

# **The Role of Human Rights in National Climate Change Strategies**

Ole W. Pedersen

Newcastle Law School

[Ole.pedersen@ncl.ac.uk](mailto:Ole.pedersen@ncl.ac.uk)

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## **Introduction**

In light of the potential catastrophic threats that climate change is estimated to give rise to, the invocation of human rights arguments in debates seeking solutions to the problem is perhaps not surprising. Likewise, it should come as no surprise that the framing of climate change discussions in the normative language of human rights would seem to be on the increase. However, given the immense challenges diplomatically, technically, financially, environmentally and legally, (and for most of us, morally), which climate change gives rise to, combined with the sometimes unsettled nature of international human rights law, it ought to become evident that using human rights norms in climate change debates is far from problem-free or

uncontroversial.<sup>1</sup> On the one hand, it quickly becomes clear that climate change has the potential to threaten the enjoyment of a series of more or less well-established, human rights. For instance, an increase in sea levels may have severe implications for the rights to life, health and property for the populations of low-lying island States, just as the increase in Arctic temperatures may have serious repercussions for the indigenous populations desperately trying to maintain their livelihood in those regions.<sup>2</sup>

However, the observation that climate change *threatens* the enjoyment of such rights is not necessarily the same as it is *violating* those said rights.<sup>3</sup> Moreover, the linking of human rights with climate change is not one subscribed to by all actors on the international scene.<sup>4</sup> While the overall effects of climate change are considered negative, climate change can have a positive effect on the enjoyment of certain human rights. On the other hand, where climate change is considered a ‘super wicked problem’, human rights would perhaps seem to be our only hope.<sup>5</sup> Likewise, the failure of established international environmental systems to address the

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<sup>1</sup> See for example submission by the United States to the OHCHR under Human Rights Council resolution 7/23 on <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/USA.pdf> stating “a “human rights approach” to addressing climate change is unlikely to be effective, and that climate change can be more appropriately addressed through traditional systems of international cooperation and international mechanisms” at 4. See also J. Knox, ‘Linking Human Rights and Climate Change at the United Nations’, 33 *Harv. Envtl. L. Rev.* 477 (2009).

<sup>2</sup> OHCHR, *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. See also S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights and Climate Change’ 9 *Vermont J. Envtl. L.* 513 (2008), S. C. Aminzadeh, ‘A Moral Imperative: The Human Rights Implications of Climate Change’ 30(2) *Hastings Int’l & Comp. L. Rev.* 231 (2007), A. Sinden, ‘Climate Change and Human Right’ 27(2) *J. Land, Resources, & Envt. Law* (2007) S. Atapattu, ‘Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?’, 20 *Colo. J. Int’l Envtl. L. & Pol’y* 35 (2009).

<sup>3</sup> See in general J. Knox, ‘Climate Change and Human Rights Law’ 50(1) *Virginia Journal of International Law* (2009).

<sup>4</sup> US submission above n. 1.

<sup>5</sup> See R. J. Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ 94 *Cornell Law Review* 1154 (2009) and Sinden above n. 2 arguing that climate change as a profound moral problem requires a profound legal response.

problem may lead some to consider human rights avenues a last resort.<sup>6</sup> In this light, questions remain as to what advantages, and indeed what disadvantages, may be gained from utilising a human rights vocabulary in the climate change context. Will the invocation of human rights norms add anything significant to the climate change debate? Linked to this is a somewhat more utilitarian question of what role may the ‘human rights community’, taken to mean human rights lawyers, NGOs and campaigners in general, add to the debates on climate change? In light of reports that the public is increasingly suffering from ‘climate fatigue’ and an oversupply of bad news,<sup>7</sup> are there strategic advantages for climate change campaigners in relying on or looking to the well-established human rights community and infrastructure for inspiration and support? These questions would appear to be only some of the preliminary issues arising from linking human rights and climate change. While they are important, they will not be dealt with in detail in this paper as the focus in this paper instead will be somewhat narrower and focus on what role human rights instruments may play on the national level when States seek to adopt regulatory measures addressing the problem of climate change. In this process, the focus will be on a mixture of European human rights law as well as international and other regional instruments. While it is hoped that this approach will not present too vague a picture, it is thought that the issue is best addressed through a broad lens in light of the relative novelty of the human rights and climate change debate.

