

HUMAN RIGHTS AND CLIMATE CHANGE: CONSTRUCTING A CASE FOR POLITICAL ACTION

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On March 28, 2008, the United Nations Human Rights Council adopted Resolution 7/23¹ on human rights and climate change, which, for the first time in a U.N. resolution, explicitly recognized that climate change “has implications for the full enjoyment of human rights.”² While this may appear a classic case of stating the obvious, the words are potentially highly significant both for climate change policy and for human rights policy. This Article will look at the implications of Resolution 7/23 for global climate change responses. It will argue that the application of human rights principles and norms can bring a range of benefits to international and national efforts to respond to global warming, and that the obstacles to doing so are mainly practical difficulties, related in particular to the entrenched “path dependence” of the two policy areas. This Article will also turn this premise around to suggest ways in which the issue of climate change could or should affect international human rights policy. In particular, it will argue that the issue of climate change points to the need for a reconceptualization of human rights, and suggests the need for a reconsideration of the utility of environmental rights. The Article mainly reflects the views of a political rather than a legal practitioner, although these views are necessarily embedded in law.

This Article is divided into four sections. First, it offers a brief overview of the international movement to draw linkages between climate change³ and human rights,⁴ an effort with which the Maldives has been inti-

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¹ The Resolution, which secured eighty co-sponsors, was adopted by consensus. U.N. Human Rights Council [UNHRC] Res. 7/23, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008) [hereinafter UNHRC 7/23].

² *Id.* at pmb1.

³ The UNFCCC definition of “climate change” is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” United Nations Framework Convention on Climate Change art. 1(2), May 9, 1992, S. TREATY Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

⁴ The term “human rights” refers to the core set of rights proclaimed under international law on behalf of all individuals, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *accord* International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The primary source texts are the 1966 ICCPR and ICESCR, and the 1948 Universal Declaration on Human Rights. The human rights laid out in these documents are generally referred to as “civil and political” on the one hand, and “economic, social and cultural” on the other. The former include rights to life, liberty, property, freedom of expression and assembly, political participation, a fair trial, privacy and home life, and protection from torture. The latter include rights to work, to education, to social

mately involved. Second, it summarizes our current understanding of the nature and extent of those linkages. Third, it asks whether human rights principles *should* be integrated into climate change policy — what is the value added and what are the potential risks? Fourth, this Article presents some initial ideas on how the international community might usefully and practically operationalize the human rights-climate change interface in order to contribute to better policy responses. Finally, turning the overall premise around, this Article suggests ways in which international human rights law might adapt in response to the challenges posed by climate change and, in this respect, might perhaps learn from principles applied in environmental law.

A YOUNG AND FAST-EVOLVING AGENDA

International interest in the linkages between climate change and human rights is a relatively recent phenomenon. It has only been since 2005 that a small number of vulnerable states, indigenous groups, and non-government organizations have begun to take a series of separate yet mutually reinforcing steps to understand, highlight, and leverage those linkages. The impetus for these actions was three-fold. First, there was a general frustration on the part of vulnerable communities at the slow pace of progress in tackling climate change using the traditional politico-scientific approach. This in turn suggested that a new supplementary framework was needed. Second, there was a growing sense on the part of these groups that, with a scientific consensus on climate change largely in place, it was time to shift the debate onto the victims of the problem — namely individual people and communities around the world. Third, and linked to the previous point, those people and communities most at risk from climate change became increasingly frustrated at the lack of any kind of accountability mechanism to deal with a phenomenon caused by man and with devastating human consequences. This frustration was enhanced by the knowledge of unequal power relationships underlying the problem, as illustrated by the “inverse relation-

security, to “enjoyment of the highest attainable standard of physical and mental health,” and to “adequate food, clothing and housing, and to the continuous improvement of living conditions.” ICESCR, *supra*, arts. 11(1)-12(1). Whereas the former rights are typically guaranteed through judicial mechanisms, including at the international level, the latter are aspirational (states, to the maximum of available resources, must pursue their progressive attainment) and have generally been dependent upon domestic welfare mechanisms in the absence of any dedicated international judicial machinery (although the recent adoption of the Optional Protocol to the ICESCR does for the first time provides victims of violations of economic, social, and cultural rights with an international accountability mechanism). See INT’L COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008) [hereinafter CLIMATE CHANGE AND HUMAN RIGHTS], available at

ship between responsibility for climate change and vulnerability to its impacts.”⁵

Climate change and human rights were first explicitly linked, it seems, in December 2005, when an alliance of Inuit from Canada and the United States, led by Sheila Watt-Cloutier, filed a petition with the Inter-American Commission on Human Rights.⁶ The petition alleged that the human rights of the plaintiffs 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.⁷ In the words of the petition: “the effects of global warming constitute violations of Inuit human rights for which the United States is responsible.”⁸ Although the petition was rejected without prejudice in November 2006, the Commission subsequently invited, in February 2007, the Inuit Alliance together with representatives of the Center for International Environmental Law (“CIEL”) and Earthjustice to provide testimony on the link between global warming and human rights.⁹

The Inuit case introduced the idea that rather than being a global and intangible phenomenon belonging squarely to the natural sciences, global climate change is in fact a very human process with demonstrable human cause and effect. It could thus, like any other aspect of human interaction, be placed within a human rights framework of responsibility, accountability, and justice. In the words of Mary Robinson, speaking during a lecture at Chatham House in December 2006: “Climate change has already begun to affect the fulfilment of human rights, and our shared human rights framework entitles and empowers developing countries and impoverished communities to claim protection of these rights.”¹⁰

On July 17, 2007, the then-President of the Maldives, Maumoon Abdul Gayoom, delivered a speech at the Royal Commonwealth Society in London to mark the twentieth anniversary of Maldivian advocacy on the question of climate change.¹¹ Reflecting on the intervening years of “failed promises

⁵ U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, at 3 (2007) [hereinafter HUMAN DEVELOPMENT REPORT].

⁶ See MARTIN WAGNER & DONALD M. GOLDBERG, AN INUIT PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOR DANGEROUS IMPACTS OF CLIMATE CHANGE (2004) (paper presented at the 10th Conference of Parties to the Framework Convention on Climate Change in Buenos Aires, Argentina), available at http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf.

⁷ *Id.*

⁸ 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 (Dec. 7, 2005), at 70 [hereinafter Inuit Petition], available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/finalpetitionicc.pdf>.

⁹ Letter from Ariel E. Dulitzky, Assistant Executive Sec’y, Org. of Am. States Inter-Am. Comm. on Human Rights to the Inuit Alliance, Earthjustice, and Ctr. for Int’l Envtl. Law (Feb. 1, 2007) (inviting them to provide testimony before the Inter-American Commission on Human Rights), available at http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf.

¹⁰ *Rights Focus Sought over Climate*, B.B.C. NEWS, Dec. 11, 2006, <http://news.bbc.co.uk/2/hi/europe/6166835.stm> (on file with the Harvard Environmental Law Review).

¹¹ Maumoon Abdul Gayoom, President of the Maldives, Speech at Royal Commonwealth Society (July 17, 2007), available at <http://www.maldivesmission.ch/fileadmin/Pdf/Envi>

and missed opportunities,” the President concluded that, in order to turn the situation around, the world would need to reconceptualize climate change as a profoundly human issue with human causes and human consequences.¹² The world would, in short, have to understand the “human dimension of climate change,” including the effects of climate change on human rights.¹³

In November 2007, the Maldives convened a Small Island States Conference to address these effects and the implications thereof.¹⁴ The outcome of the meeting — the Malé Declaration on the Human Dimension of Global Climate Change — stated explicitly (and for the first time in an international agreement) that “climate change has clear and immediate implications for the full enjoyment of human rights” and called on the United Nations human rights system to address the issue as a matter of urgency.¹⁵

The Malé Declaration was taken to the Thirteenth Conference of Parties to the United Nations Framework Convention on Climate Change (“COP 13”) in Bali and was presented to assembled world governments by President Gayoom. It stated: “We [Small Island States] believe that climate change must be viewed not only as a danger to natural systems, but also as a direct threat to human survival and well-being. We are convinced that this negotiation process must not be viewed as a traditional series of government trade-offs, but as an urgent international effort to safeguard human lives, homes, rights and livelihoods.”¹⁶ Echoing these sentiments, Kyung-wha Kang, Deputy U.N. High Commissioner for Human Rights, said, “[A]ny strategy to deal with climate change, whether in terms of adaptation or mitigation, must incorporate the consequences for humans, as individuals and communities, and the human rights framework is the most effective way to do so.”¹⁷

ronment/Speech_by_President_Gayoom_to_Royal_Commonwealth_Society_July_07.pdf. In 1987, President Gayoom gave two speeches in North America — one to Commonwealth leaders meeting in Vancouver and one to world leaders at the U.N. General Assembly in which he gave early warning about the peril of climate change — especially for small island states. See Maumoon Abdul Gayoom, President of the Maldives, Speech at Commonwealth Heads of Government Meeting (Oct. 15, 1987), available at http://www.presidencymaldives.gov.mv/speeches/VANCOUVER_15101987.pdf; Maumoon Abdul Gayoom, President of the Maldives, Speech to U.N. General Assembly on the Issues of Environment and Development (Oct. 19, 1987), available at http://www.presidencymaldives.gov.mv/speeches/UNGA_1987.pdf.

¹² Gayoom, Speech at Royal Commonwealth Society, *supra* note 11.

¹³ *Id.*

¹⁴ Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva, Human Rights and Climate Change, <http://www.maldivesmission.ch/index.php?id=68> (last visited Apr. 8, 2009) (on file with the Harvard Environmental Law Review).

¹⁵ Small Island States Conference, Malé, Maldives, Nov. 13-14, 2007, *Malé Declaration on the Human Dimension of Global Climate Change*, at 2 (Nov. 14, 2007), available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

¹⁶ Maumoon Abul Gayoom, President of the Maldives, Address at 13th Session of the Conference of the Parties of the UNFCCC (Dec. 12, 2007), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/President_at_Bali_Conference_2012122007_final_.pdf.

¹⁷ Kyung-wha Kang, Deputy High Comm’r for Human Rights, Office of the U.N. High Comm’r for Human Rights, Address at the Conference of the Parties to the UNFCCC and its

Operating in parallel with these initial steps, a range of other actors also began to explore the interface between climate change and human rights, including the International Council on Human Rights Policy (“ICHRP”),¹⁸ the Organization of American States,¹⁹ Oxfam International,²⁰ Mary Robinson’s Realizing Rights,²¹ Kofi Annan’s Global Humanitarian Forum,²² and the United Nations Development Programme. The latter, in its 2007/2008 Human Development Report, argued that climate change represents “a systematic violation of the human rights of the world’s poor and future generations, and a step back from universal values.”²³

In March 2007, these various strands were drawn together at the United Nations Human Rights Council’s seventh regular session. During the session’s ministerial and general segments,²⁴ Bolivia, Bhutan, Greece, Maldives,²⁵ 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 Then, on

Kyoto Protocol (Dec. 14, 2007), *available at* http://www.maldivesmission.ch/fileadmin/Pdf/Environment/DHC_Statement_Bali_Final.pdf.

¹⁸ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4.

¹⁹ See Organization of American States [OAS], General Assembly Res. AG/Res. 2429 (XXXVIII-O/08), OAS Doc. AG/doc.4886/08 (June 3, 2008).

²⁰ See OXFAM INT’L, CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY (2008), *available at* <http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-and-human-rights-0809.pdf>.

²¹ Mary Robinson, Barbara Ward Lecture at Chatham House: Climate Change and Justice (Dec. 11, 2006), *available at* http://www.realizingrights.org/pdf/Barbara_Ward_Lecture_12-11-06_FINAL.pdf.

²² The Global Humanitarian Forum’s inaugural annual meeting was titled “The Human Face of Climate Change,” and the Forum’s current strategic focus is “The Human Impact of Climate Change.” See GLOBAL HUMANITARIAN FORUM GENEVA, FORUM 2008: THE HUMAN FACE OF CLIMATE CHANGE (2008), *available at* <http://www.ghf-geneva.org> (follow “A Forum Report: The Human Face of Climate Change” hyperlink).

²³ See HUMAN DEVELOPMENT REPORT, *supra* note 5, at 4.

²⁴ General segments feature keynote statements on human rights (ambassadorial-level) by states that were not able to be represented at ministerial- or senior government-level.

²⁵ The Minister of Foreign Affairs of the Maldives, Abdulla Shahid, also raised the issue of climate change in a speech during the sixth session of the Council. Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Statement at the Sixth Session of the Human Rights Council of the United Nations (Sept. 20, 2007), *available at* <http://www.foreign.gov.mv/v2/speech.php?speech=10&page=3>.

