangered" in the United States. *Id.* In fact, Sterling Burnett, a scientist at the National Center for Policy Analysis in Dallas, expressed doubt that "humans are responsible for some, most or all of the warming trend in the Arctic" and claimed that the real question is "how to adapt to future changes in climate, regardless of the direction or the cause." *Id.*

99. *Id.*

100. Andrew E. Derocher, Nicholas J. Lunn & Ian Stirling, *Polar Bears in a Warming Climate*, 44 INTEG. & COMP. BIOL. 163 (2004), *available at* http://icb.oxfordjournals.org/cgi/reprint/44/2/163.pdf.

101. *Id.* at 163, 166–67.

found that climate warming will "alter the pathways and concentrations of pollutants entering the Arctic via long-range transport on air and ocean currents."[102] For example, many organic pollutants can reach high levels in polar bears due to their high-fat diet.[103] Furthermore, although polar bears normally are not vulnerable to parasites due to their reliance on high-fat species, the change in their dietary patterns caused by the unavailability of their normal prey will likely cause them to eat other species and parts of species, like the intestines and organs, which harbor parasites.[104] Due to these circumstances, it is difficult to imagine that polar bears will have the capacity to "adapt" to climate change.[105] Similar uncertainty exists for a broad array of marine mammals in the Arctic.[106]

In 2005, as a response to this grim set of challenges, the Inuit peoples of the Arctic filed a human rights case in front of the Inter American Commission on Human Rights, asking for the Commission's assistance in obtaining relief from the impact of global warming.[107] The Commission held hearings on the matter in March of 2007.[108] The petitioners assert that carbon emissions from the United States have contributed so significantly to global warming that they should be considered a human rights violation.[109] This claim may be raised by other vulnerable communities in the future, necessitating a comparative evaluation of the harms encountered in the Arctic and Pacific by indigenous peoples.

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102. *Id.* at 170.
103. *Id.* at 170.
104. *Id.* at 170–71.
105. *Id.* at 171.
106. *See* Cynthia T. Tynan & Douglas P. DeMaster, *Observations and Predictions of Arctic Climate Change: Potential Effects on Marine Mammals*, 50 ARCTIC 308 (Dec. 1997), *available at* http://pubs.aina.ucalgary.ca/artic/Artic50-4-308.pdf.
107. INUIT CIRCUMPOLAR CONFERENCE, 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 (2005), http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf [hereinafter ICC PETITION].
108. *Inuits Press Complaint over Warming from U.S.*, ARIZ. REPUBLIC, Mar. 2, 2007, at A2.
109. *Id.*

C. Common Themes

The Alaska and Pacific case studies illustrate that the key to resolving the second generation of environmental justice claims by Native peoples lies in recognition of their identities as the indigenous peoples of particular regions, with unique sets of cultural attributes and separate histories that reflect the close relationship between these peoples and their lands. Unlike the first generation of environmental justice claims, the problem of climate change cannot be resolved through recognition of Native sovereignty, because the environmental harms are largely occurring beyond the boundaries of their lands. The Federated States of Micronesia in fact enjoy a greater degree of political autonomy than federally recognized Indian tribes in the United States.[110] Nevertheless, they are powerless over the choices of other nation-states to engage in activities that generate harmful consequences for vulnerable nations and communities across the world.

The appropriate framework for the justice or rights claims under current circumstances will require a change in global policy that considers the unique status of indigenous peoples in relation to their traditional lands and protects that relationship for future generations. Current international policy focuses on adaptation to climate change, including the potential need to relocate vulnerable communities. Indeed, recent scholarship on climate change posits that given the current rates of global warming, the rise in sea levels, and associated changes in the ocean system, there are likely to be millions of displaced refugees "from developing countries looking for safer ground" in future years.[111] These commentators note that the international community currently lacks a strategy to deal with the needs of these people and is likely to deal with them in the same "ad hoc manner in which refugee problems are otherwise

110. *See* Bureau of Intelligence and Research, U.S. Dept. of State, Fact Sheet: Independent States in the World (Aug. 5, 2007), http://www.state.gov/s/inr/rls/4250.htm (listing the Federated States of Micronesia as an "independent nation" and not as a "dependency"); FABIAN SITAN NIMEA, FEDERATED STATES OF MICRONESIA: NATIONAL ASSESSMENT REPORT 12 (June 2006), *available at* http://www.un.org/esa/sustdev/natlinfo/nsds/pacific_sids/fsm_nar.pdf (United Nations report identifying Federated States of Micronesia as an independent nation).

111. Sujatha Byravan & Sudhir Chella Rajan, *Providing New Homes for Climate Change Exiles*, 6 CLIMATE POL'Y 247, 248 (2006).

managed."[112] They suggest an "ethical alternative," namely "to provide phased immigration benefits, in advance of disastrous impacts, to people in vulnerable communities on the basis of the host countries' historical greenhouse gas emissions."[113] Under this theory, members of the refugee populations receive some offsetting "benefit" for their displacement by being allowed to emigrate to one of the developed nations.

A policy of relocation may make perfect sense in terms of an "equal citizenship" argument. Under such an argument, "global citizens" of underdeveloped nations must receive compensation for their harm at the hands of the developed nations. Presumably, if they are granted citizenship in the countries responsible for this harm and have equal access to the benefits of citizenship in the developed nation, then the appropriate redistribution of benefits can be achieved. This argument, however, is of little assistance to indigenous peoples. There is no other place that indigenous peoples can go and still continue to practice their unique lifeways and cultural practices. Geographical location is essential to indigenous identity. History has demonstrated time and again that the forcible removal of indigenous communities from their traditional lands, resources, and lifeways results in immeasurable harm.

In response to this devastating history, contemporary human rights law has attempted to address the protections that ought to be accorded to indigenous peoples with respect to their occupancy of their traditional lands.[114] International Labour Organisation (ILO) Convention No. 169, for instance, specifically provides that indigenous peoples "shall not be removed from the lands which they occupy" except under specific and limited circumstances, when removal becomes necessary as an "exceptional measure."[115]

However, while the native peoples of the Pacific and Arctic are currently the most vulnerable to these harms, other native groups such as the federally recognized Indian nations in the United States should also be concerned about the consequences of climate change for their way of life. There is already evidence that the issue of climate change is of increasing impor-

112. *Id.* at 248–49.
113. *Id.* at 249.
114. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 141–48 (2d ed. 2004).
115. *Id.* at 43 n.110.

tance for Indian nations in the United States. The U.S. Global Change Research Program's study on "Climate Change Impacts on the United States" devotes a portion of its assessment to "Native Peoples and Homelands."[116] The Assessment Team's report discusses Native peoples in all regions of the United States and documents a special set of challenges facing those living on and associated economically, culturally, and spiritually with reservations and Native homelands.[117] The five primary issues identified by the Assessment Team are (1) impacts on tourism and community development; (2) impacts on human heath; (3) impacts on water and natural resource rights; (4) impacts on subsistence economies and cultural resources; and (5) impacts on cultural sites, wildlife, and natural resources.[118]

Thus, the impacts in Alaska merely foreshadow what will happen in the "lower 48 states," states Robert Corell, a scientist and senior fellow at the American Meteorological Society.[119] Moreover, as the Assessment Team's report documents, all Native communities will face harm from climate change to one extent or another in the future. Therefore, if there are any unique rights that indigenous peoples have to their cultural, spiritual, and physical survival, this is the time to define them. The United States' own brutal history of removing Native communities from their traditional lands illustrates the tremendous loss of life and culture that occurs as a result of these policies. It would be a grave injustice to repeat this genocidal past as a supposedly beneficial contemporary policy of "adaptation" to climate change.

III. THE LEGAL FRAMEWORK FOR INDIGENOUS ENVIRONMENTAL JUSTICE CLAIMS

Building a coherent framework to articulate contemporary Native claims for environmental justice requires an understanding of relevant domestic laws and international human rights law. This section starts with a brief discussion of the

116. NATIONAL ASSESSMENT SYNTHESIS TEAM (U.S. GLOBAL CHANGE RESEARCH PROGRAM), CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE 84 (2000), *updated* Oct. 12, 2003, http://www.usgcrp.gov/usgcrp/Library/national assessment/13NA.pdf.

