

Restoring the Climate by Realizing Rights: The Role of the International Human Rights System

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In recent years human rights have begun to feature prominently as a tool to address climate change. This article explores how the institutions and tools of the human rights system are being deployed to complement the negotiations within the United Nations Framework Convention on Climate Change, close the emissions gap and hold the increase in global average temperature below 2 °C or 1.5 °C above pre-industrial levels. It offers an explanation of how the interface between rights and climate change has helped to evolve our analysis of socio-ecological thresholds, created a strong and compelling narrative centered on climate justice, and enhanced political processes to better account for the experience of vulnerable populations. The article shows that the various Special Procedures and Universal Periodic Review of the Human Rights Council are already advancing the cause of urgent and ambitious climate action and suggests ways in which they can become more influential in a wider climate change regime complex.

INTRODUCTION

The Cancún Agreements, adopted at the sixteenth Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) in December 2010, include strong and explicit language on the promotion and protection of human rights for the first time in an international climate change agreement.¹ The seventh preambular paragraph to Decision 1/CP.16 [notes] ‘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’.² Operative paragraph eight then affirms the central importance of human rights in the context of climate responses by stating that ‘parties should, in all climate change related actions, fully respect human rights’.³ This paragraph is extremely important as it makes clear that States must be guided by human

rights considerations across all of the climate building blocks encompassing action on mitigation, adaptation, finance and technology. In addition, a number of other paragraphs also emphasize the importance of equality and non-discrimination principles and of procedural rights.⁴

The inclusions of human rights wording and concepts in the Cancún Agreements represents a unprecedented recognition of the fundamental link between human rights and climate change, and the first tangible results of years of patient analysis, advocacy and alliance building by communities vulnerable to climate change. Rights have become a relevant part of this discourse. The question is: can they now become more effective agents of change?

With this article we explore how the institutions and tools of the human rights system are being deployed to complement the negotiations within the UNFCCC, close the emissions gap and hold the increase in global average temperature below 2 °C or 1.5 °C above pre-industrial levels. The principal purpose is to examine how the Human Rights Council and its mechanisms can help to advance the cause of urgent and ambitious climate action. We argue that these instruments are already providing vulnerable countries with the opportunity to account for their experience of climate impacts; are helping to evolve our analysis of socio-ecological thresholds; and are building a compelling climate justice narrative that can play an increasingly important role in enhancing political will for greater ambition in climate policy. Notwithstanding these achievements, we note that the effectiveness of this approach has reached a threshold and will only become a truly effective supplementary pathway to the UNFCCC with greater legal clarity about how human rights law can be applied to global warming. We go on to suggest that should the international community move towards such clarity, it will empower the Human Rights Council’s mechanisms, especially Special Procedures and the Universal Periodic Review (UPR), to contribute much more. The establishment of a new Special Procedure on human rights and the environment during the nineteenth session of the Human Rights

¹ Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011).

² Ibid., at paragraph 2.

³ Ibid., at paragraph 4.

⁴ Including paragraphs 8 and 12 of Decision 1/CP.16, n. 1 above, and subparagraphs 2(c) and (d) of Appendix I to the Decision.

Council offers an important opportunity to bring such clarity and foster international consensus around it, though its success in this regard is far from assured. By clarifying the human rights obligations relevant to the fight against global warming, this new Special Procedure has the potential to help existing UN mechanisms (e.g., other relevant Special Procedures, treaty bodies and the UPR), as well as regional and national human rights mechanisms (including courts), nongovernmental organizations (NGOs) and legal practitioners become more effective tools to press for urgent climate action. In addition, the UPR contains valuable lessons that could inform procedures to report and verify greenhouse gas emissions and mitigation commitments under the UNFCCC, thus enhancing transparency and accountability in the climate regime.

This article does not aim to provide an exhaustive account of why vulnerable countries chose to pursue a human-rights-inspired strategy to address climate change. A comprehensive treatment of this recent chapter in the evolution of a wider climate change regime complex has been addressed elsewhere.⁵ Furthermore, this article does not seek to address itself the complex legal issues pertaining to the application of human rights law to the human impacts of climate change. A number of influential texts since 2007 have provided a solid evidence base with illustrations of how climate change affects a range of internationally recognized human rights and grapple with both the ethical and legal dimensions of this interface.⁶ Finally, the article does not focus on the operationalization of human rights principles in the UNFCCC process – building on preambular paragraph seven and operative paragraph eight of Decision 1/CP.16. The Human Rights Council played a key role in introducing these principles into the UNFCCC process but is not able, for institutional reasons, to play a significant role in operationalizing them – this responsibility must now fall to climate change policy makers. Nevertheless, this would be an interesting area of further inquiry. In the view of the authors of this article, little if any progress has been made since Cancún in translating the human

rights language contained in Decision 1/CP.16 into stronger climate change policy.

The structure of the article reflects our desire to focus on the instrumental relationship between parts of the human rights system and evolving climate change policy. We begin with the premise that the persistence of a widening emissions gap is exacerbating the vulnerability of a growing number of countries and populations, and thus there is an urgent need for a rights component to global climate policy. The core of the article argues that the rights-climate interface can offer more than an ethical call for action or a means of authoritative advocacy. We advance the idea that the human rights regime can be of instrumental value to the cause of climate compatible development, notably through the use of the Special Procedures and the UPR mechanisms of the Human Rights Council.

HUMAN RIGHTS AND CLIMATE CHANGE: AN EVOLVING AND INCREASINGLY EFFECTIVE DISCOURSE

*'It is the customary fate of new truths to begin as heresies and to end as superstitions.'*⁷

Progress in making human rights relevant in the wider global effort to address climate change has been hard won. The landmark petition filed with the Inter-American Commission on Human Rights by an alliance of Inuit from Canada and the United States, which alleged that human rights had been infringed and were being further violated due in large part to the failure of the United States to curb its greenhouse gas emissions was rejected without prejudice in November 2006.⁸

Moreover, when the Maldives initiated a process of linking human rights and climate change with the 2007 Male' Declaration on the Human Dimension of Climate Change,⁹ they invited a wave of opposition. From a conceptual standpoint, far from being a common and admired standard, the human rights framework is actually a patchwork of very different texts, obligations, monitoring and enforcement mechanisms. Countries' preferences, rather than being universal, are often

⁵ See, e.g., E. Cameron, 'The Human Dimensions of Global Climate Change', 15:1 *West Northwest* (2009), 1; and M. Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action', 33:2 *Harvard Environmental Law Review* (2009), 439. The term 'regime complex' was first coined by K. Raustiala and D.G. Victor, 'The Regime Complex for Plant Genetic Resources', 58:2 *International Organization* (2004), 277.

⁶ See, e.g., International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (International Council on Human Rights Policy, 2008); Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights (UN Doc. A/HRC/10/61, 15 January 2009) ('Report of the OHCHR'); J. Knox, 'Climate Change and Human Rights Law', 50:1 *Virginia Journal of International Law* (2009), 164; and S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank, 2011).

⁷ Quote from T.H. Huxley taken from A. Sen, *Development as Freedom* (Anchor, 2000), at 111.

⁸ See M. Wagner and D.M. Goldberg, An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change (2004) (paper presented at the Tenth Conference of Parties to the Framework Convention on Climate Change in Buenos Aires, Argentina), found at: <http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf>.

⁹ Male' Declaration on the Human Dimension of Global Climate Change (14 November 2007), found at: <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf>.

rights-specific.¹⁰ Human rights demand universality but there are no such universal values, critics claim. Amartya Sen refers to this as the ‘cultural critique’ of human-rights-based approaches.¹¹ Other opponents argue that human rights are often in conflict with each other and as a consequence introducing this lens to the climate change debate would solve few problems and open up entirely new ones.¹² Adding to the difficulties in ensuring coherence is the argument that rights require duties and obligations to be meaningful. If no such duties are recognized, then the alleged rights cannot be but hollow.¹³ A third challenge to this approach came from those who view the human rights framework as being ineffectual. Scholar Peter Uvin argues that the ‘Geneva based UN human rights mechanisms constitute some of the most powerless, underfinanced, toothless formulaic and politically manipulated agencies within the UN system’.¹⁴

The conceptual opposition was matched by considerable political and pragmatic reluctance.¹⁵ Many vulnerable countries feared that using a human rights narrative would invite the international community to interrogate their own questionable human rights records, particularly those relating to political and civil rights. The major economies feared having to defend their emissions record against the threat of litigation stemming from vulnerable countries but also from domestic advocacy groups. Many of these States applied persistent and strong pressure on the island States to drop this approach. Finally, among the community of climate change negotiators there was a real fear that importing the opaque world of international human rights law into the climate change regime would invite politicization and complexity into a process that is already significantly constrained by both.

