



연구 논문

# Integrating Human Rights and the Environment

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The integration of human rights law and environmental protection law, both great fields of international law, enriches each area by elaborating their boundaries and contours. This integration also strengthens these two areas of the law individually by grounding each area in a broader system of shared values and jurisprudence, and making available to them a wider array of institutions, thereby providing greater protection to the interests they serve.

Part I of this article provides a general introduction to the respective international law concepts of human rights and the environment and their interrelationship. Part II outlines legislative and policy developments, with a particular focus on climate change. Part III discusses the jurisprudence with respect to human rights and environment generally; and Part IV draws some conclusions on the significance of the relationship.

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## I. Introduction

The fusion of the environment with human rights provides useful lessons at a time when diplomats, legal practitioners and scholars alike bemoan the fragmentation of international law. This integration was not inevitable, but rather faced significant challenges. Conceptually, for example, human rights are anthropocentric, whereas environmental protection seems on its face to be biocentric, and at a minimum demands a respect for nature not explicitly required by human rights doctrines.

Similarly, much of international human rights law deals with a state's treatment of its nationals, or others within its jurisdiction or control, whereas environmental law deals both with domestic and transboundary problems, or problems affecting shared resources and commons. Whilst the human rights regime speaks in terms of rights, the environmental protection regime, at least in its early stages, approached problems in terms of limits and standards.

Initially, many international human rights lawyers were wary that new claims based on environmental rights – such as a right to a healthy environment -- might undermine already-existing human rights and their associated mechanisms, whose recognition was difficult to secure and protection far from guaranteed. Environmental activists strategizing to utilize human rights norms and institutions also were aware that their own efforts would be weakened if the human rights platform was undermined. The way forward thus had to be painstakingly delicate.

Moreover, the public's and policymakers' consensus for protecting the two was different. Whereas the sanctity of the human being was self-evident to most people after the horrors of World War II, the fundamental importance of the environment – that is, that nature is the true infrastructure of human society and that human civilization could not survive without the ecosystem services that nature provides for free – has not yet achieved universal recognition. For example, many people do not associate environmental protection with protecting human health, one of its core values and principal links with human rights.

At the same time, however, important synergies exist that have facilitated integration of the concepts underlying human rights law and environmental right. Such synergies have been recognized by human rights and other institutions, and include synergies between:

- the right to health and concerns about a safe work place;<sup>1)</sup>
- freedom of speech and environmental advocacy;<sup>2)</sup>
- the right to culture and concerns about indigenous peoples and their lands and culture;<sup>3)</sup>  
and
- the right to life and threats from ozone depletion, hazardous chemicals, disposal of hazardous waste, and other forms of pollution.<sup>4)</sup>

Conceptually, the anthropocentric-biocentric dichotomy is more apparent than real, primarily because of these synergies. Many environmental protection efforts focus on humans – either preventing harm to humans (for example, controlling air and water pollution and setting food standards), or providing benefits to them (for example, providing sanitation facilities, creating parks and protecting cultural heritage). Similarly, important environmental protection instruments embody a rights or entitlement approach, such as Principle 1 of the Stockholm Declaration on the Human Environment which specifies that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>5)</sup>

Human rights and environmental law focus on and use the language of “protection,” thus avoiding linguistic conflict which can occur in environment-and-trade interactions.<sup>6)</sup> Moreover, both areas impose new limits on sovereignty: In the human rights context, this concerns a state’s treatment of its nationals; and in the environmental protection context, this concerns state’s impact on the environment of other states and areas beyond national jurisdiction. Both fields also involve behavior not only by state actors, but also by private

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1) See e.g., WHO Beijing Declaration on Occupational Health For All, 1994; WHO Global Strategy for Health for All by the Year 2000; United Nations Commission on Human Rights, (UNCHR) Resolution 1990/31; Preamble to the ILO Constitution.

2) See e.g. Miguel Ignacio Fredes González and Ana Andrea Tuzek Fries v. Chile, Case 12.696, Inter-Am. C.H.R., Rep. No. 14/09, admissibility decision of Mar. 19, 2009.

3) See e.g. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Comm. No. 276/2003, Feb. 4, 2010; Indigenous Community Yakye Axa v. Paraguay, 2005 Inter –Am. Ct. H.R. (ser. C)(June 17, 2005).

4) See e.g., Nuclear Tests (New Zealand v. France), 1974 I.C.J. Rep. 253 (Dec. 20, 1974) (complaint to the ICJ re effect of nuclear testing); Öneriyildiz v. Turkey, App. No. 48939/99, §156, ECHR 2004-XII (European Court of Human Rights Grand Chamber finding of a breach of Art. 2 right to life in allowing slum dwellers to live in the vicinity of unregulated rubbish dump).

5) Declaration of the United Nations Conference on the Human Environment, (Stockholm Declaration), 1972.

6) Daniel Magraw, *NAFTA and the Environment: Substance and Process* (1995).

business entities and individuals, as well as state controls on their behavior.<sup>7)</sup>

Furthermore, human rights and environmental protection are alike in terms of the critically important roles played by transparency and public participation. In each area, these have proven essential in recognizing the existence of threats, adopting substantive norms, implementing those norms, and achieving accountability. The two areas also have made extensive use of “soft law” (i.e., non-binding instruments) to create hortatory standards that eventually become legally binding. Examples include the Universal Declaration of Human Rights, which is now widely accepted as customary international law,<sup>8)</sup> and Principle 21 of the Stockholm Declaration.<sup>9)</sup>

Significant progress has been made in integrating human rights and environmental protection, as is described in Part III below.<sup>o</sup> Achieving this integration has required mutual education, thoughtful analysis, identification of specific synergies, strategic approaches, collaborative action, and patience. The climate change successes described immediately below is an illustration of these factors at work.

