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# RIGHTS-BASED PERSPECTIVES IN THE INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE

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**Abstract** It is axiomatic that the climate impacts documented by the Intergovernmental Panel on Climate Change are likely to undermine the realization of a range of protected human rights. Yet it is only in the recent past that an explicit human rights approach has been brought to bear on the climate change problematic. Scholars and human rights bodies have begun to advocate a human rights-centred approach to climate change - an approach which would place the individual at the centre of inquiry, and draw attention to the impact that climate change could have on the realization of a range of human rights. This article focuses on the human rights claims raised in the climate negotiations, the implications these claims may have and the interests they may serve.

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# Rights-Based Perspectives in the International Negotiations on Climate Change

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## 1. Introduction

In the two decades since it first appeared on the international agenda,[2] climate change has progressed from an issue of marginal significance to one of central importance to the future of humanity.[3] The global average temperature has increased by 0.74 centigrade in the last century, the largest and fastest warming trend in the history of the Earth.[4] It is predicted to increase by between 1.8 to 6.4° C by the end of the 21st Century.[5] In addition to other impacts, climate change will increase the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, the incidence of malaria and heat-related mortality, and decrease crop yield and food security.[6] There is also increasing certainty that, as the climate system warms, poorer nations, and the poorest within them, will be the worst affected.[7] Moreover, climate change is "a massive threat to human development."[8]

Notwithstanding the magnitude of the problem and the years that the international community has spent engaging on this issue, an effective and universal solution to address it has thus far proved elusive. The United Nations Framework Convention on Climate Change[9] and its Kyoto Protocol[10] contain emissions reduction commitments that are both inadequate[11] and inadequately implemented.[12] The Copenhagen

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[2] GA Res. 44/228 (1989).

[3] The 2007-8 Human Development Report characterized it as the "the defining human development challenge for the 21st century." UNDP, Human Development Report, 2007/8, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD (2007) [hereinafter Human Development Report 2007/8], available at: http://hdr.undp.org/en/reports/global/hdr2007-2008/

[4] Susan Solomon et al., ed., CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2007).

[5] *Id*, Summary for Policy Makers, 8.

[6] *Id.*

[7] *Id.*

[8] Summary for Policy Makers, *supra* note 3; *See also* STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE (2006) [hereinafter Stern Review], available at: http://webarchive.nationalarchives.gov.uk/+/http:/www.hmtreasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm

[9] *United Nations Framework Convention on Climate Change*, 1992, *reprinted in* (1992) 31 ILM 849 [hereinafter FCCC]; 192 countries are Party to the FCCC, available at: http://www.unfccc.int.

[10] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 1997, *reprinted in* (1998) 37 ILM 22 [hereinafter Kyoto Protocol]; 176 countries and the EC are Party to the Kyoto Protocol, available at: http://www.unfccc.int.

[11] The current commitments require industrialized countries to reduce a basket of green house gases (GHG) 5% below 1990 levels in the commitment period 2008-2012, *see* Article 3, Kyoto Protocol.
The IPCC recommends 25-40% below 1990 levels by 2020 for industrialized countries, *see* Terry Barker *et al*, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON

Accord arrived at in December 2009 among heads of states and government of 28 Parties to the UNFCCC,[13] takes a limited step towards resolving climate change,[14] and even in this limited form it is in troubled waters.[15] Meanwhile the impacts of climate change continue to prejudicially affect the poor, disempowered, culturally distinct, and geographically disadvantaged across the globe.

It is axiomatic that the documented impacts of climate change are likely to undermine the realization of a range of protected human rights, civil and political as well as economic, social and cultural. The right to life and to health provide useful examples. The Human Rights Committee has noted that the "inherent right to life" cannot be interpreted in a restrictive manner, and that the protection of this right requires states to take positive measures.[16] The Committee also notes that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life.[17] This duty could arguably be extended to cover specific climatic incidents, sourced to human activity, that cause arbitrary loss of life. The IPCC has predicted that extreme weather events will become more frequent, more intense and more widespread through the 21st century. And, that intense tropical cyclone activity, heat waves, and heavy precipitation events are likely or very likely to increase.[18] These weather events increase the risk of mortality (especially for the elderly, chronically sick, very young and socially isolated), injuries and infections.[19] To take another example, the right to the highest attainable standard of health is considered indispensable for the enjoyment of other human rights.[20] And, it is widely protected in international and regional instruments, and under national constitutions. The right to health has been broadly defined as an "inclusive right" including timely and appropriate health care, access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information.[21]

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CLIMATE CHANGE (2007), Box 13.7 at 776. Two IPCC authors later recommended 15-30% below baseline for developing countries by 2020, *see* Michel den Elzen, *Emission Reduction Trade-Offs for Meeting Concentration Targets*, Bonn Climate Change Talks, Presentation at the IPCC in-session workshop, UNFCCC SBSTA 28, 6 June 2008, available at: http://unfccc.int/files/meetings/sb28/application/pdf/sb28_ipcc_6_den_elzen.pdf.

[12] For status of implementation, see Annual compilation and accounting report for Annex B Parties under the Kyoto Protocol FCCC/KP/CMP/2008/9/Rev.1. The EU-15 is currently 2.7% below 1990 levels, Economies in transition are 30-40% below 1990 levels due to economic restructuring, and other industrialized countries are marginally above 1990 levels. The US as a non-Kyoto Party is not part of the analysis.

[13] Decision 2/CP.15 Copenhagen Accord in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session FCCC/CP/2009/11/Add.1 (30 March 2010) at 4 [hereinafter Copenhagen Accord].

[14] Pledges made under the Copenhagen Accord are likely to lead to a temperature increase of more than 3 degrees this century, see J. Rogelj et al, *Copenhagen Accord Pledges are Paltry*, 464 NATURE 1126–1128 (2010).

[15] *See* Lavanya Rajamani, *The Making and Unmaking of the Copenhagen Accord*, 59 (3) INT'L& COMP. L. Q. 824 (2010). For a more optimistic view see Daniel Bodansky, *The Copenhagen Conference - A Post-Mortem*, 104 AM. J. INT'L L.230 (2010).

[16] Human Rights Committee, Covenant on Civil and Political Rights, General Comment 6, *The Right to Life*, CCPR, 30/04/82 (1982).

[17] *Id.*

[18] IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT (Cambridge University Press, 2007), Summary for Policy Makers at 18.

[19] *Id*.

[20] Human Rights Committee, Covenant on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* E/C.12/2000/4 (2000).

[21] *Id*.

These are considered the basic determinants of health, and as the World Health Organization (WHO) reports, climate change will place these basic determinants of health at risk.[22]

Yet it is only in the recent past that an explicit human rights approach has been brought to bear on the climate change problematic.[23] In the early days of the negotiations, in particular in the context of the FCCC, developing countries sought to introduce and privilege the right to development in the text. More recently some countries and interest groups have sought to widen the range of human rights of relevance in the climate negotiations. Scholars and human rights bodies have gone further and advocated a human-rights-centred approach to climate change. Such an approach would place the individual at the centre of inquiry, and therefore draw attention to the impact that climate change could have on the realization of a range of human rights.

This article is focused on the human rights claims raised in the climate negotiations, the implications these claims may have and the interests they may serve. This article begins by examining the references or lack thereof to human rights in the climate change treaties, and then documents the human rights-based interventions and submissions made by Parties in the ongoing climate change negotiations. It then steps back to analyse, in an initial and contingent fashion, the role and relevance of a human rights approach to climate change. In doing this, the article identifies two principal approaches to bringing human rights to bear on climate protection. First, climate protection could be brought within the context of the existing human right in relation to the environment, howsoever defined, litigated in national and international fora, and thus enforced in discrete cases. Second, a human rights optic could be applied to climate impacts. The latter is a less concrete yet more ambitious approach in that it seeks a reframing of the climate problematic that would provide nations with a "compass for policy orientation" and draw them towards ever more stringent actions. The focus in the latter is on the broader range of human rights placed at risk by the impacts of climate change and the ethical pull this might create, rather than exclusively on a human right in relation to the environment and the litigation possibilities that might flow from it. This article touches on the former in so far as it complements the latter but focuses on the latter as it arguably has more radical potential.

This article argues that human rights approaches, taken in their entirety, have the potential to bring much needed attention to individual welfare as well as to provide ethical moorings in inter-governmental climate negotiations currently characterized by self-interested deal-seeking. Human rights approaches

[22] PROTECTING HEALTH FROM CLIMATE CHANGE, World Health Organization (2008) at 6, available at: http://www.who.int/world-health-day/toolkit/report_web.pdf.

[23] Stephen Humphreys, THE HUMAN RIGHTS DIMENSIONS OF CLIMATE CHANGE: A ROUGH GUIDE, The International Council on Human Rights Policy 3(2008) [hereinafter the ICHRP Report]. This Report explores in some detail the silence on human rights in climate change discourse, including in page 3, footnote 4, to the limited references in the IPCC's Fourth Assessment Report to human rights.

provide benchmarks against which states' actions can be evaluated and they offer the possibility of holding authorities to account. Human rights approaches may also offer additional criteria for the interpretation of applicable principles and obligations that states have to each other, to their own citizens, and to the citizens of other states in relation to climate change. This article seeks to provide initial and contingent insights into the ways in which rights-based interpretations of applicable principles and obligations may serve to influence some of the current debates in the climate negotiations.

## 2. Righting the Framework Convention on Climate Change

Since the early days of negotiations on climate change, developing countries have advanced an equity perspective on climate change – a perspective which is underpinned by human rights concerns. The crux of their argument rests on an appreciation of differences between countries – differences in contributions to the carbon stock and flow in the atmosphere (historical versus current and future), nature of emissions (survival versus luxury), economic status (poverty versus wealth) [24] and physical impacts, including their ability to cope with them (severe versus adaptable). In their view, these differences in contributions to carbon stock, nature of emissions and economic status suggest that developing countries should only be expected to contribute to solving the problem, to the extent that they are enabled and supported to do so.[25] It is in this context that developing countries advance their right to development.[26]

Whilst the FCCC does not endorse an explicit "right" to development, disputed as it is,[27] it does recognize the central role that development plays in the climate change regime. FCCC Article 2 (Objective) specifies that stabilization of GHGs in the atmosphere must be achieved within a time frame sufficient to "enable economic development to proceed in a sustainable manner." The FCCC also recognizes that in the pursuit of social and economic development, emissions and energy consumption in developing countries

[24] As an early influential article written by developing country activists asks "[c]an we really equate the carbon dioxide guzzling automobiles in Europe and North America or, for that matter, anywhere in the Third World with the methane emissions of draught cattle and rice fields of subsistence farmers in West Bengal or Thailand? Do these people not have a right to live?" *See* ANIL AGARWAL AND SUNITA NARAIN, GLOBAL WARMING IN AN UNEQUAL WORLD: A CASE OF ENVIRONMENTAL COLONIALISM 3 (1991).

[25] Article 4(7), FCCC.

[26] Ideas and Proposals on Paragraph 1 of the Bali Action Plan, *Revised Note by the Chair,* FCCC/AWGLCA/2008/16/Rev.1 at 12 (10 December 2008) (the right to development/sustainable development was highlighted in the submissions by, among others, Philippines, South Africa, Argentina, Brazil, India, Chile, China, Ecuador, Ghana, G-77/China, in the context of "principles for a shared vision").