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<sup>6</sup> See E. Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ 155 *U. Pa. L. Rev* 1925 (2006-2007).

<sup>7</sup> See BBC News, ‘UK Climate Scepticism More Common’ September 10 2009 <http://news.bbc.co.uk/1/hi/sci/tech/8249668.stm>, BBC News, ‘Media Attacked for ‘Climate Porn’’ August 2 2006 <http://news.bbc.co.uk/1/hi/sci/tech/5236482.stm> and New York Times, ‘Seeking to Save the Planet, with a Thesaurus’ May 1 2009 <http://www.nytimes.com/2009/05/02/us/politics/02enviro.html>

## **Human Rights Implications of Climate Change Policies**

What human rights considerations must States make when implementing or taking steps to address climate change on the national level? As a precursor, it might be observed that as part of the considerations as to what specific measures to take, States may of course, setting international obligations aside for a minute, decide to do nothing at all and simply opt for leaving climate change unaddressed. While this may be tempting, it could in itself have human rights implications. This was, for instance, hinted at in the much discussed Inuit petition before the Inter-American Commission on Human Rights.<sup>8</sup> While the petition was ultimately unsuccessful, it represents an innovative approach to State responsibility and international environmental and human rights law. One is left with the impression that far from acting as a deterrent to similar groups in comparable situations elsewhere, the petition might very well represent the beginning rather than the end. For instance, one cannot help wondering whether perhaps the petitioners were being too ambitious when listing the rights which they alleged were being violated and whether a stronger focus on a number of core rights might have served to build a stronger case (more about this below). Speculatively, for example, well-established rights of property and privacy, which have clear environmental and climate change implications, may have been more suitable than economic, social and cultural rights which will inevitably afford States more leeway, thus making them harder to enforce before international tribunals. Here inspiration could be taken from the European human rights arena, where what resembles ‘environmental rights’ are, in the absence of explicit reference in the European Convention on Human Rights, derived

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<sup>8</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 of December 7 2005 on [http://www.earthjustice.org/our\\_work/cases/2005/inuit\\_human\\_rights\\_and\\_climate\\_change.html](http://www.earthjustice.org/our_work/cases/2005/inuit_human_rights_and_climate_change.html) as well as H. M. Osofsky, ‘The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights’ 31 Am. Indian L. Rev. 675 (2006-2007).

from a right to respect for private and family life.<sup>9</sup> This argument is arguably further supported by the admission that regional human rights tribunals tend to look to the deliberations of their counterparts in other parts of the world when deciding the cases before them.<sup>10</sup> In addition, the allegations that the United States had failed in their obligations under the UNFCCC were perhaps ambitious in light of the rather vague obligations in the Convention in relation to actual mitigation of climate change. Hence, it may be argued that the petitioners would have had a better case had the plaintiff actually signed up to the binding targets in the Kyoto Protocol rather than merely the Framework Convention. Of course, this might well be a point which will be tested in the future depending on the outcome of the coming meeting in Copenhagen.

Regardless of the outcome of the Inuit petition or definitive endorsement from other human rights tribunals, the option of not addressing climate change may have human rights implications. These are by and large similar to the ones which are listed in the host of documents and reports which have been produced over the last few years by governments, international organisations and NGOs.<sup>11</sup> As noted in the introduction, these may entail obligations toward the protection of the right to life and property.<sup>12</sup> However, in the spirit of optimism, hoping that agreement might be reached next month, we shall move to the question of what human rights

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<sup>9</sup> See in general O. W. Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?', 21 *Georgetown International Environmental Law Review* 73 (2008).

<sup>10</sup> A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* 471 (2007).

<sup>11</sup> OHCHR above n. 2, International Human Rights Council, 'Climate Change and Human Rights: A Rough Guide' 2008, Center for International Environmental Law, 'Human Rights and Climate Change: Practical Steps for Implementation' 2009, B. H. Weston and T. Bach, 'Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights and Intergenerational Justice' *Vermont Law School Legal Studies Research Paper Series*, No. 10-06, F. Seymour, 'Forests, Climate Change, and Human Rights: Managing Risk and Trade-offs' Center for International Forestry Research 2008, Oxfam, 'Climate Wrongs and Human Rights' 2008 and Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change' Background Paper 2008.

