

Climate Change and Human Rights

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Abstract This chapter examines the inter-relationship between human rights and climate change, a linkage that has been given little attention, but whose importance is likely to grow in the coming years. Some aspects of the relationship between climate change and human rights have been selected, especially those that have emerged as having most potential in influencing climate change governance. We will identify how climate change, with its dramatic consequences, impacts the enjoyment of human rights and has already led to a human rights petition against the United States. We will, then, turn to the implications of human rights to the functioning of the climate change regime, such as how the emerging rights to participate in environmental decision-making are reflected in the negotiation process of defining the elements of the current climate change regime. More difficult question on whether human rights can or even should influence the future design of the climate change regime will be examined. The concluding remarks will focus on evaluating the pros and cons of using human rights in the struggle against climate change impacts and the influence of human rights on the design and operation of the climate change regime.

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12.1 Introduction

There is hardly an environmental issue that has captured as much or more global attention as global warming and the associated climate change. The Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), released in 2007, warned that climate change is unequivocal and accelerating.¹ Over the last century, the global average temperature has increased by 0.74°C, which constitutes the largest and fastest warming trend in world history.² It is predicted that it will increase by 1.1–6.4°C.³ It is also estimated that climate change will, among other impacts, 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 decreasing crop yield and food security.⁴

Despite states' inertia to adequately respond to this phenomenon, climate change – with good reason – has been characterized as “the defining human development issue of our

¹ Rajendra K. Pachauri and Andy Reisinger (eds), *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2007), at 30.

² *Ibid.*, at 30.

³ *Ibid.*, at 23.

⁴ *Ibid.*, at 26.

generation.”⁵ As expressed in the UN Human Development Report, climate change differs from other problems facing humanity, because of its ability to challenge us to think differently in many ways. Above all, it forces us to consider what it means to live as a part of an ecologically interdependent human community. Climate change serves as a reminder of what humanity shares: planet Earth. All nations and all people share one atmosphere.⁶

Notwithstanding the urgency of the climate change problem, and despite clear human rights risks, governments have only very recently awoken to a discussion on the human rights dimensions of climate change and the potential role that human rights law, principles, and institutions could play in responding to climate change.⁷ A notable example in this direction is the United Nations (UN) Human Rights Council’s consensus resolution 2009, which was adopted by a total of 88 UN member states and encouraged the greater involvement of human rights expert bodies in the UNFCCC process.⁸

***289** In regard to the implications of climate change on human rights, the resolution notes:

[Noting that] climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.⁹

The resolution also serves as a reminder of how the implications of climate change mostly affect those who already find themselves in vulnerable situations due to factors that include, among others, geography, poverty, gender, age, indigenous or minority status, and disability.¹⁰

There are various ways in which human rights and climate change may be regarded as being inter-related. Climate change influences the enjoyment of human rights and human rights, in turn, should affect how the climate change regime functions and could function. However, as human rights have not played a strong role in how climate change is perceived as a politico-legal problem, this is not inevitable. It was with the pioneering

⁵ United Nations Development Programme, “Human Development Report 2007–2008, Fighting Climate Change: Human Solidarity in a Divided World”, 2007, available at: http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf (last accessed on 25 February 2012), at 16.

⁶ Ibid., at 17.

⁷ Siobhán McInerney-Lankford, Mac Darrow, and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (Washington, DC: The World Bank Study, 2011), at 55.

⁸ United Nations Human Rights Council (HRC) Resolution 10/4, Human Rights and Climate Change, UN Doc. A/HRC/10/L.11, 12 May 2009.

⁹ Ibid.

¹⁰ Ibid. Already a year before, indeed, the Council had made a resolution “Human rights and climate change”, recognising the implications of climate change on the enjoyment of human rights, see HRC Resolution 7/23, Human rights and climate change, UN Doc. A/HRC/RES/7/23, 28 March 2008. In implementation of that resolution, the Council prepared and submitted a study on the relationship between climate change and human rights. Report of the Office of the High Commissioner for Human Rights [hereinafter OHCHR] on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, 15 January 2009. This concerned was also reaffirmed by the more recent resolution of the Council on Human Rights and Climate Change, HRC Resolution 18/22, UN Doc. A/HRC/18/L.26/Rev.1, 28 September 2011.

of the 2005 Inuit human rights petition, against the United States, that climate change was concretely framed as a human rights problem. It was primarily this first international climate change litigation that spurred interest in the role of human rights in combating climate change.

This chapter will examine selected aspects of the relationship between climate change and human rights and will particularly concentrate on those that have emerged with the most potential in influencing climate change governance. We will begin by identifying how climate change, with its dramatic consequences, impacts the enjoyment of human rights. We will focus on two core human rights – to life and health – and will generally examine how international instruments and environmental rights jurisprudence began paying attention as to how these rights are violated by environmental pollution, including climate change. As an example of this approach, we will briefly demonstrate how the Inuit's developed a human rights petition against the United States because of the latter's climate policy.

Human rights are drawn into – or at least should be, as they have not yet played a strong role – the discussion on how the climate change regime functions today and should be reformed for the future. The second section, examines the implications of *290 human rights on the function of the climate change regime, such as how emerging participatory rights in environmental decision-making are reflected in the negotiation process and defines elements of the current climate change regime. The case study on palm oil plantations in the Bajo Aguan illustrates the risk that climate policies may infringe on local communities' rights. We then consider how procedural rights, and human rights more broadly, are to be exercised in the implementation of the climate change regime at the domestic level.

Thereafter, we approach a more challenging question on whether human rights can or should influence the future design of the climate change regime. There are various perspectives as to how and, on which basis the climate change regime should be developed in order to meet the vast challenges ahead. In the chapter's third section, we examine a human rights approach to climate change that is skillfully argued by Professor Caney.¹¹

The final section's concluding remarks will focus on evaluating the pros and cons of using human rights in the struggle against climate change impacts and in having human rights influence the design and operation of the climate change regime. As noted, although it appears as though human rights should play various roles in climate change related decision-making, this is still a very incipient development. Consequently, it is useful to consider the strengths and weaknesses of human rights in climate change governance.

12.2 Climate Change Impacts on the Enjoyment of Human Rights

Despite the fact that the inherent connection between human rights and climate change has, thus far, not been widely addressed by international forums, the general linkage between human rights and the environment has been widely discussed since the 1970s.¹²

¹¹ Simon Caney, "Climate Change, Human Rights and Moral Thresholds", in Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010), 69.

¹² When looking at the evolution of the concept of "a human right to the environment", it can be seen as dating back to the United Nations Stockholm Declaration on Human Environment 1972, which provides that: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." Declaration of the UN Conference on the Human Environment, UN Doc. A/CONF. 48/14/Rev.1, 16 June 1972, principle 1.

Although this debate has not led to a wide-spread recognition of an independent human right to decent or satisfactory environment,¹³ it has spurred a lot *291 of action where existing human rights are regarded as important in protecting the environment, also against climate change consequences. So, despite the fact that a specific universal right to the environment may not have been recognized explicitly,¹⁴ many other substantive human rights, such as the right to life, health, and property, or procedural rights, such as participatory rights or the right to effective remedies, have been applied by human rights monitoring bodies in an environmental context.

Before examining how human rights to life and health are applied by monitoring bodies in cases concerning environmental interference and in relation to human rights violations considering the likely impacts of climate change on the enjoyment of human rights, it is useful to define our meaning of “environmental rights” – the possibility of formulating claims relating to the environment in terms of human rights.¹⁵ There is no general definition of environmental rights, but the concept includes rights that belong to both general human rights law and the instruments of international environmental law.¹⁶

Many international human rights bodies, including those with the authority to hear complaints or resolve disputes, have acknowledged environmental issues in one way or another. These institutions commonly appear to support the idea that environmental degradation may affect human rights in demonstrable ways. However, the precepts and analyses upon which these bodies have acted and articulated the connection between human rights and the environment vary. Despite the fact that no single standard or analytical tool exists for the evaluation of environmental issues within the human rights doctrine, there is a legal precedent for considering these issues within the global institutional framework and, more concretely, region by region.¹⁷ *292

12.2.1 Climate Change Impact on the Right to Life

The right to life is often considered to be one of the most fundamental human rights. International human rights treaties and customary international law affirm states’

¹³ There have been attempts at different forums to create an instrument that would explicitly recognize a human right to the environment. In 1994, Special Rapporteur Fatma Zohra Ksentini delivered her Final Report on Human Rights and the Environment to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (Draft Principles on Human Rights and the Environment, Annex I, UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994). The Report included a Draft Declaration of Principles on Human Rights and the Environment, inter alia, stating that “all persons have the right to a secure, healthy and ecologically sound environment”.

¹⁴ On the other hand, there are a few regional instruments that explicitly recognize the right to environment; See, Additional Protocol to the American Convention on Human Rights, San Salvador, 17 November 1988, 28 *International Legal Materials* (1989), 156, at 161. American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978, 114 *United Nations Treaty Series* (1978), 123, Art. 11; The African Charter on Human and Peoples’ Rights, 27 June 1981, in force 21 October 1986, 21 *International Legal Materials* (1982), 58, Art. 24.

¹⁵ See generally, for example, Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996); and Dinah Shelton, “Environmental Rights”, in Philipp Alston (ed.), *Peoples’ Rights* (Oxford: Oxford University Press, 2001), 189.

¹⁶ See, for instance, Shelton, “Environmental Rights”, supra, note 15; Dinah Shelton, “Environmental Rights in Multilateral Treaties Adopted between 1991 and 2001”, 32 *Environmental Policy and Law* (2002), 70.

¹⁷ Michelle T. Leighton, From Concept to Design: Creating an International Environmental Ombudsperson, *Legal and Normative References: Environmental Human Rights* (Berkeley, Ca.: The Nautilus Institute for Security and Sustainable Development, 1998), at 12.

obligation to not undertake acts that harm or threaten human life. The right to life is guaranteed by nearly all major human rights instruments. For example, Article 3 of the Universal Declaration of Human Rights states, “[e]veryone has the right to life, liberty and security of person.”¹⁸ In a similar vein, Article 6 of the International Covenant on Civil and Political Rights (CCPR) states that “every human being has the inherent right to life.”¹⁹

Many treaties, including the CCPR, attempt to clarify the content of the right to life by only prohibiting the “arbitrary deprivation” or “intentional deprivation” of life. However, in relation to this right, states’ obligations extend beyond the requirement of arbitrary or intentional deprivation of life. There appears to be a general understanding that the right to life itself requires a precautionary approach by governments, which means that government officials must prevent harm or threats to human life in cases where they may be foreseen.²⁰

In its General Comment No. 6, the UN Human Rights Committee has also stated that the right to life “has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.”²¹

In regard to the environmental dimension of the right to life, the UN Human Rights Committee has indicated that state obligations to protect the right to life may ***293** include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics.²² In *E.H.P. v. Canada*,²³ a case concerning the storage of

¹⁸ The Universal Declaration of Human Rights, Paris, 10 December 1948, UN Doc. A/810, Art. 3.

¹⁹ The International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* (1976), 302. Additionally, this right has been recognized in the United Nations Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 *United Nations Treaty Series* (1990), 3, Art. 6; The European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 *United Nations Treaty Series* (1951), 222, Art. 2; the African Charter on Human and Peoples’ Rights, supra, note 13, Art. 4; the American Convention on Human Rights, supra, note 13, Art. 4; and the American Declaration of the Rights and Duties of Man, Bogotá, 2 May 1948, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992), Art. 1.

²⁰ For instance the Inter-American Court of Human Rights has interpreted the obligation as requiring states to exercise their power in a manner that legally ensures the full enjoyment of human rights, including preventing, investigating and punishing any violation of the rights provided by the American Convention on Human Rights. See, e.g., Valesquez Rodriguez Case, Judgement, Inter-Am. Ct. H.R., App. VI, OAS/Ser.L/V/III.19, doc. 13, at 70–71. In its Report on the Situation of Human Rights in Ecuador, the Inter-American Commission on Human Rights stated that “the right to have one’s life respected is not ... limited to protection against arbitrary killing”. Inter-American Commission on Human Rights, Report on the Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96, 24 April 1997, available at: cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm (last accessed on 25 February 2012), at chapter 8.

