

Andrew M. Tarrant

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Re-Envisioning Kyoto: Human Rights and Global Warming

Advisor: Prof. Lucinda Peach

## **The United Nations Framework Convention on Climate Change, Kyoto, and Human Rights: A Fresh View of Global Warming and International Law**

Human society is now moving into a period of profound upheaval in the global climate system. Human produced global warming and climate change, and all the negative outcomes associated therewith, threaten geopolitical stability and human welfare. The Frame Conventions on Climate Change and its Kyoto Protocol seek to remedy and avoid some of the worst possible effects of climate change, and represent an acknowledgement of our shared responsibility to do so. This paper argues that these documents should be viewed as lying within the body of international human rights law, owing to their profound concern for individual and collective well-being, and the nature of the threat posed by global warming. While a human rights approach is strongly recommended, one must remember also to view these documents as more general environmental treaties as well, owing to their concern for non-human species and natural systems.

The paper is subdivided into three sections. The first surveys the state we find ourselves in, both in relation to climate change itself and the legal and ideational efforts presently set forth to combat it. The second section builds an argument for viewing the documents in a human rights framework, both because it is internally and ethically consistent to do so, and because it will provide avenues for greater pragmatic efficacy and substantive efforts against the emerging climate crisis. The final section builds upon the further potential benefits of this re-imagining, while also cautioning the reader of the potential perils associated therewith.

## Section One: The Situation Thus Far

The Kyoto Protocol, and the United Nations Framework Convention on Climate Change (FCCC) of which it is a part, is the strongest and most widely discussed international legal mechanism designed to take action against the threats posed by anthropogenic climate change to date. Global warming is now considered to be an unequivocal and uncontested scientific fact, with the infamous “hockey-stick graph” of global atmospheric temperatures over the last thousand years thoroughly seared into the collective consciousness via both popular and academic channels.<sup>1</sup> Additionally and not inconsequential to policy and moral duty, according to the Intergovernmental Panel on Climate Change (IPCC), it is “very likely” that human greenhouse gas emissions account for most of the observed warming of the last fifty years.<sup>2</sup> Even during the course of writing this piece, new evidence is coming forward pointing away from natural causes such as changes in solar activity, further weakening skeptic’s arguments against anthropogenic climate change.<sup>3</sup>

This section will attempt to impress upon the reader to the greatest degree possible the threat to human society and individual and collective well-being, both for present and future generations. While a vast body of work exists and is constantly being refreshed in this area, it is helpful to speak not just in abstractions but in more concrete and immediate terms about the potential effects on humanity of unmitigated climate change, so as to provide appropriate intellectual and ethical fodder for the argument this

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<sup>1</sup> Core Writing Team, R K. Pachauri, and A Reisinger, eds. Climate Change 2007: Synthesis Report Contribution of Working Groups I, II and III to the Fourth Assessment. Intergovernmental Panel on Climate Change. Geneva, 2007. 10 Mar. 2008 [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf), p. 30.

<sup>2</sup> Ibid., p. 39.

<sup>3</sup> Black, Richard. "'No Sun Link' to Climate Change." BBC News| Science/Nature. 3 Apr. 2008 <<http://news.bbc.co.uk/2/hi/science/nature/7327393.stm>>

paper makes. This section also addresses the pragmatic inadequacy and morally inappropriate nature of the prevailing paradigm and course of action thus far used to stave off the worst effects of global warming and climate change. While the economic, political, and other considerations often used to limit action and ambition for change are important, given their impacts upon peoples' lives and rights, they mustn't become excuses for inaction. The repercussions of inaction for humanity and the broader ecosphere are too great to allow fleeting concerns to halt action against a long-term problem.

### Negative Effects of Climate Change on Humans

Scientists studying the global climate system not only predict future changes in climatic conditions and incidence of dramatic weather events, but also attribute already observed events and climate dynamics to anthropogenic global warming. In general, the observed and expected effects of climate change can be subdivided into two categories; one is an increase in the frequency and severity of extreme weather events, the other is a shift in long-term overall climate and other natural systems for a given region or ecosystem. Of course, there is some overlap between the two, each contributing to and helping to define the other. Crucially, both also share the ability to wreak havoc upon the individual and collective well-being of humans: basic subsistence, geo-political stability and peace, the continued existence of certain states, and numerous other areas of human existence and rights are potentially undermined by the processes in question.

Extreme weather events include tropical storms such as hurricanes and typhoons, non-tropical storms exhibiting significant precipitation and winds, heat waves and similar

periods of unusually and dangerously cold temperatures. The Fourth Assessment Report of the IPCC finds that it is *very likely* that heat waves and temperature extremes, as well as extreme precipitation events, will become more frequent over the course even of this century.<sup>4</sup> The same report also finds that it is *likely* that tropical cyclones (hurricanes and typhoons) will increase in strength and frequency, as well as experience a broadening of geographical range of impact. One need only look to recent history to see the grave threat to human life and society posed by any increase in the frequency or severity of such events.