117. *Id.*

118. *Id.*

119. Weise, *supra* note 88.

rights that emerged from the first generation of tribal environmental justice claims in the United States and then analyzes where such rights claims have been deficient, leading to a discussion of the potential role of human rights law in constructing a broader right to indigenous environmental self-determination.

A. Domestic Legal Rights

In the United States, tribal regulatory authority over reservation lands is defined by a complex intersection of treaty law, statutory law, and judicial law. Such authority is conditioned upon the status of the group as a "federally recognized" Indian tribe and the status of the land at issue as "Indian Country."[120] There are several sources of tribal regulatory authority, including the tribe's treaty right to "exclude" persons from its territory,[121] the tribe's inherent sovereignty to regulate lands and persons within its jurisdiction,[122] and the tribe's ability to regulate, even in areas beyond its jurisdiction, under delegations of authority from the federal government.[123] This latter source of authority has become particularly important following the Supreme Court's more recent cases, which have limited inherent tribal sovereignty over nonmembers and nonmember fee lands within the boundaries of the reservation.[124]

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120. *See generally* COHEN's HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 77. The United States maintains a trust responsibility to "recognized" Indian tribes, and maintains a list of the Indian nations that are eligible to receive services from the Bureau of Indian Affairs. *See* Indian Entities Recognized and Eligible to Receive Services, 65 Fed. Reg. 13,298 (Mar. 13, 2000). The term "Indian Country" is used to delineate the lands that are subject to special jurisdictional rules that promote the federal guardianship, as well as tribal self-governance. *See* 18 U.S.C. § 1151 (2006) (statutory definition of Indian Country for purposes of criminal jurisdiction); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (noting that the statutory definition also applies to questions of civil jurisdiction).

121. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

122. *Id.*

123. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975).

124. *See, e.g.*, Montana v. United States, 450 U.S. 544, 567 (1981) (holding that the Crow tribe lacked jurisdiction to regulate hunting and fishing by non-Indians on non-Indian-owned fee land within the Crow reservation); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (holding that tribe lacked jurisdiction to adjudicate tort lawsuit between two non-Indians that occurred on a state highway right-of-way on the reservation). The Crow reservation in the Montana case, like many reservations across the United States, consists of both trust land owned by the tribe and tribal members and land held in fee by nonmembers of the tribe but lo-

Because of the complex jurisdictional rules applicable to tribal regulatory authority on the reservation, the EPA has developed federal/tribal partnerships in most areas relevant to control of pollution, which enable uniform regulatory jurisdiction over air and water resources.[125] The EPA's tribal policy recognizes the important federal interest in avoiding dual regulatory jurisdiction over reservation lands and resources and favors tribal implementation of air and water quality standards with EPA assistance and oversight. This regulatory scheme has a firm statutory foundation in the tribal amendments to the major federal pollution control statutes. Each of the federal environmental statutes, with the exception of the Resource Conservation and Recovery Act (RCRA), was amended during the late 1980s and early 1990s to include Indian nations as appropriate governments to assume regulatory authority in partnership with the EPA.[126] Although various states brought challenges to tribal regulatory jurisdiction, the courts have uniformly upheld the federal statutes as administered by the EPA.[127]

It is important to note that the tribal amendments to the federal environmental statutes were not necessary to enable Indian nations to regulate environmental conditions on the reservation. The Indian nations' inherent sovereignty gives

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cated within the exterior boundaries of the reservation. This mixed pattern of ownership is the direct result of the nineteenth-century policy of "allotment," which sought to break up the communal landholdings of the Indian nations and create small parcels of land for individual ownership by tribal members. The "surplus lands" on the reservation left over after allotment were often sold to non-Indian settlers. In other cases, individual tribal members eventually alienated their lands in fee to non-Indian purchasers. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 77, at 75–80 (discussing allotment policy); 188–91 (discussing mixed patterns of land ownership in relation to definition of "Indian Country").

125. *See generally* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 232–37 (1996).

126. *See generally* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW 217–53 (2002) (detailing EPA policy and various statutes amended, as well as major cases under each).

127. *See, e.g.*, City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996) (upholding water quality standards established by Isleta Pueblo under Clean Water Act); Montana v. EPA, 137 F.3d 1135, 1142 (9th Cir. 1998) (upholding EPA regulations allowing tribes to be treated as states under Clean Water Act); Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1294 (D.C. Cir. 2000) (accepting as reasonable EPA's interpretation of federal statutes regarding "reservations").

them the authority and responsibility to regulate environmental conditions on the reservation.[128] However, the tribal amendments enabled the tribes to participate in a federal/tribal partnership with respect to pollution control similar to that between the federal government and the states. This benefits the tribes in many ways, including establishing their eligibility for federal funding to develop and maintain tribal programs, confirming uniform tribal jurisdiction throughout the reservation, and allowing the tribes to gain a degree of control over off-reservation pollution sources, such as upstream users of the water resources, that they would not have simply by virtue of their inherent sovereignty.[129]

The law that emerges from the federal statutes, court cases, and federal regulatory directives indicates that the federal environmental statutes establish minimum standards for environmental protection that apply nationwide and include tribal lands. The Indian nations are held responsible for compliance with these federal standards and are recognized as having primary responsibility for protecting the reservation environment.[130] To the extent that they fail to control environmental hazards on the reservation, tribal governments may be held liable for resultant harm through citizen suits under relevant statutes, such as the RCRA.[131] Within Indian Country, tribal sovereignty has genuine importance in the regulation of environmental conditions. Outside of Indian Country, however, tribal interests may become identical to those of other "citizens." For example, Indian nations have been repeatedly frustrated in their attempts to protect tribal sacred sites on public and privately owned lands from destructive development.[132] In particular, tribal claims that develop-

128. *See, e.g.*, Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (tribe's inherent sovereignty supported delegation of air quality regulatory authority by EPA, prior to tribal amendments to Clean Air Act).

129. *See generally* ROYSTER & BLUMM, *supra* note 126, at 217–53.

130. *Id.*

131. *See* Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Cmty, 827 F. Supp. 608 (D. Ariz. 1993); Blue Legs v. EPA, 668 F. Supp. 1329 (D.S.D. 1987).

132. *See, e.g.*, Lyng v. Nw. Cemetery Protective Ass'n, 485 U.S. 439 (1988) (refusing to apply Free Exercise clause of U.S. Constitution or the American Indian Religious Freedom Act to protect Native sacred site from development by U.S. Forest Service on federal land); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (similar result with attempt to protect Navajo sacred sites within the Rainbow Bridge National Monument).

ment will cause cultural harm have not found success under existing legal theories.[133]

Nevertheless, cultural harm arises from situations in which Native peoples' access to their own cultural systems is somehow blocked or precluded.[134] This happened with a great deal of frequency during the nineteenth and early twentieth centuries, when the federal government banned the practice of Native religions and forcibly removed Native children to federally operated boarding schools where they were forbidden from speaking their languages or practicing their traditions.[135] Although assimilation is no longer an official federal policy, cultural harm continues to result from "neutral" government policies, such as the management of public lands, which deny Native peoples access to sacred sites and permit practices like mining or dam construction which obliterate or destroy these sites.[136]

Many of the Native sacred sites cases have been litigated as claims for "religious freedom."[137] Although the categories of "culture" and "religion" share a close intersection for Native peoples, they are not synonymous. Because of the fact that Native cultures are tied to specific lands, most Native peoples perceive certain places, such as the "origin place" of the people or places where humans can communicate with the spirit realm, to hold a special significance.[138] However, traditional First Amendment doctrine, which holds that the government merely has a responsibility not to coerce citizens to give up their beliefs, is hardly protective of the need to ensure the integrity and continuity of land-based cultural practices. In the *Lyng* case, for example, the Supreme Court assumed that the government's construction of a road through a Native American sacred site would "virtually destroy" the religious practice of the Native people but reasoned that road construction on public lands was not the type of coercive government behavior that triggers First Amendment scrutiny.[139] The Native people were

133. *Lyng*, 485 U.S. 439; *Badoni*, 638 F.2d 172.

134. *See* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002).

135. *Id.* at 317.

136. *See, e.g.*, *Lyng*, 485 U.S. 439; *Badoni*, 638 F.2d 172.

137. *See, e.g.*, *Lyng*, 485 U.S. 439.