²¹ Human Rights Committee, General Comment No. 6, The Right to life (Art.6), UN Doc./A/37/40, 30 April 1982, available at: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument) (last accessed on 25 February 2012), item 5.

²² *Ibid.*, para. 5.

²³ In *E.H.P. v. Canada*, a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations. *E.H.P. v. Canada*, Communication No. 67/1980, UN Doc. CCPR/C/OP/1, 1984, at 20, para. 8. Also available at: <http://www1.umn.edu/humanrts/undocs/html/67-1980.htm> (last accessed on 25

radioactive waste near the claimants' home, the UN Human Rights Committee said the case raised "serious issues with regard to the obligation of States parties to protect human life."²⁴

The Inter-American Commission on Human Rights has also recognized the environmental dimension of the right to life by laying down that:

The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.²⁵

Furthermore, when discussing the connection between the physical environment and the right to life, the Inter-American Commission concluded that environmental degradation can "give rise to an obligation on the part of a state to take reasonable measures to prevent the risk to life associated with environmental degradation."²⁶ The Commission noted that human rights law "is premised on the principle that rights inhere in the individual simply by virtue of being human", and that environmental degradation, "which may cause serious physical illness, impairment and suffering on the part of the local populace, [is] inconsistent with the right to be respected as a human being."²⁷

The Inter-American Commission has also dealt with the right to life in a petition brought by the Yanomami community against the Brazilian government.²⁸ In the petition, the Commission explicitly recognized that environmental degradation can violate the right to life. In that case, the Brazilian government constructed a highway through Yanomami territory and authorized the exploitation of the territory's resources. These actions led to an influx of non-indigenous people who brought contagious diseases that spread to the Yanomami, resulting in disease and death.²⁹ The Commission found that, among other things, the government's failure to protect the integrity of Yanomami lands violated the Yanomami's rights to life, liberty, and personal security, which are guaranteed by Article 1 of the American Declaration *294 of the Rights and Duties of Man.³⁰ In this statement, the Commission importantly connected the interference with the lands of indigenous peoples to a violation of their right to life.

Another regional human rights body, the European Court of Human Rights, has found a direct connection between the right to life and environmental interference. Both *Öneryildiz v. Turkey*³¹ and the case of *Budayeva and Others v. Russia*³² were brought before the European Court on the basis of Article 2 (a right to life) and Article 1 of a Protocol (a right to property) to the European Human Rights Convention. In the former case, in addition to the right to life, the Court also found a violation of the right to

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²⁴ Ibid., para 8.

²⁵ Report on the Human Rights Situation in Ecuador, supra, note 19.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Case of Yanomami Indians, Judgement, 1985, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66 doc. 10 rev. 1. Also available at: www.cidh.org/annualrep/84.85eng/Brazil7615.htm (last accessed on 25 February 2012).

²⁹ Ibid., under the section "Background", para. 3.

³⁰ Ibid., under the section "The Inter-American Commission on Human Rights, resolves", para. 1.

³¹ Case of *Öneryildiz v. Turkey*, Judgement, 41 EHRR (2004), at 20.

³² Case of *Budayeva and Others v. Russia*, Judgement, EHRR 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 /2008.

property.³³

The first case concerned a vast waste-collection site in Turkey, which was established in opposition to the Environmental Act and the Regulations on Solid-Waste Control. In April 1993, a methane explosion occurred at a site that was near the slum dwelling area. The explosion was followed by a mudslide, which was caused by pressure and led to the death of 39 people.³⁴ The Court found that the administrative and municipal authorities knew or ought to have known that there was a real and immediate risk to people. Therefore, they had a positive obligation, under Article 2 of the Convention, to take necessary and sufficient preventive measures to protect those individuals. Hence, the Court “unanimously [held] that there has been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant’s close relatives.”³⁵ Additionally, the Court stated that “there has also been a violation of Article 2 of the Convention on its procedural aspect, on account of the lack of adequate protection by law safeguarding the right to life.”³⁶ *295

The facts of the latter case are very similar to those of the first and relate to the alleged negligence of Russian authorities in mitigating the result of the mudslide, which resulted in both deaths and the destruction of property. Similarly, the Court found the violation of substantive and procedural aspects of the right to life.³⁷

It is indisputable that humanity’s ultimate survival is indelibly linked to the state of the Earth’s environment.³⁸ Human rights monitoring bodies have also increasingly recognized situations where environmental destruction may seriously affect human life. It is undeniable that anthropogenic climate change violates the right to life. To start with, climate change is projected to result in increasingly severe weather occurrences, including tornadoes, hurricanes, storm surges, and floods, which may lead to a direct loss of life.³⁹

In these cases, one cannot specify the individuals that will suffer in advance. However, this does not weaken the argument that the actions in question undermine human rights.

³³ In an environmental context, the right to property has been applied quite extensively by the Inter-American Human Rights Court. See, for instance, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement, 31 August 2001, Inter-Am. Ct. HR., (Ser.C), No. 79; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement, 29 March 2006, Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev.; *Yakye Axa Indigenous Community v. Paraguay*, Judgement, 24 August 2010, Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1, at 387; *Moiwana Community v. Suriname*, Judgement, 15 June 2005, Series C No. 124; *Saramaka People v. Suriname*, Judgement, 28 November 2007, Inter-American Court of Human Rights, (ser. C). No. 172. For an extensive analysis of the protection of the property rights of indigenous peoples in international instruments, see Nigel Bankes, “The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments”, 3 *The Yearbook of Polar Law* (2011), 57.

³⁴ For an analysis, see Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Cheltenham: Edward Elgar, 2009), at 201.

³⁵ Item 1 of the considerations of the merits, available at: <http://www.elaw.org/node/5566> (last accessed on 25 February 2012).

³⁶ Item 2, see *Ibid.*

³⁷ See Items 2 and 3 of the consideration of the merits, available at: <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=69032692&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=28166&highlight=Budayeva> (last accessed on 25 February 2012).

³⁸ See generally Prue Taylor, *An Ecological Approach to International Law, Responding to Challenges of Climate Change* (London: Routledge, 1998).

³⁹ Special Report: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, Summary for Policy Makers (2011).

Examples of storm-surge flooding in Bangladesh⁴⁰ and extreme heat waves in Chicago⁴¹ or Western Europe are merely examples of the climatic changes leading to a considerable increase in deaths.⁴²

In its 2009 report on climate change and human rights, the OHCHR, based on the 2007 IPCC assessment, states:

A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. IPCC...projects with high confidence an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development, cardio-respiratory morbidity and mortality related to ground-level ozone. Climate change will exacerbate weather-related disasters which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world. For example, an estimated 262 million people were affected by climate disasters annually from 2000 to 2004, of whom over 98 per cent live in developing countries.⁴³ *296

Climate change, by redrawing the maps of water availability, food security, disease prevalence, population distribution, and coastal boundaries has the potential to exacerbate insecurity and violent conflict on a potentially large scale.⁴⁴ While threats to life are more immediate in some countries and regions than in others, a recent report by the U.S. Center for Naval Analyses argues that climate change acts as a threat multiplier in already fragile regions, exacerbating conditions that lead to failed states and breed terrorism and extremism, and concluded that “projected climate change poses a serious threat to America’s national security.”⁴⁵

⁴⁰ R.F. Mclean and Alla Tsyban, “Coastal Zones and Marine Ecosystems”, in James J. McCarthy et al. (eds), *Climate Change 2001: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2001), at 366–367.

⁴¹ Jonathan A. Patz et al., “The Potential Health Impacts of Climate Variability and Change for the United States: Executive Summary of the Report of the Health Sector of the U.S. National Assessment”, 108 *Environmental Health Perspectives* (2000), 367, at 370.

⁴² For a general overview, See Andrew Haines et al., “Climate Change and Human Health: Impacts, Vulnerability, and Mitigation”, 369 *The Lancet* (2006), 2101.

⁴³ OHCHR, *supra*, note 9, paras. 22–23.

⁴⁴ See, McInerney-Lankford, Darrow and Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, *supra* note 6, at 13. See also, Oli Brown and Alec Crawford, “Rising Temperatures, Rising Tensions: Climate Change and the Risk of Violent Conflict in the Middle East”, 2009, available at: http://www.iisd.org/pdf/2009/rising_temps_middle_east.pdf (last accessed on 26 February 2012). United Nations Environment Programme “From Conflict to Peace-Building: The Role of Natural Resources and the Environment”, 2009, available at: http://postconflict.unep.ch/publications/pcdmb_policy_01.pdf (last accessed on 26 February 2012); Nick Mabey, “Delivering Climate Security: International Security Responses to a Climate Changed World”, 2008, available at: <http://www.tandf.co.uk/journals/spissue/rwhi-si.1.asp> (last accessed on 25 February 2012); Brahma Chellaney, “Climate Change and Security in Southern Asia: Understanding the National Security Implications”, 152 *Royal United Services Institute Journal* (2007), at 63.

⁴⁵ Center for Naval Analyses Corporation, “National Security and the Threat of Climate Change”, 2007, available at: <http://securityandclimate.cna.org/report/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf> (last accessed on 25 February 2012). See also Douglas V. Johnson, “Global Climate Change: National Security Implications”, 2007, available at: <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=779> (last accessed on 26 February 2012).

12.2.2 Climate Change Impacts on the Right to Health

The right to health,⁴⁶ similar to the right to life, is guaranteed by many widely accepted international human rights instruments.⁴⁷ The International Covenant on Economic, Social and Cultural Rights (CESCR) recognizes the right to the “highest *297 attainable standard of physical and mental health.”⁴⁸ The Committee on Economic, Social and Cultural Rights states that this right is indispensable for the enjoyment of other human rights.⁴⁹

As interpreted by the CESCR and other authoritative or adjudicatory bodies, the substantive content of this right includes 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.⁵⁰ Furthermore, the Committee goes on to state that victims of violations of the right to health should have access to remedies at both national and international levels and should be entitled to adequate reparation.⁵¹ These are considered to be the basic determinants of health that, according to the assessment of the World Health Organization (WHO), will be placed at risk due to climate change.⁵²

The only United Nations’ human rights treaty whose text directly refers to environmental issues in relation to the right to health is the United Nations Convention on the Rights of the Child. While recognizing the right of the child to the enjoyment of their highest attainable standard of health, state parties, *inter alia*, shall take appropriate measures to combat disease and malnutrition, “taking into consideration the dangers and risks of environmental pollution.”⁵³

⁴⁶ The World Health Organization, which addresses health concerns in a variety of cultural and social contexts, defines health as “a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity”. Constitution of the World Health Organization, New York, 22 July 1946, in force 7 April 1948, Official Records of the World Health Organization, Vol. 2, preamble, at 100. The definition and application of the universal right to health, then, must account for the complex interplay of physical, mental and social experiences and circumstances, and the varying cultural and social norms used to evaluate them. Michael F. Willis, “Economic Development, Environmental Protection, and the Right to Health”, 9 *Georgetown International Environmental Law Review* (1996), 195–220, at 197.

⁴⁷ The Universal Declaration of Human Rights, *supra* note 17, Art. 25 (1); The European Social Charter, 18 October 1961, revised in May 1996, in force 1999, 529 *United Nations Treaty Series* (1997), 89, Art. 11; The American Declaration of the Rights and Duties of Man, *supra*, note 13, Art. XI; The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), *supra*, note 13, Art. 10.

⁴⁸ The International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 *United Nations Treaty Series* (1996), Art.12.

⁴⁹ The Committee on Economic, Social and Cultural Rights 3 [hereinafter CESCR], General Comment No. 14, The right to the highest attainable standard of health, Un. Doc. E/C.12/2000/4 11 August 2000, paras. 1 and 3.

⁵⁰ *Ibid.*, para. 11. For a discussion on the sources and content of this right, see, P. Hunt, Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, UN Doc. E/CN.4/2003/58, 2003, paras. 10–36.

⁵¹ *Ibid.*, para. 59.

⁵² World Health Organization, “Protecting Health from Climate Change”, 2008, available at: http://www.who.int/world-health-day/toolkit/report_web.pdf (last accessed on 26 February 2012), at 6.