As a result, for many years, this approach represented a high-risk and often unwelcome strategy. However, five years on from the Male’ Declaration, the tables have turned. Professor Daniel Magraw, former President of the Center for International Law and one of the earliest proponents of the link between human rights and climate change, has said that when this nexus was first mooted ‘people laughed at the very thought; but no one is laughing now’.¹⁶ Today human rights are seen as a

legitimate and powerful element of a wider climate change regime complex, stretching across a wide range of multilateral processes.¹⁷ Rather than being shunned, the succession of Human Rights Council resolutions, the explosion of academic and civil society output on this issue, and the increasing call to human rights norms within the UNFCCC suggest that human rights is increasingly viewed as a potentially transformational part of tackling the climate challenge.¹⁸ The climate justice narrative has become a powerful advocacy tool for civil society organizations and vulnerable countries, which is helping to evolve our analysis of socio-ecological thresholds and is enhancing political processes both internationally and domestically to better account for the experience of vulnerable populations.

CAUGHT IN THE TENTACLES OF CIRCUMSTANCE

Robert Caro’s biography of Lyndon Johnson reveals that the President’s own father instilled in his son the belief that the highest duty of government is ‘to help people caught in the tentacles of circumstance’.¹⁹ The emergence of an international approach to human rights and climate change is the story of how vulnerable populations sought to leverage rights to overcome the most challenging circumstance – characterized by the immediate and far-reaching impacts of climate change and the inadequacy of the global response.

Vulnerable communities and nations developed an interest in the human rights lens because it provided a way for them to account for the social, economic and political threats they face, expressed their frustration with the pace of the UNFCCC negotiations, and, for some, provided a transformative sociopolitical strategy that could be used to re-energize the global debate. In many ways it was a statement of urgency on their part. This remains very relevant today as that need for urgency remains and is indeed increasing.

Earlier this year, the UN Secretary General’s High-level Panel on Global Sustainability expressed their ‘deep concern that developing countries are particularly vul-

¹⁰ E. Cameron, *Development, Climate Change and Human Rights: From the Margins to the Mainstream?*, Social Development Working Paper 123 (World Bank, 2011).

¹¹ See A. Sen, n. 7 above, at 228.

¹² M. Freeman, *Human Rights* (Polity Press, 2002).

¹³ See A. Sen, n. 7 above, at 228.

¹⁴ P. Uvin, *Human Rights and Development* (Kumarian Press, 2004), at 140.

¹⁵ See M. Limon, n. 5 above, at 445, 460. See also M. Limon, ‘Human Rights Obligations and Accountability in the Face of Climate Change’, 38:3 *Georgia Journal of International and Comparative Law* (2010), at 551.

¹⁶ D. Magraw, Speech to Three Degrees Conference (University of Washington, Seattle, 27 May 2009).

¹⁷ For more on the climate regime complex see, e.g., R. Greenspan Bell et al., *Building International Climate Cooperation: Lessons from the Weapons and Trade Regimes for Achieving International Climate Goals*. (World Resources Institute, 2012).

¹⁸ See International Council on Human Rights Policy, n. 6 above; K. Raworth, *Climate Wrongs and Human Rights*, Oxfam International Briefing Papers (Oxfam International, 2008); Global Humanitarian Forum, *The Human Impact Report: Climate Change – The Anatomy of a Silent Crisis* (Global Humanitarian Forum, 2009); E. Cameron, ‘Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach’, 38:3 *Georgia Journal of International and Comparative Law* (2010), at 673.

¹⁹ R.A. Caro, *The Years of Lyndon Johnson: The Passage of Power* (Alfred A. Knopf, 2012), at 29.

nerable to and are experiencing increased negative impacts from climate change'.²⁰ This in turn is 'severely undermining food security and efforts to eradicate poverty, and also threatens the territorial integrity, viability and the very existence of small island developing states'.²¹ This affirmation of the immense challenge of climate change comes a full quarter century after President Gayoom of the Maldives became the first world leader to draw attention to global warming in what became known as the 'death of a nation' speech at the UN General Assembly in 1987.²² Regrettably, it seems that concern does not automatically translate into urgency and action.

As a result of more than twenty-five years of delay we are now faced with a decisive decade. The stability of the global climate, the integrity of vital ecosystems and consequently the long-term rights, livelihoods and indeed lives of vulnerable populations require immediate and ambitious steps to close the emissions gap. The United Nations Environment Programme's (UNEP) *Bridging the Emissions Gap* study has identified the scale of the challenge we face. According to UNEP, following the current business-as-usual emissions path results in a gap between current projections and levels consistent with a 2°C pathway of 12 Gigatonnes (Gt) CO₂-equivalent (CO₂e) (in the range of 9–18 Gt CO₂e). This is assuming that countries fail to act on the promises they have made over the past three years in Copenhagen and Cancún. If those pledges are implemented in full and at the highest level of ambition, UNEP estimates at least a gap of 1 Gt CO₂e. Moreover, 'emission pathways consistent with a "likely" chance of meeting the 2°C target have a peak before 2020 – around 44 Gt CO₂e, which would require an average of 2.6% decline per year, with a range of 2.2–3.1%'.²³ The key message is that even if countries commit to the higher ends in their pledged ranges, and even if they implement these policies with the highest level of effectiveness, they will still fall short of where the international community needs to be in 2020. This means there is a pressing need to move countries towards more ambitious targets, while enhancing their ability to implement these targets effectively.

While the scale of the challenge is daunting, there are emerging opportunities that can contribute to closing the emissions gap. The decision on the Durban Platform on Enhanced Action, arguably the key text to

emerge from COP-17 in South Africa, has the potential to strengthen and equip the multilateral rules-based regime. It establishes a timeframe to develop a 'protocol, another legal instrument or an agreed outcome with legal force' by 2015 to come into force by 2020; calls for the widest possible cooperation by all countries in this effort and seeks to establish a work-plan for the pre-2020 time period on enhancing mitigation ambition by all.²⁴ Moreover, an increasing number of influential thought-leaders are now suggesting that the full spectrum of international multilateral fora need to be mobilized in response to the climate challenge – both in terms of driving ambition within their own specific areas of competence, and also in informing the shape of the climate regime by harvesting their own distinct best practices.²⁵

LEVERAGING THE MECHANISMS OF THE HUMAN RIGHTS COUNCIL

The theme of human rights and climate change made its substantive debut during the Human Rights Council's seventh session in March 2008. Prompted by the Male' Declaration of November 2007, a number of countries including, *inter alia*, Bolivia, Bhutan, Greece, the Maldives, Nigeria, Indonesia and the Philippines, all noted the serious consequences of climate change for the full enjoyment of human rights and called on the Council to address the human rights dimension.²⁶ On 28 March 2008, the Maldives,

²⁴ Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012).

²⁵ See, e.g., R. Moncel *et al.*, *Building the Climate Regime: Survey and Analysis of Approaches* (UNEP/World Resources Institute, 2011); R. Greenspan Bell *et al.*, n. 17 above.

²⁶ O. Maduekwe, Minister of Foreign Affairs of Nigeria, Statement at High-level Segment of the Seventh Session of the Human Rights Council (4 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Nigeria-E.pdf>>; S.T. Rabgye, Permanent Representative of Bhutan to the United Nations, Statement at High-level Segment of the Seventh Session of the Human Rights Council (5 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/audio.htm>>; A.G. Romulo, Secretary of Foreign Affairs of the Philippines, Statement at High-level Segment of the Seventh Session of the Human Rights Council: Behind a Common Cause: Advancing with Resolve, Finding Strength in Synergy (3 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Philippines-E.pdf>>; A. Shahid, Minister of Foreign Affairs of the Maldives, Statement at High-level Segment of the Seventh Session of the Human Rights Council (4 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Maldives-E.pdf>>; S.S. Llorenti Soliz, Vice Minister for the Coordination of Social Movements and Civil Society of Bolivia, Statement at High-level Segment of the Seventh Session of the Human Rights Council (3 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Bolivia-S.pdf>>; F. Verros, Permanent Representative of Greece to the United Nations at Geneva, Statement at High-level Segment of the Seventh Session of the Human Rights Council (5 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/audio.htm>>; N. Hassan Wirajuda,

²⁰ United Nations Secretary-General's High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A Future Worth Choosing* (United Nations, 2012), at 30.