## II. Legislative and Policy Developments, with a Particular Focus on Climate Change

Considerable progress has been made in the last decade in integrating human rights and climate change – a critically important relationship. This process, which is ongoing, has involved three somewhat overlapping stages:

7) See e.g., UN Guiding Principles for business & human rights, Principles 3 and 18 (Mar. 24, 2011). The Principles are to be considered by the UN Human Rights Council in June 2011, (<http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>).

8) See e.g., Helsinki Final Act (1975); Ian Brownie, *Principles of Public International Law* (5<sup>th</sup> ed) (1998) at 574-575; and John Humphrey, *No distant millennium: the international law of human rights*, UNESCO (1989).

9) Declaration of the United Nations Conference on the Human Environment, 1972 (providing “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”).

- first, establishing that there is a relationship between human rights and climate change;
- second, elaborating the normative content of that relationship; and
- third, implementing that relationship in order to protect human rights in the context of climate change.

## 1. Human Rights Mechanisms

Regarding the first stage, when environmental lawyers started to assert that there was a relationship between climate change and human rights, there was strong opposition and skepticism. In addition to the issues referred to in the Introduction above together with the fact that some countries simply oppose human rights generally, many said that climate change is already one of the most complicated issues facing humankind and that climate change negotiators were typically diplomats, scientists and economists who would only be distracted and confused by human rights arguments. There was even derision, for example when CIEL worked with Inuit leader Sheila Watt-Cloutier and Earthjustice, to petition in the Inter-American Commission on Human Rights in 2005 on behalf of Watt-Cloutier and other Inuit, arguing that the United States was violating their human rights by its refusal to take sufficient steps to stop global warming.<sup>10)</sup> At one international conference, delegates literally laughed at this idea.

The basis for the petition was the dramatic impact of global warming in the Arctic, where the Inuit live. Weakened sea ice, which melts from the bottom, threatened their rights to life and right to health as hunters were falling through the ice. Melting permafrost – which was no longer “perma”, and in some cases was not even frost – caused roads and structures to collapse, affecting the right to property. Similarly, disappearing shore ice has led to erosion and buildings falling into the sea – also affecting the right to property. Changing snow conditions made it impossible for the Inuit to build igloos, threatening their ability to travel and hunt and thus, the right to enjoy their culture. Although the Commission on Human Rights declined to proceed with the petition, it decided to hold a thematic hearing on human rights and climate

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10) 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 (submitted by Sheila Watt-Cloutier) (Dec. 7, 2005), The Inuit petition alleged, among other things, that the impact of climate change on the way of life of the Inuit would decimate their culture and destroy their right to self-determination. See also, Martin Wagner & Donald M. Goldberg. CIEL & Earthjustice, An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change (2004), [http://www.ciel.org/Publications/COP\\_10\\_Handout\\_EJCIEL.pdf](http://www.ciel.org/Publications/COP_10_Handout_EJCIEL.pdf).

change, which was webcast around the world.<sup>11)</sup> Before the hearing began, the Chair of the Commission approached Watt-Cloutier and said, “Thank you for putting this important human rights issue on our agenda.” The process of recognition had begun.

CIEL then began working with the Republic of the Maldives, which is faced with a different kind of climate change-induced threat to human rights. The Maldives consists of a chain of 1192 islands in the Indian Ocean. The highest elevation on any of the 1192 islands is only two meters above sea level. About eighty percent of the islands are less than one meter above sea level.<sup>12)</sup> According to a United Nations (“U.N.”) report by the U.N. Special Rapporteur on the right to housing:

“Climate change has aggravated and will further amplify some of the problems linked with characteristics of Maldives, including land scarcity and vulnerability of the islands to natural phenomena. The impact of climate change on the acceleration of coastal erosion, frequency of storms and flooding and the rise of the sea level would increasingly affect the housing and livelihood of many Maldivians.”<sup>13)</sup>

The Maldivian government has already begun moving people away from the most vulnerable islands and looking for land to purchase elsewhere.<sup>14)</sup> Threats to life, health and property are obviously inherent in this situation. In addition, the risk that the entire country will become uninhabitable raises the prospect of a different type of human rights violation.

The arguments on behalf of the Inuit had focused on the application of human rights which no-one seriously contends do not exist, such as the right to life, rather than on an all-encompassing right to a “safe” or “healthy” environment. On the face of it, the idea that there is such a possibility as a human right to a “healthy” environment, as such, is questionable. For example, from the first author’s perspective of living in Minnesota, which has freezing winter weather, venomous snakes and large carnivores that can threaten human health, the

11) Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights, to Sheila Watt-Cloutier, Petitioner (Feb. 1, 2007), available at [http://www.earthjustice.org/library/legal\\_docs/inter-american-commission-on-human-rights-inuit-invite.pdf](http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf).

