

# Linking Climate Litigation and Human Rights

Marilyn Averill

*Human activities since the beginning of the industrial age have produced emissions that are accelerating natural forces and changing the global climate. The expected impacts on sea levels, temperature, precipitation and storm intensity will stress many human communities and, in many cases, will threaten basic human rights. Climate litigation provides one tool that can be used to shape climate policy and to seek redress from climate-related injuries. This article explores the advantages and disadvantages of linking climate litigation and human rights in order to find effective strategies for protecting those most vulnerable to threats to well-being created by climate change.*

## INTRODUCTION

Climate change is a truly global phenomenon. Everyone contributes to climate change and everyone will be affected, but contributions and impacts differ widely in type and magnitude, and those least responsible for climate change are likely to be among those most adversely affected. In many cases, adverse impacts will be so severe in some places that they threaten basic human rights of individuals and communities.

The overwhelming complexities of climate science, economics, ethics, and politics complicate policy responses. Decision makers from the local to the international level, across all sectors of society, are seeking ways to slow down climate change and to promote adaptation to changes, while still protecting the interests of their constituencies. Many parties are turning to the courts to try to shape climate policy in order to protect their interests. While few of these lawsuits explicitly address human rights, decisions in the cases usually will have implications for such rights.

This article explores the contribution that litigation can make to protecting human rights threatened by climate change. The first section presents an overview of the linkage between climate change and human rights, including the history of concern over these rights, beginning with the United Nations Framework Convention on Climate Change. The second section focuses on

climate litigation, providing a general overview and ways that lawsuits can affect protection of human rights. The third section considers the effects of framing legal claims in terms of human rights. The fourth section discusses some of the advantages and disadvantages to litigation as a means of rights protection in the climate context. Direct and indirect impacts are explored in terms of mitigation, adaptation, procedural rights, civic education, participation, and legitimacy and policy coherence. The article ends with a brief concluding statement.

## LINKING HUMAN RIGHTS AND CLIMATE CHANGE

The climate regime has been concerned with impacts on human beings from the very beginning. The United Nations Framework Convention on Climate Change (UNFCCC), presented at the Rio Conference in 1992, begins by stating that the parties acknowledge 'that change in the Earth's climate and its adverse effects are a common concern of humankind'.<sup>1</sup> The recitations go on to emphasize the interconnectedness of economic, social and development goals – the three pillars of sustainable development. Without using the term 'human rights', adverse impacts are defined as 'changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health or welfare'.<sup>2</sup> The anthropocentric nature of both the causes and impacts of climate change have repeatedly been emphasized, along with impacts on ecosystems. Ethics and justice issues also have been central to the climate debate from the beginning, including discussion about rights and responsibilities of governments, corporations and individuals.<sup>3</sup> The UNFCCC articulates the need for

<sup>1</sup> United Nations Framework Convention on Climate Change (New York, 9 May 1992) (UNFCCC), Introduction, available at (<http://unfccc.int/resource/docs/convkp/conveng.pdf>).

<sup>2</sup> *Ibid.*, Article 1(1).

<sup>3</sup> See, e.g., D. Jamieson. 'The Moral and Political Challenges of Climate Change', in S.C. Moser and L. Dilling (eds.), *Creating a*

'common but differentiated responsibilities', which reflects the diversity among nations in contributions to the causes and likelihood to suffer the effects of climate change, as well as the differing capacities among nations to deal with climate change.

Linkages between climate change and human rights have become more explicit in recent years. In March 2008, the United Nations Human Rights Council issued a resolution expressing concern that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.<sup>4</sup> The Council asked the Office of the High Commissioner on Human Rights (OHCHR) to conduct a study of the relationship between climate change and human rights, and the OHCHR submitted its study to the Council in March 2009.<sup>5</sup> The Council then issued another resolution:

*Noting* that climate change related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, *inter alia*, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.<sup>6</sup>

The Council also affirmed 'that human rights obligations and commitments have the potential to inform and strengthen international and national policy making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes', and called for continuing study and discussion of the relationship between human rights and climate change.<sup>7</sup>

## CLIMATE LITIGATION

Litigation provides one tool that can be used to protect human rights threatened by climate change. The term

'climate litigation' refers to any climate-related claims filed before any adjudicative tribunal. The great majority of cases to date have been filed in the USA, which provides a culture supportive of litigation and a legal system that is accustomed to expanding to handle novel and complex claims.<sup>8</sup> Climate cases also have been filed in many other jurisdictions, most notably Australia,<sup>9</sup> but also in Canada, Germany, New Zealand, Nigeria,<sup>10</sup> and in other countries. Some of these cases have directly addressed human rights issues, but all have potential connections to human rights. This article focuses primarily on cases filed in the USA.