²⁶ Ojo Maduekwe, Minister of Foreign Affairs of Nigeria, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Nigeria-E.pdf>; Sonam T. Rabgye, Permanent Representative of Bhutan to the United Nations, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 5, 2008) (on file with the Harvard Environmental Law Review); Alberto G. Romulo, Sec’y of Foreign Affairs of the Phil., 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 (Mar. 3, 2008), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Philippines-E.pdf>; Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Maldives-E.pdf>; Sacha Sergio Llorenti Soliz, Vice Minister for the Coordination of Soc. Movements & Civil Soc. of Bol., at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 3, 2008), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Bolivia-S.pdf>; Franciscos Verros,

March 28, 2008, the Maldives, together with seventy-eight co-sponsors from all regional groups,²⁷ secured the adoption, by consensus, of United Nations Human Rights Council Resolution 7/23 on “Human Rights and Climate Change,” which, for the first time in an official U.N. 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.”²⁸

The Resolution asked 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,” and further required that the study and a summary of the Council debate be sent to the Conference of Parties to the UNFCCC ahead of the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (“COP15”) in Copenhagen, in order to inform negotiations.²⁹

STATING THE OBVIOUS?

On January 15, 2009, the OHCHR published an advanced unedited version of the analytical study requested under Resolution 7/23.³⁰ The Report, which was based on written and oral submissions by over thirty states and thirty-five international organizations, national human rights institutions, NGOs, and academic bodies, marks a first attempt by the United Nations

Permanent Representative of Greece to the United Nations at Geneva, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 5, 2008) (on file with the Harvard Environmental Law Review); N. Hassan Wirajuda, Minister for Foreign Affairs of Indon., Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Indonesia-E.pdf>.

²⁷ Cosponsors were (in order of signature): Maldives, Uruguay, Sri Lanka, Costa Rica, Switzerland, Greece, Burkina Faso, Spain, Iceland, United Kingdom, Bangladesh, Djibouti, Chile, Bhutan, Austria, New Zealand, Belgium, Finland, Germany, Mali, East Timor, Serbia, Slovenia, Portugal, Italy, Uganda, Panama, Montenegro, Peru, Nicaragua, Tuvalu, Fiji, Comoros, Micronesia, Cyprus, Mauritania, Ivory Coast, Albania, Malta, Luxembourg, Mauritius, Singapore, Estonia, Ireland, Madagascar, Bulgaria, Slovakia, Norway, France, Nepal, Zambia, Bolivia, Kenya, Botswana, Monaco, Philippines, Ghana, Syria, Pakistan, India, Azerbaijan, Netherlands, Ukraine, Senegal, Cape Verde, Sweden, Samoa, Suriname, Australia, Seychelles, Gambia, Marshall Islands, Nauru, Cameroon, El Salvador, Guinea, Indonesia, Malaysia, and Thailand. UNHRC, *Report of the Human Rights Council on its Seventh Session*, at 149, U.N. Doc. A/HRC/7/78 (July 14, 2008) (prepared by Alejandro Artucio).

²⁸ UNHRC 7/23, *supra* note 1, pmb1. During negotiations on the resolution, there was significant opposition to this paragraph with some countries arguing that there was no definitive U.N. assessment to prove the premise.

²⁹ *Id.* ¶¶ 1-3. Two other Council resolutions on the “right to adequate housing” (Res. 6/27) and the “right to food” (Res. 7/14), adopted during the Sixth and Seventh Sessions respectively, also made explicit reference to the effects of climate change on human rights. See UNHRC Res. 6/27, U.N. Doc. A/HRC/6/22 (Apr. 14, 2008) [hereinafter UNHRC 6/27]; UNHRC Res. 7/14, U.N. Doc. A/HRC/7/78 (July 14, 2008) [hereinafter UNHRC 7/14].

³⁰ Office of the U.N. High Comm’r for Human Rights [OHCHR], *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report].

human rights machinery to undertake a comprehensive assessment of the complex and multifaceted inter-linkages between climate change, environmental degradation, and human rights. Although the Report is extremely conservative in its analysis and conclusions (many of the national submissions go much further), it is nevertheless highly significant in that it marks a definitive break with arguments about whether there is indeed a relationship between climate change and human rights, and thus points toward a new debate on the implications of and necessary responses to that relationship.

It may seem surprising that such a break is necessary — that states or other entities would seriously argue with the premise that climate change does have implications for human rights (i.e., that there are linkages). However, at least at an official level, this was indeed the case.

During negotiations on Resolution 7/23, there was considerable opposition to the assertion, in preambular paragraph one, that climate change has “implications for the full enjoyment of human rights.” This opposition, led by major oil producing and oil consuming countries, was part legal (based on the argument that there was no official U.N. documentation to support the claim) and part strategic (if the point were to be conceded, it would necessarily open up various new avenues of debate). However, perhaps unwilling to argue that climate change *does not* have human rights implications in the Council, which holds its meetings in public, these countries eventually conceded the point.

Notwithstanding, evidence of residual resistance can be found in various national submissions to the OHCHR study.³¹ For example, Canada only acknowledges that “there *can* be an impact on the effective enjoyment of human rights as a result of *situations arising* from environmental degradation *amplified* by climate change.”³² Similarly, the United Kingdom (which was in fact a strong supporter of the Resolution) “recognises that climate change may impact on the full enjoyment of human rights at the national level.”³³ The United States meanwhile took a different approach — agreeing that “climate change . . . has implications for the full enjoyment of human rights,” but noting “of course, that [such] statements are factual ob-

³¹ Indeed, such resistance was still evident in March 2009 during negotiations to follow-up U.N. Human Rights Council Resolution 10/4 on human rights and climate change, during which some delegations continued to push for softer language such as “climate change-related effects *may have* implications for the effective enjoyment of human rights,” and “these *potential* implications *may* affect individuals and communities around the world.” However, this conditionalized wording was not acceptable to the main co-sponsors as it would have represented a step back from what had been agreed in preamble paragraph 1 of Resolution 7/23.

³² Submission of Canada to OHCHR Report, *Government of Canada Response*, at 1 (Nov. 2008) [hereinafter Canada OHCHR Report Submission] (emphasis added), available at <http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf>.

³³ Submission of U.K. to OHCHR Report, *Assessment at National Level of the Impact of Climate Change (Experienced or Anticipated) on Human Lives and on Population Most Affected and Vulnerable*, ¶ 20 (2008) [hereinafter U.K. OHCHR Report Submission], available at <http://www2.ohchr.org/English/issues/climatechange/docs/submissions/uk.pdf>.

servations rather than statements of international law.”³⁴ The U.S. submission also points out that the effects of climate change on the enjoyment of human rights can be positive as well as negative.³⁵

In order to respond to concerns among some States expressed during negotiations on Resolution 7/23 that OHCHR lacks the expertise to undertake any work in the area of climate change, the Office’s Report uses the Intergovernmental Panel on Climate Change’s Fourth Assessment Report³⁶ (“IPCC AR4”) as a scientific foundation upon which its subsequent human rights analysis is built.³⁷ It then attempts to tackle a significant legal problem associated with drawing linkages between climate change and human rights — namely that climate change affects human rights only indirectly (with environmental degradation being the intermediary step) and, at present, “the universal human rights treaties do not refer to a specific right to a safe and healthy environment.”³⁸ To respond to this legal gap, the OHCHR Report draws attention to the 1972 Declaration of the United Nations Conference on the Human Environment³⁹ (“the Stockholm Declaration”), which “reflects a general recognition of the interdependence and interrelatedness of human rights and the environment,” as well as to the fact that “United Nations human rights treaty bodies recognize the intrinsic link between the environment and the realization of a range of human rights.”⁴⁰

The OHCHR Report then outlines “how the empirical reality and projections of the adverse effects of climate change [i.e., the baseline provided by IPCC AR4] on the effective enjoyment of human rights relate to obligations assumed by States under the international human rights treaties.”⁴¹ The Report asserts that global warming “will potentially have implications for the full range of human rights” but that certain rights are most directly implicated by climate change-related impacts.⁴² These rights include the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, and the right to self-determination.⁴³ Moreover, while these implications affect individuals and communities around the world, certain countries — including small island states; countries with low-lying coastal deltas; and countries liable to floods, drought, and desertifica-

³⁴ Submission of U.S. to OHCHR Report, *Observations by the United States of America on the Relationship Between Climate Change and Human Rights*, ¶ 14 (2008) [hereinafter U.S. OHCHR Report Submission], available at http://www2.ohchr.org/English/issues/climate_change/docs/submissions/USA.pdf.

³⁵ *Id.* ¶ 15.

³⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (“IPCC”), FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007) [hereinafter IPCC AR4], available at http://www.ipcc.ch/pdf/assessment-report/ary/syr/ar4_syr.pdf.

³⁷ OHCHR Report, *supra* note 30, ¶¶ 6-7.

³⁸ *Id.* ¶ 18.

³⁹ U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (June 16, 1972) [hereinafter Stockholm Declaration].

⁴⁰ OHCHR Report, *supra* note 30, ¶¶ 17-18.

⁴¹ *Id.* ¶ 69.

⁴² *Id.* ¶ 20.

⁴³ *Id.* ¶¶ 21-41.

tion — are particularly vulnerable.⁴⁴ These arguments are strongly supported by certain national submissions (e.g., Maldives, Mali, and Marshall Islands), which catalogue and explore each of the affected rights in considerable detail and place these impacts in the context of geographical vulnerability.⁴⁵

The Report also argues that “[v]ulnerability due to geography is often compounded by a low capacity to adapt,” meaning the poor are especially affected.⁴⁶ Moreover, climate change serves to exacerbate existing vulnerabilities, meaning that the rights of groups such as children, women, minorities, the elderly, and persons with disabilities are disproportionately threatened.⁴⁷ Both points in turn raise questions about equality and non-discrimination. Finally, the Report makes the important but often overlooked point that measures taken to mitigate (e.g., use of food crops for bio-fuels) and adapt to (e.g., dislocation from ancestral areas) the effects of climate change also have human rights implications.⁴⁸

Following the publication of the OHCHR Report, it can now be said to be beyond any doubt, legal or otherwise, that climate change has serious and widespread implications for the full enjoyment of human rights. As the International Council on Human Rights Policy (“ICHRP”) notes in its book *Climate Change and Human Rights: A Rough Guide*, “As a matter of simple fact, climate change is already undermining the realisation of a broad range of internationally protected human rights.”⁴⁹ The Marshall Islands, in its submission, goes even further, arguing that climate change impairs not only the freedoms guaranteed “in human rights agreements, but also [those provided] within the U.N. Charter, and as part of customary international law.”⁵⁰

As of March 25, 2009, the “simple fact” referred to by ICHRP is now reflected and embedded in international law. On that date, the tenth session of the U.N. Human Rights Council adopted, by consensus and with eighty-nine co-sponsors, Resolution 10/4 on human rights and climate change.⁵¹ Resolution 10/4 responds to the OHCHR Report by drawing out some key conclusions from the study and by outlining certain next steps. In terms of the former, the Resolution notes that “climate change-related effects have a

⁴⁴ *Id.* ¶¶ 29, 36, 56.

⁴⁵ See *infra* Annex 1 (outlining the various impacted rights); see also Submission of Maldives to OHCHR Report, *Human Rights and Climate Change* (Sept. 2008) [hereinafter Maldives OHCHR Report Submission], available at http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf.

⁴⁶ OHCHR Report, *supra* note 30, ¶ 93.

⁴⁷ *Id.* ¶ 94.

⁴⁸ *Id.* ¶¶ 65-68.

⁴⁹ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

⁵⁰ Submission of Marshall Islands to OHCHR Report, National Communication Regarding the Relationship Between Human Rights & the Impacts of Climate Change (Dec. 2008) [hereinafter Marshall Islands OHCHR Report Submission], available at http://www2.ohchr.org/english/issues/climatechange/docs/Republic_of_the_Marshall_Islands.doc.

⁵¹ UNHRC, *Report of the Human Rights Council on Its Tenth Session*, at 159, U.N. Doc. A/HRC/10/29 (Apr. 20, 2009) (prepared by Elchin Amirbayov).

range of implications, both direct and indirect, for the effective enjoyment of human rights” and goes on to list those rights that are particularly implicated.⁵² It further states that the effects of climate change will fall hardest on the rights of those people who are already in vulnerable situations “owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.”⁵³

TO ACT OR NOT TO ACT?