138. *See* Tsosie, *supra* note 35, at 272–87 (describing Native cultural norms that relate the people to particular places).

139. *Lyng*, 485 U.S. at 451, 457 (internal citations omitted).

free to believe whatever they wanted, and that was the important thing, according to the Court.[140]

Not surprisingly, the same dichotomy exists in cases where Native peoples bring claims for environmental harm that has also caused cultural harm. For example, in the wake of the Exxon Valdez oil spill, Native people sought to recover damages for the injury to their lands and natural resources and also for the cultural harm that they suffered from the inability to practice their traditional lifeways.[141] In the ensuing litigation, the Ninth Circuit Court of Appeals affirmed the district court's ruling that harm to culture does not constitute an independent basis for compensation.[142] The Court reasoned that the effects of the oil spill on the communal and subsistence lifestyles of the Native people were not appreciably different from the effects on other rural Alaskan people.[143] Furthermore, in the view of the district court, "one's culture—a person's way of life—is deeply embedded in the mind and the heart. Even catastrophic cultural impacts cannot change what is the mind or in the heart unless we lose the will to pursue a given way of life."[144]

For these courts, as for the scholars who assume that indigenous communities are "movable" if they lose their traditional lands because of climate change, culture is perceived to be an "inner state" rather than the type of "outer condition," like a fishing right, that merits protection and compensation for loss. Thus, if Native peoples lose treaty-guaranteed resources such as land, water, and fishing rights, those are compensable. However, the loss of the opportunity to practice one's culture, as a separate aspect of indigenous existence, is not compensable. Thus, if there is to be any greater understanding of the need to protect indigenous cultures, it must come from some authority outside domestic law. This is the prospective role of international human rights law.

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140. *Id.* at 454–55.

141. Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997).

142. *Id.*

143. *Id.* at 1198.

144. *In re* Exxon Valdez, No. A89-0095-CV, 1994 WL 182856, at *4 (D. Alaska Mar. 23, 1994), *aff'd sub nom* Alaska Native Class, 104 F.3d 1196 (Alaska Ct. App. 1997).

B. International Human Rights Law and the Normative Basis for an Indigenous Right to Environmental Self-Determination

The organizational framework applicable to international human rights law is complex.[145] The central motivating idea, however, that contemporary societies can generate a set of "universal" norms to guide the moral and, to some extent, legal interactions of nations with one another and with their subjects, is fascinating. Many skeptics argue that international human rights law is virtually irrelevant in the United States because the United States rarely signs on to international conventions and, when it does, almost never binds itself to them in any enforceable manner. It is admittedly complex and difficult to enforce a set of "universal principles" against a powerful nation-state. Nonetheless, the concept of international human rights is interesting at the normative level, and it is worth contemplating the possibility of constructing a more just system of domestic law by investigating principles that are emerging through international consensus.

We cannot afford to maintain a set of domestic laws based on Anglo-American cultural categories, such as "property rights," "environmental rights," and "religious rights," just because they are the ones we have always had and we know how and when they are enforceable, if the end result is to continually perpetuate grave injustices upon indigenous peoples. We must open our collective minds to a notion of justice that is truly intercultural in nature. Such a notion of justice must incorporate an indigenous right to environmental self-determination that allows indigenous peoples to protect their traditional, land-based cultural practices regardless of whether they also possess the sovereign right to govern those lands or, in the case of climate change, prevent the practices that are jeopardizing those environments.

It may seem incongruous to categorize indigenous peoples' interests in participating in environmental decision-making as claims for "rights." Rights are, after all, a distinctively Western concept and may not really reflect the interests of indige-

145. *See generally* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS (2007); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (1996).

nous peoples at all.[146] Moreover, some might question whether forcing indigenous peoples to phrase their concerns as "rights" may actually perpetuate a form of forcible assimilation or colonization. Although these points are valid, insofar as rights are used to protect human values, including the basic needs and interests at the heart of a group's distinctive cultural or political identity, they are useful and allow indigenous peoples to participate equally in the national and international discourse about human rights.[147] The primary value of the discourse on human rights is that it allows the international community to define norms according to the expectations and values of the diverse peoples that belong to the world community, rather than limiting the norms to those of the sovereign nation-states.[148]

International human rights law extends beyond the realm of individual rights to describe the collective rights of distinct peoples and groups, including racial, ethnic, and religious minorities, women, "local communities," and "indigenous peoples."[149] The category of "indigenous peoples" transcends the boundaries between "peoples" and ethnic minorities.[150] There is an increasing recognition that, at both a political and cultural level, indigenous peoples are distinctive and that their rights cannot be coextensive with those of any other group.[151] This distinctive set of rights arises from the status of indigenous peoples as the "original" or "first" peoples of the lands that they inhabit, who continue to live and practice the traditions of these land-based cultures and who retain their separate politi-

146. *See* Holmes Rolston, III, *Rights and Responsibilities on the Home Planet*, 18 YALE J. INT'L L. 251, 255 n.9 (1993) (noting that rights are a Western construct and that defenders of rights should ask whether rights are sufficiently compatible with diverse world cultures to serve as the dominant model for global human ethics).

147. *See generally* PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 1 (2002).

148. *See* NICKEL, *supra* note 145, at 10 (observing that "human rights are not dependent for their existence on recognition or enactment by particular governments;" rather, they exist as "norms of justified or enlightened political morality").

149. *See* STEINER AND ALSTON, *supra* note 145 (describing human rights frameworks applicable to these various groups); *see also* THE RIGHTS OF PEOPLES 24–36 (James Crawford ed., 1988) (describing three versions of the rights of "peoples").

150. THORNBERRY, *supra* note 147, at 1–10 (describing central theoretical tensions for collective rights theories, and in particular, for a distinct category of "indigenous" rights).

151. *See generally* ANAYA *supra* note 114.

cal and cultural character despite the colonization of their lands by Europeans.[152] Indigenous peoples are not nation-states, but they are "states" who forged a political relationship, often by treaty, with the European states.[153] When measured by number, they constitute minority groups. Yet their status is different from racial or ethnic minorities that have emigrated from their native lands, as well as from involuntary immigrants, such as African-Americans, who were forcibly removed from their nations to serve as slave labor to the Europeans. Thus, indigenous peoples have a unique status within international human rights law.[154] This status is both political and cultural, and it is tied in very important ways to the traditional lands and environments that sustain indigenous peoples.[155]

In general, indigenous claims regarding the environment can be divided into two categories. The first category comprises claims for governmental control over indigenous lands. In the United States, this has been the focal point of Native claims for land, water, and other natural resources and for regulatory authority during the first generation of environmental justice claims. The second category involves claims for participatory control over national or international environmental decision-making that impacts indigenous peoples. This latter claim is the focal point of the climate justice debate. In these cases, recognition of indigenous rights may not be legally required as an aspect of property or other political or civil rights, but, for moral and equitable reasons, it would be unjust not to recognize their unique claims.

One can make a case for an indigenous right to environmental self-determination using variety of theoretical arguments, each of which might have different implications as to the scope of the right. First, one could argue for such a right on the basis of the territorial sovereignty indigenous peoples maintain over their ancestral lands. This would be a political argument for indigenous environmental rights. In the broadest sense, a right based on territorial sovereignty would recognize

152. *Id.* at 3–4.

153. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 16, 19–20 (1831) (finding that the Cherokee Nation is a "distinct political society" and therefore constitutes a "state," although it did not constitute a "foreign nation" within the meaning of Article III of the U.S. Constitution).

154. ANAYA, *supra* note 114; THORNBERRY, *supra* note 147.

155. *See* ANAYA, *supra* note 114, at 3, 141–48.

the separate political status of indigenous groups as peoples with a right of self-determination equivalent to that of all other peoples.[156] The most important aspects of this right would be political control of ancestral lands and the enjoyment of equal rights with nation-states to make decisions affecting such lands and to obtain redress for injustices.

Second, it could be argued that a right to environmental self-determination stems from the unique cultural relationship that indigenous peoples have with their traditional lands. This argument would acknowledge the different values of stewardship and appropriate care of the land and resources that stem from indigenous epistemologies. This argument would also recognize the rights of indigenous peoples to continue their longstanding relationship with these environments and to honor their traditional knowledge and the systems of ethics that guide their interactions with their lands and resources. Under this view, tribal environmental rights are grounded in the unique forms of cultural expression that perpetuate lifeways that promote conservation and environmental protection. A right based on culture is clearly more limited than the political right of territorial autonomy, which is akin to the domestic sovereignty claim, and yet it may go further toward protecting the cultural values that are so unique and precious to groups that continue to practice their traditional lifeways.