²¹ *Ibid.*

²² See E. Cameron, n. 5 above.

²³ United Nations Environment Programme (UNEP), *The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2°C or 1.5°C? A Preliminary Assessment* (UNEP, 2010), at 16; and UNEP, *Bridging the Emissions Gap* (UNEP, 2011), at 8.

together with 78 co-sponsors from all regional groups, secured the adoption, by consensus, of Human Rights Council Resolution 7/23 on 'human rights and climate change' which, for the first time in an official UN resolution, stated explicitly that climate change 'poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.²⁷ The members of the Council agreed to give further consideration by mandating the Office of the High Commissioner for Human Rights (OHCHR) to prepare 'a detailed analytical study on the relationship between climate change and human rights, to be submitted to the Council prior to its tenth session'.²⁸

The OHCHR published its report on climate change and human rights in January 2009.²⁹ The report was based on written and oral submissions by over thirty States, and thirty-five international agencies, national human rights institutions, NGOs and academic bodies. The OHCHR's report began by clearly asserting that there is an important relationship between climate change and human rights, and went on to delineate and define the nature of that relationship. In particular, the OHCHR outlined the many ways in which climate change undermines a range of internationally protected human rights – particularly the rights of vulnerable populations.³⁰

A second Human Rights Council Resolution (10/4) on climate change and human rights, adopted on 20 March 2009, echoed the findings of the OHCHR report and affirmed 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.³¹

On 15 June 2009, as per Resolution 10/4, the Human Rights Council's eleventh regular session dedicated a half day to an interactive panel debate on the relationship between climate change and human rights. In late 2007–early 2008, a wide range of States refused to accept that there was any relationship between climate change and human rights, arguing instead that they were two completely separate bodies of law and that climate change must be dealt with by the UNFCCC, and

human rights policy by the Human Rights Council. However, by June 2009, no delegation argued with the notion that climate change has implications for a wide range of explicitly identified, internationally protected human rights; that already vulnerable 'climate front-line' countries are most at risk (and the least able to adapt); and that the human rights impacts do not fall evenly across a given population, but rather target marginalized or vulnerable groups, such as women and children. What is more, during the June debate an impressive number of States accepted and even promoted the idea that the various aspects of the relationship between climate change and human rights could and should be placed within an overall concept of 'climate injustice'.³²

The Human Rights Council's work on climate change prior to June 2009 was premised on achieving two main policy goals. The first and primary goal was to introduce human rights concepts and principles into the UNFCCC process in order to highlight the human dimension of global warming and to use human rights principles such as equality, non-discrimination, access to information, access to decision making and access to justice to qualitatively improve climate policy. The second goal was to mobilize international human rights mechanisms as an additional (to the UNFCCC) means of mobilizing international climate action. As noted above, this article focuses on the latter goal which, since the OHCHR's study and the summary of the June 2009 Council debate were transmitted to the UNFCCC COP for its consideration (as per Resolutions 7/23 and 10/4), has become the main preoccupation of the Human Rights Council.

In this regard, Resolutions 7/23 and 10/4 acted as a springboard for continued efforts within the Council to find ways outside the UNFCCC to promote climate action. For example, since the adoption of Resolution 10/4, a number of UN Special Rapporteurs, have focused reports on the issue of climate change (see below for details). A number of them have also conducted country missions to explore the impact of climate change on human rights. Treaty bodies³³ have also begun to show an informal interest in the issue, while the Maldives, Philippines and others have used the Council's UPR mechanism to ask vulnerable States about the impacts of climate change on the human

Minister for Foreign Affairs of Indonesia, Statement at High-level Segment of the Seventh Session of the Human Rights Council (4 March 2008), found at: <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Indonesia-E.pdf>>.

²⁷ Human Rights Council Resolution 7/23, Human Rights and Climate Change (UN Doc. A/HRC/7/78, 14 July 2008), preamble.

²⁸ *Ibid.*, at paragraph 1.

²⁹ See Report of the OHCHR, n. 6 above.

³⁰ For a detailed overview of the content and implications of the OHCHR report, see M. Limon, 'Human Rights Obligations and Accountability', n. 15 above, and E. Cameron, n. 10 above.

³¹ Human Rights Council Resolution 10/4, Human Rights and Climate Change (UN Doc. A/HRC/10/L, 25 March 2009).

³² See P. Charnhumidol, Minister Counselor, Permanent Mission of Thailand to the United Nations at Geneva, Panel on Human Rights and Global Climate Change at the Eleventh Session of the Human Rights Council (15 June 2009); D. Tshering, Deputy Permanent Representative of Bhutan to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (15 June 2009); Statement of the Philippines, Panel on Human Rights and Global Climate Change at the Eleventh Session of the Human Rights Council (15 June 2009).

³³ Most notably the Committee on Economic, Social and Cultural Rights.

rights of their people, and to ask major emitting nations to justify the manner in which they knowingly undermine international human rights.³⁴

Yet, while since the Male' Declaration and the Council's first tentative considerations of climate change issues in 2008 there has been an enormous quantitative increase in the attention paid to climate change by international human rights mechanisms, the qualitative impact of that attention has been limited. This is mainly because of a lack of detailed understanding on the part of States (especially climate vulnerable States), Special Procedure mandate-holders and others, as to exactly how human rights law can be applied to leverage stronger climate action. To date, the interventions of most States, Special Procedures and NGOs has been to point out that climate change undermines the human rights of individuals in vulnerable countries, and, to a lesser degree, to discuss how human rights principles can help strengthen national climate change adaptation strategies through, for example, consulting with and prioritizing the needs of vulnerable population groups. While important from the perspective of awareness-raising and public advocacy, such interventions are unlikely to have a transformative influence on the climate policies of high-emitting States. What is needed therefore is for the Council to confront and resolve a number of crucial (and interlinked) questions related to the precise nature of a State's human rights obligations (both domestic and extraterritorial) as they pertain to climate change and other forms of environmental harm, and whether, where a State fails to fulfill such obligations, the resulting harm can be considered a human rights violation in a strict legal sense.

Only by addressing and generating greater understanding about these central questions will vulnerable States and international human rights mechanisms be able to more effectively leverage international human rights law as an effective additional means (outside the UNFCCC) of responding to climate change. In the sections that follow we will first examine the potential of the Special Rapporteurs to drive ambition within the human rights system, before moving on to analyze how the Human Rights Council's UPR process has been leveraged by vulnerable States to highlight their plight and to press for more urgent mitigation and adaptation action. In both cases, we will look at the potential importance of the mandate of the newly established UN Independent Expert on Human Rights Obligations Related to the Enjoyment of a Safe, Secure, Healthy and Sustainable Environment as a means

³⁴ Treaty bodies have yet to take a formal and explicit interest in the human rights implications of climate change. While some treaty bodies, such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, have addressed environmental issues more broadly, they have not focused on the particular issue of global warming. This represents an important untapped area of possible future progress.

of driving progress on the key questions mentioned above and thus of empowering all human rights mechanisms to more effectively respond to global warming. The following sections will also explore the capacity of the UPR to inform and shape the development of transparency, accountability and review in the UNFCCC.

THE SPECIAL PROCEDURES: BUILDING NEW ROUTES FOR CLIMATE ACTION

'Special Procedures' is the general name given to the Human Rights Council mechanisms established to address either human rights situations or issues in all parts of the world. There are different types of Special Procedure including³⁵ Special Rapporteurs and Special Representatives of the Secretary-General who tend to have wider mandates encompassing normative analysis, conducting country missions and commenting on country situations, receiving human rights complaints and issuing urgent appeals; and Independent Experts who tend to have more restricted mandates focused on normative analysis such as clarifying the nature of human rights obligations as they apply to a certain issue. Mandate holders, who are respected experts in their field and are independent of State influence, are usually tasked with examining, monitoring, advising and publicly reporting on human rights situations in specific countries or territories, known as 'country mandates',³⁶ or on major phenomena of human rights violations worldwide, known as 'thematic mandates'.³⁷ Currently, there are thirty-three thematic and eight country mandates. Various activities are undertaken by Special Procedures, including responding to individual complaints, conducting studies, undertaking public advocacy, undertaking country missions and providing States with recommendations, sending urgent appeals to States about alleged human rights violations, and providing advice on technical cooperation at the country level.³⁸

The growing attention devoted to climate change by UN Special Procedures was partly organic – representing the rapid and sustained emergence of the interface between climate change and human rights as an issue in civil society and academic circles. However, it was also

³⁵ Including but not restricted to. There are yet more types of Special Procedure mandates, such as Working Groups.