The knowledge, as expounded by the ICHRP and confirmed by Resolution 10/4, that climate change has serious negative implications for the realization of a broad range of internationally protected human rights and that “the interlinkages are deep and complex”⁵⁴ in fact, brings us up to date with the current status of the debate at the international level. Little or no consideration has been given, by governments or international organizations (nor, seemingly, by NGOs or academic bodies), as to what this new reality should mean in practice. If climate change does indeed have serious and widespread, deep and complex implications for human rights, then what, if anything, should be done about it?

In order to answer this fundamental and urgent⁵⁵ question, it is necessary to first ask: should the international community do anything? Only if the answer to that question is “yes” must the follow-up question be addressed: what responses should be considered?

In terms of the first question, it can, of course, be argued that if climate change has serious and wide-ranging human rights implications for millions of people around the world, especially when those implications include core rights such as to life and self-determination, and when the malign impacts fall heaviest on the weakest and most vulnerable, then the international community is duty-bound to respond. However, this argument misses one key point: the international community *is* already responding — a response supported by the almost two hundred states parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) and pursued through

⁵² UNHRC Res. 10/4, pmb1., U.N. Doc. A/HRC/10/29 (Mar. 20, 2009) [hereinafter UNHRC 10/4]. The Resolution highlights, in particular: “the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination, and human rights obligations related to safe drinking water and sanitation.” *Id.* The Resolution also recalls that, under international human rights law, in no case may a people be deprived of its own means of subsistence. *Id.* It is particularly noteworthy and significant that states, especially major emitting states, agreed to include the right to life, the right to self-determination, and the right of nations to their own means of subsistence in the list.

⁵³ *Id.* (building on preambular paragraphs 8-9 in UNHRC 7/23, *supra* note 1).

⁵⁴ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

⁵⁵ If it is to effectively influence the Bali Process, which is due (though far from certain) to conclude in December 2009, the human rights community, led by the Council, will need to draw conclusions quickly and feed these into UNFCCC-level discussions and proposals.

negotiations under the Bali Road Map,⁵⁶ which is expected to lead to a new global climate change treaty by the end of 2009. While these negotiations were not initiated with the express intention of protecting and promoting human rights, it is nevertheless clear that the “full, effective and sustained implementation of the Convention through long-term cooperative action now, up to and beyond 2012”⁵⁷ would have, *inter alia*, that effect.

The problem with this argument is, of course, that despite over three decades of international advocacy on climate change,⁵⁸ the world is no closer to a workable solution today than it was in 1987, when the Maldives first issued warnings about climate change to the U.N. General Assembly.⁵⁹ Moreover, many observers doubt that the Bali Roadmap will succeed in reversing the trend. As James Gustave Speth, who has personally witnessed this unfolding failure as policy-maker, advocate, and academic, has concluded:

The current system of international efforts to help the environment simply isn't working. The design makes sure it won't work, and the statistics keep getting worse. We need a new design For twenty years thoughtful people and intelligent leaders should have known that we needed to get busy. Precious time has been wasted. And now a new generation has been given a climate problem that is deeper and more difficult.⁶⁰

The national submission of the Marshall Islands powerfully highlights the growing lack of trust in the UNFCCC process, as well as the inverse and

⁵⁶ The Bali Road Map was the end product of the U.N. Climate Change Conference 2007/COP 13 in Bali, Indonesia. It consists of a number of forward-looking decisions that represent the various tracks that are essential to reaching a secure climate future. The United Nations Climate Change Conference in Bali, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Apr. 22, 2009) (on file with the Harvard Environmental Law Review). The Bali Road Map includes the Bali Action Plan (Decision 1/CP.13), which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this Plan by the United Nations Climate Change Conference 2009/COP 15 in Copenhagen in December 2009. U.N. Climate Change Conference 2007 Decision 1/CP.13, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Decision 1/CP.13].

⁵⁷ Decision 1/CP.13, *supra* note 56, ¶ 1; *see also* UNHRC 10/4, *supra* note 52, pmb1.

⁵⁸ In 1979, the United States National Academy of Sciences published an assessment of the scientific basis for climate change which concluded that: “[i]f carbon dioxide continues to increase, the study group finds no reason to doubt that climate change will result and no reason to believe that these changes will be negligible.” Edward Cameron, *The Human Dimension of Global Climate Change*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL’Y. 1, 8 (2009) (quoting NAT’L ACAD. OF SCI., CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT, at viii (1979), available at http://www.nap.edu/catalog.php?record_id=12181).

⁵⁹ In 1987, President Gayoom became the first world leader to raise the issue of climate change at the United Nations General Assembly when he delivered his famous “Death of a Nation” speech. Gayoom, Speech at Royal Commonwealth Society, *supra* note 11, at 6. A few weeks earlier, he also raised the issue at the Commonwealth Heads of Government Meeting in Canada. Gayoom, Speech at Commonwealth Heads of Government Meeting, *supra* note 11, at 2-4.

⁶⁰ JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT, at xii, 5–6 (2005).

proportional emergence of questions regarding the value of other approaches to reinforce or replace the traditional architecture:

There is general uncertainty as to if international climate negotiations will result in urgent or actual progress, or if the international community is merely going through the motions In summary, it may be difficult for [the Marshall Islands] to rely solely upon ongoing international negotiations as a means to assure its people their basic rights and fundamental freedoms.⁶¹

Thus the question becomes: can human rights principles, laws, and mechanisms be utilized to leverage a more effective response to climate change either inside or outside the UNFCCC umbrella? To answer this question, it is useful to undertake a risk-benefit analysis.

THE POTENTIAL BENEFITS OF A “RIGHTS-BASED APPROACH”⁶² TO CLIMATE CHANGE

Relevant literature proposes a range of interconnected and overlapping benefits that human rights thinking can bring to climate change discussions. These include, *inter alia*: promoting a shift in emphasis from the physical sciences to the plight of individual people, their lives, and their communities; drawing attention and giving voice to the concerns and opinions of vulnerable and marginalized social groups; enhancing equity in international decision-making; encouraging more effective, fairer, and more sustainable policy outcomes through the promotion of accountability concepts and of participatory and democratic principles in decision-making; emphasizing international cooperation — even to the extent that cooperation might be deemed a legal obligation; and responding to gaps in the existing climate change policy architecture.⁶³

First, a human rights perspective or “human rights lens”⁶⁴ helps shift the focus of international debate on climate change more directly onto indi-

⁶¹ Marshall Islands OHCHR Report Submission, *supra* note 50, at 13-14.

⁶² During OHCHR open-ended informal consultations on the relationship between climate change and human rights, on October 22, 2008, the Maldives delegation proposed substituting the phrase “rights-based approach,” which is suggestive of a completely new approach to existing UNFCCC processes, with the more complementary-sounding “human rights informed approach.” Press Release, OHCHR, Open-Ended Consultation on the Relationship Between Climate Change and Human Rights: Summary of Discussions ¶ 58 (Oct. 22, 2008) (internal quotations omitted), available at <http://www2.ohchr.org/english/issues/climatechange/docs/SummaryofDiscussions.doc>.

⁶³ See also Ibrahim Wani, Chief of the Research & Right to Dev. Branch, OHCHR, Address at the Small Island States Conference on the Human Dimension of Climate Change: The Environment and Human Rights (Nov. 14, 2007), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives_Presentation__Wani_111407_Final.pdf; Gayoom, *supra* note 16; Kang, *supra* note 17; OHCHR Report, *supra* note 30.

⁶⁴ Mary Robinson, Op-Ed., *Climate Change Is an Issue of Human Rights*, INDEPENDENT (London), Dec. 10, 2008, available at <http://www.independent.co.uk/opinion/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html>.

viduals and the effects of climate change on their lives.⁶⁵ This, in turn, has important potential consequences for how climate change is perceived. One of the key failings of climate change diplomacy over the past two decades is that the phenomenon has been viewed as a scientific projection, “a kind of line graph stretching into the future with abstract measurements based on parts per million, degrees centigrade or centimetres. . . . [T]he international community has largely failed to translate the important and hard-won scientific consensus into an equally compelling vision of how the consequences of global warming are being felt by people and communities around the world. In other words . . . the world has failed to humanise climate change.”⁶⁶ This is more than just a conceptual argument — it has critical implications for the importance and urgency attached to climate change negotiations. It is far harder for world governments to remain ambivalent in the face of human suffering, especially when that suffering is on a global scale and is man-made, than is the case with physical phenomena such as melting icecaps or bleaching coral.⁶⁷ Humanizing climate change thus creates an ethical imperative to act that can with time translate into legal obligations: “[h]uman rights thinking habitually resituates ethical imperatives within a legal framework.”⁶⁸

Second, using a human rights framework helps amplify the voices of those who are disproportionately affected by climate change — the poor, marginalized, and vulnerable people (including women, children, indigenous groups, and the old) who might otherwise not be heard and who, if empowered to do so, could make an important contribution to improving climate change policy.⁶⁹

Third, by bringing the climate change debate to the level of individual people, all of whom have equal status under international law, a human rights approach has the potential to “level the playing field” in international negotiations, which have to date been dominated by large states involved in largely economically motivated power plays and trade-offs. As the Marshall Islands notes in its OHCHR submission, “international multilateral negotiations have created a platform under which [the Marshall Islands], with limited political weight, is forced to bargain desperately against large political powers, in an attempt to preserve what should otherwise be rights entitled to all humans.”⁷⁰

Fourth, by focusing attention on individuals and by supplying a set of internationally agreed values around which policy responses can be negoti-

⁶⁵ Kang, *supra* note 17.

⁶⁶ Maumoon Abdul Gayoom, President of the Maldives, Statement at the Annual Meeting 2008 of the Global Humanitarian Forum (June 24, 2008), *available at* http://www.maldivesmission.ch/fileadmin/Pdf/Environment/HEP_Speech_to_GHF_final.pdf.

⁶⁷ See Statement by the Maldives at the General Debate Under Item 3, Tenth Session of the Human Rights Council (March 16, 2009), *available at* http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_HR_and_CC_10_session_hrc.pdf.

⁶⁸ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 7.

⁶⁹ See OHCHR Report, *supra* note 30, ¶¶ 42-54.

⁷⁰ Marshall Islands OHCHR Report Submission, *supra* note 50, at 13.

ated and motivated, human rights thinking also has the potential to contribute, qualitatively, to the construction of better policy responses at both the national and international level. As OHCHR argues in its report:

Human rights standards and principles should inform and strengthen policymaking in the area of climate change, promoting policy coherence and sustainable outcomes. The human rights framework draws attention to the importance of aligning climate change policies and measures with overall human rights objectives, including through assessing possible effects of such policies and measures on human rights.⁷¹

The potential qualitative contribution that human rights principles and rules can make to climate change policy is further strengthened by the emphasis they place on accountability mechanisms, including, in the case of implementation of climate change policies, access to administrative and judicial remedies, and by the emphasis given to procedural rights such as access to information and access to decision-making, which are critical to the evolution of effective, legitimate, and sustainable policy responses.⁷² The idea that human rights standards and principles, including access to information, decision-making, and a judicial remedy, might improve policymaking in the area of climate change was taken up by states in preambular paragraph ten of Human Rights Council Resolution 10/4.⁷³

Fifth, the human rights framework also has the potential to help by emphasizing international cooperation. As OHCHR notes, “climate change can only be effectively addressed through cooperation of all members of the international community,”⁷⁴ and both the U.N. Charter⁷⁵ and the International Bill of Human Rights⁷⁶ contain language that emphasizes such cooperation. To draw attention to such obligations was indeed one of the original goals of the Maldives’ initiative on human rights and climate change:

⁷¹ OHCHR Report, *supra* note 30, ¶ 80.

⁷² Wani, *supra* note 63.

⁷³ “Affirming 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. . . .” UNHRC 10/4, *supra* note 52, pmb1.

⁷⁴ OHCHR Report, *supra* note 30, ¶ 84. As the Special Procedure mandate holders of the Human Rights Council, in a joint statement on International Human Rights Day, December 10, 2008, stated, “Today the interests of States, and the impacts of actions by States, are ever more interconnected. New challenges include ensuring global access to food, and those presented by climate change and financial crisis have potentially massive human rights and development implications. If we are to confront them effectively we must do so collectively.” Press Release, Special Procedures Mandate Holders of the UNHRC, The Universal Declaration on Human Rights — Sixty Years of Inspiration and Empowerment for Human Rights (Dec. 9, 2008), available at [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/B9EADC37E6D21C8CC125751A00352285?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/B9EADC37E6D21C8CC125751A00352285?OpenDocument).