Litigation may serve many purposes in the human rights context. While few cases to date have directly addressed human rights, many cases, if successful, will have collateral protective benefits. Some lawsuits are filed specifically to protect those most vulnerable to the adverse effects of climate change. This might include people living in coastal areas subject to immersion, erosion or storm surges; people located on marginal agricultural lands that will be unable to provide adequate food for current populations as temperature and precipitation patterns change; people whose access to safe water supplies will be threatened by shifting precipitation patterns or salt water intrusion; and many others. Lawsuits also can seek to reduce emissions and thereby to mitigate climate change to reduce or slow down adverse impacts. Litigation is also used to protect more specific victims, in order to obtain funding and services to compensate them for injuries and help them to adapt to climate impacts.

Climate plaintiffs use whatever legal theories appear to serve their purposes and interests.<sup>11</sup> Lawsuits have been filed to force or to block governmental climate action, to bring climate change into governmental decision making, to force changes in industry practices, to obtain recognition of and compensation for climate-related injuries, and for a variety of other purposes. Legal theories are carefully selected to match the purposes of the litigation.

Both mitigation and adaptation measures are needed to combat human rights abuses associated with climate

*Climate for Change: Communicating Climate Change and Facilitating Social Change* (Cambridge University Press, 2007), 475; M. Averill, 'Climate Litigation: Ethical Implications and Societal Impacts', 85:4 *Denver University Law Review* (2008), 899; D. Brown *et al.*, *White Paper on the Ethical Dimensions of Climate Change* (Rock Ethics Institute, Pennsylvania State University, 2006), available at (<http://www.webethics.net/padova2008/doc/pdf/edcc-whitepaper.pdf>).

<sup>4</sup> Resolution 7/23, *Human Rights and Climate Change* (28 March 2008), available at ([http://www2.ohchr.org/english/issues/climatechange/docs/Resolution\\_7\\_23.pdf](http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf)).

<sup>5</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* (A/HRC/10/61, 15 January 2009), available at (<http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>).

<sup>6</sup> Resolution 10/4, *Human Rights and Climate Change* (25 March 2009), at 1, available at ([http://www2.ohchr.org/english/issues/climatechange/docs/resolution10\\_4.doc](http://www2.ohchr.org/english/issues/climatechange/docs/resolution10_4.doc)) (original emphasis).

<sup>7</sup> *Ibid.*, at 2.

<sup>8</sup> For a taxonomy of cases filed in the USA that is kept updated, along with links to the opinions, see M.B. Gerrard and J.C. Howe, *Climate Change Litigation in the US* (American Bar Association, undated), available at (<http://www.climatecasechart.com/>).

<sup>9</sup> For an overview of Australian climate litigation, see J. Smith and D. Shearman, *Climate Change Litigation: Analysing the Law, Scientific Evidence and Impacts on the Environment* (Presidian Legal Publications, 2006).

<sup>10</sup> See, e.g., *Jonah Gbemre v. Shell Petroleum Development Co. Nigeria Ltd*, Unreported Suit No. FHC/B/CS/153/05, delivered 14 November 2005 (includes claims that gas flaring contributes to climate change and violates human rights protected under Nigerian law).

<sup>11</sup> For an overview of claims in climate litigation, see B.C. Mank, 'Civil Remedies', in M.B. Gerrard (ed.), *Global Climate Change and US Law* (American Bar Association, 2007), 183.

change. The outcomes of climate lawsuits can help to clarify the authority and responsibility of governments to regulate climate change under existing law. Some of these cases could push governments into regulating, but others could challenge regulation and shut it down. Other cases may simply shape the way governmental agencies operate, and encourage them to consider the impacts of their decisions on the climate. Still others may result in judgments that force corporations to reduce their climate footprint, or persuade them that it is in their best interests to do so.

Litigation provides only one of many tools that may protect climate-related human rights. Neil Komesar emphasizes the importance of evaluating institutional effectiveness, including the effectiveness of litigation, in meeting various policy goals.<sup>12</sup> He notes that political, market and judicial institutions have comparative advantages in different situations. Before filing a lawsuit, plaintiffs should consider whether litigation is likely to be the most efficient and effective way to achieve the desired outcome. Both the human rights and the climate change community should think about the relative costs and benefits of framing claims in litigation as human rights abuses.

## HUMAN RIGHTS FRAMING IN CLIMATE LITIGATION

Framing plays a critical role in the way issues are understood and the policy alternatives generated to deal with them. Framing legal claims as human rights violations focuses on some aspects of the problem and excludes others. Such framing creates advantages for litigants, but can also pose special challenges.