³⁶ See <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx>>.

³⁷ See <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>>.

³⁸ For more information on human rights Special Procedures and other mechanisms see, e.g., B. Ramcharan, *The UN Human Rights Council* (Routledge, 2011).

reflective of the will of States, which used Council resolutions to encourage a greater focus on the subject. For example, Resolution 7/23 takes note

of the conclusions and recommendations contained in the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the General Assembly (A/62/214), which includes a call for the Council to study the impact of climate change on human rights.³⁹

For its part, Resolution 10/4, in its operative part

[w]elcomes the decision of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living to prepare and present a thematic report on the potential impact of climate change on the right to adequate housing, and encourages other relevant special procedure mandate holders to give consideration to the issue of climate change within their respective mandates.⁴⁰

Moreover, States began to alter the mandates of existing thematic Special Rapporteurs to include a request to consider the impacts of climate change. For example, when the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living was renewed in December 2007 through Resolution 6/27, the main sponsor, Germany, worked with the Maldives to include the issue of climate change.⁴¹

As a result of these various processes, a wide-array of UN Special Procedures, including the Special Rapporteur on the Right to Food,⁴² Adequate Housing,⁴³ the Special Rapporteur (formerly Independent Expert) on Access to Safe Drinking Water and Sanitation,⁴⁴ the Special Rapporteur on the Rights of Indigenous Peoples,⁴⁵ and the Special Rapporteur on the Human Rights of Internally Displaced Persons,⁴⁶ have focused

significant parts of their mandate on the impacts of climate change. This has included country missions to ascertain the impacts of global warming on human rights, especially in vulnerable States. For example, both the Special Rapporteur on Adequate Housing and the Special Rapporteur on the Human Rights of Internally Displaced Persons have undertaken recent visits to the Maldives and reported their findings to the Human Rights Council.⁴⁷ In the case of the former, her visit was used as the basis of a thematic report on the interlinkages between human rights and climate change.⁴⁸

Perhaps the most active mandate-holder on questions of climate change and environmental sustainability has been the Special Rapporteur on the Right to Food, Olivier de Schutter. Through his work, which has included a dedicated report to the Council,⁴⁹ and a press statement ahead of COP-16 in Cancún calling for a 'green Marshall Plan for agriculture',⁵⁰ De Schutter has tried to draw attention to the impacts of climate change on the right to food, and has also emphasized the importance of building food systems that not only have minimal greenhouse gas emissions but are also resilient to extreme climate conditions.

In addition to undertaking focused country missions and presenting reports on the issue of climate change, Special Procedures have also taken innovative steps such as issuing joint statements on the subject. For example, in the run-up to COP-15 in Copenhagen, all UN Special Procedures issued a joint statement entitled 'An ambitious climate change agreement must protect [the] human rights of all',⁵¹ in which they argued that a weak outcome from COP-15 would threaten to infringe on human rights and called on mitigation and adaptation policies to be developed in accordance with human rights norms.

The effectiveness of Special Procedure interventions on the issue of climate change is difficult to determine. Beyond qualitatively adding to the range of voices high-

³⁹ Human Rights Council Resolution 7/23, n. 27 above, at preamble.

⁴⁰ Human Rights Council Resolution 10/4, n. 31 above, at paragraph 3.

⁴¹ Human Rights Council Resolution 6/27, Adequate Housing as a Component of the Right to an Adequate Standard of Living (UN Doc. A/HRC/6/22, 14 April 2008).

⁴² Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Building Resilience: A Human Rights Framework for World food and Nutrition Security* (UN Doc. A/HRC/9/23, 8 September 2008); see also E. Caesens *et al.*, *Climate Change and the Right to Food: A Comprehensive Study* (Heinrich Böll Stiftung, 2009).

⁴³ Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik, *Mission to Maldives* (UN Doc. A/HRC/13/20/Add.3, 11 January 2010), Annex.

⁴⁴ *Climate Change and the Human Rights to Water and Sanitation: Position Paper* (Office of the High Commissioner for Human Rights, 2009), found at: <http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf>.

⁴⁵ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (UN Doc. A/HRC/4/32, 27 February 2007), paragraph 49ff.

⁴⁶ Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, *Mission to Maldives* (UN Doc. A/HRC/19/54/Add.1, 30 January 2012), Annex.

⁴⁷ See Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, n. 31 above; and Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, n. 32 above.

⁴⁸ See Report of the Special Rapporteur on Adequate Housing, n. 43 above.

⁴⁹ See Report of the Special Rapporteur on the Right to Food, n. 42 above.

⁵⁰ Press release: 'Cancun Climate Summit: UN Food Expert Calls for a "Green Marshall Plan for Agriculture"' (29 November 2010), found at: <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10565&LangID=E>>.

⁵¹ Press release, ' "An Ambitious Climate Change Agreement Must Protect Human Rights of All," Warn UN Experts, Joint Statement of the Special Procedure Mandate-holders of the Human Rights Council on the UN Climate Change Conference (Copenhagen, 7–18 December 2009)' (7 December 2009), found at: <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9667&LangID=E>>.

lighting the various impacts of global warming and urging action, it is unlikely, as things stand, that they have had or will have any significant qualitative or determinative effect on global efforts to reverse the phenomenon through more ambitious mitigation actions. This is because the work they are currently undertaking is premised on raising awareness of the impacts of climate change on the rights covered by their mandate, and by pressing States to adopt a rights-based approach to the conception and implementation of adaptation policies (by, for example, applying equality and non-discrimination principles to ensure that policies are targeted towards vulnerable population groups, and ensuring that those groups have access to information and access to the policy-making process). While not unimportant, this misses the main potential benefit of a right-based approach to climate change, which is to leverage hard law – human rights law – with its emphasis on rights, obligations, harm, accountability and redress, to bring additional legal pressure to bear on States in order to encourage a meaningful mitigation response.

Some States, such as Bangladesh, and some NGOs, including the Friedrich Ebert Stiftung, are convinced that the answer to this limitation is to create a new dedicated Special Procedure on human rights and climate change.⁵² However, such an approach misses the point. Any new mandate, even if focused solely on the issue of global warming, would still focus on bringing a human rights perspective to international debates and negotiations on climate change, and thus would still face the same limitations as other mandates already active on the issue. Apart from drawing attention to the human rights impacts of climate change – which has already been done – and using that information to press for more urgent action – which has also been done – the only avenue of influence such a mandate possesses would be to try to press States in the UNFCCC climate change negotiations to adopt a more rights-based approach. However, as the OHCHR has found when it has tried to participate at a senior-level in the UNFCCC COPs in Bali, Copenhagen and Cancún, the crucial working group negotiations on the draft negotiating text (as well as high-level informal negotiations such as that which led to the Copenhagen Accord) are only open to States and the ability of international organizations and mechanisms to influence them is extremely limited.

If Special Procedures could use their mandates to add legal weight to the notion that, by emitting greenhouse

gases beyond safe-levels or by failing to implement policies to effectively reduce emissions in line with scientific advice or with its obligations under the Kyoto Protocol, a given State is violating the human rights of those affected and thus could and should be held legally accountable, this would prove far more effective and potentially transformative. For that to happen, far more progress needs to be made at the international level on clarifying the precise nature of human rights obligations relating to the enjoyment of a safe, secure and clean environment.

CLARIFYING HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE: THE KEY TO UNLOCKING THE RIGHTS-BASED APPROACH

In March 2011, the Maldives, Costa Rica and Switzerland spearheaded negotiations leading to the adoption by consensus of a new resolution requesting the OHCHR to conduct a study which would take stock of political and judicial efforts at international, regional, national and local levels, to clarify, develop and leverage linkages between human rights law and environmental law.⁵³ The OHCHR published its analytical study on 16 December 2011, and presented it to the Council during the latter's nineteenth session in March 2012.⁵⁴ Importantly, beyond well-understood and well-established theoretical discussions on the relationship between human rights and the environment, the report also addressed the development of international, regional and national law in the field and the evolution of relevant jurisprudence. The study also began addressing central questions that will ultimately determine the success or otherwise of using the international human rights system to meaningfully address climate change. In other words, it attempted to identify the current state-of-play in international understanding of the nature and scope of human rights obligations pertinent to climate change and other forms of environmental harm, and suggested areas where further work and clarification is urgently needed. These areas include the linked questions of environmental rights and responsibilities, the question of how best to leverage domestic human rights obligations to strengthen national environmental policy making, whether anthropogenic environmental harm can be considered to violate the fundamental human rights of victims, and the nature of the (human rights) duty of international cooperation in the context of climate change.