⁷⁵ U.N. Charter art. 1, para. 3.

⁷⁶ The International Bill of Human Rights is an informal name for the Universal Declaration of Human Rights, *supra* note 4; ICCPR, *supra* note 4; and ICESCR, *supra* note 4.

The aim of the human approach to climate change is to remind all peoples of the bonds and mutual dependency that tie us all together. By highlighting the ultimate human impact of climate change, and by emphasising the web of rights and responsibilities that link us all together, we hope . . . [to] provide an added spur or catalyst to drive the world towards a mutually beneficial solution to the problem of climate change.⁷⁷

At one level, the U.N. Charter, the Bill of Rights, and related human rights conventions help by stressing the importance of international cooperation.⁷⁸ As OHCHR has argued:

International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations. The importance of such cooperation is explicitly stated in provisions of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and in the Declaration on the Right to Development.⁷⁹

However, there are clear steps on the part of international human rights mechanisms to move beyond the moral impetus to cooperate, as derived from the core human rights treaties, toward a more legally binding understanding of the actual obligations of state parties under those treaties. For example, the Committee on Economic, Social and Cultural Rights,⁸⁰ in General Comment 3 states that:

[I]n accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. . . . It emphasizes that, in the absence of an active programme of international assistance and cooperation

⁷⁷ Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Speech at the Opening of the Small Island States Conference on the Human Dimension of Climate Change (Nov. 13, 2007), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_by_Minister_of_Foreign_Affairs_-_FINAL.pdf.

⁷⁸ See *id.*

⁷⁹ OHCHR Report, *supra* note 30, ¶ 85 (footnotes omitted).

⁸⁰ It is worth recalling that each state that has ratified the ICESCR has a duty to respect, protect, and fulfil the rights laid down in that treaty for those coming within their jurisdiction, and these duties have their own specific scope under the treaty. INT'L COMM'N OF JURISTS, THE STATE OBLIGATION TO RESPECT, PROTECT, AND FULFIL ICESCR RIGHTS (n.d.), available at <http://www.icj.org/IMG/pdf/7.pdf>. The obligation to *respect* a right means the state must take no steps that would violate that right; the obligation to *protect* requires states to act to ensure that other actors, including private and international actors, are not permitted to violate the right; the obligation to *fulfil* requires that states take steps over time to progressively realize citizens' rights to food, shelter, health, and so on. *Id.*

on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).⁸¹

While this General Comment was not written with climate change in mind, and while there are unfortunately no immediate plans on the part of the Committee to update it, the obligations that it identifies are clearly applicable to the case of climate change, at least in the case of international cooperation on adaptation (i.e., a positive obligation to render assistance) and, quite probably, on mitigation (i.e., a negative obligation to reduce emissions). The Committee on the Rights of the Child goes perhaps even further, arguing in General Comment 5 that states which ratify human rights conventions “take upon themselves obligations not only to implement [them] within their jurisdiction, but also to contribute, through international cooperation, to global implementation.”⁸² In a summary of a number of different General Comments by the Committee on Economic, Social and Cultural Rights, the OHCHR in its Report proposes four distinct types of extraterritorial obligation in the context of international cooperation to promote and protect economic, social, and cultural rights. OHCHR argues that

States have legal obligations to:

- Refrain from interfering with the enjoyment of human rights in other countries
- Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;
- Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.⁸³

⁸¹ OHCHR, U.N. Comm. on Econ., Social and Cultural Rights [UNCESCR], *General Comment 3: The Nature of States Parties Obligations*, ¶ 14, U.N. Doc. E/1991/23 (Dec. 14, 1990).

⁸² OHCHR, U.N. Comm. on the Rights of the Child [CRC], *General Comment 5: General measures of implementation for the Convention on Rights of the Child*, ¶ 7, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

⁸³ OHCHR Report, *supra* note 30, ¶ 86; *see, e.g.*, UNCESCR, *General Comment 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 (May 12, 1999); UNCESCR, *General Comment 13: The Right to Education*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); UNCESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); UNCESCR, *General Comment 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2002).

This is perhaps the most important and innovative contribution of the OHCHR Report to both the evolution of human rights law (as it pertains to international cooperation)⁸⁴ and, potentially, to the evolution of climate change policy. In short, it suggests that all states that are party to the ICESCR have a legal obligation through international cooperation (i.e., the UNFCCC process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other countries (especially vulnerable countries), to fund adaptation measures in vulnerable countries (depending on the availability of resources), and to ensure that the international climate change agreement due to be penned at COP 15 in Copenhagen is consistent with those human rights obligations and, at the very least, does not adversely impact human rights.

The progressive nature of the OHCHR's analysis and conclusions on international cooperation inevitably meant that it became a focus of disagreement during negotiations on Human Rights Council Resolution 10/4. Many vulnerable countries⁸⁵ wanted the draft to recite the precise language used in paragraph ninety-nine of the OHCHR Report, namely that "international cooperation [to effectively address climate change] is not only expedient but also a human rights obligation and that its central objective is the realization of human rights."⁸⁶ However, others, especially developed countries, disagreed strongly, both legally and politically, with this reading of international human rights law, insisting that the legal obligation to fulfil human rights lies solely with relevant national governments. This ideological difference explains the rather convoluted nature of the final wording employed in preambular paragraph nine.⁸⁷

Finally, human rights can potentially help fill important gaps in the existing international climate change regime. For example, the UNFCCC and the Kyoto Protocol both consciously ignore issues pertaining to the potential loss of sovereignty or statelessness caused by climate change-related impacts. As the Marshall Islands has noted, "[s]evere inundation or the total loss of land could result in the Marshall Islands ceasing to be physically habitable, which raises problems of migration, resettlement, cultural survival and sovereignty. These important issues have not been resolved in the international discussions on climate change."⁸⁸ Such an omission is extremely

⁸⁴ See John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 493-96 (2009).

⁸⁵ See, e.g., Maldives Delegation, Statement at the General Debate under Item 3 at the Tenth Session of the Human Rights Council (Mar. 16, 2009), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_HR_and_CC_10_session_hrc.pdf.

⁸⁶ OHCHR Report, *supra* note 30, ¶ 99.

⁸⁷ "Recognizing also that climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts" UNHRC 10/4, *supra* note 52, pmb1.

⁸⁸ Marshall Islands OHCHR Report Submission, *supra* note 50, at 7 (internal quotation marks omitted) (quoting M. CRAWFORD ET AL., VULNERABILITY ASSESSMENT FOR ACCELER-

serious, especially when one considers that the citizens of many small island states, including Tuvalu, Vanuatu, the Maldives, and the Marshall Islands, are facing this possibility of becoming environmental refugees during the present century.⁸⁹ What are the obligations of states, in the context of climate change, to respect the right of self-determination and to prevent loss of statehood? What should happen to people who become stateless? What are the obligations of the international community in this regard? These are crucial and difficult questions which perhaps the science-led UNFCCC process is poorly placed to answer.

The international human rights system, together with the U.N. Security Council, could potentially play a valuable role in helping to fill this gap.⁹⁰ Indeed, the human rights treaty bodies have already taken steps to better understand the nature of state obligations in the context of self-determination. As the Maldives has noted in its national submission,⁹¹ the Human Rights Committee in its General Comment 12⁹² confirmed that states should refrain from interfering in the internal affairs of other states in a way that adversely affects the exercise of the right to self-determination. While the Committee did not, perhaps, explicitly contemplate interference in the manner imposed by climate change, catastrophic anthropogenic climate change-related events, such as the rendering of small island states uninhabitable, would clearly imply the denial of the right to self-determination. The Maldives submission continues:

Furthermore, Article 2 of the ICCPR imposes an obligation on the international community to take positive action toward the realisation of the right to self-determination, regardless of whether a people are located within the territory or jurisdiction of a particular State. This is suggestive of a positive obligation upon industrialised countries to protect the sovereignty of Small Island States by taking meaningful action to cut greenhouse gases before such States are rendered uninhabitable.⁹³

Against the various potential benefits of deploying a human rights approach to climate change must be weighed the potential risks and drawbacks. These can be roughly divided into theoretical and practical problems. The theoretical difficulties in applying human rights thinking to climate

ATED SEA LEVEL RISE, CASE STUDY: MAJURO ATOLL, REPUBLIC OF THE MARSHALL ISLANDS (1993)).

⁸⁹ Cameron, *supra* note 58, at 6-7; *see also* Shahid, *supra* note 26.

⁹⁰ This is a point recognized in the conclusions of the OHCHR Report, which argue that “[f]urther study is also needed of protection mechanisms for persons who may be considered to have been displaced within or across national borders due to climate change-related events and for those populations which may be permanently displaced as a consequence of inundation of low-lying areas and island States.” OHCHR Report, *supra* note 30, ¶ 98.

⁹¹ Maldives OHCHR Report Submission, *supra* note 45, at 39-40.

⁹² OHCHR, Human Rights Committee [CCPR], *General Comment 12: The Right to Self-Determination of Peoples*, ¶ 14 (Mar. 13, 1984), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument).

⁹³ Maldives OHCHR Report Submission, *supra* note 45, at 7.

change are described in detail in the U.S. submission to the OHCHR study.⁹⁴ The United States identifies three main theoretical problems that would make any movement “toward a human rights-based approach to climate protection . . . [both] impractical and unwise[.]”⁹⁵

1. “[C]limate change is a highly complex environmental issue, characterized by a long chain of steps between the initial human activities that produce greenhouse gas emissions and the eventual physical impacts that may result from those emissions. . . . Furthermore, many uncertainties exist regarding the magnitude of current and future climate change, including distinguishing between those impacts that are part of natural climate variability and those that are influenced by anthropogenic climate change.”⁹⁶
2. “[C]limate change is a global phenomenon. A worldwide and diffuse set of actors — public and private, wealthy and poor — collectively determine the world’s anthropogenic greenhouse emission levels.”⁹⁷
3. “[C]limate change is a long-term challenge. Emissions of carbon dioxide, on average, remain in the atmosphere for about 100 years. . . . Accordingly, the impacts of climate change today are caused not by recent emissions but the accumulation of greenhouse gases over long periods of time by a diffuse set of actors, most of whom would have been unaware of any potentially adverse future impact”⁹⁸

According to the United States, “[a] complex global environmental problem with these characteristics does not lend itself to human rights-based solutions.”⁹⁹ While these arguments clearly have some merit, they are not yet conclusive and, more importantly, they reflect a one-dimensional view of the potential conceptual linkages between climate change and human rights. They are based on the premise that “[a] central purpose of human rights law . . . is providing remedies for the victims of specific rights violations. . . . This framework requires identifiable violations, and identifiable harms attributable to the violations”¹⁰⁰

It is true of course that, at present, it is very difficult to argue that climate change represents a violation of human rights.¹⁰¹ OHCHR in fact

⁹⁴ U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-26.

⁹⁵ *Id.*

⁹⁶ *Id.* ¶¶ 18-19.

⁹⁷ *Id.* ¶ 20.

⁹⁸ *Id.* ¶ 21.

⁹⁹ *Id.* ¶ 23.

¹⁰⁰ *Id.* ¶¶ 23-24.

¹⁰¹ Difficult, but not impossible. For example, the ICHRP has argued that “specific actors are responsible for climate change — namely those who overuse carbon fuels, albeit in highly varying degrees. . . . The question is thus whether this group can be broken down into definite and identifiable parties to whom responsibility can be attributed in a specific and discrete

concedes this point¹⁰² in its report: “The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harms often cannot clearly be attributed to acts or omissions of specific States.”¹⁰³ Moreover, even if responsibility and harm could be established, existing human rights law is primarily concerned with how a government treats its own citizens and others living within its territory and under its jurisdiction. It therefore provides no useful kind of accountability or redress framework for situations arising from phenomena such as climate change, where responsibility and harm are largely trans-national.

However, identifying and providing remedies for specific human rights violations is not the only potential role of human rights law. As Kyung-wha Kang has noted, “[h]uman rights supply not only legal imperatives, but also a set of internationally agreed values around which common action can be negotiated and motivated.”¹⁰⁴ Thus, human rights should not only be seen as a way of seeking redress for what has happened, but as a forward-looking means of encouraging the evolution of, and providing a qualitative contribution to, robust, effective, and sustainable policy responses at both the national and international level, across mitigation and adaptation.¹⁰⁵ It is in this progressive sense that the contemporary value of linking human rights and climate change is to be found, and it is in this progressive sense that the various benefits of a human rights approach, as enumerated earlier, come to the fore.¹⁰⁶ In short, in the limited sense understood by the United States, there are clear theoretical difficulties in applying human rights-based solutions to climate change. However, seen in the broader sense as a set of values and norms from which to draw inspiration, a human rights-approach

manner.” CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 65. Another way of assigning responsibility and harm is suggested by *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497 (2007). Here, EPA was found responsible for harms caused by greenhouse gases because it was aware of the potential for harm and had the power to regulate emissions, but did not act. *Id.* at 533. If it had acted, some injuries, both past and future, might conceivably have been avoided. *Id.* at 500. In its OHCHR submission, the United States obliquely recognizes the possibility that “novel theories of responsibility” might be devised, leading to “climate-related human rights claims . . . gain[ing] traction.” U.S. OHCHR Report Submission, *supra* note 34, ¶ 96; *see also* KNOX, *supra* note 84, at 488-89.

