

# CLIMATE CHANGE IN THE WORK OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Marcos A. Orellana, Miloon Kothari, Shivani Chaudhry



# Preface

It is with great pleasure that the Geneva Office of the Friedrich-Ebert-Stiftung (FES) is presenting this paper to the Members of the Committee on Economic Social and Cultural Rights (CESCR) and to a wider public interested in the interface between climate change and the enjoyment of human rights. The paper was commissioned to the Center for International Environmental Law (CIEL) and Habitat International's Housing and Land Rights Network (HLRN), both of which are partners of FES in working for the recognition of the human rights impacts of global warming and the inclusion of human rights standards and instruments in the global climate regime. I would like to thank the authors, Marcos A. Orellana, Miloon Kothari and Shivani Chaudhry for their thorough analysis of the subject and their insightful recommendations for action.

The paper at hand comes as a realization of one of the recommendations that were given at an initial workshop in January 2009, where a group of experts on environmental law, international and human rights law and representatives of human rights organizations were brought together by CIEL and FES to explore in-depth the impacts that global warming is and will be having on the enjoyment of human rights and how the human rights regime could respond to these new threats. As a result, different recommendations were formulated as to how the human rights agenda could be promoted vis-à-vis the climate negotiations and, no less importantly, how the human rights actors such as the Special Procedures, the different UN Committees and in particular the CESCR, alongside the Office of the High Commissioner for Human Rights and non-governmental organizations could protect the most vulnerable on our globe that will be hit most dramatically by climate change.

The CESCR has a particularly prominent role in finding remedies for the expected harms that the most vulnerable communities will suffer as it oversees most of the rights which are at the core of the debate on climate change and human rights: the right to housing, the right to food, to water and sanitation as well as the right to an adequate standard of living along with many other basic human rights are threatened in many countries as water and food supply will likely diminish due to droughts and the degradation of ecosystems, just to name one of the many impacts of global warming. The CESCR is likely to be challenged increasingly by the issue of climate change as some of the state reports it is receiving are likely to point to climate change related environmental degradations as causes for non-compliance with human rights obligations; it is also likely to receive complaints by individuals, (indigenous) communities and NGO's whose basic human rights have been violated as a result of climate change or the mitigation and adaptation strategies their or other governments have taken.

We believe that the paper at hand provides a good basis for an in-depth discussion with and among the Committee Members on both the existing working methods of the CESCR and potentially new instruments it might adopt to face the challenges ahead. In the spirit of past fruitful debates we have had with all the Members of the CESCR, I wish that this debate will not only take the CESCR but the entire human rights community a step further on the long way to tackling one of the most serious and challenging issues of our future.

Türkan Karakurt  
Director, Friedrich-Ebert-Stiftung Geneva

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## Introduction

According to the Office of the High Commissioner for Human Rights 2008 analytical report on climate change and human rights (CC&HRs), “global warming will potentially have implications for the full range of human rights,” and particularly for the rights to life, adequate food, water, health, adequate housing, and the right to self-determination.<sup>1</sup> Particularly affected are poor people living in the least developed States, arid and semi-arid regions, arctic regions, and small-island States, where global warming will have its most negative impacts and where adaptive capacity is already low. Most at risk are the rights of already vulnerable groups, such as indigenous peoples, minorities, women, children, the elderly, persons with disabilities, and other groups especially dependent on the physical environment. In addition to the environmental impacts of climate change, other major issues of concern include population displacement, forced migration, conflict and security risks, food insecurity, and the human rights impacts of response measures.

This paper describes how the CC&HRs issue has developed in practice and analyzes how it may be applied in the work of the Committee on Economic, Social and Cultural Rights [hereinafter CESCR or Committee]. In particular, the paper elaborates on the linkages between climate change and economic, social and cultural rights within the broader human rights and environment framework. Clarification of these linkages is useful for, inter alia: the consideration of reports and formulation of concluding observations; the elaboration of statements; the handling of complaints under the Optional Protocol; and the organization of a day of general discussion on the climate change and human rights interface.

This report is divided into seven sections. Following the introduction, the second section provides a short summary of human rights outcomes from the 2009 Copenhagen Conference on climate change. The third section provides an overview of the development of international environmental law, with a view to contextualizing the CC&HRs interface, as well as the human rights and environment jurisprudence. The fourth section discusses the jurisprudence of environmental cases involving human rights claims, and the development of climate change litigation in domestic and international practice. The fifth section relates these issues more specifically to the work of the CESCR, reviewing its working methods and existing links in its work to climate change, considering further possibilities in its reporting guidelines and list of issues and dialogs with State Parties, and highlighting existing obligations, national and international, that may be drawn upon. The sixth section considers the possibilities of complaints being brought pursuant to the Optional Protocol of the CESCR under various claims involving climate change. Finally, the seventh section provides some recommendations to the CESCR on how to anchor climate change considerations within its work.

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<sup>1</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 (15 Jan 2009), para. 20 [hereinafter OHCHR Climate Change Report].

## I. OVERVIEW OF HUMAN RIGHTS IMPACTS OF CLIMATE CHANGE

The following paragraphs provide a brief overview of some of the impacts of climate change on human rights.

The human rights to life and health are affected by the projected increase of death, disease, and injury from heat waves, floods, storms, extreme weather, fires, and droughts; hunger and malnutrition from food shortages; mortalities by ground-level ozone; and an expanded range and impact of illnesses and diseases.<sup>2</sup> The human rights to food and water will be affected as climate change reduces the supply and security (and raises costs) of both—through, for example, reduced yields in tropical regions for food, and for water through droughts, flooding, and decreased glacier and snow sources.<sup>3</sup> The human right to adequate housing is affected as sea level rise and storm surges flood coastal and flood-prone urban areas, affecting habitability as well as causing significant internal and extra-territorial relocation and displacement. This increases shelter needs and other needs such as protection from forced evictions without

consultation or remedy.<sup>4</sup> The right to culture is implicated for indigenous peoples to the extent their climate-sensitive ways of life are undermined by global warming, such as the loss of hunting opportunities for the Inuit or the loss of traditional territories of pastoral, forest and coastal communities.<sup>5</sup>

The right to self-determination of peoples is also affected by the impacts of climate change. Self-determination of communities of low-lying island States is affected as sea level rise threatens the territorial existence of their entire State, raising issues about their political status and legal protections in case of extra-territorial resettlement.<sup>6</sup> The self-determination and property rights of indigenous and tribal peoples may also be implicated if they are displaced from their traditional lands. More generally, self-determination is affected as a result of the loss of control over political, social and economic affairs and development, particularly as it concerns natural resources and the means of subsistence. In this connection, climate change threatens the very existence of States and survival

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<sup>2</sup> Id., para 21-24, 31-34.

<sup>3</sup> Id., para 25-30. *Report of the Human Rights Council Advisory Committee - Study on discrimination in the context of the right to food, including identification of good practices of anti-discriminatory policies and strategies*, A/HRC/13/32 (22 Feb. 2010) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-32.pdf>. *Report on "Climate Change and the Right to Food", prepared by the Columbia Law School under the supervision of the Special Rapporteur on the Right to Food (forthcoming)* <http://www2.ohchr.org/english/issues/food/index.htm>. Position Paper by the Independent Expert on water and sanitation on "Climate Change and the Human Right to Water and Sanitation", at [http://www2.ohchr.org/english/issues/water/lexpert/docs/ClimateChange\\_HRtWS.pdf](http://www2.ohchr.org/english/issues/water/lexpert/docs/ClimateChange_HRtWS.pdf).

<sup>4</sup> OHCHR Climate Change Report, supra note 1, para 35-38. Report of the Special Rapporteur on adequate housing to the 64th session of the General Assembly on the impact of climate change on the fulfillment of the right to adequate housing (A/64/255). *Report of the Special Rapporteur on adequate housing on the mission to Maldives -Preliminary note*, A/HRC/10/7/Add.4, available at <http://www2.ohchr.org/english/issues/housing/visits.htm>.

<sup>5</sup> See, 2004 Arctic Climate Impact Assessment, available at <http://www.acia.uaf.edu/pages/scientific.html> ("For Inuit, warming is likely to disrupt or even destroy their hunting and food sharing culture as reduced sea ice causes the animals on which they depend to decline, become less accessible, and possibly become extinct.").

<sup>6</sup> OHCHR Climate Change Report, supra note 1, para. 39-41. See IPCC AR4 WGII, IPCC Fourth Assessment Report (2007), p. 708.

<sup>7</sup> OHCHR Climate Change Report, supra note 1, para 65-68. Greiber, et al, Conservation with Justice: A Rights-based Approach, (2009) IUCN Env Policy and Law Paper No. 71. International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, chapter II.

of peoples, thus posing a direct threat to the fundamental right of self-determination.

Response measures to climate change raise another category of human rights issues.<sup>7</sup> Projects intended to mitigate climate change, including under the Kyoto Protocol's Clean Development Mechanism (CDM) or in the context of Reducing Emissions from Deforestation and Forest Degradation (REDD)—such as building a dam for hydropower, reforestation, or other land-use changes—may impact local communities and indigenous

communities and call for their effective participation to proceed (e.g., access to information; consultation; free, prior and informed consent; and access to justice).<sup>8</sup> Projects to transition food production to agro-fuel production may raise food prices (implicating the right to food) and may accelerate deforestation. State-managed relocation or displacement of threatened communities, even in-State, can also affect their rights in the same way as climate-caused displacement. As with the previous paragraph, these are examples.