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156. The Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on September 12, 2007, is the first document to use the term "peoples" and "self-determination" in a manner consistent with the International Covenant on Civil and Political Rights. *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sept. 12, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html [hereinafter Declaration]. Canada and the United States, which were among the nation-states that voted against adoption of the Declaration, had previously expressed hesitation about adopting these terms in relation to indigenous groups because of the perception that a right of "self-determination" may include the right to secede or otherwise impair the territorial or political integrity of the nation-states. *See* American Indian Law Alliance (AILA) paper on the General Assembly adoption of the Declaration of the Rights of Indigenous Peoples (10/17/07), *available at* http://www.tonatierra.org/AILAFinal102802.doc. [hereinafter AILA paper]. The International Covenant on Civil and Political Rights distinguished between the rights of "peoples" and members of racial, ethnic or religious minorities. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 1, 2, U.N. Doc. A/6316 (1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm The rights of racial, ethnic, and religious groups are primarily cultural, rather than political. *See id.*; ANAYA, *supra* note 114, at 100–03 (explaining the implications of the term "peoples" when used in association with the right to "self-determination").

A third possibility is to premise the right of environmental self-determination on the need to achieve social justice and equal rights. This would be a historical argument focused on the violations of indigenous human rights that have occurred under the guise of protecting national interests. Proponents of this view would argue that the past practices of national governments in dispossessing indigenous peoples of their lands and resources and forcibly colonizing them have created a grave contemporary injustice that can only be redressed through special rights that protect what little of their land remains. This argument would support indigenous claims for repatriation of traditional lands in some cases and would also provide a positive right against the destruction or dispossessing of their remaining land-base. This argument, which to some extent can be associated with a concept of reparations, would also support the mandatory inclusion of indigenous peoples within the institutional processes that have historically excluded them.

Finally, it could be argued that indigenous environmental rights are derivative of the individual tribal members' rights to cultural survival, which encompasses the members' rights to enjoy a distinctive cultural heritage, to maintain and develop their cultural identity, to perpetuate their languages, religions and traditions, and to protect and have access to sacred sites.[157] This argument is based on a belief that destruction of indigenous land-bases would result in destruction of indigenous groups who understand themselves as culturally distinctive and rooted in the land. This understanding is shared by each member of the group as an individual, as well as by the entire group as a collective. Based on this understanding, the group maintains an ethical view of itself in relation to the land, and it is this ethical view that perpetuates each generation of tribal members, as a cultural group. Thus, to take that group's land would strip the group of its understanding of itself and destroy the opportunity of the members to belong to the larger unit and

157. *See* Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 365 (1993); Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After* Lyng v. Northwest Indian Cemetery Protective Association, 42 HASTINGS L.J. 591 (1991). Professor Anaya describes this cluster of interests within the rubric of "cultural integrity" and observes that respect for cultures is promoted by Article 27 of the International Covenant on Civil and Political Rights. ANAYA, *supra* note 114, at 131–32.

share in that collective understanding. This argument, very much like the second argument that specifically extends to the cultural relationship to traditional lands, is justified by cultural rather than political rights.

It is necessary to employ all of these arguments, to some degree, in articulating an indigenous right to environmental self-determination. However, it is important to distinguish the normative justifications for such a right in order to respond to counterarguments that might be made to a particular argument.

IV. A PROSPECTIVE FRAMEWORK FOR ENVIRONMENTAL SELF-DETERMINATION: THE MORAL AND LEGAL DIMENSIONS OF "JUSTICE"

Building a theory of environmental self-determination requires articulation of both the moral and legal dimensions of tribal environmental rights. The Inuit's recent petition to the Inter-American Commission on Human Rights provides an opportunity to explore the moral and legal arguments that might be made in connection with the specific issue of climate change. This case is pivotal in assessing the international response to the arguments like those discussed above in favor of an indigenous right of environmental self-determination. This is particularly true given that the Inuit view themselves as a culturally and linguistically distinct people, despite the fact that they reside within four countries, namely Russia, the United States, Canada, and Greenland.[158] In their eyes, they are the indigenous people of this entire region, regardless of international boundaries. However, because they straddle several international borders, their claims cannot be redressed through any single nation-state's domestic law. As a distinct "people," however, they suffer a combination of unique harms to their culture, lands, environment, and lifeways from the changes in the Arctic climate.

This section will first provide a framework for understanding how climate change is being addressed in the international arena. At a policy level, nation-states have the autonomy to participate or decline to participate in various international

158. *See* ICC PETITION, *supra* note 107, at 1; *see also* Steven Lee Myers et al., *Old Ways of Life Are Fading as Arctic Thaws*, N.Y TIMES, Oct. 20, 2005, at A1.

agreements intended to address the harms caused by the emission of pollutants into common air and water resources. This is the "negotiated consent model" of global environmental mitigation. To the extent that the international community fails to reach accord, particular instances of environmental harm may be addressed by litigation, either through tort-based environmental claims or through human rights claims. A discussion of the existing legal framework will thus be followed by a consideration of its shortcomings. This section will then conclude by suggesting a framework for a theory of indigenous environmental self-determination and situating the Inuit claim within that framework.

A. The Policy Framework for Climate Change: International Strategies

At the global policy level, there have been three responses to the issue of global climate change: prevention, mitigation, and adaptation.[159] By the early 1990s, however, it was apparent to both scientists and policymakers that a policy of "prevention" was simply unrealistic.[160] Global warming and climate change had become a grim but documented reality after years of greenhouse gas emissions. The focus then turned to the strategies of mitigation and adaptation. The Framework Convention on Climate Change ("Convention") emerged from the 1992 Rio Earth Summit.[161] The Convention came into force in 1994, and by 2004, 189 countries had ratified the Convention.[162] The Convention centered upon a mitigation strategy to achieve the overall goal of stabilizing atmospheric concentrations of greenhouse gases at a level that would preclude harmful occurrences of climate change.[163] The drafters anticipated that this could be accomplished through voluntary commitments from the nation-states to conform their emissions to their 1990 levels by the year 2000.[164] In 1997, most nations agreed in principle to the Kyoto Protocol as a means to achieve

159. Dale Jamieson, *Adaptation, Mitigation, and Justice, in* PERSPECTIVES ON CLIMATE CHANGE: SCIENCE, ECONOMICS, POLITICS, ETHICS 217 (Walter Sinnott-Armstrong & Richard B. Howarth eds., 2005).
160. *Id.* at 218.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

"quantified, emission limitation reduction objectives."[165] The United States and several other developed nations took issue with the Kyoto Protocol and found it "unworkable."[166] On February 16, 2005, however, the Kyoto Protocol came into force, binding "virtually every country in the world except the United States and Australia."[167]

Although the Kyoto Protocol is in effect, it may be unable to accomplish its goals because the United States and certain developing nations like India and China have joined together in questioning the emissions control regime of the Kyoto Protocol and in blocking further discussion of a post-2012 regime, which must be in place when the Kyoto commitments expire in 2012.[168] Professor Dale Jamieson concludes that these efforts have engendered "an era in which the world has given up on significantly mitigating climate change," and has instead adopted a "de facto policy of 'adaptation only.' "[169] Jamieson's conclusion is supported by recent statements from scientists calling for "renewed attention to policies for adapting to climate change."[170]

The strategy of "adaptation" entails "adjustments in ecological-social-economic systems in response to actual or expected climate stimuli, their effects or impacts."[171] Jamieson points out that adaptation can include "conscious responses to climate change," using the example of existing plans to "evacuate low-lying Pacific islands," and can also include "nonconscious adaptations," such as incremental responses by farmers to climate variability.[172] He also notes that some adaptations are "anticipatory," in relation to projected events (e.g., flooding), while others are "reactive," in relation to unforeseen natural disasters in a particular community (e.g., hurricanes).[173] In either case, however, the adaptation response is deficient because it sees climate change as inevitable and implies that the