¹⁰² Which, in addition to the U.S. submission, was also made by a number of other states, including the U.K.

¹⁰³ OHCHR Report, *supra* note 30, ¶ 26.

¹⁰⁴ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 8.

¹⁰⁵ A third theoretical use of human rights proposed in the OHCHR Report — to emphasize to states that “irrespective of the additional strain climate change-related events may place on available resources,” they in any case “remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights” — seems perverse from the perspective of small vulnerable countries, which are, in effect, being told to take additional strain so as to honor their obligations in the face of a phenomenon (climate change) for which they bear almost no responsibility. OHCHR Report, *supra* note 30, ¶ 77.

¹⁰⁶ This is not to say that human rights should not also eventually be used as an accountability framework for addressing harm, responsibility, and redress. However, at present, human rights law, which is overwhelmingly understood as a national contract between citizen and state, is not geared to this utility.

can potentially add much value to the existing politico-scientific climate change discourse.

In addition to theoretical issues, it is also important to address and respond to potential practical difficulties that may arise from linking human rights and climate change. A first key practical constraint that has plagued efforts to draw linkages between climate change and human rights from the beginning is what the ICHRP has termed “path-dependenc[y]”¹⁰⁷ but which might also be called “path exclusivity.” The climate change response process, led by the IPCC and the UNFCCC, is dominated in general by experts in the physical sciences.¹⁰⁸ As ICHRP has noted: “[t]he study of climate change began among meteorologists, became firmly entrenched in the physical sciences, and has only gradually — if inevitably — reached into the social sciences.”¹⁰⁹ Consequently, there is an almost complete lack of understanding of human rights systems and their potential value within the IPCC and, more importantly, within the UNFCCC process (both among states and the Secretariat).¹¹⁰ Indeed, this lack of understanding sometimes manifests itself as outright hostility.¹¹¹ For its part, the human rights community, despite obvious overlap, has until recently been equally reluctant to address climate change.¹¹² This is both because the issue is seen by many states as one that belongs squarely in the natural sciences (i.e., it is the responsibility of environment ministries rather than foreign ministries),¹¹³ and because human rights practitioners “are unlikely to take up issues framed as hypothetical or scenario-based.”¹¹⁴ As well as making useful linkages between the two disciplines difficult, “path dependence” also leads to the oft-repeated argument by states that human rights must be dealt with by the Human Rights Council and climate change by the UNFCCC. As the United States notes in its submission, “the United States takes the view that a

¹⁰⁷ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

¹⁰⁸ *Id.* at 3. Although, in the case of the IPCC, the social sciences are making a belated impact. The Maldives secured a vice chair position on the IPCC Working Group II on Impacts, Adaptation and Vulnerability during 2008 partly on a platform of encouraging the expansion of the body’s work to include economics, social sciences, and human rights.

¹⁰⁹ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

¹¹⁰ ICHRP has noted that the words “human rights” are almost totally absent from core UNFCCC and IPCC documentation. *Id.* Mainstream climate change literature also almost completely ignores human rights. *Id.*

¹¹¹ For example, some Caribbean small island state climate change negotiators have been openly hostile to any attempt to integrate human rights principles or language into the UNFCCC negotiations because, in essence, they see human rights as being limited to those core civil and political rights (e.g., right to freedom of expression, right to trial, right to vote, and right to life) that are often used as a tool for the developed world to criticize the developing world.

¹¹² CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

¹¹³ This reasoning also explains the reticence of many states to ask OHCHR to prepare the study on human rights and climate change, as they felt it was beyond the organization’s competence and capacity. This in turn explains why UNHRC 7/23 stipulates that the report must be compiled “in consultation with and taking into account the views of” the IPCC and UNFCCC, and also why the final report clearly states that it is entirely formulated on the basis of agreed science (i.e., IPCC and UNFCCC science). UNHRC 7/23, *supra* note 1, ¶ 1.

¹¹⁴ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

'human rights approach' to addressing climate change is unlikely to be effective, and that climate change can be more appropriately addressed through traditional systems of international cooperation and international mechanisms for addressing this problem, including through the UNFCCC process."¹¹⁵ Similarly, Canada noted in its national submission that it "joined consensus on resolution 7/23, notwithstanding initial concerns that the Council is not the most appropriate forum for a discussion on climate change issues. Canada believes the UNFCCC is the most appropriate forum in which to address issues related to climate change."¹¹⁶ This of course ignores the fact that both climate change and human rights are horizontal issues and thus will necessarily (and indeed do) appear in the context of the work of a range of different U.N. bodies.¹¹⁷

A second, more strategic problem relates to a concern on the part of many states that the Human Rights Council and related bodies should not be seen to be replacing or duplicating the UNFCCC process or challenging its primacy on climate change matters. This led many members of the Council to effectively make their support for Resolution 7/23 dependent on the tacit understanding that the Council's eventual output on this issue (i.e., the OHCHR Report and a summary of the Council's views) would be dovetailed with or "fed into" the Bali Process.¹¹⁸ The Council must not, it was urged, retain climate change as a permanent item on the agenda or set up parallel mechanisms to the UNFCCC.¹¹⁹ A third, more tactical concern raised informally by some states is that including human rights in negotiations on the post-Kyoto climate change framework would perversely make delegations less likely to sign up to stringent emission reduction targets for fear that, if they were to fail to reach those targets, they might leave themselves open to litigation.

A final important practical constraint relates to a lack of political trust between developed and developing countries. In a broad sense, this lack of trust manifests itself, on the part of industrialized countries, in a fear that

¹¹⁵ U.S. OHCHR Report Submission, *supra* note 34, ¶ 4.

¹¹⁶ Submission of Canada to OHCHR Study, *Government of Canada Response to Request for Information by the Office of the High Commissioner for Human Rights Concerning a Request in Human Rights Council Resolution 7/23 for a Detailed Analytical Study of the Relationship Between Climate Change and Human Rights*, at 1 (2008) [hereinafter Canada OHCHR Report Submission], available at http://www2.ohchr.org/english/issues/climate_change/docs/canada.pdf.

¹¹⁷ The impact of climate change, within the context of their mandate, has been or is being actively addressed by a range of different U.N. bodies including, *inter alia*, the United Nations Development Programme ("UNDP"), the World Health Organisation ("WHO"), and the Office of the U.N. High Commissioner for Refugees ("UNHCR").

¹¹⁸ This explains the presence in UNHRC 7/23 of the instruction for the Council to "make available" the study and the summary of the debate to the Conference of Parties to the UNFCCC. See UNHRC 7/23, *supra* note 1, ¶ 3. "Make available" had originally read "transmit." However, this was opposed by some delegations that did not support such finality and wanted to leave the Council's options open.

¹¹⁹ This explains the language in UNHRC 7/23 that refers to the UNFCCC as "the comprehensive global framework to deal with climate change issues." UNHRC 7/23, *supra* note 1, ¶ 5 (emphasis added).

individuals or even countries that have suffered or will suffer harm could use any officially recognized linkages between human rights and climate change as a political or legal weapon against them.¹²⁰ Some developed countries also have concerns that developing countries may be using the issue of climate change as a “backdoor” to reintroduce the related and controversial issues of extraterritorial application of human rights and the establishment of a new universal “right to a safe and secure environment.”¹²¹ For developing countries, mistrust manifests itself as a suspicion that the West wants to use human rights as a way of either preventing their development (i.e., climate change affects human rights and thus countries must slow the process of industrialization) or of conditionalizing climate change adaptation funds.¹²²

On the last point, these suspicions are unlikely to have been allayed by a review of the U.K. and U.S. submissions to the OHCHR, which, in the case of the U.K. submission, calls for a compact for climate change funding under which recipient countries would “pledge to act appropriately by targeting the poorest and most vulnerable in their own countries, ensuring transparency and accountability of the finance, ensuring wide participation and integration of civil society and affected groups,”¹²³ and, in the case of the U.S. submission, claims that “[w]ell-governed societies are inherently more adaptable to changing economic, social and environmental conditions of all kinds.”¹²⁴

Yet while these practical challenges are clearly important, they are certainly not an insurmountable obstacle to progress. Path dependency, for example, should be seen not as a reason to halt efforts to draw links between human rights and climate change, but rather as a motivation to continue — based on the understanding that the artificial barriers between the scientific and social study of climate change has been one of the causes of mankind’s

¹²⁰ This concern is clearly evident in the U.S. submission to the OHCHR study, which states: “Even if novel theories of responsibility are devised and climate-related human rights claims . . . gain traction . . . the overall results are not likely to meaningfully contribute to the underlying need to slow, stop and reverse worldwide emissions The process of pursuing human rights claims would be adversarial and require affixing blame to particular entities; this contrasts with efforts to achieve international cooperation that have thus far been pursued through the international climate change negotiations.” U.S. OHCHR Report Submission, *supra* note 34, ¶ 26.

¹²¹ These concerns are evident in the U.K. submission, which made clear that “[t]he United Kingdom recognises that climate change may impact on the full enjoyment of human rights at the *national level*.” U.K. OHCHR Report Submission, *supra* note 33, at 4 (emphasis added). The U.S. submission offers lengthy arguments as to why a right to a sustainable environment is not a good idea even though this question was not even asked in the OHCHR’s request for input. U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-27. In its submission, the United States said that it “considers a safe and sustainable environment to be an essential and shared goal — one that may further the realization of certain human rights However, the United States does not consider that a right to a ‘safe environment’ . . . exists under international law.” *Id.* ¶¶ 3-4.

¹²² This explains the presence of repeated references in UNHRC 7/23 of “the right to development.” UNHRC 7/23, *supra* note 1, pmbl.

¹²³ U.K. OHCHR Report Submission, *supra* note 33, at 3.

¹²⁴ U.S. OHCHR Report Submission, *supra* note 34, ¶ 6.

failure to respond. Indeed, there is evidence to suggest that these barriers are being broken down.

For example, during the twenty-ninth plenary session of the IPCC (August 31-September 4, 2008), a number of members emphasized the importance of reaching out to the social sciences for future assessment reports, while Amjad Abdulla from the Maldives, who was elected Vice-Chair of Working Group II, campaigned partly on the need to integrate a human or human-rights focus into the IPCC's work on climate change impacts.¹²⁵ Similarly, in late January 2009, both the OHCHR and the UNFCCC Secretariat decided to establish informal focal points on the issue of human rights and climate change to exchange information and coordinate action.¹²⁶

Moreover, arguments that the international human rights machinery might replace or undermine the UNFCCC process, that the inclusion of human rights wording might make states less likely to sign up to binding targets through fear of litigation, and that human rights might be used as some kind of political or legal football between North and South, all reflect the misconception, referred to earlier, that the utility of a human rights approach is limited to recognizing and seeking remedy for violations of those rights, thus ignoring the normative or instructive value of human rights principles. Seen in this sense, it is clear that human rights thinking has the potential to strengthen and complement the IPCC and UNFCCC processes, rather than undermine, endanger, or replace them. As the OHCHR notes in its report, "[i]nternational human rights law complements the [UNFCCC] by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights,"¹²⁷ and, in the context of those negotiations, "[h]uman rights standards and principles should inform and strengthen policy-making . . . promoting coherence and sustainable outcomes."¹²⁸ In conclusion, the various theoretical or practical arguments put forward to argue against further action on linking climate change with human rights are, for the large part, invalid and are, moreover, based on a fundamental misconception of the potential value and utility of human rights. That said, they do remain impor-

¹²⁵ IPCC, Geneva, Switz., Aug. 31-Sept. 4, 2008, *Draft Report of the Twenty-Ninth Session*, at 4-6, IPCC Doc. IPCC-XXX/Doc.5 (Apr. 2009), available at <http://www.ipcc.ch/meetings/session30/doc5.pdf>; see also Abdullahi Majeed, Deputy Minister of Env't of the Maldives, Statement During Discussion on Agenda Item 8: Future IPCC Activities (2008), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_IPCC_0908.pdf.

