

The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change

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Abstract

It is axiomatic that the climate impacts documented by the Intergovernmental Panel on Climate Change are likely to undermine the realisation of a range of protected human rights. Yet it is only in the recent past that an explicit human rights approach has been brought to bear on the climate change problem. Scholars and human rights bodies have begun to advocate a human rights-centred approach to climate change—an approach which would place the individual at the centre of inquiry, and draw attention to the impact that climate change could have on human rights protection. This article focuses on the human rights claims raised in the climate negotiations, the implications these claims may have and the interests they may serve. The article argues that human rights approaches, taken in their entirety, have the potential to bring much needed attention to individual welfare as well as to provide ethical moorings in inter-governmental climate negotiations currently characterised by self-interested deal-seeking. Human rights approaches provide

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

Keywords: Climate change, international law, negotiations, human rights

1. Introduction

In the two decades since it first appeared on the international agenda,¹ climate change has progressed from an issue of marginal significance to one of central importance to the future of humanity.² The global average temperature has increased by 0.74°C in the last century, the largest and fastest warming trend in the history of the Earth.³ It is predicted to increase by around 1.8 to 6.4°C by the end of the 21st century.⁴ In addition to other impacts, climate change will likely increase the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, and the incidence of malaria and heat-related mortality, and decrease crop yield and food security.⁵ There is also increasing certainty that, as the climate system warms, poorer nations, and the poorest within them, will be the worst affected.⁶ Moreover, climate change is 'a massive threat to human development'.⁷

Notwithstanding the magnitude of the problem and the years that the international community has spent engaging on this issue, an effective and universal solution to address it has thus far proved elusive. The United Nations Framework Convention on Climate Change⁸ and its

1 UNGA Res (22 December 1989) UN Doc A/Resolution 44/228.

2 The 2007–8 Human Development Report characterised it as the 'the defining human development challenge for the 21st century'. UN Development Programme, 'Human Development Report 2007/8, Fighting Climate Change: Human Solidarity in a Divided World' (2007) [hereinafter Human Development Report 2007/8], <<http://hdr.undp.org/en/reports/global/hdr2007-2008/>> accessed 17 September 2010.

3 S Solomon and others (eds), *Climate Change 2007: The Physical Science Basis, Contribution of Working Group to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, Cambridge 2007).

4 Human Development Report 2007/8 (n 2) 8.

5 Ibid.

6 Ibid.

7 Ibid. N Stern, *Stern Review: The Economics of Climate Change* (CUP, Cambridge 2006).

8 UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (1992) 31 ILM 849 (hereinafter FCCC) <<http://www.unfccc.int>> accessed 17 September 2010. One hundred and ninety-three states and the European Union are Party to the FCCC.

Kyoto Protocol⁹ contain emissions reduction commitments that are both inadequate¹⁰ and inadequately implemented.¹¹ The Copenhagen Accord arrived at in December 2009 among heads of states and government of 28 Parties to the UNFCCC,¹² takes a limited step towards resolving climate change,¹³ and even in this limited form it is in troubled waters.¹⁴ Meanwhile, the impacts of climate change continue to prejudicially affect the poor, disempowered, culturally distinct, and the geographically disadvantaged across the globe.

It is axiomatic that the documented impacts of climate change are likely to undermine the realisation of a range of protected human rights, civil and political as well as economic, social and cultural. The right to life and to health provide useful examples. The Human Rights Committee has noted that the 'inherent right to life' cannot be interpreted in a restrictive manner, and that the protection of this right requires states to take positive measures.¹⁵ The Committee also notes that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life.¹⁶ This duty could arguably be extended to cover specific climatic incidents, sourced to human activity, that cause arbitrary loss of life. The IPCC

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) (1998) 37 ILM 22 [hereinafter Kyoto Protocol], <<http://www.unfccc.int>> accessed 17 September 2010. One hundred and eighty-nine states and the European Union are party to the Kyoto Protocol.

10 The current commitments require industrialised countries to reduce a basket of green house gases (GHG) 5% below 1990 levels in the commitment period 2008–12, see art 3, Kyoto Protocol. The IPCC recommends 25–40% below 1990 levels by 2020 for industrialized countries; see T Barker and others, *Climate Change 2007: Mitigation of Climate Change. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, Cambridge 2007) Box 13.7 at 776. Two IPCC authors later recommended 15–30% below baseline for developing countries by 2020; see M den Elzen, 'Emission Reduction Trade-Offs for Meeting Concentration Targets' Bonn Climate Change Talks, Presentation at the IPCC in-session workshop, UNFCCC SBSTA 28, 6 June 2008 <<http://unfccc.int/files/meetings/sb28/application/pdf/sb28.ipcc.6.den.elzen.pdf>> accessed 17 September 2010.

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

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

13 Pledges made under the Copenhagen Accord are likely to lead to a temperature increase of more than 3°C this century; see J Rogelj and others, 'Copenhagen Accord Pledges are Paltry' (2010) 464 *Nature* 1126–8.

14 See L Rajamani, 'The Making and Unmaking of the Copenhagen Accord' (2010) 59 *ICLQ* 824. For a more optimistic view, see D Bodansky, 'The Copenhagen Conference—A Post-Mortem' (2010) 104 *AJIL* 230.

15 Human Rights Committee, 'Covenant on Civil and Political Rights General Comment No. 6, The Right to Life' (1982) 30/04/82.

16 *Ibid.*

has predicted that extreme weather events will become more frequent, more intense and more widespread through the 21st century and, that intense tropical cyclone activity, heat waves, and heavy precipitation events are likely or very likely to increase.¹⁷ These weather events increase the risk of mortality (especially for the elderly, chronically sick, very young and the socially isolated), injuries and infections.¹⁸ To take another example, the right to the highest attainable standard of health is considered indispensable for the enjoyment of other human rights,¹⁹ And it is widely protected in international and regional instruments, and under national constitutions. The right to health has been broadly defined as an 'inclusive right' including timely and appropriate health care, access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information.²⁰ These are considered the basic determinants of health, and as the World Health Organization (WHO) reports, climate change will place these basic determinants at risk.²¹

Yet it is only in the recent past that an explicit human rights approach has been brought to bear on the climate change problem.²² In the early days of the negotiations, in particular in the context of the FCCC, developing countries sought to introduce and privilege the right to development in the text. More recently, some countries and interest groups have sought to widen the range of human rights of relevance in the climate negotiations. Scholars and human rights bodies have gone further and advocated a human rights-centred approach to climate change. Such an approach would place the individual at the centre of inquiry and therefore draw attention to the impact that climate change could have on the realisation of a range of human rights.

This article is focused on the human rights claims raised in the climate negotiations, the implications these claims may have and the interests they may serve. The article begins by examining the references or lack thereof to human rights in the climate change treaties, and then documents the human rights-based interventions and submissions made by Parties in the ongoing climate change negotiations. It then steps back to analyse, in an initial and

17 IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report* (CUP, Cambridge 2007) 18.

18 Ibid.

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

20 Ibid.

21 World Health Organization, 'Protecting Health from Climate Change' (2008) 6 <<http://www.who.int/world-health-day/toolkit/report.web.pdf>> accessed 17 September 2010.

22 S Humphreys, *The Human Rights Dimensions of Climate Change: A Rough Guide* (International Council on Human Rights Policy, Geneva 2008) (hereinafter the ICHRP Report). This Report explores in some detail the silence on human rights in climate change discourse, including in p 3, fn 4, to the limited references in the IPCC's Fourth Assessment Report to human rights.

contingent fashion, the role and relevance of a human rights approach to climate change. In doing this, the article identifies two principal approaches to bringing human rights to bear on climate protection. First, climate protection could be brought within the context of the existing human right in relation to the environment, howsoever defined, litigated in several national and international fora, and thus enforced in discrete cases. Second, a human rights optic could be applied to climate impacts. The latter is a less concrete yet more ambitious approach in that it seeks a reframing of the climate problem that would provide nations with a 'compass for policy orientation' and draw them towards ever more stringent actions. The focus in the latter is on the broader range of human rights placed at risk by the impacts of climate change and the ethical pull this might create, rather than exclusively on a human right in relation to the environment and the litigation possibilities that might flow from it. This article touches on the former in so far as it complements the latter but focuses on the latter as it arguably has more radical potential.

The article argues that human rights approaches, taken in their entirety, have the potential to bring much needed attention to individual welfare as well as to provide ethical moorings in inter-governmental climate negotiations currently characterised by self-interested deal-seeking. Human rights approaches provide benchmarks against which states' actions can be evaluated and they offer the possibility of holding authorities to account. Human rights approaches may also offer additional criteria for the interpretation of applicable principles and obligations that states have to each other, to their own citizens, and to the citizens of other states in relation to climate change. This article seeks to provide some preliminary insights into the ways in which rights-based interpretations of applicable principles and obligations may serve to influence some of the current debates in the climate negotiations.

2. Righting the Framework Convention on Climate Change

Since the early days of negotiations on climate change, many developing countries have advanced an equity perspective on climate change—a perspective which is underpinned by human rights concerns. The crux of their argument rests on an appreciation of differences between countries—differences in contributions to the carbon stock and flow in the atmosphere (historical versus current and future), nature of emissions (survival versus luxury), economic status (poverty versus wealth)²³ and physical impacts, including their ability

23 As an early influential paper written by developing country activists asks '[c]an we really equate the carbon dioxide guzzling automobiles in Europe and North America or, for that matter, anywhere in the Third World with the methane emissions of draught cattle and rice fields of subsistence farmers in West Bengal or Thailand? Do these people not have a right to

to cope with them (severe versus adaptable). In their view, these differences in contributions to carbon stock, nature of emissions and economic status suggest that developing countries should only be expected to contribute to solving the problem, to the extent that they are enabled and supported to do so.²⁴ It is in this context that these developing countries advance their right to development.²⁵

Whilst the FCCC does not endorse an explicit 'right' to development, disputed as it is,²⁶ it does recognise the central role that development plays in the climate change regime. FCCC Article 2 (Objective) specifies that stabilisation of green house gases (GHGs) in the atmosphere must be achieved within a time frame sufficient to 'enable economic development to proceed in a sustainable manner'. The FCCC also recognises that in the pursuit of social and economic development, emissions and energy consumption in developing countries will grow.²⁷ This, read in conjunction with the global stabilisation goal in Article 2, arguably suggests that the climate regime envisions a redistribution of the ecological space, with industrial countries reducing their emissions to make room for developing countries to grow.²⁸ It could be further argued that such redistribution stems from a recognition that developing countries, and by extension their citizens, are entitled to an appropriate proportion of the ecological space so as to achieve and sustain a certain

live?' See A Agarwal and S Narain, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (Centre for Science and Environment, New Delhi 1991) 3.

24 Art 4(7) FCCC.

25 UNFCCC, 'Ideas and Proposals on Paragraph 1 of the Bali Action Plan, Revised Note by the Chair' (10 December 2008) FCCC/AWGLCA/2008/16/Rev.1.12 (the right to development/sustainable development was highlighted in the submissions by, among others, Philippines, South Africa, Argentina, Brazil, India, Chile, China, Ecuador, Ghana, G-77/China, in the context of 'principles for a shared vision').