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<sup>8</sup> See Marcos Orellana, *Climate Change and the Right to Development: International Cooperation, Financial Arrangements, and the Clean Development Mechanism*, (10 Feb 2010) A/HRC/15/WG.2/TF/CRP.3/Rev.1, available at <http://www2.ohchr.org/english/issues/development/right/docs/A-HRC-15-WG-2-TF-CRP-3-Rev1.pdf>.

## II. HUMAN RIGHTS OUTCOMES AT THE COPENHAGEN CONFERENCE OF THE PARTIES OF THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

Human rights considerations were relatively marginal in the outcomes of the UN climate change conference in Copenhagen, which ran from December 7-19, 2009. However, all six negotiating bodies active at Copenhagen produced language during the conference either referencing human rights considerations directly or involving ways to potentially recognize or protect human rights in practice.<sup>9</sup> With two exceptions, this rights-related language is directed at public action taken under the climate regime with the potential to affect people's rights, which activity can be broken down into climate adapting and mitigating actions.<sup>10</sup> In five cases the language involves direct rights-like appeals, and in two cases it involves general methods for engaging stakeholder or State views. It is important to note that these provisions are uncoordinated and fragmented across the complicated terrain of the climate regime, only applying within the boundaries of their text's 'topic' to a specific category of State action under either the United Nations Framework Convention on Climate

Change (UNFCCC) or Kyoto Protocol (and its State Parties, which vary). The two exceptions involve cross-cutting texts meant to apply to all actions under the UNFCCC. The following paragraphs offer a very brief summary of these provisions.

The two UNFCCC cross-cutting provisions are in the draft text "Shared Vision" by the ad hoc working group on long-term cooperation (AWG-LCA).<sup>11</sup> They are:

1. *HRC Resolution 10/4 and Vulnerable People.* The penultimate preambular paragraph of the "Shared Vision" draft text 'notes' (1) Human Rights Council Resolution 10/4 (2009), which recognizes the human rights impacts of climate change and the importance of UNFCCC implementation for realizing climate change-affected rights; and (2) persons vulnerable to climate change such as women, youth, the elderly, the disabled, indigenous peoples, minorities, and those made vulnerable by geography status.
2. *Civil Participation in Climate Decision-Making.*

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<sup>9</sup> The six negotiating bodies were active at Copenhagen: **COP**: the Conference of the Parties for the UNFCCC. **CMP**: COP serving as Meeting of the Parties for the Kyoto Protocol. **AWG-LCA**: Ad Hoc Working Group on Long-Term Cooperative Action. **AWG-KP**: Ad Hoc Working Group for Kyoto Protocol, setting post-2012 targets. **SBI**: Subsidiary Body for Implementation. **SBSTA**: Subsidiary Body for Scientific and Technological Advice.

<sup>10</sup> Adaptation activities include acts such as managing displaced peoples or extreme weather events. Mitigation-type activities include project-based activities (such as wind farms, dam projects, and other renewable energy source projects) and sectoral activities (such as setting fuel efficiency standards).

<sup>11</sup> Work Undertaken by the [COP] at its fifteenth session on the basis of the report of the [AWG-LCA] under the Convention, (11 Feb. 2010) FCCC/CP/2010/2, available at <http://unfccc.int/resource/docs/2010/cop16/eng/02.pdf> (modifying Report of the [AWG-LCA] under the Convention on its eighth session (5 Feb. 2010) FCCC/AWGLCA/2009/17, available at <http://unfccc.int/resource/docs/2009/awglca8/eng/17.pdf>.) One complication is that there currently exist two versions of the AWG-LCA draft texts competing for the status of "latest draft", one drafted by the AWG-LCA and one later drafted by COP-drafting groups (so technically COP draft texts) as suggestions to future AWG-LCA work with ambiguous status. Usually the differences are minor. This summary will focus on the shared meaning of both texts, but quote the COP-drafted version when necessary.

Another preambular paragraph of the same text recognizes “the need to engage a broad range of stakeholders”, including government, business, civil society, youth, persons with disability, women, and indigenous peoples in climate decision-making.<sup>12</sup>

The five provisions with rights (or rights-like) language involving specific government activities, all under the UNFCCC (not the Kyoto Protocol), are:

1. *General Participatory Rights for Adaptation Activities.* The third preambular paragraph of the AWG-LCA’s “Adaptation” draft text affirms that such activities should follow “a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems....”<sup>13</sup>
2. *Participatory Rights of Indigenous Peoples and local communities for Projects involving Reducing Emissions from Deforestation and Degradation (REDD)*
  - (a) The fourth preambular paragraph of the COP Decision “Methodological Guidance,” originally drafted by the Subsidiary Body for Scientific and Technological Advice (SBSTA), recognizes “the need for full and effective engagement of indigenous peoples and local communities” and their knowledge for monitoring and reporting REDD decisions.<sup>14</sup> Paragraph 3 of the same text encourages developing tools for such engagement.<sup>15</sup>

Paragraphs 2(c) - (e) of the AWG-LCA’s draft text on “REDD” affirms the need to promote and support “safeguards” for indigenous peoples and local communities in REDD activities, including: respect for their knowledge and rights; recognition of the UN Declaration on the Rights of Indigenous Peoples; a requirement for full and effective participation of all relevant stakeholders “including, in particular, indigenous peoples and local communities”; and a requirement to take into account the “livelihoods of indigenous peoples and local communities and their interdependence on forests.”<sup>16</sup>

3. *Displacement Due to Climate Change.* Paragraph 4(f) of the AWG-LCA’s draft text on the “Adaptation” calls for “Measures to enhance understanding, coordination and cooperation” for domestic and extraterritorial climate-change induced “displacement, migration and planned relocation.”<sup>17</sup> There is no mention of the rights of displaced people, however.
4. *Agriculture, the Right to Food, Land and other Rights.* The third preambular paragraph of the AWG-LCA’s “Agriculture” draft text recognizes the “rights of indigenous peoples and traditional knowledge and practices, in the context of applicable international obligations” in the context of agricultural reforms.<sup>18</sup>

Finally, a number of texts involving two other mitigation-type activities are in the process of developing methods to involve stakeholder or

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<sup>12</sup> *Id.*, at 5.

<sup>13</sup> Annex II: Enhanced action on adaptation, (11 Feb 2010) FCCC/CP/2010/2, para. 3.

<sup>14</sup> Decision 4/CP.15: Methodological guidance for activities relating to REDD and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, FCCC/CP/2009/11/Add.1, available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> (30 March 2010), at 11 (adopting [REDD]: approaches to stimulate action, FCCC/SBSTA/2009/L.19/Add.1, available at <http://unfccc.int/resource/docs/2009/sbsta/eng/l19a01.pdf> (11 Dec. 2009)).

<sup>15</sup> *Id.*, at para. 3.

<sup>16</sup> Annex V: Policy approaches and positive incentives on issues relating to [REDD] in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; FCCC/CP/2010/2 (11 Feb 2010) (modifying Annex I G of FCCC/AWG/LCA/2009/17 (17 Dec 2009)), paras. 2(c), 2(d), 2(e) footnote 3, 7.

<sup>17</sup> Annex II, enhanced action on adaptation, FCCC/CP/2010/2, para. 4(f).

<sup>18</sup> COP-Work Report, Annex VIII, Cooperative sectoral approaches and sector-specific actions in agriculture.

host-State participation or views in decision-making on the activities. The first, a decision by the Kyoto Protocol's governing body on the CDM, outlines processes for stakeholder consultation, review, approval, and appeals for CDM Projects under the Kyoto Protocol (i.e., developed States funding climate mitigation projects in developing States in return for carbon credits).<sup>19</sup> The second involves three draft texts (under both the UNFCCC and Kyoto Protocol) on the topic of State reporting, assessing, and responding to "social and economic consequences of response measures" or

their "spillover" effects.<sup>20</sup> None of the proposals under either category involve specific appeals to the rights of people affected by the activities, but it is worth noting that, to the extent new general methods or mechanisms are developed to engage stakeholder or State participation or comment over planned activities, these mechanisms may in practice provide a space for human rights concerns to enter the decision-making for the activities, depending on the particular technical ways such comments or participation is made available under each category.

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<sup>19</sup> Decision 2/CMP.5: Further guidance relating to the clean development mechanism, FCCC/KP/CMP/2009/21/Add.1, available at <http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf> (30 March 2010), paras. 8, 39, 42, 43.

<sup>20</sup> Annex, Matters relating to Article 2, paragraph 3, of the Kyoto Protocol (11 Dec 2009) FCCC/SBSTA/2009/L.18, at 2 ff. Annex II, Matters relating to Article 2, paragraph 3 of the Kyoto Protocol, FCCC/SBSTA/2009/8 (12 Feb 2010), at 16 ff (SBSTA Report). Annex I, Matters relating to Article 3, paragraph 14, of the Kyoto Protocol, (16 Feb 2010) FCCC/SBI/2009/15, at 18 ff (SBI Report). Annex VI, Economic and social consequences of response measures, supra note 18, at 31ff (COP-Work Report). Annex I.H., Enhanced national/international action on mitigation of climate change: economic and social consequences of response measures, supra note 11, at 38ff (AWG-LCA Report). Consideration of information on potential environmental, economic and social consequences, including spillover effects, of tools, policies, measures, (28 Jan 2010) FCCC/KP/AWG/2009/17, at 45ff (AWG-KP Report).

### III. DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

The development of international environmental law (IEL) over the last century can be conceived as following a very broad trend from reacting to relatively narrow and discrete concerns of pollution clean-up in its early period to developing more holistic, governance-oriented approaches addressing the underlying causes of harm as it has matured. This includes covering wider areas of human activity with more robust and interconnected institutions, as well as forging links with related regimes such as investment, trade, and human rights.