165. *Id.*
166. *Id.* at 219.
167. *Id.*
168. *Id.* at 220.
169. *Id.* at 220.
170. *See, e.g.*, Roger Pielke, Jr. et al., *Lifting the Taboo on Adaptation*, 445 NATURE 597 (2007).
171. Jamieson, *supra* note 159, at 220.
172. *Id.*
173. *Id.* at 220–21.

only choice is to adapt to climate change or perish.[174] Jamieson makes a powerful case that a policy of adaptation, without mitigation, will impose "serious practical and moral risks."[175] He claims that this will be the case regardless of whether current projections about "abrupt" climate change materialize or not.[176] Even if they do not, he argues that the policy will result in some victims of climate change being driven to extinction, namely some small island states and endangered species in this category, and others having to bear the cost of their own victimization.[177]

In a direct analogy to the underlying claims of the Environmental Justice Movement, Jamieson claims that "the moral risk of a policy of 'adaptation only' is that it will hit the poor the hardest."[178] Poor countries, which lack industrial capacity, "have done the least to bring about climate change."[179] However, they will suffer the worst impacts because they also have the least capacity for adaptation.[180] Wealthy countries will also experience impacts from climate change, but they will have the resources necessary for adaptation. Jamieson expresses understandable doubt that the international community will provide the projected billions of dollars of aid necessary to assist poor countries, and claims that while the need for adaptation is certainly present, the only way to deal in a moral fashion with climate change is to also make a commitment to mitigation by reducing greenhouse gas emissions.[181] Only this will slow down the rate of climate change, reduce the risk of abrupt, catastrophic change, and make those who are most culpable for climate change take responsibility for their actions.[182]

B. The Legal Framework: Litigating Rights Violations

As demonstrated above, the negotiated consent model for nation-states to deal with climate change by voluntarily complying with adaptation and mitigation strategies has serious

174. *Id.* at 222.
175. *Id.*
176. *Id.* at 223.
177. *Id.*
178. *Id.* at 225.
179. *Id.*
180. *Id.*
181. *Id.* at 229.
182. *Id.*

shortcomings. Under the current regime of international law, there is no way to secure the cooperation of dissenting countries such as the United States, even if such countries are the greatest contributors to the problem. The alternative approach to voluntary consent is litigation based on the argument that failure to prevent or address continuing harm is essentially tortious behavior and ought to result in legal liability, either in the domestic courts of the offending country or in an international tribunal.

In a recent paper, Eric Posner acknowledges that many scholars are now advocating litigation in this area, using both environmental claims and human rights claims.[183] Although some scholars are cautiously optimistic that human rights-based claims could succeed against corporations or governments if appropriately framed pursuant to the Alien Tort Claims Act, there is currently no case law supporting such a strategy.[184] Environmental litigation against multinational corporations is difficult, but Posner sees even less potential for success in either the domestic or the international arena for environmental claims against national governments, noting the problems with causation and sovereign immunity that arise with such cases.[185] He points out, however, that "if international environmental law is weak, international human rights law is, by comparison, robust," which has led scholars to advocate for international human rights law as a mechanism to litigate climate justice issues.[186]

Although Posner sees little hope for claims against states due to their sovereign immunity, he acknowledges that multinational corporations could potentially be held liable if individual plaintiffs could prove harm, causation, and that the corporation operated in complicity with a state and had breached

183. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal* (John M. Olin Law and Economics Working Paper No. 329, Jan. 2007).

184. *See, e.g.*, Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003) (advocating a human rights based approach and noting the lack of success by plaintiffs alleging environmental torts under the ATCA); RoseMary Reed, Comment, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399 (2002) (noting that tort claims under the ATCA require a clear violation of international law and suggesting potential bases for such a claim by Pacific Islanders).

185. Posner, *supra* note 183, at 3.

186. *Id.*

obligations under international law.[187] However, as Posner notes, the combination of these requirements would be a daunting hurdle for any plaintiff. Furthermore, even if the plaintiff could make a case for liability, Posner believes that this type of litigation would ultimately generate "bad policy."[188] Using a utilitarian cost-benefit approach, Posner concludes that "corporations should not be forced to shut down factories unless the climate costs of their activities exceed the value they produce in the form of consumer surplus and returns to shareholders."[189] Moreover, Posner points out that a healthy climate is a "public good" and thus, there must be a consistent liability standard around the world to ensure that the costs are borne equally by American and foreign corporations.[190] Posner acknowledges that, in an ideal scenario, the threat of liability for damages could cause large corporations to reduce their greenhouse gas emissions.[191]

Posner ultimately concludes, however, that the requisite judgments that courts would have to make about causation, damages, liability, and harm are so complicated in the context of global climate change that they are beyond the capacity of courts to generate.[192] Even if courts were able to handle such complexities, Posner believes that they would "implicitly be making climate change policy both for the United States and for the world," which is not an appropriate role for courts.[193] Moreover, even though such a global environmental policy might make sense to the judges, it is not likely to "reflect the needs and interests of people living all over the world."[194] All things considered, Posner finds that the litigation model will be of dubious utility in driving global greenhouse gas policy, and that it may, in fact, lead to bad policy.[195]

If Posner is right, then the only way to generate global policy on climate change is to rely on national legislatures to articulate their domestic policies, and then build consensus with other nation-states through multilateral compacts, such as the

187. *Id.* at 5.
188. *Id.* at 7.
189. *Id.* at 8.
190. *Id.* at 9.
191. *Id.* at 10.
192. *Id.* at 11–12.
193. *Id.* at 12.
194. *Id.* at 16.
195. *Id.* at 19

Kyoto protocol. This is the existing global framework, and it is problematic for indigenous groups because they are vulnerable to the negotiations between the nation-states. Although United States domestic law accords federally recognized tribes decision-making rights within the domestic arena, indigenous groups do not enjoy a coextensive right in the international arena. Nevertheless, ideally the nation-states should only be allowed to express a national environmental policy if it is respectful of the needs, interests, and rights of the indigenous nations within their borders. Moreover, as a global community, the nation-states should be required to negotiate with one another, keeping those constraints in mind. Drawing on the normative arguments outlined above for an indigenous right to self-determination, this article now turns to an examination of the framework of human rights law that might support these claims.[196]

C. *Constructing an Indigenous Right to Environmental Self-Determination*

There is a very important discussion underway within international human rights law that distinguishes the right of sovereignty from the right of self-determination.[197] Sovereignty refers to governmental authority and is often linked to jurisdiction within distinct territorial boundaries. Thus, the United States has the national sovereignty to determine what can occur within its national boundaries, and through federalism, this exercise of sovereignty is harmonized with the sovereign exercises of authority by the states within state boundaries and by tribes within reservation boundaries. Self-determination, on the other hand, is the right of a people to "freely determine their political status and freely pursue their economic, social, and cultural development."[198] Thus, sovereignty is a substantive legal status while self-determination is a political right that stems from an underlying moral claim.

For indigenous peoples, although the concepts of sovereignty and self-determination are inextricably connected, they

196. *See* note 120 and accompanying text, *supra*.

197. *See* ANAYA, *supra* note 114, at 97–103.

198. Int'l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 1, U.N. Doc.A/6316 (Dec. 16, 1966), *available at* http://www.ohchr.org/english/law/pdf/ccpr.pdf.

are not coextensive. As Professor Robert Williams observes, indigenous claims to sovereignty are unique in the sense that they are primarily a "jurisgenerative demand on the part of indigenous peoples to live by a law of their own choosing and creation."[199] In relation to climate change, federally recognized tribes have some opportunities, albeit limited ones, to participate in domestic environmental law and thus exercise their right to sovereignty.[200] However, in the international arena, indigenous peoples, including federally recognized tribes, are not able to exercise sovereignty because they lack standing as nation-states and are represented in international human rights dialogues through non-governmental organizations (NGOs).[201]

The first step toward environmental self-determination, then, is being clear that indigenous peoples have an equal right to self-determination as "peoples." Although that principle is clear to proponents of tribal rights, it continues to be contested by nation-states. Under international human rights law, there has been some hesitancy to recognize indigenous groups as "peoples" for purposes of Article 1 of the Covenant on Civil and Political Rights, and they have been instead recognized as holders of "minority rights" under Article 27 of the Covenant.[202] The distinction is important. Under Article 27, ethnic, religious, and linguistic minorities merely have a right to protest national policies that would prohibit them from enjoying their right to enjoy their culture, practice their religion, or speak their language.[203] They do not, however, have a right to require the state to affirmatively promote or protect their cul-

199. Robert A. Williams, Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. OF CONST. STUD. 146, 149 (1995).

200. *See* ROYSTER & BLUMM, *supra* note 126 and accompanying text.