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

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

28 An argument made at length in L Rajamani, *Differential Treatment in International Environmental Law* (OUP, Oxford 2006) 238–9.

quality of life. The discussions in the climate negotiations, and on the sidelines of it, on the right to an 'equitable sharing of atmospheric space',²⁹ survival and luxury emissions,³⁰ the contraction and convergence proposal (based on per capita CO₂ emission entitlements)³¹ and the Greenhouse Development Rights framework (based on the right of all people to reach a dignified level of sustainable human development),³² all draw on the equity-based right to development.

In the climate context, although not typically labelled as such, the right to development takes within its fold the right to emit. The desire to occupy a larger share of the ecological space, and an entitlement to it, is a legitimate one. For in the words of Wolfgang Sachs, '[e]missions not only produce the burden of marginalization they also produce the benefit of power, and the right to use the atmosphere as a dumping ground represents a source of economic power. Disparity in access leads to disparity in economic opportunities. It partitions the world into winners and losers.'³³ It is this, for instance, that inspires India's position on climate change. India has committed that its per capita emissions will not exceed the levels of developed countries.³⁴ India's per capita emissions are 1.2 metric tons, while the OECD average is 13.2.³⁵ If industrialised countries lower their per capita emissions to 4 metric tons, India would be committed to remaining at or below it. The USA, for instance, aspires to lower its emissions 80% by 2050. It is currently at 20 metric tons per capita. At 2050, if it meets its mitigation aspiration, it will be at 4 tons per capita, and India would be committed to staying below that. This both ties India's commitment to that of OECD countries, as well as seeks an equitable redistribution of the ecological space. To the extent that these positions are per capita assessments, they are in essence taking an anthropocentric rights-based approach to the issue of climate change.

The exercise of a right to development, to the extent it is recognised and protected in the FCCC, is not unfettered. Developing countries are required under the climate regime to develop in a sustainable manner³⁶ and while

29 See n 75 below. This position is also held by many other developing countries, including in particular India and China. See eg Ministry of Environment and Forests, Government of India, 'Climate Change Negotiations: India's submissions to the United Nations Framework Convention on Climate Change' (Government of India, New Delhi 2009) 11 <<http://moef.nic.in/downloads/home/UNFCCC-final.pdf>> accessed 17 September 2010.

30 See M Mwandosya, *Survival Emissions: A Perspective from the South on Global Climate* (EEST & DUP, Dar es Salaam 2000) 74.

31 Global Commons Institute, 'Contraction and Convergence: A Global Solution for a Global Problem' <<http://www.gci.org.uk/contconv/cc.html#intro>> accessed 17 September 2010.

32 P Baer and others, *The Right to Development in a Climate Constrained World* (2nd edn, Heinrich Boll Foundation, Berlin 2008) <<http://www.ecoequity.org/docs/TheGDRsFramework.pdf>> accessed 17 September 2010.

33 W Sachs, 'Climate Change and Human Rights' World Economy and Development in Brief (2007) WDEV Special Report 1/200, 3 <<http://www.wdev.eu/>> accessed 17 September 2010.

34 PM's Intervention on Climate Change at Heiligendamm Meeting of G8 plus 5, Heiligendamm, Germany, 8 June 2007 <<http://pib.nic.in>> accessed 17 September 2010.

35 Human Development Report 2007/8, Statistics (n 2).

36 Preamble, arts 3 (4) and 4(1), FCCC.

doing so to address the adverse effects of climate change through adaptation. This is, however, a responsibility unique to developing countries in the sense that it requires them to take on board sustainable development at a period in the trajectory of their development—a comparable period in which the industrial countries had no such restraints on their development.³⁷ Although fettered, the exercise of such a right to develop will result in greater GHG emissions.

3. Recent Efforts to Link Human Rights and Climate Change

Much of the recent interest in the human rights dimensions of climate change has been sparked by the plight of the Inuit³⁸ and the Small Island States, at the frontlines of climate change. In their 2005 petition before the Inter-American Commission on Human Rights, the Inuit claimed that the impacts of climate change, caused by acts and omissions of the United States, violated their fundamental human rights—in particular the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.³⁹ These rights, they argued, were protected under several international human rights instruments, including the American Declaration of the Rights and Duties of Man.⁴⁰ The Commission refused to review the merits of the petition on the grounds that the information provided did not enable them to determine whether there was a violation of the rights protected by the American Declaration.⁴¹ Although the Inuit Petition did not fare well before the Commission, it drew attention to the links between climate change and human rights, and led to a ‘Hearing of a General Nature’ on human rights and global warming.⁴² The Hearing was held on 1 March 2007, and featured

37 The IPCC noted that ‘the level of energy intensities in developing countries today is generally comparable with the range of the now-industrialised countries when they had the same level of per capita GDP’. See IPCC, N Nakicenovic and R Swart (eds), *IPCC Special Report on Emissions Scenarios* (CUP, Cambridge 2000) s 2.4.10.

38 See eg S Watt-Cloutier, ‘Climate Change and Human Rights’ (2004) 2 *Human Rights Dialogue* 26.

39 S Watt-Cloutier and others, ‘Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States’ (2005) <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> accessed 17 September 2010.

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

41 Quoted in J George, ‘ICC Climate Change Petition Rejected’ *Nunatsiaq News* (Iqaluit 15 December 2006) <<http://www.nunatsiaq.com/archives/61215/news/nunavut/61215.02.html>> accessed 17 September 2010.

42 Inter-American Commission on Human Rights Press Release, ‘IACHR Announces Webcast of Public Hearings of the 127th Regular Period of Sessions’ (26 February 2007) Press

testimonies from the Chair of the Inuit Circumpolar Conference (ICC) and its lawyers but not representatives of the USA.⁴³ However, it was not intended to achieve any concrete outcome and consequently no such outcome ensued.⁴⁴

In the climate negotiations, indigenous groups more generally have delivered strong statements on the impacts of climate change on indigenous peoples' health, society, culture and well-being.⁴⁵ Indigenous peoples' organisations have been admitted to the Convention process as NGOs, with constituency status.⁴⁶ The Permanent Forum on Indigenous Issues under the Economic and Social Council (ECOSOC) at its second session recommended the establishment of an *ad hoc* open-ended working group on indigenous peoples and climate change⁴⁷—this, however, did not come to pass.⁴⁸ In its seventh session, in April–May 2008, dedicated to climate change, the Forum recommended that the Declaration on the Rights of Indigenous Peoples serve as a 'key and binding framework' in efforts to curb climate change, and that the human rights-based approach guide the design and implementation of local, national, regional and global climate policies and projects.⁴⁹

The Small Island States, and Maldives in particular, launched a campaign to link climate change and human rights. Representatives of Small Island Developing States met in November 2007 to adopt the *Malé Declaration on the Human Dimension of Global Climate Change, inter alia*, requesting the UN Human Rights Council to convene a debate on climate change and human rights.⁵⁰ The Council adopted a Resolution tabled by Maldives titled *Human Rights and Climate Change* in March 2008 that requested the Office of the

Release No 8/07 <<http://www.cidh.org/Comunicados/English/2007/8.07eng.htm>> accessed 17 September 2010.

- 43 J Harrington, 'Climate Change, Human Rights and the Right to be Cold' (2007) 18 *Fordham Envtl L Rev* 513 (criticising on procedural and substantive grounds the transformation of the ICC petition into a generalised hearing of a particularised claim against an absent state).
- 44 The ICC petition spawned a host of American law review articles. See eg H Osofsky, 'The Inuit Petition as a Bridge? Beyond the Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 *Am Indian L Rev* 675; R Abate, 'Climate Change, the United States and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable international Environmental Human Rights' (2007) 26 *Stan Envtl LJ* 3.
- 45 See eg statements made in response to the four-year international study leading to the Arctic Climate Impact Assessment (ACIA): Statement by representatives of Arctic Indigenous Peoples Organizations on the Occasion of the 11th Conference of Parties to the Framework Convention on Climate Change (Montreal, Canada, 2005) <<http://unfccc.int/resource/docs/2005/cop11/stmt/ngo/011.pdf>> accessed 17 September 2010.
- 46 See UNFCCC, 'Promoting Effective Participation in the Convention Process, Note by the Secretariat' 16 April 2004 FCCC/SBI/2004/5 [39]–[47].
- 47 UN Permanent Forum on Indigenous Issues, 'Report on the second session' (12–23 May 2003) Economic and Social Council, E/2003/43, E/C.19/2003/22, 10.
- 48 UNFCCC, 'Report of the Subsidiary Body for Implementation on its twentieth session, held at Bonn from 16 to 25 June 2004' (UNFCCC, Geneva, 2004) FCCC/SBI/2004/10, [105].
- 49 Permanent Forum on Indigenous Issues, 'Report on the seventh session' (21 April–2 May 2008) Economic and Social Council, E/2008/43, e/c.19/2008/13, 3–4.
- 50 'Malé Declaration on the Human Dimension of Global Climate Change' (14 November 2007) <<http://www.ciel.org/Publications/Male.Declaration.Nov07.pdf>> accessed 17 September 2010.

United Nations High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study on the relationship between climate change and human rights.⁵¹ This study has since been submitted.⁵² In March 2009, the Council adopted Resolution 10/4 titled *Human rights and Climate Change* which recognises that climate change-related impacts have a range of implications for the effective realisation of human rights, and that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making.⁵³

In a similar vein in the Americas, Argentina drafted and tabled a resolution on human rights and climate change, which was adopted by the General Assembly of the Organization of American States in June 2008. The Resolution instructs the Inter-American Commission on Human Rights to 'determine the possible existence of a link between adverse effects of climate change and the full enjoyment of human rights.'⁵⁴ Argentina believes that exploring the barriers that climate change presents to social and economic development and human rights realisation would offer critical knowledge to climate vulnerable States.⁵⁵

4. Human Rights in the Climate Negotiations: 2008–10

In over 2,000 pages of ideas and proposals submitted by Parties between 2008 and 2010 to the Ad Hoc Working Group on Long term Cooperation Action (AWG-LCA)⁵⁶—the FCCC process tasked with negotiating a post-2012 climate agreement—only a few countries, for example, Argentina, Bolivia and Chile, have explicitly argued the relevance of a human rights approach:⁵⁷ The Bali

51 Human Rights Council, 'Human Rights and Climate Change' (28 March 2008) Resolution 7/23 <<http://ap.ohchr.org/documents/E/HRC/resolutions/AHRC.RES.7.23.pdf>> accessed 17 September 2010.

52 Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (15 January 2009). A/HRC/10/61 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>> accessed 4 October 2010.

53 Human Rights Council, 'Human rights and Climate Change' (25 March 2009) Resolution 10/4.

54 General Assembly of the Organisation of American States, 'Human Rights and Climate Change in the Americas' Resolution 2429 (4 June 2008) AG/RES 2429 (XXXVIII-O/08).

55 Centre for Human Rights and Environment Press Release, 'OAS Approves Human Rights and Climate Change Resolution' (4 June 2008) Medellín Colombia.