The beginnings of modern IEL reach back into 19th and early 20th century treaties for managing shared living resources—fish, fur seals, useful birds—which took a very narrow instrumental view of protection to suit human needs. The 1930s through the 1950s saw an increasing ecological focus on reservations and pollution from the rapid development of industrialized countries, with the 1941 *Trail Smelter* case establishing the important principle that a State may not permit the harm of another State’s territory through trans-boundary pollution.<sup>21</sup>

The end of the 1960s saw the rise of the modern environmentalist movement and rapid developments in environmental regulation, culminating internationally with the Stockholm Conference of 1972, which laid the foundation for subsequent environmental cooperation. While there was some institutional develop-

ment (e.g., the creation of the United Nations Environment Programme (UNEP)), the Conference’s main outcome was the Stockholm Declaration on the Human Environment.<sup>22</sup> The Stockholm Declaration expressed the first explicit link between human rights and the environment in an international agreement in its first principle, where it defined a human right to “adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being,” as well as a responsibility to protect and improve the environment for present and future generations.

Other important principles in the Stockholm Declaration include a restatement of the *Trail Smelter* principle that States have the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to not damage the environment of other States or extra-territorial areas (Para. 21); the principle of ‘common but differentiated responsibilities’ whereby environmental norms apply differentially to recognize the needs of developing States (Para. 23); and substantive calls to maintain natural resources and avoid specific types of pollution (Paras. 2-7), promote economic and social development as conditions for environmental protection (Paras. 8-11), and transfer financial and technical aid, and international assistance to help developing States meet their obligations (Paras. 9, 12).

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<sup>21</sup> Arbitral Award in the *Trail Smelter Case* (Mar. 11, 1941), 3 UNRIAA 1905.

<sup>22</sup> Report of the U.N. Conference on the Human Environment, from the U.N. Conference in Stockholm, Sweden [Stockholm Declaration] Stockholm, 16 June 1972), U.N. Doc. A/CONF.48/14, 11 I.L.M. 1416 (1972).

Many important multilateral environmental agreements (MEAs) were promulgated following the Stockholm Conference into the 1970s and 1980s. They were oriented increasingly beyond end-of-pipe cleanup and towards regulating the sources of risks (such as industrial emissions and trade of species), risks across the lifetime of products (such as disposal of hazardous wastes), and newly discovered risks (such as the ozone layer and climate change issues).

The most important development from the late 1980s was an increasing focus on “sustainable development.” The integration of development policies and environmental protection was stressed by the influential Brundtland Report (1987) and inspired the 1992 UN Conference on Environment and Development (UNCED) in Rio de Janeiro (the Rio Conference). The Rio Conference produced, among other works,<sup>23</sup> a Declaration on Environment and Development (the Rio Declaration) reaffirming the Stockholm Declaration principles but focusing its 27 principles more through the lens of sustainable development.<sup>24</sup> Important principles include: the right to a healthy environment and the right to development, for present and future generations of humankind (Paras. 1 and 3); environmental protection is part of development and cannot be considered in isolation (Para. 4); the “precautionary principle” allowing regulation without waiting for “full scientific certainty” (Para. 15); the “polluter pays” principle (Para. 16); requiring “environmental impact assessments” in certain cases (Para. 17); and requiring public information, participation, and remedies for environmental issues (Para. 10).

The principles of IEL recognized in the Stockholm and Rio Conferences are both inspired by, and consistent with, recognized principles of international human rights law, including the principles of “non-discrimination,” “non-retrogression,” “right to participation,” “right to a remedy,” “international cooperation,” among others. The congruence between these principles reinforces the human rights and environment linkages and provides a further basis for action for the CESCR with respect to climate change.

The UN Special Rapporteur on Adequate Housing in his statement to the World Summit on Sustainable Development stated that there was a need:

[...] to recognize the **value of human rights principles and instruments as a basis for sustainable development.** Several Multilateral Environment Agreements (MEAs), such as the Convention on Biological Diversity, have close affinity to the international human rights instruments. Both the MEAs and the human rights instruments protect entitlements to self-determination, decentralization, primacy of people's rights, gender equality, ecological sustainability, and protection of culture and traditional knowledge especially for indigenous peoples.<sup>25</sup>

Following the Rio Conference, international environmental considerations began to be more widely recognized across and adopted within other regimes in international law.<sup>26</sup> Also, more important MEAs and instruments were adopted on climate change, genetically modified organisms, hazardous chemicals, and

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<sup>23</sup> Four other texts coming out of the Rio Conference were the adoption of the UN Framework Convention on Climate Change and the Convention on Biological Diversity, a declaration on forest conservation, and Agenda 21, an 800+ page document discussing a large range of substantive issues and institutional aspects of IEL.

<sup>24</sup> United Nations Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992).

<sup>25</sup> Statement of the Special Rapporteur on Adequate Housing, Miloon Kothari, to the World Summit on Sustainable Development, Johannesburg, 2002 at: <http://www.unhchr.ch/Hurricane/Hurricane.nsf/60a520ce334aaa77802566100031b4bf/f9025f723f7eb70ec1256f5b003ae963?OpenDocument>

<sup>26</sup> Examples include environmental considerations in the World Trade Organization, the North American Free Trade Agreement, The UN Human Rights Council, the World Health Organization, the International Committee of the Red Cross, etc.

persistent organic pollutants. Other MEAs focused on particular eco-systems or regions, such as deserts, transboundary watercourses and rivers, mountain ranges, and the arctic and Antarctic regions. Yet other MEAs explicitly elaborated the human rights and environment interface, such as the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

In 2002, the World Summit on Sustainable Development reaffirmed the Rio texts and focused attention on implementation and compliance of IEL agreements and coordination among their secretariats, acknowledging the interrelated, holistic nature of many environmental problems and the challenges of compliance. Since this time, new MEAs and instruments have continued to be negotiated and old regimes have continued to be strengthened and refined. Since WSSD, a further emphasis on sustainable development has also focused attention on integration of various international legal regimes and policy objectives, such as between environment and international economic law, development and poverty eradication. The International Law

Association, for example, has formulated the “principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives”.<sup>27</sup> In regard of the principle of integration, the ultimate objective of the UNFCCC, i.e., the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”, could be interpreted in light of human rights considerations and the need to ensure that climate change impacts and responses do not undermine the realization of human rights.

Broadly speaking, the development of IEL has led to a field of institutionally mature MEAs and instruments addressing many areas of environmental concern. The development continues as global environmental challenges, such as climate change, continue to press IEL to seek more holistic and interconnected governance to adequately address them. The long-recognized relationship between IEL and human rights has an important role to play in this continuing development.

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<sup>27</sup> ILA Resolution 3/2002: New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development , in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002).

## IV. INTERNATIONAL LITIGATION INVOLVING ENVIRONMENTAL HARM & HUMAN RIGHTS CLAIMS

### A. Human Rights and Environment in Evolving International Jurisprudence

Several cases decided by human rights tribunals and bodies have clarified the intersection of environmental harm and human rights claims (see Annex 1 for a more comprehensive list). Broadly speaking, environmental factors can involve human rights obligations in three ways: (1) environmental harm can directly affect a protected right, giving public authorities a duty to take protective measures; (2) environmental harm can implicate procedural rights, such as a duty to inform affected people, establish effective channels for public participation, and ensure access to justice; and (3) public measures to protect the environment can affect rights, which may or may not be justified depending on, e.g., its aim or burden relative to public benefit.<sup>28</sup> Complaints brought before the UN treaty bodies, Inter-American, and European human rights tribunals have involved allegations of environmental harm either violating a national environmental right (such as a constitutional right to an ‘environment of quality’) or one or more rights under their supervision. In this latter category, the rights most often infringed in connection with environmental issues include the rights to

life, health, property, culture, information, privacy and home life.<sup>29</sup>

So far, only the African Commission on Human and Peoples’ Rights has protected a ‘right to a satisfactory environment,’ in light of the wording of the African Charter of Human and Peoples’ Rights. In the *Ogoni* case, the applicants alleged that the oil extraction operations produced environmental degradation and health problems to people of Ogoniland in Nigeria.<sup>30</sup> They argued that oil companies had disposed toxic wastes and caused numerous avoidable spills near villages, consequently poisoning much of the region’s soil and water. The African Commission found that the right to a general satisfactory environment imposes clear obligations upon a government, requiring the State, “to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>31</sup>

Regarding substantive rights claims, a paradigmatic case is *López Ostra*, decided by the European Court of Human Rights, on the level of degradation which violates a protected right, here the right to “private life and the home” (Article 8) being undermined by fumes

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<sup>28</sup> See Council of Europe Publishing, *Manual on human rights and the environment* (2006), at 5-6.

<sup>29</sup> This analysis provides the State a margin of appreciation in meeting a legitimate aim, defined by whether the measure’s burden is proportionate to the legitimate aim, weighing the individual’s and community’s interests. See D Shelton, ‘Developing substantive environmental rights’, (2010) 1 J of Hum R’s & the Env 92. D Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?’ (2006) 35 Denv J Int’l L & Pol’y 129.

<sup>30</sup> African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, (2001).

<sup>31</sup> *Id.*, at para. 52.

from a tannery waste treatment plant. It held that severe pollution may affect individuals' well-being enough to violate Article 8 without affecting health, as long as the enjoyment of the right was seriously impacted without a fair balance between the public interest and the effective enjoyment of the right.<sup>32</sup> Later jurisprudence elaborated that mere environmental degradation alone is not enough; there must be a minimum level of adverse effect on the right, but it need not reach the level of proven injury to health.<sup>33</sup> It is enough if serious risks are verifiably posed.