Though it is inaccurate and scientifically impossible to attribute any single event solely to climate change, what is clear is that statistically the Earth would have experienced fewer and weaker extreme weather events over the last decades had greenhouse gas emissions not been steadily on the rise over the last two hundred years. Single events, like Hurricane Katrina in the United States or the 2003 European heat wave, might still have happened without human activity; however, they would have been less likely to happen and would be less at risk of similar events recurring without human emissions. This has some bearing on the level of human culpability and responsibility toward others suffering as a result of the events, though we *can* statistically derive an increased number of weather events and ensuing death and suffering due to our actions. Questions of equity, in addition to moral calculations surrounding simply death and suffering, arise as citizens and governments of poorer countries are less able to afford the infrastructure necessary to provide adequate shelter and support during weather emergencies.<sup>5</sup>

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<sup>4</sup> IPCC, 46.

<sup>5</sup> Gelbspan, Ross. Boiling Point. New York: Basic Books, 2004, p. 145.

While less media focus goes to the long term transformations in climate and weather patterns already under way, they represent the deepest and most ominous impacts of climate change. The 2007 IPCC Assessment Report finds that precipitation increases in the higher latitudes are very likely within this century, and that precipitation decreases of up to 20% by 2100 are likely in sub-tropical zones.<sup>6</sup> The so-called “Medieval Warm Period,” while generally warmer in the higher latitudes of Europe, produced decades-long drought and other unfavorable climate shifts in other parts of the world. Some climatologists and anthropologists blame the “Medieval Warm” decreases in precipitation seen in Southeast Asia, for example, for the abandonment of the once massive city of Angkor, Cambodia. As climate shifted, it became more difficult to yield the harvests necessary to sustain such a large and concentrated population. Archaeologist Brian Fagan warns that the widespread drought of this less severe period of warming would be devastating today, given the sheer scale of industrialized societies that renders us even more vulnerable to drought and sea level rise than our pre-industrial ancestors.<sup>7</sup> Already, climate changes and drought are causing reduced crop yields in such “bread basket” nations as Australia and Ukraine, and food insecurity is only expected to increase with increased global warming.<sup>8</sup> Again, those from the poorest countries and regions will suffer hunger and deprivation disproportionately from these effects, both because they tend to be located in regions more likely to be affected by drought, and because they lack the resources necessary for sufficient adaptation to climate change.<sup>9</sup>

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<sup>6</sup> IPCC, 46.

<sup>7</sup> Fagan, Brian M. The Great Warming: Climate Change and the Rise and Fall of Civilizations. New York: Bloomsbury, 2008, p. 240.

<sup>8</sup> Rosenthal, Elisabeth. "World Food Supply is Shrinking, U.N. Agency Warns." New York Times 18 Dec. 2007, Late ed., sec. C: 5.

<sup>9</sup> Fischer, Gunther, Mahendra Shah, Francesco Tubiello, and Harrij Van Velhuizen. "Socio-Economic and Climate Change Impacts on Agriculture: an Integrated Assessment, 1990–2080." Philosophical Transactions of the Royal Society 360 (2005), p. 2081.

Finally, one must consider the secondary effects of these changes in climate and resource availability. In addition to increased difficulties in obtaining those things considered as essential to a minimal standard of living, the political and economic responses to such difficulties may constitute a threat to human rights and security as well. Growing geo-political instability, such as conflicts over water usage rights, may become a much more salient feature of international politics in the coming decades. With conflicts come destruction, death, and other gross violations of the most fundamental human rights. Of course, such a path toward climate change, instability, scarcity, and conflict is not unavoidable or a given for the future. Action is already being taken by individuals, communities, governments, and the international community to try and avoid at least the worst possible scenarios of runaway, unmitigated climate change. The question of whether these actions and approaches are appropriate and effective, both ethically and pragmatically, is another question altogether. For the purposes of this paper, given the collective nature of the causes and consequences of anthropogenic global warming, examining the highest level governmental/international actions and strategies for climate change abatement for their appropriateness is of primary importance.

#### Evaluating the Current “Standard Operating Procedures”

The primary international vehicle for addressing climate change is the United Nations Framework Convention on Climate Change; especially notable is the Kyoto protocol to the Convention which is recognized as the strongest and most widely adopted climate change treaty at this point in time. Kyoto’s most important contribution, in terms of human rights and the environment, is its implicit and stated bases for preventing

climate change and the way in which these contribute to a concept of human rights to the environment, as well as toward viewing global climate change as, at least in part, a question of human rights. However, for such high-minded rhetoric both within the document and in the fanfare surrounding its passage and adoption, the mechanisms and strategies contained within it are wholly inappropriate morally, and rather lackluster pragmatically. In short, the Kyoto Protocol to the FCCC is not fit for purpose: for having achieved little toward the aim of reducing warming and emissions, and for adopting strategies and mechanisms not up to the task.

National level approaches, such as those advocated by the United States government instead of global commitments, are also both pragmatically and ethically flawed. It is highly unlikely that each nation working alone would spontaneously choose to set the right goals for the task. Additionally, specific perceived national interests such as protecting certain industries are more likely to weaken commitments at the national level. Global warming is a problem caused by everyone, and affecting everyone. As such, each state and global actor needs to take its share of the responsibility for the problem in order for it to be addressed effectively. Allowing some states to avoid their responsibilities leads to the failure of all other individual approaches to mitigating climate change. Collective problems, with collective blame and collective responsibility to correct, demand a collective and coordinated international response.