201. *See* ANAYA, *supra* note 114, at 56–58 (describing the inception of the indigenous rights movement in international human rights law).

202. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 158–61 n.4 (1989); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 672–76 (1990).

203. *See* International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (specifying that members of such minority groups "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language").

tures. Therefore, any attendant right to self-determination at a cultural or political level is limited.

The most recent dialogue on indigenous self-determination arose in conjunction with the Declaration on the Rights of Indigenous Peoples, which was adopted by the United Nations' General Assembly on September 12, 2007.[204] Article 3 of the Declaration employs the same language on self-determination as Article 1 of the Covenant on Civil and Political Rights.[205] In addition, the Declaration defines a host of political and cultural rights related to land, natural resources, and cultural resources.[206] Notably, the Declaration recognizes the right of indigenous peoples to define their own destiny and to govern themselves freely, without subordination or control by another government, except to the extent that they voluntarily consent to such control.[207]

In theory, such a right should include the right to survive as a distinct people and the right to restrain national governments from undertaking policies that would jeopardize their continued physical or cultural survival. Indeed, the Declaration specifies that indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development," and are entitled to "just and fair redress" for any deprivation of this right.[208] Thus, the various provisions of the Declaration offer an appropriate starting place for indigenous peoples' right of environmental self-determination.

Even if the ultimate extent of indigenous peoples' right to self-determination is still contested by some of the nation-states, the Declaration articulates a basis for recognizing a right of environmental self-determination that preserves the relationship between indigenous peoples and their traditional lands for cultural and moral reasons. Giving testimony in international human rights forums, indigenous leaders have em-

204. *See* Declaration, *supra* note 156. The United States, Australia, Canada and New Zealand voted against adoption of the Declaration. *See* AILA paper, *supra* note 156.

205. *See* Declaration, *supra* note 156, at art. 3..

206. *Id.* at arts. 25–30 (discussing indigenous peoples' rights to their traditional lands and resources).

207. *Id.* at art. 10 (providing that no relocation of indigenous communities should take place without their "free and informed consent"); *id.* at art. 20 (specifying that states shall obtain the "free and informed consent of the peoples concerned" before devising legislature or administrative measures that might affect indigenous peoples).

208. *Id.* at art. 20.

phasized that "the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories."[209] For example, during hearings on a pipeline project, a tribal member of one of Canada's First Nations testified as follows: "To the Indian people our land is really our life. Without our land we cannot—we could no longer exist as people. If our land is destroyed, we too are destroyed. If your people ever take our land, you will be taking our life."[210]

Indigenous leaders also point out that "international legal recognition of indigenous peoples' collective human rights to exist as distinct peoples pursuing their own cultural development and identity would mean little without a corresponding recognition of the collective nature of indigenous rights to occupy traditional territories."[211] Moreover, many existing sources of international law concerning indigenous human rights recognize that the cultural survival of indigenous peoples is centrally linked to the integrity of their land base.[212] For example, the International Labour Organization Convention on Indigenous and Tribal Peoples, which was adopted in 1989 and endorsed by several nation-states, recognizes "indigenous peoples' collective rights to self-development, cultural and institutional integrity, territory, and environmental security."[213] The

209. Williams, *supra* note 202, at 689.

210. Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CAN. J.L. & JURIS. 19, 32.

211. Williams, *supra* note 202, at 689; *see also* Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 382–83 (1989) (noting that "[i]f an important part of a culture" is its connection to a land-based economy, "then the collective right should include the resource base necessary for the economic activity. The resource base is needed, not to ensure that individuals have adequate nutrition or income, even though it may contribute to those ends, but because the resource is vital to the cultural life of the group.").

212. *See* Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 345, 347–48 (1993); *see generally* ANAYA, *supra* note 114.

213. Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 44 (1994). *See* International Labour Organisation [ILO], Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (Sept. 5, 1991) (adopted by the General Conference of the ILO on June 27, 1989, in force beginning Sept. 5, 1991) [hereinafter ILO No. 169], *available at* http://www.ilo.org/ilolex/english/convdisp1.htm. The International Labour Conference adopted ILO No. 169 at the end of its 1989 session, and the convention came into force in 1991, when it was ratified by Norway and Mexico. ANAYA, *supra* note 114, at 59. Subsequently, the convention was ratified by several other nations, including Argentina, Bolivia,

Convention specifically calls upon the nation-states to facilitate cross-border initiatives that support cooperative efforts by indigenous peoples on either side of the border on common "economic, social, cultural, spiritual and environmental" issues.[214] Undoubtedly, climate change could be a focal point, especially in arctic regions.

Indeed, many international agreements on environmental issues have highlighted the distinctive status and contributions of indigenous peoples with respect to issues such as sustainable development. In 1992, for example, world leaders convened at the Rio Summit to establish the terms of a global compact on the environment.[215] Participants in the Rio Summit adopted a Declaration on Environment and Development and an agenda for achieving sustainable development.[216] Principle 22 of the Rio Declaration recognizes the vital role of indigenous communities "in environmental management and development because of their knowledge and traditional practices" and declares that "[s]tates should recognize and duly support [indigenous groups'] identity, culture and interests and enable their effective participation in the achievement of sustainable development."[217] The agenda for sustainable development adopted at the Rio Summit advocates a full partnership with indigenous communities and empowerment of indigenous peoples by various means, including recognizing their traditional resource management practices, settling their land claims, and protecting them from activities that would degrade the environment of their lands or that would be considered environmentally inappropriate under indigenous cultural norms.[218]

The International Convention on Biological Diversity (CBD), which also emerged from the Rio Summit, also speaks to the unique role of indigenous peoples in conserving biological diversity and promoting the sustainable use of biological resources such as forests and marine fisheries. The CBD is a

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Brazil, Columbia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, The Netherlands, Paraguay, Peru and Venezuela. *Id.* at 59 n.58.

214. ILO No. 169, *supra* note 213, at art. 32; *see also* Declaration, *supra* note 156, at art. 35.

215. *See* Report of the United Nations Conference on Env't & Dev., Rio de Janeiro, June 3–14, 1992, U.N. Doc. A/CONF.151/26/Rev. 1 (1993) [hereinafter Rio Report].

216. Barsh, *supra* note 213, at 45.

217. *Id.* at 46.

218. Rio Report, *supra* note 215, at 387.

comprehensive global agreement that addresses biodiversity "in terms of genes, species and ecosystems; whether in their natural state or modified by human intervention."[219] The CBD was the first international environmental treaty to step beyond the responsibilities of the nation-states and consider the role of indigenous and local communities in environmental decision-making that impacts biological resources.[220]

However, the CBD views the role of indigenous people in protecting biodiversity to be an equity issue, rather than a sovereignty issue, which bears on the CBD's perception of indigenous rights.[221] The CBD accords nation-states the paramount role in constructing environmental policies impacting biodiversity. Because of their longstanding relationship with particular geographic regions and the specialized knowledge of these environments that they have accumulated over time, indigenous peoples and local communities are merely recognized as having separate interests that should be factored into the decision-making process of the nation-states.[222] Thus, while the CBD does not recognize indigenous peoples as having sovereignty over these territories, it does recognize their right to participate in international decision-making based on their traditional relationship to particular lands and the belief that traditional indigenous land management practices promote the optimal goals of conservation and sustainable development.

Although the commitment to sustainability is still present in international law, it is unclear how much of an impact it will have on the discussion about climate justice. Based on the documents that emerged from the Rio Summit, the concept of sustainability appears to have at least four separate, but interrelated, objectives: (1) a commitment to preserve natural resources for the benefit of present and future generations; (2) a commitment to develop appropriate standards for the exploita-

219. Jeffrey A. McNeeley et al., *The Convention on Biological Diversity: Promise and Frustration*, 4 J. ENV'T & DEV. 33, 33 (1995).