Another important line of jurisprudence involves positive obligations on the State to protect specific rights. In the context of indigenous peoples rights, the Inter-American Commission held in *Yanomami v. Brazil* that the State violated the Yanomami's (an indigenous people) rights to life, liberty and security (Article I) and other rights because the government failed to implement affirmative measures to protect their safety and health during a highway construction project it authorized through Yanomami territory which brought, among other harms, untreated contagious diseases.<sup>34</sup>

The Inter-American Court, in *Saramaka People v. Suriname*, further elaborated on the protections incumbent upon the State when affecting indigenous and tribal peoples lands and natural resources.<sup>35</sup> The case involved logging and mining concessions granted by Suriname on the tribal Saramaka people's territory without their effective consultation.

The Court elaborated a framework of safeguards, so that restrictions on the right to property of the Saramaka over the natural resources necessary for the continuation of their way of life would not endanger their survival. The Court required the State to meet three affirmative duties: (a) ensure effective consultations, and free, prior, and informed consent with respect to major development projects, according to their customs; (b) guarantee that the Saramaka receive a reasonable benefit from the investment plan; and (c) refrain from issuing concessions without a prior environmental and social impact assessment.<sup>36</sup> Because the concessions did not fulfill these safeguards, the Court found Suriname responsible of the violations suffered by the Saramaka.

The reasoning in the *Saramaka* case has been recently followed by the African Commission of Human and Peoples' Rights in the case of the Endorois Community.<sup>37</sup> The complainants argued that the displacement of the Endorois community from their ancestral lands by the Kenyan government to create a game reserve, as well as the failure to adequately compensate them for the loss of their property, violated their rights. The African Commission found Kenya responsible for the land rights violation and recognized the indigenous peoples' rights to ancestral land that they traditionally occupied and used.<sup>38</sup> In addition, the African Commission concluded that the Kenyan government violated the Endorois' right to freely dispose of their wealth and natural resources because they never received

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<sup>32</sup> Lopez Ostra v Spain, (1994) Eur Ct Hum Rts Series A, No. 303C.

<sup>33</sup> See Fadayeve v Russia, no 55723/00 (judgment 9 June 2005) 2005/IV Eur Ct H R 255 (2005); Kyrtatos v Greece (App no 41666/98) Reports 2003-VI (22 May).

<sup>34</sup> Yanomami Case, Res No 12/85, Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985*, OEA/Ser.L/V/II.66, Doc 10, Rev 1 (1985) 24.

<sup>35</sup> *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Ser. C, No. 172, (Inter-Am. Ct. H.R. Nov. 28 2007). See generally, Marcos Orellana, *Saramaka People v. Suriname*, Vol. 102, No. 4 Am. J. of Int'l L. 841 (2008).

<sup>36</sup> *Id.*, paras. 129 & 134.

<sup>37</sup> Centre for Minority Rights Development on behalf of Endorois Community v. Kenya, Comm. 276/2003, May 2009.

<sup>38</sup> *Id.* para. 199.

adequate compensation or restitution for their land.<sup>39</sup>

Inherently dangerous activities were given particular treatment by the European Court of Human Rights in *Oneriyildiz v. Turkey*, involving a mismanaged waste-dump site that exploded, killing people illegally living around it. The Court found that the right to life (Article 2) applies “in the context of any activity, whether public or not, in which the right to life may be at stake,” creating a duty of care depending on the inherent danger, the risk exposed to the individual, the status of those creating the risk, and whether it was deliberate.<sup>40</sup> The Court found, considering the evidence, that the authorities knew the risk and needed to take preventive measures “particularly as there were specific regulations,” giving them an obligation under Article 2 to take preventive measures to protect the individuals, which they failed to do.<sup>41</sup> The case is also notable in that the Court recognized the affected persons’ right to information in light of the danger, giving the government the affirmative duty to inform the affected persons concerning the risks to life and to investigate when loss of life occurred.<sup>42</sup>

This line of jurisprudence has also been applied to climate-related harms in *Budayeva and Others v Russia*, where the same standard of care was found to apply to known and dangerous natural disasters. *Budayeva* involved government knowledge of risk and a failure to act in a situation of repeated mudslides of “mortal risk.”<sup>43</sup> The Court found

that the government failed substantive duties to take reasonable precautions or form relief policies with resulting deaths and property loss, as well as procedural duties to inform the population about risks and evacuation measures or to investigate the accident, all amounting to a rights violation.<sup>44</sup>

Regarding issues of causality, evidence and precaution, some human rights procedures limit standing to ‘victims’ of violations, requiring a sufficient risk to qualify an applicant as a victim, raising evidentiary questions.<sup>45</sup> In many cases, the evidentiary basis of a claim comes from domestic fact-finding or reports or standards of reputable scientific organizations, such as with *Oneriyildiz* and *Fadayeva v Russia*.<sup>46</sup> The latter case is instructive. In it, the European Court of Human Rights made a presumption of harmful exposure based on steel mill emissions significantly exceeding the national safety standard and had evidence of the applicant’s health deteriorating (the medical report not specifying a cause but noting that it was exacerbated by the exposure). The presumption and evidence were enough for the Court to find the emissions affected her quality of life by their contribution, not requiring a specific quantification of its effects, but nevertheless maintaining a high standard of proof.

Finally, in the particular context of economic, social and cultural rights, the case of *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, exemplifies the linkages

<sup>39</sup> Id. para 268.

<sup>40</sup> *Oneriyildiz v Turkey* [GC], Reports 2004-VI (30 November 2004).

<sup>41</sup> Id., para. 101.

<sup>42</sup> Id., para 90.

<sup>43</sup> *Budayeva and Others v Russia* (App no 15339/02) & Ors (20 March 2008). <sup>37</sup> Centre for Minority Rights Development on behalf of Endorois Community v. Kenya, Comm. 276/2003, May 2009.

<sup>44</sup> More specifically, the court found a violation of Article 2 (right to life) because the precautions could have prevented the deaths, although not Protocol 1, Article 1 (right to property) because the precautions might not have prevented the loss of property (since the mudslide was unprecedentedly severe).

<sup>45</sup> See *Bordes and Temeharo v France* (30 July 1996) Comm No 645/1995, CCPR/C/57/D/645/1995 (finding the risk of radiation from French nuclear testing in the South Pacific too remote to qualify the applicants as victims).

<sup>46</sup> *Oneriyildiz*, supra note 40. *Fadayeva v Russia*, no 55723/00 (judgment 9 June 2005) 2005/IV Eur Ct H R 255 (2005).

between the right to health and air pollution caused by lignite coal-fired facilities generating electricity. In this case, the European Committee for Social Rights concluded that Greece's policies toward lignite mines and power plants violated its obligations under Article 11 of the European Social Charter, which requires States to take certain measures in furtherance of the right to health. The Committee chastised Greece for failing to make sufficient progress toward the goal of "overcoming pollution". It found, *inter alia*, that Greece had too few inspectors; that its fines were insufficient to deter violations of its air quality standards; and that it had not shown that the power plants had adopted best available techniques to reduce pollution. The Committee stated that, "even taking into consideration the margin of discretion granted to national authorities in such matters, Greece has not managed to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest".<sup>47</sup>

As this jurisprudence demonstrates, the link between environmental harm and human rights has been firmly established in human rights courts and treaty bodies. This includes harms caused by the actions and failures of public authorities to act, private corporations under public authorization, and climate-related disasters that are inherently dangerous and well-known, as well as harms to indigenous peoples and their territories. Climate-related harms and human rights can thus be said to not constitute new territory for rights litigation, but rather to be part of an already well-established jurisprudence.

The evolution of human rights and environment jurisprudence thus opens an important role for the CESCR with respect to allegations of violation of rights included in the Covenant brought before it under the Optional Protocol. In respect of this role, the CESCR may benefit from an overview of the various approaches that have been adopted in climate change litigation. We turn there next.

## **B. Approaches to Climate Change Litigation**

Since the early 1990s when the first climate change-related cases were heard, climate litigation, petitions, and other legal actions have become increasingly prevalent within and across countries and international bodies.<sup>48</sup> Early tribunals were challenged by the (at the time novel) characteristics of climate change—e.g., every greenhouse gas (GHG) emission collectively contributes and impacts are global—and with questions about victimhood, causation, and responsibility. As the jurisprudence has matured and the phenomenon of climate change become better understood, courts have grown more confident in addressing these issues, allowing cases to proceed to the merits and providing remedies for plaintiffs in appropriate situations.

A leading case in this development is the U.S. Supreme Court decision in *Massachusetts v. EPA*.<sup>49</sup> In this case the Court found that Massachusetts did have standing regarding global warming, based on the "actual" and "imminent" injury of, *inter alia*, losing its coastal land, some of which had already been lost.<sup>50</sup> The defendant's argument that the harm

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<sup>47</sup> Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint no. 30/2005, para. 221.

<sup>48</sup> See <http://www.climatelaw.org/cases/country/>. The countries include at least Argentina, Australia, Belize, Canada, Czech Republic, Federated States of Micronesia, Germany, Nepal, Nigeria, New Zealand, Peru, United Kingdom, and United States. International bodies include the Inter-American Court of Human Rights, Kyoto Compliance Committee, European Union Court of Justice, OECD, and UNESCO.