The primary ethical weakness of the mechanisms in the Kyoto Protocol are their contingency: contingent on being as economically non-disruptive as possible, contingent even on the creation of markets designed to trade, and hence monetarily incentivize, carbon reductions. This is, primarily, a pragmatic move in order to create international



public policy that is both palatable to as wide a circle of policy makers as possible, and also most likely to be adopted and enacted by as many actors as is feasible. Robert Mendelsohn dismisses out of hand so-called command and control models for attempting to roll back global emissions and global warming as being prohibitively expensive and undesirable.<sup>10</sup> Writing in the style, and from the viewpoint, of many in his field, he considers fellow-contributor William Cline's relatively low discount rate cost-benefit analysis of warming abatement measures including the Kyoto Protocol regime to be foolish and too concerned with the "deep" future. Mendelsohn finds it irresponsible to impose such drastic costs on the present generation, when future ones will have just as much responsibility to keep their emissions low. He argues that we must take a very near term view of costs and benefits, and that if there is a low return on the investment, that investment is better placed in other areas where a greater and more immediate impact relative to investment can be achieved.<sup>11</sup> For his part, Cline estimates that benefits (judged monetarily) from Kyoto implementation will begin to outweigh costs for the world as a whole only by the year 2100, and for the most-industrialized countries only after 2200.<sup>12</sup> Given the substantial up-front costs and relatively low rate of return on economic hardship, he finds that the Kyoto Protocol "accomplishes relatively little in curbing warming...better than nothing, but not a persuasive answer to the problem of global warming."<sup>13</sup>

The debate between the two authors discussed above highlights several important points about the nature of the current approach via Kyoto, as well as arguments for other

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<sup>10</sup> Mendelsohn, Robert. "Perspective Paper 1.1" in *Global Crises, Global Solutions*, Bjorn Lomborg (ed.) (Cambridge: Cambridge UP, 2004), p. 46.

<sup>11</sup> *Ibid.*, pp. 44-45.

<sup>12</sup> Cline, William R. "Climate Change" in *Global Crises, Global Solutions*, Bjorn Lomborg (ed.) (Cambridge: Cambridge UP, 2004), p. 31.

<sup>13</sup> *Ibid.*

policy programs, current in the international policy dialogue. For one, it is clear that an essentially economic underbelly girds the argument over best practices and policies. Mendelsohn's synthesizing of his own body of work demonstrates his and many policy makers' non-willingness to compromise economic growth on the basis of expected outcomes stretching centuries into the future. His "wait and see" approach, as well as his casual dismissal of the already occurring negative impacts on tropical and sub-tropical dwellers, ignores the very real concerns of those already living and tends to mortgage the future against the financial concerns of largely Northern economic players alive today.<sup>14</sup> Of course, financial and resource constraints must be taken into account when considering how best to deal with the issue of global warming. Imposing impossible to reach goals upon actors by definition will lead to a failure to meet said goals, as well as to increasing cynicism and resentment among the actors responsible.

The "differentiated responsibilities" approach, embedded within the foundational Rio Declaration upon which the FCCC and Kyoto are built, recognizes that different actors bear different responsibilities for levels of emissions and have differential capacities to respond to the issue. This approach balances the very real need for development and improved quality of life in the developing countries with the necessity to cut overall CO<sub>2</sub> equivalent emissions.<sup>15</sup> A main critique of Kyoto, at least by the United States, is that it gives too lenient treatment to the developing world while too harshly burdening the already industrialized countries. However, "common but differentiated responsibilities" as a principle is designed to recognize not only the special needs of the developing states, but also the greater historic and present responsibility of

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<sup>14</sup> Cline, William R. "Rejoinder to Perspective Papers 1.1 and 1.2" in *Global Crises, Global Solutions*, Bjorn Lomborg (ed.) (Cambridge: Cambridge UP, 2004), p. 58.

<sup>15</sup> Halvorssen, Anita Margrethe. *Equality Among Unequals in International Environmental Law: Differential Treatments for Developing Countries*. (Boulder, CO: Westview P, 1999), pp. 74-75.

already-industrialized countries for the level of warming and greenhouse gas concentrations present in the atmosphere thus far.<sup>16</sup> In this it recognizes that legal (and ethical) burdens rest more greatly on those actors responsible for the damage done, yet that in the case of global warming all actors must work together and share responsibilities to prevent future human hardship and environmental harm. However, here Mendelsohn has perhaps one point of contention worth bearing out. He notes that under Kyoto, many developing countries have no commitment to remedial actions, even though they will soon be responsible for a good proportion of global greenhouse gas emissions.<sup>17</sup> While the genesis of his objection is perhaps not the same, it points to the Brundtland report's similar point that while economic growth is necessary in order to benefit the great masses of humanity still living in deprivation, such growth must be sustainable and tempered by respect for international environmental constraints.<sup>18</sup> The report, prepared in 1987, recommends the establishment of some source of international revenue in order to provide assistance to developing countries so as to enable them to engage in environmentally sustainable growth.<sup>19</sup>

Whether or not Kyoto, and especially mechanisms like carbon trading proposed around it, live up to the values inherent to "common but differentiated responsibilities" is another question altogether. Critics are right to point out that carbon permit trading schemes, under which countries producing below their quota share of permitted carbon emissions may sell the remainder of their quota to countries unable to get down to their

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<sup>16</sup> Dabholkar, Uttam G. "The Global Future and International Cooperation for the Environment" in *International Rights and Responsibilities for the Future*, Kenneth Hunter and Timothy Clark (eds.) (Westport, CT: Praeger, 1996), p. 130.