¹²⁶ In a further sign of growing interest on the part of the UNFCCC Secretariat in the potential utility of human rights principles in the context of climate change policy, the Secretariat prepared a statement on human rights and climate change for delivery during the Tenth Session of the Human Rights Council. Unfortunately, due to changes in the scheduling of the Session, it was unable to deliver it. UNFCCC Secretariat, *Draft Oral Statement at the 10th Session of the Human Rights Council* (2009) (on file with Harvard Environmental Law Review).

¹²⁷ OHCHR Report, *supra* note 30, ¶ 99.

¹²⁸ *Id.* ¶ 80.

tant both as warning markers to guard against potential pitfalls and, especially in the case of path dependency, as potential obstacles to progress.

THE WAY FORWARD: BUILDING BRIDGES

On January 23-24, 2009, CIEL and the Friedrich Ebert Stiftung (“FES”) convened a two-day expert meeting on human rights and climate change at Chateau de Bossey near Geneva, which brought together for the first time a range of the foremost experts on the relationship between human rights and climate change.¹²⁹ The meeting represented the first concerted attempt by human rights and climate change policy practitioners working in tandem to move the common agenda forward by exploring ways to operationalize the human rights-climate change interface. The meeting addressed possible actions in the Human Rights Council and treaty bodies, as well as possible actions under the UNFCCC framework.¹³⁰

Regarding the former, the meeting proposed and evaluated a variety of ways to address climate change and its consequences through the international human rights machinery.¹³¹ Three main avenues of possible progress were addressed: within Special Procedures of the Human Rights Council, within the Council itself, and within human rights treaty bodies.¹³²

Special Procedures (independent human rights experts with either a country or a thematic mandate) are in fact already active on the issue of climate change. For example, following lobbying by the Maldives and with the support of the main sponsor, Germany, Resolution 6/27 on adequate housing explicitly includes the impacts of climate change as one of the areas to be covered by the Special Procedure mandate,¹³³ and indeed during February 2009 the mandate-holder, Raquel Rolnik, visited the Maldives to prepare

¹²⁹ See also CIEL & FES, HUMAN RIGHTS AND CLIMATE CHANGE: PRACTICAL STEPS FOR IMPLEMENTATION 42 (2009) [hereinafter PRACTICAL STEPS], available at http://www.ciel.org/Publications/CCandHRE_Feb09.pdf. Participants included Mary Robinson, former U.N. High Commissioner for Human Rights; Catarina de Albuquerque, the U.N. Independent Expert on the right to water and former Chair of the U.N. Working Group on the Optional Protocol to the Covenant on Economic, Social and Cultural Rights; Olivier De Schutter, U.N. Special Rapporteur on the right to food; Virginia Bras-Gomes, Member of the U.N. Committee on Economic, Social and Cultural Rights; Miloon Kothari, former U.N. Special Rapporteur on the right to adequate housing; Angus Friday, former Chair of the Alliance of Small Island States; Ibrahim Wani, Chief of Research at OHCHR; Marc Limon, Permanent Mission of the Maldives to the U.N. at Geneva; Kilaparti Ramakrishna, Chief of cross-sectoral issues at UNEP; and various representatives of the UNFCCC, World Bank, the Global Humanitarian Forum, the ICHRP, Earthjustice, CIEL, Tebtebba Foundation (indigenous persons group), and Harvard University. *Id.* at 34.

¹³⁰ See also *id.* at 13-32.

¹³¹ See also *id.* at 13-27.

¹³² See also *id.*

¹³³ UNHRC 6/27, *supra* note 29, ¶ 3. Resolution 6/27 was the first resolution by either the Human Rights Council or its predecessor, the U.N. Commission on Human Rights, to contain the words “climate change.” During the following Seventh Session, climate change was mentioned again in both Resolution 7/23 and Resolution 7/14. UNHRC 7/23, *supra* note 1, ¶¶ 1-3; UNHRC 7/14, *supra* note 29, pmb1.

a thematic report on the effects of climate change on the right to housing.¹³⁴ To build on this, the CIEL-FES meeting proposed that other relevant Special Procedures, including on the right to food, on access to water, and on the right to health, also address the issue, either separately or jointly.¹³⁵ Because of the operational independence of Special Procedures, such reports would have the advantage of potentially being more expansive, progressive, and action-oriented than the OHCHR Report.¹³⁶ Indeed, this option was taken up by the Human Rights Council in Resolution 10/4, which “encourages relevant special procedure mandate-holders to give consideration to the issue of climate change within their respective mandates.”¹³⁷ A further, more long-term option would be to create a new Special Procedure mandate on human rights and climate change¹³⁸ that might, for example, be tasked with integrating a human rights perspective into national and international climate change policy-making.¹³⁹

In terms of useful steps in the Council plenary, participants noted that it would be useful to hold a dedicated panel debate on human rights and climate change during either the Eleventh or Twelfth Session of the Council, during which States, OHCHR, Special Procedures, IPCC, and the UNFCCC Secretariat could hold an in-depth interactive dialogue. This would serve to improve understanding of the issues at stake, build further bridges between the disciplines, and send out a strong political message from state representatives in the Council to their colleagues in the UNFCCC Conference of Parties. Again, members of the Human Rights Council took up this recommendation in March 2009, deciding, in Resolution 10/4, “to hold a panel discussion on the relationship between climate change and human rights at its eleventh session in order to contribute to the realization of the goals set out in the Bali Action Plan and to invite all relevant stakeholders to participate therein.”¹⁴⁰ As was the case with Resolution 7/23,¹⁴¹ the Council,

¹³⁴ UNHRC, *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: Preliminary Note on the Mission to Maldives*, ¶¶ 1, 3, U.N. Doc. A/HRC/10/7/Add.4 (Mar. 3, 2009) (prepared by Raquel Rolnik).

¹³⁵ See also PRACTICAL STEPS, *supra* note 129, at 13-16.

¹³⁶ Special Procedures are both “independent experts” (rather than a secretariat) and are encouraged to take forward and develop issues falling within their mandate rather than commenting on the existing status quo.

¹³⁷ The Council “[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.” UNHRC 10/4, *supra* note 52, ¶ 3.

¹³⁸ See also PRACTICAL STEPS, *supra* note 129, at 17.

¹³⁹ Because new mandates are difficult to establish at the Human Rights Council, an alternative might be to expand the mandate of an existing Special Procedure, such as on toxic waste, to cover environmental degradation more broadly — and include the issue of climate change as one of the focus areas.

¹⁴⁰ UNHRC 10/4, *supra* note 52, ¶ 1.

¹⁴¹ In which the Council decided to make the OHCHR Report and a copy of the subsequent consideration of Report at its Tenth Session available to the Conference of Parties to the UNFCCC. UNHRC 7/23, *supra* note 1, ¶ 3.

in Resolution 10/4, decided to make explicit reference to the need for its work to link to, complement, and support the UNFCCC process. Operative paragraph two requires that a summary of the panel debate be made available to the Conference of Parties to the UNFCCC for the latter's consideration.¹⁴²

Another interesting option, discussed at Chateau Bossey, was to use the Council's new Universal Periodic Review ("UPR") mechanism to both explore the human impacts of climate change in different national contexts, and to remind major emitting states about the human rights implications of their actions.¹⁴³ For example, the national UPR Report of Tuvalu devotes considerable attention to the impacts of global warming on the rights of Tuvaluans,¹⁴⁴ while during the country's review in December 2008, the Maldives delegation noted that:

Tuvalu on its own is incapable of fully protecting the wide range of rights and freedoms directly implicated by climate change; even though those rights are guaranteed under national and international law. This is because the ultimate cause of climate change originates far beyond the borders of the country and far beyond its effective control. Thus, the international community, in particular the major emitting countries of the developed world, must themselves also take responsibility for promoting and protecting the human rights of Tuvaluans by arresting their dangerous interference with the global climate system.¹⁴⁵

Human rights treaty bodies, especially the Committee on Economic, Social and Cultural Rights, also have an important role to play, both in an analytical and an advocacy sense. For example, states might be encouraged through treaty body reporting guidelines to include reference to the impacts of climate change in their state reports. Or, during the presentation of reports, members of treaty bodies might ask questions about the effects of climate change on human rights, or on the steps taken by states, individually and through international cooperation, to mitigate and adapt. Finally, treaty bodies could potentially play a very useful role in advancing the normative framework by issuing progressive general comments on, for example, the extent of states' legal obligations to cooperate internationally to protect eco-

¹⁴² UNHRC 10/4, *supra* note 52, ¶ 2. Operative paragraphs 4 (which welcomes steps to establish institutional linkages between the OHCHR and the UNFCCC Secretariat) and 5 (which encourages the High Commissioner for Human Rights or a senior representative to participate in key climate change meetings) also reflect the Council's determination to support and not duplicate the UNFCCC Bali process. *Id.* ¶¶ 4-5.

¹⁴³ See also PRACTICAL STEPS, *supra* note 129, at 22-23.

¹⁴⁴ UNHRC, Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1*, ¶¶ 2, 42-43, 56-57, 75, U.N. Doc. A/HRC/WG.6/3/TUV/1 (Sept. 12, 2008) (prepared by Tuvalu).

¹⁴⁵ UNHRC, *Report of the Working Group on the Universal Periodic Review — Tuvalu*, ¶ 47, U.N. Doc. A/HRC/10/84 (Jan. 9, 2009).

conomic, social, and cultural rights in the face of climate change, or on the obligations of states in the context of disappearing states and their right to self-determination.

Ideas on the practical application of human rights principles within international climate change policy-making, expressed during the meeting, were less well-defined and mainly represented a set of a la carte aspirations rather than mutually-reinforcing components of a well-defined strategy. These included¹⁴⁶ the creation of a mechanism to provide greater participation among indigenous peoples and local communities in negotiations, especially with respect to the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (“UN-REDD”); the establishment of a new UNFCCC subsidiary body to study, monitor, report on, and provide guidance regarding the human dimension of climate change, including human rights; the drafting of technical papers by the Subsidiary Body for Scientific and Technical Advice (“SBSTA”), the Subsidiary Body for Implementation (“SBI”), or the Clean Development Mechanism Executive Board on the utility of human rights norms in the work of the UNFCCC; and the inclusion of human rights standards as a criteria when reviewing State implementation of UNFCCC commitments.¹⁴⁷

Overall, the meeting demonstrated that while, on the one side, the international human rights community is now fairly well-advanced in terms of understanding and accepting the interface between the two disciplines, in terms of identifying workable options to further develop our understanding, and in terms of considering ways to reach out to the Bali Process, there is far less certainty, on the part of either human rights or environmental policy-makers, as to how to usefully leverage this evolving knowledge-base in the context of the climate change negotiations. This fundamental disconnect unquestionably represents the foremost challenge facing the contemporary human rights-climate change agenda.

How can this disconnect be resolved? How might human rights principles be integrated into climate change policy-making? While these are difficult questions, one thing seems certain: the answers must necessarily lie with the Conference of Parties to the UNFCCC rather than in the Human Rights Council. While the latter can make (and indeed is making) an important contribution by highlighting and exploring the relationship between human rights and climate change, in the final analysis, the prerogative to use this knowledge or not and the expertise to understand how it might be applied to climate change policy rests with the former. Human rights ideas and principles cannot be imposed on the Bali Roadmap. Rather, a case must be con-

¹⁴⁶ See also PRACTICAL STEPS, *supra* note 129, at 7.

¹⁴⁷ This was in fact suggested by the Marshall Islands in its national submission, and was also referred to during the CIEL-FES meeting. Maldives OHCHR Report Submission, *supra* note 45, at 84.

structed for their organic integration and evolution, and that case must be won.

This probably entails two steps. First, it will be necessary to secure a formal entry point. While, as has been noted, the opening preambular paragraph to Resolution 7/23 may, to some, have been startling in its timidity, the words “climate change . . . has implications for the full enjoyment of human rights” were nevertheless of the utmost importance.¹⁴⁸ Those countries that insisted on their retention knew as much, as did those which insisted on their deletion. This is because they acted, in effect, as the thin end of a wedge. They represented a door to wider possibilities, an officially sanctioned basis for further engagement by a growing range of proponents. At the start of March 2008, the majority of delegates in the Human Rights Council privately and publicly questioned whether there was any relationship between human rights and climate change and asserted, on the contrary, that the issue of climate change had no place at the Council. By the beginning of March 2009, the situation had changed completely.¹⁴⁹ That climate change has implications for the full enjoyment of human rights is now taken as given, as is the understanding that the Council must move to assess the options for addressing this fact.¹⁵⁰

What was true of the state representatives sitting in the Council is almost certainly true of state representatives sitting in the Conference of Parties to the UNFCCC and its subsidiary bodies. What is needed, therefore, in order to kick-start an organic assessment of the value, utility, and possible application of human rights principles in the context of climate change policy, is official wording in the agreed outcome document of COP 15 (whatever form it takes) recognizing that climate change has significant negative implications on the lives and livelihoods of individual people (especially vulnerable people) around the world, that climate change policy must therefore be premised on the need to protect and rehabilitate such individuals, and that human rights policy offers an important way of understanding the former and informing and facilitating the latter.¹⁵¹

¹⁴⁸ UNHRC 7/23, *supra* note 1, pmb1.