<sup>49</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>50</sup> *Id.* cited in Chris Wold, Melissa Powers & David Hunter, *Climate Change and the Law*, pg. 510 (2009).

was “widely shared” did not remove Massachusetts’ concrete harm, in the Court’s view. On the issue of causation (or “fair connection”),<sup>51</sup> the Court rejected the argument that the defendant’s actions only “contributed” to Massachusetts’ injury and that remedying it would not stop global warming, arguing that an incremental contribution was sufficient to meet the requirement, and that the contribution was “meaningful.”<sup>52</sup>

Building on this and similar jurisprudence, domestic and international courts have been increasingly willing and able, generally speaking, to integrate climate cases into the established jurisprudence of environmental law, applying the traditional elements of claims to the specific circumstances of climate change. Relevant cases (under domestic and international law) broadly fall into three categories:<sup>53</sup> (1) administrative law actions calling for or reviewing government agency actions; (2) common law tort claims by climate-impacted victims against significant emitters; and (3) constitutional or international human rights claims by injured parties against significant emitters, countries allowing significant emissions, and non-emitters with duties to protect people in climate change-related situations such as during dangerous weather events or mitigation projects like dam-building. The following sections discuss each category.

## 1. Administrative Claims

Administrative claims allow affected parties to petition resistant government agencies to address climate risks as part of their existing legal obligations. In *Massachusetts v EPA*, responding to the challenge of such a petition, the US Supreme Court interpreted the US Environmental Protection Agency’s (EPA) obligations to require it to consider GHGs when setting vehicle emission standards, as plaintiffs had petitioned.<sup>54</sup> This trend continued in a set of cases involving environmental impact assessments (EIAs) and similar analyses, which agencies are required to consider when developing or approving certain projects. Cases arise when the agencies refuse to consider climate-impacts and plaintiffs petition for their inclusion. In the paradigmatic Australian cases *Hazelwood* and *Anvil Hill*, both involving the approval of new or alternative coal sources, state courts rejected the agencies’ arguments that the climate impacts of developing the coal sources were not “direct” enough for EIA consideration.<sup>55</sup> The courts responded that the activities would invariably contribute to global warming, making the climate impacts sufficiently “direct”. Two characteristic features in all of these cases are a focus on the clear statutory language of the obligation (as opposed to political considerations beyond the obligation), and an understanding of agency “discretion” as pertaining to how it meets its

<sup>51</sup> Note that within U.S. practice, the finding of causation necessary for purposes of plaintiff standing is weaker than that necessary to meet the causation element for a common law tort, although they are related inquiries.

<sup>52</sup> The action at issue, refusing to reduce U.S. automobile emissions, involved a source of emissions constituting 6% of worldwide carbon dioxide emissions, “a meaningful contribution to greenhouse gas concentrations.” *Id.*, cited in Chris Wold, Melissa Powers & David Hunter, *Climate Change and the Law*, pg. 511 (2009).

<sup>53</sup> This does not include non-environmental types of claims beyond the scope and purposes of this paper, such as contract claims for carbon credit transactions.

<sup>54</sup> Or provide a statutorily-grounded reason why it refuses. But in the Court’s interpretation, effectively the only reason available for it to refuse is if, in its judgment, it finds that GHGs do not impact the climate and human welfare. *Massachusetts v EPA*, *supra* note 48.

<sup>55</sup> *Re Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 (*Hazelwood*); *Gray v The Minister for Planning* [2006] NSWLEC 720 (*Anvil Hill*); but see *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736 (*Wildlife Whitsunday*). US federal courts have similarly rejected agency refusals to consider climate-effects in EIA and EIA-like analyses; see *Friends of the Chattahoochee Inc v Couch*, No. 2008 CV146398 (Ga. Supr. Ct., 30 June 2008) (“best technology” analysis for coal plant), *Center for Biological Diversity v NHTSA*, 508 F.3d 508 (9<sup>th</sup> Cir. 2007)(EIA for changing fuel economy standards for certain vehicles).

obligation according to its language, but not whether it meets its obligation at all.

## 2. Common Law Tort Claims

Three cases, all U.S. nuisance claims, exemplify the current state of climate-related tort litigation: *Kivalina v ExxonMobile Corp*, *Connecticut v AEP*, and *Comer v Murphy Oil*.<sup>56</sup> U.S. Circuit courts in the latter two cases followed the lead of *Massachusetts v EPA* and granted standing to the plaintiffs (eight states, inter alia, in *Connecticut*; victims of hurricane Katrina in *Comer*), considering them having an “actual or immanent” injury by a “fair connection” to the actions of the defendants, significant emitting parties such as oil and power companies. The cases have yet to reach the merits stage at the time of this writing. These cases may be contrasted to the decision in *Kivalina*, involving an Alaskan tribe losing its protective ice sea-wall to warming and similarly suing oil and power companies. The district court deciding the case did not find a “fair connection” to the defendants’ action and dismissed the case. It is being appealed.

Looking at the arguments of the three decisions, the principal difference in outcome appears to involve how each judge understands the harm of global warming. The district court dismissing *Kivalina* analogized climate change to thousands of people dumping waste into a large river, with the plaintiff getting sick from contact, as if the harm of climate change were rooted in individual, separable emissions each doing their own individual harm.<sup>57</sup> This would call on

courts to trace a specific emission to the plaintiff’s contact, an impossible task. The circuit courts and Supreme Court that found standing for the climate-based claims, on the other hand, understand the harm of climate change as being rooted in a holistic system of global warming to which all emissions collectively contribute, including the defendant’s.<sup>58</sup> This also represents the best characterization of the scientific position.<sup>59</sup> It remains to be seen how these cases will be resolved on the merits of their individual tort claims.

## 3. Rights-based Claims

There has been relatively little litigation in the area of climate change and human rights against significant emitting parties as of this writing. The two most notable cases, *Gbemre v. Shell* in Nigeria and the Inter-American Commission’s *Inuit Petition*, are most noteworthy in not contributing to the jurisprudence.<sup>60</sup> In the *Gbemre* case, a domestic Nigerian court found a violation of villagers’ constitutional rights to life and dignity by Shell for practicing gas flaring (burning excess gas into the air) near their village, including for the harm, inter alia, of contributing to global warming which affected the villagers. Unfortunately, the court did not give reasons for its decision or discuss any of the issues other courts have confronted.

The *Inuit Petition* involved a petition by the Inuit indigenous peoples of Arctic regions to the Inter-American Commission of Human Rights against the United States (as a State

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<sup>56</sup> *Kivalina v ExxonMobile Corp*, Case No. C 08-1138. SBA (N.D. Ca. Sept. 30, 2009), *Connecticut v AEP*, 406 F. Supp. 2d 265 (SDNY 2005); *Comer v Murphy Oil*, 2006 WL 1474089 (S.D. Miss. Apr. 19, 2006).

<sup>57</sup> *Kivalina*, supra note 55, at 16-22 (analogizing climate change to *Tx. Indep. Producers v EPA*, 410 F.3d 964 (2005)).

<sup>58</sup> *Massachusetts*, cited in Chris Wold, Melissa Powers & David Hunter, *Climate Change and the Law*, pg. 510 (2009).

<sup>59</sup> See IPCC Fourth Assessment Report, supra note 6.

<sup>60</sup> *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). *Gbemre v Shell*, judgment, Suit No. fhc/b/cs/53/05, Fed. H. Ct. of Nigeria, Benin Jud. Div. (14 Nov. 2005).

allowing significant emissions) for the impacts global warming has had on their rights to, inter alia, culture, property, life, health, security, means of subsistence, and residence, as the warming had caused serious health problems, disrupted culturally important ways of life like subsistence hunting and igloo-making, and made tracks of their land inaccessible. In response to their petition the Inter-American Commission noted that it cannot process the petition “at present” because it “does not enable [it] to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration.”<sup>61</sup>

Thus, human rights jurisprudence against GHG emitting States for climate-related harms remains undeveloped. However, the elements involved in such litigation (victimhood, causation, responsibility, state duties, etc) may be informed by the developments in other regimes, e.g., administrative and tort law discussed above.

At the same time, human rights claims against States in climate change-related situations find

support in well-established human rights jurisprudence. This includes government duties to protect people when engaging in climate adaptation or mitigation projects, like forceful relocation or dam-building projects, or from the foreseeable dangerous impacts of global warming, such as the mudslide in *Budayeva*, floods, sea inundation, extreme weather, population dislocations, illnesses, etc. A clear understanding of “climate change” still plays an important role in such cases. The reality of global warming informs what governments and corporations know, what risks to people in their care they can foresee, what duties they have towards such people, and what behavior is unreasonable. For example, while the mudslide in *Budayeva* was “unprecedented,” affecting what the State could expect and thus the scope of its human rights’ duties, the reality of global warming means that such “unprecedented” effects will nevertheless be increasingly “foreseeable.” Human rights tribunals will need to develop their jurisprudence to account for such global warming-informed considerations accordingly.

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<sup>61</sup> Inter-American Commission on Human Rights Response to [Inuit Petition] (Nov. 16, 2006). The Commission subsequently allowed petitioners to testify at a thematic hearing on the relationship between global warming and human rights.

## V. THE COMMITTEE'S WORK RELATING TO THE LINKS BETWEEN HUMAN RIGHTS, THE ENVIRONMENT AND CLIMATE CHANGE

### A. Background

Under the International Covenant on Economic, Social and Cultural Rights, State Parties are obliged to submit regular reports to the Committee on the implementation of the Covenant ("State Reports" or "Reports").<sup>62</sup> State Reports are publicly examined by the Committee during its biannual sessions, at which time the Committee engages in a dialogue with representatives of the reporting State with respect to such Reports.