A human rights frame can help to stimulate public debate and set the stage for political action. The assertion of climate-related human rights implies that these rights are not receiving adequate protection and that action is needed. Jack Donnelly observes that 'Human rights claims characteristically seek to challenge or change existing institutions, practices, or norms, especially legal practices'.<sup>13</sup> Grounding a lawsuit in claims of a violation of human rights legitimizes and lends moral authority to the claim. Where no legal remedy yet is available, as for many climate-related claims, asserting a human rights violation may attract public attention. Even if the legal claim is unsuccessful, the media and civil society may engage in discussions of whether, how and why the case does in fact represent such a violation.

Numerous tribunals now have the authority to rule on human rights issues, while environmental issues lack such tribunals. Dinah Shelton describes how framing environmental issues as human rights violations provides access to these tribunals and opens up new opportunities for victims of environmental degradation to seek redress for harms suffered,<sup>14</sup> but questions remain as to whether these tribunals can be effective in protecting the most vulnerable against climate change. Having a forum in which to file a legal action is not enough. Claims must be legally cognizable and the tribunal needs to have jurisdiction over all parties, the ability to order appropriate relief and the authority to enforce judgments.

Human rights law remains more aspirational than enforceable. Many rights, even though widely recognized, cannot serve as the basis for a legal claim. In addition, most human rights declarations apply to nation States, not to corporations or individuals. While States are expected to control environmental threats within their borders, attaching responsibility at the national level implicates issues of sovereignty, and makes it harder to go after individual actors. In many cases, States have not acquiesced to the jurisdiction of the tribunals that handle human rights claims. For example, the United States has not consented to the jurisdiction of the Inter-American Commission on Human Rights.

Causation is very difficult to prove in all climate litigation, where emissions and other causes are spatially and temporally distant from their impacts. Both causes and impacts are global in nature, making it difficult to hold any one actor accountable, at least in a court of law. Climate-related threats to human rights present additional difficulties, as climate often adds another stress on top of pervasive poverty, discrimination, resource depletion, political disenfranchisement, power imbalances and other problems that threaten those most vulnerable to climate change. Disentangling the effects of climate change from other stresses will be a challenge.

While climate change is already impacting many communities, particularly in the Arctic, many of the most severe threats to human rights are expected to occur in the future. Courts are generally not equipped to deal with predictions of future injuries, except where the harm is expected to be quite imminent. The right to life, for example, is arguably the most serious human right implicated by climate change. Some recent estimates

<sup>12</sup> N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago University Press, 1994), a 123.

<sup>13</sup> J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003).

<sup>14</sup> D. Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals', in R. Piccolotti and J.D. Taillant, *Linking Human Rights and the Environment* (University of Arizona Press, 2003), 1, at 1–2; see also L.A. Malone and S. Pasternack, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (Transnational Publishers, 2004), at 9.

say that 300,000 deaths a year can currently be attributed to climate change,<sup>15</sup> but identifying the particular deaths attributable to climate change would be difficult. Predictions of future deaths are even more alarming. Current legal systems simply are not set up to deal with such claims, and climate litigation is not well suited to address threats to the rights of future generations.

Framing climate-related injuries as human rights violations will probably have little effect in cases brought under existing environmental laws, unless such laws already contain a human rights component. Challenges under existing environmental laws generally provide a forum, and plaintiffs need not turn to human rights to have their day in court. In the USA, cases such as *Massachusetts v. Environmental Protection Agency (EPA)*<sup>16</sup> and *Friends of the Earth v. Spinelli*<sup>17</sup> have led to successful conclusions without direct reference to human rights. This has been possible because both the US Clean Air Act (CAA)<sup>18</sup> and the National Environmental Policy Act (NEPA)<sup>19</sup> allow citizen access to the courts to address statutory violations. Forcing governments or corporations to take action without depending on existing statutory law requires more creative legal theories, and framing injuries as human rights violations may be useful in these cases.

Alleging violations of human rights is easiest to justify, and may do the most good, when individuals or communities seek damages for climate-related injuries. The 'human rights violation' tag adds gravitas to the claim. The media may be more likely to report actual injuries to real people, and corporations may see public relations threats in such claims, in addition to the legal problems. But such claims are not yet legally cognizable in many courts, and new laws will need to be developed in order to protect those who claim that human activities are driving climate change, which, in turn, creates conditions that threaten their basic rights.

One problem, as with all discussions of human rights, involves reaching agreement over just what a right entails, who is responsible for protecting the right or compensating for its violation, and how rights relate to each other. Conflicts often arise among rights or among those holding the rights, and reducing threats for one group or one right may increase threats for others.