<sup>12</sup> Above n. 2.

implications climate change policies and measures might give rise to should States adopt such measures.

### **Civil and Political Rights**

A rather obvious but still important limitation on State responses to climate change is traditional civil and political rights of freedom of speech, movement and association. While these may not be directly impacted by climate change, it is evident that States will have to respect such rights and cannot simply disregard them in the name of addressing climate change. Thus, States will have to tolerate criticism of their climate change policies.<sup>13</sup> On the other hand, it may be questioned whether climate change will have the potential to represent, for the purposes of the ECHR, a ‘public emergency threatening the life of the nation’ thus allowing for derogation from Convention rights.<sup>14</sup> Given the few precedents available in this area, however, such outcomes would seem unlikely.

### **Indigenous Communities and Rights**

Traditionally, environmental issues and questions of what measures to take to protect the environment have been matters reserved for the sovereign State with little room for international interference. However, this is slowly starting to change in part as a result of so-called

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<sup>13</sup> Knox above n. 3 at 38-40.

<sup>14</sup> ECHR Art. 15.

‘environmental rights’. Indeed, as noted by Professor Osofsky elsewhere, human rights provide “a mechanism for limiting State sovereignty when environmental harm impacts human beings.”<sup>15</sup>

One such example may be where a State seeks to address the problem of climate change through, for example, the preservation of large forest areas or by reducing deforestation (otherwise known as reduction of emissions from deforestation and degradation REDD).<sup>16</sup> In certain countries such policies raise immediate questions of how to combine such policies with the protecting of the rights of indigenous groups owning, residing in and using affected forest areas. The Declaration on the Rights of Indigenous Peoples states in Art. 8 that indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture, just as the Declaration obliges States to provide effective mechanisms for prevention of, and redress for, ‘any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities’.<sup>17</sup> Likewise, Art. 10 provides that ‘indigenous peoples shall not be forcibly removed from their lands or territories’ and that relocation can only take place subject to prior, free and informed consent.<sup>18</sup> Thus, in accordance with the Declaration, States may if necessary have to seek the consent of any indigenous populations before embarking on projects seeking to abate climate change through the conservation of forest areas on which indigenous populations depends. The same could very well go for, say, policies aiming at reducing emissions through agro-fuel productions and large

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<sup>15</sup> H. M. Osofsky ‘Learning from Environmental Justice: A New Model for International Environmental Rights’ 24 *Stan. Envtl. L. J.* 71 (2005) at 86.

<sup>16</sup> See World Bank Guidance.

<sup>17</sup> United Nations Declaration on the Rights of Indigenous Peoples Art. 8.

<sup>18</sup> *Id.* Art. 10.

hydroelectric projects where such facilities affect indigenous populations.<sup>19</sup> All this, however, come with the rather serious caveat of the Declaration, as a General Assembly vote, does not represent binding international law, although it may be seen as representing a combination of emerging and well-established principles of international law in certain parts.

On the domestic level, the need to respect indigenous populations is highlighted in the cases from the Inter-American Commission on Human Rights (IACHR), which has on several occasions restricted government action with reference to the needs of indigenous populations. For example, the IACHR found Belize to have violated, *inter alia*, the right to property under the American Declaration of the Rights and Duties of Man of the Maya People by granting extensive logging and oil extraction concessions without prior and proper consultations.<sup>20</sup> Likewise, the Inter-American Court of Human Rights held in *Saramaka People*, relating to the granting of mining and logging concessions over resources located on the territory of the Saramaka People, that the government of Suriname had a duty to not only consult with the Saramaka People but also to obtain their free, prior and informed consent while carrying out environmental and social impact assessment before embarking on projects that would have a major impact on their territory.<sup>21</sup>

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<sup>19</sup> OHCHR above . 2.

<sup>20</sup> Inter-Am. C.H.R., *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

<sup>21</sup> Inter-Am. Court H.R., *Case of the Saramaka People v. Suriname*, Judgment of August 12, 2008. Series C No. 185.