<sup>17</sup> Mendelsohn, p. 47.

<sup>18</sup> Brundtland Report: "Our Common Future": <http://ringofpeace.org/environment/brundtland.html> (Accessed April 3, 2008), p. 96.

<sup>19</sup> *Ibid.*, p. 333.

quota level, may end up incentivizing underdevelopment in the developing world, allowing it to act as a net seller of carbon permits to the industrialized countries. This would allow them to shirk their burden of reduction in favor of paying off the developing countries. Also possible is the eventual necessity of developing countries to purchase, perhaps at exorbitant market rates, carbon credits from the richer countries more able to lower their carbon emissions while sustaining economic well-being.<sup>20</sup> This reliance on the creation of a carbon market, which is already being developed internationally, may therefore not necessarily produce the most humanly equitable or ecologically responsible results. If such a system were to become the international standard, it would require legal and oversight mechanisms designed to ensure that production and consumption patterns were actually changing, and that inequality in burden sharing was not becoming a problem.<sup>21</sup>

When one gets to the bottom of the issue, there seems to be little discussion among policy makers and other political “movers and shakers” on whether or not such a market-based, monetary evaluation of costs and benefits of climate change abatement is ethically and even pragmatically sound course to take. One could see the institutional arrangements going back to the Rio Earth Summit as simply preparing a new framework for capital exploitation of natural resources, albeit mediated by a desire to ensure the world doesn’t spin into complete climate catastrophe. Underlying this approach, therefore, is not necessarily a concern for human well-being (though surely such a concern is evidenced in the text of the FCCC and KP, as well as among the discourse of climate change activists involved in preparing the documents), but also a concern for the

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<sup>20</sup> Halvorssen, p. 159.

<sup>21</sup> *Ibid.*

future ability to harness natural resources especially in the developing and non-developed countries for international capital gain.<sup>22</sup> In Saleh's words, this "corporate harmonization" of environment and capital is a most worrying intrusion of profit-motives into the arena of environmental protection. While Saleh's critique certainly touches upon the paradigmatic bias of most Northern policy-makers, and while the text of the FCCC and Kyoto Protocol thereto seems to find it necessary to note that systems designed to address climate change are economically justifiable "in their own right," there also exists at least in the basic principles of the treaty the desire to produce socially and ecologically beneficial outcomes and to attempt to mitigate climate change insofar as it is possible to do so.<sup>23</sup> Enshrined in these documents are the principles of fairness and equity, a concern for the well-being of future generations, and a desire to bring about climate stability.

The economic market mechanisms designed to bring about these results are simply not appropriate, ethically or pragmatically, to safeguard human life or to bring about the desired result of climate change abatement. Considering even the limited treatment of the potential perils and threats to human life and society associate with global warming given above, one must wonder why economic considerations feature quite as front and center as they do in the policy and academic debates. We humans, especially those of us in the industrialized and fast industrializing countries are perpetrating a chain of action that is harming not only seemingly "abstract" concepts of ecosystems and far away species we might not ever encounter first hand, but also ourselves and our fellow human beings, including some of the most vulnerable members of our society as well as our as yet unborn children and all future generations. Given the

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<sup>22</sup> Saleh, Ariel. "Terra Nullius" in *Ecofeminism as Politics: nature, Marx, and the postmodern* (London and New York: Zed Books, 1997), p. 120.

<sup>23</sup> Full Text of the Convention, UN Framework Convention on Climate Change. [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php). (Accessed: 14 April 2008).

suffering and even death our actions are already causing, why are we seemingly only willing to act to prevent such suffering if it is either economically neutral, or even beneficial, to do so? No serious person admits that we develop medicines and new treatments, attempt to stop genocides or other violent conflicts, or simply stop harming our neighbors and families only when we can expect an immediately visible monetary profit for having done so. Certainly self-interested considerations come into play when determining in which conflicts to intervene, or what medicines to develop (consider the amount of time and resources poured into finding new and better treatments for erectile dysfunction); however, no scholar, international legal expert, philosopher, or even politician would admit that human rights need only be respected when a monetary return is forthcoming. For this reason, the market mechanisms proposed with Kyoto to meet its goals might be pragmatic, but they are not ethically appropriate. Contingency can also cut into pragmatic affect, as discussed above, and end up doing very little to actually treat the problem in the long-term or to get down to its core.

## **Section Two: Kyoto, Global Warming, and Human Rights**

Having established the inconsistencies and pitfalls involved in approaching global warming mitigation from a contingent and market-based solutions perspective, this paper's task now turns to building an argument for a human rights based view of both Kyoto and the global warming issue in general. By stressing the human rights dimension of climate change and climate change mitigation, this paper seeks both to build greater pragmatic momentum toward substantive change and to expose, recognize, and give full

credence to the human rights ideas and ideals already to be found in international environmental law and academic discourse. Therefore, this argument is not being built from scratch, but seeks simply to illuminate and consolidate much of the legal and ideational framework that already exists in this area.