56 This refers to human rights approaches generally - the right to development is seen as integral to the discourse, and numerous developing countries have raised it in their submissions. See above (n 18). Maldives does not raise human rights in its submission to the FCCC. See UNFCCC, 'Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Submissions from Parties' (3 March 2008) FCCC/AWGLCA/2008/MISC 1.31.

57 All submissions of Parties to the AWG-LCA are available at <<http://unfccc.int/meetings/ad-hoc-working-groups/lca/items/4578.php>> accessed 17 September 2010. In addition to submissions from Parties, non-state actors such as the International Council on Human Rights Policy, Oxfam, and the former High Commissioner for Human Rights, among others, have in press conferences and other public events, argued for a rights orientation to current climate

Action Plan, 2007, that launched the post-2012 climate negotiations, identified five pillars on which a future climate regime should be built: shared vision, mitigation, adaptation, technology and finance.⁵⁸ Chile suggests that a shared vision on climate change be based, *inter alia*, on a human rights perspective.⁵⁹ Bolivia argues that the scientific basis for a climate regime must include a full analysis of social, economic and environmental conditions (including the right to water, the protection of human rights, poverty eradication, etc) in developing countries.⁶⁰ And, Argentina raises human rights in the context of 'enhanced action on adaptation' arguing that further research on the impacts of climate change on human rights realisation, 'will be useful in ensuring that climate response takes place within a strong sustainable development framework'.⁶¹ These countries do not offer specific suggestions for integrating human rights approaches into the negotiations. A few Parties made references to the rights of indigenous peoples, and in the first negotiating text prepared by the Chair of the AWG-LCA in May 2009, the rights of indigenous peoples in the context of adaptation⁶² and of reducing emissions from deforestation,⁶³ made an appearance.

In subsequent negotiating sessions in 2009, several Parties introduced language on human rights into the negotiating text. The Least Developed Countries sought recognition in the 'shared vision' section of the text that the adverse effects of climate change 'have a range of direct and indirect implications for the full and effective enjoyment of human rights including the right to self-determination, statehood, life, food, health and the right of a people not to be deprived of its own means of subsistence, particularly in developing

policy. Above (n 22); OXFAM, 'Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change' (September 2008) <http://www.oxfam.org.uk/resources/policy/climate_change/bp117.climatewrongs.html> accessed 17 September 2010; and M Robinson in 'Rights focus sought over climate change' *BBC News* (11 December 2006) <<http://news.bbc.co.uk/1/hi/world/europe/6166835.stm>> accessed 17 September 2010.

- 58 UNFCCC Conference of the Parties, 'Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session' (14 March 2008) FCCC/CP/2007/6/Add 1, 3.
- 59 UNFCCC AWG-LCA, 'Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan, Submissions from Parties' (10 December 2008) FCCC/AWGLCA/2008/MISC 5/Add 2 Part I, 111.
- 60 *Ibid* [107].
- 61 UNFCCC AWG-LCA, 'Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties' (27 October 2008) FCCC/AWGLCA/2008/MISC 5, 13.
- 62 UNFCCC AWG-LCA, 'Negotiating Text' (19 May 2009) FCCC/AWGLCA/2009/8, 11 [22]. Adaptation projects, such as infrastructure development initiatives on community lands, have the potential, unless appropriately designed, to adversely impact the rights of local communities and indigenous peoples in relation to these lands.
- 63 *Ibid* 31 [109]–[110]. Internationally designed forest policies implemented in a top-down fashion have the potential, unless appropriately designed, to adversely impact the rights of local communities and indigenous people in relation to participatory decision-making and benefit-sharing.

countries'.⁶⁴ In the context of principles guiding adaptation action, Thailand proposed a reference to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁵ and Iceland to the UN Declaration on the Rights of Indigenous Peoples and the Convention on Elimination of all forms of Discrimination against Women.⁶⁶

In the lead up to the 15th Conference of Parties (COP-15) to the FCCC in Copenhagen, December 2009, members of the Bolivarian Alliance for the Americas (ALBA)—Bolivia, Cuba, Ecuador, Nicaragua and Venezuela⁶⁷—proposed the inclusion of various rights in the negotiating text on 'shared vision', in particular the right to development and the right to live well. These were opposed by most developed countries who did not wish to refer in the climate texts to rights that were either not recognised in human rights treaties (such as the right to live well) or were disputed (such as the right to development).⁶⁸ The Copenhagen conference resulted in decisions to continue negotiations under the FCCC⁶⁹ and Kyoto Protocol,⁷⁰ and the controversial Copenhagen Accord reached among a subset of the Parties to the FCCC and Kyoto Protocol.⁷¹ States were tasked with continuing on the basis of the work that had been undertaken thus far.⁷² Among the texts forwarded for further work is an overarching draft COP decision which contains several references to human rights. It 'note[s]' resolution 10/4 of the United Nations Human Rights Council is 'mindful' that 'the adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights, including living well' and it 'recogniz[es] the right of all nations to survival'.⁷³ A forwarded draft decision on reducing emissions from deforestation in developing countries also contains a reference to the need to respect the

64 UNFCCC AWG-LCA, 'Revised Negotiating Text' (22 June 2009) FCCC/AWGLCA/2009/Inf 1, 8.

65 Ibid 32.

66 Ibid 34.

67 ALBA emerged as an 'alternative to the neo liberal model' which has, they believe, deepened the structural asymmetries to favour the accumulation of wealth in privileged minorities; for further details, <http://www.alianzabolivariana.org/>.

68 Early versions of the Shared Vision text, December 2009, on file with the author.

69 Decision 1/CP 15, Outcome of the work of the AWG-LCA under the Convention, in Report of the Conference of Parties on its 15th session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1 (30 March 2010) at 3.

70 Decision 1/CMP 5, Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex 1 Parties under the Kyoto Protocol, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fifth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its fifth session, FCCC/KP/CMP/2009/21/Add 1 (30 March 2010) at 3.

71 See n 12.

72 See n 69 (containing a full set of draft decisions).

73 Ibid 7.

knowledge and 'rights of indigenous peoples and members of local communities'.⁷⁴

In April 2010, Bolivia held a World People's Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia, with an estimated participation of 35,000 people from social movements and organisations from 140 countries. Bolivia submitted the outcome of this Conference to the FCCC process. This Bolivian submission is by far the most comprehensive exposition on rights to be submitted to the FCCC process. In a submission liberally peppered with rights language, Bolivia seeks to introduce into the post-2012 negotiations the rights of developing countries (*inter alia* to 'equitable sharing of atmospheric space' and to development), rights of all peoples including migrants (*inter alia* to life, food, housing, health, access to water and to be protected from the adverse impacts of climate change), rights of indigenous peoples (*inter alia* to consultation, participation and prior, free and informed consent) and intriguingly to the rights of 'Mother Earth' (*inter alia* to live, to be respected, to regenerate its bio-capacity and to integral health).⁷⁵

The rights that the Bolivian submission refers to can be divided into: rights recognised elsewhere in human rights instruments; rights recognised elsewhere but whose nature, content and extent are disputed; and rights that are yet to be recognised. Most of the rights Bolivia highlights in its submission fall into the first category. The rights of indigenous people and the references to the 'UN Declaration on the Rights of Indigenous Peoples and other instruments'⁷⁶ are examples. Among the rights in the second category is the 'right to development' expressed in the climate context in a right derived from it—a right to 'the equitable sharing of atmospheric space'.⁷⁷ In so far as the right to development is disputed, its reiteration and referencing in the climate process, should this come to pass, would lend it considerable weight. In the third category of rights are the rights of Mother Earth, a novel attempt to fashion eco-centric rights. In an annex to its submission, Bolivia included a draft 'Universal Declaration on the Rights of Mother Earth', which it suggests be adopted by the General Assembly as a 'common standard of achievement for all peoples and all nations of the world'.⁷⁸ The intended locus of action is the General Assembly not the FCCC process, and the rights of Mother Earth are

74 Draft decision/CP 15, Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, *ibid* 34.

75 See Submission by the Plurinational State of Bolivia to the AWG-LCA, 'Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties' (30 April 2010) FCCC/AWGLCA/2010/MISC 2, 14–39.

76 *Ibid*.

77 *Ibid* 16.

78 *Ibid* 36.

not limited or related to climate-specific impacts but to environmental harms more generally.⁷⁹ The Bolivian submission signals a desire to press for a range of rights recognised and protected in human rights instruments—albeit of varying levels of acceptance, normativity, legal weight and enforceability—to be taken into account in the negotiation and implementation of the climate regime. Notwithstanding the liberal deployment of rights language, it is less clear that they hope to create substantive climate-specific rights in the post-2012 climate regime. Moreover, it is unlikely that they will be able to.

Submissions such as the Bolivian one are not likely to or even perhaps designed to create substantive climate-specific rights. The legal form of the post-2012 agreement is as yet uncertain. The Bali Action Plan, which launched the process towards an ‘agreed outcome’ in Copenhagen, left the legal form as well as the ambition of that outcome uncertain.⁸⁰ Options include a legally binding instrument either to supplement the FCCC and Kyoto Protocol, or to replace the Kyoto Protocol; an amendment or set of amendments to the FCCC including the Annexes, or by adding Annex/es; a single COP decision or a set of COP decisions to further implement the FCCC; a Ministerial Declaration containing the elements of the political agreement; and any combination or package of the above.⁸¹ COP-15 extended the deadline, and with it the uncertainty on legal form. Most Party suggestions for rights references find their way into ‘preambular text’, as they did, for instance, in the overarching decision text forwarded from COP-15.⁸² Preambular references can add colour, texture and context to an agreement but cannot create substantive rights and obligations. To the extent that rights references are incorporated into operational text, the entire text may well be nothing more than COP decision text, which, except in defined contexts, is not legally binding, and cannot act as a vehicle to create substantive new obligations for Parties.⁸³ Finally, it is also worth bearing in mind that Bolivia, and the ALBA states, whilst not without influence and friends, are outliers in the post-2012 negotiations. They seek a radical restructuring of the international legal order,⁸⁴ of which the climate negotiations is just one part. They opposed the adoption of the Copenhagen Accord as a COP decision in December 2009,⁸⁵ and

79 See for further information: ECOSOC Permanent Forum on Indigenous Issues, ‘Study on the need to recognize and respect the rights of Mother Earth’ (15 January 2010) E/C 19/2010/4.

80 See L Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’ (2009) 58 ICLQ 803–34 for a detailed analysis of the various legal form options.

81 *Ibid.*

82 FCCC/CP/2009/11/Add 1 (n 69).

83 See J Brunnée, ‘Coping with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 LJIL 1, 32 for an excellent analysis of the legal status of COP decisions.

84 See eg M al Attar and R Miller, ‘Towards an Emancipatory International Law: The Bolivarian Reconstruction’ (2010) 31 Third World Quart 347.