Framing climate change as a human rights issue can have both advantages and disadvantages from a rights perspective. The point, according to the Human Rights

Council, is to produce an agreement that will be protective of human rights, particularly as they are impacted by climate change. But reframing also may affect the way that negotiators and policy makers see and understand the climate change problem. Human rights are not always viewed as a positive framing. Contention over the nature of human rights and their violation has caused some people and countries to react negatively to a rights discourse. Framing climate injuries as human rights violations could raise awareness of the rights of the most vulnerable, but it also could divert attention from other serious abuses, such as torture or genocide.

Climate change often is viewed as primarily a matter of science. Human rights framing can help people to focus on the human stories about how climate change will impact people and communities. Emphasizing such human stories may help to move discussion beyond the scientific debates that often mask important underlying values disputes.

The question is just how protective litigation is likely to be for human rights that are threatened by climate change. While it may appear attractive to have a court rule and order relief, litigation often fails to achieve its ultimate objectives. Eric Posner, for example, doubts that climate litigation will be very effective in controlling climate change, including impacts on human rights.<sup>20</sup> While he notes that international human rights law is more robust than international environmental law, he also points to the lack of power of international tribunals. He maintains that human rights/climate claims have their best chance in US courts under the Alien Tort Statute (ATS), although he acknowledges many of the limitations to this approach.<sup>21</sup> Such claims should be focused on corporations, as States are likely to be protected by sovereign immunity. Posner acknowledges the obvious appeal in such litigation, as a way to change corporate behaviour and to acquire compensation for injured parties, but he also recognizes serious drawbacks to such claims, saying:

If ATS litigation results in significant liability, then either massive evasion will occur as corporations withdraw from the United States and foreign countries immunize corporations that do substantial business on their territory,

<sup>20</sup> E.A. Posner, *Climate Change and Human Rights Litigation: A Critical Appraisal*, John M. Olin Law and Economics Working Paper No. 329 (2d Series), Public Law and Legal Theory Working Paper No. 148 (University of Chicago School of Law, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=959748#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959748#).

<sup>21</sup> Also known as the Alien Tort Claims Act. Originally enacted in 1789, it provides that 'The district courts shall have original jurisdiction of and civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. See Alien Tort Claims Act 28 USC Section 1350. For additional concerns about use of the ATS, see M. Droz and R. Wing, *The Alien Tort Claims Act Will Never Be a Viable Vehicle for Addressing Climate Change* (Holland and Hart LLP, 12 April 2007), available at [http://www.hhclimatechange.com/climate\\_change/2007/04/the\\_alien\\_tort\\_.html](http://www.hhclimatechange.com/climate_change/2007/04/the_alien_tort_.html).

<sup>15</sup> J. Vidal, 'Global Warming Causes 300,000 Deaths a Year, says Kofi Annan Thinktank', *Guardian* (29 May 2009), available at <http://www.guardian.co.uk/environment/2009/may/29/1>.

<sup>16</sup> *Massachusetts v. Environmental Protection Agency*, 549 US 497 (2007).

<sup>17</sup> *Friends of the Earth v. Spinelli*, Civ. No. 02-4106 (ND Cal.).

<sup>18</sup> Clean Air Act, 42 USC Section 1401 *et seq.*

<sup>19</sup> National Environmental Policy Act, 42 USC Section 4321 *et seq.*

or – even worse, but highly unlikely – massive evasion will not occur and American courts will draw up global environmental policy that makes sense to the judges but does not reflect the needs and interests of people living all over the world.<sup>22</sup>

## DIRECT AND INDIRECT EFFECTS OF CLIMATE LITIGATION

Some cases address human rights directly. Other cases may not use the term ‘human rights’, but could have major effects on protections for those rights. Cases that seek to reduce greenhouse gas emissions are intended to mitigate climate change. If successful, they will reduce the extent of the change and thereby reduce adverse impacts. Other cases seek damages for injuries suffered; if successful, they will set precedents that can be used by other groups that believe they have suffered climate-related abuses. All cases will involve issues relating to injuries suffered or anticipated, causes of climate change, responsibility for contributing to the problem, and the determination and allocation of liabilities, as well as remedies for injuries. Media reports about climate-related cases can educate the public about relevant issues and stimulate debate about appropriate societal responses.

## MITIGATION AND ADAPTATION

Mitigation actions are those designed to slow down the drivers of climate change and, thereby, reduce the degree of climate change itself. Mitigation actions, if they are implemented as intended and have the intended physical outcomes, should reduce the level and slow the pace of climate change, which can reduce the negative impacts, including the adverse effects on human rights, and give vulnerable communities time to adapt.