[27] The right to development is deeply disputed. The disagreements (broadly between developing and some developed countries) relate to the definition and scope of the term right to development, the correlative duty this right entails, and the subjects to which this right attaches. The United States, in particular, has consistently rejected the notion of a "right" to development. In 1986, when the UN General Assembly adopted the Declaration on the Right to Development, the United States cast a negative vote, and a few European countries abstained. At Rio, the United States entered an interpretative statement to Principle 3 (right to development) which reads, "[t]he United States does not, by joining consensus on the Rio Declaration, change its long-standing opposition to the so-called 'right to development.' Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of the human rights set out in the Universal Declaration of Human Rights." *See* Report of the United Nations Conference on Environment and Development, United Nations Conference on Environment and Development, A/CONF. 151/26 (vol. IV) (1992) at 20. *See also* A/CONF.151/26/Rev.1 (vol. II) (1992) at Chapter III paragraph 16.

will grow.[28] This, read in conjunction with the global stabilization goal in Article 2, suggests arguably that the climate regime envisions a redistribution of the ecological space, with industrial countries reducing their emissions to make room for developing countries to grow.[29] It could be further argued that such redistribution stems from a recognition that developing countries, and by extension their citizens, are entitled, to an appropriate proportion of the ecological space so as to achieve and sustain a certain quality of life. The discussions in the climate negotiations, and on the sidelines of it, on the right to an "equitable sharing of atmospheric space,"[30] survival and luxury emissions,[31] the contraction and convergence proposal (based on per capita $CO_2$ emission entitlements),[32] the Greenhouse Development Rights framework (based on the right of all people to reach a dignified level of sustainable human development),[33] draw on the equity-based right to development.

In the climate context, although not typically labelled as such, the right to development takes within its fold the right to emit. The desire to occupy a larger share of the ecological space, and an entitlement to it, is a legitimate one. For in the words of Wolfgang Sachs, "[e]missions not only produce the burden of marginalization they also produce the benefit of power, and the right to use the atmosphere as a dumping ground represents a source of economic power. Disparity in access leads to disparity in economic opportunities. It partitions the world into winners and losers."[34] It is this, for instance, that inspires India's position on climate change. India has committed that its per capita emissions will not exceed the levels of developed countries.[35] India's per capita emissions are 1.2 metric tons, while the OECD average is 13.2.[36] If industrialized countries lower their per capita emissions to 4 metric tons, India would be committed to remaining at or below it. The US, for instance aspires to lower its emissions 80% by 2050. It is currently at 20 metric tons per capita. At 2050 if it meets its mitigation aspiration, it will be at 4 tons per capita, and India would be committed to staying below that. This both ties India's commitment to that of OECD countries, as well as seeks an equitable redistribution of the ecological space. To the extent that these positions are per capita assessments, they are in essence taking an anthropocentric rights-based approach to the issue of climate change.

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[28] Preamble, FCCC. The Preamble also specifies that states have the sovereign right to exploit their resources pursuant to their environmental and developmental policies; standards and priorities in developing countries should reflect the developmental context to which they apply; and responses to climate change should be coordinated with social and economic development in order to avoid adverse impacts on development.

[29] An argument made at length in LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 238-239 (2006).

[30] *See infra* text accompanying note 80. This position is also held by many other developing countries, including in particular India and China. *See e.g.* Ministry of Environment and Forests, India's submissions to the United Nations Framework Convention on Climate Change 11 (August 2009), available at: http://moef.nic.in/downloads/home/UNFCCC-final.pdf

[31] *See* MARK J. MWANDOSYA, SURVIVAL EMISSIONS: A PERSPECTIVE FROM THE SOUTH ON GLOBAL CLIMATE NEGOTIATIONS 74 (1999).

[32] Global Commons Institute, CONTRACTION AND CONVERGENCE: A GLOBAL SOLUTION FOR A GLOBAL PROBLEM, details available at: http://www.gci.org.uk/contconv/cc.html#intro.

[33] PAUL BAER ET AL, THE RIGHT TO DEVELOPMENT IN A CLIMATE CONSTRAINED WORLD (2008), available at: http://www.ecoequity.org/docs/TheGDRsFramework.pdf.

[34] Wolfgang Sachs, *Climate Change and Human Rights*, WDEV SPECIAL REPORT, 2007, at 3.

[35] PM's Intervention on Climate Change at Heiligendamm Meeting of G8 plus 5, Heiligendamm, Germany, June 8, 2007, available at: http://pib.nic.in.

[36] Human Development Report 2007/8, Statistics*, supra* note 3.

The exercise of a right to development, to the extent it is recognized and protected in the FCCC, is not unfettered. Developing countries are required under the climate regime to develop in a sustainable manner[37] and while doing so to address the adverse effects of climate change through adaptation. This is, however, a responsibility unique to developing countries in the sense that it requires developing countries to take on board sustainable development at a period in the trajectory of their development, a comparable period in which the industrial countries had no such restraints on their development.[38] Although fettered, the exercise of such a right to develop will result in greater GHG emissions.

### 3. Recent Efforts to Link Human Rights and Climate Change

Much of the recent interest in the human rights dimensions of climate change has been sparked by the plight of the Inuit[39] and the Small Island States, at the frontlines, of climate change. In their 2005 petition before the Inter-American Commission on Human Rights, the Inuit claimed that the impacts of climate change, caused by acts and omissions of the United States, violated their fundamental human rights – in particular the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.[40] These rights, they argued, were protected under several international human rights instruments, including the American Declaration of the Rights and Duties of Man.[41] The Commission refused to review the merits of the petition on the grounds that the information provided did not enable them to determine whether there was a violation of the rights protected by the American Declaration.[42] Although the Inuit Petition did not fare well before the Commission, it drew attention to the links between climate change and human rights, and led to a "Hearing of a General Nature" on human rights and global warming.[43] The Hearing was held on 1 March 2007, and featured testimonies from the Chair of the Inuit Circumpolar

[37] Preamble, Articles 3 (4) and 4(1), FCCC.

[38] The IPCC noted that "the level of energy intensities in developing countries today is generally comparable with the range of the now-industrialized countries when they had the same level of per capita GDP." *See* IPCC, SPECIAL REPORT ON EMISSIONS SCENARIOS at Section 2.4.10 (Nebojsa Nakicenovic and Rob Swart eds., 2000).

[39] *See* e.g. Sheila Watt-Cloutier, *Climate Change and Human Rights*, HUMAN RIGHTS DIALOGUE: ENVIRONMENTAL RIGHTS (22 April 2004).

[40] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (2005), available at: http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf.

[41] *Id*. O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

[42] Quoted in Jane George, *ICC Climate Change Petition Rejected*, NUNATSIAQ NEWS (2006), available at: http://www.nunatsiaq.com/archives/61215/news/nunavut/61215_02.html.

[43] Press Release No 8/07, Inter-American Commission on Human Rights, IACHR Announces Webcast of Public Hearings of the 127th Regular Period of Sessions, 26 February 2007, available at: http://www.cidh.org/Comunicados/English/2007/8.07eng.htm.

Conference (ICC) and its lawyers but not representatives of the US.[44] It however was not intended to achieve any concrete outcome and consequently no such outcome ensued. [45]

In the climate negotiations, indigenous groups more generally have delivered strong statements on the impacts of climate change on indigenous peoples' health, society, culture and well-being.[46] Indigenous peoples' organizations have been admitted to the Convention process as NGOs, with constituency status.[47] The Permanent Forum on Indigenous Issues under the Economic and Social Council (ECOSOC) at its second session recommended the establishment of an *ad hoc* open-ended working group on indigenous peoples and climate change[48] - this, however, did not come to pass.[49] In its seventh session, in April-May 2008, dedicated to climate change, the Forum recommended that the Declaration on the Rights of Indigenous Peoples serve as a "key and binding framework" in efforts to curb climate change, and that the human rights-based approach guide the design and implementation of local, national, regional, and global climate policies and projects.[50]

The Small Island States, and Maldives in particular, launched a campaign to link climate change and human rights. Representatives of Small Island Developing States met in November 2007 to adopt the *Malé Declaration on the Human Dimension of Global Climate Change*, *inter alia*, requesting the UN Human Rights Council to convene a debate on climate change and human rights.[51] The Council adopted a Resolution tabled by Maldives titled *Human Rights and Climate Change* in March 2008 that requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study on the relationship between climate change and human rights.[52] This study has since been submitted.[53] In March

[44] Joanna Harrington, *Climate Change, Human Rights and the Right to be Cold*, 18 FORDHAM ENVT'L L. REV. 513 (2007) (criticizing on procedural and substantive grounds the transformation of the ICC petition into a generalized hearing of a particularized claim against an absent state).

[45] The ICC petition spawned a host of American law review articles. *See e.g.* Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond the Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 (2) AM. INDIAN L. REV. 675 (2007); and, Randall S. Abate, *Climate Change, the United States and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable international Environmental Human Rights*, 26 STAN. ENVT'L L. J. 3 (2007).

[46] *See e.g.* statements made in response to the four-year international study leading to the Arctic Climate Impact Assessment (ACIA). Statement by representatives of Arctic Indigenous Peoples Organizations on the Occasion of the 11th Conference of Parties to the Framework Convention on Climate Change, Montreal, Canada, 2005, available at: http://unfccc.int/resource/docs/2005/cop11/stmt/ngo/011.pdf.

[47] *See* Promoting Effective Participation in the Convention Process, Note by the Secretariat, FCCC/SBI/2004/5 16 April 2004, at paragraphs 39-47.

[48] Permanent Forum on Indigenous Issues, Report on the second session, 12– 23 May 2003, Economic and Social Council, E/2003/43, E/C.19/2003/22 at 10.

[49] Report of the Subsidiary Body for Implementation on its twentieth session, held at Bonn from 16 to 25 June 2004, FCCC/SBI/2004/10, at paragraph 105.

[50] Permanent Forum on Indigenous Issues, Report on the seventh session, 21 April – 2 May 2008, Economic and Social Council, E/2008/43, e/c.19/2008/13 at 3-4.

[51] *Malé Declaration on the Human Dimension of Global Climate Change* 14 November 2007, available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf .

[52] *Human Rights and Climate Change*, Resolution 7/23 (28 March 2008), available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf.

[53] 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).

2009, the Council adopted Resolution 10/4 titled *Human rights and Climate Change* which recognizes that climate change-related impacts have a range of implications for the effective realization of human rights, and that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making.[54]

In a similar vein in the Americas, Argentina drafted and tabled a resolution on human rights and climate change which was adopted by the General Assembly of the Organization of American States in June 2008. The Resolution instructs the Inter-American Commission on Human Rights to "determine the possible existence of a link between adverse effects of climate change and the full enjoyment of human rights."[55] Argentina is concerned that the inequitable impacts of climate change will place an undue strain on vulnerable states that will need to introduce climate policies and measures to ensure that they meet their human rights obligations.[56]

In defiance of the compartmentalization characteristic of these specialized areas of international law, the efforts to link human rights and climate change in the human rights field have seeped into the climate change negotiations.

## 4. Human Rights in the post-2012 Climate Negotiations: 2008-2010

Some countries, UN agencies, and non-state actors invoke human rights approaches to argue for ambitious GHG mitigation targets and a sharper focus on adaptation, and vulnerable communities. Maldives, Argentina, Chile and Bolivia have sought to explore the links between human rights and climate change.[57] Indigenous groups, like the Inuit, have alleged rights violations as a result of climate change attributable to the US.[58] The International Council on Human Rights Policy,[59] Oxfam,[60] Christian Aid, the former High Commissioner for Human Rights,[61] among others, have argued for a rights orientation to current climate policy - an orientation designed to ratchet up the level of ambition in the regime, increase the focus on adaptation and enhance the regime's sensitivity to specific impacts not just of climate change but also of policies and measures to address it.

[54] Human rights and climate change, Resolution 10/4 (25 March 2009).
[55] *Human Rights and Climate Change in the Americas*, Resolution 2429, AG/RES. 2429 (XXXVIII-O/08).
[56] *OAS Approves Human Rights and Climate Change Resolution*, Medellín Colombia, Centre for Human Rights and Environment, Press Release, 4 June 2008.
[57] All submissions of Parties to the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA), are available at: http://www.unfccc.int.
[58] *Supra* note 40.
[59] *Supra* note 23.
[60] *Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change*, OXFAM Report, September 2008, available at: http://www.oxfam.org.uk/resources/policy/climate_change/bp117_climatewrongs.html.
[61] *Rights focus sought over climate change*, BBC NEWS, 11 December 2006 (quoting Mary Robinson as seeking such an approach).