¹⁴⁹ The change was, in essence, due to gradual acceptance by states of the de facto reality of the idea contained in UNHRC 7/23 — that climate change has implications for the full enjoyment of human rights — both because it was now in an official U.N. document and because other stakeholders, such as U.N. human rights mechanisms, vulnerable communities, and NGOs, began regularly referring to it. What had been a philosophical argument became, over the course of a year, a perception of fact.

¹⁵⁰ See Statement by the Maldives at the General Debate Under Item 3, *supra* note 67.

¹⁵¹ At the Fifth Session of the Ad-Hoc Working Group on Long-Term Cooperative Action under the Convention (“AWG-LCA”) (March 29-April 8, Bonn), a subsidiary body of the UNFCCC tasked under the Bali Action Plan to pursue the full, effective, and sustained implementation of the Convention, the Maldives delegation began the process of trying to integrate human rights language into the draft negotiating text being prepared by the Chair of the AWG-LCA. See, e.g., Maldives Delegation to the Fifth Session of the Ad-Hoc Working Group on Long-Term Cooperative Action, *Proposed Draft Wording to Be Sent as National Submission to Be Included in the Negotiating Text Under Shared Vision* (Apr. 2009), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives_wording_AWG-LCA_April_09.pdf.

Such wording would then, as with Resolution 7/23, act as a basis for, and as encouragement to, further detailed analysis among climate change policy-makers as to how human rights principles and ideas might be applied in practice.¹⁵² It would also serve as a useful point of entry or reference for interested NGOs, academics, and, of course, other relevant intergovernmental bodies — such as, for example, the Human Rights Council.

While such a scenario might offer a possible way forward, it is nevertheless clear that much remains to be done in the short- and medium-term to successfully and effectively integrate human rights principles into climate change policy, even if the level of interest in and support for such a course (both quantitatively and qualitatively speaking) gives some cause for cautious optimism.

But what of the longer-term? Some might argue that it is insufficient and unfair to focus solely on the normative or instructive value of human rights, and ignore or sideline their justicial value. It is all very well concluding, as the OHCHR, the United States, the United Kingdom, and others have, that it is legally impossible to connect harm with responsibility in the context of climate change, and thus to identify violations of human rights and place them within an effective accountability and redress framework.¹⁵³ But such a conclusion is unlikely to be acceptable to the Inuit of North America who every year see their lands eroding, their houses subsiding, their food sources disappearing, their friends or family falling through the thinning ice, especially when they know that their own governments in Ottawa and Washington have known about the ultimate cause of these tragedies for at least two decades and have done nothing to meaningfully curb emissions themselves or to promote international cooperation in this regard.¹⁵⁴ And what of the people of the Maldives, the Marshall Islands, Tuvalu, or Vanuatu who risk, because of the economically motivated actions of relatively prosperous people in far-off lands, losing their entire homeland — the country of their birth and the country that their ancestors have inhabited for millennia — and with it their entire culture?¹⁵⁵ Can we tell these people that their

¹⁵² There are small signs that such an analysis has already begun. For example, during the Tenth Session of the Human Rights Council, the UNFCCC Secretariat prepared (but was finally unable to deliver) a statement on human rights and climate change in which it noted that “the human rights community can provide valuable information to UNFCCC parties as they assess, plan and implement their adaptation actions. The expertise of the human rights regime has to date been unavailable to adaptation practitioners even though human rights knowledge could be a significant addition to the methods and tools available to Parties.” UNFCCC Secretariat, *supra* note 126, ¶ 7.

¹⁵³ OHCHR Report, *supra* note 30, ¶ 70; U.K. OHCHR Report Submission, *supra* note 33, ¶ 1; U.S. OHCHR Report Submission, *supra* note 34, ¶ 25.

¹⁵⁴ Indeed, it could be argued that they have actually worked to actively block international cooperation. See Inuit Petition, *supra* note 8.

¹⁵⁵ Tuvalu sought legal advice on who might be held responsible for the imminent loss of homes and lifestyles but chose not to pursue litigation. See Akiko Okamatsu, Problems and Prospects of International Legal Disputes on Climate Change (Dec. 2, 2005) (unpublished paper), available at http://web.fu-berlin.de/ffu/akumwelt/bc2005/papers/okamatsu_bc2005.pdf; Tom Price, *The Canary is Drowning: Tiny Tuvalu Fights Back Against Climate Change*, GLOBAL POL’Y F., Dec. 3, 2002, <http://www.globalpolicy.org/nations/micro/2002/1203canary>.

human rights have not been violated because it is difficult to apportion responsibility? Perhaps we must, but that is surely because the law is wrong, rather than because our instincts of fairness, equity, and justice are wrong.

It is perhaps through highlighting this *de facto* injustice that the greatest long-term benefit of linking human rights and climate change will be found, for climate change demonstrates, perhaps better than any other issue, the inadequacy of existing international human rights law in the context of the modern, globalized world. More importantly, it also gives hints as to how the law should be reformed, in two key ways.¹⁵⁶

First, by confirming that climate change has a range of significant implications for human rights, the Human Rights Council has indirectly, but perhaps not inadvertently, drawn attention to a major gap in the international human rights conventions — namely the lack of an explicit right to a safe and secure environment. It is clear that climate change itself does not directly affect human rights. Rather, global warming causes environmental change, which in turn affects human rights. Thus, to properly protect and promote human rights — all of which are dependent on a safe and secure environment — it is clear that the international community should give renewed attention to the relative merits of declaring “environmental rights” at the international level:

[S]uch a move would have major implications for climate change and other trans-national environmental harms, but also for government policy and accountability both domestically and internationally. For this reason the idea is a controversial one, but perhaps the issue of climate change, one of the ultimate environmental manifestations of globalisation, points to the need for a renewed focus on this significant gap in the continuum between international human rights policy and international environmental policy.¹⁵⁷

The concept of environmental rights is not a new one. As long ago as 1972, the Stockholm Declaration asserted that “[m]an has a fundamental right to freedom, equality and adequate conditions of life, in an environment

htm (on file with the Harvard Environmental Law Review); HOLLEY RALSTON ET AL., GERMANWATCH, CLIMATE CHANGE CHALLENGES TUVALU (2004), available at <http://germanwatch.org/download/klak/fb-tuv-e.pdf>. The legal options available to small island states facing disappearance at low warming thresholds have been investigated in some detail. See OHCHR, Sub-Comm’n on the Promotion & Prot. of Human Rights, *Working Paper: Prevention of Discrimination and Protection of Indigenous Peoples*, ¶¶ 11-15, U.N. Doc. E/CN.4/Sub.2/2005/28 (June 16, 2005) (prepared by Françoise Hampson).

¹⁵⁶ See Ahmed Shaheed, Minister of Foreign Affairs of the Maldives, Speech at Commonwealth Side-Event on “Human Rights and Climate Change: The Way Forward” (Mar. 3, 2009), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech_to_Commonwealth.pdf

¹⁵⁷ Marc Limon, *A Rights-Informed Approach to Tackling Climate Change*, MEA BULL., Nov. 21, 2008, <http://www.iisd.ca/mea-l/guestarticle58.html> (on file with the Harvard Environmental Law Review).

of a quality that permits a life of dignity and well-being.”¹⁵⁸ Unfortunately, that text represents both the starting point and the high point of international efforts in the area.¹⁵⁹ Although the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights is recognized in varying formulations in the constitutions of over 120 states and directly or indirectly in several international instruments,¹⁶⁰ the fact remains that since Stockholm, efforts at the international level to establish a universal right to a safe and secure environment have floundered — if not gone backward.¹⁶¹

That environmental degradation has impacts on existing human rights is now widely acknowledged. Some international human rights treaties explicitly address the linkages between the protection of the environment and the enjoyment of human rights. For example, the Convention on the Rights of the Child recognizes that the enjoyment of human rights depends, *inter alia*, on a decent environment,¹⁶² and ILO Convention No. 169 concerning indigenous and tribal peoples also provides for the protection of the environment of indigenous and tribal peoples.¹⁶³ The U.N. Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the Human Rights Committee, among others, have also issued recommendations related to environmental issues in their review of specific country reports,¹⁶⁴ while a range of human rights Special Procedures have noted the indispens-

¹⁵⁸ Stockholm Declaration, *supra* note 39.

¹⁵⁹ This is true even though the language from Stockholm was repeated in U.N. General Assembly Resolution 45/94, which stated that all individuals have a “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.” G.A. Res. 45/94, ¶ 11, U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

¹⁶⁰ See, e.g., African Charter on Human and Peoples’ Rights art. 24, *adopted* June 27, 1981, 1520 U.N.T.S. 248 (providing that “all peoples shall have the right to a general satisfactory environment favorable to their development”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 144 (recognizing the “right to live in a healthy environment” and demanding that states parties “promote the protection, preservation, and improvement of the environment”); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, *adopted* June 25, 1998, 2161 U.N.T.S. 447 (providing for the right of every person of present and future generations to live in an environment adequate to his or her health and well-being).

¹⁶¹ As the United States notes in its national submission, there is a lack of clarity as to the exact linguistic formulation for such a right, with the “right to live in a safe, secure and sustainable environment,” the “right to a safe and sustainable environment,” the “right to an environment capable of supporting human society” being some of the common variations. This is also, as the United States further notes, one of the concept’s weaknesses. U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-12.

¹⁶² See U.N. Convention on the Rights of the Child art. 24(2), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (on the right to the highest attainable standard of health requires state parties to consider “the dangers and risks of environmental pollution” and ensure that all segments of society have access to information and education with regard to, *inter alia*, hygiene and environmental sanitation); *id.* art. 29(e) (includes “the development of respect for the natural environment” among the goals of educational programs).

¹⁶³ See Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 4, 7(3)-(4), *adopted* June 27, 1989, 28 I.L.M. 1382.

¹⁶⁴ Wani said:

ability of a healthy environment as a precondition for the effective enjoyment of human rights.¹⁶⁵ Resolutions 7/23 and 10/4 on human rights and climate change build on this consensus.

Moreover, case law from the European Court of Human Rights and the Human Rights Committee also indicates that environmental deterioration can lead to violations of human rights, including the right to life, the right to health, the right to respect for privacy and family life, and the right to freedom of expression.¹⁶⁶ As Judge Weeramantry explained in a separate opinion for the International Court of Justice:

[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.¹⁶⁷

However, despite efforts by some human rights treaty bodies to try to compensate for the lack of an explicit right to a safe and healthy environment by creatively and expansively interpreting other fundamental rights,¹⁶⁸

For example, in relation to the pollution of water sources; protection of indigenous peoples' natural resources; environmental policies and their specific impact on the enjoyment of human rights; environmental degradation; natural disasters; the impact of large infrastructure development projects on the environment; environmental hazards affecting specific groups or minorities; and the dumping of toxic waste and its impact on the enjoyment of human rights.

Wani, *supra* note 63, at 6.

¹⁶⁵ Wani also noted:

The former Special Rapporteur on the human rights of migrants identified environmental degradation among the reasons why people leave their countries; the former Independent Expert on human rights and extreme poverty stressed the links between poverty and environmental degradation; the Special Rapporteur on adequate housing underlined that housing cannot be separated from other issues related notably to a safe and healthy environment; the Representative of the Secretary General on the human rights of internally displaced persons highlighted that natural disasters are among the leading causes of internal displacement; the Special Representative of the Secretary-General on human rights defenders included environmental activists in the group of civil society actors that are particularly exposed to violence and other violations of their rights; the mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights has, since its creation, highlighted how international movements of waste can have negative effects on the enjoyment of several human rights, including the right to life, health, adequate food, health [sic], freedom of association or the right to form and join trade unions.

Id. at 7.

¹⁶⁶ These rights include the right to seek information and minority rights. See Stefano Sensi, *Human Rights and the Environment: A Practical Guide for Environmental Activists* (unpublished paper) (on file with Harvard Environmental Law Review).