12) Mission to Maldives: Report of the Special Rapporteur on the Right to Adequate Housing, Human Rights Council, Thirteenth session, UN Doc. A/HRC/13/20/Add.3 (11 Jan. 11 2010).

13) *Id.*, para. 68.

14) Randeep Ramesh, *Paradise almost lost: Maldives seek to buy a new homeland*, The Guardian, Nov. 10, 2008.

environment is not “healthy” in some senses. But the extreme situation of the Maldives is surely convincing evidence that there is a need for a human right to an environment capable of sustaining human society and enabling the full realization of other human rights.

CIEL’s work with the Inuit and Maldives was effective at both a legal and policy level. Perhaps most importantly, it gave a human face to the climate change debate, which had previously been dominated by scientific and economic considerations. More specifically, it led to a chain of developments that ultimately incorporated all three of the stages referred to above. In 2007, CIEL led both groups to the Inter-American Commission on Human Rights’ thematic hearing on human rights and climate change, and to the Malé Declaration, in which island and low-lying coastal countries called on the United Nations to debate the relationship of climate change to human rights.<sup>15)</sup> The Declaration noted that the environment provides the infrastructure for human civilization, and that the impacts of climate change pose the most immediate, fundamental and far-reaching threat to the environment, individuals and communities around the planet. It also articulated the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights, noting that this right has been recognized by the international community. It expressed concern that climate change has clear and immediate implications for the full enjoyment of human rights. The Declaration further called for the cooperation of the U.N. Office of the High Commissioner for Human Rights (OHCHR) and the Human Rights Council (HR Council), in assessing the human rights implications of climate change.

The Malé Declaration was soon followed by a resolution in the HR Council recognizing the relationship between climate change and human rights.<sup>16)</sup> The 2008 resolution acknowledged that climate change “poses an immediate and far-reaching threat” for the “full enjoyment of human rights.”<sup>17)</sup> It also called on the OHCHR to conduct “a detailed analytical study on the relationship between climate change and human rights, to be submitted to the Council prior to its tenth session.”<sup>18)</sup>

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15) Malé Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, [www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

16) Human rights and climate change, Human Rights Council (HR Council), Res. U.N. Doc. A/RC/RES/7/23 (Mar. 28, 2008) [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf)

17) *Id.* Preamble.

18) Human rights and climate change, Human Rights Council, Res., 41st meeting, U.N. Doc. A/HRC/10/L.11 (Mar. 25, 2009), para. 1.

The human rights and climate change linkage was further advanced by the OHCHR's report, which explored and elaborated on the substantive content of that relationship.<sup>19)</sup> The report, which was released in early 2009, drew significantly on a submission from the Republic of the Maldives, which CIEL had participated in drafting.<sup>20)</sup> The report concluded that "global warming would potentially have implications for the full range of human rights, "in particular the rights to life, adequate food, water, health, adequate housing, and the right to self-determination." The report identified that most at risk are the rights of vulnerable communities, such as indigenous peoples, minorities, women, children, the elderly, persons with disabilities, and others who are dependent on the physical environment.

Notably the report elaborates on states' obligations of international cooperation,<sup>21)</sup> stating, "International cooperation is important because the effects and risk of climate change are significantly higher in low-income countries... International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations".<sup>22)</sup> Emphasizing a state's duty to consult the report also indicated "participation in decision-making is of key importance in efforts to tackle climate change."<sup>23)</sup> The report was submitted to the Tenth session of the HR Council, held in March 2009, which led to a 2009 HR Council Resolution on climate change (referred to as Resolution 10/4), echoing and advancing the 2008 Resolution.<sup>24)</sup>

In January 2009, CIEL and the non-governmental, non-profit organization, Friedrich Ebert Stiftung (FES)<sup>25)</sup> brought together a group of the world's leading environmental and human rights experts to identify and evaluate practical measures for implementing the link between human rights and climate change. The participants analyzed and improved on ideas in a discussion paper prepared by CIEL with the assistance of the Harvard Law School's Human Rights Clinic. CIEL and FES then produced a report containing the suggestions that emerged from the workshop.<sup>26)</sup> The workshop catalyzed several important actions, some

19) Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009), <http://www2.ohchr.org/english/issues/climatechange/study.htm>.

20) Maldives Submission under Resolution HRC 7/23, Sept. 25, 2008, [http://www.ciel.org/Publications/Maldives/Maldives\\_Submission\\_29Sep08.pdf](http://www.ciel.org/Publications/Maldives/Maldives_Submission_29Sep08.pdf).

21) OCHR report, supra note 21 at paras. 84-88.

22) *Id.* paras. 84-85; and see UN Charter, Art 1(3), Art.55 and Art.56.

23) *Id.* para. 79.

24) Human rights and climate change, Human Rights Council, Res., 41st meeting, U.N. Doc. A/HRC/10/L.11 (Mar. 25, 2009).

25) <http://www.fesdc.org/index.htm>.