⁵³ CRC, *supra* note 19, Art. 24.

In the context of the state reporting procedure, the UN Committee on the Rights of the Child has issued observations calling for better compliance with Article 24(2) (c) in some of its Concluding Observations. For instance, it recommended that Jordan “take all appropriate measures, including through international cooperation, to prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children and to strengthen procedures for inspection.”⁵⁴ The Committee also expressed concern regarding South Africa and *298 “the increase in environmental degradation, especially as regards air pollution.”⁵⁵ It recommended that South Africa fight environmental degradation, particularly air pollution, by facilitating “the implementation of sustainable development programmes to prevent environmental degradation, especially as regards air pollution.”⁵⁶

Many multilateral environmental agreements acknowledge and address the impact that environmental harms may have on human health.⁵⁷ The UNFCCC, in its definition of adverse effects of climate change, includes “significant deleterious impacts on human health and welfare”, and requires Parties to account for, *inter alia*, health impacts in relevant social, economic, and environmental policies.⁵⁸

The close relationship between environmental integrity and health has been recognized by various studies concerning international human rights. UN Special Rapporteur on human rights and the environment of the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,⁵⁹ Fatma Zohra Ksentini, identified the right to health as a fundamental right and analyzed the effects of the environment on it.⁶⁰ After studying various international human rights documents and national constitutions, she concluded that, under customary international law, “everyone has a right to the highest attainable standard of health.”⁶¹ Furthermore, she came to the conclusion that “in the

⁵⁴ UN Committee on the Rights of the Child, Concluding Observations on Jordan, UN Doc. CRC/C/15/Add.125, at para. 50. Also available at: www1.umn.edu/humanrts/crc/jordan2000.htm (last accessed on 15 January 2012). See UN Committee on the Rights of the Child, Concluding Observations on South Africa, UN Doc. CRC/C/15/Add. 122, 26 January 2000, at para. 30. Also available at: <http://www1.umn.edu/humanrts/crc/southafrica2000.html> (last accessed on 26 February 2012).

⁵⁵ See UN Committee on the Rights of the Child, Concluding Observations on South Africa, *supra*, note 54, at para. 30.

⁵⁶ *Ibid.*

⁵⁷ See e.g. Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 18 *International Legal Materials* (1979), 1442; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1979, in force 5 May 1992, 28 *International Legal Materials* (1979), 656; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 10 September 1998, in force 24 February 2004, 38 *International Legal Materials* (1999), 1; The Stockholm Convention on Persistent Organic Pollutants, Stockholm, 23 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001), 532. See also Need to Ensure a Healthy Environment for the Well-being of Individuals, G.A. Res. 45/94, UN Doc. !/RES/45/94, 14 December 1990.

⁵⁸ United Nations Framework Convention on Climate Change, United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992), 849, Art. 1(1).

⁵⁹ The body has changed its name and is now the Sub-Commission on Promotion and Protection of Human Rights.

⁶⁰ Fatma Z. Ksentini, “Review of Further Developments in the Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment”, UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994, paras. 176–187.

⁶¹ *Ibid.*, para. 176.

environmental context, the right to health essentially implies feasible protection from natural hazards and freedom from pollution.”⁶² *299

The Inter-American Commission on Human Rights has also recognized the close relationship between environmental degradation and the right to health, especially in the context of indigenous peoples. In the *Yanomami case*, aside from the right to life, the Commission recognized that harm to people, resulting from environmental degradation, violated their right to health in Article XI of the American Declaration.⁶³ Additionally, in the *Belize Maya case*, the Commission noted that indigenous people’s right to health and well-being was so dependent on the integrity and condition of indigenous land that “broad violations” of indigenous property rights essentially impacted the health and well-being of the Maya.⁶⁴

The European Court of Human Rights and its case-law as regards Article 8 of the European Human Rights Convention (a right to home and privacy) has established a close connection to the right to health and well-being. There are several cases in the Court that relate to the environmental interference causing health-related problems to applicants.⁶⁵ Based on the study concerning the Court’s jurisprudence, Boyle concludes that states have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health or the enjoyment of private life or property.⁶⁶

There is, by now, an extensive literature pointing to the severe health impacts of anthropogenic climate change.⁶⁷ For example, the Fourth Assessment Report of the IPCC notes that anthropogenic climate change will increase the number of people suffering from disease and injury as a result of heat waves, floods, storms, fires, and

⁶² Ibid. Other rapporteurs of the UN have also found connections between environmental degradation and the right to health. The United Nations’ Special Rapporteur on the right to health, Paul Hunt, noted that the right to health gives rise to an obligation on the part of a State to ensure that environmental degradation does not endanger human health. See P. Hunt, Right of Everyone to the Highest Standard of Physical and Mental Health: Addendum, Mission to Peru, UN Doc. E/CN.4/2005/51/Add.3, 2005, para. 54. A reference to human rights generally in relation to the environment was also made by Special Rapporteur Rodolfo Stavenhagen of the UN Commission on Human Rights, who took particular account of indigenous peoples. He concluded that “the effects of global warming and environmental pollution are particularly pertinent to the life changes of Aboriginal people in Canada’s North, a human rights issue that requires urgent attention at the national and international levels, as indicated in the recent Arctic Climate Impact Assessment”. Rodolfo Stavenhagen, Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, UN Doc. E/CN.4/2005/88/Add. 4, 15 December 2004, para. 94.

⁶³ *Yanomami Indians case*, under the section “The Inter-American Commission on Human Rights, resolves”, supra, note 28, para. 1.

⁶⁴ *Belize Maya, Judgement, 2004*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev.1, at 727, paras 154–156.

⁶⁵ See, for instance, *Lopez Ostra v. Spain*, Judgement, 20 EHRR (1994), at 277; *Guerra v. Italy*, Judgement, 26 EHRR (1998), at 357; *Fadeyeva v. Russia*, Judgement, ECHR (2005), at 376; *Raynor and Powell v. United Kingdom*, Judgement, 12 EHRR (1990), at 355; *Taskin v. Turkey*, Judgement, ECHR 46117/99; *Tatar v. Romania*, Judgement, ECHR, 67021/01. See also two Hatton cases: *Hatton and others v. United Kingdom*, Judgement, 2 October 2001 and 8 July 2003.

⁶⁶ Alan E. Boyle, “Human Rights and the Environment: A Reassessment”, 2010, available at: <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=GccCLNbrmg%3D&tabid=....> (last accessed on 26 February 2012), at 16. Originally published in 18 *Fordham Environmental Law Review* (2008), 471.

⁶⁷ Caney, supra, note 11, at 79.

droughts; increase the range of malaria in some places, while decreases in ***300** others; increase the burden of diarrhoeal diseases; increase cardio-respiratory morbidity associated with ground-level ozone; and increase the number of people at risk of dengue.⁶⁸ Thus, human-induced climate change clearly results in a variety of threats to the human right to health.⁶⁹

The IPCC also predicts that adverse health impacts will be greatest in low-income countries. Across all countries, “the urban poor, the elderly and children, traditional societies, subsistence farmers, and coastal populations’ are at greatest risk.⁷⁰ Health equity is also at risk, as are prospects for achieving the health-related Millennium Development Goals.⁷¹ Overall, negative health effects will be disproportionately felt in Sub-Saharan Africa, South Asia, and the Middle East.⁷² In the Arctic area, as described in relation to the Inuit Petition examined in the following chapter, climate change is already having health-related impacts on indigenous peoples living on the lands.

12.2.3 The Inuit Petition as an Example of a Human Rights Approach to Climate Change

To date, global climate change has most intensively been felt in the Arctic area. Over the past few decades, the average Arctic temperature has risen twice as much as the average global temperature.⁷³ The United Nations Intergovernmental Panel on Climate Change (IPCC) has predicted that Arctic temperatures will increase by 5–7° by 2099, while the Earth’s temperature is predicted to rise by 1.8–4°.⁷⁴

The Arctic Climate Impact Assessment (ACIA) – a comprehensive international evaluation of Arctic climate change and its impact undertaken by hundreds of ***301** scientists – points to dramatic changes in the Arctic environment and Arctic indigenous peoples’ nature-based lifestyle as a result of global climate change. According to the ACIA, over the next 100 years, climate change is expected to accelerate and will contribute to major physical, ecological, social, and economic changes, many of which have already begun.⁷⁵

Many environmental changes, studied and predicted by the ACIA, are already having a direct impact on Arctic indigenous peoples’ traditional lifestyle. Indigenous peoples

⁶⁸ Pachauri and Reisinger (eds), *Climate Change 2007*, supra, note 1, at 48.

⁶⁹ Caney, supra, note 11, at 80.

⁷⁰ Ulisses Confalonieri et al., “Human Health”, in Martin L. Parry et al. (eds), *Climate Change 2007: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2007), at 393. See also Nicholas Stern, “Stern Review on the Economics of Climate Change”, 2006, available at: http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_index.cfm (last accessed on 26 February 2012), part II, chapter 3.

⁷¹ See, McInerney-Lankford, Darrow and Rajamani, *Human Rights and Climate Change, A Review of the International Legal Dimensions*, supra, note 7, at 16. See also World Health Assembly, “Resolution on Climate Change and Health”, 24 May 2008, available at: http://www.who.int/gb/ebwha/pdf_files/A61/A61_R19-en.pdf (last accessed on 26 February 2012).

⁷² OHCHR (2009), supra, note 10, para. 32.

⁷³ Arctic Climate Impact Assessment (ACIA) (Cambridge: Cambridge University Press, 2005).

⁷⁴ See summary for policymakers of the synthesis report of the fourth assessment report of the Intergovernmental Panel on Climate Change, Rajendra K. Pachauri and Andy Reisinger (eds), *Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change – Synthesis Report*, supra, note 1. Also available at: <http://www.ipcc.ch/> (last accessed on 26 February 2012).

⁷⁵ See generally ACIA, supra, note 73.

throughout the Arctic area depend on the land and sea for food and income as well as traditional activities, including hunting, fishing, gathering, and reindeer herding, which are vitally important for indigenous society and culture.⁷⁶ The hunting culture of many Arctic indigenous peoples is particularly endangered. However, climate change will also affect other traditional livelihoods.

For Arctic indigenous peoples, global climate change is an important human rights issue due to their traditional, nature-based way of life, which is often considered to be the crux of the culture of indigenous peoples.⁷⁷ For this reason, in 2005, Sheila Watt-Cloutier, the former president of the Inuit Circumpolar Council (ICC), an organization representing Inuit peoples in four Arctic states,⁷⁸ filed a petition against the United States at the Inter-American Commission on Human Rights, for the damage caused to the Inuit and their rights as a result of global climate change.⁷⁹ This chapter briefly explores the petition with the aim of showing how the present impacts of climate change are already making Arctic indigenous peoples particularly vulnerable by infringing on many of their important human rights.

According to the Inuit petition, the impact of climate change caused by acts and omissions of the United States, violates the Inuit's fundamental human rights, which are protected by the American Declaration of the Rights and Duties of Man and other international instruments. At that time, the petition served as a reminder that ***302** the United States is the world's largest contributor to global warming, which has a damaging effect on the Inuit. As the world's leading consumer of energy, both historically and at the time of the petition, the United States is responsible for the largest amount of cumulative emissions of any state.⁸⁰

The Inuit petition greatly relies on the ACIA and uses the assessment as a scientific basis. The petition points out that, because average annual Arctic temperatures are increasing more than twice as fast as temperatures in the rest of the world, climate change has already seriously impacted the Arctic. This includes the deterioration of ice conditions, a decrease in the quantity and quality of snow, changes in the weather and weather patterns, as well as a transfigured landscape as permafrost melts at an alarming rate, which causes slumping, landslides, and severe erosion in some coastal areas.⁸¹ For instance, in the Shishmaref village in Alaska, many of the houses owned by local Inuit

⁷⁶ Ibid., at 4.

⁷⁷ Indigenous peoples often live in the most vulnerable ecosystems, such as in areas of high biological diversity or in the stark arctic regions. According to estimates made in 1990, around 200 million of the world's 300 million indigenous peoples live in vulnerable ecosystems. See Report of the Commission on Human Rights at its forty-sixth session E/1990/22-E/CN.4/1990/94, 1990, at 8.