85 Rajamani (n 14).

they have since spearheaded the effort to reject the Accord which they perceive as inadequate and illegitimate.⁸⁶ They oppose markets, have proposed a reduction in domestic GHG emissions of 50% below 1990 levels by 2017 for developed countries, and stress a range of rights which most Parties are uneasy about incorporating into the climate text. In the consensus-based FCCC process,⁸⁷ although the ALBA countries have blocking power, their ideas do not resonate sufficiently with the majority of Parties for these to fundamentally shape the post-2012 agreement.

There have been three iterations of the negotiating text in 2010 and the rights references have increased in each successive iteration of the text.⁸⁸ Although the August 2010 version⁸⁹ does not incorporate the full gamut of rights references that Bolivia advocates, it does do the following. The text takes notes in its preamble of the General Assembly Resolution on 'International Mother Earth Day'⁹⁰ and the Human Rights Council Resolution on 'Human Rights and Climate Change'.⁹¹ The text on 'shared vision' contains an option, inspired by the ALBA submissions, that obliges Parties, in all climate-related actions, to ensure full respect for human rights, as well as to recognise and defend the rights of Mother Earth.⁹² The text on the 'global goal' includes a reference to the right to life,⁹³ and the text on adaptation requires Parties to undertake actions in accordance, *inter alia*, with relevant international human rights instruments.⁹⁴ There are also references to the UN Declaration on the Rights of Indigenous Peoples,⁹⁵ and safeguards for indigenous peoples both in the context of REDD activities as well as in designing response measures to climate change. Parties are required to obtain free, prior and informed consent from indigenous peoples before adopting and implementing measures that may affect them.⁹⁶ Needless to say the negotiating text is much bracketed, signifying disagreement amongst Parties on these and other issues.

86 FCCC/AWGLCA/2010/MISC 2 (n 75) 32.

87 Parties have yet to agree on Rule 42 (Voting), of the draft Rules of Procedure, which have been applied, with the exception of Rule 42, since 1996. In the absence of agreement, decisions are taken by consensus. See Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, (22 May 1996) FCCC/CP/1996/2.

88 See: UNFCCC AWG-LCA, 'Text to facilitate negotiations among Parties, Note by the Chair' (9 July 2010) FCCC/AWGLCA/2010/8; UNFCCC Ad Hoc Working Group, 'Text to facilitate negotiations among Parties, Note by the Chair' (17 May 2010) FCCC/AWGLCA/2010/6.

89 UNFCCC AWG-LCA, 'Negotiating Text, (13 August 2010) FCCC/AWGLCA/2010/14.

90 Ibid 4.

91 Ibid 5.

92 Option 1 bis, Ibid 6.

93 Ibid.

94 Ibid 8.

95 Ibid 53, 57.

96 Ibid 27.

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

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

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

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

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

The multilateral environmental dialogue, in its anthropocentricity,⁹⁷ has always held the human being firmly at its centre, but it is only in the last few decades that environmental protection, which by logical extension encompasses climate protection, has been articulated in the language of human rights. Several international soft law instruments⁹⁸ and numerous treaties recognise and protect environmental rights whether procedural,⁹⁹ derivative¹⁰⁰ or stand-alone¹⁰¹ ones. In addition, more than a hundred national constitutions¹⁰² recognise an environmental right. Indeed, the Ksentini Report, commissioned by the UN Sub Commission on Prevention of Discrimination and Protection of Minorities, records 'universal acceptance' of environmental rights at the national, regional and international level.¹⁰³

Only a handful of these international treaties recognise a stand-alone or explicit human right in relation to the environment.¹⁰⁴ The African Charter is

97 See A Gillespie, *International Environmental Law and Policy* (OUP, Oxford 1997) 15–8 (arguing that anthropocentrism, despite a few recent developments that buck the trend, remains central to contemporary international environmental policy).

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

99 See eg art 1, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) reprinted in (1999) 38 ILM 517 (hereinafter 'Aarhus Convention').

100 See eg art 6, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), reprinted in (1967) 6 ILM 368 (hereinafter ICCPR); art 2, European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222; art 4 American Convention on Human Rights (adopted 1969, entered into force 18 July 1978) reprinted in (1970) 9 ILM 673 (where an environmental right might be said to flow from the right to life); and, see art 8, European Convention, (where an environmental right might be said to flow from the right to private and family life). See generally R Churchill, 'Environmental Rights in Existing Human Rights Treaties' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford 1996) 89.

101 See eg arts 2, 4, 7 and 15, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989) reprinted in (1989) 28 ILM 1382; art 24, African Charter on Human and Peoples' Rights, (27 June 1981, entered into force 21 October 1986) reprinted in (1982) 21 ILM 58 (hereinafter African Charter); and art 11, Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, (adopted 17 November 1988, entered into force 16 November 1999) reprinted in (1989) 28 ILM 156 (also known as and hereinafter the San Salvador Protocol).

102 See eg s 24, Constitution of the Republic of South Africa, 1996. See generally F Ksentini, 'Human Rights and the Environment, Final Report' (1994) E CN 4/Sub 2/1994/9, Annex III, 81–9.

103 See Ksentini, *ibid.* Annex I, 74–7. The Report recommends a list of 'draft principles on human rights and the environment.'

104 An explicit substantive human right relating to the environment can be found in the African Charter and the San Salvador Protocol. A general reference to the environment in the context of sustainable development is to be found in the Treaty for the Establishment of the East

one such.¹⁰⁵ The African Commission on Human and People's Rights has found Nigeria in violation of the right to life, health, food, property, and to a healthy environment in the case concerning Shell and the Ogoni People.¹⁰⁶ And, more recently, the African Commission found Kenya in violation of the rights to freedom of religion, property, health, culture, religion, natural resources and, intriguingly, the right to development in the case concerning the Endorois Peoples.¹⁰⁷

Even in the absence of an explicit human right in relation to the environment, international judicial fora, such as the European Court of Human Rights, have increasingly recognised that environmental harms lead to human rights violations.¹⁰⁸ Such recognition is not evidence of the evolution of a distinctive autonomous right to a healthy environment (which is mired in controversy) but quite simply an emerging understanding that environmental harms impact human rights, such as the right to respect for private and family life, health and even the right to life.¹⁰⁹

The European Court of Human Rights starting with its landmark judgment in *Lopez Ostra*¹¹⁰ has held that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely'.¹¹¹ The Court in *Lopez Ostra* did not consider the absence of a specific right to a healthy environment a bar to considering environmental cases.¹¹² In the series of cases that followed *Lopez Ostra*,¹¹³ the European Court's recognition that severe environmental pollution may affect an individual's well being and impact their rights,

African Community, (adopted 19 November 1996, entered into force 7 July 2000) <<http://www.eac.int>> accessed 17 September 2010.

105 African Charter (n 101) art 24.

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

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

108 *Ksentini* (n 102) 59.

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

110 *Lopez Ostra v Spain* (1994) 20 EHRR 277.

111 *Ibid* [51].

112 See generally P Sands, 'Human Rights, Environment and the Lopez Ostra Case: Context and Consequences' (1996) 6 EHRLR 597, 618.

113 See eg *Guerra v Italy* (1998) 26 EHRR 357; *Taskin v Turkey* (2006) 42 EHRR 50; *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Fadeyeva v Russia* (2007) 45 EHRR 10; *Tatar v Romania* (App no 67021/01) 27 January 2009; *Leon and Agnieszka Kania v Poland* (App no 12605/03) 21 July 2009; *Olujić v Croatia* (App no 22330/05) 5 February 2009. See also cases balancing the societal interest in economic development with the human rights of particular claimants, *Rayner and Powell v UK* (1990) 12 EHRR 355; *Hatton v UK* (2002) 34 EHRR 1.

became evident. The Court is clear, however, that such environmental harm must impact a person's enjoyment of a protected right. As the Court stressed in *Kyrtatos v Greece*, 'the crucial element which must be present. . . is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'. The Court went on to say that '[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect'.¹¹⁴

The UN Human Rights Committee¹¹⁵ as well as the Inter-American Commission and Court on Human Rights also consider cases based on environmental harms in the absence of specific environmental rights¹¹⁶—however, not without dispute. In an admissibility hearing in the recent case of *Mossville Environmental Action Now v United States* before the Inter-American Commission, the USA argued that there is 'no such right as the right to a healthy environment, either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination'.¹¹⁷ The USA also argued that even if one were to assert that customary international law existed on the topic, the USA should be considered a 'persistent objector' to it.¹¹⁸

Notwithstanding widespread recognition that environmental harms impact human rights, an explicit human right in relation to the environment—its scope, content, and justiciability, as well as the wisdom of pursuing a human rights path to environmental protection—remains controversial.¹¹⁹ The scope and content of a human right in relation to the environment is by its very nature indeterminate. It raises more questions than it answers. First, to what qualitative level should the environment be protected—clean, safe, healthy, decent or satisfactory?¹²⁰ In the climate context, what degree of temperature increase would be acceptable, some temperature increase being inevitable?

114 *Kyrtatos v Greece* (2003) 36 EHRR 242 [52].

115 See eg *Sara and others v Finland*, Communication No 431/1990, (1994) UN Doc CCPR/C/50/D/431/1990; *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, Communication No 167/1984, CCPR/C/38/D/167/1984.

116 See Organization of American States, Inter-Am Commission on HR, 'Report on the Situation of Human Rights in Ecuador' (24 April 1997) OEA/Ser L/V/II 96, Doc 10, Rev 1; *Case of the Mayagna (Sumo) Indigenous Community of Awastingni*, Judgment, (31 August 2001) Inter-Am Ct HR (Ser C) No 79.

117 Organization of American States, *Inter-Am. Commission on HR, Mossville Environmental Action Now v United States*, Report no 43/10, Petition no 242/05, Admissibility, OEA/Ser LV/II 138 (17 March 2010) 5.

118 *Ibid* 5.

119 See A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP, Oxford 1996) 43; D McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45 ICLQ 796, 811

120 *Ibid*.

Even limiting global warming to below 2°C temperature increase, endorsed by the Copenhagen Accord,¹²¹ would result in serious climatic changes.¹²² Second, against which of the numerous existing standards or benchmarks should the qualitative level of protection be assessed? How, for instance, do we determine the climate impacts that are acceptable and those that are not, given that impacts differ between people and communities? Third, even if determinable, to what extent, if at all, should the level of protection be uniform across states (should it, instead, be tailored to the specificities of economic resources and priorities)? Should all states have uniform obligations to protect the climate system, or should their obligations be tailored to their state of economic well-being or their historical responsibility? Fourth, who should bear the burden of the correlative duties—states (by themselves or collectively), multinational corporations, private actors, and/or individuals? Fifth, to what extent should these rights be justiciable? These queries are yet to be authoritatively considered and resolved. In addition to these pragmatic difficulties in conceptualising a workable human right in relation to the environment, is the ethical concern that a human rights focus to environmental protection may be excessively anthropocentric, and not accord due consideration to the intrinsic value of the environment,¹²³ as for instance, the many species that are likely to face extinction as a result of global warming. Given these numerous uncertainties and complexities in fashioning and implementing a workable human right in relation to the environment, the role that such a right can directly play in providing a steer to the climate negotiations and post-2012 regime is limited. To the extent that climate litigation, based on a human right in relation to the environment, however, gains ground in national and regional fora, it can serve to shape Parties' positions in the climate negotiations.