In over 2000 pages of ideas and proposal submitted by Parties between 2008 and 2010 to the Ad Hoc Working Group on Long term Cooperation (AWG-LCA), the FCCC process tasked with negotiating a post-2012 climate agreement, only a few countries explicitly argued the relevance of a human rights approach:[62] Argentina, Bolivia and Chile among them. The Bali Action Plan, 2007, that launched the post-2012 climate negotiations, identified five pillars on which a future climate regime should be built: shared vision, mitigation, adaptation, technology and finance.[63] Chile proposed that a shared vision on climate change be based, *inter alia*, on a human rights perspective.[64] Bolivia argues that the scientific basis for a climate regime must include a full analysis of social, economic and environmental conditions (including the right to water, the protection of human rights, poverty eradication, etc.) in developing countries.[65] And, Argentina raised human rights in the context of "enhanced action on adaptation" arguing that further research on the impacts of climate change on human rights realization, "will be useful in ensuring that climate response takes place within a strong sustainable development framework."[66] These countries do not offer specific suggestions for integrating human rights approaches into the current negotiations. A few Parties made references to the rights of indigenous peoples, and in the first negotiating text prepared by the Chair of the AWG-LCA in May 2009, the rights of indigenous peoples in the context of adaptation[67] and of reducing emissions from deforestation,[68] made an appearance.

In subsequent negotiating sessions in 2009, several Parties introduced language on human rights into the negotiating text. The Least Developed Countries sought recognition in the "shared vision" section of the text that the adverse effects of climate change "have a range of direct and indirect implications for the full and effective enjoyment of human rights including the right to self-determination, statehood, life, food, health and the right of a people not to be deprived of its own means of subsistence, particularly in developing countries."[69] In the context of principles guiding adaptation action, Thailand proposed a reference to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights,[70] and Iceland to the UN

[62] This refers to human rights approaches generally, the right to development is seen as integral to the discourse, and numerous developing countries have raised it in their submissions. *See supra* note 19. Maldives does not raise human rights in its submission to the FCCC. *See* Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Submissions from Parties, *Maldives on behalf of the Least Developed Countries,* FCCC/AWGLCA/2008/MISC.1 (3 March 2008) at 31.

[63] Decision 1/CP.13, Bali Action Plan, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (14 March 2008).

[64] Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, *Submission by Chile* FCCC/AWGLCA/2008/MISC.5/Add.2. Part I (10 December 2008) at 111.

[65] Id, *Submission by Bolivia,* at 107.

[66] Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, *Submission by Argentina*, FCCC/AWGLCA/2008/MISC.5 (27 October 2008) at 13.

[67] Negotiating Text, FCCC/AWGLCA/2009/8 para 22, at 11 (19 May 2009).

[68] *Id*, para 109, 110 at 31.

[69] Revised Negotiating Text, FCCC/AWGLA/2009/Inf.1 (22 June 2009) at 8.

[70] *Id* at 32.

Declaration on the Rights of Indigenous Peoples and the Convention on Elimination of all forms of Discrimination against Women.[71]

In the lead up to the fifteenth Conference of Parties (COP-15), to the FCCC in Copenhagen, December 2009, members of the Bolivarian Alliance for the Americas (ALBA) - Bolivia, Cuba, Ecuador, Nicaragua and Venezuela,[72] proposed the inclusion of various rights in the negotiating text on "shared vision", in particular the right to development and the right to live well. These were opposed by most developed countries who did not wish to refer in the climate texts to rights that were either not recognized in human rights treaties (such as the right to live well) or were disputed (such as the right to development).[73] The Copenhagen conference resulted in decisions to continue negotiations under the FCCC[74] and Kyoto Protocol,[75] as well as the controversial Copenhagen Accord reached among a subset of the Parties to the FCCC and Kyoto Protocol.[76] States were tasked with continuing on the basis of the work that had been undertaken thus far.[77] Among the texts forwarded for further work, is an overarching draft COP decision which contains several references to human rights. It "note[s]" resolution 10/4 of the United Nations Human Rights Council is "mindful" that "the adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights, including living well," and it "recogniz[es] the right of all nations to survival."[78] A forwarded draft decision on reducing emissions from deforestation in developing countries also contains a reference to the need to respect the knowledge and "rights of indigenous peoples and members of local communities."[79]

In April 2010, Bolivia held a World People's Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia, with an estimated participation of 35,000 people from social movements and organizations from 140 countries. Bolivia submitted the outcome of this Conference to the FCCC process. This Bolivian submission is by far the most comprehensive exposition on rights to be submitted to the FCCC process. In a submission liberally peppered with rights language, Bolivia seeks to introduce into the post-2012 negotiations the rights of developing countries (*inter alia* to "equitable sharing of atmospheric space"

[71] *Id* at 34.
[72] ALBA emerged as an "alternative to the neo liberal model" which has, they believe, deepened the structural asymmetries to favour the accumulation of wealth in privileged minorities, further details available at: http://www.alianzabolivariana.org/.
[73] Early versions of the Shared Vision text, December 2009, on file with the author.
[74] Decision 1/CP.15, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1 (30 March 2010) at 3.
[75] Decision 1/CMP.5, Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fifth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its fifth session, FCCC/KP/CMP/2009/21/Add.1 (30 March 2010) at 3.
[76] *See supra* note 13.
[77] *See supra* note 74 (containing a full set of draft decisions).
[78] See *Id* at 7.
[79] Draft decision -/CP.15, Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, *Id* at 34.

and to development), rights of all peoples including migrants (*inter alia* to life, food, housing, health, access to water and to be protected from the adverse impacts of climate change), rights of indigenous peoples (*inter alia* to consultation, participation and prior, free and informed consent) and intriguingly to the rights of "Mother Earth" (*inter alia* to live, to be respected, to regenerate its bio-capacity, and to integral health).[80]

The rights that the Bolivian submission refers to can be divided into: rights recognized elsewhere in human rights instruments; rights recognized elsewhere but whose nature, content and extent are disputed; and rights that are yet to be recognized. Most of the rights Bolivia highlights in their submission fall into the first category. The rights of indigenous people and the references to the "UN Declaration on the Rights of Indigenous Peoples and other instruments,"[81] are examples. Among the rights in the second category is the "right to development," expressed in the climate context in a right derived from it – a right to "the equitable sharing of atmospheric space."[82] In so far as the right to development is disputed, its reiteration and referencing in the climate process, should this come to pass, would lend it considerable gravitas. In the third category of rights are the rights of Mother Earth, a novel attempt to fashion eco-centric rights. In an annex to its submission, Bolivia included a draft "Universal Declaration on the Rights of Mother Earth," which it suggests be adopted by the General Assembly as a "common standard of achievement for all peoples and all nations of the world."[83] The intended locus of action is the General Assembly not the FCCC process, and the rights of Mother Earth are not limited or related to climate specific impacts but to environmental harms more generally.[84] The Bolivian submission signals a desire to press for a range of rights recognized and protected in human rights instruments - albeit of varying levels of acceptance, normativity, legal gravitas, and enforceability - to be taken into account in the negotiation and implementation of the climate regime. Notwithstanding the liberal deployment of rights language, it is less clear that they hope to create substantive climate-specific rights in the post-2012 climate regime. Moreover it is unlikely that they will be able to.

Submissions such as the Bolivian one are not likely to or even perhaps designed to create substantive climate-specific rights. The legal form of the post-2012 agreement is as yet uncertain. The Bali Action Plan, which launched the process towards an "agreed outcome" in Copenhagen, left the legal form

[80] *See* Submission by the Plurinational State of Bolivia to the Ad-Hoc Working Group on Long-Term Cooperative Action, in Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties, FCCC/AWGLCA/2010/MISC.2, 14-39.
[81] *Id.*
[82] *Id* at 16.
[83] *Id* at 36.
[84] *See* for further information, Study on the need to recognize and respect the rights of Mother Earth, Permanent Forum on Indigenous Issues, E/C.19/2010/4 (15 January 2010).

as well as the ambition of that outcome uncertain.[85] Options include: a legally binding instrument either to supplement the FCCC and Kyoto Protocol, or to replace the Kyoto Protocol; an amendment or set of amendments to the FCCC including to the Annexes, and by adding Annex/es; a single COP decision or a set of COP decisions to further implement the FCCC; a Ministerial Declaration containing the elements of the political agreement; and any combination or package of the above.[86] COP-15 extended the deadline, and with it the uncertainty on legal form. Most Party suggestions for rights references find their way into "preambular text," as they did, for instance, in the overarching decision text forwarded from COP-15.[87] Preambular references can add colour, texture and context to an agreement but cannot create substantive rights and obligations. To the extent that rights references are incorporated into operational text, the entire text may well be nothing more than COP decision text, which, except in defined contexts, is not legally binding, and cannot act as a vehicle to create substantive new obligations for Parties. [88] Finally, it is also worth bearing in mind that Bolivia, and the ALBA states, whilst not without influence and friends, are outliers in the post-2012 negotiations. They seek a radical restructuring of the international legal order,[89] of which the climate negotiations is just one part. They opposed the adoption of the Copenhagen Accord as a COP decision in December 2009,[90] and they have since spear headed the effort to reject the Accord which they perceive as inadequate and illegitimate.[91] They oppose markets, have proposed a reduction in domestic GHG emissions of 50% below 1990 levels by 2017 for developed countries, and stress a range of rights which most Parties are uneasy about incorporating into the climate text. In the consensus-based FCCC process[92] although the ALBA countries have blocking power, their ideas do not resonate sufficiently with the majority of Parties for these to fundamentally shape the post-2012 agreement.

There have been three iterations of the negotiating text in 2010 and the rights references have increased in each successive iteration of the text.[93] Although the August 2010 version of the negotiating text[94] does not incorporate the full gamut of rights references Bolivia advocates, it does do the following. The negotiating text takes notes in its preamble of the General Assembly Resolution on "International

[85] *See* Lavanya Rajamani, *Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime*, 58 INT'L & COMP. L.Q. 803-834 (2009) for a detailed analysis of the various legal form options.
[86] *Id.*
[87] *See supra* note 74..
[88] *See* J. Brunnée *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 32 (2002) for an excellent analysis of the legal status of COP decisions.
[89] *See e.g.* Mohsen al Attar and Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 30 (3) THIRD WORLD QUARTERLY (2010).
[90] *See supra* note 15.
[91] *See supra* note 80 at 32.
[92] Parties have yet to agree on Rule 42 (Voting), of the draft Rules of Procedure, which have been applied, with the exception of Rule 42, since 1996. In the absence of agreement, decisions are taken by consensus. *See* Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies in FCCC/CP/1996/2.
[93] *See* Text to facilitate negotiations among Parties, Note by the Chair, FCCC/AWGLCA/2010/8 (9 July 2010); and, Text to facilitate negotiations among Parties, Note by the Chair FCCC/AWGLCA/2010/6 (17 May 2010).
[94] Negotiating Text, FCCC/AWGLCA/2010/14 (13 August 2010).

Mother Earth Day," [95] and the Human Rights Council Resolution on "Human Rights and Climate Change."[96] The text on "shared vision" contains an option, inspired by the ALBA submissions, that obliges Parties, in all climate-related actions, to ensure full respect for human rights, as well as to recognize and defend the rights of Mother Earth.[97] The text on the "global goal" includes a reference to the right to life,[98] and the text on adaptation requires Parties to undertake actions in accordance, *inter alia*, with relevant international human rights instruments.[99] There are also references to the UN Declaration on the Rights of Indigenous Peoples,[100] and safeguards for indigenous peoples both in the context of REDD activities as well as in designing response measures to climate change. Parties are required to obtain free, prior and informed consent from indigenous peoples before adopting and implementing measures that may affect them.[101] Needless to say the negotiating text is much bracketed signifying disagreement amongst Parties on these and other issues.