⁵² See, e.g., NGO Declaration on 'Climate Change and Human Rights' to the Third United Nations Human Rights Council's Social Forum (1 October 2010), found at: <<http://iefworld.org/node/249>>. Countries which support this call, such as Bangladesh and Bolivia, have not done so publicly through, e.g., Human Rights Council statements, but rather through informal lobbying and comments in informal meetings.

⁵³ Human Rights Council Resolution 16/11, Human Rights and the Environment (UN Doc. A/HRC/16/11, 24 March 2011).

⁵⁴ Analytical Study on the Relationship between Human Rights and the Environment, Report of the United Nations High Commissioner on Human Rights (UN Doc. A/HRC/19/34, 16 December 2011).

Perhaps most importantly, it also includes debate on the possible extraterritorial application of human rights. This has always been a core, contestable and contentious issue at the heart of the international human rights system and its capacity to address climate change. The OHCHR study devoted an entire section to the extraterritorial dimensions of human rights obligations in the context of the environment, noting that the 'extraterritorial dimensions of the human rights and environment interface provide fertile ground for further inquiry, particularly in relation to transboundary and global environmental issues', such as climate change.⁵⁵

Clarifying the extraterritorial dimension of human rights obligations in the context of climate change is especially important for vulnerable countries and communities. It would already represent important progress if the international community were able to move towards an understanding that environmental harm such as that caused by climate change violates the human rights of victims where the victim resides within the jurisdiction of the country said to have caused the harm. Showing that the human rights of such a person have been violated by the failure of his/her government to curb, for example, greenhouse gas emissions, would open the way to accountability and legal redress whether through domestic mechanisms such as the courts, or through international mechanisms such as treaty bodies or Special Procedures (where an individual can turn when his/her domestic institutions fail to deliver justice, accountability and redress). However, for individuals residing in vulnerable countries which have contributed little to the atmospheric stock of greenhouse gas emissions, the ability to use international human rights law to hold foreign States accountable would be more relevant and significant. In other words, they would need to apply human rights law extraterritorially.

As the OHCHR report notes, this question (of extraterritoriality) is crucial: 'Such harm arises where environmental degradation results in the impairment of rights of people outside of the territory of the State where the damaging activity occurs. One country's pollution can become another country's environmental and human rights problem.'⁵⁶ The OHCHR report further recognizes 'that the extraterritorial problem raised by transboundary environmental harm also extends to global pollution issues, such as the concentration of greenhouse gases in the atmosphere leading to dangerous climate change and marine dumping, which may affect areas beyond national jurisdiction such as the high seas'.⁵⁷

Development of human rights law in this direction would strengthen the capacity of an individual in, say,

small island developing States, to take action against a foreign State such as a heavily emitting developed country by opening up new supranational avenues of securing accountability and redress for damage caused by climate change. At a regional level, for example, it would allow for a renewal (with a greater likelihood of success) of the 2006 Inuit Petition to the Inter-American Commission on Human Rights. At the international level, as this article seeks to demonstrate, it would empower the various international human rights mechanisms to more effectively secure accountability and redress and thus become a more credible supplementary framework to the UNFCCC.

Finally, the evolution of human rights law in this manner would have important implications for the UNFCCC process itself and for the role of vulnerable States therein. In one sense, this is because the success or otherwise of attempts to use human rights law to hold a certain State accountable for damage caused by climate change would depend on a demonstration that a given State had legal responsibilities in the context of global warming and failed to comply with those responsibilities (and is thus responsible for the resulting environmental harm and any consequent human rights violations). Clearly the most obvious source of such legal responsibility (as well as the foundation of any assessment of compliance with it) is a State's commitments under the UNFCCC. This could have implications for the willingness of States to accept deeper emission reduction commitments, and also for the system of monitoring, review and verification of compliance with those commitments.

Taking their lead from the OHCHR report, the Human Rights Council adopted, by consensus and with 81 co-sponsors, Resolution 19/10 at its nineteenth session,⁵⁸ which established a new UN human rights Special Procedure – namely an Independent Expert on issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment (Independent Expert on Environment). Here, for the first time, the international community has a single mechanism at the UN-level to drive forward international understanding of, and consensus around, the precise nature of human rights obligations as they pertain to protecting the environment and to cases of environmental harm, including those caused by climate change.

It is perhaps tempting to question how this new mandate will make a difference beyond what existing Special Procedures have been able to achieve. And indeed, by itself, the mandate holder alone will not be able to transform human rights law and mechanisms into an effective new avenue to address climate

⁵⁵ *Ibid.*, at paragraph 64.

⁵⁶ *Ibid.*, at paragraph 65.

⁵⁷ *Ibid.*, at paragraph 66.

⁵⁸ Human Rights Council Resolution 19/10, Human Rights and the Environment (UN Doc. A/HRC/19/10, 22 March 2012).

change. Rather, the new Independent Expert will act as an enabler for a wide range of existing mechanisms to undertake more effective interventions on the question of global warming by clarifying the nature and application of human rights obligations pertinent to climate change. Ever since the OHCHR's 2009 report, efforts by vulnerable countries to use human rights law as a supplement to the UNFCCC and as a powerful new advocacy tool have been held back by deep intergovernmental divergences crucial human rights questions mentioned above, namely:

- 1) What is the exact nature and scope of domestic human rights obligations pertaining to climate change?
- 2) What is the exact nature and scope of extra-territorial human rights obligations pertaining to climate change, including the duty of international cooperation?
- 3) Is it possible, under international law, to demonstrate that an individual's human rights have been violated by climate change where a State has failed to abide by its obligations under 1 or 2 above and thus for that individual to hold his or another State accountable?

It has become increasingly clear from the Human Rights Council's work on climate change that States alone will not be able to build convergence on these questions. Divisions are too deep and the stakes are too high. The only way forward therefore was for the international community (importantly acting by consensus) to 'outsource' the issue by mandating a respected international expert to try to understand the different views of States, and to carefully construct a new consensus on the questions mentioned above. In other words, the only way to forge deeper understanding and convergence on the part of States is through the offices of a UN Special Procedure – an independent expert who will help clarify the nature and extent of human rights obligations in the context of climate change and bring States to a common understanding.

The work of the new Independent Expert will centre on studying the existing practices of States, and international and regional mechanisms in the area of human rights and the environment, and the existing jurisprudence of courts and quasi-judicial bodies such as treaty bodies on the central questions raised above. This analysis will, it is expected, act as the foundation for a series of UN reports to clarify the application of human rights law to environmental problems such as climate change. It is clear that these reports alone will not change the international human rights system into a new transformative framework for action on climate change. But as a depository of contemporary legal understanding, as a centralized international source of progressive legal thought and as a contribution to, and driver of, jurisprudence in the area of human rights and

climate change, these reports, together with other related actions of the Independent Expert such as inter-governmental consultations, legal seminars and contributions to international conferences, can potentially become a vital source of inspiration and leverage for a wide-range of existing human rights mechanisms.

This will not happen overnight. The Independent Expert will not, through three UN reports, singlehandedly transform international, regional and national human rights law. Rather, through his work,⁵⁹ the mandate-holder will gradually over time, through interactions with policy makers, with lawyers and judges, with domestic, regional and international courts, with the Human Rights Council and its mechanisms, and with NGOs and campaign groups, influence contemporary legal thought and help generate progressive jurisprudence in the context of the human rights–climate change interface.

Part of this evolution will be the role of the new Independent Expert's work in strengthening the capacity of other relevant UN Special Procedures, of treaty bodies, and of the Universal Periodic Review to deliver a more robust rights-based approach to tackling climate change. Only when these mechanisms are able to move beyond a passive acknowledgement that climate change has implications for human rights (as is the case today) to a more assertive stance on precisely what that means for the legal relationship between a citizen and his/her State or a citizen and a foreign State, will the international human rights system really begin to deliver a supplementary path for climate action.

CLIMATE CHANGE IN THE UPR

In addition to Special Procedures, the other main international human rights mechanism that has been used to try to drive action on climate change⁶⁰ is the Universal Periodic Review (UPR). The UPR is a peer review mechanism under the auspices of the Human Rights Council. Under the UPR, every UN member State has its human rights performance – the degree to which it is complying with international human rights law as well

⁵⁹ The twentieth session of the Human Rights Council in June 2012 appointed Professor John Knox as United Nations Independent Expert on Environment. See United Nations Office at Geneva, 'Council Names Independent Expert on the Environment and Members of Fact-finding Mission on Israeli Settlements' (6 July 2012), found at: <[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/AFB769AC2D976C4EC1257A33004CDA6D?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/AFB769AC2D976C4EC1257A33004CDA6D?OpenDocument)>.