26) Human Rights and Climate Change: Practical Steps for Implementation, <http://www.ciel.org/Publications/>

almost immediately, ranging from the identification of a contact point for human rights and adaptation within the United Nations Framework Convention on Climate Change (UNFCCC) secretariat, to the “Joint Statement of the Special Procedure Mandate Holders of the Human Rights Council on the UN Climate Change Conference.”<sup>27)</sup> The Joint Statement urged participants at the Copenhagen Climate Change Conference “to step up their efforts to achieve a new agreement that prevents further climate change, protects affected individuals from its adverse impact and leads to the formulation of global and national mitigation and adaptation responses based on internationally recognized human rights norms and standards.”<sup>28)</sup>

Another significant development occurred in October 2010, when the HR Council convened its Social Forum,<sup>29)</sup> with a specific focus on climate change and human rights. The 2010 Social Forum provided an opportunity to discuss: the adverse effects of climate change on the full enjoyment of human rights; measures and actions to address the impact of climate change on the full enjoyment of human rights at the local, national, regional and international levels; and international assistance and cooperation in addressing the human rights-related impact of climate change.<sup>30)</sup> In her concluding remarks, Laura Dupuy Lasserre, the Chairperson-Rapporteur of the 2010 Social Forum, noted that the discussions had reaffirmed the HR Council’s 2009 Resolution 10/4, finding that “human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.” In preparation for the Social Forum, the Human Rights Council requested that the United Nations High Commissioner for Human Rights provide a background report in consultation with members engaged in the forum on these issues.<sup>31)</sup> The report suggested that the outcomes of the Social Forum discussions be shared at negotiations for the sixteenth session of the

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27) Copenhagen, Dec. 7, 2009, [http://www.srfood.org/images/stories/pdf/otherdocuments/20091216\\_statement-climate-change\\_en.pdf](http://www.srfood.org/images/stories/pdf/otherdocuments/20091216_statement-climate-change_en.pdf); <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9667&LangID=E>. See also, See, *Climate change and the human right to adequate food*, Contribution of the Special Rapporteur on the right to food, to the meeting convened by the Friedrich-Ebert-Stiftung with the Committee on Economic, Social and Cultural Rights, Geneva, May 13, 2010, <http://www.srfood.org/index.php/en/areas-of-work/climate-change>.

28) *Id.*

29) The Social Forum is a subsidiary body of the Human Rights Council (Human Rights Council Res. A/HRC/6/13 (Sep. 28, 2007)).

30) Human Rights Council Res., The Social Forum, U.N. Doc. A/HRC/RES/13/17 (April 15, 2010).

31) United Nations General Assembly, Human Rights Council, Implementation of Human Rights Council Resolution 13/17 of the 25 March 10 entitled “The Social Forum,” Background report submitted by the United Nations High Commissioner for Human Rights, 2010.

Conference of the Parties of the United Nations Framework Convention on Climate Change, held in Cancun, Mexico.

The Social Forum led to the NGO Declaration on Climate Change and Human Rights on October 1, 2010. The Declaration recommended that the Social Forum should recommend to the HR Council that it create a thematic “Special Procedures”<sup>32)</sup> mechanism to climate change and human rights, with an independent expert. One of the aims of introducing such a Special Procedure would be to help clarify the conceptual and operational dimensions of the connection between human rights and climate change.

Despite the recent discussion and ongoing progress, questions still remain about the exact content of the human rights norms relating to climate change. For example, on question is whether a state has human rights obligations to persons outside its territory who are harmed by climate change. Some commentators answer this question in the negative. But there are increasing grounds to contend that a state does have such obligations in international law.

## 2. Environmental mechanisms

The UN Framework Convention on Climate Change (UNFCCC)<sup>33)</sup> is the international legal instrument for channeling international cooperation to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>34)</sup> Significantly, it recognizes equity as a central principle to guide the Parties’ actions in achieving its objectives.<sup>35)</sup> It was followed by the Kyoto Protocol<sup>36)</sup> to the UNFCCC, which represented the first step in this process, imposing emissions reduction and limitation obligations on industrialized state parties.<sup>37)</sup>

The current UNFCCC negotiating process is conducted through the Bali Road Map, the

32) “Special procedures” is the general name given to the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are thirty three thematic and eight country mandates. Thematic mandates concern specific human rights issues, such as the right to food.

33) United Nations Framework Convention on Climate Change, adopted 1994. At the time of writing there were 195 parties.

34) UNFCCC, Article 2.

35) UNFCCC, Article 3.

36) The Kyoto Protocol was adopted in Kyoto, Japan, on Dec. 11, 1997 and entered into force on Feb. 16, 2005. At the time of writing there were 193 parties.

37) See Breidenich, Magraw, Rowley & Rubin, Current Development: The Kyoto Protocol to the Framework convention on Climate Change, 92 Am. J. Int’l L. 322 (1998).

long-term plan for negotiating follow-up to the Kyoto Protocol, the first commitment period of which expires in 2012) and includes negotiations on long-term cooperative action to combat climate change.

There was much expectation for the United Nations Climate Change Conference in Copenhagen in 2009, but the 15<sup>th</sup> Conference of the Parties ended with a non-binding agreement by world leaders known as the Copenhagen Accord.<sup>38)</sup> In relevant part, the Accord states that: “we shall, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius, on the basis of equity and in the context of sustainable development, enhance our long-term cooperative action to combat climate change.”<sup>39)</sup> The agreement provided that industrialized countries would commit to implement, individually or jointly, quantified economy-wide emissions targets from 2020, to be listed in the Accord before January 31, 2010. Also a number of developing countries agreed to communicate their efforts to limit greenhouse gas emissions every two years, and to list their voluntary pledges before this date. There was also agreement that developed countries would raise funds approaching \$30 billion for the period 2010-2012 representing new and additional resources.<sup>40)</sup> One-hundred-and-twelve Parties, one of which is the European Union, have indicated their support for the Accord. A significant part of the Accord is a pledge by industrialized nations to provide short-term and long-term financing for developing countries for adaptation and mitigation purposes.