This section will first look to international law and custom for support for a rights based approach to environmental protection, especially in the area of climate change. Next, an examination of the more ethical and philosophical discourse surrounding the topic will help the reader to recognize the appropriate view to be taken in relation to climate change and global treaties attempting to mediate its effects. Finally, this section will conclude by examining the benefits to be had, not merely in the realm of accuracy and recognition, but also toward making real pragmatic progress in reducing carbon emissions and preventing the worst effects of anthropogenic climate change.

### Legal Precedent and the International Environmental Discourse

It is helpful to examine not only the documents in question, mainly the FCCC and Kyoto Protocol, but also the international legal precedents for a human rights view of the environment generally. International environmental law has been steadily evolving over the last decades, especially since the 1972 Stockholm Declaration, which adopted the precautionary principle to environmental law. No longer did a state actor have to wait to be wronged by another, instead measures were endorsed to prevent environmental degradation in the first place or, at the least, to commit to reversing environmental degradation wherever possible regardless of any official grievance being lodged against

an actor.<sup>24</sup> This principle would later be re-endorsed at the Rio Earth Summit in 1992. This principle, now so widely used in international environmental law especially, is fundamental to any legal body seeking earnestly to deal with climate change, given the often irreversible consequences associated with unmediated greenhouse gas emissions.<sup>25</sup> Additionally, the view of the environment as a solidarity right, one that must be preserved often via mandatory aid from one state actor to another, is recognized in the 1992 Rio Convention on Climate Change, and plays against any system of carbon trading, for example, that might induce poor countries to either become sources of carbon permits for the unreformed rich, or for any system in which developing countries become saddled with the burden of buying inordinately expensive carbon permits from the more able to adapt wealthy countries.<sup>26</sup>

In addition to human rights principles being contained within the body of international environment law, one can find evidence of a certain level of recognition of environmental rights in human rights treaties. Churchill's treatment of human rights treaties, narrowly defined as treaties concerned exclusively with human rights, sheds further light on the widespread if underdeveloped recognition of certain environmental rights in international law.<sup>27</sup> While the author's selection of such narrowly defined first-generation human rights treaties may at first seem limiting, it is helpful given the sometimes contentious nature of second and third generation human rights recognition especially by the United States, the biggest single emitter of greenhouse gasses *per*

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<sup>24</sup> Boyle, Alan "International Human Rights Law," in *Human Rights Approaches to Environmental Protection*, Boyle and Anderson (eds.) (Oxford: Clarendon P, 1996), p. 54.

<sup>25</sup> Vicuna, Francisco Orrego "State responsibility, liability, and remedial measures under international law: New criteria for environmental protection," in *Environmental change and international law: New challenges and dimensions*, Edith Brown Weiss (ed.) (Tokyo: United Nations UP, 1992), p. 126.

<sup>26</sup> Boyle, p. 57.

<sup>27</sup> Churchill, R.R. "Environmental Rights in Existing Human Rights Treaties" in *Human Rights Approaches to Environmental Protection*, Boyle and Anderson (eds.) (Oxford: Clarendon P, 1996), p. 89.



*annum* as of the time of writing. Churchill finds that all of the treaties in question recognized a basic right to life, though whether state responsibility extended beyond simply refraining from taking life to actual positive obligations to promote better quality of life and decreased mortality rates.<sup>28</sup> Even if we accepted the bare minimum of a responsibility to refrain from taking life, an argument can be made that climate change is especially suited to falling under this responsibility. Given the scientifically established nature of climate change as a largely anthropogenic phenomenon, the unabated continuation of activities leading to further and more severe climate change can arguably be said to involve causing the preventable deaths of others.

International law includes not only the text of treaties, but also customary procedures, norms, and official discourse among international actors, including regional bodies. To a less certain, yet still considerable, extent international law and legal precedent appeals to discourse as well as national level legislation for precedents and principles. The report of UN Special Rapporteur Fatma Ksentini, presented to the Commission on Human Rights, Economic and Social Council of the United Nations, in 1994 led the General Assembly to adopt and re-affirm many principles linking the environment and human rights. Ksentini notes that as early as the 1960s international actors and states recognized in writing the ability of technological, industrial, and economic “progress” to endanger the rights and freedoms of individuals, and that there were significant consequences of the impairment of the quality of the human environment on the condition of man (and woman) and their enjoyment of basic human rights.<sup>29</sup> She also notes that the quality of the “social and international order” necessary for the

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<sup>28</sup> Ibid., p. 90.

<sup>29</sup> Ksentini Report, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/eeab2b6937bcca18025675c005779c3?Opendocument>, (Accessed: 19 March 2008), sub-section 26.

enjoyment of human rights referred to in the Universal Declaration of Human Rights is now generally agreed to include the natural environment, assumedly including the climate and ecosystems of which it is comprised.<sup>30</sup> Ksentini highlights the list of mainly human rights documents produced before that point that can and should be considered for their bearing on ecological issues, including: the Universal Declaration of Human Rights, Proclamation of Tehran, International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, International Covenant on the Elimination of All Forms of Racial Discrimination, Covenant on the Elimination of All Forms of Discrimination Against Women, and finally the International Covenant on the Protection of the Rights of All Migrant Workers and their Families.<sup>31</sup> She cautions that this list is not exhaustive, but serves well to demonstrate the embeddedness of environmental rights and concerns within existing international human rights documents of even the most fundamental category. In response to her report the Commission on Human Rights passed Resolution 1994/65, recognizing that environmental damage (in which we can include climate change and harmful shifts in weather patterns) has potentially negative effects on human rights, and re-affirmed that human beings are at the center of concerns for sustainable development and are entitled to lives in harmony with nature.<sup>32</sup>

Other declarations by international bodies include Unesco recognition of the trans-generational nature of human rights concerning a preserved Earth, principles of human responsibility to others especially toward the promotion of human rights and in the case of global problems requiring global solutions, and regional-level commitments to

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<sup>30</sup> Ibid., sub-section 34.