While these cases relate to practices that would appear to be detrimental to the combating of climate change, they would seem equally applicable to cases where a State would seek to e.g. lower emissions through the regulation of land usage and practices over which indigenous groups hold rights. Thus, should a State seek to build a hydroelectric dam or similar installations in the name of addressing climate change in areas occupied by indigenous people, it will have to pay due regard to the rights of those people and make sure that prior consultation is carried out and consent is obtained.

## **ECHR**

Closer to home, the ECHR and the jurisprudence of the ECtHR can likewise be seen as placing certain constraints on States in relation to what measures they may take to address climate change. Notwithstanding that the most serious effects of climate change are for the most part predicted to hit countries outside of Europe, the developing environmental jurisprudence of the Court has some repercussions for States seeking to address climate change. Ever since its landmark ruling in *Lopez Ostra*, it has become clear that the ECHR has environmental implications as the ECtHR has continuously added decisions to its portfolio of environmental cases.<sup>22</sup> For the most part, this portfolio has dealt with serious incidents or prolonged situations of severe pollution, which on the face of it may seem of little relevance to climate change. However, over the last few years, the ECtHR has started to address the environmental cases

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<sup>22</sup> *López Ostra v. Spain*, (1995) 20 EHRR 277. See also *Fadeyeva v. Russia*, (2007) 45 EHRR 10.

before it in a slightly different manner, emphasising a “procedural” approach, which has the potential to cause restraint on national measures aimed at combating climate change.<sup>23</sup>

Before turning to this, however, a few points from the ECtHR’s early environmental jurisprudence are worth flagging as these may equally be of relevance to climate change policies. For example, two traits of the Court’s early environmental jurisprudence were that the pollution in case would have to be severe or the activity complained about would have to be in violation of either domestic law or judicial decisions.<sup>24</sup> An example is again *Lopez Ostra*, where the factual circumstances, i.e. the pollution, in the case by most measures were rather grave. For instance, the Court relied on evidence indicating that the applicant’s daughter was suffering from clinical nausea, vomiting, allergic reaction and anorexia as a result of the polluting activities taking place in close proximity to their home.<sup>25</sup> With regard to the second trait, the decision in *Taşkin and others v. Turkey* is a good example of where national authorities, in this case the Turkish authorities, were found to be in violation as a result of them having had an obvious disregard for national law.<sup>26</sup> In *Taskin*, the Turkish authorities had plainly ignored a ruling from the Supreme Administrative Court ordering the closure of a gold mine extracting gold through the use of sodium cyanide, and allowed the mine to carry on.<sup>27</sup> Likewise, in *Moreno Gómez v. Spain*, the Spanish authorities were found to be in violation of Article 8 as a result of them paying little

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<sup>23</sup> For two excellent accounts of this see Boyle above n. 10 and C. Hilson, ‘Risk and the European Convention on Human Rights: Towards a New Approach’ in *The Cambridge Yearbook of European Legal Studies* 2008-2009, Vol. 11, Hart Publishing.

<sup>24</sup> See in general Pedersen above n. 9.

<sup>25</sup> *Lopez Ostra* above n. 22.

<sup>26</sup> *Taşkin and others v. Turkey*, (2006) 42 EHRR 50.

<sup>27</sup> *Id.*

attention to national rules in place aimed at securing acceptable noise levels.<sup>28</sup> Another example would be the Court's decision in *Fadeyeva v. Russia*, where Russia was held responsible for ignoring an exclusion zone around an industrial plant and thus allowed it to continue to pollute.<sup>29</sup>

It is this second trait which is of most, although perhaps rather obvious, relevance when it comes to States seeking to develop climate change mitigating measures. Should a State choose to set up a legal regime of whatever form, to address climate change, it may be held responsible before the ECtHR if it does not adhere to such schemes (of course, one way to circumvent this would simply be for the State to change the relevant laws.). To put it simply, once an environmental legislative framework is in place, States will have to enforce it – they cannot merely choose to flout such rules and carry on as if nothing had happened. This rule of law-based approach could, for example, at some point become relevant in a UK context in light of the recently enacted climate change acts for both England and Wales, and Scotland. Obvious as this may seem, a not unsubstantial amount of the environmental cases before the ECtHR relate to situations where States have paid little attention to national law.