A working group of the Committee meets prior to each of the Committee's sessions and is tasked with identifying in advance the questions that will constitute the principal focus of the dialogue with representatives of the reporting State Parties. This process results in the generation of a list of issues, which is then given directly to the representatives of reporting States. State Parties are urged to provide written replies to the list of issues in advance of the session at which their Report will be considered. The Committee then examines each State Report and raises concerns and makes recommendations to State Parties in the form of its Concluding Observations.

The Committee provides opportunities to non-governmental organizations to submit relevant information for its consideration in con-

junction with the State reporting process. Further, the Committee notes that it seeks to coordinate its activities with those of other bodies and specialized agencies of the United Nations, UN country missions, and other bodies to the greatest extent possible and to draw as widely as it can on available expertise in the fields of its competence. Although the Committee adopts a pro-active approach to inter-agency dialogue, other UN bodies and specialized agencies do not always correspond.

In addition to the State reporting process, the Committee undertakes the preparation of General Comments on the interpretation of various articles and provisions of the Covenant, with a view to assisting State Parties in the fulfillment of their obligations. The Committee also adopts statements to clarify and confirm its position with respect to major international developments and issues bearing upon the implementation of the Covenant.

### B. General Comments

The Committee has given some consideration to the effects of climate change in its General Comments. The Committee has also elaborated on environmental considerations relevant to the Covenant.

In General Comment No. 15 – The right to water,<sup>63</sup> the Committee states the following in its delineation of the obligations on State

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<sup>62</sup> ESCR, Articles 16 and 17.

<sup>63</sup> General Comment No. 15 (2002) – The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003.

Parties flowing from the right to water:

States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: ...(e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity;...<sup>64</sup>

The Committee further notes that “environmental hygiene” is an aspect of the right to health under Article 12(2)(b) which “encompasses taking steps... to prevent threats to health from unsafe and toxic water conditions.”<sup>65</sup>

In General Comment No. 14 – The right to the highest attainable standard of health,<sup>66</sup> the Committee, in its discussion of the drafting history of Article 12(2), states “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as... a healthy environment.”<sup>67</sup>

The Committee also cites the preamble and Article 3 of the UNFCCC in reference to the “emerging international law and practice and the recent measures taken by States in relation to indigenous peoples.”<sup>68</sup>

In General Comment No. 12 – The right to adequate food,<sup>69</sup> in its discussion of the normative content of Article 11, the Committee states the following with respect to the adequacy and sustainability of food availability and access:

The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. The precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.<sup>70</sup>

The Committee further states that the right to adequate food requires “the adoption of appropriate economic, environmental and social policies, at both the national and international levels.”<sup>71</sup>

In General Comment No. 4 – The right to adequate housing,<sup>72</sup> the Committee, in its discussion of the concept of “adequacy” in relation to housing, notes “adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors.”<sup>73</sup>

The Committee further comments that towards achieving the full realization of the right to adequate housing, “steps should be taken to

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<sup>64</sup> General Comment No. 15, para. 28.

<sup>65</sup> General Comment No. 15, para. 8.

<sup>66</sup> General Comment No. 14 (2000) – The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000.

<sup>67</sup> General Comment No. 14, para. 4.

<sup>68</sup> General Comment No. 14, para. 27.

<sup>69</sup> General Comment No. 12 (1999) – The right to adequate food (article 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5, 12 May 1999.

<sup>70</sup> General Comment No. 12, para. 7.

<sup>71</sup> General Comment No. 12, para. 4.

<sup>72</sup> General Comment No. 4 (1991) – The right to adequate housing (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights), E/1992/23, 13 December 1991.

<sup>73</sup> General Comment No. 4, para. 8.

ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.).”<sup>74</sup>

### **C. State Reports / Concluding Observations**

As of the time of writing, the Committee has directly referenced climate change in its Concluding Observations to State Reports on three occasions.<sup>75</sup>

In its 2008 Concluding Observations on Ukraine, the Committee welcomed the State Party’s adoption of climate protection legislation implementing the Kyoto Protocol and UNFCCC.<sup>76</sup>

In its 2009 Concluding Observations on Australia, the Committee noted its concern with the negative impact of climate change on the right to an adequate standard of living, including the right to food and the right to water, affecting in particular indigenous peoples. The Committee recommended that the State Party intensify its efforts to address issues of climate change, including through carbon reduction schemes, and further encourages the State Party to reduce its greenhouse gas emissions and to take “all necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples.”<sup>77</sup>

Finally, in its 2009 Concluding Observations on Cambodia, the Committee welcomed the State Party’s initiation of a carbon credit project for community forestry under the Clean Development Mechanism and the Reduced Emissions from Deforestation and Forest Degradation of the UNFCCC.<sup>78</sup> However, the Committee also expressed its deep concern over the dramatic loss of the State Party’s tropical forest cover, with the attendant adverse effects on biodiversity and the displacement of indigenous peoples.<sup>79</sup>

State Parties are also increasingly referencing climate change in their Reports to the Committee, although not necessarily in respect of the linkages between climate change and human rights. References by State Parties include statements indicating ratification and/or implementation of the UNFCCC and the Kyoto Protocol,<sup>80</sup> as well as accounts of efforts undertaken to combat climate change as it relates to the right to physical and mental health.<sup>81</sup>

The Committee has repeatedly expressed more general concerns over environmental degradation in its Concluding Observations, particularly as it relates to following rights:

- (a) The rights of indigenous peoples (economic, social and cultural), often in relation to the extraction of natural resources;<sup>82</sup>

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<sup>74</sup> General Comment No. 4, para. 12.

<sup>75</sup> As of 23 July 2009.

<sup>76</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Ukraine, E/C.12/UKR/CO/5, 4 January 2008, para. 4.

<sup>77</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia, E/C.12/AUS/CO/4, 12 June 2009, para. 27.

<sup>78</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para. 7.

<sup>79</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para. 15.

<sup>80</sup> Canada – Third Periodic Report, E/1994/104/Add.17, 20 January 1998, para. 340; Chile – Third Periodic Report, E/1994/104/Add.26, 14 July 2003, para. 866 – 868; Peru – Initial Report, E/1990/5/Add.29, 17 June 1996, para. 496 – 497; UK – Third Periodic Report, E/1994/104/Add.11, 17 June 1996, para. 313; Uzbekistan - Initial Report, E/1990/5/Add.63, 24 June 2004, para. 528 and 531.

<sup>81</sup> Canada – Fourth Periodic Report, E/C.12/4/Add.15, 20 October 2004, para. 991 and 2226.

<sup>82</sup> See for example: Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para. 15-16; Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador, 07/06/2004. E/C.12/1/Add.100, para. 12 and 35; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, E/C.12/MEX/CO/49, June 2006, para. 10; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russia, E/C.12/1/Add.13, 20 May 1997, para. 14; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Venezuela, E/C.12/1/Add.56, 21 May 2001, para. 12.

- (b) The right to the highest attainable standard of physical and mental health (Article 12);<sup>83</sup>
- (c) The right to safe and healthy working conditions (Article 7(b));<sup>84</sup> and
- (d) The right to an adequate standard of living,<sup>85</sup> particularly the right to adequate food (Article 11);<sup>86</sup>
- (e) Protection of the environment;<sup>87</sup> and
- (f) Right to adequate housing, protection against evictions, right to resettlement.<sup>88</sup>

The realization of these rights could similarly be hindered by environmental dislocation and forced migration caused by climate change. Accordingly, the Committee's work regarding environmental issues is relevant to the analysis of the climate change and human rights interface.

The Committee also increasingly makes general requests for information from State Parties on environmental policies<sup>89</sup> and has noted that "extreme climatic conditions" can constitute a "serious impediment to the enjoyment of economic, social and cultural rights."<sup>90</sup>

## D. Statements

The Committee has directly addressed climate change in its recent *Statement of the Committee on Economic, Social and Cultural Rights - The World Food Crisis*:<sup>91</sup>

The Committee urges States parties to address the structural causes at the national and international levels, including by: ... Implementing strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by article 2 of the United Nations Framework Convention on Climate Change;<sup>92</sup>

The Committee has further commented on the relationship between human rights and sustainable development. In anticipation of the World Summit on Sustainable Development, in May of 2002, the Committee issued the *Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit on Sustainable Development*.<sup>93</sup> The Statement

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<sup>83</sup> See for example: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Estonia, E/C.12/1/Add.85, 19 December 2002, para. 54; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras, E/C.12/1/Add.57, 21 May 2001, para. 24 and 46; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria, E/C.12/1/Add.23, 13 May 1998, para. 29; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uzbekistan, E/C.12/UZB/CO/1, 24 January 2006, para. 28.

<sup>84</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras, E/C.12/1/Add.57, 21 May 2001, paras. 24 and 46.

<sup>85</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands, E/C.12/1/Add.33, 14 May 1999, para. 21.

<sup>86</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russia, E/C.12/1/Add.13, 20 May 1997, para. 24 and 38.

<sup>87</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para. 15; Concluding observations of the Committee on Economic, Social and Cultural Rights: Philippines, E/C.12/PHL/CO/4, 1 December 2008, para. 9; Concluding observations of the Committee on Economic, Social and Cultural Rights: Bolivia, E/C.12/BOL/CO/2, 8 August 2008, para. 9.

<sup>88</sup> See e.g., Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para. 15-16; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, E/C.12/MEX/CO/49, June 2006, para. 10.

<sup>89</sup> See e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), E/C.12/1/Add.107, 13 May 2005, para. 63.

<sup>90</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mongolia, E/C.12/1/Add.47, 1 September 2000, para. 10.