Some climate-related cases can affect mitigation by clarifying and shaping climate regulation at various levels. In *Massachusetts v. EPA*, the US Supreme Court found that the EPA has the authority to regulate greenhouse gas emissions from the tailpipes of new automobiles. The decision paves the way for the agency to decide whether it should be regulating greenhouse gases (GHGs) under the CAA. But litigation also can slow down regulation. In *Central Valley Chrysler-Jeep, Inc. v. Goldstene*,<sup>23</sup> car dealers and associations sued the State of California to stop the implementation of the state’s new standards for regulating GHGs from cars.

The plaintiffs claimed that California’s actions were pre-empted by federal laws, including the CAA and the Energy Policy and Conservation Act. The judge enjoined California from implementing its standards until the EPA issued a waiver to the state under the CAA. The EPA issued a waiver to California on 30 June 2009.<sup>24</sup>

A direct attempt was made to reduce emissions in *Connecticut v. American Electric Power*,<sup>25</sup> a case that demonstrates the limitations of litigation as a mechanism to achieve climate-related goals. In that case, eight states, one city and three non-governmental organizations (NGOs) brought a suit against the five biggest power companies in the USA, alleging that emissions from their operations were contributing to global warming, which poses threats to public health and safety. The plaintiffs asked that the defendants be held joint and severally liable for contributing to a public nuisance, and that they be required to cap their emissions and then to reduce the cap every year for at least a decade. The judge found that the questions presented constituted ‘non-justiciable political questions that are consigned to the political branches, not the judiciary’,<sup>26</sup> and dismissed the case.

Adaptation activities will help vulnerable communities to cope with the threats of climate change and to become more resilient. Few cases to date have focused directly on adaptation than on mitigation, in part because the adverse impacts of climate change are just beginning to be felt. These cases are more likely to involve a specific group asking for assistance, usually in the form of monetary compensation, to address injuries from climate change. The case involving the community of Kivalina, Alaska, described below, is the best example to date.<sup>27</sup> Kivalina is seeking damages for the costs of relocating the entire community because of injuries to property due to climate change.

## PROCEDURAL RIGHTS

Human rights include procedural rights such as the right to access to information and the right of all affected stakeholders to participate in decisions. Several climate lawsuits involve procedural claims, although the claims are attached to existing environmental law, rather than claiming a human rights violation.

<sup>24</sup> California State Motor Vehicle Control Standards: Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (8 July 2009).

<sup>25</sup> *Connecticut v. American Electric Power, Inc.*, 406 F. Supp. 2d 265 (SDNY, 2005).

<sup>26</sup> *Ibid.*, at 274.

<sup>27</sup> *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp. et al.*, Civ. No. CV 08 1138 (ND Cal., 2008) (Kivalina Complaint).

<sup>22</sup> See E.A. Posner, n. 20 above, at 16.

<sup>23</sup> *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 563 F. Supp. 2d 1158 (ED Cal., 2008).

Some cases seek to ensure that government agencies consider the effects of their decisions on climate change and make information available to the public. In *Friends of the Earth v. Spinelli*, three cities and two NGOs brought a suit against two federal agencies, the US Export-Import Bank and the Overseas Private Investment Corporation.<sup>28</sup> The plaintiffs alleged that the agencies were in violation of NEPA because the agencies were not considering the climate-related effects of their decisions when conducting environmental reviews. The defendants' motion for summary judgment on standing and other jurisdictional issues was denied in August 2005.<sup>29</sup> Both agencies entered into settlements in February 2009<sup>30</sup> and both agencies have agreed to incorporate climate concerns into their decision making. The settlements will increase the transparency of decision making at the two agencies with respect to climate issues, increase agency awareness of how their decisions affect climate and give citizens ready access to information about climate impacts needed to understand and evaluate agency decisions.

Procedure takes precedence over substance in NEPA. Agencies must consider the environmental effects of their major decisions, but they are not obligated to choose the most protective alternative. The same will be true if climate impacts are included in environmental reviews. Nevertheless, agencies will, of necessity, be more aware of the impacts of their decisions on climate. While these lawsuits will not directly allow more affected individuals to participate in decision making, information about climate impacts will need to be collected and disseminated, and will provide information that interested parties could use to evaluate and possibly challenge agency decisions.

## STORY-TELLING AND CIVIC EDUCATION

Win or lose, climate litigation serves an important civic education function.<sup>31</sup> Lawsuits tell stories to support the

claims asserted. Plaintiffs tell stories about injuries that they have suffered and how defendants caused those injuries. Defendants recast the narrative in order to question injuries or causal chains. These stories, grounded in the facts of a particular case, can show how human activities that contribute to climate change actually can threaten the human rights of people.

Lawsuits bring complex climate science to an understandable level and explain how causes such as greenhouse gas emissions can result in injuries to human beings and ecosystems far away in time and space. Attorneys must bring science to a level that can be understood by judges and jurors who may have little training in science. Demonstrating the causal linkage between emissions and actual injuries to human beings is a necessary step in establishing responsibility for threats to human rights.