A related point in question is whether the ECHR regime would have anything to say about what type of climate change mitigating measures a State ought to take. In other words, are States under an obligation to adopt particular climate change mitigating instruments? The short answer would seem to be no. This is so simply in light of the doctrine of margin of appreciation,

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<sup>28</sup> *Moreno Gómez v. Spain*, (2005) 41 EHRR 40.

<sup>29</sup> *Fadeyeva v. Russia*, (2007) 45 EHRR 10.

which is heavily relied upon by the Court when adjudicating in environmental cases. This was hinted at in the *Hatton* decision, where the Court noted “[E]nvironmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights”.<sup>30</sup> Prior to this, the Court found in *Powell and Rayner* that it is not for the Court “to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere”,<sup>31</sup> and similarly in *Giacomelli*, that it is for the domestic authorities “to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community.”<sup>32</sup> More recently, the Court, when confronted with a rather specific complaint challenging the regime set up by the German authorities to address the problem of dust emission from diesel vehicles, reiterated that national authorities are best placed to make decisions relating to the specific ways and choice of regulatory methods.<sup>33</sup> Interestingly, the Court noted that substituting the choice of regulatory method of the German authorities with that of the Court’s would seem to unduly restrict the regulatory manoeuvrability of the authorities.<sup>34</sup>

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<sup>30</sup> *Hatton and others v. United Kingdom*, (2003) 37 EHRR 28 at 122-129.

<sup>31</sup> See *Powell and Rayner v. United Kingdom*, (1990) 20 EHRR 277.

<sup>32</sup> *Giacomelli v. Italy*, (2006) 45 EHRR 871 at 80. See also decision by the Commission in *Jehl-Doberer v. Switzerland* Appl. No. 17667/91, 01/09-1993, relating to the fluoridation of drinking water by regional authorities and *Athanassoglou v. Switzerland* 31 EHRR 16, relating to the assessment of nuclear power policy under Article 6, where the Court found that such issues were best dealt with on the national level.

<sup>33</sup> *Greenpeace E.V. and others v. Germany*, decision of 12 May 2009 (Appl. no. 1821/06).

<sup>34</sup> *Id.*

Moving on to the “procedural” side of the Court’s jurisprudence, we will see that this is arguably the most relevant for States seeking to adopt climate change mitigating measures. On the whole, as we will see, this “procedural” case law from the Court seeks to ensure that citizens have the appropriate tools and mechanisms available to them in order to assess risks arising from various dangerous situations potentially affecting human health and the environment. At this point, it may be worth pointing out that the reason for terming the Court’s approach to such issues as “procedural” is found in the adoption in 1998 of the UN Economic Commission for Europe’s Aarhus Convention on rights to environmental information, public participation and access to justice in environmental matters.<sup>35</sup> At this point, a few words about the Aarhus Convention itself may be appropriate. Although phrased in terms of substantive rights, as for example in Art. 1 stating that “[I]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters”, the main emphasis in the convention is on procedural issues.<sup>36</sup> In this sense, the Aarhus Convention represents a great leap forward in that it is the first multilateral environmental agreement which specifically sets forward citizens’ rights against the State. Notwithstanding that some of the most extensive provisions in the Convention are somewhat curbed by references to “national law”, the Convention has the potential to become a significant instrument over the years and decades to come. Thus, the Convention is tentatively finding its way to the UK courts,<sup>37</sup> it has already led to

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<sup>35</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 38 *ILM* 517 (1999). See also Boyle above n. 10 and Hilson above n. 23.

<sup>36</sup> *Id.* Art. 1.