Most climate negotiators consider the human rights approaches valuable in so far as it presents a useful complement to the inter governmental climate process. Within the process itself, many negotiators are skeptical of the utility of a human rights approach, given the complex and laden agenda of the negotiations, the limited space nearly two decades into the negotiations for new methodological or conceptual approaches, and the reluctance to import the many differences among states on human rights issues into the climate negotiations. A glimpse into these differences are in evidence in the discussions on shared vision, where ALBA countries advocate ethically-anchored expansive notions of rights, including of Mother Earth, and many developed countries, including the United States, offer vigorous resistance on formal legal grounds.

For a human rights approach to be effective rights cannot simply be layered on, as yet another preambular recital, they would need to be integrated and mainstreamed. Existing treaties would need to be reinterpreted in a fashion not envisaged at the time when they were negotiated, and the post-2012 negotiations would need to take these into account. The existing treaties are primarily concerned with inter-state burden sharing for a global environmental problem. They are not rights-focused. Any attempt, some believe, to reinterpret them in a rights-focused manner would of necessity be contrived. The role that human rights approaches could play in this context would have to be carefully tailored to the needs and constraints of the climate regime.

[95] *Id* at 4.
[96] *Id* at 5.
[97] Option 1 bis, *id* at 6
[98] *Id.*
[99] *Id* at 8.
[100] *Id* at 53 and 57.
[101] *Id* at 27.

## 5. The Role and Relevance of a Human Rights Approach to Climate Protection

There are atleast two approaches to bringing human rights to bear on climate protection. First, climate protection could be brought within the context of the existing human right in relation to the environment, litigated in national and international fora, and thus enforced in discrete cases. Second, a human rights optic could be applied to climate impacts. The latter is by far the less concrete yet more ambitious approach in that it seeks a reframing of the climate problematic which would draw nations towards ever more stringent actions. In the latter the value-laden language and rhetoric of human rights is pressed into service to stress the urgency of climate change and to catalyze multilateral action on it. It is this endeavour that some Parties in the climate negotiations are engaged in. However, the scope and limits of the former are also worth exploring briefly so as to illustrate the ways in which these two approaches might inform and complement each other.

### 5.1 Extending the Human Right in Relation to the Environment to Climate Protection

The multilateral environmental dialogue, in its anthropocentricity,[102] has always held the human being firmly at its centre, but it is only in the last few decades that environmental protection, which by logical extension encompasses climate protection, has been articulated in the language of human rights. Several international soft law instruments[103] and numerous treaties, recognize and protect environmental rights, whether procedural,[104] derivative[105] or stand-alone[106] ones. In addition, more than a hundred national constitutions[107] recognize an environmental right. Indeed, the Ksentini Report, commissioned by the UN Sub Commission on Prevention of Discrimination and Protection of Minorities, records "universal acceptance" of environmental rights at the national, regional and international level.[108]

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[102] *See* ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS 15-18 (1997) (arguing that anthropocentrism, despite a few recent developments that buck the trend, remains central to contemporary international environmental policy).

[103] *See e.g.* G.A. Res. 2398 (XXII) (1968); Preamble, Declaration of the United Nations Conference on the Human Environment, 1972, A/CONF.48/14/Rev.1 (1972), *reprinted in* 11 ILM 1416 (1972); the Hague Declaration on the Environment, 1989, *reprinted in* 28 ILM 1308 (1989); and, G.A. Res. 45/94 (1990).

[104] *See e.g.* Article 1, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 Jun. 1998 *reprinted in* 38 I.L.M. 517 (1999) (hereinafter "Aarhus Convention").

[105] *See e.g.* Article 6, International Covenant on Civil and Political Rights, 1966, *reprinted* in 6 ILM 368 (1967) (hereinafter ICCPR); Article 2, European Convention on Human Rights and Fundamental Freedoms, 1950, 213 UNTS 222; Article 4 American Convention on Human Rights, 1969, *reprinted in* 9 ILM 673 (1970) (where an environmental right might be said to flow from the right to life); and, see Article 8, European Convention, (where an environmental right might be said to flow from the right to private and family life). *See generally* Robin Churchill, *Environmental Rights in Existing Human Rights Treaties*, *in* Alan Boyle and Michael Anderson ed., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 89 (1996).

[106] *See e.g.* Articles 2, 4, 7 and 15, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, *reprinted in* 28 ILM. 1382 (1989); Article 24, African Charter on Human and People's Rights, 1981, *reprinted in* 21 ILM 58 (1982) (hereinafter African Charter); and, Article 11, Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988, *reprinted in* 28 ILM 156 (1989) (also known as and hereinafter the San Salvador Protocol).

[107] *See e.g.* Section 24, Constitution of the Republic of South Africa, 1996. *See generally* Fatma Zohra Ksentini, Human Rights and the Environment, Final Report, E.CN.4/Sub.2/1994/9 (1994), at Annex III, 81-89.

[108] *See* Ksentini, *Id* at 58. The Report recommends a list of "draft principles on human rights and the environment." *Id at* Annex I, 74-77.

Only a handful of international treaties, however, recognize an explicit human right in relation to the environment.[109] The African Charter is one such.[110] The African Commission on Human and People's Rights has found Nigeria in violation of the right to life, health, food, property, and to a healthy environment in the case concerning Shell and the Ogoni People.[111] And, more recently the African Commission found Kenya in violation of the rights to freedom of religion, property, health, culture, religion, natural resources and intriguingly the right to development in the case concerning the Endorois Peoples.[112]

Even in the absence of an explicit human right in relation to the environment, international judicial fora, such as the European Court of Human Rights, have increasingly recognized that environmental harms lead to human rights violations.[113] Such recognition is not evidence of the evolution of a distinctive autonomous right to a healthy environment (which is mired in controversy) but quite simply an emerging understanding that environmental harms impact human rights, such as the right to respect for private and family life, health and even the right to life.[114]

The European Court of Human Rights starting with its landmark judgment in *Lopez Ostra*[115] has held that "severe environmental pollution may affect individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."[116] The Court in *Lopez Ostra* did not consider the absence of a specific right to a healthy environment a bar to considering environmental cases.[117] In the series of cases that followed *Lopez Ostra*[118] the European Court's recognition that severe environmental pollution may affect an individual's well being and impact their rights, became evident. The Court is clear, however, that such environmental harm must impact a person's enjoyment of a protected right. As the Court stressed in *Krytatos v. Greece*, "the crucial element which

[109] An explicit substantive human right relating to the environment can be found in the African Charter and the San Salvador Protocol. A general reference to the environment in the context of sustainable development is to be found in the The Treaty for the Establishment of the East African Community, 1996, available at: http://www.eac.int/eacu.html.

[110] Article 24, African Charter.

[111] Decision of the African Commission on Human and People's Rights, Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, ACHPR/COMM/A004/1 (27 May 2002).

[112] Decision of the African Commission on Human and People's Rights, Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Coucil v Kenya (17 February 2010).

[113] *Supra note* 108 at 59.

[114] In the *Gabcikovo Nagymoros Case,* the Separate Opinion of Judge Weeramantry recognized the protection of the environment as a "sine qua non for numerous human rights such as right to health and the right to life itself." Gabcíkovo Nagymoros (Hungary/Slovakia) 37 ILM 162 (1998) at 206 (Separate Opinion of Judge Weeramantry).

[115] Lopez Ostra v. Spain, 20 EHRR 277 (1994).

[116] Lopez Ostra, *Id*, at paragraph 51.

[117] *See generally* Philippe Sands, *Human Rights, Environment and the Lopez Ostra Case: Context and Consequences*, 6 EHRLR 597, 618 (1996).

[118] *See e.g.* Guerra and others v. Italy, (1998) 26 EHRR 357; Taskin and others v. Turkey, [2004] ECHR 621; Moreno Gomez v. Spain , App. no. 4143/02, Judgment of 16 November 2004; Fadeyava v. Russia, Application no. 55723/00, Judgment of 9 June 2005, Tatar v. Romania, Application no. 67021/01, Judgment of 27 January 2009; Leon and Agnieszka Kania v. Poland, , Application no. 12605/03, Judgment of 21 July 2009; Olujić v. Croatia, Application no. 22330/05, Judgment of 5 February 2009). *See also* cases balancing the societal interest in economic development with the human rights of particular claimants, Rayner and Powell v. UK (1990) 12 EHRR 355; Hatton v. UK (2002) 34 EHRR 1.

must be present… is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment." The Court went on to say that "[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect."[119]

The Human Rights Committee[120] as well as the Inter-American Commission and Court on Human Rights also consider cases based on environmental harms in the absence of specific environmental rights.[121] However, not without dispute. In an admissibility hearing in the recent case of *Mossville Environmental Action Now v United States* before the Inter-American Commission, the United States argued that there is "no such right as the right to a healthy environment, either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination."[122] The US also argued that even if one were to assert that customary international law existed on the topic, the US should be considered a "persistent objector" to it.[123]

Notwithstanding widespread recognition that environmental harms impact human rights, an explicit human right in relation to the environment, - its scope, content, and justiciability - as well as the wisdom of pursuing a human rights path to environmental protection, remains controversial.[124] The scope and content of a human right in relation to the environment is by its very nature indeterminate. It raises more questions than it answers. First, to what qualitative level should the environment be protected – clean, safe, healthy, decent or satisfactory?[125] In the climate context, what degree of temperature increase would be acceptable, some temperature increase being inevitable? Even limiting global warming to 2° C temperature increase, endorsed by the Copenhagen Accord,[126] would result in serious climatic changes.[127] Second, against which of the numerous existing standards or benchmarks should the qualitative level of protection be assessed? How, for instance, do we determine the climate impacts that are acceptable and those that are not, given that impacts differ between people and communities? Third, even if

[119] Krytatos v. Greece (Application no. 41666/98), Judgment of 22 May 2003, para 52.
[120] *See e.g.* Sara et al v. Finland, Communication No. 431/1990, U.N. Doc. CCPR/C/50/D/431/1990 (1994); Chief Bernard Ominayak and Lubicon Lake Band v. Canada. Communication No. 167/1984, CCPR/C/38/D/167/1984.
[121] *See* Organization of American States, Inter-Am. Commission on H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L./V/II.96, Doc. 10, Rev. 1 (24 April 1997); Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni, Judgment, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001).
[122] Organization of American States, Inter-Am. Commission on H.R., Mossville Environmental Action Now v United States, Report no. 43/10, Petition no. 242/05, Admissibility, OEA/Ser.LV/II.138 (17 March2010) at 5.
[123] *Id* at 6.
[124] *See See* Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, *in* Alan Boyle and Michael Anderson ed., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43 (1996); and, Dominick McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INT'L & COMP. L.Q. 796, 811 (1996).
[125] *Id.*
[126] Copenhagen Accord, 2009, paragraph 1.
[127] *See* WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE 5 (2010); and, Carolyn Symon et al ed., ARCTIC CLIMATE IMPACT ASSESSMENT REPORT (2005) available at: http://www.acia.uaf.edu/pages/scientific.html

determinable, to what extent, if at all, should the level of protection be uniform across states (should it, instead, be tailored to the specificities of economic resources and priorities)? Should all states have uniform obligations to protect the climate system, or should their obligations be tailored to their state of economic well-being or their historical responsibility? Fourth, who should bear the burden of the correlative duties – states (by themselves or collectively), multinational corporations, private actors, and/or individuals? Fifth, to what extent should these rights be justiciable? These queries are yet to be authoritatively considered and resolved. In addition to these pragmatic difficulties in conceptualizing a workable human right in relation to the environment, is the ethical concern that a human rights focus to environmental protection may be excessively anthropocentric, and not accord due consideration to the intrinsic value of the environment,[128] as for instance, the many species that are likely to face extinction as a result of global warming. Given these numerous uncertainties and complexities in fashioning and implementing a workable human right in relation to the environment, the role that such a right can directly play in providing a steer to the climate negotiations and post-2012 regime is limited. To the extent that climate litigation, based on a human right in relation to the environment, however, gains ground in national and regional fora, it can serve to shape Parties' positions in the climate negotiations.