Focusing on particular cases in litigation brings human stories about climate change to life and helps the public to understand how climate change will change people's lives.<sup>32</sup> Psychologists have established that people are more willing to help others when an actual victim has been identified, rather than a statistical group. Climate litigation focused on human rights allows plaintiffs to tell the stories of particular victims of climate impacts – victims who are suffering the effects today, not in the future. Whether or not the case wins in court, the stories themselves, as reported by the media, are likely to increase public awareness of and possibly sympathy for those most vulnerable to the early effects of climate change.

Climate change already has heightened visibility for some vulnerable populations in international negotiations. Small island States such as Tuvalu, for example, are among those with the most to lose if seas rise, as many islands are only a few meters above current sea levels. The citizens of these countries may lose their homes, their livelihoods and even their countries if climate change causes seas to rise as predicted. The Inuit have been particularly effective in bringing their story to the climate community, and representatives from Inuit cultures typically attend the annual UN conferences on climate change to tell stories about their changing environment. Climate litigation can take stories of these vulnerable populations to a new level of specificity. Asserting claims before a tribunal requires describing injuries and their causes with particularity, and adds names and faces to those stories about who is responsible and who is suffering the consequences.

Native communities in the Arctic regions are among the first to suffer early adverse impacts of climate change, and some of these communities have turned to litigation to pursue relief for their injuries. Two such cases

<sup>28</sup> See *Friends of the Earth v. Spinelli*, n. 17 above.

<sup>29</sup> *Friends of the Earth v. Watson*, 2005 US Dist. LEXIS 42335, 35 Env'tl. L. Rptr. 20179 (ND Cal., 2005). In a separate decision, the court considered and mostly denied cross-motions for summary judgment, leaving the merits of the case unresolved. See *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (ND Cal. 2007).

<sup>30</sup> The settlement with the Export-Import Bank is available at (<http://www.climatelaw.org/cases/case-documents/us/exim.pdf>). The settlement with the Overseas Private Investment Corporation is available at (<http://www.climatecasechart.com/>).

<sup>31</sup> M. Averill, 'Climate Litigation: Shaping Public Policy and Stimulating Debate', in S.C. Moser and L. Dilling, *Creating a Climate for Change: Communicating Climate Change and Facilitating Social Change* (Cambridge University Press, 2007), 462; see also D.B. Hunter, *The Implications of Climate Change Litigation for International Environmental Law-Making*, Washington College of Law Research Paper No. 2008-14 (2008), at 13, available at ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005345&rec=1&srcabs=984266](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005345&rec=1&srcabs=984266)).

<sup>32</sup> See M. Averill, *ibid.* See also D.B. Hunter, *ibid.*

tell very different stories. The two cases illustrate how creative parties can use climate litigation to experiment with different legal theories and tribunals to call attention to their situation and hold those responsible to account.

The first case involves the Inuit peoples of the Circumpolar Conference. Working with EarthJustice and the Center for International Environmental Law, Sheila Watt Cloutier, then Chair of the Inuit Circumpolar Conference, filed a petition before the Inter-American Commission on Human Rights (IACHR). The petition described in detail the human rights of the Inuit people that are already threatened by climate change.<sup>33</sup> The Inuit case focused on the USA as the largest emitter of GHGs, and asked the IACHR to declare that, by failing to regulate greenhouse gases, the USA is responsible for violating various rights of the Inuit. The petition went on to request relief relating to both mitigation and adaptation. Among the requests for relief, the petition asked the Commission to recommend that the USA adopt mandatory measures to limit its GHG emissions and take impacts on the Arctic into account in making major governmental decisions. It also called for a plan to protect the Inuit and to assist them in adapting to climate change.

The case faced several difficulties from the beginning. First and foremost, the USA has not submitted itself to the jurisdiction of the IACHR, so any decision would have no real legal effect. These challenges, however, were simply barriers to winning the requested relief. Filing this petition may have served other purposes of equal importance. The case received a great deal of attention from the media and raised awareness of climate impacts on the Inuit.

The IACHR declined to hear the case. Nevertheless, it did agree to allow the petitioners a hearing to tell their story directly to the Commission, which had been a major objective of the litigation.<sup>34</sup>

In a case with similar facts but very different legal arguments, the Alaskan coastal village of Kivalina is seeking damages from five oil companies, 14 utilities and a coal company for injuries to property resulting from the defendants' actions.<sup>35</sup> Instead of focusing on the story of the injuries suffered, and without specifically referring to violations of human rights, this complaint tells a tale of conspiracy and public nuisance. Kivalina suffers many of the same early impacts of climate change as the

Inuit petitioners before the IACHR, but the Kivalina complaint focuses on property interests. The community is built on the tip of a barrier reef that is rapidly eroding due to 'waves, storm surges and erosion'.<sup>36</sup> The entire community will need to be relocated, at an estimated cost of up to US\$400 million. The community needs more than a declaration of rights; it needs financing for the relocation.