<sup>31</sup> Ibid., sub-sections 39-46.

<sup>32</sup> "Resolution 1994/65 on human rights and the environment, adopted 9 March 1994" in *Human Rights and the environment* Dejeant-Pons and Pallemmaerts (eds.) (Council of Europe Publishing, 2002), p. 68.

greenhouse gas and environmental degradation mitigation.<sup>33</sup> Overall, there exists a large and growing body of international legal precedent linking the health and preservation of the environment with human rights. Additionally, the FCCC and Kyoto Protocol both contain language explicit to the rights based nature of the climate change threat. Article 3 of the Framework Convention on Climate Change spells out the principles on which the Convention is based. These include that “[the] Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities...” and that the parties should take precautionary measures “to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>34</sup> Furthermore, it stipulates that lack of full scientific certainty on every aspect of the problem is not to stand as a reason for failure to act. Furthermore, the preamble clearly defines a commitment to both present and future generations as a primary motivator for the drafting of the Convention.

### Ethical and Philosophical Bases for Climate Change Prevention as Human Right

Most simply put, when international law has provided such a foundation for recognizing a certain level of environmental standards as a prerequisite for human rights enjoyment, building up a separate right to environment is somewhat unnecessary. Also, given the recognition in the form of international law of a legal *duty*, from which legal rights flow, to protect present and future generations from climate change and its worst effects is already substantially in place. The justifiable claim by present generations,

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<sup>33</sup> Dejeant-Pons and Pallemarts, pp. 76, 99, 124.

<sup>34</sup> Full Text of the Convention, [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php) (Accessed: 18 April 2008), Article 3, sections 1 and 3.

without even having to consider future ones, to not have their health and safety diminished, or their territorial integrity compromised (by rising sea levels, for example), constitutes further support for viewing Kyoto, the FCCC, and other climate change documents from a rights perspective.<sup>35</sup> However the work of several ethicists and philosophers contributes a great deal to the foundation of a more broadly envisioned right to both protection from climate change and to environment in general, as well as a philosophical support to many of the principles that feature so heavily in the international environmental law. For our purposes, the work of philosophers in their derivation of the right to environment that touch most closely upon climate change issues will be considered here.

R.S. Pathak offers a comprehensive philosophical basis for a right to the environment, seeming to flow from within the tradition of natural law and liberal political philosophy. Recognizing that the need for a healthful environment, for our purposes one in which climate systems operate in a relatively stable manner as free as possible from the harmful influence of human activities, is vital both to the protection of life and to the preservation and enhancement of its quality and condition, Pathak explores the many ways in which environmental degradation can detract from a full and flourishing life.<sup>36</sup> The author considers both the preservation of health, personality and emotional stability, cultural heritage, and the social need for a constant environment of a healthful order. Being beyond the scope of consideration of this paper, some of the more (at least, legally) controversial rights to culture etc., will not be considered here. However, the author's

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<sup>35</sup> Chapman, Audrey R. "Reintegrating rights and responsibilities: Toward a new human rights paradigm" in *International Rights and Responsibilities for the Future*, Hunter and Mack (eds.)(Westport, CT: Preager, 1996), p. 5.

<sup>36</sup> Pathak, R.S. "The human rights system as a conceptual framework for environmental law" in *Environmental Change and International Law*, Edith Brown Weiss (ed.) (Tokyo: United Nations UP, 1992), p. 211.

emphasis that human rights are distinct from general rights in their universality, inalienability, and perpetually enduring nature is useful given the universal and long-lasting impact of climate change. A human rights approach to climate change may seem to rely on secondary justifications, and therefore not qualify given the necessity for primacy of importance of human rights as compared to other right. However, given the potentially deadly effects of climate change and its associated dangers, the right to a healthful environment can be seen as a vital component of the right to life itself.<sup>37</sup>

As the necessity of a stable and healthy climate environment to the preservation of life is now apparent, it should also be apparent that the right to a healthy environment is neither mere convention of a time nor a relativistic cultural value. This alone, in Pathak's view, makes the right to a healthful environment jurisprudentially a human right as such. Combine this with Pathak's assertion, in the tradition of the natural law and social contract political philosophers, that such international human rights treaties as the Universal Declaration of Human Rights have passed into the form of almost global social contracts, and that the necessity of a healthy environment can be located within the legal confines of such documents and their emphasis on the right to life, and one can see yet another philosophical support for the inclusion of environmental rights within the human rights framework.<sup>38</sup> Pathak views the right to a healthful environment as a negative right (after the thought of Isaiah Berlin) in that it is necessary in relation to the right to life, as well as a positive right in which the promotion of a healthier relationship between humans and nature contributes to the enjoyment of second and third generation rights.<sup>39</sup> The UN FCCC and Kyoto Protocol, in that they seek to further these ends, should be

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<sup>37</sup> Pathak, p. 213.