### 5.2. Applying a Human Rights Lens to Climate Protection

The second approach to bringing human rights to bear on climate protection is by applying a broader human rights lens to analyze and address climate change. There are two elements to this approach. First, the focus of this approach is on those human rights that are not in dispute such as the rights to life, liberty and security, and the right to an adequate standard of living (of which health, and shelter are a part).[129] It is not restricted to a human right in relation to the environment, a right some are not persuaded by, and which is vulnerable to the challenge of anthropocentricism. Second, this approach rests on a broader ethical conception of human rights rather than solely on a legal construction of human rights.

The international human rights discourse is premised on the notion of universality,[130] the notion that universally valid rights located "beyond law and history,"[131] and their protection transcends cultural, social,

[128] *See* Catherine Redgwell, *Life, the Universe and Everything: A Critique of Anthropocentric Rights*, in Alan Boyle and Michael Anderson ed., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 71-87, 87 (1996).

[129] The existence of these rights is not in dispute, however there is neither a widely accepted list of which rights constitute "core rights" nor an agreement on whether, to the extent that they exist, they should be drawn from civil and political rights alone or extend to economic and social rights as well. The notion of core rights also flies in the face of the indivisibility thesis. However influential scholars such as Henry Shue argue from first principles that there are some "basic rights" that cut across the divide between civil and political rights and economic and social rights, and extend to negative and positive aspects of these rights. Shue argues for an open-ended category of basic rights that includes in the first instance the rights to physical security, subsistence, and political participation. *See* HENRY SHUE, BASIC RIGHTS, SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY (2nd edn., 1996).*See also* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 61-5 (2nd edn., 2007)

[130] *See* Preamble, Universal Declaration on Human Rights, G.A. Res. 217A (1948); Preamble, International Covenant on Economic, Social and Cultural Rights, 1966, *reprinted in* 6 ILM 360 (1967); Preamble, ICCPR ; Preamble African Charter; and, Article 1(1) Vienna Declaration and Programme of Action, 1993, *reprinted in* 32 ILM 1661 (1993).

religious, economic and political context. As such the institution of human rights combines "law and morality, description and prescription."[132] This has the potential as Douzinas argues lead to "confusion and rhetorical exaggeration."[133]However, such confusion can be limited as long a conceptual distinction is maintained between legal and moral human rights. The content of legal human rights is dependent on the legislative, judicial, and executive bodies that maintain and interpret the laws in question.[134] The validity of moral human rights on the other hand is independent of such governmental bodies, and it is indeed respect for moral human rights that imparts legitimacy to the acts of governmental bodies.[135] While legal human rights derive their legitimacy from consent based sources of international law, such as human rights treaties, moral human rights derive their validity and rhetorical force primarily from natural law, and only secondarily from consent-based sources of international law. [136] The recognition of moral human rights is significant because it creates the space for a critical assessment of existing international law, free from the narrow formalistic confines of consent-based renderings of international law. The recognition of moral human rights may also serve as a catalyst to the legalization of these rights. It is worth noting in this context that as international lawyers begin to engage on issues such as climate change and human rights a tension will likely emerge between the formalistic consent-based renderings of international law and critical ethically-anchored revisionist renderings of international law, and this tension needs to be acknowledged and accommodated. The efforts of ALBA countries to tailor the post-2012 climate regime to fit their alternative eco-centric rights-based and socialistic vision expose such a tension.

Given the complexity of the ongoing negotiation process, and the marginal buy-in from states of human rights approaches in the context of the intergovernmental climate process, what space can a human rights approach constructively occupy, and what role can it creatively play? The ICHRP report suggests that human rights offers "a shared and codified moral language around which consensus can be built."[137] Elsewhere the report notes that human rights language can add "considerable normative traction to arguments in favour of strong mitigation and adaptation,"[138] and that "human rights provide a legitimate set of guiding principles for global policy because they are widely accepted by societies and governments everywhere."[139] This argument is premised on the notion that the institution of human rights offers a universally shared value system. The conscience-affirming but self-denying actions that tackling climate change will require can only occur if it is predicated on and spurred by a powerful value system. This is an

[131] M, Koskenniemi, *The Preamble of the Universal Declaration on Human Rights*, in G. Alfredsson and A. Eide ed., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 32 (1999).
[132] *See* Costas Douzinas, HUMAN RIGHTS AND EMPIRE 9-10 (2007).
[133] *Id.*
[134] T. Pogge, *Recognized and Violated by International Law: the Human Rights of the Global Poor,* 18 LEIDEN J. INT'L L. 717 (2005).
[135] *Id* at 718.
[136] *See e.g.* A. Woodcock, *Jacques Maritain, Natural Law and the Universal Declaration of Human Rights*, 8 J. OF THE HISTORY OF INT'L L. 245 (2006).
[137] *Supra* note 23 at 79.
[138] *Id* at 20.
[139] *Id.*

intuitively persuasive argument, in particular if viewed in conjunction with the Argentinean suggestion that a human rights approach could "provide us with a compass for policy orientation."[140] But where does this compass lead us? And, in what sorts of disputes might this approach provide a mediating influence?

**5.2. a) A Normative Focus on the Individual**

The primary defining feature of a human rights approach is its normative focus on the individual i.e., "in the dignity and worth of the human person."[141] A focus on the dignity and worth of every individual renders efforts to deal-seek for the majority problematic. And it is this that states in the climate negotiations are essentially engaged in, deal-seeking for perceived aggregate welfare which may well be incompatible with individual rights for particular people or groups of people. The primary objective of the climate regime is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[142] This object is found in Article 2 of the FCCC and reference is made to it in the Kyoto Protocol as well.[143] But, what constitutes "dangerous" anthropogenic interference with the climate system? And, how is it to be determined? The IPCC notes that this is a value judgment[144] determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk." [145] Sachs argues that it involves two valuations: "what kind of danger is acceptable, and what kind of danger is acceptable for whom?"[146] The Copenhagen Accord agreed to limit temperature increase to 2°C (some increase being inevitable). But even a 2°C temperature increase will have significant impacts on the inhabitants of small island states and the Arctic Inuit.[147] It appears then that the costs (to the global community) of limiting climate change to below 2°C must have been deemed to outweigh the benefits it will bring to a small (in proportion) number of people. A focus on individual rights would make such determinations of aggregate welfare questionable, for the "[l]anguage of rights strengthens the power of the marginalized."[148] This is not to suggest that human rights of particular individuals are determinative in such an instance, and that the regime should be structured around a negligible temperature increase. It is conceivable that the costs, economic and opportunity, and the corresponding rights implications, may be prohibitive for the rest of the world, for other people and other rights. And, human rights are not absolute – as evidenced by the fact that

[140] *Supra* note 66.
[141] Preamble, Charter of the United Nations, 1945, 1 UNTS XVI.
[142] Article 2, FCCC.
[143] Preamble, Kyoto Protocol.
[144] *See* Bernstein et al, CLIMATE CHANGE 2007: SYNTHESIS REPORT (Cambridge University Press, 2007) at 64. *See also* Australia's submissions to the AWG-LCA, Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Submissions from Parties, *Submission by Australia,* FCCC/AWGLCA/2008/MISC.1/Add.2 (20 March 2008) at 3 (noting that "social and economic conditions (including access to financial and investment flows) and other factors will be relevant" to such a value judgment, "as will be the availability of affordable low emissions technologies").
[145] *Id.*
[146] *Supra* note 34 at 3.
[147] *See supra* note 127
[148] *See supra* note 34 at 7.

economic and social rights are to be "progressively realized" and even some civil and political rights can be derogated from in emergencies.[149] Human rights approaches in such situations would shift focus to the correlative duties of restitution, compensation and rehabilitation for the affected individuals. It is worth noting that the small island states have proposed stabilization of GHG concentrations well below 350ppm $CO_2$ eq, temperature increases limited to well below 1.5º C above the pre-industrial level, and reduction of $CO_2$ emissions by greater than 85% by 2050.[150] They have also called for the establishment of an international mechanism to address social, economic and environmental loss and damage associated with climate change impacts in vulnerable developing countries through risk management, insurance, compensation and
rehabilitation.[151]

**5.2.b) A Benchmarking Device[152]**

The focus on individual rights, however, offers little guidance in situations where rights seemingly conflict, as they often do. To take a paradigmatic case, in India where 44% of its population (approximately 500 million) does not have access to electricity, provision of energy to all, will result in rapid increases in GHGs. Such increases could result, directly or indirectly, in the loss of the island of Tuvalu. The rights of 500 million Indians to an adequate standard of living, to development (and access to energy) conflict with the rights of 12,000 Tuvaluans to their culture, property and territorial integrity. On what principled basis can one decide the rights and people that trump the others? Or is it possible (and indeed necessary) for both to subsist?

Political philosopher Caney argues that since in such a paradigmatic case both sets of rights relate to vital interests (of sufficient gravitas to impose obligations on others), it should be possible to satisfy both.[153] There are many fossil-fuel intensive climate endangering activities in other (primarily industrialized) parts of the world that relate to "relatively trivial interests," and these must be cut back[154] so as to create space for increased GHG emissions for individuals without access to electricity, as well as to protect the territorial

[149] See Daniel Bodansky, *Climate Change and Human Rights: Unpacking the Issues*, GEORGIA J. INT'L & COM. L. (forthcoming, 2010).
[150] *See* Article 2, Proposed protocol to the Convention submitted by Grenada for adoption at the sixteenth session of the Conference of the Parties, *Submission by Grenada on behalf of the Alliance of Small Island States*, in FCCC/CP/2010/3 (2 June 2010)
[151] *See* Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submission by Grenada *on behalf of the Alliance of Small Island States*, in FCCC/CP/2010/Misc.2 (30 April 2010) at 61.
[152] This sub-section draws inspiration from Simon Caney, *Climate Change, Human Rights and Moral Thresholds*, in Stephen Humphreys (ed), HUMAN RIGHTS AND CLIMATE CHANGE 69 (2009). Simon Caney, *Human Rights, Climate Change and Discounting*, 17 (4) ENV'L POLITICS 536 (2008); Simon Caney, *Global Justice, Rights and Climate Change*, 19 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 255 (2006); Simon Caney, *Cosmopolitan Justice, Responsibility and Global Climate Change*, 18 LEIDEN J. INT'L L. 747 (2005); HENRY SHUE, BASIC RIGHTS, *supra* note 129; Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 (1) LAW & POL'Y 39 (1993); and, Henry Shue, *The Unavoidability of Justice*, in Andrew Hurrell & Benedict Kingsbury ed., THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 397 (1992).
[153] *Id,* Caney, *Global Justice, Rights and Climate Change*, at 262-263.
[154] *Id.*

integrity, and cultural rights of the small islanders. Two aspects of this argument are interesting: first, this argument finds resonance in the climate regime which is fundamentally premised, as argued before, on a redistribution of the ecological space. And, second, this argument distinguishes between trivial and non-trivial interests that may be served by climate endangering activities. This distinction has a long history in the climate negotiations where India and China have consistently argued that developing country emissions are "survival emissions" while industrialized country emissions are "lifestyle" or "luxury" emissions.[155] Human rights protect the former not the latter. They provide benchmarks – "moral thresholds"[156] or "line[s] beneath which no one is allowed to sink"[157] against which actions can be evaluated. In this sense there is a synergy, notwithstanding differences in methodology, between human rights approaches and the climate change discourse.