The Bali Action Plan, mentioned above, calls for the parties to develop a shared vision for long-term action to avoid interference with the climate system under four pillars: mitigation; adaptation; financing; and technology transfer. Human rights are relevant to all these pillars. Among other things, under the UNFCCC, Article 6, the parties commit to promote and facilitate public access to information on climate change. Four aspects of current activities and institutions are discussed below.

## 1) Adaptation

Adaptation policies attempt to increase the capacity of societies and ecosystems to deal with

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38) Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Copenhagen Accord, UNFCCC/CP/2009/11/Add.1 ( Mar. 30, 2010), Decision 2/CP.15 (hereinafter “Copenhagen Accord”) (<http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4>).

39) *Id.* Copenhagen Accord, para. 1.

40) *Id.* Copenhagen Accord, para. 8.

the risks and impacts of climate change. It is now clear that governments and other actors will have to take action to cope with or “adapt to” the changes brought about by climate change. These adaptation measures have the potential to infringe on human rights. It is equally clear that efforts to adapt, like other governmental actions, must observe basic human rights norms. In this regard, the duty in human rights law to protect people from harm is universally recognized. The UNFCCC Secretariat has designated a focal point on human rights with respect to adaptation.

Due to the nature of the climate system and the long-term effects of increased GHG concentrations, climate change will continue over several decades, and adaptation strategies are key to protecting vulnerable populations. A variety of adaptation measures implicate human rights, such as measures regarding food, water, and the availability of adaptation resources for vulnerable populations. Similarly, disaster risk reduction should address the particular situation of the most vulnerable and marginalized.

## 2) Mitigation

The Bali Action Plan contemplates additional emission reduction commitments for industrialized countries and introduces the concept of nationally appropriate mitigation actions (NAMAs) by developing countries, which are to be supported by technology, financing, and capacity-building. Although the contours of the post-2012 mitigation regime are unclear at this point in the negotiations, the scope of the effort necessary to address climate change will undoubtedly impact human rights.

The Kyoto Protocol requires the adoption of mitigation strategies to reduce the emission of GHGs into the atmosphere. Certain mitigation mechanisms established under the Kyoto Protocol, such as the Clean Development Mechanism (CDM) and Joint Implementation, are in effect. The detail of other mitigation measures, such as reducing emissions from deforestation and forest degradation (REDD) programs, which was highlighted in the Copenhagen Accord,<sup>41)</sup> are still being negotiated.

The Kyoto Protocol is the first instrument of its kind to set up a market-based mechanism – the CDM – which allows state parties to fulfill their treaty obligations by investing in developing countries. The CDM, which is discussed briefly below, supports projects in developing countries that result in emission reductions, generating carbon credits that

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41) Copenhagen Accord, paras. 6, 8 and 10.

industrialized countries can use to offset their own emissions. REDD has also been advanced in the current climate change negotiations as a potential mitigation tool. In addition to mitigating emissions, REDD could provide a mechanism to advance the principle of “common but differentiated responsibilities”<sup>42)</sup> which underlies the climate change regime, by channeling funds to developing countries, indigenous peoples and other forest-dependent communities involved in forest conservation.

### 3) Clean Development Mechanism

Projects under the Kyoto Protocol’s CDM may involve displacement of communities and result in other local environmental and human rights impacts. Denial of free, prior and informed consent (FPIC) to development by indigenous peoples and other local communities could further aggravate these impacts with respect to their rights, lands and territories. Current CDM modalities and procedures already contain some tools that help promote a human rights-based approach, such as disclosure of environmental assessments and channels for public participation. At present, however, the CDM requires only consultation with affected communities, not FPIC, so it falls short in this regard. As countries negotiate the future of the CDM, a rights-based approach can help ensure that its future operations make a positive contribution to the right to development.<sup>43)</sup> Similarly, respect for human rights is an integral element of sustainable development,<sup>44)</sup> which is one of the objectives inspiring the CDM’s design.

### 4) Forests and Land Use

Policies and measures adopted by national governments in connection with forests and land use can have a significant adverse impact on indigenous peoples and forest-dependent communities. Land tenure, traditional use of resources, and benefit-sharing considerations may all be implicated by efforts such as REDD. For example, national governments establishing protected areas over forests occupied or otherwise used by indigenous peoples and other

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42) UNFCCC, Article 3(1).

43) *See, e.g.*, Marcos Orellana, A Rights-based Approach to Climate Change Mitigation, in *Conservation with Justice: A Rights-based Approach* 37 (Thomas Greiber ed., 2009).

44) *See, e.g.*, Shirin Chaudhry, Owen Lynch & Daniel Magraw, *One Species, One Planet: Environmental Justice and Sustainable Development*, [www.ciel.org](http://www.ciel.org) (2002).

forest-dependent communities could potentially displace traditional occupants and implicate relocation and traditional resource use rights. Because land and livelihoods may be impacted, it is important to ensure protections for the people most closely associated with the forest, including procedural protections through FPIC.