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

The second approach to bringing human rights to bear on climate protection is by applying a broader human rights lens to analyse and address climate change. There are two elements to this approach. First, the focus is on those human rights that are not in dispute such as the rights to life, liberty and security, and the right to an adequate standard of living (of which health, and shelter are a part).¹²⁴ It is not restricted to a human right in relation to the

121 Copenhagen Accord, 2009 (n 12) [1].

122 See World Bank, 'World Bank Development Report 2010: Development and Climate Change' (2010) 5; C Symon and others (eds), *Arctic Climate Impact Assessment Report* (2005) <<http://www.acia.uaf.edu/pages/scientific.html>> accessed 17 September 2010.

123 C Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP, Oxford 1996) 87.

124 The existence of these rights is not in dispute; however, there is neither a widely accepted list of which rights constitute 'core rights' nor an agreement on whether, to the extent that they

environment, a right some are not persuaded by, and which is vulnerable to the challenge of anthropocentrism. Second, this approach rests on a broader ethical conception of human rights rather than solely on a legal construction of them.

A host of internationally protected rights—in particular the rights to life, liberty and security, and the right to an adequate standard of living—and progressive realisation towards them will be at risk from climate impacts. There is a burgeoning and ever-persuasive literature arguing the case.¹²⁵ The vast majority of nations have signed the core human rights treaties, including the ICCPR and the ICESCR.¹²⁶ State Parties have obligations to respect, protect and fulfil the rights contained in these treaties, each of these requiring different degrees of state intervention.¹²⁷ These obligations are binding on every state Party,¹²⁸ and must be given effect to in good faith.¹²⁹ And, indeed, once a state has ratified the ICCPR, it is not permitted to denounce or withdraw from it.¹³⁰

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

exist, they should be drawn from civil and political rights alone or extend to economic and social rights as well. The notion of core rights also flies in the face of the indivisibility thesis. However influential scholars such as Shue argue from first principles that there are some 'basic rights' that cut across the divide between civil and political rights and economic and social rights, and extend to negative and positive aspects of these rights. Shue argues for an open-ended category of basic rights that includes in the first instance the rights to physical security, subsistence and political participation. See H Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (2nd edn, Princeton UP, Princeton 1996); J Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell Publishing, Oxford 2007) 61–5.

- 125 The ICHR Report documents these in thoughtful detail. For an exploration of specific rights that will be at risk through climate impacts, see C Bals and others, 'Climate Change, Food Security and the Right to Adequate Food' (Diakonisches Werk der EKD Stuttgart eV 2008); OXFAM, 'Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change' (September 2008); P Baer and others, 'The Right to Development in a Climate Constrained World' (Heinrich Böll Foundation, Berlin 2008); World Health Organization, 'Protecting Health from Climate Change' (2008); B Saul and J McAdam, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' Legal Studies Research Paper 08/131 (Sydney 2008); J Knox, 'Climate Change as a Global Threat to Human Rights, UN Consultation on the Relationship between Climate Change and Human Rights' (Geneva, 22 October 2008).
- 126 Status of ratifications of core human rights treaties <<http://www2.ohchr.org/english/bodies/docs/status.pdf>> accessed 17 September 2010.
- 127 For a discussion of the distinction between the duties to respect, protect and fulfil in the climate change context, see D Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38 Ga J Int'l & Comp L 511.
- 128 *Barcelona Traction Light and Power Company Ltd, Second Phase* [1970] ICJ Rep 3.
- 129 Art 26, Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) reprinted in 8 ILM 1969. Also referred to in Human Rights Committee, Covenant on Civil and Political Rights, 'General Comment 31' CCPR/C/21/Rev 1/Add 13.
- 130 Human Rights Committee, 'Covenant on Civil and Political Rights, General Comment 26, Continuity of Obligations' (1997) CCPR/C/21/Rev 1/Add 8/Rev 1.

of all human rights is central to human rights jurisprudence.¹³¹ The Human Rights Committee has noted that a distinction between the two sets of rights with respect to the provision of legal remedies cannot be maintained.¹³² This position is also endorsed by several influential scholars who believe that evolving notions of political responsibility place considerable strain on rigid distinctions between civil and political rights on the one hand, and economic, social and cultural rights on the other, as also between negative and positive obligations¹³³

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

Most of the Parties to the core human rights treaties are also Party to the FCCC and the Kyoto Protocol.¹³⁴ States, at least those that are Party to both the climate treaties and the human rights treaties (this includes the vast majority), are obliged to approach the climate change problem not just as a global environmental problem, but also as a human rights concern. States are obliged to identify and explore the human rights that might be placed at risk by climate impacts, and take pre-emptive action in that regard. They are also obliged to design policies and measures to mitigate and adapt to climate change, sensitive to the impacts that these could have on the progressive realisation of protected human rights. Admittedly, the language of obligations in the absence of mechanisms for oversight and enforcement may be of limited use. However, to the extent that Parties' recognise the existence of such obligations, their positions in the climate negotiations should be tailored to and informed by them.

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

131 H Steiner and P Alston, *International Human Rights in Context: Law, Politics and Morals* (2nd edn. OUP, Oxford 2000) 268–300.

132 Human Rights Committee, 'Covenant on Economic, Social and Cultural Rights, General Comment 9, The Domestic Application of the Covenant' E/C 12/1998/24 (1998).

133 See generally, S Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (OUP, Oxford 2008); Shue (n 124).

134 There are 166 Parties to the ICCPR, 160 to the ICESCR, 194 to the FCCC and 190 to the Kyoto Protocol.

degradation it is important to take into account the recognition, protection and specific dimensions of the rights of indigenous peoples and communities under human rights treaties.¹³⁵ The latest iteration of the negotiating text contains such protections in bracketed text.¹³⁶

In addition to the obligations that can be said to flow from a legal construction of human rights, an ethical conception of human rights can also lend considerable value to the climate change debate. The international human rights discourse is premised on the notion of universality,¹³⁷ the notion that universally valid rights are located 'beyond law and history',¹³⁸ and their protection transcends cultural, social, religious, economic and political context. As such the institution of human rights combines 'law and morality, description and prescription'.¹³⁹ This has the potential, as Douzinas argues, to lead to 'confusion and rhetorical exaggeration'.¹⁴⁰ However, such confusion can be limited as long as a conceptual distinction is maintained between legal and moral human rights. The content of legal human rights is dependent on the legislative, judicial, and executive bodies that maintain and interpret the laws in question.¹⁴¹ The validity of moral human rights on the other hand is independent of such governmental bodies, and it is indeed respect for moral human rights that imparts legitimacy to the acts of governmental bodies.¹⁴² While legal human rights derive their legitimacy from consent-based sources of international law such as human rights treaties, moral human rights derive their validity and rhetorical force primarily from natural law, and only secondarily from consent-based sources of international law.¹⁴³ The recognition of moral human rights is significant because it creates the space for a critical assessment of existing international law, free from the narrow formalistic confines of consent-based renderings of international law. The recognition of moral human rights may also serve as a catalyst to the legalisation of these rights. It is worth noting in this context that as international lawyers begin to

135 Bolivia has proposed that the REDD provisions operate within the UN Declaration on the Rights of Indigenous Peoples, see FCCC/AWGLCA/2008/16/Rev 1 (n 25).

136 See FCCC/AWGLCA/2010/14 (n 89).

137 See Preamble, Universal Declaration on Human Rights, UNGA Res 217A (1948); Preamble, International Covenant on Economic, Social and Cultural Rights, 1966; Preamble, ICCPR; Preamble African Charter; and, art 1(1) Vienna Declaration and Programme of Action (adopted 25 June 1993) reprinted in (1993) 32 ILM 1661.

138 M Koskeniemi, 'The Preamble of the Universal Declaration on Human Rights' in G Alfreðsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International, The Hague 1999) 32.

139 C Douzinas, *Human Rights and the Empire* (Routledge-Cavendish, New York 2007) 9–10.

140 Ibid.

141 T Pogge, 'Recognized and Violated by International Law: the Human Rights of the Global Poor' (2005) 18 LJIL 717.

142 Ibid 718.

143 See eg A Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights' (2006) 8 J Hist Intl L 245.

engage with issues such as climate change and human rights, a tension will likely emerge between the formalistic consent-based renderings of international law and critical, ethically anchored revisionist renderings of international law, and this tension needs to be acknowledged and accommodated. The efforts of ALBA countries to tailor the post-2012 climate regime to fit their alternative eco-centric rights-based and socialistic vision expose such a tension.

Given the complexity of the ongoing negotiation process, and the marginal buy-in from states of human rights approaches in the context of the intergovernmental climate process, what space can a human rights approach constructively occupy, and what role can it creatively play? The ICHRP report suggests that human rights offers ‘a shared and codified moral language around which consensus can be built’.¹⁴⁴ Elsewhere the report notes that human rights language can add ‘considerable normative traction to arguments in favour of strong mitigation and adaptation’¹⁴⁵ and that ‘human rights provide a legitimate set of guiding principles for global policy because they are widely accepted by societies and governments everywhere’.¹⁴⁶ This argument is premised on the notion that the institution of human rights offers a universally shared value system. The conscience-affirming but self-denying actions that tackling climate change will require can only occur if it is predicated on and spurred by a powerful value system. This is an intuitively persuasive argument, in particular if viewed in conjunction with the Argentinean suggestion that a human rights approach could ‘provide us with a compass for policy orientation’.¹⁴⁷ But where does this compass lead us? And, in what sorts of disputes might this approach provide a mediating influence?

5.2.1. A normative focus on the individual

The primary defining feature of a human rights approach is its normative focus on the individual—in other words ‘in the dignity and worth of the human person’.¹⁴⁸ A focus on the dignity and worth of every individual renders efforts to deal-seek for the majority problematic. And it is this that states in the climate negotiations are essentially engaged in—deal-seeking for perceived aggregate welfare which may well be incompatible with individual rights for particular people or groups of people. The primary objective of the climate regime is the ‘stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.¹⁴⁹ This object is found in Article 2 of the FCCC and reference

144 Humphreys (n 22) 79.

145 *Ibid* 20.

146 *Ibid*.