**5.2.c) Holding Authorities to Account**

Another defining feature of human rights approaches is its power, given the necessary implication of obligations or duties, to hold authorities, even at times across territorial lines, to account.[158] It is the enforcement potential of human rights approaches, given the glacial pace and distant promise of the climate negotiations, that first captured the legal imagination. A series of cases have been filed in national[159] and international[160] fora seeking recompense for climate damage. Few of these cases have resulted in clear victories. The Inuit case, the most high profile of its kind, was held inadmissible. Although the Commission did not offer detailed reasons for its decision, they are not hard to fathom. There are serious hurdles in terms of establishing clear and binding obligations (given the contextual and soft language used in the relevant treaties), jurisdiction (since states, on occasion, do not recognize the jurisdiction of various international dispute settlement fora), standing (as every state both contributes to and suffers the impacts of climate change), causation (between the GHG emissions of the defendant state, current and historic, and impacts suffered by the plaintiff state/individuals), and damage (as much of it may be future damage). Indeed, the climate change problematic exposes the fault lines and limits of international law.[161] National level human rights-climate change litigation has fared better. In the *Nigerian Gas Flaring Case*[162] the Court held that the practice of gas flaring by Nigeria in the Niger Delta, a practice which contributed more to climate change than all other sources in Sub-Saharan Africa, violated

[155] *See supra* note 31 at 74.
[156] *See* Caney, *Climate Change, Human Rights and Moral Thresholds, supra* note 152.
[157] *See* HENRY SHUE, BASIC RIGHTS, *supra* note 129 at 18.
[158] *Supra* note 34.
[159] *See e.g*. Massachusetts v. EPA, WL 558353 (U.S.) (No. 05-1120) (2006); Native Village of Kivalina and City of Kivalina v. Exxon Mobil (2008) (right to property), available at: http://www.climatelaw.org.
[160] *See* The Inuit Case *supra* note 40.
[161] *See generally* for scholarly efforts to address climate change damage in international law, Christina Voigt, *State Responsibility for Climate Change Damages*, 77 (1-2) NORDIC J. INT'L L. 1 (2008); RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY (2005).
[162] Jonah Gbemre v. Shell Petroleum Development Co. Nigeria Ltd. Et al (2005) FHCNLR (Nigeria).

guaranteed constitutional rights to life and dignity.[163] It is worth noting, however, that whatever the outcome of human rights based climate litigations, the act of filing of these cases itself has considerable rhetorical and practical impact. As some scholars note, the focus on specific injuries builds political support, and the "story-telling quality" of the cases makes climate change real and tangible.[164] And, even if individual cases fail, they indirectly build pressure for policy and legislative action.[165]

The power to hold authorities to account in the human rights arena is more than a legal concept, i.e., it is more than the power to enforce in dispute settlement fora. In sync with the "moral human rights" notion raised earlier, the 2000 Human Development Report characterizes human rights as "moral claims on the behaviour of individual and collective agents, and on the design of social arrangements."[166] People have legitimate claims on others and on the design of social arrangements "regardless of what laws happen to be enforced."[167] These sorts of claims and this fluid notion of accountability render certain national positions in the climate negotiations suspect. For instance, India, among other developing countries, often argues that "India is certainly not responsible for the mess. We are, in fact, victims of it. So why expect us to tighten our belts?"[168] While it is true that India is not (either solely or primarily) responsible for the "mess", and that they are, amongst others victims of it, the legitimate human rights claims of those who will suffer the ill effects of climate change within India - along the coastline, in the Sundarbans, and in the rural areas[169] - demand that the government give account of itself. That it takes adaptation and mitigation concerns seriously because climate change threatens the existing protection of some human rights, and the progressive realization of the rest within its borders. And whether it takes mitigation targets internationally or not, it still has human rights obligations to its people, both under international and national constitutional law.

Open to a similar critique is the position of the US. The US refused to take up GHG targets under the Kyoto Protocol since the Protocol "exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy,"[170] The US continues to deploy this argument in the post-2012 negotiations to ensure its mitigation obligations are

[163] *Id*.
[164] *See* David Hunter, *The Implications of Climate Change Litigation for International Environmental Law Making*, in H. Osofsky & W. Burns ed., ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL AND SUPRA-NATIONAL APPROACHES (2008) and references contained therein.
[165] *Id.*
[166] UNDP, HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT (2000) at 25, available at: http://hdr.undp.org/en/media/HDR_2000_EN.pdf.
[167] *Id.*
[168] Prodipto Ghosh, quoted in Raj Chengappa, 'Apocalypse Now', *India Today*, 23 April 2007 (Ghosh is a former Indian negotiator).
[169] India's 700 million rural population depends directly on climate-sensitive sectors (agriculture, forests and fisheries) and natural resources for their subsistence. *See* Sathaye *et al*, *Climate Change, sustainable development and India: Global and national concerns*, 90(3) CURRENT SCIENCE 314, 318 (2006).
[170] Office of the Press Secretary of the White House, Text Of A Letter From The President To Senators Hagel, Helms, Craig, And Roberts 1 (13 March 2001).

comparable to those for developing countries in legal character even if not in stringency.[171] Needless to say, no nation is obliged to sign a treaty. It is true that China and India do not have quantitative mitigation targets under the Kyoto Protocol, and this may be a justifiable reason for the US to reject the Kyoto Protocol. But this is not a sufficient reason for the US to shy away from stringent action on mitigation and adaptation. The standards required of other nations may be appropriate considerations in the context of a deal-seeking utilitarian intergovernmental negotiation, but not in the context of a human rights approach. A human rights optic renders the requirements (or lack thereof) placed on India and China irrelevant in determining whether the US has a duty to take stringent action to avert and adapt to climate change domestically. The US can be held to account (even if only in the court of public opinion) irrespective of the action or inaction of any other nation.

## 6. The Legal, Policy, and Interpretative Implications of Human Rights Approaches to Climate Change

A host of internationally protected rights and progressive realization towards them will be at risk from climate impacts. There is a burgeoning and ever-persuasive literature arguing the case.[172] The vast majority of nations have signed the core human rights treaties, including in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[173] State Parties have obligations to respect, protect and fulfil the rights contained in these treaties, each of these requiring different degrees of state intervention.[174] These obligations are binding on every state Party,[175] and must be given effect to in good faith.[176] And, indeed, once a state has ratified the ICCPR, it is not permitted to denounce or withdraw from it.[177]

It is worth noting that although several rights likely to be placed at risk from climate impacts fall in the category of economic, social and cultural rights, they are nonetheless salient. The notion of

[171] *See* Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions by Parties, *Submission by the US* FCCC/AWGLCA/2010/MISC.2 (30 April 2010) at 79; *See also* earlier *submission* FCCC/AWGLCA/2008/MISC.5 (27 October 2008) at 107.

[172] The ICHRP Report documents these in thoughtful detail. For an exploration of specific rights that will be at risk through climate impacts, *see* CHRISTOPH BALS, SVEN HARMELING AND MICHAEL WINDFUHR, CLIMATE CHANGE, FOOD SECURITY AND THE RIGHT TO ADEQUATE FOOD (2008); CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE CHANGE, OXFAM Report (September 2008); PAUL BAER ET AL, THE RIGHT TO DEVELOPMENT IN A CLIMATE CONSTRAINED WORLD (2008); PROTECTING HEALTH FROM CLIMATE CHANGE, World Health Organization (2008); Ben Saul and Jane McAdam, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, Legal Studies Research Paper 08/131, Sydney (2008); John H. Knox, *Climate Change as a Global Threat to Human Rights*, UN Consultation on the Relationship between Climate Change and Human Rights, Geneva, Switzerland – October 22, 2008.

[173] Status of ratifications of core human rights treaties, available at: http://www2.ohchr.org/english/bodies/docs/status.pdf.

[174] For a discussion of the distinction between the duties to respect, protect and fulfil in the climate change context *see supra* note 149.

[175] *Barcelona Traction Light and Power Company Ltd., Second Phase,* 1970 ICJ REP. 3.

[176] Article 26, Vienna Convention on the Law of Treaties, 1969, *reprinted in* 8 ILM 1969. Also referred to in Human Rights Committee, Covenant on Civil and Political Rights, General Comment 31, CCPR/C/21/Rev.1/Add.13.

[177] Human Rights Committee, Covenant on Civil and Political Rights, General Comment 26, *Continuity of Obligations*, CCPR/C/21/Rev.1/Add.8/Rev.1 (1997).

interdependence and indivisibility of all human rights is central to human rights jurisprudence.[178] The Human Rights Committee has noted that a distinction between the two sets of rights with respect to the provision of legal remedies cannot be maintained. [179] This position is also endorsed by several influential scholars who believe that evolving notions of political responsibility place considerable strain on rigid distinctions between civil and political rights on the one hand, and economic, social and cultural rights on the other, as also between negative and positive obligations[180]

The extent of application and enforcement of protected human rights will, of necessity, differ from state to state depending on national circumstances, constitutional culture, legislative proclivity, judicial creativity, and governance mechanisms, but at a minimum, the core human rights treaties set standards and benchmarks in place, and impose process obligations - obligations to integrate human rights concerns into policy planning.

Most of the Parties to the core human rights treaties are also Party to the FCCC and the Kyoto Protocol.[181] States, at least those , that are Party to both the climate treaties and the human rights treaties (this includes the vast majority), are obliged to approach the climate change problematic not just as a global environmental problem, but also as a human rights concern. States are obliged to identify and explore the human rights that might be placed at risk by climate impacts, and take pre-emptive action in that regard. They are also obliged to design policies and measures to mitigate and adapt to climate change sensitive to the impacts that these could have on the progressive realization of protected human rights. Admittedly, the language of obligations in the absence of mechanisms for oversight and enforcement may be of limited use. However, to the extent that Parties' recognize the existence of such obligations, their positions in the climate negotiations will be tailored to and informed by them.

In the interests of coherence, it would be advisable for states to take their obligations under human rights treaties into account in designing the post-2012 climate regime. If they do not, the performance of obligations under the climate regime may be inconsistent with, interfere or impact the performance of obligations under certain human rights treaties. To take an example, there are discussions underway in the climate negotiations on Reducing Emissions from Deforestation and Degradation (REDD). In designing policy approaches and framing positive incentives to reduce emissions from deforestation and degradation it is important to take into account the recognition, protection and specific dimensions of the rights of

[178] *See* HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 268-300 (2nd edn, 2000).
[179] Human Rights Committee, Covenant on Economic, Social and Cultural Rights, General Comment 9, *The Domestic Application of the Covenant*, E/C.12/1998/24 (1998).
[180] *See generally*, SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE DUTIES AND POSITIVE RIGHTS (2008); and, HENRY SHUE, BASIC RIGHTS, *supra* note 129.
[181] There are 162 Parties to the ICCPR, 159 to the ICESCR, 194 to the FCCC and 190 to the Kyoto Protocol.

indigenous peoples and communities under human rights treaties.[182] The latest iteration of the negotiating text contains such protections in bracketed text.[183]

If a broader human rights approach to climate change has much to recommend itself, and the preceding sections suggest that it does, before applying this approach, it is worth exploring the ways in which a human rights approach may shape our understanding and influence our interpretations of relevant principles and obligations as they apply between states, within states, and between states and those subject to another's jurisdiction.

**6.1 Between States *Inter Se***

Does a human rights optic demand a certain "code of conduct" between states in the manner in which issues such as climate change, with such serious and inequitably distributed human rights implications, are resolved? The "code of conduct" between states in addressing climate change is guided principally by a set of principles contained in the FCCC. To what extent or in what ways would a human rights optic alter currently accepted interpretations of these principles?

*The Principle of Common but Differentiated Responsibility:* The first and arguably foremost principle governing the code of conduct is the principle of common but differentiated responsibilities and respective capabilities (CBDR).[184] The CBDR principle brings together several strands of thought. First, it establishes unequivocally the common responsibility of states for the protection of the global environment. Next, it builds on the acknowledgement by industrial countries that they bear the primary responsibility for creating the global environmental problem by taking into account the contributions of states to environmental degradation in determining their levels of responsibility under the regime. In doing so it recognizes broad distinctions between states, whether on the basis of economic development or consumption levels.