The Kivalina complaint barely touches on the injuries suffered by the people of the town. It alleges just enough to establish standing and to provide the basis for computing damages. The injuries are not in question here; the community has been told that it will need to relocate. Instead of focusing on the story of the victims, the Kivalina complaint highlights the stories of how defendants' actions contribute to climate change, and how defendants engaged, *inter alia*, in a conspiracy to 'launder' information about climate change 'to mislead the public with respect to the science of global warming and to delay public awareness of the issue',<sup>37</sup> so that the defendants would not need to make costly changes in their behaviour. The complaint alleges that the conspiracy allowed the defendants to continue operating as a public nuisance, which contributed to the injuries to Kivalina. The plaintiffs are seeking both to obtain compensation for the community, to pay for its relocation; but even more importantly to establish a legal theory that could be used to bring new claims on behalf of other communities. Using novel theories of conspiracy and concert of action, the complaint carefully tells a tale that fits the requirements of those claims. The plaintiffs ask that each defendant be held joint and severally liable for maintaining a public nuisance, for civil conspiracy and for concert of action, and that a declaratory judgment be entered for such monetary damages as will be incurred by Kivalina in response to global warming.

## PARTICIPATION

Climate litigation provides citizens access to courts to force or block government action on climate change; to change corporate behaviour; and to seek redress for climate-related injuries, including injuries to human rights; but such access is unlikely to be widely available. Litigation is extremely expensive and plaintiffs need to be prepared to bear these costs, even if they lose their case. Those most vulnerable to climate change are unlikely to have the resources to bring claims in court, unless they are represented by a public-interest law firm of some sort, as happened in both the Inuit and Kivalina cases. Courts cannot choose their plaintiffs, and may find they are serving those with the resources to bring a lawsuit rather than those with the greatest

<sup>33</sup> 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 (7 December 2005), available at <http://www.climatecasechart.com/>.

<sup>34</sup> Transcripts of testimony before the IACHR by Cloutier, Wagner and Goldberg (March 2007) are available at [http://www.ciel.org/Climate/IACHR\\_Inuit\\_5Mar07.html](http://www.ciel.org/Climate/IACHR_Inuit_5Mar07.html).

<sup>35</sup> See Kivalina Complaint, n. 27 above.

<sup>36</sup> *Ibid.*, at 45.

<sup>37</sup> *Ibid.*, at 65.

need. Climate litigation ultimately may not be the best vehicle to serve the interests of those most vulnerable to climate change.

Posner argues that 'litigation will redistribute wealth from multinational corporations to middle class or relatively wealthy individuals'<sup>38</sup> and explains how linking climate change to human rights in litigation may end up benefitting the wrong people.<sup>39</sup> While early claims may be filed on behalf of some of the most vulnerable victims of climate change, providing them with compensation for injuries, including injuries to human rights, later actions may be filed by wealthier plaintiffs, whose property losses are worth more. Both groups would have lost their homes, arguably a violation of their right to housing, but the value of the lost homes would differ greatly. Lawyers seeking higher fees would be attracted to these wealthier clients. Corporations such as power companies that are forced to pay damages would pass costs onto their customers through higher prices, which would have disproportionate effects on the poor.

David Hunter, however, notes that climate litigation can have democratizing effects.<sup>40</sup> International negotiations are still dominated by nation States, which are the entities negotiating an international agreement. Civil society plays a strong observer role, but ultimately the climate agreement will be forged by national representatives. Hunter describes how litigation empowers civil society by allowing it to shape policy without working through national governments.

Such empowerment to influence policy may carry risks. Courts' decisions often influence policy far beyond the case in litigation. Because litigation usually involves a dispute in a particular factual context, lawsuits typically do not educate courts about the complex, interactive effects of climate change causes, impacts and policies. Courts may have a narrow view of the impacts of their decision, and may lack the information needed to craft appropriate policy responses.