⁷⁸ Alaska (USA), Canada, Greenland (Denmark) and the Russian Federation.

⁷⁹ The Inuit petition was submitted by Sheila Watt-Cloutier, the president of the ICC at the time, "with the support of the Inuit Circumpolar Conference", on behalf of all the Inuit of the Arctic regions of the United States and Canada; it is signed by 62 people in addition to Watt-Cloutier. See the Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 7 December 2005, available at: <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> (last accessed on 1 February 2012), at 1. According to the rules of procedure of the Commission, any person, group of persons or non-governmental entity may submit a petition as long as the petition involves an alleged violation of a human right recognized under the IAHR regime. See Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109th Session, 8 December 2000, in force 1 May 2001.

⁸⁰ The Inuit petition, supra, note 79, at 103.

⁸¹ Ibid., at 2.

have been badly damaged and partly fallen into the sea due to erosion and a rise in the sea-level.⁸² Inuit observations and scientific studies consistently document many types of environmental changes. Importantly, the ACIA contains a chapter related to indigenous traditional knowledge and indigenous peoples' observations on climate change.⁸³

According to the petition, several principles of international law guide the application of human rights issues in this case. Most directly, the US membership in the Organization of American States and its acceptance of the American Declaration of the Rights and Duties of Man oblige it to protect the rights of the Inuit.⁸⁴ The petition alleges that diverse impacts of climate change violate several human rights, such as 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.⁸⁵

The petition's legal starting point is that indigenous peoples' human rights are to be interpreted in the context of indigenous culture, which requires the protection of their land and environment.⁸⁶ The petition points out that, in applying rights contained in the American Declaration to indigenous peoples, both the Inter-American *303 Human Rights Court and the Commission have repeatedly emphasized the need to account for the unique context of indigenous culture.⁸⁷ The Commission has stated that, by interpreting the American Declaration as safeguarding the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission respects the very purpose underlying the Declaration, which, as expressed in the preamble, recognizes that "it is the duty of man to preserve, practice and foster culture by every means within his power."⁸⁸ Furthermore, the Commission has stated that "indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival."⁸⁹

According to the petition, the lives and culture of the Inuit demonstrate that indigenous peoples' human rights are inseparable from their environment. Therefore, the

⁸² See BBC News, David Willis, "Sea Engulfing Alaskan village", available at: <http://news.bbc.co.uk/1/hi/world/europe/3940399.stm> (last accessed on 26 February 2012).

⁸³ ACIA, "The Changing Arctic: Indigenous Perspectives", supra, note 73, at 61–98.

⁸⁴ The Inuit petition, supra, note 79, at 5. The United States is not a party to the American Convention on Human Rights, so the Convention cannot be applied to this case. The American Declaration is nevertheless regarded as having become a legally binding instrument through so-called double incorporation. See Thomas Buergenthal, "The Revised OAS Charter and the Protection of Human Rights", 69 *American Journal of International Law* (1975), 828. Additionally, the Inter-American Commission has regarded the Inter-American Declaration as legally binding in its case law. See Douglass Cassel, "Inter-American Human Rights Law, Soft and Hard", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), 393, at 397.

⁸⁵ The Inuit petition, supra, note 79, at 5.

⁸⁶ *Ibid.*, at 70.

⁸⁷ *Ibid.* The petition refers to many cases that will be dealt with in this section.

⁸⁸ Case of Mary and Carrie Dann, Judgement, 27 December 2002, Report No. 75/02, Case 11.140, Inter-Am. C.H.R., 2002, para. 131, quoting the American Declaration of the Rights and Duties of Man. Also available at: <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm> (last accessed on 26 February 2012).

⁸⁹ Report on the Human Rights Situation in Ecuador: Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country, OEA/Ser.L/V/II.96, 27 April, 1997. Available at: <http://cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> (last accessed on 26 February 2012).

preservation of the Arctic environment is “one of the distinct protections required for the Inuit to fully enjoy their human rights on an equal basis with all peoples.”⁹⁰ The petition claims that states, thus, have an international obligation to not degrade the environment to an extent where it threatens the culture, health, life, property, or ecological security of indigenous peoples.⁹¹

The petition serves as a reminder that the Inuit and their culture have developed over thousands of years in relation and response to the Arctic’s physical environment.⁹² The Inuit have, thus, developed an intimate relationship with their surroundings, using their understanding of the Arctic environment to develop tools, techniques, and knowledge that has enabled them to subsist on their scarce environmental resources.⁹³ All aspects of Inuit life depend on Arctic ice, snow, land, and weather conditions. The petition even goes so far as to argue that “the subsistence harvest is essential to the continued existence of the Inuit as a people.”⁹⁴ *304

The Inter-American Commission on Human Rights has clearly recognized that environmental interference with indigenous peoples’ lands may lead to the infringement of their human rights.⁹⁵ So, in principle, at the Commission, it may be assumed that the consequences of climate change could be considered to be an issue of human rights.

On November 16, 2006, the Commission rejected the Inuit petition, stating that “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”⁹⁶ Following a request of the petitioners, the Inter-American Commission decided to hold a public hearing to gather more evidence on the link between global warming and human rights. However, the petitioners’ request modestly states, “[w]e are aware that the

⁹⁰ The Inuit petition, *supra*, note 79, at 72.

⁹¹ *Ibid.*

⁹² The petition refers to Margie A. Gibson and Sally B. Schullinger, *Answers from the Ice Edge: The Consequences of Climate Change on Life in the Bering and Chukchi Seas* (Anchorage, Alaska: Arctic Network & Greenpeace, 1998), at 6.

⁹³ The petition refers to the ACIA Overview report *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge: Cambridge University Press, 2004), at 16.

⁹⁴ The petition refers to the ACIA Overview report, *supra*, note 93, at 94; Alaska Native Science Commission, “National Subsistence Technical – Planning Meeting for the Protection of Traditional & Tribal Life-ways”, 15 April 2003, available at: <http://www.nativescience.org/pubs/reports.htm> (last accessed on 25 February 2012); Alaska Regional Assessment Group, *The Potential Consequences of Climate Variability and Change* (Fairbanks: The Center for Global Change and Arctic System Research, 1999).

⁹⁵ In the planning state of the petition, the ICC was trying to determine whether there might be other suitable bodies for the petition. In the beginning of 2003, the Executive Council of the ICC issued a resolution pondering the issue. The resolution mentions in particular two states, the Russian Federation and the United States, which had not at that time ratified the Kyoto Protocol. See ICC, ICC Executive Council Resolution 2003–1, available at: <http://www.inuit.org/index.asp?lang=eng&num=244> (last accessed on 15 February 2012). Russia, unlike the United States, has ratified the Optional Protocol to the CCPR, so in principle the Russian Inuit could have brought an individual communication to the UN Human Rights Committee. Importantly, however, the Russian Federation ratified the Kyoto Protocol before the Inuit took the legal action against the United States, so a claim against the Russian Federation was no longer so topical (The Russian Federation ratified the Kyoto Protocol on 5 November 2004).

⁹⁶ Letter from Ariel E. Dulitzki, Assistant Executive Secretary to Paul Crowley, Legal Representative for Sheila Watt-Cloutier, 16 November 2006, available at: <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (last accessed on 26 February 2012).

Commission has dismissed that petition and do not seek here to reopen that decision.”⁹⁷ Now that several years have passed, it appears to be obvious that the Commission has decided not to proceed with the case. The pros and cons of the Inuit petition will be discussed in Sect. 12.4. below.

12.3 Human Rights Influence on the Function and Design of the Climate Change Regime

The situation of Northern Honduras provides a dramatic example of the manner in which climate mitigation measures may potentially clash with the enjoyment of basic human rights. The background of the case is as follows. The region of Bajo Aguan is the location of a longstanding land claim dispute caused by the government’s illegal sale of land, previously allocated to peasants, to private entrepreneurs as a result of the agrarian reform in the 1990s. Within the context of a general insecurity in the country since 2009, the situation resulted in a conflict between peasants **305* claiming their land rights and private security firms protecting the interest of large palm oil plantations. As a result, between January 2010 and the winter of 2011, 42 people – primarily peasants, but also journalists – have been assassinated in the context of the conflict. During its field visit in May 2010, the Inter-American Commission on Human Rights already expressed “its concern over the involvement of the armed forces in matters related to citizen security; as such matters should be the exclusive purview of the civilian law enforcement.”⁹⁸ Military presence was, however, increased in the region in August 2011. On 24 October 2011, the Inter-American Commission on Human Rights held a hearing on the situation in Bajo Aguan, during which the situation was described by the petitioners as “the most severe repression and aggression against peasant communities in a sub-region in Central America in the past 15 years.”⁹⁹

In July 2011, the Aguan biogas project, which produces fuel from the output of local palm oil plantations, was registered by the Executive Board (EB) of the Clean Development Mechanism (CDM). This decision was reached despite the involved firms’ direct link to cases of alleged murders. Hence, the project’s registration under UNFCCC flexibility mechanisms, will provide a financial incentive for the continuation of the dispute between entrepreneurs and local peasants. This issue prompted non-governmental and institutional stakeholders to call for a reform of the CDM in order to ensure that the respect of human rights becomes a basic requirement for all projects.¹⁰⁰ This unfortunate example highlights that the convention’s implementation does not guarantee the respect of human rights but may sometimes lead to a gross violation of the rights of local communities. Three approaches may be relied upon in order to mitigate this risk. Firstly, the effective enjoyment of stakeholders’ procedural rights should be guaranteed.¹⁰¹ In the design of the climate regime, the exercise of these rights provides an opportunity for civil society representatives to highlight the risks and flaws inherent in the development of the climate regime. Secondly, the exercise of these rights in the adoption of mitigation and adaptation policies ensures that the measures adopted in the

⁹⁷ Letter from Sheila Watt-Cloutier, Martin Wagner and Daniel Magraw, “Request for a Hearing on the Relationship between Global Warming and Human Rights”, 15 January 2007, available at: http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf (last accessed on 26 February 2012).

⁹⁸ Preliminary Observations of the Inter-American Commission on Human Rights on its visit to Honduras, OEA/Ser.L/V/II., Doc. 68, 18 May 2010, para. 120.

⁹⁹ See report, Claire Grandison, “Human Rights Situation in the Bajo Aguan, Honduras”, 28 October 2011, available at: <http://hrbrief.org/2011/10/human-rights-situation-in-the-bajo-aguanhonduras/> (last accessed on 26 February 2012).

¹⁰⁰ See for instance the European Parliament resolution of 16 November 2011 on the climate change conference in Durban (COP 17), P7_TA-PROV(2011)0504, para. 28.

¹⁰¹ See Svitlana Kravchenko, “Procedural Rights as a Crucial Tool to Combat Climate Change”, 38 *Georgia Journal of International and Comparative Law* (2010), 635.

implementation of the convention do not infringe on the specific rights of local communities. Thirdly, the necessity to respect substantive human rights, when fulfilling obligations resulting from the climate regime, may be explicitly addressed by the working bodies of the regime. *306

12.3.1 Procedural Rights in the Intergovernmental Process

Based on the guidelines for participation of observers under the UNFCCC, public participation allows “vital experience, expertise, information and perspectives from civil society to be brought into the process to generate new insights and approaches” and “promotes transparency.”¹⁰² The situation in the Bajo Aguan region proves, in an extreme manner, that some of the climate regime’s design mechanisms, here the CDM, may lead to consequences that were obviously unexpected. In light of this tragedy and judging by some of the parties’ current disarray, one may expect that their negotiating teams, had they anticipated the consequences of the terms adopted in 2001, would not have accepted the existing modalities and procedures. In this case, one of the flaws of the current modalities and procedures is the fact that substantial time might pass between the consultation of local stakeholders and the registration of a project by the EB, thus potentially allowing a knowledge gap. Effective access to the negotiation process and the stakeholders’ adequate participation may, in many instances, provide a warning when the proposed decisions may risk infringing on the rights of local communities.