Industrialized countries have a legal obligation under the UNFCCC to assist lower-income countries in funding mitigation and adaptation strategies necessary to reduce emissions and protect vulnerable populations.<sup>45)</sup> Lower income countries acting alone may not be in a financial position to fully protect their populations from climate change impacts. Financing, therefore, is critical to assisting these countries in fighting climate change and protecting the human rights of their people.

### 3. Cancun: Aligning the human rights and environmental approaches within the UNFCCC Framework

The 2009 OHCHR report referred to above<sup>46)</sup> and a summary of the HR Council's discussions were made available to COP16 to inform the debate in Cancun in December 2010. The parties to the UNFCCC and the Kyoto Protocol agreed to adopt a set of decisions collectively known as the Cancun Agreements,<sup>47)</sup> which include references to human rights. Most notably, the decision that reflects the work of the Ad Hoc Working Group on Long-term Cooperative Action ("Cancun LCA" outcome)<sup>48)</sup> recognizes the connection between human rights and climate change by referencing Human Rights Council Resolution 10/4 and its findings on the human rights implications of climate change and vulnerability:

Noting resolution 10/4 of the United Nations Human Rights Council on 'human rights and climate change', which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable

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45) UNFCCC, Article 4 (3).

46) n22.

47) The Cancun Agreements are available at: [http://unfccc.int/meetings/cop\\_16/items/5571.php](http://unfccc.int/meetings/cop_16/items/5571.php).

48) Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, advanced unedited version, adopted by the Conference of the parties to the UNFCCC, 16th Session, (Dec. 14, 2010), available at [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_lca.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf).

owing to geography, gender, age, indigenous or minority status and disability.”<sup>49)</sup>

To protect those most vulnerable to climate change, the Cancun LCA outcome also “emphasizes that Parties should, in all climate change-related actions, fully respect human rights,” and recognizes the need to protect the participatory rights of affected individuals and peoples in decision-making processes. This human rights-related language in the Cancun LCA outcome is evidence of the recognition by States of an obligation to respect human rights in climate-change related activities.

#### 4. The 2011 Human Rights Council

In March 2011, the Human Rights Council adopted a Resolution on Human Rights and Environment requesting the OHCHR to conduct a detailed analytical study on the relationship between human rights and the environment that would be submitted to the Human Rights Council prior to its nineteenth session.<sup>50)</sup> The Preamble to the Resolution highlighted climate change by noting decisions made at the United Nations Climate Change Conference held in Cancun, Mexico in 2010 and the desire “to contribute positively to a successful outcome of the next United Nations Climate Change Conference of the Parties, to be held in Durban, South Africa, in 2011.” Although an alternative proposal to specifically address human rights and climate change did not proceed at the March 2011 HR Council meeting, several states are working on a proposal for the HR Council to create a special procedure on climate change.

#### 5. The 2012 Conference on Sustainable Development

The next global engagement of states on the issue of sustainable development, the United Nations Conference on Sustainable Development (“Rio 2012”) is due to take place in June 2012, but neither climate change nor human rights is currently on the agenda. Also referred to as the Rio+20 or the Earth Summit 2012, due to the initial conference having been held in Rio in 1992, the Conference’s objectives are to: (i) secure renewed political commitment to sustainable development; (ii) assess progress towards internationally agreed goals on

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49) Cancun LCA Outcome, preambular para. 7.

50) Human Rights Council Res. A/HRC/16/L.7, (Mar. 18, 2011), [http://ap.ohchr.org/documents/E/HRC/d\\_res\\_dec/A\\_HRC\\_16\\_L.7.pdf](http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_16_L.7.pdf).

sustainable development, and (iii) address new and emerging challenges.<sup>51)</sup> The Conference will focus on two specific themes: a green economy in the context of poverty eradication and sustainable development, and the institutional framework for sustainable development.

### III. Jurisprudence

In addition to advancements in the policy and international agreement realms, there has also been considerable activity in judicial or quasi-judicial decisions addressing human rights in the environmental context. Efforts to integrate human rights and environmental protection in the courts have yielded a number of concrete results.

At the international level, these include recognition by regional human rights tribunals of:

- indigenous and tribal peoples' rights to land and natural resources;<sup>52)</sup>
- safeguards such as free, prior and informed consent;<sup>53)</sup>
- the facts that pollution can interfere with right to privacy in the home and the right to life;<sup>54)</sup>
- the fact that states can be held responsible for the actions of private actors;<sup>55)</sup>
- the right to exercise religion in a national park; and
- the right to live in a healthy environment.<sup>56)</sup>

51) Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development, G.A.Res. 64/236, U.N. Doc. A/RES/64/236 (Mar. 31, 2010), <http://css.escwa.org.lb/GARes/64-236.pdf>.

52) *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No.79, (Aug. 31, 2001); *Yanomami Case 7615 (Brazil)*, Inter-Am.Comm. H.R., Report Case, Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985); *Moiwana Community v. Suriname*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 124, (June 15, 2004).

53) *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, Doc. 5 rev. 1, at 860 (2002).

54) *Öneryıldiz v. Turkey [GC]*, App. No. 48939/99, § 156, ECHR 2004-XII; *López Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R.(ser. A) (1994).

55) *Hatton and Others v. The United Kingdom*, App. No. 36022/97, 2003-VIII Eur. Ct. H.R.; *Öneryıldiz v. Turkey [GC]*, App. No. 48939/99, § 156, ECHR 2004-XII.