<sup>91</sup> Statement of the Committee on Economic, Social and Cultural Rights on the World Food Crisis, E/C.12/2008/1, 20 May 2008.

<sup>92</sup> *Id.*, para. 13.

<sup>93</sup> Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit on Sustainable Development (Bali, Indonesia, 27 May to 7 June 2002) – Adopted at the twenty-eighth session, 17 May 2002).

expressed the Committees' concern that human rights be given adequate consideration at the Summit, and that references to human rights be included in the final texts of documents resulting from the Summit. In particular, the Committee states the following:

The Committee... affirms its view that States must uphold the human rights commitments adopted in the Rio Declaration on Environment and Development, the Habitat Agenda and other specialized and complementary efforts in international cooperation. It is therefore necessary to ensure the inclusion of references to human rights in the final documents of the World Summit on Sustainable Development....<sup>94</sup>

The international commitments on human rights and on sustainable development

should be considered in the light of their important points of convergence, and of the legally binding nature of human rights obligations.<sup>95</sup>

The failure of Governments to place human rights at the centre of converging efforts to achieve sustainable development will undermine the gains of historical experience codified in international law.<sup>96</sup>

Finally, in its *Statement of the United Nations Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization* the Committee urged the WTO to undertake a review of the full range of international trade and investment policies which would "address as a matter of highest priority the impact of WTO policies on... the environment."<sup>97</sup>

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<sup>94</sup> *Id.*, para. 1.

<sup>95</sup> *Id.*, para. 2.

<sup>96</sup> *Id.*, para. 4.

<sup>97</sup> Statement of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) to the Third Ministerial Conference of the World Trade Organization, E/C.12/1999/9, 26 November 1999.

## VI. USING THE OPTIONAL PROTOCOL FOR CLIMATE CHANGE RELATED COMPLAINTS: POSSIBILITIES AND CHALLENGES

The emergence of the Optional Protocol to the Covenant can create opportunities to clarify the link between the human rights contained in the Covenant and the impacts of climate change.

The international obligations contained in Article 2 of the Covenant, as clarified in General Comment 3, require State Parties to demonstrate, inter alia, that they are taking concrete steps to implement the Covenant. This obligation implicates all policy and legal formulations, including administrative action, relating to climate change mitigation and adaptation. The failure to design effective climate measures on the basis of the rights established in the Covenant sets the stage for the use of the Optional Protocol in connection with States Parties acts and omissions concerning climate change.

The Optional Protocol, as a formal complaints procedure for individuals and groups of individuals who claim that their rights under the Covenant have been violated, could potentially be used to redress climate change related grievances.

The groups most likely to be vulnerable to the adverse impacts of climate change due to their geographical and physical location, dependence on natural resources, poverty levels and vulnerability to social and environmental change, include:

- (a) Coastal and fishing communities;
- (b) Indigenous peoples;
- (c) Communities living in deserts and other arid zones;
- (d) Forest and pastoral communities;
- (e) Rural and urban poor;
- (f) Those living in informal settlements and slums; and
- (g) Migrants, refugees and internally displaced persons.

Amongst these groups, the women, children, older persons, persons with disabilities, and persons living with HIV/AIDS and mental illness are likely to be more severely affected.

The major principles of international human rights law would need to guide the grievance redress procedure, in particular the principles of:

- (a) international cooperation;
- (b) progressive realization;
- (c) indivisibility of human rights;
- (d) non-retrogression;
- (e) gender equality; and
- (f) subsidiarity.

In addition, the following environmental law principles would need to be considered for climate change related complaints:

- (a) polluter pays principle;
- (b) precaution;
- (c) principle of sustainable development;
- (d) principle of common but differentiated responsibility;
- (e) principle of intra-generational and inter-generational equity; and
- (f) principle of common concern of humankind and common heritage.

Generally speaking, two broad categories of cases could probably be brought before the Committee under the Optional Protocol.

**1. Communities, organizations or individuals file complaints with the Committee against a State Party (Article 3 of the Optional Protocol)**

These could be in the nature of complaints brought by individuals and groups of individuals, and would apply to acts of omission and commission by a State in contributing to climate change related disasters and other phenomena, or failing to take adequate measures for mitigation and adaptation.

Cases could, inter alia, be of several types:

- (a) after a climate change related disaster/event, in order to seek remedy, rehabilitation, compensation, respite, and reprieve;
- (b) compensation for impact due to state failure to provide adequate protection and mitigation measures;

- (c) failure of State Party to adopt “appropriate measures” to help prevent climate change;
- (d) failure of State Party to provide information on climate change – susceptibility or technology;
- (e) failure of State Party to allocate adequate funds for climate change mitigation, adaptation, technology development, use of alternatives;
- (f) promotion of ostensible mitigation or adaptation measures by a State Party that impact human rights of vulnerable populations – for instance land acquisition for cultivation of biofuels resulting in displacement and food insecurity, land acquisition and displacement of forest communities and indigenous peoples for reforestation projects under Reducing Emissions from Deforestation and Forest Degradation (REDD), and inequitable carbon trading paradigms;
- (g) collective complaints filed by communities displaced due to climate change related events – either within or across national borders; and
- (h) all cases demonstrating infringement of Covenant-guaranteed human rights – in particular the rights to self determination; an adequate standard of living, including adequate food, housing and clothing; water; health; work; and education.

**2. Complaint filed by a State Party to the Protocol against another State Party that is not fulfilling its obligations under the Covenant (Article 10 of the Optional Protocol)**

Given the transboundary nature of climate change effects, it is possible that State Parties

would attempt to use the Optional Protocol to hold other Parties accountable for climate change effects occurring within their national borders. Such an inter-State complaint would involve a range of issues, including *inter alia*, economic dimensions of international relations, obligations under climate change law, and human rights extraterritorial responsibilities.

In relation to these two broad categories of cases involving the climate change and human rights linkage, international environmental law may play a role in the examination of complaints involving violations of rights under the CESCR and Optional Protocol. MEAs could be used in helping to determine whether there has been a violation of a protected right, for example by clarifying minimum international standards and benchmarks regarding community obligations for international co-operation. At the same time, by virtue of the principle of systemic interpretation codified in Article 31.3.c. of the Vienna Convention on the Law of Treaties, MEAs assist in the interpretation of the scope and content of protected rights, as well as of State obligations concerning those rights.

### Questions for Discussion

- (a) Complaints to the Committee under the Optional Protocol can only be made when “all available domestic remedies have been exhausted” (Article 3). Since climate change is a relatively new arena, there may not be adequate, if any, domestic recourse available or other remedies.
- (b) Establishing causation: one of the most difficult tasks is the issue of causation – establishing that a particular violation of Covenant-guaranteed rights resulting from climate change, can be attributed to an act

of commission or omission of the State Party.

- (c) Dealing with transboundary cases involving inter-State Party claims, and determining, whether relevant, the extent of liability and damage, and degree of causation.
- (d) Determining the meaning of the phrase “under the jurisdiction of a State Party” where, as a result of the severe effects of climate change, e.g., loss of land and territories, inhabitants of certain countries are brought under the effective control of a Party.
- (e) Using international law and emerging rights not specifically within the framework of the Covenant. This includes international environmental and climate change law.
- (f) Determining proof of liability/ burden of proof on complainant. Mechanisms would need to be developed to deal with individual and collective complaints separately.
- (g) Developing procedure for conducting inquiry and visits to countries by Committee members (Article 11 of the Optional Protocol).
- (h) Determining benchmarks/guidelines for international cooperation and assistance, such as linking Covenant guaranteed rights with provisions in international environmental agreements (Article 14).
- (i) Defining appropriate remedies.
- (j) Developing procedure and criteria for appropriately designing and establishing a trust fund to provide expert and technical

assistance to State Parties (Article 14.3 of the Optional Protocol).

- (k) Handling scientific questions involved in climate change. In this regard, the *Marangopoulos* case discussed above shows how complex technical questions can be addressed in a legal setting. In addition, the ICJ's *Pulp Mills* decision, and particularly the joint Dissenting Opinion of Judges Al-Khasawneh and Simma, show how scientific evidence can be handled. Finally, the availability of assessments by the Inter-governmental Panel on Climate

Change provides a solid basis for handling scientific evidence concerning climate change.

Since the Optional Protocol is a new mechanism, as is climate change related litigation, the Committee would greatly benefit from a General Day of Discussion on climate change. The aim of this section is to raise some questions that could be considered while deliberating on procedural and substantive elements that could arise from climate change related complaints to the Committee through the Optional Protocol.

## VII. RECOMMENDATIONS

The CESCR undertakes a number of activities in pursuance of the implementation of the Covenant. Since climate change affects people's lives, the CESCR can play a key role in monitoring State compliance with obligations under the Covenant in terms of mitigation and adaptation measures in the context of climate change. The CESCR can contribute to the climate change and human rights interface in the following ways:

1. *List of issues:* During the preparation of the list of issues that CESCR prepares in preparation of country reviews, CESCR could draft questions directed at the link between climate change and human rights. The CESCR could make a general request, in the list of issues, to report on adaptation and mitigation measures to climate change. The Committee could also request State Parties to report on information sent in compliance with its obligations to the Kyoto Protocol and in ongoing communication with UNFCCC, including whether the positions taken by respective countries is consistent with their obligations under the Covenant.<sup>98</sup>
2. *Model questions:* The CESCR could wish to consider drafting model questions on climate change and human rights. Such model questions could be selectively used during questioning that takes place when State Parties appear before CESCR. For example, the CESCR could ask:

- (a) How are State Parties anticipating the impacts of climate change on persons subject to their jurisdiction, and particularly which specific measures are they adopting?
- (b) How are State Parties informing the population about risks associated to climate change and economic, social and cultural rights?
- (c) How are State Parties applying due diligence to assess the impacts of their foreign policies and programmes on the ESC rights of populations beyond their territories?
- (d) What measures are States implementing to give effect to the obligation of international assistance and cooperation<sup>99</sup> to address the impacts of climate change on protected rights?
- (e) What measures are States adopting to reduce their emissions to levels consistent with the full enjoyment of human rights in other countries?
- (f) What adaptation and mitigation measures are States implementing to meet the obligations under Articles 11 and 12 of the Covenant to protect the rights of people and communities to food, health and housing? Include information on the impact of climate change processes on specific communities in the jurisdiction of the State Party.