147 FCCC/AWGLCA/2008/MISC 5 (n 61) 14.

148 Preamble, Charter of the United Nations (26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

149 Art 2, FCCC.

is also made to it in the Kyoto Protocol.¹⁵⁰ But, what constitutes 'dangerous' anthropogenic interference with the climate system? And, how is it to be determined? The IPCC notes that this is a value judgment¹⁵¹ determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk.¹⁵² Sachs argues that it involves two valuations: 'what kind of danger is acceptable, and what kind of danger is acceptable for whom?'¹⁵³ The Copenhagen Accord agreed to limit temperature increase to below 2°C (some increase being inevitable). But even a 2°C temperature increase will have significant impacts on the inhabitants of small island states and the Arctic Inuit.¹⁵⁴ It appears then that the costs (to the global community) of limiting climate change to below 2°C must have been deemed to outweigh the benefits it will bring to a small (in proportion) number of people. A focus on individual rights would make such determinations of aggregate welfare questionable, for the '[l]anguage of rights strengthens the power of the marginalized.'¹⁵⁵ This is not to suggest that human rights of particular individuals are determinative in such an instance, and that the regime should be structured around a negligible temperature increase. It is conceivable that the costs, economic and opportunity, and the corresponding rights implications, may be prohibitive for the rest of the world, for other people and other rights. And, human rights are not absolute—as evidenced by the fact that economic and social rights are to be 'progressively realized' and even some civil and political rights can be derogated from in emergencies.¹⁵⁶ Human rights approaches in such situations would shift focus to the correlative duties of restitution, compensation and rehabilitation for the affected individuals. It is worth noting that the small island states have proposed stabilisation of GHG concentrations well below 350ppm CO₂ eq, temperature increases limited to well below 1.5°C above the pre-industrial level, and reduction of CO₂ emissions by greater than 85% by 2050.¹⁵⁷ They have also called for the establishment of an international

150 Preamble, Kyoto Protocol.

151 See Bernstein and others, 'Climate Change 2007: Synthesis Report' (CUP, Cambridge 2007) 64. See also Australia's submissions to the AWG-LCA, 'Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Submissions from Parties' (20 March 2008) FCCC/AWG/LCA/2008/MISC 1/Add 2, 3 (noting that 'social and economic conditions (including access to financial and investment flows) and other factors will be relevant' to such a value judgment, 'as will be the availability of affordable low emissions technologies').

152 Ibid.

153 Sachs (n 33) 3.

154 Symon and others (n 122).

155 Sachs (n 33) 7.

156 Bodansky (n 127).

157 See art 2, Proposed Protocol to the Convention submitted by Grenada for adoption at the sixteenth session of the Conference of the Parties, Submission by Grenada on behalf of the Alliance of Small Island States, in FCCC/CP/2010/3 (2 June 2010).

mechanism to address social, economic and environmental loss and damage associated with climate change impacts in vulnerable developing countries through risk management, insurance, compensation and rehabilitation.¹⁵⁸

5.2.2. A benchmarking device¹⁵⁹

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

Political philosopher Caney argues that since in such a paradigmatic case both sets of rights relate to vital interests (of sufficient weight to impose obligations on others), it should be possible to satisfy both.¹⁶⁰ There are many fossil-fuel intensive climate endangering activities in other (primarily industrialised) parts of the world that relate to 'relatively trivial interests', and these must be cut back¹⁶¹ so as to create space for increased GHG emissions for individuals without access to electricity, as well as to protect the territorial integrity, and cultural rights of the small islanders. Two aspects of this argument are interesting: first, it finds resonance in the climate regime which is fundamentally premised, as argued before, on a redistribution of the ecological space. And, second, it distinguishes between trivial and non-trivial interests that may be served by climate endangering activities. This distinction has a long history in the climate negotiations, where India and China have consistently argued that developing country emissions are 'survival emissions' while industrialised country emissions are 'lifestyle' or 'luxury' emissions.¹⁶² Human

158 See Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submission by Grenada on behalf of the Alliance of Small Island States (30 April 2010) FCCC/CP/2010/Misc 2 61.

159 This subsection draws inspiration from S Caney, 'Climate Change, Human Rights and Moral Thresholds' in S Humphreys (ed), *Human Rights and Climate Change* (CUP, Cambridge 2009) 69; S Caney, 'Human Rights, Climate Change and Discounting' (2008) 17 *Envtl Politics* 536; S Caney, 'Global Justice, Rights and Climate Change' (2006) 19 *Canadian J L & Jurisprudence* 255; S Caney, 'Cosmopolitan Justice, Responsibility and Global Climate Change' (2005) 18 *LJIL* 747; Shue (n 124); H Shue, 'Subsistence Emissions and Luxury Emissions' (1993) 15 *Law & Pol'y* 39; H Shue, 'The Unavoidability of Justice' in A Hurrell and B Kingsbury (eds), *The International Politics of the Environment* (Clarendon Press, Oxford 1992) 397.

160 Caney, 'Global Justice, Rights and Climate Change' *ibid* 262–3.

161 *Ibid*.

162 Mwadosya (n 30) 74.

rights protect the former not the latter. They provide benchmarks—‘moral thresholds’¹⁶³ or ‘line[s] beneath which no one is allowed to sink’¹⁶⁴ against which actions can be evaluated. In this sense there is a synergy, notwithstanding differences in methodology, between human rights approaches and the climate change discourse.

5.2.3. Holding authorities to account

Another defining feature of human rights approaches is their power, given the necessary implication of obligations or duties, to hold authorities, even at times across territorial lines, to account.¹⁶⁵ It is the enforcement potential of human rights approaches, given the glacial pace and distant promise of the climate negotiations, that first captured the legal imagination. A series of cases have been filed in national¹⁶⁶ and international¹⁶⁷ fora seeking recompense for climate damage. Few of these cases have resulted in clear victories. The Inuit case, the most high profile of its kind, was held inadmissible. Although the Commission did not offer detailed reasons for its decision, they are not hard to fathom. There are serious hurdles in terms of establishing clear and binding obligations (given the contextual and soft language used in the relevant treaties), jurisdiction (since states, on occasion, do not recognise the jurisdiction of various international dispute settlement fora), standing (as every state both contributes to and suffers the impacts of climate change), causation (between the GHG emissions of the defendant state, current and historic, and impacts suffered by the plaintiff state/individuals), and damage (as much of it may be future damage). Indeed, the climate change problem exposes the fault lines and limits of international law.¹⁶⁸ National level human rights–climate change litigation has fared better. In the *Nigerian Gas Flaring Case*¹⁶⁹ the Court held that the practice of gas flaring by Nigeria in the Niger Delta, a practice which contributed more to climate change than all other sources in Sub-Saharan Africa, violated guaranteed constitutional rights to life and dignity.¹⁷⁰ It is worth noting, however, that whatever the

163 Caney (n 159).

164 Shue (n 124) 18.

165 Sachs (n 33).

166 See eg *Gbemre v Shell Petroleum Development Co Nigeria Ltd* (2005) Federal High Court of Nigeria, Benin Division, Judgement of 14 November 2005, Suit No: FHC/B/CS/53/05; *Massachusetts v EPA* (2006) WL 558353 (US) (No 05-1120); *Native Village of Kivalina and City of Kivalina v Exxon Mobil* (2009) 663 F Supp 2d 863 (ND Cal).

167 See the Inuit case (n 39).

168 See generally for scholarly efforts to address climate change damage in international law, C Voigt, ‘State Responsibility for Climate Change Damages’ (2008) 77 *Nordic J Intl L* 1; R Verheyen, *Climate Change and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff Publishers, Leiden 2005).

169 *Gbemre* (n 166).

170 *Ibid.*

outcome of human rights-based climate litigation, the act of filing of these cases itself has considerable rhetorical and practical impact. As some scholars note, the focus on specific injuries builds political support, and the 'story-telling quality' of the cases makes climate change real and tangible.¹⁷¹ And, even if individual cases fail, they indirectly build pressure for policy and legislative action.¹⁷²

The power to hold authorities to account in the human rights arena is more than a legal concept—in other words, it is more than the power to enforce in dispute settlement fora. In sync with the 'moral human rights' notion raised earlier, the 2000 Human Development Report characterises human rights as 'moral claims on the behaviour of individual and collective agents, and on the design of social arrangements'.¹⁷³ People have legitimate claims on others and on the design of social arrangements 'regardless of what laws happen to be enforced'.¹⁷⁴ These sorts of claims and this fluid notion of accountability render certain national positions in the climate negotiations suspect. For instance, India, among other developing countries, often argues that 'India is certainly not responsible for the mess. We are, in fact, victims of it. So why expect us to tighten our belts?'¹⁷⁵ While it is true that India is not (either solely or primarily) responsible for the 'mess' and that it is, amongst others, a victim of it, the legitimate human rights claims of those who suffer the ill effects of climate change within India—along the coastline, in the Sundarbans, and in the rural areas¹⁷⁶—demand that the government give account of itself and that it takes adaptation and mitigation concerns seriously. And whether it accepts mitigation targets internationally or not, it still has human rights obligations to its people, both under international and national constitutional law.

Open to a similar critique is the position of the USA. The USA refused to adopt GHG targets under Kyoto since the Protocol 'exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy'.¹⁷⁷

171 See D Hunter, 'The Implications of Climate Change Litigation for International Environmental Law Making' in H Osofsky and W Burns (eds), *Adjudicating Climate Control: Sub-National, National And Supra-National Approaches* (CUP, Cambridge 2008) and references contained therein.

172 Ibid.

173 UNDP, 'Human Development Report 2000: Human Rights and Human Development' (2000) <<http://hdr.undp.org/en/media/HDR.2000.EN.pdf>> accessed 17 September 2010, 25.

174 Ibid.

175 Prodipto Ghosh, quoted in R Chengappa, 'Apocalypse Now' *India Today* (23 April 2007) (Ghosh is a former Indian negotiator).

176 India's 700 million rural population depends directly on climate-sensitive sectors (agriculture, forests and fisheries) and natural resources for their subsistence. See J Sathaye and others, 'Climate Change, Sustainable Development and India: Global and National Concerns' (2006) 90 *Current Science* 314, 318.

177 Office of the Press Secretary of the White House, Text Of A Letter From The President To Senators Hagel, Helms, Craig, and Roberts 1 (13 March 2001).

The USA continues to deploy this argument in the post-2012 negotiations to ensure its mitigation obligations are comparable to those for developing countries in legal character even if not in stringency.¹⁷⁸ Needless to say, no nation is obliged to sign a treaty. It is true that China and India do not have quantitative mitigation targets under the Kyoto Protocol, and this may be a justifiable reason for the USA to reject the Protocol. But this is not a sufficient reason for the USA to shy away from stringent action on mitigation and adaptation. The standards required of other nations may be appropriate considerations in the context of a deal-seeking utilitarian intergovernmental negotiation, but not in the context of a human rights approach. A human rights optic renders the requirements (or lack thereof) placed on India and China irrelevant in determining whether the USA has a duty to take stringent action to avert and adapt to climate change domestically. The USA can be held to account (even if only in the court of public opinion) irrespective of the action or inaction of any other nation.

6. The Interpretative Implications of Human Rights Approaches to Climate Change

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

6.1. *Between States Inter Se*

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

178 See Submission by the US in Additional Views (n 158) 79; See also earlier submission FCCC/AWGLCA/2008/MISC 5 (27 October 2008) 107.

6.1.1. The principle of common but differentiated responsibilities

The first and arguably foremost principle governing the code of conduct is the principle of common but differentiated responsibilities and respective capabilities (CBDR).¹⁷⁹ The CBDR principle brings together several strands of thought. First, it establishes unequivocally the common responsibility of states for the protection of the global environment. Next, it builds on the acknowledgement by industrial countries that they bear the primary responsibility for creating the global environmental problem by taking into account the contributions of states to environmental degradation in determining their levels of responsibility under the regime. In doing so it recognises broad distinctions between states, whether on the basis of economic development or consumption levels.