The Convention provides that all parties have the obligation to “encourage the widest participation in this process, including that of non-governmental organizations.”¹⁰³ The general extent of observers’ rights to partake in the UNFCCC is defined by the Conference of the Parties.¹⁰⁴ The category of observers includes governments who are not party to the convention (or to the Kyoto Protocol, in relation to processes established under the protocol), intergovernmental organizations, and stakeholders.

The Subsidiary Bodies consider observers’ consultation of and participation to the intergovernmental process on a cyclical basis.¹⁰⁵ Such discussion typically lasts over several sessions and includes a first session that is dedicated to a general statement by interested parties, a consultation round of both parties and stakeholders, via submissions or a workshop, and a final decision by the subsidiary body, as well as a possible endorsement of the decision by the COP itself.

Due to the lack of preparedness of the secretariat, in comparison to the unprecedented level of attendance and a historically high participatory rate of heads of *307 state and government officials, COP 15 in 2009 presented a particular logistical challenge. Once they had arrived at the venue, thousands of delegates who had preregistered in accordance with the established procedures were unable to obtain their accreditation badge and participate in the conference. Furthermore, during the conference’s remaining 3 days, the secretariat decided to severely limit access to the conference (to approximately 2 % of the civil society representatives during the final 48 h) by

¹⁰² UNFCCC, “Guidelines for the Participation of Representatives of Non-governmental Organizations at Meetings of the Bodies of the United Nations Framework Convention on Climate Change”, 2003, available at: http://unfccc.int/files/parties_and_observers/ngo/application/pdf/coc_guide.pdf (last accessed on 25 February 2012), at 3.

¹⁰³ UNFCCC, supra, note 56, Art. 4.1(i).

¹⁰⁴ Ibid., Art. 7.6.

¹⁰⁵ The Subsidiary Body for Scientific and Technological Advice (SBSTA) was mandated to consider this issue as part of its agenda until 1997, after which this fall under the competence of the Subsidiary Body for Implementation (SBI) according to the division of labour between the two bodies. Report of the Subsidiary Body for Scientific and Technological Advice on the work of its 7th session held in Bonn from 25 February to 28 February 1997, FCCC/SBSTA/1997/4, 29 November 1997, para. 37(b).

communicating this decision merely a few hours prior to its implementation. This situation led to an unparalleled denial of the rights of duly accredited members of the public to attend and participate at an intergovernmental meeting and led the Executive Secretary to express his personal regret for this situation.¹⁰⁶ Consequently, civil society's participation has been the subject of intergovernmental negotiation, under the COP and the Subsidiary Body for Implementation (SBI), with the objective of enhancing participation.¹⁰⁷ Additionally, the secretariat has conducted internal reviews and taken concrete steps in preventing such a situation at future sessions. The secretariat has also established the practice of meeting with all constituencies' representatives in order to discuss the modalities and challenges associated with the participation of observers in the process.

12.3.1.1 Access to Negotiations

The observer status is necessary for intergovernmental and non-governmental organizations that are interested in attending meetings and participating in the process. Non-governmental organizations, as well as non-UN intergovernmental bodies, interested in partaking in the negotiating process may submit an application to the secretariat in order to be admitted as an observer organization. In order to be admitted, organizations must demonstrate that they are "qualified in matters covered by the Convention."¹⁰⁸ The first Conference of the Parties, serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP), decided to extend the arrangements related to the participation of observer organizations to the meetings under the Kyoto Protocol of the Convention.¹⁰⁹ Once accredited, an organization may then nominate representatives to attend any negotiation meetings. There is no formal limit on the number of delegates that each organization may originally *308 nominate for a particular meeting. However, in order not to exceed the physical capacity of the venues, the secretariat has implemented since 2010 a quota system through which it allocates a specific number of accreditation badges to each organization proportionally to the number of delegates that they originally accredited.¹¹⁰

According to the procedures' draft rules, the COP meetings are held in public unless otherwise decided.¹¹¹ The rules of procedure provide that the subsidiary bodies'

¹⁰⁶ Message from the Executive Secretary to the Designated Focal Points of observer organizations, YdB/SD/HP/MEN, 23 February 2010.

¹⁰⁷ Report of the Subsidiary Body for Implementation on its 32nd session held in Bonn from 31 May to 9 June 2010, UN Doc. FCCC/SBI/2010/10, 25 August 2010, para. 167.

¹⁰⁸ UNFCCC, *supra*, note 58, Art. 7.6 and Draft Rules of Procedure of the COP and its Subsidiary Bodies, applied provisionally, UN Doc. FCCC/CP/1996/2, 22 May 1996, Rule 7(1).

¹⁰⁹ Decision 17/CP.9, Arrangements for the First Session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, UN Doc. FCCC/CP/2003/6/Add.2, 30 March 2004, and Decision 36/CMP.1, Arrangements for the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol at its First Session, UN Doc. FCCC/KP/CMP/2005/8/Add.4, 30 March 2006, para. 2. (c).

¹¹⁰ In response to concerns expressed by civil society and parties delegates on the impact of the seize of the venue for the participation of observers, the SBI also "encouraged hosts of future sessions of the COP and the CMP to consider, in their planning and organization, the size of the venue and the need to facilitate the participation of all Parties and admitted observer organizations". Report of the SBI (2010), *supra*, note 107, para. 166. Representatives under the age of 18 years old can be registered at the discretion of the secretariat, which allows their participation only for specific event and with additional requirements. See Guidelines for Participation, *supra*, note 99, section A, para. 4.

¹¹¹ Rules of Procedures, *supra*, note 108, rule 30. In practice logistical constraints in the implementation of this rule have been addressed through the use of webcasts and screening of the proceedings of the main sessions of the COP in parallel conference room in order to accommodate a large number of participants.

meetings are to be held in private, but an interpretative footnote comments on this rule, providing that it is to be interpreted in a manner that permits “duly accredited observers to participate in “private” meetings.”¹¹²

However, the main bodies’ plenary sessions, established under the convention (and the protocol), are primarily dedicated to the session’s ceremonial opening, to crosscutting stocktaking, and to the final negotiations during the last hours of each session.¹¹³ Most of the negotiations take place during the sessions in thematic groups established under one or several of the main bodies. Open-ended “contact groups” are the most formal manner of discussions. Observers may attend the contact group meetings unless a third of a session’s present parties request the opposite.¹¹⁴ The presiding officers also have the authority to close a contact group to observers at any given time. In recent years, governmental delegations have complained about their inability to attend all formal meetings taking place simultaneously. Consequently, current rules concerning the scheduling of sessions foresee that only six meetings may be scheduled in parallel, with only two of those as either plenary meetings or contact group.¹¹⁵

Hence, most meetings scheduled during the negotiation sessions are, however, organized as informal working groups. These groups allow for more flexible *309 procedural rules and enable more open discussions between negotiators.¹¹⁶ In the absence of a formal recommendation on the access of observers to informals within the climate change regime, the meetings’ facilitators adopted in most cases a default practice in refusing access to observers. The SBI considered this issue and recommended in June 2011 that the first and last informals shall be open to observers in case the agenda item under discussion is not the object of a contact group, parties retaining the right to close any such meeting.¹¹⁷

Outside the main negotiations sessions, workshops are organized in order to facilitate discussion regarding the negotiations’ technical aspects or in order to foster a more open exchange of views on new approaches. These intersessional workshops typically only involve a limited number of parties and do not constitute an integral part of the official process. The presence of observers at these meetings is particularly relevant as their expertise and perspective may promote new thinking in the discussions.¹¹⁸ As they are organized on an ad-hoc basis, participation rules may vary at the discretion of the chair of the subsidiary body conveying the workshop and depending on its nature and substance. In 2002, the SBI requested that the chairs of the subsidiary bodies and workshops, as well as the secretariat, “promote transparency and observer participation, while safeguarding the effectiveness of workshops” and adapt the number of observers

¹¹² For the reference to a prior discussion by the Intergovernmental Negotiating Committee on this issue, see Report of the Committee on its Eight Session, A/AC.237/41, paras. 105 and 106(c).

¹¹³ For an example of the use by presiding officers of diverse degree of openness towards observers in their meetings, see Joanna Depledge, *The Organization of Global Negotiation: Constructing the Climate Change Regime* (London: Earthscan, 2005), at 218.

¹¹⁴ Decision 18/CP.4, Attendance of Intergovernmental and Non-governmental Organizations at Contact Groups, UN Doc. FCCC/CP/1998/16/Add.1, 25 January 1999, para. 1.

¹¹⁵ Report of the SBI, *supra*, note 107, para. 164.

¹¹⁶ Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2004), at 453.

¹¹⁷ Report of the Subsidiary Body for Implementation on its 34th session, held in Bonn from 6 June to 17 June 2011, UN Doc. FCCC/SBI/2011/7, 19 September 2011, para. 167.

¹¹⁸ Yamin and Depledge, *The International Climate Change Regime*, *supra*, note 116, at 462.

attending based on the nature of each workshop.¹¹⁹ More recently, the SBI called for observers' enhanced participation in workshops and invited the meetings' chairs to "make greater use of observer input"¹²⁰ and "invite, time permitting, observer organizations to make presentations."¹²¹

12.3.1.2 Access to Information

In climate change negotiations, NGOs have access to official documents in a similar manner as governmental delegations. Documents distributed in negotiating rooms are distributed to civil society delegates once all parties are provided with the text. Official documents are also made available on the webpage of the convention as **310* soon as they are released. In the past, the default practice regarding access to non-official documents distributed in closed meetings, such as the latest non-papers proposed by facilitators, was to not release them to stakeholders.¹²² Since 2010, this practice has been reversed so that civil society representatives also have access to informal negotiating texts except when parties or presiding officers explicitly decide otherwise. In order to increase the transparency of the process and in order to allow those who are not attending a meeting to follow the discussions, the secretariat has increasingly utilized webcasts.¹²³

In her assessment of the COPs' legitimacy and the importance of transparency in the body's proceedings, Brunnée noted the role played by the online streaming of these meetings in this context, as well as the publication of semi-official reports "Earth Negotiation Bulletin" by the non-governmental organization IISD.¹²⁴

12.3.1.3 Public Participation

Stakeholders are invited to make interventions in the plenary sessions of the convention's main working bodies. In order to channel the perspective of all stakeholder groups, while limiting the number of interventions, one intervention is traditionally invited from each constituency that is recognized by the secretariat. Yamin and Depledge described this right as the implementation of the right to participate provided in the rule of procedures.¹²⁵ This participatory right is, however, limited. It is not guaranteed in

¹¹⁹ Report of the Subsidiary Body for Implementation on its 17th Session, held in New Delhi from 23 October to 1 November 2002, UN Doc. FCCC/SBI/2002/17, 13 February 2003, paras. 50(c) and (d). In practice, the later request is managed through the involvement of the constituencies, which are often expected to nominate a maximum of one or two representatives among their rank for a given workshop.

¹²⁰ Report of the SBI, *supra*, note 107, para. 178 (a) ii.

¹²¹ *Ibid.*, para. 176.

¹²² For a classification of the various types of official and non-official documents, see Depledge, *The Organization of Global Negotiation*, *supra*, note 113, table 11.1.

¹²³ Good practice and challenges for public participation in international forums: Report prepared by the secretariat in cooperation with the Chair of the Task Force on Public Participation in International Forums, ECE/MP.PP/2011/10, 9 March 2012, para. 40. Webcasts currently covers plenary sessions of the main working bodies of the Convention, and some of the special events and workshops. Webcasts are also used to cover some sessions of the meetings of the Clean Development Mechanism Executive Board and the Joint Implementation Joint Committee. In its conclusions on the enhancement of the participation of observers, the SBI has recently noted this practice and requested the secretariat, "subject to the availability of resources and where appropriate, to increase the number of meetings that are webcast", Report of the SBI, *supra*, note 107, para. 178(e)ii.

¹²⁴ Jutta Brunnée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements", 15 *Leiden Journal of International Law* (2002), at 45.