<sup>37</sup> *Morgan and Baker v. Hinton Organics* [2009] EWCA civ 107.

changes to certain EC environmental provisions and it would seem to have influenced the ECtHR significantly.<sup>38</sup>

However, the first case from the Court establishing a “procedural” element to Article 8, on right to respect for private and family life, the decision in *Guerra v. Italy*, was decided prior to the Aarhus Convention.<sup>39</sup> Here the applicants lived near a fertilizer factory which had a history of accidents and was classified as a “high risk” facility under domestic law, which led the applicants to seek relevant information on emergency and evacuation plans for the area in case another accident were to occur. As this information was denied the applicants, they alleged an Art. 8 violation before the Court, which found that the “applicants waited, right up until the production of fertilisers ceased [...], for essential information that would have enabled them to assess the risks they and their families might run if they continued to live” in the area.<sup>40</sup> Thus, the Italian authorities had failed in their positive obligations to secure respect for the applicants’ private and family life and Art. 8 was seen as encompassing a right to environmental information.

This was subsequently picked up by the Court in *Öneryıldız*, relating to a fire at a landfill site which killed members of the applicant’s family, where the Court found that with “regard to such hazardous activities, public access to clear and full information is deemed to be a basic human right”.<sup>41</sup> Thus, the Court found that Turkey had been in violation of Art. 2 by failing to

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<sup>38</sup> See below and again Boyle above n. 10 and Hilson above n. 23.

<sup>39</sup> *Guerra and others v. Italy*, (1998) 26 EHRR 357.

<sup>40</sup> Id. at 60.

<sup>41</sup> *Öneryıldız v. Turkey*, (2005) 41 EHRR 20 at 56.

“comply with their duty to inform the inhabitants of the [...] area” of the risks associated with living in proximity to the landfill site.<sup>42</sup> Hence, taken together with *Guerra*, it becomes evident that authorities have a duty under the Convention to inform citizens about certain hazards causing a risk to their life and well-being. Moreover, it would appear that the threshold for what information the national authorities would have to make available seems rather low. For instance, in *Öneryıldız*, the applicant lived in close vicinity to the landfill site which had frequently been ravaged by fires and it may be asserted that this ought to have sent the alarm bells tolling for the applicant. On the other hand, the Court found, partly aided by the fact that the information submitted by the Turkish government seemed incomplete in certain aspects, that the *exact risk* posed by leaking methane gasses causing an explosion and subsequent fire and landslide was not made readily available to the applicant.<sup>43</sup> Moreover, the Court noted that the authorities cannot “be deemed to have done everything that could reasonably be expected of them within the scope of their powers under the regulations in force to prevent those risks materialising.”<sup>44</sup>

The relevance of this for climate change, which in itself represents a serious risk, is that authorities are under an obligation to, firstly, make available relevant information to citizens allowing them to assess the relevant risks themselves, and, secondly, take reasonable steps to prevent such risk materialising. Some modifications are relevant here, however. The above discussed cases of *Guerra* and *Öneryıldız* represent rather contained incidents, notwithstanding

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<sup>42</sup> Id. at 87.

<sup>43</sup> Id. at 85.

<sup>44</sup> Id. at 87.

the serious effects that the respective risk may have or indeed led to. Moreover, the risks associated with climate change are much more diverse and less easy to identify, although they may be much more serious. However, should a government be in possession of relevant information on, for instance, expected contingency and emergency plans in case of flooding and/or rising sea levels, the government would be required to release such information to citizens allowing them to take the relevant precautionary measures themselves. A related point of relevance here is where States chose to address, say, the issue of greenhouse gas emission through, for instance, the building of nuclear power plants, or problems of rising sea levels through construction of desalination plants; such decisions would likewise be subject to the requirements of access to information as well as disclosure of relevant information allowing citizens to assess all relevant risks. It might very well be that the formal decision of which whether to build new nuclear power plants as a mitigation strategy still lays with the authorities and rightly so, but the decision-making process will be subject to the requirements of access to information (although this requirement would seem to be of a lower threshold than the requirements under the Aarhus Convention, as noted by Alan Boyle elsewhere).<sup>45</sup>

The case law discussed so far has primarily related to industrial incidents and pollution and it could be argued that climate change is a different matter altogether in that likely damage is thought to be caused by natural occurring events, such as flooding and increased downpour – albeit with higher frequencies. On the other hand, it can be argued that naturally occurring risks and dangers have the potential to cause as much harm and present an equally threatening risk

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<sup>45</sup> Boyle above n. 10.