Posner discusses the influence that climate litigation in the USA could have on global climate policy.<sup>41</sup> He argues that court decisions are based on the interests of the litigants, rather than the needs and interests of the nation, other countries and people throughout the world. Climate litigation also is decided within a narrow context of issues presented in a case, and is likely to ignore impacts on other major issues such as development and security. Posner concludes his article by saying 'Whatever the merits of policy-driven litigation in the domestic arena, however, the assumption that it

can drive global greenhouse policy at all, or in the right direction, is of doubtful plausibility'.<sup>42</sup>

Climate lawsuits unquestionably allow plaintiffs from all sectors of society, and all levels of government, to shape policies vertically and horizontally across sectors and governments. Actions taken or avoided at one level of government can trigger actions at another level or in a different sector. Inaction at the federal level under the Bush Administration, for example, inspired numerous lawsuits filed by those concerned about climate change to clarify existing law and to force action. Other actors sought to block action on climate from the local to the national level. States were divided on issues, sometimes with multiple states supporting each side of a lawsuit. Cities, states, federal agencies, environmental groups, corporations and others supported plaintiffs in some cases and defendants in others, as each party tried to shape climate policy to promote its own interests. Regardless of actions taken under the Obama Administration, climate lawsuits will continue to be filed to shape policies pursued by all players.

Litigation also can produce unintended consequences. A successful lawsuit awarding large damages to a plaintiff injured by climate change could trigger calls for limits on climate-related tort liability. States that successfully assert their rights to craft their own emissions regulations could inspire industry to call for a preemptive national standard to ensure that businesses deal with consistent regulations rather than a patchwork of policies set by individual states.

## LEGITIMACY AND POLICY COHERENCE

Linking human rights and climate change may enhance the perceived legitimacy of both regimes. By focusing on the threats of climate change, the human rights regime demonstrates that it remains relevant and maintains the flexibility to respond to contemporary challenges to human rights. By focusing on human rights, the climate regime demonstrates that it is about more than science, and that its primary concern is the protection of real people and their communities. Lawsuits that investigate climate injuries illuminate the link to human rights by showing just how changing conditions threaten people's lives and livelihoods.

David Hunter describes how linking climate change to human rights and to other regimes such as national security 'contribute[s] substantially in building policy and legal coherence between the fields of international law – an outcome that is important for sustainable development generally and for international responses

<sup>38</sup> See E.A. Posner, n. 20 above, at 18.

<sup>39</sup> See *ibid.*, at 17–18.

<sup>40</sup> See D.B. Hunter, n. 31 above, at 14–15.

<sup>41</sup> See E.A. Posner, n. 20 above, at 12–17.

<sup>42</sup> *Ibid.*, at 19.



to climate change more specifically'.<sup>43</sup> Climate litigation serves as a sort of judicial laboratory, where novel legal theories presented in an adversarial context help to clarify the linkages across regimes.

Right now, the climate regime appears to operate as the hub of a wheel, with connections to regimes such as trade, development, security and human rights. As policies become more coherent and systematic, the divisions among the individual regimes may become blurred, with intersections across all regimes, not just connections through climate change. Not everyone will welcome policy coherence, as it could weaken the separate identities of the regimes themselves and reduce the power and possibly the effectiveness of existing institutions.

## CONCLUSION

Without question, global warming will threaten the human rights of many people. This article has explored the relative advantages and disadvantages of framing climate-related claims in litigation as human rights violations. No clear recommendation has emerged. Ultimately, the goal is not to protect human rights in the abstract but to protect people, communities and ecosystems, both now and in the future. A human rights framing is one way to promote mitigation, adaptation and other goals, but it is not the only way. Just as litigation is one of many tools to protect human rights, human rights framing is one of many approaches to providing protection for those most vulnerable.

The challenge for those seeking to protect human individuals and communities from the adverse effects of climate change is to determine what mix of framings and political, economic and legal tools will provide the greatest protection. The relative costs and benefits of each approach must be weighed, along with their distribution across different political, geographical, economic and social groupings. Political feasibility also should be assessed. Different combinations or proposals should be analysed for interactive effects across regimes, levels and sectors. The relative costs and benefits of climate litigation, and of casting claims in terms of human rights, should be examined long before a lawsuit is filed. Climate litigation provides an opportunity to experiment with different legal theories to determine which ones show the greatest potential for protecting those most vulnerable to climate change, but other approaches, such as political advocacy, should also be explored. The stakes are high, and we need to identify those strategies that can be most protective of human rights threatened by climate change.

Marilyn Averill is an attorney who currently is a doctoral student in Environmental Studies at the University of Colorado at Boulder, where she is affiliated with the Center for Science and Technology Policy Research. She previously was an attorney for the US Department of the Interior. Her current interests focus on the role of courts in shaping policy, international environmental governance and the politics of science, primarily within the context of climate change. Marilyn holds a B.A. from Wellesley College, an M.A. and a J.D. from the University of Colorado, and an M.P.A. from the Kennedy School of Government at Harvard University.

<sup>43</sup> See D.B. Hunter, n. 31 above, at 13. The Human Rights Council also has recognized that linking human rights and climate change may promote policy coherence. See Resolution 10/4, n. 6 above, at 2.