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<sup>98</sup> Questions related to State party communication on the Kyoto Protocol and with the UNFCCC and positions taken at global conferences could also be included in special reports requested from States. See point 8 below.

<sup>99</sup> See the discussion on the link between Covenant obligations of international assistance cooperation and climate change in the Statement of the Special Rapporteur on Adequate Housing to the WSSD, *supra* note 25.

3. *Day of General Discussion:* The CESCR could consider scheduling a day of general discussion on climate change and the Covenant. During such a meeting CESCR could consider whether enough material is available to start drafting a general comment on climate change and the Covenant.
4. *Concluding Observations:* The CESCR could consider, where relevant, including references to climate change in the 'principle areas of concern' and 'recommendations' sections of concluding observations that emerge following review of State obligations. Concluding observations could call for specific policy and legislative measures to assist the relevant State Party in the mitigation, adaptation and safeguard processes in relation to climate change. The concluding observations could also provide direction to obligations of 'international cooperation and assistance' for States, other than the one being examined.
5. *Statements:* The CESCR could consider issuing a public statement that would illustrate the many links between climate change and implementation of the ICESCR. Such a statement could elaborate on the link between implementation of specific rights in the Covenant and mitigation and adaptation measures. The CESCR could also highlight in such a statement the violations that can take place if States do not protect people and communities from the negative impacts of climate change. In the upcoming Conference of the Parties of the UNFCCC in Cancún, Mexico in December 2010, for example, the CESCR could consider a public statement to highlight the need for a human rights approach, consistent with the Covenant, in the discussions and outcome documents of UNFCCC negotiations.<sup>100</sup>
6. *General Comment:* The CESCR could consider adopting a General Comment on climate change and human rights. Such a general comment could be based on numerous articles of the Covenant – specific rights as well as provisions of international cooperation. The General Comment could also clarify the extraterritorial responsibilities of States with respect to human rights in other countries.
7. *Specific reports from State Parties:* The CESCR could consider requesting State Parties that are particularly affected by climate change, to prepare special reports on climate change. The Maldives, for example, could be requested to prepare a special report on difficulties, current and/or projected, facing the country in implementation of Covenant obligations. This could also be useful in the use of the Optional Protocol for dealing with climate change related complaints from vulnerable States and populations.
8. *State reporting guidelines:*<sup>101</sup> The CESCR periodically revises its State reporting guidelines. The CESCR could consider updating these guidelines to include questions linking the impact of climate change and specific rights contained in the Covenant. In addition to specific rights in the Covenant, CESCR could also consider formulating specific questions linked to the obligations of international cooperation as contained in five articles of

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<sup>100</sup> See e.g., Statement of the CESCR to the WTO Seattle Inter-ministerial, *supra* note 96.

<sup>101</sup> ESCR Articles 16 and 17. See E/C.12/2008/2.

the Covenant. In the existing guidelines the Committee, under Article 11, has a question seeking information on measures taken by States to prevent evictions and displacement. This clause, for example, can be expanded to include displacement due to climate change.

9. *Development of indicators:* The CESCR could consider, through its secretariat, or with relevant special rapporteurs, the development of indicators that could assist States in monitoring the impacts of climate change. Indicators can also be useful in identifying specific steps that States could develop in their efforts to ensure mitigation and adaptation measures in the face of climate change processes. Such indicators can be consistent with, and follow from the indicators that have already been developed, at the request of CESCR, by OHCHR. As part of such an initiative the Committee could also wish to develop criteria for determining causation and attributing a complaint to climate change.
10. *Role of Civil Society:* The CESCR may wish to encourage civil society groups to submit

parallel reports on climate change and the Covenant. Such documents can address individual country situations as well as the role of other countries within the framework provided by the international cooperation articles of the Covenant. The Committee could also encourage civil society to address climate change implications during the civil society hearings that take place at the general sessions of the Committee as well as the pre-sessional meetings.

11. *Educational activities of Committee members:* The CESCR could consider human rights education and learning opportunities for members of the Committee to be able to better comprehend the complex issues that link climate change with human rights. An understanding of the various dimensions, including scientific, of climate change could also help members who might participate in enquiries and investigation relating to complaints brought before the Committee under the Optional Protocol.

## ANNEX: RELEVANT CASES IN HUMAN RIGHTS AND ENVIRONMENT JURISPRUDENCE OF INTERNATIONAL TRIBUNALS AND OTHER BODIES

### 1. African Commission on Human Rights and People's Rights

Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria, Comm. 155/96, Case No. ACHPR/COMM/A044/1, May 27, 2002.

Centre for Minority Rights Development on behalf of Endorois Community v. Kenya, Comm. 276/2003, May 2009.

### 2. European Court of Human Rights

Zimmermann and Steiner v. Switzerland, no. 8737/79, 13 July 1983, Series A no. 66.

Leander v. Sweden, no. 9248/81, 26 March 1987, Series A no. 116.

Powell and Rayner v. the United Kingdom, no. 9310/81, 21 February 1990, Series A no. 172.

Zander v. Sweden, no. 14282/88, 25 November 1993, Series A no. 279-B.

López Ostra v. Spain, no. 1679/90, 9 December 1994, Series A no. 303-C.

L.C.B. v. the United Kingdom, no. 23413/94, 9 June 1998, Reports of Judgments and Decisions 1998-III, § 36.

Guerra and Others v. Italy, no. 14967/89, 19 February 1998, Reports 1998-I.

Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 62, ECHR 1999-III.

Pialopoulos and Others v. Greece (just satisfaction), no. 37095/97, 27 June 2002.

Kyrtatos v. Greece, no. 41666/98, § 52, ECHR 2003-VI.

Hatton and Others v. the United Kingdom [GC], no. 36022/97, ECHR 2003-VIII.

Ashworth and Others v. the United Kingdom, no. 39561/98, 20 January 2004.

Öneryıldız v. Turkey [GC], no. 48939/99, § 156, ECHR 2004-XII.

Moreno Gómez v. Spain, no. 4143/02, §§ 59- 62, ECHR 2004-X.

Taşkın and Others v. Turkey, no. 46117/99, § 117, ECHR 2004-X.

Fadeyeva v. Russia, no. 55723/00, § 96, ECHR 2005-IV.

Giacomelli v. Italy (dec.), no. 59909, 15 March 2005.

Okyay and Others v. Turkey, no. 36220/97, § 68, ECHR 2005-VII.

Öçkan and others v. Turkey, no. 46771/99, 28 March 2006.

Budayeva and Others v. Russia, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 110, ECHR 2008.

Tătar v. Romania, no. 67021/01, 27 January 2009.

Leon and Agnieszka Kania v. Poland, no. 12605/03, 21 July 2009.

### **3. European Social Charter**

Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint no. 30/2005.

### **4. Inter-American Commission on Human Rights**

Yanomami Case, Res. No. 12/85, Case 7615 (Brazil), in Annual Report of the IACHR 1984-1985, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

Report on the Situation of Human Rights in Ecuador, OAS doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997.

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

San Mateo de Hanchor v. Peru, Case 12.471, Inter-Am. C.H.R., Report No. 69/04, admissibility decision of October 15, 2004, OEA/Ser.L/V/II.122, doc. 5 rev. 1, 487 (2004).

Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am.C.H.R., Report No. 40/04, (2004).

Community of La Oroya, Peru, Case 12.718, Inter-Am. C.H.R., Report No. 76/09, admissibility decision of 5 August 2009, OAS/Ser/L/V/II.135.

Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries v. Chile, Case 12.696, Inter-Am. C.H.R., Report No. 14/09, admissibility decision of March 19, 2009.

### **5. Inter-American Court of Human Rights**

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No.79, (Aug. 31, 2001).

Moiwana Community v. Suriname, 2004 Inter-Am. Cg.H.R. (ser. C) No. 124, (June 15, 2004).

Indigenous Community Yakye Axa v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) (June 17, 2005).

Sawhoyamaya Indigenous Community v. Paraguay Case, 2006 Inter-Am. Ct.H.R. (ser. C) No. 146, (Mar. 29, 2006).

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

Saramaka People v. Suriname, Inter-Am. Ct. Hum. Rts, Ser. C No. 172 (28 Nov. 2007).

## **6. Human Rights Committee**

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

Länsman v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

## **7. International Court of Justice**

Nuclear Tests (New Zealand v. France), 1974 I.C.J. Rep. 253 (Dec. 20, 1974).

“Legality of the Threat or Use of Nuclear Weapons” – Advisory Opinion of 8 July 1996 – General List No. 95 (1995-1998).

Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 140 (Sept. 25, 1997).

Pulp Mills Case (Uru. v. Arg.), 2010 I.C.J. (Apr. 20, 2010).

## **8. World Bank Inspection Panel**

Chad-Cameroon Petroleum and Pipeline Project, Loan no. 4558, CD July 17, 2002.

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