creating an assumption in favour of the jurisprudence being equally applicable to natural disasters. This question was addressed in the Court's recent decision in *Budayeva v Russia*, relating to a mudslide in the central Caucasus in Russia.<sup>46</sup> Although the Court noted that the *Öneryıldız* obligations of safeguarding the lives of those within the State's jurisdiction applies in particular to "the sphere of industrial risks, or "dangerous activities", such as the operation of waste collection sites in the case of *Öneryıldız*", it found in *Budayeva*, that Russia had violated Art. 2 as a result of the mudslide which had killed the applicant's husband. In finding such a violation, the Court noted that in such circumstances, Art. 2 carries both substantive as well as procedural obligations. For our purposes, the substantive obligations are the most interesting (the procedural obligation relating to impartial and effective investigations into possible criminal conducts). The applicant's complaint, under the substantive heading, fell in two limbs and related to the failure on the government of not maintaining mudslide protection facilities as well as the lack of any prior public warning.<sup>47</sup> As to the complaint of mud defences not being maintained, the Court noted that the authorities "received a number of warnings that should have made them aware of the increasing risks"<sup>48</sup> but such demands were nevertheless "not given proper consideration by the decision-making and budgetary bodies"<sup>49</sup> nor were the authorities "implementing any alternative land-planning policies in the area that would dispense with the concept of the mud-defence facilities."<sup>50</sup> All together, this led the Court to state that it saw "no justification for the authorities' failure to prepare the defence infrastructure".<sup>51</sup> As with regard to the lack of proper warning of the residents, the material point for the Court was the lack of

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<sup>46</sup> *Budayeva and others v. Russia*, Appl. no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 at 129-132.

<sup>47</sup> Id at 146.

<sup>48</sup> Id at 148.

<sup>49</sup> Id. at 149

<sup>50</sup> Id. at 150

<sup>51</sup> Id. at 151.

temporary observation posts in the mountains above the area, which would have been the only method able to securing a timely forewarning of the residents in the affected area. In other words, in finding an Art. 2 violation, the Court relied heavily on the clear lack of prior warning of the affected residents as this would quite clearly have assisted them in evacuating the premises.

The relevance of the *Budayeva* decision to climate change policies is clear. First of all, where authorities know that particular areas are facing a particular high risk, authorities will have to, as under *Öneriyıldız*, mitigate this risk in order to be seen to fulfil Art. 2's requirements. Thus, where a particular area is under a heightened risk from, say flooding, the authorities will have to address this risk and if necessary facilitate protection. One obvious comparison here is to the UK decision in *Marcic*, where the ruling of the House of Lords would perhaps seem to indicate otherwise.<sup>52</sup> One important difference between the two decisions is that apart from the damage in *Marcic* being only material making it an Art. 8 rather than an Art. 2 complaint (although in *Budayeva* the Court noted that “in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8”),<sup>53</sup> in *Marcic*, a rather comprehensive legislative and administrative framework was set up through an Act of Parliament making it easier for the House of Lords to “stand back”. In *Budayeva*, “the authorities ended up by taking no measures at all”.<sup>54</sup> This notwithstanding, authorities will have

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<sup>52</sup> House of Lords, *Marcic v Thames Water Utilities Plc*, [2004] Env. LR 25.

<sup>53</sup> *Budayeva* above n. 56 at 133.

<sup>54</sup> *Id* at 156.

to take measures in order to alleviate the risk which people face as a result of certain climate change related incidents in order to fulfil their positive obligations under both Art. 2 and Art. 8.

Linked to this, it is worth noting that the Court has stressed that in order to address any risks arising from both industrial activities or natural hazards, States must put in place “legislative and administrative framework designed to provide effective deterrence against threats to the right to life” under Art. 2.<sup>55</sup> As for the rights arising from Art. 8, the Court has come to a similar conclusion. Thus in *Tatar v Romania*, relating to risks associated with gold extraction processes at gold mine, the Court found that the positive obligations imply that the State has a duty to facilitate a legislative framework offering an effective protection of human health and the environment.<sup>56</sup> This framework must govern the licensing, start-up, operation and control of the hazardous activity carried out and must include appropriate public surveys and studies allowing the public to assess the risks and effects associated with the relevant activities.<sup>57</sup> Although these requirements are undoubtedly vague, they represent an absolute minimum and are another example of human rights systems ‘piercing the sovereignty’ of States when it comes to environmental harms. As for its relevance to climate change measures, it could be observed that any legislative and political measures seeking to address climate change related problems will have to conform to this minimum requirement. In other words, when a European State seeks to implement mitigating measures, such measures must provide effective deterrence against threats to the right to life. Moreover, such measures must be conducted in an open and

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<sup>55</sup> *Budayeva* above n. 46 at 129.