¹²⁵ See Rules of Procedures, *supra*, note 108, rule 7(2), providing that observers may, upon invitation of the President, participate without the right to vote in the proceedings of any

relation to all the working bodies and statements addressing the Subsidiary Bodies or the Ad-Hoc Working Groups are most of the time at the discretion of the chair and often conditioned by the availability of time. The SBI recently invited presiding officers to “seek opportunities” for such interventions when time allows.¹²⁶ In these bodies, chairs may invite general statements or requests *311 the stakeholders to more specifically address one of the discussed agenda items.¹²⁷ Such an intervention occurs on an ad-hoc basis upon the invitation of the meeting’s facilitator, and allows for more meaningful participation as it enables delegates to directly respond to ongoing proceedings.

Written submissions are often invited by working bodies in between sessions in order to provide views and information that are useful for an upcoming discussion.¹²⁸ In 2004, the SBI agreed that the calls for submission would be extended to stakeholders “where appropriate and on the understanding that such submissions would not be issued as official documents, but would be made available on the secretariat web site.”¹²⁹ In 2011, in responding to concerns expressed by NGO representatives on the lack of accessibility of their submission to the UNFCCC website, the SBI requested that the secretariat, when feasible, “post submissions from observer organizations on the UNFCCC website in a way that makes them accessible to Parties.”¹³⁰ During the sessions, written materials may only be distributed at organizations’ exhibits or, if submitted in advance, at a dedicated counter. The distribution of all other written material is officially prohibited.¹³¹ Observer organizations are also allowed to organize a more visual demonstration within the venues of the negotiations in order to attract the attention of the negotiators and/or the media on a given issue under negotiation. In order to be authorized, these actions must be registered in advance, must respect the rules defined by the participatory guidelines, as well as other requirements indicated by the secretariat.¹³²

*312 In order to provide additional informal opportunities, expertise, and input, the UNFCCC secretariat established additional channels for participation that are based on

session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object.

¹²⁶ Report of the SBI, *supra*, note 107, para. 178(a)ii.

¹²⁷ In the past, observers were requested to submit their interventions in advance to facilitate interpretation. Taking into account concerns expressed about the difficulties to address most recent issues on the agenda due to this rule, this practice was suspended in 2011. In more limited cases, civil society delegates are sometimes invited to contribute directly to the discussions of contact groups.

¹²⁸ The faculty to provide written submission is the only form of participation authorized for non-accredited organizations as calls for submissions might in exceptional cases be open to any relevant stakeholder when explicitly provided by a working body, see for instance, Article 6 of the Convention: Draft conclusions proposed by the Chair, UN Doc. FCCC/SBI/2011/L.6, 15 June 2011, para. 2.

¹²⁹ Report of the Subsidiary Body for Implementation on its 12th Session, held in Bonn from 16 June to 25 June 2004, UN Doc. FCCC/SBI/2004/10, 31 August 2004, para. 104.

¹³⁰ Report of the SBI, *supra*, note 107, para. 178(d)i.

¹³¹ UNFCCC, “UN Security Guidelines related to Media Actions, Distribution of Publicity Materials, and Use of UN Emblem at the UNFCCC Conferences”, available at: http://unfccc.int/files/parties_and_observers/ngo/application/pdf/un_security_guidelines.pdf (last accessed on 25 February 2012), at 1.

¹³² These guidelines for participation were established by the secretariat based on the general UN guidelines and in consultation with NGOs representatives. NGOs have raised concerns, for instance, against the systematic prohibition of actions naming the World Bank, as potentially constitutive of harassment. See Report of the Compliance Committee on its 35th meeting, ECE/MP.PP/2011/10, 9 March 2012, para. 111. The UN security and the secretariat retain the authority to exclude provisionally or definitely any delegates or organizations breaching the codes of conduct. Guides for Participation, *supra*, note 102.

the experience of other UN fora. Accredited organizations can apply in advance in order to obtain an exhibit within the conference venues. The possibility to organize side events during the session provides an additional means for stakeholders to share their views. While governments can also apply for side events and exhibits, the UNFCCC secretariat guarantees that a minimum number of both are allocated to civil society organizations in order to enhance their participation.

12.3.1.4 The Role of the Aarhus Convention and Its Task Force on Public Participation in International Forums

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the “Aarhus Convention”)¹³³ constitutes the most advanced international agreement providing procedural rights in environmental matters, to date. While most of the convention’s obligations apply at the domestic level, the convention also considers the importance of the implementation of its principles in international forums.¹³⁴ This provision has led to the adoption of the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums¹³⁵ and to the creation of a dedicated Task Force.¹³⁶ Considering that over 40 UNFCCC parties are also party to the Aarhus Convention, their obligations under the latter convention are relevant in the context of the definition of the role and rights of stakeholders in the climate regime.

In June 2010, the Secretariat of the Aarhus Convention organized a specific discussion with governmental representatives, stakeholders, and a liaison officer of the UNFCCC secretariat on the case study of promoting the principles of the Aarhus Convention in the lead up to, during and after the United Nations Climate Change Conference 2009, Copenhagen. The case study concluded with 13 concrete recommendations.¹³⁷ In its June 2010 synthesis report on ways to enhance the engagement *313 of observer organizations, the UNFCCC secretariat noted that many submissions from parties and non-governmental organizations referred to the Almaty guidelines and the recommendations of the June 2010 workshop.¹³⁸ In spring 2011, the Task Force organized a second workshop, on the theme of “Making Aarhus work in international forums”, with a session that was fully dedicated to the promotion of the Aarhus Convention’s principles in the context of the 2010 Cancun Climate Conference.

On the basis of the consultation with intergovernmental organizations and of the

¹³³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999), 515.

¹³⁴ *Ibid.*, Art. 3.7.

¹³⁵ Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, UN Doc. ECE/MP.PP/2005/2/Add.5, 20 June 2005, at 4.

¹³⁶ Decision II-4, Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/2005/2/Add.5, 20 June 2005, para. 5, and renewed mandate Decision III-4, Promoting the Application of the Principles of the Aarhus Convention in International Forums, UN Doc. ECE/MP.PP/2008/2/Add.6, 13 June 2008, para. 2.

¹³⁷ Excerpts from the Chair’s Summary of the Workshop on Experiences of promoting the application of the principles of the Aarhus Convention in international forums, UN Doc. ECE/MP.PP/WG.1/2011/3, 25 January 2011, Annex, para. 8. Three of these recommendations were included in the report of the chair of the task force, which was taken note by the Working Group of the Parties. Decisions and Major Outcomes as adopted by the Working Group at its twelfth meeting, Aarhus Convention WGP-12/Inf.5, 2 July 2010, Item 5 (b) e-g.

¹³⁸ Draft conclusions proposed by the SBI Chair, *supra*, note 135.

information shared during its meetings, the secretariat of the Aarhus Convention prepared a report on “Good practice and challenges for public participation in international forums.”¹³⁹ The report quotes the UNFCCC procedures as examples of good practices in terms of public participation and access to information several times. However, it notes challenges regarding the volume of participating NGOs, the need for members’ capacity building, as well as limits to the freedom of expression and to peaceful assembly at meetings of the climate change regime.¹⁴⁰

12.3.2 Procedural Rights in the Implementation of the Convention

12.3.2.1 Procedural Rights in Domestic Climate Policies

In relation to their climate policies, the Convention refers to the obligation of parties to:

[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:

- (ii) public access to information on climate change and its effects;
- (iii) public participation in addressing climate change and its effects and developing adequate responses.¹⁴¹

The Kyoto Protocol reiterates the duty of its parties to “cooperate in and promote at the international level” public access to information.¹⁴² A country-driven work programme was adopted in 2002 in order to facilitate the cooperation and implementation of the Article 6 of the convention.¹⁴³ While the work programme *314 is primarily focused on other themes covered by Article 6, it suggests that parties could, in the implementation of their obligations under the Convention, take the following steps:

- (h) Seek opportunities to disseminate widely relevant information on climate change;
- (i) Seek input and public participation, including participation by youth and other groups, in the formulation and implementation of efforts to address climate change and encourage the involvement and participation of representatives of all stakeholders and major groups in the climate change negotiation process;
- (j) Inform the public about causes of climate change and sources of greenhouse gas emissions, as well as actions that can be taken at all levels to address climate change.¹⁴⁴

Parties are also invited to report, in their national submissions, of activities undertaken in the frame of this programme and to highlight challenges and best practices. The work programme was renewed in 2007 and the definition of its scope, in relation to public access to information and public participation, was then further defined.¹⁴⁵ The adoption of a new version of the work programme is expected at the COP18 in 2012.¹⁴⁶ However, contrary to the recognition of the fundamental nature of procedural rights, it is striking

¹³⁹ UNECE Report on Good practice and challenges for public participation in international forums, *supra*, note 120.

¹⁴⁰ *Ibid.*, paras. 100, 110 and 111.

¹⁴¹ FCCC Art. 6(a). Article 6 also addresses education, public awareness, training and international cooperation.

¹⁴² Kyoto Protocol to the United Nation Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 March 1998, 37 *International Legal Materials* (1998), 22, Art. 10(e).

¹⁴³ Decision 11/CP.8, New Delhi Work Programme on Article 6 of the Convention, UN Doc. FCCC/CP/2002/7/Add.1, 28 March 2003, at 23.

¹⁴⁴ *Ibid.*, para. 15.

¹⁴⁵ Decision 9/CP.13, Amended New Delhi Work Programme on Article 6 of the Convention, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008, paras. 14 and 15.

¹⁴⁶ See Draft Conclusions of the SBI chair, *supra*, note 126.

that the language used in Article 6 of the Convention and Article 12 of the Kyoto Protocol is not mandatory. These provisions have, nevertheless, served as a legal basis for domestic litigation.¹⁴⁷ The Office of the High Commissioner for Human Rights (OHCHR) noted that access to information and public participation are of “key importance in efforts to tackle climate change.”¹⁴⁸ It further reaffirmed that the right to participate in decision-making is implied in the right to “take part in the conduct of public affairs” protected by the International Covenant on Civil and Political Rights,¹⁴⁹ and the rights of children and indigenous peoples under specific conventions.¹⁵⁰ The importance of public participation is acknowledged in the Convention’s text, which broadly defines the modalities for the participation of observers to the intergovernmental process.¹⁵¹ *315

12.3.2.2 Procedural Rights in Flexibility Mechanisms: The Example of CDM

This subsection only addresses the issue of the exercise of procedural rights in the project cycle established under the CDM.¹⁵² The effective exercise of procedural rights of stakeholders is particularly important in the context of the CDM due to its particularly layered governance structure of the delegation of administrative authorities. Firstly, the COP, which directly represents the parties, delegates management authority to the Executive Board of the CDM, an intergovernmental body especially created. The CDM Executive Board then delegates some regulatory functions, including the tasks of validation and verification of CDM projects, to private certifiers known as Designated Operating Entities (DOEs). In international governance, the distance between elected national representatives and agents, to which regulatory authority is delegated, affects the governance models legitimacy.¹⁵³ This delegation raises additional legitimacy issues given the discrepancy between the absence of a formal status of non-state actors as subjects of international environmental law in comparison to the increasing functions performed by these actors.¹⁵⁴ Activities, undertaken by private regulators in the context of the CDM, are susceptible to indirectly affect the rights of third parties and local communities as exemplified by the Bajo Aguan case where their decisions may provide positive incentives for economic actors to engage in activities that potentially infringe on the rights of a local community’s members. In this context, all stakeholders’ adequate enjoyment of their procedural rights is particularly important to the legitimacy of the governance of the CDM.

Access to Information

In order to be formally accredited under the DOE status, a certifier is required to make

¹⁴⁷ See for instance the Ukrainian NGO “Environment People Law” that asked its domestic courts to force the government to make publicly available information regarding its climate change policies, available at: <http://epl.org.ua/en/environment/climate-change/cases/> (last accessed on 25 February 2012).

¹⁴⁸ Report of the OHCHR on the relationship between climate change and human rights, supra, note 10, paras. 78 and 79.

¹⁴⁹ Ibid., para. 79, referring to ICCPR, Art. 25.

¹⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 13 September 2007, Art. 19 and CRC, supra, note 19, Art. 12.

¹⁵¹ FCCC, Art. 7.6.

¹⁵² Discussion of aspects related to access to information and public participation in the governance of the Clean Development Mechanism has voluntarily been omitted from this chapter for the sake of brevity.