56) *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Comm. 155/96, May 27, 2002.

Significant progress has also been made at the national level. The Supreme Court of the Philippines, for example, recognized the right of minors to sue on behalf of future generations to protect forests;<sup>57)</sup> and many national constitutions now provide for a right to a healthy environment.

At the same time, on an international level, the International Court of Justice (ICJ) has refrained from identifying directly enforceable environmental rights linked to human rights. However, it has issued judgments which support the relationship between human rights and the environment. In *Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognized that the “environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.”<sup>58)</sup> The Court also recognized that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>59)</sup> In *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*,<sup>60)</sup> the ICJ directed the state parties to take the principle of sustainable development into account in their negotiations over a dam project on the Danube River.<sup>61)</sup> In his separate opinion, Judge Weeramantry of the ICJ went further stating:

[T]he protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

The European Court of Human Rights<sup>62)</sup> probably has the most developed body of jurisprudence on environmental rights, despite the fact that the European Convention on Human Rights<sup>63)</sup> (ECHR) and its Protocols contain no specific provision for a healthy

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57) *Oposa et al. v. Fulgencio S. Factoran, Jr. et al* (G.R. No. 101083).

58) Advisory Opinion of 8 July 1996 – General List No. 95 (1995-1998) para. 29.

59) *Id.*

60) 1997 I.C.J. 140 (Sept. 25, 1997).

61) *Id.* p75.

62) The Court has jurisdiction over forty seven states including Turkey and the former Soviet Union.

63) European Convention on Human Rights and Fundamental Freedoms, adopted 1950.

environment. The Court has been able to protect human rights involving the environment by creatively interpreting more traditional rights such as the right to life pursuant to Article 2 of the ECHR,<sup>64)</sup> the right to respect for home, private and family life pursuant to Article 8 of the ECHR,<sup>65)</sup> and the right to property pursuant to Article 1 of the First Protocol.<sup>66)</sup> More specifically, in the *Lopez Ostra*<sup>67)</sup> case, involving pollution by fumes from a tannery treatment plant in Spain, the European Court addressed the situation in respect of the right to private and family life, finding such pollution was a breach of Article 8. In the *Öneryildiz*<sup>68)</sup> case, involving environmental risks and loss of life resulting from methane explosions in an unregulated waste dump in Turkey, the European Court found a link between environmental pollution and the right to life, which was violated both by the state's failure to regulate the dump and its failure to prosecute the state officials responsible.

The European Committee on Social Rights has examined the right to health and the right to life in the context of lignite coal mining and power plants in Greece in the *Marangopoulos*<sup>69)</sup> case. The Committee found that there was a breach of the Article 11 (right to the protection of health) of the European Social Charter of 1961, because the Greece had failed to strike a reasonable balance between the needs of the individuals affected by the mining and the wider public interest.

The African Charter on Human and People's Rights is the only regional instrument with a specific right to a health environment. Decisions of the African Commission have involved claims relating to natural resources. The *Endorois*<sup>70)</sup> case, for example, involved the forcible removal of the Endorois indigenous people from their ancestral lands in Kenya, in order to create a game reserve. The African Commission discussed the content of a number of rights in the African Charter, including the right to practice religion, the right to property, the right to culture, and the right to free disposition of natural resources. By way of illustration, the treatment of the Ogoni people in the Niger Delta who suffered health risks and environmental degradation caused by pollution resulting from oil production in their traditional lands has

64) European Convention on Human Rights and Fundamental Freedoms.

65) *Id.*

66) The Protocol

67) *López Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (1994).

68) *Öneryildiz v. Turkey* [GC], App. No. 48939/99, § 156, ECHR 2004-XII.

69) *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Collective Complaint No. 30/2005, Dec. 6, 2006.

70) *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. No. 276/2003, Feb. 4, 2010.

attracted international attention. The African Commission addressed the Ogoni's<sup>71)</sup> complaint in the context of the right to a general satisfactory environment, in addition to the right to life, the right to health, the right to food, and the right to housing.

In the Americas, the human rights and environment jurisprudence has mainly considered the rights of indigenous and tribal peoples, in connection with land, territory and natural resources, threatened by development or investment projects. Several cases are illustrative and instructive.

The *Awás Tingni* case, for example, involved Nicaragua's grant of logging concessions without consultation with the Mayagna (Sumo) communities who occupied the land.<sup>72)</sup> The Inter-American Court framed the issue as including the right to property and the right to culture, both of which had been violated.<sup>73)</sup>

In the *Saramaka* case involving mining concessions in the lands of a tribal people, the Inter-American Court addressed the issue as one of permissible restrictions to the right to property and safeguards to ensure the survival of the group.<sup>74)</sup>

In the *San Mateo* case, a Peruvian indigenous community successfully applied for precautionary measures in the form of the immediate removal of the toxic waste from mining to avoid serious danger to their health of indigenous people and children and to the environment.<sup>75)</sup> In essence, this was the first inter-American case to recognize the connection between the environment and human rights.<sup>76)</sup>

The Inter-American Commission has recently referred a case to the Court after upholding a complaint by an indigenous Amazonian community that Ecuador had violated various human rights by contracting with an oil company to operate on their lands, without consultation.<sup>77)</sup> The Commission indicated in the application: "the present case is an opportunity for the Inter-American System to elaborate more fully on the matter of prior consultation with indigenous peoples, and the possible effect of the decision on the domestic legal provisions regarding prior

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71) Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria, *Comun.* 155/96, May 27, 2002.