<sup>38</sup> Ibid., p. 216.

<sup>39</sup> Ibid, p. 218.

viewed as contributing to the further linking of environmental and human rights, and as inherently oriented toward fulfillment and protection of already recognized human rights to life and other necessary conditions.

Edith Brown Weiss contributes further to a philosophical basis for viewing these documents in a human rights framework in her extensive exploration of duties to future generations and intergenerational equity. Given the centuries and even millennia spanning effects of our greenhouse emissions today, it is wise to view and evaluate climate change treaties not just on their impacts upon the present, but also upon the future generations of humanity. While not linked explicitly to human rights law, often for political and ideological motivations of international policy makers, intergenerational rights can be viewed as an extension of human rights law.<sup>40</sup> Notable in Weiss' theory of intergenerational equity is her attention to natural resources, and her assertion that by greedily and unwisely using up all the best, most accessible, resources today, we are depleting future generations of options and similar access to said resources for their own needs.<sup>41</sup>

While not explored in great depth in this paper, one consequence of steps taken to avoid climate change is the preservation of non-renewable natural resources such as oil, coal, natural gas, as well as the resources of land and sea that would otherwise be harmed by changing climate. It is impossible for us to imagine today what potential future uses people may find for resources such as oil. Already, oil and the minerals found within it are much more valuable for their use in medicines, plastics, and other goods, some of which may be necessary or highly beneficial to future survival. For us to literally send

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<sup>40</sup> Edith Brown Weiss. "The introductory framework," in *Environmental Change and International Law*, Edith Brown Weiss (ed.) (Tokyo: United Nations UP, 1992), p. 19.

<sup>41</sup> Weiss, Edith Brown. *In Fairness to Future Generations*, (Dobbs Ferry, NY: Transnational Pub., 1989), pp. 40-45.

these resources up in smoke, without even knowing what else they may have to offer to humankind and quality of life, seems a crime of intergenerational proportions. By taking the very traditional concept of “the commons” and extending it forward in time, Weiss makes us more aware of our stewardship, rather than unconditional ownership, of precious natural resources.<sup>42</sup> The general consensus of the necessity of some sort of mediating authority to the commons must also apply across temporal boundaries. In this way, Kyoto and the FCCC as well as any forthcoming climate change documents, act as perpetuators of intergenerational equity and fairness in access to resources.

One can see that, ranging from a simple ethic of doing no harm, through more complex philosophical theories as intergenerational equity, the philosophical foundations for viewing the FCCC and Kyoto from a rights perspective are great. Great too are the benefits of doing so, explored below. While political will to act in relation to already established rights especially of the second and third generation is sometimes patchy, international consensus is growing all the time. Regional bodies such as the European Union have been busy codifying and promoting such third generation rights as the rights of national linguistic and ethnic minorities, especially in the new member states of the former Eastern Bloc. From this, one sees that through persistent advocacy of a rights perspective, one can move from being forced to read in between the lines of international treaties, to a situation where binding legal agreements perpetuate once uncertain rights to tens of millions of people. As Kyoto expires in 2012, and a new agreement is hastily being sought through the FCCC, promise may lay on the horizon.

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<sup>42</sup> Weiss, 1989, p. 289.

### **Section Three: Promises and Perils of a Human Rights Approach to Warming**

There are pragmatic and ethical reasons to support viewing climate change from a human rights perspective, just as there are pragmatic and philosophical objections to doing so. This section will first consider, briefly, the promises already touched upon in this paper associated with approaching the FCCC and Kyoto as having a human rights element. Following this, the main objections to applying a human rights framework to climate change are examined.

Just as the contingency inherent to the current perceptual framework is one of its greatest weakness, the lack of contingency inherent to a rights-based paradigm is one of its greatest strengths. Section one demonstrated the views of scientists and political actors, and their deep concern for the welfare of individuals and society as we move forward into a world in which little (or not enough) has been done to counter climate change. If a wholesale move toward solving transnational environmental issues in a human rights approach were to take place, new mechanisms would almost surely be introduced to hold offenders accountable for their actions. Human rights mechanisms almost always include bodies designed to redress the objections of groups and individuals adversely affected.<sup>43</sup> These mechanisms create a degree of accountability and incontrovertible responsibility now lacking from the climate change framework. They also create an opportunity to give voice to those so often lacking one in the international system: the poor and disenfranchised, those lacking the political power and economic potency to redress ills in a system of markets and states.<sup>44</sup> As discussed above, these very same people also tend to suffer disproportionately under the current and expected effects

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<sup>43</sup> Dommen, Caroline. "How Human Rights Norms Can Contribute to Environmental Protection," in *Linking Human Rights and the Environment*. Romina Picolotti and Jorge Taillant (eds) (Tucson: U Arizona Press, 2003), p. 105.

<sup>44</sup> *Ibid.*, p. 106.



of climate change. The perpetrators, on the other hand, tend to be the rich and powerful and those most able to silence the voices of the opponents of their system and actions.