The core content of the CBDR principle as well as the nature of the obligation it entails is deeply contested. Both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its content. One, that the CBDR principle "is based on the differences that exist with regard to the level of economic development."[185] Alternatively, the CBDR principle is based on "differing contributions to

[182] Bolivia has suggested that the REDD provisions operate within the UN Declaration on the Rights of Indigenous Peoples, *see supra* note 26.
[183] *See supra* note 94.
[184] Article 3(1), FCCC.
[185] *See* BETTINA KELLERSMANN, DIE GEMEINSAME, ABER DIFFERENZIERTE VERANTWORTLICHKEIT VON INDUSTRIESTAATEN UND ENTWICKLUNGSLÄNDERN FÜR DEN SCHUTZ DER GLOBALEN UMWELT 335 (English Summary) (2000).

global environmental degradation and not in different levels of development."[186] There is, in addition, a fundamental disagreement as to the nature of the obligation it entails. While some argue that it is obligatory others contend that it can be nothing but discretionary. The disagreements over this principle's content and the nature of obligation it entails have spawned debates over the legal status of this principle.[187] Notwithstanding these debates, at its core the CBDR principle permits and indeed requires consideration of differential treatment between countries in the application of treaty obligations.

Differential treatment is seen in a far less expansive avatar in the human rights field.[188] But, a human rights approach does not necessarily preclude differential treatment. In fact, it could be argued in light of human rights concerns, and the notion of thresholds (based as it is on a distinction between trivial and non-trivial climate endangering activities[189]) that a human rights approach permits, indeed requires, albeit in a limited and contingent fashion, differential treatment between developing and industrialized countries.[190] In the post-2012 negotiations, as this principle remains central,[191] it would be useful to consider how a human rights approach might shape a burden sharing agreement between states that is respectful of individual rights, and of equity between and within states so as to ensure that the burden sharing arrangement does not, at least, further threaten rights protection. The issue of differentiation between developing countries, and the attempt to burden some developing countries with mitigation responsibilities might conceivably, given the additional financial burden that it will represent, risk the progressive realization of rights in these countries.

*The Polluter Pays Principle:* The polluter pays principle complements the CBDR principle. This principle does not find explicit reference in the existing climate treaties, but it complements the CBDR principle in so far as the CBDR principle countenances differentiation on grounds of differing contributions to environmental harm.[192] It is also part of the conceptual apparatus of the Kyoto Protocol in that only industrialized countries, responsible historically for the majority of GHG emissions, have mitigation targets.

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[186] International Law Association, International Committee on Legal Aspects Of Sustainable Development, Report of the Sixty-Sixth Conference 116 (1995).

[187] *See supra* note 29, Chapter 5.

[188] *Supra* note 29 at 20-24.

[189] *See* above text accompanying notes 152-156.

[190] Differentiation in certain human rights treaties, although carefully circumscribed, does exist. First, States may and often claim differentiation for themselves through reservations. Second, treaties may use discretionary language such as "to the maximum of its available resources" (Article 2, ICESCR), permitting states leeway in implementation, and therefore recognizing differentiation in implementation. States are also given an opportunity under the ICESCR, ICCPR, CEDAW and the Convention on the Rights of the Child to indicate in their reports to the relevant treaty bodies the "factors and difficulties" affecting implementation. Among the "factors and difficulties" most often deployed are economic difficulties, political transition and instability, and traditional practices and customs. *See* EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 346-352 (2001).

[191] References to CBDR are contained in submissions by the Philippines, Rwanda, United States, Pakistan, Australia, Japan, Argentina, Brazil, China, New Zealand, Panama on behalf of Costa Rica, El Salvador, Honduras, Nicaragua and Panama, Singapore, Switzerland, AOSIS, Chile, China, EC and its member States, G77 and China, Indonesia, Pakistan, Venezuela, African Group, Ecuador et al., and Ghana. *See supra* note 26 at 12.

[192] The CBDR principle, in particular as defined in Rio Principle 7, recognizes greater responsibility for developed countries in part due to "the pressures their societies place on the global environment."

The polluter pays principle requires that the "polluter should, in principle, bear the cost of pollution."[193] Although based on intuitively sound legal ground and a logical extension of the customary international law principle that states have an obligation to "ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control,"[194] this principle does not enjoy universal support. The guarded language used in the construction of the polluter pays principle bears testimony to the caution with which states approach international responsibilities. The principle is formulated in terms which are recommendatory rather than mandatory[195] and it contains little substantive legal content. Moreover, the application of the principle, to the extent that it must be implemented "without distorting international trade and investment," is subject to restrictive conditions.[196]

Some countries have suggested that the polluter pays principle constitute one of the core principles guiding the construction of a post-2012 climate regime.[197] A human rights approach would arguably support this position. In order to ensure that climate endangering activities relating to non-trivial uses might be protected where they exist, and permitted as they grow, fossil-fuel intensive climate endangering activities in other (primarily industrialized) parts of the world that relate to "relatively trivial interests," must first be reduced. This is essential to ensure that the progressive realization of human rights protections proceeds unhindered in the developing world. A strict application of the polluter pays principle, however, may also undermine the progressive realization of human rights in developing countries. Although historically the developed world has been responsible for the bulk of GHG emissions, emissions in developing countries, in particular in China and India, are also increasing. The polluter pays principle is not limited by capacity to pay or to historical emissions alone. Applied strictly and in isolation, China, currently considered to be emitting more than the United States,[198] would qualify as a polluter and be required to pay.[199] This in turn would divert scarce resources from non-trivial interests. The polluter pays principle

[193] Principle 16, Rio Declaration, 1992 reads: "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."
*See also* Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Recommendation, C (72) 128 (1972). *See generally* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, Volume I, 279-81 (2nd edn, 2003).

[194] The ICJ in The Legality of the Threat or Use of Nuclear Weapons Case held: "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *See* The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 241 at paragraph 29.

[195] Words used are "should endeavor to promote" and "in principle."

[196] *See* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?* 29 GA. L. REV. 599, 640-5 (1995).

[197] Pakistan, Switzerland, AOSIS, and Ghana, see *supra* note 26 at 19.

[198] The Netherlands Environmenal Assessment Agency estimates that China's 2006 CO2 emissions surpassed those of the USA by 8%. *See China now no. 1 in CO2 emissions; USA in second position*, available at:
http://www.pbl.nl/en/dossiers/Climatechange/moreinfo/Chinanowno1inCO2emissionsUSAinsecondposition.html

[199] For a thoughtful analysis of the Polluter Pays Principle see Simon Caney, *Climate Change and the Duties of the Advantaged*, 13(1) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 203, 212 (2010).

needs therefore to be applied so as to complement rather than supplant principles such as the principle of common but differentiated responsibility.

In so far as principles such as the polluter pays principle are viewed through the prism of human rights, they require application not just between states, the classic subjects of international law, but also within states in relation to entities and individuals. There is no principled reason, if individual welfare is the focus, to distinguish between polluters within and outside the state. If polluters within the state are engaged in fossil-fuel intensive climate endangering activities relating to trivial uses, then the polluter pays principle would apply to them as well. This may of course be outside the purview of the state-centric international negotiations.

*A Precautionary Approach or the Precautionary Principle*[200]: FCCC Article 3 urges states to take "precautionary measures to anticipate prevent or minimize the causes of climate change and mitigate its adverse effects." Some states view this as encapsulating the precautionary principle and have put this principle forward as a guiding principle in the ongoing negotiations.[201] The precautionary principle is seen by some as evidence of a paradigm shift in international environmental law, from the *ad hoc* and reactive approaches that characterized early environmental regulations to the precautionary regulation that is on the increase today. There are numerous references to the precautionary principle in international law,[202] but there are divergent views on whether the precautionary principle is properly so called, how it might best be defined, what its precise content is, what obligations it creates and on whom, and whether, in its strong version, it lends itself to actualization.[203] As such its precise import and legal status is in much dispute.[204]

The precautionary principle is purported to be in evidence in its most evolved form in the EU. The European Commission notes that the precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management and

[200] There are diverging views on whether precaution is an approach or a principle.
[201] Brazil, AOSIS, Micronesia and Venezuela, *see supra* note 26 at 12.
[202] *See e.g.* United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, *reprinted in* 34 ILM 1542 (1995); The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000, *reprinted in* 39 ILM 1027; Convention on Biological Diversity, 1992 and the FCCC. *See also* references to "prudence and caution" by the International Tribunal on the Law of the Sea in Southern Bluefin Tuna Cases (New Zealand v. Japan, Australia v. Japan), Provisional Measures, ITLOS, Order of 27 August 1999, 38 ILM 1624 (1999) at paragraph 77, and The Mox Plant Case (Ireland v. United Kingdom), Provisional Measures, ITLOS, Order of 3 December 2001, 41 ILM 405 (2002) at paragraph 84. *See for references* Owen McIntyre and Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 (2) J. ENV. L L. 221 (1997). *See* for an extensive list of references NICHOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 90 (2002).
[203] *See* Cass Sunstein, *Beyond the Precautionary Principle*, UNIVERSITY OF CHICAGO LEGAL THEORY AND PUBLIC LAW WORKING PAPER No. 38(2003). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307098.
[204] *See* European Communities - Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291, WT/DS292, WT/DS293, Panel Report circulated on 29 September 2006, at paragraph 7.89 (noting, whilst side-stepping the question, that the question of whether the precautionary principle is a general principle of international law is a "complex" and "unsettled" one).

risk communication.[205] In the Commission's view the precautionary principle is particularly relevant to the management of risk.[206] And, the determination of what constitutes an "acceptable level of risk for society is an eminently political responsibility."[207] Extrapolating from the EU to the international level, any determination of "an acceptable level of risk," necessary for the application of the precautionary principle, in the context of climate change could benefit from a human rights approach, to the extent that it is based on relevant health and scientific studies. A human rights approach could provide benchmarks or "thresholds" to define acceptable outcomes.[208] The thresholds below which the living conditions of particular individuals must not fall would determine where along the spectrum of precautionary action the balance must be struck.[209] Such a determination also has an intergenerational dimension. It is not just the living conditions of individuals of the current generations that are to be factored in, but the likely living conditions the present generation will leave to future generations.[210]

*The Principle/Duty of Cooperation*: The principle of cooperation finds reflection both in the environmental[211] and human rights field. The climate negotiation process is a sophisticated effort at achieving multilateral cooperation on a global environmental issue. The language and burden sharing arrangement contained in the FCCC and Kyoto Protocol bear testimony to this. The FCCC underscores the notion of cooperation by noting that "the global nature of climate change calls for the widest possible cooperation by all countries."[212] It requires Parties to cooperate to sustain a supportive and open international economic system which would promote sustainable economic growth.[213] Further, it obliges Parties to "cooperate" in development and transfer of technology,[214] conservation and enhancement of GHG sinks,[215] preparing for adaptation,[216] research,[217] exchange of information,[218] and, education, training and public awareness.[219] The notion of cooperation is also central to the post-2012 negotiation which is titled "long-term cooperative action under the Convention."

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[205] Communication from the Commission on the Precautionary Principle, COM (2000)1, 02/02/2000. Council adopted a resolution endorsing the broad lines of the Commission's communication in December 2000.
[206] *Id.*
[207] It acknowledges however that the precautionary principle must be submitted to the principles of proportionality and non-discrimination, to cost-benefit analysis and to review. *Id.*
[208] *See supra* note 156
[209] At the unexceptionable end of the spectrum the principle is nothing more than a reflection of the age old adage 'better safe than sorry.' At the more controversial end of the spectrum an application of the precautionary principle could require that a "margin of safety be built into all decision-making." *See* BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST 348 (2001).
[210] For a persuasive account see Henry Shue, *Deadly delays, saving opportunities: creating a more dangerous world?* in Stephen M. Gardiner et al (eds), CLIMATE ETHICS: ESSENTIAL READINGS, 146, 155-158.
[211] *See generally* Alan Boyle, *Principle of Cooperation: the Environment*, in Vaughan Lowe and Colin Warbrick ed., UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW 120 (1994).
[212] Preamble, FCCC.
[213] Article 3(5), FCCC.
[214] Article 4(1) (c), FCCC.
[215] Article 4(1) (d), FCCC.
[216] Article 4(1) (e), FCCC.
[217] Article 4(1) (g), FCCC.
[218] Article 4(1) (h), FCCC.
[219] Article 4(1) (i), FCCC.