¹⁵³ Daniel Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006), 1502.

¹⁵⁴ See on this issue Asher Alkoby, “Non-State Actors and the Legitimacy of International Environmental Law”, 3 *Non-State Actors and International Law* (2003), at 25.

information related to its internal governance, functioning, and expertise publicly available.¹⁵⁵ The CDM Executive Board is responsible for maintaining a publicly available and updated list of the status of all DOE, where each DOE is responsible for the maintenance of an updated list of all projects for which it has been contracted.¹⁵⁶ The communication of additional project-specific information is ***316** also required from certifiers in relation to every project for which they have been contracted. The procedures of the CDM generally state that the DOE should make all information publicly available provided by the project participants, except information marked as confidential.¹⁵⁷ The procedures further define the content of this general obligation with regard to both stages at which the DOE may intervene. In relation to a validation phase, the DOE is responsible to make both the project design documents and its validation report available to the public.¹⁵⁸

Public Participation

Stakeholders' consultations, in relation to specific projects, are organized via two different processes and various geographic scopes. The primary participatory channel for local stakeholders to the project cycle consists of their involvement in local consultations, which the project participants are requested to organize during the design of the project. The report of this consultation should be included in the information transmitted by the project participants to the DOEs during the validation of the project.¹⁵⁹ The registration documents should include the project participant's description of the steps taken in inviting public comments, as a summary of the comments, and a report on how the received comments have been evaluated.

On a global level, stakeholders and UNFCCC-accredited organizations are invited to provide comments through the "global stakeholders consultations" managed by the DOE. Global stakeholders consultations are initiated by the DOE's publication of the project design document's non-confidential elements, after which stakeholders are invited to submit comments.¹⁶⁰ The DOE validation report must provide information on how each comment has been duly addressed throughout the process.¹⁶¹ However, once the project has been registered, there is no formal and automatic opportunity for stakeholders to play a role in relation to the DOE's verification of the emissions reduction resulting from a project. Stakeholders can only then attempt to persuade parties to the project or members of the CDM Executive Board to trigger the review of the request for issuance of Certified Emissions Reductions. Such a review may, however, only address cases of fraud, malfeasance, and the incompetence of the DOE.¹⁶²

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Access to a Review Process

The right to an adequate access to judicial remedies constitutes the third pillar of procedural rights. The absence of procedures enabling individuals and private entities to

¹⁵⁵ Decision 3/CMP.1, Modalities and Procedures for a Clean Development Mechanism as defined in Article 12 of the Kyoto Protocol, Annex, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, para. 1(g).

¹⁵⁶ Ibid., para. 27 (f).

¹⁵⁷ Ibid., para. 27 (h).

¹⁵⁸ Ibid., para. 40. This requirement is however more limited at the verification phase as DOEs are only required to make publicly available its verification report. Ibid., para. 62 (h).

¹⁵⁹ Ibid., para. 37 (b).

¹⁶⁰ Ibid., para. 40 (c).

¹⁶¹ See Procedures for processing and reporting on validation of Clean Development Mechanism project activities (Version 03), CDM-EB-50, Annex 48, para. 12.

¹⁶² Ibid., para. 65.

directly challenge decisions reached by intergovernmental institutions is a rising issue in public international law due to the multiplication of instances in which decisions, taken at the international level, directly target individuals.¹⁶³ Currently, only parties may appeal to the decision of the COP/MOP to the enforcement branch of the compliance committee,¹⁶⁴ while such mechanism do not currently exist for decisions made by its subsidiary body.¹⁶⁵

The CDM Modalities and Procedures request DOEs to establish internal review procedures and to make “their procedures for handling complaints, appeals and disputes” publicly available.¹⁶⁶ In addition to these internal procedures, the CDM Executive Board also established an external process for handling complaints against the DOEs, to which any stakeholder who has participated at a global consultation may appeal.¹⁶⁷ In such a case, the Executive Board would organize a contradictory procedure, which could eventually lead to the suspension of the DOE.

The issue of the need for a legal standing for various actors in a review process was already identified by academics as a potential issue before the adoption of the Marrakech Accords.¹⁶⁸ At the COP15, the COP/MOP requested that the CDM Executive Board proposes, in consultation with stakeholders, procedures for appeals *318 against CDM Executive Board decisions “that are brought by stakeholders directly involved, defined in a conservative manner.”¹⁶⁹ While this request does not specifically define the scope of the legal standing in this process, the word use specifically indicates that the COP/MOP expects that the review processes’ procedures would strike a balance between the processes’ openness and the safeguard of the mechanism’s effectiveness. The CDM Executive Board developed a recommendation

¹⁶³ Charlotte Streck and Jolene Lin note the examples of the UN Security Council with regards to individuals directly affected by individual sanctions, and the Court of Arbitration for Sport in relation to decisions adopted by the World Anti-Doping Agency. Charlotte Streck and Jolene Lin, “Making Markets Work: A Review of CDM Performance and the Need for Reform”, 19 *European Journal of International Law* (2008), 428. For further analogies with other administrative review processes established in relation to decisions adopted by international institutions, see also the elements drawn from six other international mechanisms by the FCCC secretariat, Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism, UN Doc. FCCC/TP/2011/3, 17 May 2011. The processes concerned are mentioned in para. 11.

¹⁶⁴ Decision 27/CMP.1, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, UN Doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006, annex, section VII.

¹⁶⁵ Christiana Figueres and Charlotte Streck, “A Post-2012 Vision for the Clean Development Mechanism”, in David Freestone and Charlotte Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (Oxford: Oxford University Press, 2009), at 575.

¹⁶⁶ CDM Modalities and Procedures, supra, note 155, Appendix A, para. 1(g)vi. The standards for the accreditation of DOEs also contains a second reference to such processes, requesting from applicant entities to communicate their procedures to allocate responsibility in relation to the handling of complaints, Ibid., para. 1(e). The CDM accreditation standards for DOEs further develop on the content of these requirements, elaborating on each of these three types of contention processes. Clean Development Mechanism Accreditation Standard for Operational Entities (Version 02), CDM-EB-56, 17 September 2010, Annex 1, para. 133.

¹⁶⁷ Ibid., Procedure for accrediting Operational Entities by the Executive Board of the Clean Development Mechanism, (Version 10.1), Annex 2, Appendix 3.

¹⁶⁸ Peggy R. Kalas and Alexia Herwig, “Dispute Resolution under the Kyoto Protocol”, 27 *Ecology Law Quarterly* (2000), at 121.

¹⁶⁹ Decision 2/CMP.5, Further Guidance Relating to the Clean Development Mechanism, UN Doc. FCCC/KP/CMP/2009/21/Add.1, 30 March 2010, para. 42.

for an appeal procedure of its decisions, which interpreted the reference to “stakeholders directly involved, defined in a conservative manner” as only encompassing the economic entities involved in a project.¹⁷⁰ Due to a lack of consensus among the parties on the proposal contained in this recommendation, negotiations continued in 2011.¹⁷¹ A technical paper, issued by the secretariat, noted that the decision, over the scope of the legal standing, would have implications “for issues such as environmental integrity, legitimacy and confidence as well as for caseload, the efficiency of the appeal mechanism and the possibility of vexatious or frivolous claims.”¹⁷² Contrary to the draft procedures proposed by the Executive Board, the paper also refers to the role that stakeholders could play in the process, suggesting that the appeal mechanism may have the possibility to solicit, at its own discretion, views from stakeholders previously engaged in the project cycle.¹⁷³ Since parties could not agree on the terms of this appeal at the COP17, a decision on the scope of the appeal offered to the CDM Executive Board decision remains pending and may be decided in 2012.

12.3.3 The Respect of Substantial Human Rights in Climate Policies

The discussion regarding the need for the respect of substantial human rights in the implementation of the framework convention is a more recent phenomenon. Concrete examples, such as the case of the Bajo Aguan palm oil project, have raised the regime participants’ awareness of the potential importance of considering this issue. In the case of the Bajo Aguan, the project was approved by the CDM Executive Board despite NGOs having brought to its attention the resulting violation of local communities’ rights. Nonetheless, the Executive Board certified the project on the *319 basis that the project respected all requirements defined by the modalities and procedures of the CDM at the time of the submission of the registration documents. The project applicants’ respect for human rights does not constitute a criteria that the CDM Executive Board is currently mandated to consider in its decision-making processes. It also lacks the capacity to review or withdraw certification and to suspend the transfer of credits if such circumstances are brought to its knowledge. The Kyoto Protocol definition of the CDM as projects assisting non-Annex 1 parties to achieve sustainable development¹⁷⁴ could provide an avenue for the introduction of a human rights criterion in the definition of projects’ requirements. However, CDM modalities and procedures provide that national authorities are competent in interpreting the notion of “contribution to sustainable development.”¹⁷⁵

The risk that climate change mitigation and adaptation measures may infringe on the exercise of human rights was only acknowledged by the COP in 2010. The Cancun agreements provide that the COP “emphasizes that Parties should, in all climate change-related actions, fully respect human rights.”¹⁷⁶ This provision was echoed by the

¹⁷⁰ 2010 Annual Report of the EB to the CMP, UN Doc. FCCC/KP/CMP/2010/10, 3 November 2010, Annex II.

¹⁷¹ Decision 3/CMP.6, Further guidance relating to the clean development mechanism, UN Doc. FCCC/KP/CMP/2010/L.8, 10 December 2010, para. 18.

¹⁷² UNFCCC, Technical Paper: Procedures, Mechanisms and Institutional Arrangements for Appeals against the Decisions of the Executive Board of the Clean Development Mechanism, UN Doc. FCCC/TP/2011/3, 17 May 2011, para. 131.

¹⁷³ *Ibid.*, para. 132.

¹⁷⁴ Kyoto Protocol, Art. 12.2.

¹⁷⁵ CDM Modalities and Procedures, *supra*, note 155, para. 40(a).

¹⁷⁶ Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para. 8. For an insider account of the negotiations of such right-based language in the climate change process, see for instance Kravchenko, “Procedural Rights as a Crucial Tool to Combat Climate Change”, *supra*, note 101.

Human Rights Council, which “urged States to take human rights into consideration when developing their environmental policies.”¹⁷⁷ A more specific safeguard was defined in the context of the Reduction of Emissions from Deforestation and forest Degradation (REDD), the Cancun Agreements calling for the [r]espect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples.¹⁷⁸

12.3.3.1 Role of the HRC in Raising Awareness on Interlinkages at the UNFCCC

The Human Rights Council has periodically considered the inter-linkage between human rights and climate change since 2008.¹⁷⁹ The Council has placed a particular emphasis on working together with the UNFCCC secretariat and in informing *320 UNFCCC parties of its own proceedings. The Council’s resolutions request the Office of the High Commissioner on Human Rights to consult the UNFCCC secretariat when collecting information.¹⁸⁰ It also repeatedly requested that the OHCHR to release the outcomes of the discussions and workshops organized by the Human Rights Council on this issue to the UNFCCC COP.¹⁸¹ These efforts have partly resulted in the Ad hoc Working Group on Long-term Cooperative Action taking note of the resolution of the 10/4 Council and quoting, in the outcome document’s preamble, the recognition by the Council that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability.¹⁸²

On the other hand, the Human Rights Council also recognized the role of the UNFCCC in contributing to the protection of human rights. In its report on the implication of climate change for the exercise of human rights, the Council noted that effective international cooperation to enable the “full, effective and sustained implementation of the UNFCCC in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts.”¹⁸³

12.4 Human Rights as Influencing the Design Principles of a Possible New Climate Regime

There are also scholars who argue that human rights should have a bearing on the climate change regime and the currently standing regime cannot stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous

¹⁷⁷ HRC Resolution 16/11, Human Rights and the Environment, UN Doc. A/HRC/RES/16/11, 12 April 2011. The resolution also noted the human right language contained in the Cancun Agreements.

¹⁷⁸ Decision 1/CP.16, supra, note 176, Appendix 1. 2(c), Guidance and safeguards for 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.

¹⁷⁹ See HRC Resolution 7/23, supra, note 10.

¹⁸⁰ Ibid., para. 1.