By creating international political frameworks, founded on the idea of human equality and not power politics, for redressing environmental wrongs we may expect to see more concrete action on climate change. This would seem to undermine the precautionary principle underlying so much international environmental law. However, international bodies and courts tend to work not so much for their punishments meted out, but for their ability to act as deterrence to perpetrators in the first place. The potentially high-profile arenas of “naming and shaming” that international judicial bodies can become are not where big corporations or governments want to end up. Just as much as military and economic might is important to the construction of a state’s power standing in the world system, so too is its adherence to norms and international law. One need only look to the devastating impact of the Iraq war and the existence of the “black hole” at Guantanamo Bay on the standing and stature of the United States in the world system for confirmation of this less realist, more constructed understanding of international relations.

Reducing economic contingency in favor of incontrovertible rights claims also may bring about increased compliance and renewed impetus for action on climate change. While state actors such as the United States may, justifiably or not, use claims of economic hardship and an assault on the national interest to justify its shirking of climate change responsibilities, a rights based approach would close that “loophole” A human rights approach would provide a strong claim to an absolute entitlement, at least

theoretically immune political lobbying and trade-offs.<sup>45</sup> As mentioned above, just as one would not in good conscience submit the decision on whether or not to stop genocide to a cost-benefit analysis, one could not do the same for global warming remediation in a system of environmental rights. This does not mean to in anyway cheapen or dilute the horrible offence of genocide; simply consider the thousands or more unnecessary deaths from the effects of climate change, not to mention the misery of drought, hunger, disasters, and widening disease vectors also expected.

Through such a simplifying of the issue one also meets a disadvantage of viewing climate change and human rights as indivisible. Reducing the complex technical, political, and economic processes necessary to address climate change to a simple right may not address all necessary components of the issue. Not all issues can be solved and mediated in the simple language of rights.<sup>46</sup> This is a valid concern, given the potential effects of getting the issue wrong. Rights language may be well and good, but if it tends to oversimplify a complex issue it may actually hurt, especially given the universal nature of both responsibility for and vulnerability to climate change. While “common but differentiated responsibilities” works very well in the language of technical solutions and burden sharing, it might not mesh well with the absolutist claims of rights-holders. However, this needn’t necessarily be a problem. Given the extraordinary nature of climate change, one would expect oversight and monitoring bodies to have the technical and legal expertise necessary to decide who is acting in good faith and who is not. These bodies would have to balance good faith effort versus demands for rights recognition,

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<sup>45</sup> Anderson, Michael. “Human Rights Approaches to Environmental Protection: An Overview” in *Human Rights Approaches to Environmental Protection*, Boyle and Anderson (eds.) (Oxford: Clarendon P, 1996), p. 21.

<sup>46</sup> *Ibid.*, p. 22.

though just because the task might not be easy does not mean it is neither necessary nor ethically appropriate.

Environmentalists, especially those from the field of environmental philosophy and ethics, may also wield complex objections to the complete anthropomorphizing of environmental protection. Charges of human chauvinism, in which nature is only to be protected insofar as it serves human interests to do so, should not be dismissed lightly. Zimmerman's claims of anthropocentric reformism failing to really create a shift in humanity's perspective of nature are valid and valuable.<sup>47</sup> Only once human's change their self-perceptions and their perceptions of nature, and integrate the two as inseparable and interdependent, will real environmental protection take place. This paper neither supports nor contests such a view, as it is both outside of the scope to do so, and an inappropriate view of the matter at hand. While this paper argues that climate change treaties can, and should, be seen as components of international human rights law, this is not the only thing they should be viewed as. Their purpose is to protect natural systems, as well as people, from the worst effects of our self-created climate crisis. This makes them concerned with human rights, though not only. While many of the views of the environment upon which the documents have been based may not correspond to the views of modern environmental philosophers, this does not mean they are totally flawed and useless. As in so much of the political sphere, something is better than nothing. Recognition of human rights, though not animal or other rights, might not be the reader's ideal, one must still admit it is better than an international system recognizing no rights at all.

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<sup>47</sup> Zimmerman, Michael. "Introduction" in *Environmental Philosophy: From Animal Rights to Radical Ecology*. Zimmerman, Callicott, Sessions, Warren, and Clark (eds.) (Upper Saddle River NJ: Prentice Hall, 2001), p. 5.

Nevertheless, one must be cautious in too liberally construing the human rights nature of the FCCC and Kyoto Protocol. They are documents inherently concerned with human rights, though they are not the be all and end all of environmental protection or climate change mitigation. They are multi-faceted and have many purposes, and one must be highly conscious of this when considering the arguments set forth above.

## **Conclusion**

The Kyoto Protocol and the Framework Convention on Climate Change, therefore, should be viewed as components both of international human rights law and an expanding conception of a human right to a healthy environment. The shortcomings of the current dominant theoretical framework for dealing with this issue, especially as it manifests in enforcement mechanisms and schemes to economically “justify” environmental protection are clear. A human rights approach to climate change would help bring about conceptual, as well as structural and pragmatic changes to the way the world is addressing this vital issue. Additionally, the documents themselves and the international legal precedents upon which they are built contain support for their having sufficient human rights content and applicability to be viewed as such. While the environment must also be respected for its own inherent worth, and these documents also certainly do something to advance that view, respect for human lives and society are an enormous and compelling piece of their ideational foundations. Therefore, it is both legally and ethically accurate to describe Kyoto and the FCCC as documents to be included in the body of international human rights law and as vital proponents of the human right to environment.