<sup>56</sup> *Tatar v. Romania*, decision of 21 January 2009 (Appl. no. 6702/01).

<sup>57</sup> *Id.*

transparent way subject to the aforementioned procedural requirements of access to information, the making of representations of affected citizens and open to judicial scrutiny.

### **Substantive Environmental (Human) Rights**

Finally, other human rights restrictions relevant to States aiming at mitigating climate change relate to substantive environmental rights, i.e. where substantive human rights to, for instance, a safe, healthy or viable environment form part of either national or regional law, although this link is perhaps the most tenuous of all. It could be argued that measures taken to address climate change may be seen to, for instance by reference to the ‘law of unintended consequences’, cause harm to existing environments to the extent that it violates any substantive rights to a safe environment. Such provisions are, for example, recognised under the African Charter on Humans and Peoples’ Rights, as well as in an ever-increasing number of national constitutions.<sup>58</sup> Moreover, where such provisions contain specific environmental norms or principles, as does, for instance, the French ‘Charter for the Environment’, these may put significant constraints on State action.<sup>59</sup> For example, should a State, say France, seek to implement mitigation measures through projects of geo-engineering it is not difficult to imagine that such attempts would be challenged on precautionary principle grounds. In addition, the argument that well-intended climate change abating efforts may cause further environmental harm can give rise to particular problems in relation to constitutional rights affording rights to the natural environment as is the

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<sup>58</sup> Art. 24 African Charter on Human Rights and Peoples’ Rights, 21 I.L.M. (1982), Pedersen above n. 9 and J. May, ‘Constituting Fundamental Environmental Rights Worldwide’, 23 *Pace Envtl. L. Rev.* (2005-2006).

<sup>59</sup> D. Marrani, ‘The second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications’ 10 *Env. L. Rev.* 9. (2008).

case under the Ecuadorian Constitution, although these rights are at this stage of a rather unknown nature.

## **Conclusion**

Although it may seem unlikely that any human rights tribunal, let alone the ECtHR, would offer a ruling on the human rights implications of climate change, this is not the same as human rights being of no relevance for the travails which we face as a result of climate change. This paper has cautiously and unassumingly sought to focus on the question of what human rights obligations States will have to bear in mind when implementing climate change measures. These are obviously the civil and political rights such as freedom of speech and assembly. Likewise, States seeking to do nothing at all as part of their climate change strategies may face human rights related complaints. More importantly, States seeking to implement grand scale projects, such as for instance reforestation and building power plants, will have to do so taking notice of existing usage and property rights. This is particularly so where such States' citizens count indigenous groups. Moreover, States may find themselves subject to human rights complaints relating to the rule of law as States have ignored domestic legal obligations on climate change mitigation. Likewise, and in particular under the ECHR, a growing human rights emphasis on procedural guarantees of environmental information, participation and access to justice means that States will have to adopt their mitigation strategies with an eye on such procedural safeguards in order not to find themselves before international human rights tribunals. Related to this, is perhaps the most relevant human rights requirement coming out of the ECHR in relation to climate change policies. The fact that citizens have a right to expect the State to take relevant and proportionate

measures to minimize any risks causing danger to people and the environment arising from, in this case, natural disasters. In other words, States must have an effective legislative framework in place which is capable of minimizing any risks. Of course, one question remains in this analysis. The question of what positive effect these human rights obligations can have on climate change? Is the use of human rights in this context likely to have any effect? Unfortunately, it would seem that human rights cannot act as a substitute for international agreements and effective national frameworks. Incidentally, it could very well be that it is the usage of traditional civil and political rights which have the most potential to entice governments into taking action.