The core content of the CBDR principle as well as the nature of the obligation it entails is deeply contested. Both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its content: one, that the CBDR principle 'is based on the differences that exist with regard to the level of economic development';¹⁸⁰ alternatively, the CBDR principle is based on 'differing contributions to global environmental degradation and not in different levels of development'.¹⁸¹ There is, in addition, a fundamental disagreement as to the nature of the obligation it entails. While some argue that it is obligatory, others contend that it can be nothing but discretionary. The disagreements over this principle's content and the nature of obligation it entails have spawned debates over its legal status.¹⁸² Notwithstanding these debates, at its core the CBDR principle permits and indeed requires consideration of differential treatment between countries in the application of treaty obligations.

Differential treatment is seen in a far less expansive manner in the human rights field.¹⁸³ However, a human rights approach does not necessarily preclude differential treatment. In fact, it could be argued in light of human rights concerns and the notion of thresholds (based as it is on a distinction between trivial and non-trivial climate endangering activities) that a human rights approach permits, indeed requires, albeit in a limited and contingent fashion, differential treatment between developing and industrialised countries.¹⁸⁴ In the post-2012 negotiations, as the CBDR principle remains

179 Art 3(1), FCCC.

180 B Kellersmann, *Die Gemeinsame, Aber Differenzierte Verantwortlichkeit Von Industriestaaten Und Entwicklungsländern Für Den Schutz Der Globalen Umwelt* (English Summary) (Springer Verlag, Berlin 2000) 335.

181 International Law Association, 'International Committee on Legal Aspects of Sustainable Development, Report of the Sixty-Sixth Conference' (ILA, London 1995) 116.

182 Rajamani (n 28) 158–62.

183 *Ibid* 20–4.

184 Differentiation in certain human rights treaties, although carefully circumscribed, does exist. First, States may and often claim differentiation for themselves through reservations. Second, treaties may use discretionary language such as 'to the maximum of its available

central,¹⁸⁵ it would be useful to consider how a human rights approach might shape a burden sharing agreement between states that is respectful of individual rights, and of equity between and within states so as to ensure that the burden sharing arrangement does not, at least, further threaten rights protection. The issue of differentiation between developing countries, and the attempt to burden some developing countries with mitigation responsibilities might conceivably, given the additional financial burden that it will represent, risk the progressive realisation of certain rights in these countries.

6.1.2. The polluter pays principle

The polluter pays principle (PPP) complements the CBDR principle. This principle does not find explicit reference in the existing climate treaties, but it complements the CBDR principle insofar as the CBDR principle countenances differentiation on grounds of differing contributions to environmental harm.¹⁸⁶ It is also part of the conceptual apparatus of the Kyoto Protocol in that only industrialised countries, historically responsible for the majority of GHG emissions, have mitigation targets.

The PPP requires that the ‘polluter should, in principle, bear the cost of pollution’.¹⁸⁷ Although based on intuitively sound legal ground and a logical extension of the customary international law principle that states have an obligation to ‘ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control’,¹⁸⁸ this

resources’ (art 2, ICESCR), permitting states leeway in implementation, and therefore recognizing differentiation in implementation. States are also given an opportunity under the ICESCR, ICCPR, CEDAW and the Convention on the Rights of the Child to indicate in their reports to the relevant treaty bodies the ‘factors and difficulties’ affecting implementation. Among the ‘factors and difficulties’ most often deployed are economic difficulties, political transition and instability, and traditional practices and customs. See E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, The Hague 2001) 346–52.

185 References to CBDR are contained in submissions by the Philippines, Rwanda, United States, Pakistan, Australia, Japan, Argentina, Brazil, China, New Zealand, Panama on behalf of Costa Rica, El Salvador, Honduras, Nicaragua and Panama, Singapore, Switzerland, AOSIS, Chile, China, EC and its member States, G77 and China, Indonesia, Pakistan, Venezuela, African Group, Ecuador et al and Ghana. See n 25 at 12.

186 The CBDR principle, in particular as defined in Rio Principle 7, recognises greater responsibility for developed countries in part due to ‘the pressures their societies place on the global environment’.

187 Principle 16, Rio Declaration, 1992 reads: ‘[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’ See also OECD Recommendation, ‘Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies’ (1972) C (72) 128. See generally P Sands, *Principles of International Environmental Law* (2nd edn, CUP, Cambridge 2003) 279–81.

188 The ICJ in *The Legality of the Threat or Use of Nuclear Weapons Case* held: ‘[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the

principle does not enjoy universal support. The guarded language used in the construction of the PPP bears testimony to the caution with which states approach international responsibilities. The principle is formulated in terms which are recommendatory rather than mandatory¹⁸⁹ and it contains little substantive legal content. Moreover, the application of the principle, to the extent that it must be implemented 'without distorting international trade and investment' is subject to restrictive conditions.¹⁹⁰

Some countries have suggested that the PPP constitute one of the core principles guiding the construction of a post-2012 climate regime.¹⁹¹ A human rights approach would arguably support this position. In order to ensure that climate endangering activities relating to non-trivial uses might be protected where they exist, and permitted as they grow, fossil-fuel intensive climate endangering activities in other (primarily industrialised) parts of the world that relate to 'relatively trivial interests' must first be reduced. This is essential to ensure that the progressive realisation of human rights protections proceeds unhindered in the developing world. A strict application of the PPP, however, may also undermine the progressive realisation of certain human rights in developing countries. Although historically the developed world has been responsible for the bulk of GHG emissions, emissions in developing countries, in particular in China and India, are also increasing. The PPP is not limited by capacity to pay or to historical emissions alone. Applied strictly and in isolation, China, currently considered to be emitting more than the United States,¹⁹² would qualify as a polluter and be required to pay.¹⁹³ This in turn may divert scarce resources from nontrivial interests such as the provision of universal access to energy. The PPP therefore needs to be applied so as to complement rather than supplant principles such as the principle of CBDR.

In so far as principles such as the PPP are viewed through the prism of human rights, they require application not just between states, the classic subjects of international law, but also within states in relation to entities and individuals. There is no principled reason, if individual welfare is the focus, to distinguish between polluters within and outside the state. If polluters within

corpus of international law relating to the environment.' See *The Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241 [29].

189 Words used are 'should endeavor to promote' and 'in principle'.

190 D Wirth, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?' (1995) 29 Ga L Rev 599, 640–5.

191 Pakistan, Switzerland, AOSIS and Ghana, see FCCC/AWGLCA/2008/16/Rev 1 (n 25) 19.

192 The Netherlands Environmental Assessment Agency estimates that China's 2006 CO₂ emissions surpassed those of the USA by 8%. See China now no. 1 in CO₂ emissions; USA in second position <<http://www.pbl.nl/en/dossiers/Climatechange/moreinfo/ChinanownolinCO2emissionsUSAinsecondposition.html>> accessed 17 September 2010.

193 For a thoughtful analysis of the Polluter Pays Principle, see S Caney, 'Climate Change and the Duties of the Advantaged' (2010) 13 Crit Rev Intl Soc & Pol Phil 203, 212.

a state are engaged in fossil-fuel intensive climate endangering activities relating to trivial uses, then the PPP would apply to them as well. But intra-state GHG distributional inequities between sub-national entities may well be outside the purview of state-centric international negotiations.

6.1.3. A precautionary approach or the precautionary principle¹⁹⁴

FCCC Article 3 urges states to take 'precautionary measures to anticipate prevent or minimise the causes of climate change and mitigate its adverse effects'. Some states view this as encapsulating the precautionary principle and have put this principle forward as a guiding principle in the ongoing negotiations.¹⁹⁵ The precautionary principle is seen by some as evidence of a paradigm shift in international environmental law, from the *ad hoc* and reactive approaches that characterised early environmental regulations, to the precautionary regulation that is on the increase today. There are numerous references to the precautionary principle in international law,¹⁹⁶ but there are divergent views on whether the precautionary principle is properly so called, how it might best be defined, what its precise content is, what obligations it creates and on whom, and whether, in its strong version, it lends itself to actualisation.¹⁹⁷ As such its precise import and legal status is in much dispute.¹⁹⁸

The precautionary principle is purported to be in evidence in its most evolved form in the EU. The European Commission notes that the precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management and risk communication.¹⁹⁹ In the Commission's view the

194 There are diverging views on whether precaution is an approach or a principle.

195 Brazil, AOSIS, Micronesia and Venezuela, FCCC/AWGLCA/2008/16/Rev (n 25) 12.

196 See eg United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, reprinted in (1995) 34 ILM 1542; The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000, reprinted in 39 ILM 1027; Convention on Biological Diversity, 1992 and the FCCC. See also references to 'prudence and caution' by the International Tribunal on the Law of the Sea in *Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan)*, Provisional Measures, ITLOS, Order of 27 August 1999, (1999) 38 ILM 162 [77], *The Mox Plant Case (Ireland v United Kingdom)*, Provisional Measures, ITLOS, Order of 3 December 2001, (2002) 41 ILM 405 [84]. See for references O McIntyre and T Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 JEL 221. See for an extensive list of references N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002) 90.

197 See generally C Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (CUP, Cambridge 2005).

198 See European Communities, 'Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291, WT/DS292, WT/DS293' Panel Report (29 September 2006) [7.89] (noting, whilst side-stepping the question, that the question of whether the precautionary principle is a general principle of international law is a 'complex' and 'unsettled' one).

199 Communication from the Commission on the Precautionary Principle, COM (2000)1, 02/02/2000. The Council adopted a resolution endorsing the broad lines of the Commission's communication in December 2000.

precautionary principle is particularly relevant to the management of risk.²⁰⁰ And, the determination of what constitutes an 'acceptable level of risk for society is an eminently political responsibility'.²⁰¹ Extrapolating from the EU to the international level, any determination of 'an acceptable level of risk' necessary for the application of the precautionary principle, in the context of climate change could benefit from a human rights approach, to the extent that it is based on relevant health and scientific studies. A human rights approach could provide benchmarks or 'thresholds' to define acceptable outcomes.²⁰² The thresholds below which the living conditions of particular individuals must not fall would determine where along the spectrum of precautionary action the balance must be struck.²⁰³ Such a determination also has an inter-generational dimension. It is not just the living conditions of individuals of the current generations that are to be factored in, but the likely living conditions the present generation will leave to future generations.²⁰⁴

6.1.4. The principle/duty of cooperation

The principle of cooperation finds reflection both in the environmental²⁰⁵ and human rights field. The climate negotiation process is a sophisticated effort at achieving multilateral cooperation on a global environmental issue. The language and burden sharing arrangement contained in the FCCC and Kyoto Protocol bear testimony to this. The FCCC underscores the notion of cooperation by noting that 'the global nature of climate change calls for the widest possible cooperation by all countries'.²⁰⁶ It requires Parties to cooperate to sustain a supportive and open international economic system which would promote sustainable economic growth.²⁰⁷ Further, it obliges Parties to 'cooperate' in development and transfer of technology,²⁰⁸ conservation and enhancement of GHG sinks,²⁰⁹ preparing for adaptation,²¹⁰ research,²¹¹ exchange of

200 Ibid.

201 It acknowledges however that the precautionary principle must be submitted to the principles of proportionality and non-discrimination, to cost-benefit analysis and to review. Ibid.