220. *Id.*

221. For example, the Preamble to the Convention on Biological Diversity recognizes the "close and traditional dependence of many indigenous and local communities" that retain traditional lifestyles and the "desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations, and practices relevant to the conservation" goals of the Convention. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143, 145, *available at* http://www.biodiv.org/doc/legal/cbd-en.pdf.

222. *See id.* at art. 8(j).

tion of natural resources; (3) an agreement to use resources "equitably"; and (4) a requirement that environmental considerations be integrated into development plans, programs, and projects. [223]

Two lessons emerge with regard to climate justice. The first lesson is that the concept of sustainability has become a universal goal of environmental decision-making and that indigenous peoples hold particularly relevant knowledge as to how to achieve it due to their familiarity with certain environments, which allows them to make an active and unique contribution to the discussion of what sustainability will require. The second lesson is that nation-states have a duty to promote sustainability, even if it imposes some limitation on what they might otherwise choose to do in relation to development. Both lessons are critical in determining what climate justice requires in relation to an indigenous right of environmental self-determination.

D. Indigenous Peoples and Intercultural Justice: The Inuit Petition

In 2005, the Inuit people, constituted as the Inuit Circumpolar Conference (ICC), filed a petition against the United States in the Inter-American Commission on Human Rights, alleging that the impacts of global warming and climate change on the Inuit people, resulting from various acts and omissions of the United States, constitute a violation of their human rights.[224] Although the Commission initially declined to investigate, citing insufficient evidence of harm, it held hearings on the matter on March 1, 2007 to evaluate additional evidence submitted by the Inuit people through their legal representatives.[225] The Inuit claim is illustrative of the second generation of environmental justice claims, as it is not a sovereignty claim but rather a claim for environmental self-determination.

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223. *See, e.g.*, LYLE GLOWKA ET AL., ENVIRONMENTAL POLICY & LAW PAPER NO. 30, GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY 4–5 (1994) (summarizing four "obligations on the sustainable use of biological resources" that are interwoven into the Articles of the CBD).

224. *See* ICC PETITION, *supra* note 107, at 1.

225. Christopher Mason, *Canada: Inuit Say U.S. Emissions Violate Rights*, N.Y. TIMES, Mar. 2, 2007, at A6.

The Inuit have organized themselves collectively across international borders as the ICC, identifying themselves a distinctive people.[226] Their environmental self-determination claim rests on their status as a distinct people, unified in their cultural values and practices and belonging to their traditional lands and territories irrespective of the political boundaries of the nation-states.

The Inuit's petition is supported by an extensive report, the Arctic Climate Impact Assessment, which was completed in 2004 and demonstrates that the Arctic is currently experiencing some of the most rapid and severe climate change on earth.[227] Two of its key findings are (1) that marine species dependent upon sea ice, including polar bears, seals, walrus, and various species of birds, are declining and could face extinction, and (2) that the Inuit culture, which is heavily dependent upon sea ice and these species, will experience severe disruption.[228] Indeed, Sheila Watt-Cloutier, an Inuit who is the elected Chair of the ICC, explains that the group filed the petition out of a commitment to cultural survival: "Inuit are an ancient people. Our way of life is dependent upon the natural environment and the animals. Climate change is destroying our environment and eroding our culture. But we refuse to disappear. We will not become a footnote to globalization."[229]

The Inter-American Commission on Human Rights, an investigative arm of the Organization of American States (OAS),[230] is entitled to investigate cases and make findings, although these findings are not binding on the member nations of

226. Press Release, Inuit Circumpolar Conference, Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America (Dec. 7, 2005), http://www.inuitcircumpolar.com/index.php?ID=316&Lang=En.

227. ARCTIC CLIMATE IMPACT ASSESSMENT, IMPACTS OF A WARMING ARCTIC (2004), *available at* http://amap.no/workdocs/index.cfm?action=getfile&dirsub=%2FACIA%2Foverview&filename=ArcticImpacts.pdf&CFID=48&CFTOKEN=1123B2CA-92AE-1581-CA6410E8FB837BAD&sort=default.

228. *Id.* at 16.

229. Press Release, Inuit Circumpolar Conference, *supra* note 226.

230. *See generally* ANAYA, *supra* note 114, at 232–34, 259–66 (discussing the participation of the Inter-American Commission and the United States with respect to indigenous claims); Jorge Daniel Taillant, *Environmental Advocacy and the Inter-American Human Rights System*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 118, 118–61 (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (providing a detailed discussion of the Inter-American Human Rights system and its adjudication of environmental rights).

the OAS, which include the United States.[231] The Inuit have standing to bring the petition through their association with Canada, which is a member of the OAS and signatory to several human rights conventions, including the International Covenant on Civil and Political Rights.[232] Legal analysts maintain that a declaration from the Commission finding that the United States has violated the Inuit's rights could serve as the basis for a lawsuit against the United States in an international court or against American companies in federal courts.[233]

The Inuit's petition alleges that the United States is obligated to respect the Inuit's human rights by virtue of its membership in the Organization of American States (OAS) and its acceptance of the 1948 American Declaration of the Rights and Duties of Man.[234] They also maintain that other human rights instruments reinforce the United States' obligations under the Declaration.[235] In particular, the United States is a signatory to the International Convention on Civil and Political Rights and the International Convention on Economic, Social, and Cultural Rights and is therefore obligated to act consistently with the principles of those two covenants, and this obligation stands, even if it has not signed the optional protocols that would make these provisions legally enforceable against the United States.[236] The Inuit people also note that the United States has international environmental law obligations to ensure that activities within its territory do not cause transboundary harm or violate other treaties to which it is a party. The Inter-American Commission has found that the American

231. *See* Taillant, *supra* note 230, at 128.

232. *See* Andrew C. Revkin, *Eskimos Seek to Recast Global Warming as a Rights Issue*, N.Y. TIMES, Dec. 15, 2004, at A3.

233. *See* Myers et al., *supra* note 158.

234. ICC PETITION, *supra* note 107, at 5.

235. *Id.*

236. *Id.* This argument is based on the notion that nation-states are bound to respect the principles of a legal instrument upon agreeing to do so (e.g. "signing onto the covenant"), and they are also bound to respect "customary international law" which is the "controlling consensus" of world nations about particular minimal standards that must govern behavior in certain circumstances. *See* ANAYA, *supra* note 114, at 61. Within international human rights law, the question of legal enforcement, which is governed to some extent by the optional protocols to international conventions, is separate from the question of the moral duty to respect these universal principles. See NICKEL, *supra* note 145, at 32–33 (observing that a notion of "nonlegal rights" is critical to the notion of moral rights that exists at the heart of international human rights law).

Declaration "should be interpreted and applied in context of developments in the field of international human rights law . . . and with due regard to other relevant rules of international law relevant to [OAS] member states."[237]

The petition focuses on the United States because it is the largest emitter of greenhouse gases in the world and is a signatory to the 1992 Framework Convention on Climate Change, which called for all countries to scale emissions back to their 1990 levels by the year 2000. Despite its 1992 commitment, the United States has refused to bind itself to the Kyoto Protocol, which requires most industrialized countries to curb their emissions. The Inuit people believe that the United States opened the door for this claim by openly admitting that climate change is a problem that nation-states must seek to avoid, and then refusing to sign a voluntary agreement to curb its emissions. [238] The Inuit claim the United States has full knowledge of the harms being caused by climate change, yet, unlike other nation-states, it refuses to honor its obligation to avoid this harm. [239]

When evaluating the merits of the Inuit's petition, the Commission will be required to assess the nature of the harm that they are experiencing, which directly raises the issue of cultural as opposed to environmental harm. The Inuit claim that their culture is inseparable from the condition of their physical surroundings.[240] They cite the Assessment's findings as to the nature and scope of the injuries caused by climate change, including the melting of sea ice, flooding, shore erosion, destruction of marine species, and contamination of food and water resources.[241] They maintain that the result of these environmental injuries is a grave set of harms, both present and prospective, to the Inuit people.[242] One of the greatest harms will be the forced removal of indigenous communities from their traditional lands.[243] This has already occurred in some cases, and the United States is projecting that several more

237. ICC PETITION, *supra* note 107, at 5.
238. *Id.* at 6.
239. *Id.* at 6–7.
240. *Id.* at 5.
241. *Id.* at 5–6.
242. *Id.* at 4.
243. *Id.* at 3, 6.