⁶⁰ As already noted, while the human rights treaty bodies have the potential to be the third human rights mechanism that could drive change in the context of human rights and climate change, they have so far not been particularly active in the area.

as with its own laws and commitments – periodically⁶¹ reviewed by its peers (other UN member States). Every four-and-a-half years, each UN member State must send a delegation to UPR working group meetings in Geneva to present a national report on its record of promoting and protecting human rights. This report, together with a report containing the views of UN human rights mechanisms/UN system on the country under review, and a report summarizing the views of civil society/NGOs, is then considered by members and observers of the Council. States that wish to do so then make interventions including comments on the human rights situation in the country under review, questions and recommendations for future action. A report of the meeting, together with a list of all the recommendations made and the State under review's position on those recommendations (acceptance/rejection) is then subsequently adopted by the Human Rights Council as that country's UPR outcome. The precise modalities of the UPR process are explained in more detail in the following section.

Since it began to operate in 2008, the UPR has increasingly come to be seen as a useful forum for climate vulnerable States to raise concerns about the human rights impacts of global warming and to urge a more robust international response. However, while this trend demonstrates that the human rights-climate change discourse has moved, since the Male' Declaration, from being a fringe concern to being an accepted and legitimate avenue for seeking climate action, the impacts of climate-related interventions in the UPR remains debatable. This is because, as is also the case with existing thematic Special Procedures, States in the UPR process have yet to move beyond simple expressions of concern at the impacts of climate change on human lives and rights. With the exception of the Maldives, there has been little or no attempt to move the discussion towards addressing the legal implications of those impacts for the 'victims' and for States. And even where steps have been taken in this direction, their impact has been limited by the lack of legal clarity and consensus around the crucial questions of State obligations and accountability mentioned earlier in this article.

During the first cycle of the UPR (2008–2011), a total of 31 States raised the issue of climate change in their national UPR reports.⁶² The issue of climate change was

also raised in 33 UPR working group meetings.⁶³ Consideration of climate change-related issues in working group meetings mainly centered on vulnerable States but not exclusively – for example, the UPR working group meetings of both Australia and the United States featured discussions on climate change.

The Maldives' national UPR report, presented to the UPR working group on 3 November 2010, asserted that 'man-made climate change poses an existential threat to the Maldives and undermines a wide range of human rights in the country, including, *inter alia*, the right to life, the right to the highest attainable standard of health and the right to adequate housing'.⁶⁴ The Maldives also drew a clear link between these human rights impacts and the obligations of States to take action to mitigate them: 'Unless drastic action is taken to reduce emissions by all countries, but especially by the major industrialised nations and rapidly emerging economies, then by the end of the century, the Maldives will struggle to function as a viable State.'⁶⁵ In the subsequent interactive dialogue with the working group, India, Indonesia, Morocco, Bangladesh, Turkey, Bhutan, Chad, Trinidad and Tobago and Mauritius all highlighted the impacts of climate change on human rights. Finland asked whether the Maldives takes human rights considerations into account in climate change adaptation programmes and made a recommendation in this regard.⁶⁶

Likewise, Tuvalu also used its national report to highlight 'the human rights implications of the adverse impacts of climate change in particular sea level rise', claiming that 'given the constitutional rights and protection of Tuvaluan citizens' lives, and that climate change is an effect caused by human activities, the demise of human life of Tuvaluans due to [the] adverse impacts of climate change and sea level rise [are] considered as illegal acts against such persons'.⁶⁷ In the ensuing dialogue with the working group, nearly all States used their interventions to recognize the impacts of global warming on the human rights of Tuvaluans.⁶⁸

⁶³ Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Bhutan, Bolivia, Comoros, Djibouti, Dominica, Fiji, Guyana, Jamaica, Kiribati, Maldives, Marshall Islands, Micronesia, Mongolia, Nauru, Norway, Palau, Papua New Guinea, Romania, Samoa, Seychelles, Solomon Islands, St Kitts and Nevis, Trinidad and Tobago, Tuvalu, United States, Vanuatu, Vietnam and Yemen.

⁶⁴ National Report submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 – Maldives (UN Doc. A/HRC/WG.6/9/MDV/1/Rev.1, 30 August 2010).

⁶⁵ *Ibid.*, at paragraph 137.

⁶⁶ Report of the Working Group on the Universal Periodic Review – Maldives (UN Doc. A/HRC/16/7, 4 January 2011).

⁶⁷ National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 – Tuvalu (UN Doc. A/HRC/WG.6/3/TUV/1, 12 September 2008), paragraphs 2 and 42.

⁶⁸ Report of the Working Group on the Universal Periodic Review – Tuvalu (UN Doc. A/HRC/10/84, 9 January 2009).

⁶¹ Originally, the review cycle was every four years. However, due to time problems encountered during the UPR's first cycle, the second cycle and all future cycles will be based on each State being reviewed every four-and-a-half years.

⁶² These were: Bangladesh, Bhutan, Bolivia, Costa Rica, Ecuador, El Salvador, Greece, Guyana, Honduras, Iceland, Iraq, Jamaica, Kiribati, Kenya, Lao, Maldives, Malawi, Marshall Islands, Mexico, Micronesia, Mongolia, Nauru, Palau, Panama, Papua New Guinea, Samoa, Seychelles, Solomon Islands, Tanzania, Tuvalu and Vietnam.

The Maldives went further, using its intervention to highlight the fact that the only way to protect the human rights of people in Tuvalu from the impacts of climate change is for high-emitting nations to take immediate steps to reduce greenhouse gas emissions.⁶⁹

The pattern whereby vulnerable States use the UPR process to highlight the threat of climate change to people's rights, and seek to place moral pressure on industrialized and other high-emitting States has become increasingly common at the Human Rights Council. In addition to the Maldives and Tuvalu, a wider-range of other small island developing States from the Pacific and Caribbean has made similar use of the mechanism, often with the support of NGOs such as Earthjustice. The effectiveness of these efforts, however, has been limited. There are perhaps two main reasons for this. First, with the exception of the Maldives, references to climate change in the UPR have failed to go beyond general statements about the impacts of climate change on human lives and rights. They have not, for example, attempted to construct legal arguments claiming that certain rights have been violated, that certain States should be held accountable for this, and that the victims should receive compensation and redress. Second, even where there have been attempts to construct such legal arguments around the international human rights conventions, which could perhaps contribute to improving international climate change responses, the impacts of those arguments have tended to be weak. In both instances (and as is also the case with Special Procedure interventions, as we have seen) this is because the precise nature of States' human rights obligations, both domestic and extraterritorial, in the context of climate change and other forms of environmental harm remain unclear and subject to dispute. Thus, there are few vulnerable States that are able to make consistent and precise arguments, and even fewer high-emitting States that are willing to take such arguments seriously.

What is needed then, in order to make the UPR into a more effective vehicle for vulnerable States, communities and individuals to bring pressure to bear on high-emitting States, is greater legal precision on the nature and extent of human rights obligations as they apply to climate change and other types of environmental harm, and on the related issues of violation, accountability and redress. It is also necessary for such vulnerable States to be aware of, understand and be able to muster such legal arguments (and the jurisprudence which underpins them), and for those arguments to have sufficient weight so as to be a credible threat against high-emitting States.

Arriving at such a situation will take time and will require further progress in the evolution of relevant human rights jurisprudence across a range of actors/

mechanisms at domestic, regional and international levels. It will also require vulnerable States and relevant pressure groups to be made aware of that progress and have the capacity to leverage it effectively.

The new Independent Expert on Environment is expected to help in this regard both by helping vulnerable States more clearly understand the key legal levers at their disposal, and by driving international consensus on the key questions of obligations, accountability and redress. Thus, whereas the first cycle of the UPR allowed vulnerable States to raise awareness about the impacts of global warming on the human rights of their people, it is hoped that in the second cycle they will be able to move to make strong and credible legal arguments about the human rights obligations of high-emitting States, about the nature of violations suffered by individuals, and about the need for accountability and redress. This, in any case, should be the goal of representatives of those States as well as those (such as NGOs) that support them.