202 Caney (n 160).

203 At the unexceptionable end of the spectrum the principle is nothing more than a reflection of the age-old adage better safe than sorry. At the more controversial end of the spectrum an application of the precautionary principle could require that a margin of safety be built into all decision-making. See B Lomborg, *The Skeptical Environmentalist* (CUP, Cambridge 2001) 348.

204 For a persuasive account see H Shue, 'Deadly Delays, Saving Opportunities: Creating a More Dangerous World?' in S Gardiner and others (eds), *Climate Ethics: Essential Readings* (OUP, Oxford 2010) 146, 155–8.

205 See generally A Boyle, 'Principle of Cooperation: the Environment' in V Lowe and C Warbrick (eds), *United Nations and the Principles of International Law* (Routledge, London 1994) 120.

206 Preamble, FCCC.

207 FCCC art 3(5).

208 Ibid art 4(1)(c).

209 Ibid art 4(1)(d).

210 Ibid art 4(1)(e).

211 Ibid art 4(1)(g).

information,²¹² and education, training and public awareness.²¹³ The notion of cooperation is also central to the post-2012 negotiations which are titled 'long-term cooperative action under the Convention'.

In a synergistic vein, human rights doctrine also privileges international cooperation. It interprets international cooperation 'for the realization of economic, social and cultural rights' as an obligation of all States.²¹⁴ John Knox argues that the obligation to cooperate in the context of climate change should take two forms: first, in the conclusion of a Convention that effectively mitigates and ameliorates the effects of climate change on human rights; and second, in responding to the adverse effects of climate change, so as to protect human rights, in advance of an agreement.²¹⁵

Human rights provide criteria for both a successful negotiated outcome and a successful process. The negotiated outcome in the climate regime—the post-2012 agreement—if viewed through a human rights lens may need to ensure reduction of greenhouse gases to levels that will not interfere with the human rights of those considered most vulnerable to the effects of climate change.²¹⁶ The FCCC identifies sets of countries that are traditionally considered vulnerable;²¹⁷ however, there is a range of vulnerabilities associated with climate change, and even those not traditionally considered vulnerable are likely to experience new levels of vulnerability over time. The climate negotiations are engaged in devising, through submissions of Parties, ways of recognising and responding to those considered most vulnerable. A human rights optic may serve to catalyse ambition in step with the needs of the most vulnerable.

The ambition of the regime will be reflected in the choice Parties make between different levels of GHG stabilisation (350ppm CO₂ or 450 ppm CO₂) or temperature increase (2°C—or less)²¹⁸ at which the international community should aim. A human rights lens, with its normative focus on the individual, may press in favour of a more rather than less ambitious outcome, given that even at the lowest levels of stabilisation and temperature increase, some groups and peoples will have their homes, livelihoods, nations and culture threatened. A human rights approach may also require that the regime provide adequate assistance to people and communities to adapt to unavoidable

212 Ibid art 4(1)(h).

213 Ibid art 4(1)(i).

214 Human Rights Committee, 'Covenant on Economic, Social and Cultural Rights, General Comment 3' E/1991/23.

215 J Knox, 'Climate Change as a Global Threat to Human Rights' UN Consultation on the Relationship between Climate Change and Human Rights, Geneva, Switzerland, 22 October 2008.

216 Ibid.

217 FCCC art 4(8).

218 See FCCC/AWGLCA/2008/16/Rev (n 25).

climate change, which would otherwise harm their human rights.²¹⁹ In the case of adaptation, the obligations the international community has would be buttressed by states—the obligations states have under human rights treaties and/or of national constitutional norms.

Human rights approaches also provide criteria for successful procedures relating to policy-making.²²⁰ A successful procedure requires information-sharing²²¹ and participation,²²² albeit appropriately channelled in the context of an inter-governmental process, of those whose rights will be impacted by climate change. In this context it is worth noting the efforts of indigenous groups to participate in the intergovernmental process.²²³ A successful procedure would require states to incorporate rights to information and participation in the post-2012 climate agreement, and in designing national, regional and local level policies on mitigation and adaptation. Article 3(7) of the Aarhus Convention requires states to promote the application of the principles of the Convention in international environmental decision-making processes. This principle is binding on Aarhus Parties which includes most of the EU member states.²²⁴

6.2. *Within States*

Does a human right optic demand a certain code of conduct of a state vis-à-vis its citizens in the context of climate change? Human rights obligations devolve primarily on states with respect to all those within their jurisdiction. ICCPR Article 2 is the paradigmatic case. It obliges states 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. Most international human rights instruments contain a 'scope of application' provision that limits the required action of an individual state to the geographic areas or territories under its control.²²⁵ As one scholar notes, while trans-boundary air pollution knows no bounds, international human rights instruments do.²²⁶ The ICESCR does not have a scope of application provision, and the International Court of Justice (ICJ) has held that it may apply to acts carried out by a state in the exercise of its

219 See E/1991/23 (n 214).

220 In the environmental field these are reflected in Principle 10 of the 1992 Rio Declaration on Environment and Development, and in the Aarhus Convention. See Chapter 4 of the ICHR Report (n 22).

221 Aarhus Convention, art 5.

222 *Ibid* art 7.

223 See n 45–49.

224 Status of ratifications <<http://www.unece.org/env/pp/ratification.htm>> accessed 17 September 2010. There are 44 Parties to the Convention. See also ICHR Report (n 22) 50.

225 Harrington (n 43) 513.

226 *Ibid*.

jurisdiction outside its own territory.²²⁷ An extension has been suggested in the context of the right to food as well.²²⁸ Nonetheless, the primary responsibilities of States are to those within their jurisdiction. And, this responsibility, in the case of the ICESCR, is to take steps—deliberate, concrete and targeted—towards meeting the obligations recognised in the Covenant.²²⁹

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

Adaptation under the FCCC is intended to be a cooperative effort. FCCC Article 4(1)(e) read with Article 4(8) and (9) highlights the importance of cooperation and support, including support relating to funding, insurance and the transfer of technology to vulnerable developing countries. A series of international funds exist, including the recently operationalised Kyoto Protocol Adaptation Fund, to finance adaptation in developing countries.²³⁰ At present, however, these funds do not have the ability to generate the necessary finances. The FCCC Secretariat estimates that in 2030 additional investment and financial flows needed for adaptation will amount to several tens of billions USD, and a significant share of the additional investment and financial flows—USD 28–67 billion—will be needed in developing countries.²³¹ Currently available finances amount to 275 million USD.²³² Efforts by developing countries to levy a charge on the entire carbon market so as to fund adaptation came to nought, cutting off another fertile source for adaptation financing.²³³ The Copenhagen Accord sought to create a Green Fund, and

227 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 12.

228 J Zielger (ECOSOC, UNCHR) 'Report Submitted by the Special Rapporteur on the Right to Food in Accordance with Commission on Human Rights Resolution 2002/25' (2003) E/CN.4/2003/54 (2003) (by Jean Zielger) [29]. See generally S Narula, 'The Right to Food: Holding Global Actors Accountable under International Law' (2006) 44 *Columbia J Transnatl L* 691.

229 Human Rights Committee, 'Covenant on Economic, Social and Cultural Rights, General Comment 3, The Nature of State Parties Obligations' (art 2(1)), E/1991/3 (1990).

230 For an overview of adaptation activities under the climate treaties, see <<http://unfccc.int/adaptation/items/4159.php>> accessed 17 September 2010.

231 FCCC Technical Paper, 'Investment and Financial Flows to Address Climate Change' (26 November 2008) FCCC/TP/2008/7.8, <http://unfccc.int/files/cooperation_and_support/financial_mechanism/application/pdf/background_paper.pdf> accessed 17 September 2010.

232 *Ibid.*

233 A levy is already charged on the Clean Development Mechanism. At COP-14, Poznan, December 2008, an effort was made to extend this to the other market mechanisms, but industrialised countries refused to accept this.

committed developed countries to providing 30 billion USD in the 2010–12 timeframe, to be used in a balanced manner between adaptation and mitigation.²³⁴ This fund is yet to be operationalised. The shortfall in adaptation financing will ultimately have to come from national coffers. And, this in the case of developing countries will have an impact both on their ability to contribute to mitigation efforts, as well as to lift them out of poverty.

Argentina noted in a submission to the FCCC on the post-2012 negotiations that contributions from developing countries will necessarily depend on 'striking the balance between our responsibility to our citizens—ensuring they have access to minimum standards of security, human rights, and social benefits, such as food, health, education, shelter, and opportunity for self-development—and the means available to implement mitigation activities'.²³⁵

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

6.3. *Between States and those Subject to Another's Jurisdiction*

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

Climate change is likely to present international law with situations that will test its limits and expose its fault lines. One such situation is presented by the likely plight of the small island states. Entire nations, such as Maldives and Tuvalu, are likely, if current GHG emission trends continue, to be lost to sea level rise, rendering their inhabitants stateless. Tuvalu is reportedly

234 Copenhagen Accord, 2009 (n 12) [8].

235 FCCC/AWGLCA/2008/MISC 5 (n 61) 11.

negotiating agreements with Australia and New Zealand to move its 12,000 strong population²³⁶ and Maldives has started saving to buy dry land to move its 400,000 strong population to India or Sri Lanka.²³⁷ Restrictive definitions in international refugee law will preclude claims arising therein.²³⁸ But, to the extent that forced displacement is occurring due to damage caused by climate change, primarily sourced to other's fossil-fuel intensive activities, are these nations entitled to redress—land of equal size and quality?²³⁹ And if so, in what way? Should a State's jurisdiction be extended to encompass the impacts of a State's conduct wherever they may be felt?²⁴⁰

Another situation which is likely to test the limits of international law is presented by poor states that are unable to adapt to climate change. Given that the bulk of adaptation finance will have to be raised domestically, it is entirely conceivable that poverty-stricken states will be unable to raise the finances and adapt in time. Increasingly severe impacts in such states will likely upset social stability, feed discord, and pose serious security threats that could spill over national borders. Is humanitarian intervention, albeit restrictively defined thus far, justified in such situations? Does the notion of 'responsibility to protect' applied thus far to crimes against humanity and the like, apply in situations where a population is suffering serious harm but the state is unwilling or unable to prevent it?²⁴¹

7. Conclusion

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

236 B Crouch, 'Tiny Tuvalu in Save Us Plea over Rising Seas' *Sunday Mail* (5 October 2008).

237 A Revkin, 'Maldives Considers Buying Dry Land if Sea Level Rises' *New York Times* (New York 10 November 2008).

238 B Saul and J McAdam, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' Legal Studies Research Paper 08/131 (Sydney, October 2008).

239 Ibid.

240 Ibid (noting however that this takes the scope of human rights obligations well beyond the accepted jurisprudence which requires that the State exercise 'effective control' in order to be held responsible).

241 Ibid.