¹⁶⁷ Maldives OHCHR Report Submission, *supra* note 45, at 13 (quoting *Case Concerning the Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25)).

¹⁶⁸ For example, "the U.N. Committee on Economic, Social and Cultural Rights — which monitors the implementation of the International Covenant on Economic, Social and Cultural

and despite recent calls by the President of the Maldives for immediate negotiations on a comprehensive international treaty on environmental rights,¹⁶⁹ the fact remains that, aside from international agreements on some procedural rights in the context of environmental protection, we are no closer to achieving a breakthrough today than we were in 1972 (indeed the lack of reference in the 1992 Rio Declaration¹⁷⁰ to a fundamental right to live in “an environment of a quality that permits a life of dignity and well-being” shows that we have in fact gone backward).

Resolutions 7/23 and 10/4, which take international understanding and recognition of the linkage between human rights and the environment much further than the United Nation’s previous resolution on the subject — Commission on Human Rights Resolution 2005/60 on human rights and environment as part of sustainable development¹⁷¹ — offer a good platform for a renewed debate on the relative merits¹⁷² and feasibility of universally recognized environmental rights.¹⁷³

However, the universal declaration of a right to an environment of a certain quality, although helpful in dealing with climate change, would not be enough in itself. It could help individuals hold their own governments accountable for environmental degradation by enabling recourse to international human rights mechanisms (e.g., treaty bodies) and, linked to this,

Rights (ICESCR) by State Parties — has attempted to address this gap by interpreting the right to health, enshrined in this International Covenant, as encompassing the underlying determinants of health, such as healthy environmental conditions.” Wani, *supra* note 63, at 5-6.

¹⁶⁹ Maumoon Abdul Gayoom, President of the Maldives, Keynote Address at the Opening of the Small Island States Conference on the Human Dimension of Climate Change in Malé (Nov. 13, 2007), available at http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech_by_President_on_Human_Dimension_of_Climate_Change.pdf.

¹⁷⁰ G.A. Res. 45/94, *supra* note 159, ¶ 4.

¹⁷¹ U.N. Comm’n on Human Rights, Human Rights Res. 2005/60, U.N. Doc. E/CN.4/RES/2005/60 (Apr. 20, 2005).

¹⁷² The difficulties of establishing such a right are well-documented:

[W]hat is the content of this right and how would it be defined? What is the threshold quality of environment for purposes of human rights? Who are the holders of this right: is it a collective right or an individual right? Does it cover future generations? Who is the duty bearer responsible for promoting, providing for and protecting this right? More specifically, what responsibility would it impose on states? What would be the extra-territorial obligations created by such a right? What would be the added value, in term of protection, of such a right? While a right to an environment of a certain quality would certainly have rhetorical force, some have argued that in reality it would add little to what already exists in international environmental law.

Wani, *supra* note 63, at 10-11; see also Alan E. Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43 (Alan E. Boyle & Michael R. Anderson eds., 1996).

¹⁷³ Such a debate could complement current work in this area being conducted in the context of the draft Fourth Programme for the Development of the Periodic Review of Environmental Law (“Montevideo Programme IV”). See U.N. Env’t Programme, *Report of the Meeting of Senior Government Officials Expert in Environmental Law to Prepare a Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV)*, at 25, U.N. Doc. UNEP/Env.Law/MTV4/IG/2/2 (Oct. 28, 2008), available at http://www.unep.org/law/PDF/MontevideoIV/Meeting_Report_MontevideoIV.pdf.

might also facilitate or encourage the development of “novel theories of responsibility,”¹⁷⁴ such as the application of joint and several liability¹⁷⁵ in human rights law (it could therefore help, for example, the Inuit vis-à-vis their own governments). However, it is unlikely to be of much help in, say, the case of the Maldives, where responsibility lies beyond the state’s borders. Indeed, for someone in the Maldives to prove that his or her rights have been violated as a result of climate change and to hold those responsible (whenever they may be) accountable, would require a wholesale reconceptualization and reconfiguration of international human rights law as it is now understood — as, essentially, a contract between a state and its citizens. In other words, it would require the idea of human rights developed in the post-1945 world of nation-states and borders to begin to give way to a recognition that, in the globalized world, individual human interaction and personal cause and effect no longer respect traditional concepts of sovereignty. As a consequence, the idea that harm and responsibility must both reside within a single state would, according to this view, become redundant (especially in the case of economic, social, and cultural rights). As the ICHRP has noted, “more than most other issues, climate change throws into relief the inadequacies of the international justice system, given the scale and intimacy of global interdependence that drives the problem and must also drive its solutions.”¹⁷⁶

Like environmental rights, this idea is not new, but has previously been avoided because of the fear that it would allow states with poor human rights records to avoid responsibility for human rights violations by blaming external actors (such as international terrorists or multinational corporations).

Such concerns should not be taken lightly, but here too perhaps linking human rights and climate change shows us, potentially, a path forward, a way of promoting international climate justice while maintaining a strong emphasis on the primary responsibility of states to protect the rights of their citizens and others within their jurisdiction.

¹⁷⁴ U.S. OHCHR Report Submission, *supra* note 34, ¶ 26.

¹⁷⁵ The Inuit Petition to Inter-American Commission on Human Rights “sought to hold one State responsible for activities undertaken in several countries, applying both criminal law principles of joint liability and, more innovatively, the UNFCCC’s own principle of ‘common but differentiated responsibilities.’” CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 42. Although the Commission ultimately did not find the case admissible, during a subsequent public hearing on the matter (Mar. 1, 2007), the Commissioners did ask how one state could be held liable for actions also conducted in numerous other states. Martin Wagner (Earthjustice), counselor for the petitioners, contended that each state is responsible separately as well as jointly. *Id.* ICHRP has noted that:

It is common in environmental litigation, where there are numerous polluters, for a court to shift the burden of proof and hold the defendant liable unless he or she can mitigate responsibility by proving the proportional liability of other wrongdoers. Under theories of joint and several liability, each wrongdoer is held responsible for the entire harm in some circumstances. Such doctrines serve to deter pollution by all and ensure greater likelihood of redress for victims.

Id. at 43.

¹⁷⁶ *Id.* at 64.

The principle of common but differentiated responsibility (“CBDR”) is one of the cornerstones of sustainable development and is particularly important in the context of international climate change diplomacy, as led by the UNFCCC and the Kyoto Protocol.¹⁷⁷ CBDR was first explicitly formulated in Principle 7 of the Rio Declaration, which states:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁷⁸

CBDR, in short, can be said to express the need to evaluate responsibility for the remediation or mitigation of environmental degradation based on both historical contribution to a given environmental problem and present capabilities: it is a guiding principle of international cooperation and solidarity.¹⁷⁹ In the context of climate change, the practical consequences of CBDR are that differential obligations are imposed on the different parties to the UNFCCC and the Kyoto Protocol.

The preamble of the UNFCCC acknowledges “that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”¹⁸⁰ Under the Kyoto Protocol, only countries listed in Annex I (developed countries and countries with economy in transition) have quantified emissions reduction obligations under the agreement.¹⁸¹

Might CBDR also be helpful in reshaping international human rights law to make it more reflective of and more responsive to the needs of a globalized world? While CBDR as it is understood in environmental law (assigning responsibility based on historical contribution to damage and capacity) is perhaps not directly applicable to human rights law, the underlying principles of justice and equity — i.e., the promise that responsibility will be distributed fairly — clearly are.

Might one foresee a future in which responsibility for respecting, protecting, and fulfilling the economic, social, cultural, and environmental rights of a given individual would be held in common by all states, but with

¹⁷⁷ Vito De Lucia, *Common But Differentiated Responsibility*, in *ENCYCLOPEDIA OF EARTH* (Jan. 28, 2007) (on file with Harvard Environmental Law Review).

¹⁷⁸ U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the U.N. Conference on Environment and Development Volume I: Resolutions Adopted by the Conference*, at 4, U.N. Doc. A/CONF.151/26 (Jan. 1, 1993).

¹⁷⁹ De Lucia, *supra* note 177.

¹⁸⁰ UNFCCC, *supra* note 3, pmbl.

¹⁸¹ Kyoto Protocol to the UNFCCC, *adopted* Dec. 11, 1997, 2303 U.N.T.S. 148.

the greater or primary responsibility lying with the individual's own government? Or perhaps all states would have the duty to fully respect¹⁸² and play a part in fulfilling (through "international assistance and cooperation") that individual's rights, whereas the individual's own government would have the obligation to respect, fulfil, and protect them?

These are clearly "difficult, complex and far-reaching questions,"¹⁸³ but perhaps climate change's greatest influence on human rights will be to demonstrate that the time has come to start answering them. As Mali argues in its submission:

[L]aws and institutions for the defence of human rights [must] evolve to adapt to the new reality of climate change. When vulnerable communities try to use human rights laws to defend their rights and seek climate justice, important weaknesses are revealed. It is almost impossible for populations in poor countries to identify and pursue channels of justice, to have their cases heard, or to prove responsibility.¹⁸⁴

In conclusion, it is clear that drawing linkages between human rights and climate change has mutually reinforcing benefits for both areas of policy. On the one hand, human rights principles and concepts have the potential to complement traditional climate change negotiations and improve climate change policy by, *inter alia*, focusing attention on the impacts on individuals, especially vulnerable individuals, by emphasizing accountability, and by encouraging and strengthening international cooperation. On the other hand, climate change serves to highlight the inadequacies of existing international human rights law in a globalized world, while environmental policy principles (specifically CBDR) offer possible guidance on how to respond to those inadequacies. In short, if ideas from international human rights policy, which emphasizes equity within states, can successfully cross-fertilize with those from international climate change policy, which emphasizes equity between states, both disciplines stand to benefit as do, ultimately, mankind and the planet he inhabits. Notwithstanding the myriad difficulties and uncertainties inherent in such an exercise, this surely represents a compelling case for political action.

¹⁸² The Inuit Petition to the Inter-American Commission on Human Rights argued that governments and private actors have, at a minimum, a negative obligation to desist from harmful actions that lead to social and economic rights violations. Inuit Petition, *supra* note 8, at 70.

¹⁸³ Shaheed, *supra* note 156, at 7.

¹⁸⁴ Submission of Mali to OHCHR Study, *Human Rights and Climate Change* (Sept. 2008), available at <http://www2.ohchr.org/english/issues/climatechange/docs/Mali.pdf>.

ANNEX

Climate Impact	Human Impact	Rights Implicated
<p>Sea Level Rise</p> <ul style="list-style-type: none"> • Flooding • Sea Surges • Erosion • Salination of land and water 	<ul style="list-style-type: none"> • Loss of land • Drowning, injury • Lack of clean water, disease • Damage to coastal infrastructure, homes, and property • Loss of agricultural lands • Threat to tourism, lost beaches 	<ul style="list-style-type: none"> • Self-determination [ICCPR;ICESCR,1] • Life [ICCPR, 6] • Health [ICESCR, 12] • Water [CEDAW,14; ICRC 24] • Means of subsistence [ICESCR,1] • Standard of living [ICESCR, 12] • Adequate housing [ICESCR,12] • Culture [ICCPR, 27] • Property [UDHR,17]
<p>Temperature Increase</p> <ul style="list-style-type: none"> • Change in disease vectors • Coral bleaching • Impact on Fisheries 	<ul style="list-style-type: none"> • Spread of disease • Changes in traditional fishing livelihood and commercial fishing • Threat to tourism, lost coral and fish diversity 	<ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12]
<p>Extreme Weather Events</p> <ul style="list-style-type: none"> • Higher intensity storms • Sea Surges 	<ul style="list-style-type: none"> • Dislocation of populations • Contamination of water supply • Damage to infrastructure: delays in medical treatment, food crisis • Psychological distress • Increased transmission of disease • Damage to agricultural lands • Disruption of educational services • Damage to tourism sector • Massive property damage 	<ul style="list-style-type: none"> • Life [ICCPR,6] • Health [ICESCR,12] • Water [CEDAW,14; ICRC 24] • Means of subsistence [ICESCR,1] • Adequate standard of living [ICESCR, 12] • Adequate and secure housing [ICESCR,12] • Education [ICESCR,13] • Property [UDHR,17]
<p>Changes in Precipitation</p> <ul style="list-style-type: none"> • Change in disease vectors • Erosion 	<ul style="list-style-type: none"> • Outbreak of disease • Depletion of agricultural soils 	<ul style="list-style-type: none"> • Life [ICCPR,6] • Health [ICESCR,12] • Means of subsistence [ICESCR,1]