COMPARING THE UPR AND THE UNFCCC REGIME FOR MEASUREMENT, REPORTING AND VERIFICATION: LESSONS LEARNT

As well as providing a new platform for vulnerable communities to press for more urgent and ambitious climate action, the Human Rights Council's UPR process may also contribute to international efforts to combat global warming by leveraging the international measurement, reporting and verification (MRV) of the degree to which States are complying with their commitments under the UNFCCC.

A review of the climate, weapons and trade regimes conducted by Greenspan Bell and colleagues reveals that trust and accountability are vital in addressing major international challenges. It further demonstrates the myriad ways in which trust is developed, not only through formal verification procedures, but also from the level of mutual confidence that can develop out of extended and positive interactions.⁷⁰ According to the authors, 'robust reporting and verification systems allow countries to ensure that their counterparts are meeting their respective commitments and are part of a process that helps build trust over time'.⁷¹

Within the UNFCCC, the Cancún Agreements and Durban decisions provide for a new global verification regime, subjecting developing countries to scrutiny for the first time via an international consultations and analysis (ICA) of their inventory, mitigation actions and

⁶⁹ Ibid.

⁷⁰ See R. Greenspan Bell *et al.*, n. 17 above.

⁷¹ Ibid., at 3.

support received, while developed countries are subject to a more comprehensive review process, based on existing requirements, but including an additional international assessment and review process (IAR) of information related to inventory, mitigation and support.⁷² This new verification regime aims at enhancing:

- *Trust building and accountability.* By strengthening confidence that other parties are doing what they said they would do, thereby building trust among parties. In some regimes, accountability can also include encouragement to do more, making sure certain rules or standards are followed.
- *Learning.* By enabling countries to understand which policies and practices are working, so that they and other countries can build on a solid evidence bases. In this context, such verification process can encourage robust and perhaps more ambitious mitigation efforts and promote effective implementation thanks to the established facilitative approach that enables informal share of best practice, without being too intrusive.
- *Tracking aggregate progress.* A complete and accurate picture of the collective mitigation action taken by all countries allows parties to assess to what extent the international community as a whole is successful in closing the emissions gap.
- *Support/capacity building for developing countries.* The ICA process should be designed to support the climate and development goals of participating countries. Greater transparency could lead to a better understanding of the capacity and financial needs of a developing country with regard to the reporting and review process, as well as the identification and implementation of current or additional mitigation actions.

As conveyed in a recent report by the Organization for Economic Cooperation and Development (OECD), to be effective, the verification process should be:⁷³

- *Facilitative.* In the context of the Kyoto Protocol, the term 'facilitative' is used in reference to the compliance mechanism's facilitative branch which, unlike the enforcement branch, does not impose consequences on parties but instead provides advice and assistance to parties in order to promote compliance.⁷⁴ In this broader sense, a 'facilitative approach' can be defined as one that builds the

capacity of the country concerned to provide the required information and enhance the effectiveness of its mitigation actions.

- *Non-intrusive.* This principle is taken from the Cancún Agreements, which state that ICA is to be conducted 'in a manner that is non-intrusive, non-punitive, and respectful of national sovereignty'.⁷⁵ A process that is non-intrusive limits undue disruption into the operations of the country concerned, ensures collaboration between the reviewers and the party concerned, and allows for the concerns of the party to be taken into account during the review.
- *Non-punitive.* A non-punitive process does not inflict any form of punishment on the country concerned by, for example, removing existing rights or inflicting penalties. Rather, a non-punitive process is facilitative and encourages improvements by creating incentives that reward countries for best efforts.
- *Efficient.* Efficiency was not explicitly mentioned as a principle for in the Cancún Agreements, but parties in Durban acknowledged its importance and COP-17 decisions explicitly recognize the 'need to have an efficient, cost-effective and practical international consultation and analysis process, which does not impose an excessive burden on Parties, and on the secretariat'.⁷⁶
- *Iterative and self-improving.* This principle is not explicitly contained in the Cancún Agreements, but would be useful for negotiators to consider. An iterative ICA process therefore would continuously improve based on previous experience, adaptation of the modalities and guidelines, and building of countries' capacities.

The UPR could hold a number of potentially valuable lessons for each of the nine bullet points listed above. As a result it can be used to further inform and strengthen the shape of the transitional verification regime in the UNFCCC. The UPR is a State-driven process, under the auspices of the Human Rights Council, designed to prompt, support and expand the promotion and protection of human rights. Its scope is to assess the extent to which States respect their international human rights obligations, national human rights policies and/or programmes implemented within States; and applicable international humanitarian law. It therefore covers both pledges and formal commitments. The UPR also aims to provide technical assistance to States and enhance their capacity to deal effectively with human rights challenges and to share best practices in the field of human rights among States and other stakeholders.

⁷² Decision 1/CP.16, n. 1 above.

⁷³ For a more detailed account of these principles please refer to J. Ellis and G. Briner, *Design Options for International Assessment and Review (IAR) and International Consultations and Analysis (ICA)* (Organization for Economic Cooperation and Development, 2011), found at: <<http://www.oecd.org/environment/climatechange/49101052.pdf>>.

⁷⁴ For more information on the facilitative branch of the Kyoto Protocol's compliance mechanism, see <http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php>.

⁷⁵ Decision 1/CP.16, n. 1 above, paragraph 63.

⁷⁶ Decision 2/CP.17, Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012), at 7.

Equal treatment for all States is a fundamental part of this process. All UN members are reviewed within a four-year cycle with 48 States reviewed every year. This scheduled approach could prove particularly effective within the UNFCCC to enable the transitional regime to cope with the extended framework (from 41 Annex I countries to 192 parties to be subject to a verification process).

The Human Rights Council Periodic Review is carried out with the full involvement of the State under review by a working group consisting of members of the Council that meets three times per year for two weeks and is facilitated by groups of three member States of the Council (the 'Troika'). Currently, no other universal mechanism of this kind exists.⁷⁷ This may be because nominating and sustaining experts who dedicate six weeks to carry out the analysis/technical assessment (let alone the time for preparation and consolidation of the final report), is not only challenging (in view of the scarcity of experts) but fairly intensive. This could be weighed up against the flexible use of the current roster of experts or dedicated permanent staff from the UNFCCC secretariat.

UPR reviews take place through an interactive discussion between the State under review and other UN member States during a meeting of the UPR Working Group. During this discussion, any UN Member State can pose questions, comments and/or make recommendations to the States under review. The review is based on:

- Information provided by the State under review in the form of a national report;
- Information contained in the reports of independent human rights experts and groups (the Special Procedures), human rights treaty bodies, and other UN entities; and
- Information from other stakeholders including NGOs and national human rights institutions. NGOs can submit information which can be added to the 'other stakeholders' report, which is considered during the review. Information they provide can be referred to by any of the States taking part in the interactive discussion during the review at the working group meeting. NGOs can attend the working group sessions and can make statements at the regular session of the Human Rights Council when the outcome of the State reviews are considered.

Once the reviews take place the working group presents each State with recommendations contained within a final outcomes report. The State has the primary responsibility to implement these recommendations

and the UPR ensures that all countries are accountable for progress or failure in implementing these recommendations. By the time of the second review, States must provide information on what they have been doing to implement the recommendations made during the first review four years earlier. The new UNFCCC ICA and IAR include similar steps but do not allow NGOs to get involved in the process. The benefits of using NGOs as independent pressure points should be further emphasized when the guidelines and modalities for the ICA and IAR will be revised (by 2016 and 2017, respectively).

The UPR includes a Voluntary Trust Fund that provides funding for the travel of official representatives of developing countries, and in particular the least developed countries, to Geneva to present the national report, take part in the ensuing interactive dialogue and to be involved in the adoption of the report. It further provides funding for the travel of official representatives of developing countries, and in particular least developed countries, which are members of the Human Rights Council and which do not have a permanent mission in Geneva to act as Rapporteur.⁷⁸ In addition, the Fund can be used to finance training for member States in the preparation of national reports. Financial assistance may be requested by any developing country. Contributions to the Fund are made voluntarily by States, intergovernmental and nongovernmental organizations or private institutions and individuals.

In addition, the Human Rights Council has a Voluntary Fund for Financial and Technical Assistance in order to provide a source of financial and technical assistance to help countries implement recommendations emanating from the UPR. This includes assistance in the conduct of needs assessments, the exchange of information and sharing of best practices, and the development of national capacity and expertise for the implementation of the UPR outcomes.