In a synergistic vein, human rights doctrine also privileges international cooperation. It interprets international cooperation "for the realization of economic, social and cultural rights" as an obligation of all States.[220] John Knox argues that the obligation to cooperate in the context of climate change should take two forms, first, in the conclusion of a Convention that effectively mitigates and ameliorates the effects of climate change on human rights, and second, in responding to the adverse effects of climate change, so as to protect human rights, in advance of an agreement.[221]

Human rights provide criteria for both a successful negotiated outcome and a successful process. The negotiated outcome in the climate regime - the post-2012 agreement – if viewed through a human rights lens may need to ensure reduction of greenhouse gases to levels that will not interfere with the human rights of those considered most vulnerable to the effects of climate change.[222] The FCCC identifies sets of countries that are traditionally considered vulnerable,[223] however, there are a range of vulnerabilities associated with climate change, and even those not traditionally considered vulnerable will experience new levels of vulnerability over time. The climate negotiations are engaged in devising, through submissions of Parties, ways of recognizing and responding to those considered most vulnerable. A human rights optic may serve to catalyze ambition in step with the needs of the most vulnerable.

The ambition of the regime will be reflected in the choice Parties make between different levels of GHG stabilization (350ppm $CO_2$ or 450 ppm $CO_2$) or temperature increase (2°C – or less)[224] that the international community should aim for. A human rights optic, with its normative focus on the individual, may press in favour of a more rather than less ambitious outcome, given that even at the lowest levels of stabilization and temperature increase some groups and peoples will have their homes, livelihoods, nations and culture threatened. A human rights approach may also require that the regime provide adequate assistance to people and communities to adapt to unavoidable climate change, which would otherwise harm their human rights.[225] In the context of adaptation, however, a human rights lens offers a more complicated view of what should be covered in the internationally negotiated outcome, as states need to adapt in order to protect their citizens and neutralize threats to their human rights - obligations that arise not as a result of an international climate change agreement but as a result of human rights treaties and/or of national constitutional norms.

[220] Human Rights Committee, Covenant on Economic, Social and Cultural Rights, General Comment 3, E/1991/23.
[221] John H. Knox, *Climate Change as a Global Threat to Human Rights*, UN Consultation on the Relationship between Climate Change and Human Rights, Geneva, Switzerland, 22 October 2008.
[222] *Id*.
[223] Article 4 (8), FCCC.
[224] *See supra* note 26.
[225] *See supra* note221.

Human rights approaches also provide criteria for successful procedures.[226] A successful procedure requires information-sharing,[227] and participation,[228] albeit appropriately channelled in the context of an inter-governmental process, of those whose rights will be impacted by climate change. In this context it is worth noting the efforts of indigenous groups to participate in the intergovernmental process.[229] A successful procedure would require states to incorporate rights to information and participation in the post-2012 climate agreement, and in designing national, regional and local level policies on mitigation and adaptation. Article 3(7) of the Aarhus Convention requires states to promote the application of the principles of the Convention in international environmental decision-making process. This principle is binding on Aarhus Parties which includes most of the EU member states.[230]

**6.2 Within States**

Does a human right optic demand a certain code of conduct of a state vis-à-vis its citizens in the context of climate change? Human rights obligations devolve primarily on states with respect to all those within their jurisdiction. ICCPR Article 2 is the paradigmatic case. It obliges states to "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." Most international human rights instruments contain a "scope of application" provision that limits the required action of an individual state to the geographic areas or territories under its control.[231] As one scholar notes, while trans-boundary air pollution knows no bounds, international human rights instruments do.[232] The ICESCR does not have a scope of application provision, and the ICJ has held that it may apply to acts carried out by a state in the exercise of its jurisdiction outside its own territory.[233] An extension has been suggested in the context of the right to food as well.[234] Nonetheless, the primary responsibilities of States are to those within their jurisdiction. And, this responsibility, in the case of the ICESCR, is to take steps - deliberate, concrete and targeted - towards meeting the obligations recognized in the Covenant.[235]

[226] In the environmental field these are reflected in Principle 10 of the 1992 Rio Declaration on Environment and Development, and in the Aarhus Convention. *See* Chapter 4 of the ICHRP Report *supra* note 23.
[227] Article 5, Aarhus Convention.
[228] Article 7, Aarhus Convention.
[229] *See* text accompanying notes 46-50.
[230] Status of ratifications available at: http://www.unece.org/env/pp/ratification.htm. There are 42 Parties to the Convention. *See also* ICHRP Report at 50.
[231] *See* Harrington *supra* note 44 at 513.
[232] *Id.*
[233] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP 12.
[234] ECOSOC, UNCHR, Report Submitted by the Special Rapporteur on the Right to Food in Accordance with Commission on Human Rights Resolution 2002/25, E/CN.4/2003/54 (2003) (by Jean Zielger) at para 29. *See generally* Smita Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 COLUM. J. TRANSNAT'L L. 691 (2006).
[235] Human Rights Committee, Covenant on Economic, Social and Cultural Rights, General Comment 3, *The Nature of State Parties Obligations (Article 2 paragraph 1)*, E/1991/3 (1990).

As discussed, many of the impacts of climate change will have serious consequences for the progressive realization of human rights. And independent of any international agreement on climate change, states have an obligation under the relevant human rights instruments to take action both to prevent the living conditions of their nationals from falling below acceptable thresholds, and to ensure that the progressive realization of protected rights is not impeded. The actions states are obliged to take relate to adapting to the adverse effects of climate change, and when appropriate, disaster relief.

Adaptation under the FCCC is intended to be a cooperative effort. FCCC Article 4(1)(e) read with Article 4(8) and (9) highlights the importance of cooperation and support, including support relating to funding, insurance and the transfer of technology to vulnerable developing countries. A series of international funds exist, including the recently operationalized Kyoto Protocol Adaptation Fund, to finance adaptation in developing countries.[236] At present, however, these funds do not have the ability to generate the necessary finances. The FCCC Secretariat estimates that in 2030 additional investment and financial flows needed for adaptation amount to several tens of billion USD, and a significant share of the additional investment and financial flows- USD 28 – 67 billion will be needed in developing countries.[237] Currently available finances amount to 275 million USD.[238] Efforts by developing countries to levy a charge on the entire carbon market so as to fund adaptation came to nought, cutting off another fertile source for adaptation financing. [239] The Copenhagen Accord sought to create a Green Fund, and committed developed countries to providing 30billion USD in the 2010-2012 timeframe, to be used in a balanced manner between adaptation and mitigation.[240] This fund is yet to be operationalized. The shortfall in adaptation financing will ultimately have to come from national coffers. And, this will have an impact both on the ability of developing countries to contribute to mitigation efforts, as well as to lift them out of poverty.

Argentina noted in a submission to the FCCC on the post-2012 negotiations, that contributions from developing countries will necessarily depend on "striking the balance between our responsibility to our citizens – ensuring they have access to minimum standards of security, human rights, and social benefits, such as food, health, education, shelter, and opportunity for self-development – and the means available to implement mitigation activities."[241]

[236] For an overview of adaptation activities under the climate treaties see:http://unfccc.int/adaptation/items/4159.php.
[237] FCCC Technical Paper, *Investment and Financial Flows to Address Climate Change*, FCCC/TP/2008/7 (26 November 2008), at 8, available at:
http://unfccc.int/files/cooperation_and_support/financial_mechanism/application/pdf/background_paper.pdf.
[238] *Id.*
[239] A levy is already charged on the Clean Development Mechanism. At COP-14, Poznan, December 2008, an effort was made to extend this to the other market mechanisms, but industrialized countries refused to accept such an extension of levy.
[240] Copenhagen Accord, 2009, paragraph 8.
[241] *Supra* note 66.

It is worth noting in passing that adaptation actions justified on human rights grounds may raise some doctrinal difficulties. Adaptation to climate change framed in human rights terms is in essence pre-emptive action against prospective denial of human rights. In addition to the fact that human rights theorists are wary of pre-emptive action, some may argue that the basis for prioritizing rights at risk from climate impacts over other rights is unclear, as is the basis for taking pre-emptive action with respect to climate change over pre-emptive action with respect to other events that might risk a denial of human rights. An answer to this critique may lie in the core rights thesis. The rights at risk from climate impacts are core undisputed rights such as the right to life. Even if the duties that attach to these rights are purely negative, given the scale, gravity, and ferocity of the climate change problem confronting the international community, inaction on climate change adaption and mitigation will lead to rights violations.

**6.3 Between States and those subject to another's jurisdiction**

Does a human rights optic oblige a state to adopt a certain code of conduct towards nationals of other states? Although, most human rights instruments have boundaries, are there exceptional situations which might justify, indeed require, extraterritorial reach?

Climate change is likely to present international law with situations that will test its limits and expose its fault lines. One such situation is presented by the likely plight of the small island states. Entire nations, such as Maldives and Tuvalu, are likely, if current GHG emission trends continue, to be lost to sea level rise, rendering their inhabitants stateless. Tuvalu is reportedly negotiating agreements with Australia and New Zealand to move its 12,000 strong population[242] and Maldives has started saving to buy dry land to move its 400,000 strong population to India or Sri Lanka.[243] Restrictive definitions in international refugee law will preclude claims arising therein.[244] But, to the extent that forced displacement is occurring due to damage caused by climate change, primarily sourced to other's fossil-fuel intensive activities, are these nations entitled to redress – land of equal size and quality?[245] If so, in what way? Should a State's jurisdiction be extended to encompass the impacts of a State's conduct wherever they may be felt?[246]

Another situation which is likely to test the limits of international law is presented by poor states that are unable to adapt to climate change. Given that the bulk of adaptation finance will have to be raised domestically, it is entirely conceivable that poverty-stricken states will be unable to raise the finances and

[242] Brad Crouch, *Tiny Tuvalu in Save Us Plea over Rising Seas*, SUNDAY MAIL, 5 October 2008
[243] Andrew C. Revkin, *Maldives Considers Buying Dry Land if Sea Level Rises*, NEW YORK TIMES, 10 November 2008
[244] Ben Saul and Jane McAdam, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, Legal Studies Research Paper 08/131, Sydney, October 2008.
[245] *Id*.
[246] *Id* (noting however that this takes the scope of human rights obligations well beyond the accepted jurisprudence which requires that the State exercise "effective control" in order to be held responsible).

adapt in time. Increasingly severe impacts in such states will likely upset social stability, feed discord, and pose serious security threats that could spill over national borders. Is humanitarian intervention, albeit restrictively defined thus far, justified in such situations? Does the notion of "responsibility to protect," applied thus far to crimes against humanity and the like, apply in situations where a population is suffering serious harm but the state is unwilling or unable to prevent it?[247]

## 7. Conclusion

Human rights approaches have the potential to bring much needed attention to individual welfare as well as to provide ethical moorings in inter-governmental climate negotiations. They offer benchmarks against which states' actions can be evaluated, the possibility of holding authorities to account, and additional criteria for the interpretation of applicable principles and obligations that states have to each other, to their own citizens, and to the citizens of other states in relation to climate change. This article sought to provide initial insights into the numerous rights based interventions in the climate negotiations as well as the ways in which human rights approaches may serve to influence some of the current debates in the climate negotiations.

[247] *Id.*

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