¹⁸¹ HRC Resolution 10/4, supra, note 8, para. 2 and HRC Resolution 18/22, supra, note 10, para. 4(b).

¹⁸² Decision 1/CP.16, supra, note 176, preamble.

¹⁸³ HRC Resolution 18/22, supra, note 10.

anthropogenic interference with the climate system”, the objective of the climate regime.¹⁸⁴ Perhaps, in this respect, Professor Caney has made the most credible argument.¹⁸⁵ Firstly, he identifies that there is no scientific uncertainty regarding the radical impact of climate change on human rights: some of these have already occurred, some will concretize in time. Although there may be uncertainty as to how climate change will violate some human rights, Caney focuses on the most modest and widely accepted interpretations of human rights – to life, health, and subsistence – and how these are and will be violated by climate change. For example, *321 he notes that there may be controversies surrounding the human right to life, but not in terms of its very core – all persons have a human right to not be arbitrarily deprived of their life – as prescribed by the International Covenant on Civil and Political Rights (ICCPR).¹⁸⁶ As he argues, this formulation of the right to life does not make the possibly contentious claim that each person has a positive right to have their life saved from all kinds of threats because it only insists on arbitrary loss of life.¹⁸⁷

Caney points to the continuing loss of life caused by climate change, but especially those projected by science. He contrasts a human rights approach to various versions of cost-benefit analysis on how to justly allocate burdens over climate change. The general problem with cost-benefit models in re-designing the way that mitigation burdens should be allocated is that they have a hard time moving beyond nation-states because, even if allocation were to take place on a per capita basis, it is impossible to account for large differentiation within states; surely, it is unjust and unreasonable to expect poor Indians to shoulder the same mitigation burden as the wealthier ones. Although there is potential in making this distinction – like Henry Shue’s differentiation between subsistence/survival emissions (GHG’s that are used to fulfil basic human needs must be differentiated from those aiming to perpetuate luxurious lifestyles) –this model remains based on Gross Domestic Product (GDP) and, thus, cannot examine vulnerability beyond or within states, even if it can differentiate between nation-states.¹⁸⁸ Caney’s “human rights as thresholds” requires differentiation between human beings within states, as climate change will not affect the enjoyment of basic human rights of all, but only some people within countries and in many different ways. The human rights approach, thus, has the potential to differentiate the burdens of mitigation and adaptation both between nation-states and within them in a more nuanced manner.

It is important to note that, in Caney’s approach, those suffering from climate change driven human rights violations, have a right to compensation in the case that their human rights are violated. This is a missing aspect of the current climate change regime, which only emphasizes adaptation to climate change consequences and avoids the discussion of responsibility from damage caused by climate change.¹⁸⁹ *322

¹⁸⁴ FCCC Art. 2.

¹⁸⁵ Caney, “Climate Change, Human Rights and Moral Thresholds”, supra, note 11.

¹⁸⁶ FCCC, Art. 6 (1).

¹⁸⁷ Caney, “Climate Change, Human Rights and Moral Thresholds”, supra, note 11, at 76.

¹⁸⁸ Henry Shue, “Subsistence Emissions and Luxury Emissions”, 15 *Law & Policy* (1993), 39; another well-known proposal is so-called Contraction and Convergence (C&C), proposed originally by the Global Commons Institute. The idea is first that future total of greenhouse gas emissions from human sources is decreased over time to near zero-emissions within a specified time-frame (contraction). To achieve this, global per capita average of emissions arising under the contraction rate is chosen (convergence), which thus varies in accordance with states per capita emissions. See GCI, “Contraction and Convergence: Climate Justice without Vengeance”, available at: <http://www.gci.org.uk/contconv/cc.html> (last accessed on 25 February 2012).

¹⁸⁹ However, the new Work Programme on Loss and Damage established by the Cancun agreement does consider some of these issues. It does not address state responsibility as such but only “approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable”, Decision 1/CP.16, supra, note 176, para. 26.

This has led e.g. small island states to make declarations to the effect that their participation in the UNFCCC and the Kyoto Protocol does not mean that they renounce their rights under general international law to invoke state responsibility over environmental damage caused by climate change.¹⁹⁰

12.5 Concluding Remarks – Evaluation

As reviewed in this chapter, there are many ways that human rights and climate change are interconnected. Yet, as Stephen Humphrey's rightly notes, the climate change regime appears to avoid the use of human rights language and climate change does not figure into the human rights discourse.¹⁹¹ There are many reasons for this – for instance, the well-documented phenomenon of fragmentation whereby various sub-disciplines of international law increasingly function independently of each other – but the more interesting question is whether it is desirable or not to have human rights and the climate change (regime) to more actively interact. It is useful to focus on evaluating the pros and cons of this inter-relationship in the order that we have studied each question: whether it makes sense to use human rights in the struggle against climate change impacts, as manifested by the Inuit Petition; what, if any, should be the consequences of human rights to the functioning of the climate change regime; and, whether human rights should, in effect, guide the development of a new type of international policy to combat climate change.

12.5.1 Evaluation

The Inuit petition showed the strengths and weaknesses of using a human rights petition to combat climate change. Even if the Inuit petition was clearly well prepared, it appears that despite the Inter-American Commission's fairly innovative manner of construing human rights requirements, finding that the US is infringing on the Inuit's various human rights via its irresponsible climate policy was a perspective that was just too extraordinary for the Commission. Even in the unlikely case *323 that the petition had been found meritorious, it would have hardly achieved its aim: the effective protection of the rights of the Inuit. It is difficult to see how the Commission could so dramatically affect the climate change policy of the United States that the major climatic changes, that are already beginning to take place in the Arctic, would not threaten the traditional livelihoods of the Inuit. The case also demonstrates – at least currently – that traditional human rights mechanisms cannot be effectively used in protecting the rights of indigenous, as well as other peoples and individuals, from global environmental interference, such as climate change. We must also be critical of the potential consequences of the Inuit petition; given that it did not even proceed to the merits' stage in the Inter-American Commission, it cannot be ruled out as though it has also had a disillusioning effect on the use of human rights in the fight against climate change.

On the other hand, even if it presently seems that it is difficult to address climate change concerns via human rights petitions, cases such as the Inuit petition importantly challenge human rights bodies to open up new ways of thinking and interpreting the articles of human rights instruments that were not originally created to handle the

¹⁹⁰ For instance, Nauru made the following declaration upon ratification of the Kyoto Protocol: “Nauru declares its understanding that the ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change”, see at UNFCCC, “Declarations and Reservations by Parties – Kyoto Protocol: Nauru”, available at: http://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php (last accessed on 25 February 2012).

¹⁹¹ Stephen Humphreys, “Conceiving Justice: Articulating Common Causes in Distinct Regimes”, in Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2009), 299.

complex impacts of global climate change. In a similar vein, research on human rights and climate change increased greatly after the Inuit petition, which particularly showed that this is a possible course of action.

For the major victims of climate change – such as the Inuit – the most significant and immediate consequence of their human rights legal strategy was not winning their case. By making their legal claims against the worst polluters public, victims are able to improve their position in an effort to combat climate change. The climate regime involves a great number of actors and decision-making structures. The publication of their legal claims allowed Inuit to reinforce their activities in the climate regime and to obtain a louder voice in the global regime. For example, the ICC consciously brought its human rights petition to the public eye during its drafting phase and organized press meetings during the climate change regime's Conference of the Parties. They also openly advocated for human rights and other legal actions to be taken all over the world in order to combat climate change.

The ICC's actions demonstrate how to effectively challenge both the basic rules prescribed by the climate regime and the structure upheld by international law as a society of states. By raising the human rights petition against the United States, the Inuit expanded society's notion of who is entitled to participate in the fight against climate change. Through their consolidated agency, the Inuit also brought their plight – the death of their culture – into the public eye, which is not easily achieved. This message arguably challenged the climate regime's view that climate change is a problem that we can control and manage. The ICC petition may have also opened a new era for climate litigation with the office of the High Commissioner for Human Rights noting the importance of “the recognition of the extraterritorial obligations of States [which] allows victims of ... dangerous climate change, to have access to remedies.”¹⁹² *324

Turning to the question as to what, if any, should be the consequences of human rights to the functioning of the climate change regime? As demonstrated in Section 3, it is clear that particularly the Rio principle on access to information, public participation in environmental decision-making, and access to justice is already gradually encroaching on the climate change regime and domestic climate policies. This is a welcome development, as not only climate change affects vulnerable communities' enjoyment of human rights. Still, response policies may also potentially constitute a threat for the protection of these rights. Even if this is the case, they are rarely openly seen as hard-core human rights that must be accounted for, but rather as accommodating diverse interests in managing climate change. It appears to be evident that it is desirable to have the procedural principles of human rights play a more forceful role in the climate change regime, also because these principles have more clearly matured as universally applicable human rights principles.¹⁹³

Finally, we will ask whether human rights should guide the development of a new type of international policy to combat climate change. It seems clear that Simon Caney's human rights approach would have a lot to give if the climate change regime would engage in real soul-searching, which is yet to happen. The brilliance of Caney's argument is – in effect – that the design principles for a new climate regime may already be found in existing universally valid human rights law and that these design principles also make sense: they enable us to nuance the way climate mitigation and adaptation burdens are allocated between nation-states and within them; they also introduce the missing element of compensation for damage resulting from climate change impacts to the design of possible new international policy of climate policy and law. The other side

¹⁹² Analytical study on the relationship between human rights and the environment, Report of the OHCHR, UN Doc. A/HRC/19/34, 16 December 2011, para. 72.

¹⁹³ A good overview is in McInerney-Lankford, Darrow, and Rajamani, *Human Rights and Climate Change*, supra, note 7, at 32–36.

of the coin is, of course, that Caney's ideas are very far from the current reality of the climate change regime.

Caney not only goes against the cost-benefit analysis models studied above, but also argues that the human rights approach has a lot more to offer in combating climate change than a security-oriented approach, an approach that may also be regarded as a viable alternative.¹⁹⁴ However, Caney understands the security-oriented approach too narrowly as he argues that this approach “gives us reason to be concerned about climate change only if, because, and to the extent that, it results in violent conflict.”¹⁹⁵ This is a constricted reading of the security-oriented approach, as it does not consider the long-standing discourse on the securitization of environmental problems, particularly in the case of climate change.¹⁹⁶ *325

Climate change could also be framed anew as a collective security problem, as opposed to an environmental problem, with a corresponding soft welfare approach to its solution. It may well be that only in re-framing climate change – likely the biggest collective security problem faced by humanity – and understanding it as a matter of collective security, will stronger response measures follow. We must acknowledge that the climate change regime has failed to deliver and we are faced with gloomy future scenarios. We may, of course, defend the present climate regime as the only viable alternative. However, if it continues to act as a façade for inaction, providing states the excuse to argue that they are combatting climate change while they are not, then it is important to seriously examine other perspectives and possibilities of framing and solving climate change as a politico-legal problem.

Unfortunately, at the moment, there are only weak signs that such a “climate change securitization” is taking place. There are also no strong signs that human rights will determine our response to climate change in the manner that Caney insightfully outlines. After the 2011 Climate Conference in Durban, governments have agreed to a new timeframe for negotiations, thus, postponing the roadmap that was originally agreed upon in Bali and failing to address the urgency of the climate response urged by scientists. At least, at the moment, the managerial approach of the current climate change regime seems to prevail. Yet, when the consequences of climate change become more manifest, it is likely that some actors will increasingly choose other approaches to combat climate change. Let us hope that we still have time for this.

¹⁹⁴ See, e.g. Timo Koivurova, “International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects”, 22 *Journal of Environmental Law & Litigation* (2007), 267.

¹⁹⁵ Caney, “Climate Change, Human Rights and Moral Thresholds”, *supra*, note 11, at 85–86.

¹⁹⁶ See Bill McSweeney, *Security, Identity and Interests: a Sociology of International Relations* (Cambridge: Cambridge University Press, 1999), 45; see also Lorraine Elliott, “Expanding the Mandate of the United Nations Security Council”, in W. Bradnee Chambers and Jessica F. Green (eds), *Reforming International Environmental Governance: from Institutional Limits to Innovative Reforms* (Tokyo: United Nations University Press, 2005), 204.