Developing countries expressed great concerns over funding within the climate talks. Although they managed to secure decisions that guarantee the funding of both the reporting and verification framework, there is currently nothing concretely in place to support the ICA and IAR processes. The Global Environment Facility (GEF) is currently mandated to support the report-

⁷⁸ Human Rights Council Resolution 6/17 called on the UN Secretary-General to establish a UPR Voluntary Trust Fund to facilitate the participation of developing countries, particularly least developing countries, in the UPR mechanism. See Human Rights Council Resolution 6/17, Establishment of Funds for the Universal Periodic Review Mechanism of the Human Rights Council (UN Doc. A/HRC/RES/6/17, 28 September 2007). The OHCHR has also produced an information note on the Voluntary Fund for the UPR. See OHCHR, Voluntary Fund for Participation in the Universal Periodic Review (2 April 2008), found at: <<http://www.ohchr.org/EN/HRBodies/UPR/Documents/NVVoluntaryTrustFundUPR.pdf>>.

⁷⁷ Human Rights Council (UNGA Resolution A/RES/60/251, 3 April 2006).

ing requirements and parties will need to advise the GEF on how to enhance its support at its next replenishment. The funding process described above under of the UPR could be adapted to serve the purpose of the UNFCCC objectives.

It would be particularly helpful to encourage parties to report in their national reports to the UNFCCC (biennial reports, national communications) the recommendations made by the Human Right Council on issues related to climate change, how its trust Fund is supporting the parties concerned in this regards and a qualitative assessment of its impact. This additional reporting could leverage actions/arguments within the Human Right Council and drive further actions. The funding schemes under both multilateral regimes could also be enhanced and create the incentives needed to drive effective and more ambitious actions.

The UPR has been successful in ensuring increased effectiveness in the implementation of human rights norms and in prompting countries to be more ambitious in committing to go beyond their existing human rights pledges/commitments. Outputs have included:

- The ratification of international human rights instruments;
- New voluntary pledges/commitments for the enforcement of ambitious international human rights norms;
- The elaboration of comprehensive national road maps or actions plans for the implementation of UPR recommendations;
- Identifying and pursuing priority recommendations from the UPR outcomes report;
- Improved efforts to meet reporting obligations to treaty bodies;
- Issuance of open and standing invitations/acceptance of country visits by Special Procedures mandate-holders; and
- Establishment/strengthening of national human rights institutions.

These are notable successes that could be contemplated within the UNFCCC under the transitional and post 2020 regime with regard to action on emissions reductions. Durban and Cancún paved the way for a climate regime that would aim for:

- Making the MRV requirements legally binding;
- Showcasing voluntary domestic pledges/commitments that could contribute to the enforcement of ambitious actions;
- Driving the elaboration of comprehensive national road maps or actions plans in line with sustainable development goals;
- Identifying and pursuing priority recommendations from the ICA and IAR outcomes reports;
- Demonstrating efforts and improvement to meet reporting obligations, including the establishment/

strengthening of national institutional arrangements/systems; and

- Tracking of global efforts.

One of the weakest links of both the UPR and UNFCCC MRV regime relates to their (in)ability to incentivize effectively more ambitious actions while holding parties accountable for their commitments through an effective accounting and compliance framework: the rules are loose, the existing sticks are not sufficient to dramatically change behaviour, the carrots not appealing enough and the result is a lack of trust between Parties. This is a sensitive and challenging issue that would require further reflection.

CONCLUSIONS

*'This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.'*⁷⁹

As we approach the fifth anniversary of the Maldives' decision to look to human rights as a strategy for addressing climate change there is a moment to reflect on the enormous progress that has been made in linking two complex but essential international regimes. The progress to date has had two main characteristics. First, progress has focused on using human rights language and principles as a new lens to understand climate change and as a new moral imperative to act. For example, it has moved the conversation from ecological systems to human ones as the pioneers of this process (the Maldives and other participants in the Male' conference) intended. As a result, it has contributed to greater understanding of how climate change relates to livelihoods, health, standard of living, mobility, migration, State fragility and premature morbidity. Moreover, it has provided populations at the forefront of climate change with the opportunity to more effectively voice concerns about their vulnerability and has added an additional and valuable tool to civil society organizations as they pursue authoritative advocacy in the pursuit of climate policies.

Second, progress on the human rights–climate change nexus continues to influence, shape and strengthen the UNFCCC and climate change policy. The climate justice movement has emerged in recent years and is today playing an active role in helping to re-think the principle of equity and the concept of common but differentiated responsibility and respective capabilities using rights-based approaches. Furthermore, the lessons learned in the UPR could help enhancing the rules governing MRV, notably around the verification process.

⁷⁹ W. Churchill, *Speech at the Lord Mayor's Day Luncheon at the Mansion House* (London, 9 November 1942).

These initial steps need to continue. A strong narrative to encourage greater urgency and ambition and to generate political will is going to be crucial on the road to 2015 and beyond. As the new protest movements across the globe have demonstrated, the justice argument can be a powerful force in demanding action across a range of interests. Appealing to the human dimensions of climate change may indeed put this issue back on top of the political agenda. Moreover, as the underlying rules of the climate regime continue to evolve, and particularly as efforts increase to improve the MRV components of the UNFCCC, there will be a continued need to learn lessons from more than fifty years of experience in the human rights system.

Moving forward, it will be increasingly important to move to a situation where we can use human rights law in a 'harder' sense – notably to construct an accountability framework so that vulnerable individuals and communities can demonstrate that a given State has failed in its legal human rights obligations, that this failure has resulted in a violation of an individual's rights, and thus that the individual can seek redress (justice, compensation, etc.). Just as the Male' Declaration from 2007 and the enormous body of work it has led to set the ground for the first two steps, it is now hoped that the new Independent Expert on human rights and environment will prepare the ground for making similarly impressive progress in this third step.

The success or otherwise of the new Special Procedure mandate will depend on the extent to which he is able to work with policy makers (those covering both human rights and environmental dossiers), human rights lawyers, environmental lawyers, the representatives of climate vulnerable groups and others to clarify the precise nature of human rights obligations as they pertain to climate change/environmental harm and to aggregate understanding around that clarification. It will then depend on the willingness and capacity of these groups to more effectively leverage human rights law and international human rights mechanisms to strengthen global responses to climate change.

Vulnerable populations remain a long way from securing their long-term goal of stabilizing the global climate and securing their development aspirations. The 'end' remains a distant destination down a long and challenging path. However, significant ground has been covered over the past five years and the interface between human rights and climate change has moved from silence to salience. With the new Independent Expert having begun his mandate on 1 August 2012, a new phase is about to begin.

Edward Cameron is the Director of the International Climate Initiative at the World Resources Institute (WRI) in Washington, DC. In this capacity he is tasked with shaping and executing an ambitious five-year strategy designed to inject urgency, ambition and innovation into the evolving global climate regime. His current focus looks at how to ensure climate justice in the new agreement under the UNFCCC by rethinking and operationalizing equity across climate adaptation, mitigation, finance and technology. Prior to joining WRI, Edward worked at the World Bank's Social Development Department, where he led work on climate change, human rights and equity; and designed a training course on vulnerability and resilience for development practitioners. Before joining the Bank, he served as Senior Advisor on Climate Change to the Ministry of Foreign Affairs of the Maldives – designing the Ministry's climate strategy, and co-leading the Human Dimensions of Climate Change initiative with co-author March Limon. This was the first State-led process to link climate change with human rights and has resulted in two UN Human Rights Council Resolutions, the incorporation of human rights language into official UNFCCC texts, and a flurry of academic work examining the role of human rights in reducing vulnerability to climate change. In addition to these two posts, he spent eight years specializing in EU sustainable development policies in various posts in Brussels.

Marc Limon works for the Republic of the Maldives, where he advises the government on both international human rights policy and international climate change policy. Marc co-organized the 2007 Male Conference on the Human Dimension of Climate Change, which acted as a springboard for so much that has happened since in the area of human rights and climate change. Marc drafted and negotiated UN Human Rights Council Resolutions 7/23 and 10/4 on Human Rights and Climate Change. He was also one of the Maldives' lead negotiators at COP-15 in Copenhagen, where he was instrumental in securing human rights wording in the negotiating draft, which then went on to form the basis of the Cancun Agreements. More recently, Marc drafted, negotiated and secured the adoption of Human Rights Council Resolutions 16/11 and 19/10 which resulted in the establishment of a new UN Special Procedure mandate on Human Rights and the Environment. He has published on human rights and climate change in the *Georgia Journal of International and Comparative Law* and the *Harvard Environmental Law Review*.

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