72) *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, 2001 *Inter-Am. Ct. H.R. (ser. C) No. 79*, (Aug. 31, 2001).  
73) *Id.*

74) *Saramaka People v. Suriname*, 2007 *Inter-Am. Ct. H.R. (ser. C) No. 172*, (Nov. 28, 2007).

75) *San Mateo de Huanchor v. Peru*, Case 12.471, *Inter-Am. Comm'n H.R.*, Report No. 69/04, admissibility decision of Oct. 15, 2004, OEA/Ser.L/V/II.122, doc. 5 rev. 1, 487 (2004).

76) *San Mateo de Huanchor v. Peru*, Case 12.471, *Inter-Am. Comm'n H.R.*, Report No. 69/04, admissibility decision of Oct. 15, 2004, OEA/Ser.L/V/II.122, doc. 5 rev. 1, 487 (2004).

77) *Inter-American Commission on Human Rights application to Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (Case 12.465) v. Ecuador* (April 26, 2010).

consultation and free and informed consent.<sup>78)</sup>

A human rights case with important implications for transparency in environmental and other cases is the *Claude Reyes* case, involving access to environmental information. The Inter-American Court recognized the human right to access information in connection with freedom of expression.<sup>79)</sup> The *Társaság* case in the European Court of Human Rights is also significant in this development.<sup>80)</sup>

The UN Human Rights Committee was asked to consider a complaint about the effect of oil and gas development which threatened the environmental and economic base of an indigenous community in Canada, impeding its right to hunt, trap and fish in traditional lands and had causing environmental damage.<sup>81)</sup> The Committee relied on the International Covenant on Civil and Political Rights, Article 27, right to culture. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>82)</sup>

Even the World Bank, which traditionally has focused on economic rather than human rights concerns, has begun to acknowledge human rights' relevance in an environmental context in decisions of its Inspection Panel.<sup>83)</sup> The Panel found the human rights situation relating to the construction of a billion-dollar oil pipeline in Chad raised serious questions about the Bank's compliance with its policies on informed and open consultation, warranting further monitoring.<sup>84)</sup>

78) *Id.* para. 4.

79) *Claude-Reyes, et al. v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, (Sept. 19, 2006).

80) *Case of Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, Eur. Ct. H.R. (Apr. 14, 2009).

81) *Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990).

82) International Covenant on Civil and Political Rights, Article 27.

83) *Chad-Cameroon Petroleum and Pipeline Project*, Loan no. 4558-CD; *Petroleum Sector Management Capacity Building Project* (Credit No. 3373-CD); and *Management of the Petroleum Economy* (Credit No. 3316), Inspection Report, July 17, 2002. *See also*, *Honduras: Land Administration Project* (IDA Credit No. 3858-HO), Report No. 39933, Investigation Report, June 12, 2007.

84) *Id.* para. 217. *See also*, views expressed by the late bank Senior, Vice President and General Counsel, Ibrahim F.I. Shihata, in *World Bank in a Changing World – Selected Essays*, Martinus Nijhoff Publishers, 84-93 and 107-8.

## IV. Conclusion

Integrating the two great international law fields of human rights and environmental protection has enriched and strengthened each of them. That integration faced many obstacles, but it was supported by significant synergies. Ultimately, significant progress has been made in various quarters across the world in establishing the relationship, defining its normative content, and giving it practical effect. Achieving this integration has required mutual education, thoughtful analysis, identification of specific synergies, strategic approaches, collaborative action, and patience.

One organization that has been instrumental in the drive towards integration is CIEL. CIEL has worked closely with human rights and climate change experts and organizations around the world to achieve recognition of the relationship between human rights and climate change, to explicate properly the normative content of that relationship, and to give practical effect to international human rights law in the context of climate change, for example in the 2009 high-level experts workshop in Geneva.

It has now become clear that climate change impacts the realization of human rights. It is also recognized that governments must honor their human rights obligations in their efforts to mitigate and adapt to climate change. Human rights are, for example, a major factor in discussions of climate change-related areas such as Reducing Emissions from Forest Degradation and Deforestation – referred to as REDD – where an important issue is how the right to free, prior and informed consent applies in that context – that is, how a human right affects REDD. The integration of these issues can no longer be laughed off the agenda.

Mary Robinson, former High Commissioner for Human Rights, has said that climate change is the biggest human rights issue of our time.<sup>85)</sup> There is no doubt that climate change poses severe threats to human rights and to the environment that must be confronted, though we may face equally serious human rights threats due to loss of privacy and censorship to governments and corporations in the name of anti-terrorism and Internet commerce, respectively, and the risk of the use of nuclear weapons by governments and terrorists. The empty chair for Liu Xiaobo at the 2010 Nobel Peace Prize ceremony illustrates another type of threat.

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85) See e.g., Mary Robinson, *Climate change is an issue of human rights*, Dec. 10, 2010, The Independent, <http://www.independent.co.uk/opinion/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html>.

Such threats represent further evidence of the commonality between human rights and environmental protection. If the price of liberty is eternal vigilance, the same applies to the price of a healthy planet. Threats to each will continue to arise as society changes, presenting a challenge to lawyers and others to find the most effective means of responding to those threats.

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