Inuit villages will have to be removed at a cost of $100 million or more for each one.[244]

The petition cites at length a variety of other harms, including the isolation of communities as the ice and snow melt, the obstruction of land travel, the loss of ability to hunt, fish, travel, or engage in traditional subsistence activities, the loss of ability to transmit Inuit culture to younger generations, the contamination and loss of food and water resources causing changes in diet and poorer health conditions, and the loss of traditional knowledge represented by "fine-tuned tools, techniques, and knowledge" gained over thousands of years of adaptation to the arctic environment.[245] For example, hunters have been unable to traverse their usual and accustomed areas and build igloos because of lack of sufficient snow and ice and are jeopardized by the need to carry cumbersome and weighty tents, which increases the potential of falling through the sea ice that is now quite thin in many places.[246] The Inuit also cite changed conditions on inland rivers and lakes, such as decreased water levels, which affects natural sources of drinking water and the habitat for fish, plants, and game upon which the Inuit depend.[247] The Inuit maintain that the weather is now so unpredictable that the Inuit are unable to schedule safe travel.[248] The negative effects on species such as polar bears, walrus, seals, and caribou, which are essential to subsistence and also cultural identity, have been disruptive to Inuit culture.[249]

The Inuit people thus assert the violation of a number of human rights, including "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."[250] In short, the "subsistence culture central to Inuit cultural identity has been damaged by climate change and may cease to exist if action is not taken by the United States in concert with the community of nations."[251] The Inuit petition demonstrates the central con-

244. Myers et al., *supra* note 158.
245. ICC PETITION, *supra* note 107, at 1.
246. *Id.* at 2.
247. *Id.* at 3.
248. *Id.*
249. *Id.*
250. *Id.* at 5.
251. *Id.*

nections between land and identity for Native peoples. The harm is both environmental and cultural. It is most severe when Native peoples are forcibly removed from their homelands and barred from access to sites traditionally used for cultural, spiritual, and material purposes. Cultural harm is both material and spiritual. It impacts the physical and psychological health of Native peoples in ways that cannot be adequately understood by industrialized nation-states, whose citizens are supremely mobile and always in search of better economic opportunities.

The Inuit petition presents a unique opportunity to overcome the traditional tort models of liability used to establish damages claims for environmental harm or other property-based harm, as well as personal injury. These limited categories of harm do not allow American courts to assess the claims that Native people have made for the negative cultural effects that result from the destruction of their traditional lands. The destruction of a people can take place physically, but it can also take place spiritually and culturally. For Native peoples, the categories of harm are inseparable, and so are the impacts of climate change.

CONCLUSION

This article has argued for a right to environmental self-determination for indigenous peoples, which would allow them to maintain their unique cultural and political status as the peoples of traditional lands since before the establishment of current national boundaries. In the context of climate change policy, recognition of a right to self-determination would impose affirmative obligations on nation-states to engage in a mitigation strategy in order to avoid catastrophic harm to indigenous peoples.

This human rights-based claim is different from the first generation of indigenous environmental justice claims, which focused on sovereignty and the need to exercise tribal regulatory jurisdiction over reservation lands. In the United States, the political sovereignty of federally recognized Indian nations may enhance their claim for a right to participate in the development of a national policy on climate change. However, the recognition of tribal "sovereignty" is not sufficient to protect indigenous peoples within their traditional environments. Simi-

larly, the claim of environmental self-determination is quite different from tort-based models of human rights litigation, which attempt to hold nation-states and corporations liable for environmental harm. Such claims are limited by the requirements of injury, causation, and damages, and they primarily deal with redress for quantifiable past harm but do little to prevent the prospective harms likely to be caused by the environmental policies, or lack thereof, of nation-states.

The international dialogue on climate change is currently focused on a strategy of adaptation to climate change that includes the projected removal of entire communities, if necessary. Such a strategy will prove genocidal for many groups of indigenous peoples. As Sheila Watt-Cloutier observes in the context of the Inuit case, it is unconscionable to reduce an entire people to status as a "footnote to globalization."[252] One of the greatest evils of European imperialism and the United States' expansion into the West during the nineteenth century was the forcible appropriation of indigenous lands and the wholesale removal of indigenous people. The genocide of indigenous peoples was justified by policymakers as being necessary for the triumph of European civilization and for the achievement of the "manifest destiny" of the United States.[253] Contemporary policymakers must not repeat this dynamic in the context of climate change policy. To dismiss these ancient cultures as "doomed" in the face of industrial development is to continue the colonial rhetoric about the "fate" of indigenous peoples. This is the time to develop a concerted international strategy to prevent the need for massive relocation of indigenous peoples, with the attendant destruction of culture and communities that this will entail.

Scholarly commentators on climate change emphasize that "justice must play a central role in addressing climate change

252. *See* Press Release, Inuit Circumpolar Conference, *supra* note 226.

253. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 56 (1983) (noting that English colonists used the "Indian as savage" imagery to justify the expropriation of Indian land); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 251 (1989) (discussing the "legitimating discourse of a civilized society of cultivators' superior claim to the 'waste' and underutilized lands roamed over by savage tribes").

impacts."[254] However, what constitutes "justice" is the subject of active debate.[255] Advocates of adaptation policy, in a pitch for compensatory justice, stress the need to compensate the affected communities for the harm they have suffered. However, they are focusing on compensating communities for harms that are perceived to be inevitable. Under this view, indigenous peoples will indeed become a "footnote to globalization." Yet from an indigenous perspective, justice can only be achieved by an affirmative commitment to protect indigenous peoples within their traditional lands.[256] This is the type of justice envisioned by advocates of an indigenous right to environmental self-determination. They argue that if the nation-states alter their domestic policies to recognize this right for indigenous peoples, then they will promote the continued survival of these unique peoples and cultures. The harm of climate change is occurring, but the catastrophic impacts can still be mitigated. The nation-states are moving toward a consensus that protects values of global justice, but they have not yet achieved that goal. The Inuit petition presents an opportunity for the United States to rethink its domestic policy on climate change. It is

254. *See, e.g.*, W. NEIL ADGER ET AL, FAIRNESS IN ADAPTATION TO CLIMATE CHANGE xi (2006).

255. *See id.* There are many intriguing dimensions to the "justice" claims attendant to climate change, though these are beyond the scope of this article. For a full discussion of the justice claims and the problem of justice to future generations, see EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS (2006); J. TIMMONS ROBERTS & BRADLEY C. PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY (2007).

256. This perspective is exemplified by a very recent development involving several indigenous nations. On August 1, 2007, delegates from several indigenous nations met at the Lummi Nation and signed a proposed treaty creating the "United League of Indigenous Nations." The treaty is anticipated to be formally signed and ratified by the leaders of many native nations in November, 2007. *See* Redwing Cloud, *United League of Indigenous Nations Formed*, INDIAN COUNTRY, Aug. 10, 2007, http://www.indiancountry.com/content.cfm?id=1096415578. Suzan Shown Harjo, President of the Morning Star Institute, referred to the treaty as "a historical act" and also an "act of self-defense." *Id.* According to one delegate, Chief Jaret Cardinal of the Sucker Creek Cree Nation, the Treaty is intended to provide a mechanism for indigenous Nations to stand together on common issues, including global warming and international trade. *Id.* Professor Alan Parker of Evergreen State University, who has been involved in the foundational work for the Treaty for several years, emphasized that Native peoples throughout the world are "being impacted in their ability to sustain a way of life that is essential to their survival," and thus, they must exercise a "collective voice" and insist upon representation "before all national and international bodies on climate change." *Id.*

incumbent upon powerful nations, such as the United States, to engage in a mitigation strategy that will protect indigenous peoples and their ancient and remarkable cultures.

However, it is not just the interests of justice that make it imperative that indigenous cultures be protected from environmental harm. There is an intergenerational quality to indigenous identity that is closely linked to traditional lands and resources. Scientists and global citizens may contemplate what it takes for human beings to survive in such an environment, but only those who have experienced this environment over centuries can really know what the relationship entails. Indigenous peoples and the lands that sustain them are closely linked through ancient epistemologies that organize the universe quite differently than Western epistemology does. Indigenous lifeways present an opportunity to understand facets of human life that are otherwise unknowable. The only hope for our survival as a global community is our willingness to protect that which is precious and sacred and to respect even that which is beyond our limited human experience.