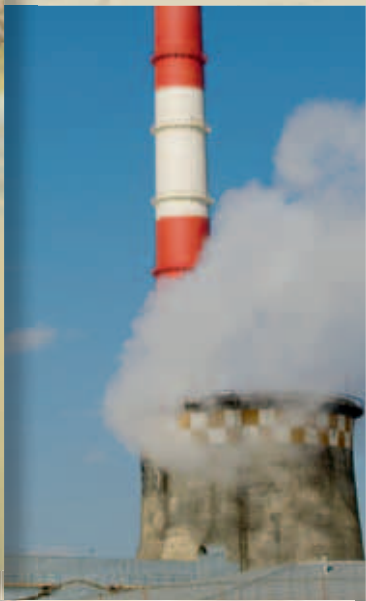


Human Rights and Climate Change

Practical Steps for Implementation



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25 February 2009

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Summary

Climate Change and Human Rights: A Practical Way Forward

Climate change is already interfering with the human rights of individuals and vulnerable communities, and is an enormous threat to human rights everywhere. States have obligations under human rights law to protect against harm to human rights caused by climate change, through taking effective mitigation and adaptation measures. In addition, human rights law requires States to ensure that their responses to climate change – including their mitigation and adaptation measures – do not themselves violate human rights. For example, States must address climate change through transparent processes open to participation by all affected communities, including indigenous peoples and forest dwellers.

One of the obligations of States under human rights law is to cooperate internationally to address threats to human rights. This duty is of utmost importance when addressing climate change, which can only be effectively dealt with on a global basis. To fulfill their duty to cooperate, States must reach and implement an agreement that adequately protects against the harms to human rights resulting from climate change.

The Office of the High Commissioner on Human Rights (OHCHR) has conducted a study on the substantive relationship between human rights and climate change. The OHCHR's report will be discussed at the March 2009 meeting of the Human Rights Council (HRC). This leads to the question: what practical steps can be taken so that human rights be protected in the context of climate change?

Listed below are pragmatic measures that could be taken within the international climate change and human rights legal regimes to address the human rights implications of climate change, that is, to protect human rights while tackling climate change.

Other regimes and institutions should also be involved in this effort, including: the International Labour Organization, e.g. in connection with ILO Convention 169; the United Nations Environment Programme (UNEP), e.g. with respect to REDD financing and Montevideo IV; the World Bank, e.g. with respect to REDD and adaptation funding; NGOs and foundations, with respect to their climate change-related activities that affect individuals or local communities; and business enterprises, e.g. when they cooperate in any of the above activities or initiate climate change-related activities. The principal efforts and leadership, however, should come from the two most directly involved regimes – climate change and human rights.

The measures outlined below were discussed and refined at a January 2009 experts meeting in Geneva.¹ These practical measures would encourage, facilitate and supplement the national actions necessary to protect and respect human rights within the context of climate change.

Human rights regime

- Expertise and a focal point on climate change could be established at the OHCHR.
 - This has already been done in practice and could now be officially announced.
- Existing special rapporteurs and other mandate holders could consider the impacts of climate change on their mandates.
 - The HRC has already drawn the attention of the Special Rapporteurs on Food and Housing to the threat to those rights posed by climate change.
 - The HRC could request other mandate holders to consider the impacts of climate change on

¹ See *infra* Annex.

the subject of their mandate. They may already examine such impacts without a request from the HRC; but a specific request from the HRC would help with resources and reporting.

- The HRC could request the Special Rapporteurs on Food and Housing and the Independent Expert on Drinking Water and Sanitation to prepare a joint report by September 2009 on the impacts of climate change on their mandates.
- The HRC could hold a panel discussion on human rights and climate change at its September 2009 meeting, or it could convene a special session on the topic.
- The HRC could request the High Commissioner to attend the climate change negotiations in Bonn in June and the COP 15 in Copenhagen in December, 2009.
- The HRC could create a new special procedure on climate change at either its 2009 or 2010 session.
- The HRC could request that mandate holders elaborate guidelines recognizing and effectuating the linkage between climate change and human rights.
- The HRC could specifically cover human rights and climate change in its Universal Periodic Reviews.
- Treaty bodies (especially the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child) could consider the impacts of climate change on the rights covered by their treaty, e.g. by requiring that the human rights implications of climate change be covered in country reports, inquiring about climate change (e.g., on the basis of parallel reports submitted by civil society addressing climate change and human rights), issuing Concluding Observations, a General Comment or Statement, or holding joint meetings to discuss human rights and climate change.
- Training programs could be held regarding human rights and climate change for personnel within the human rights system, including mandate holders, OHCHR staff, and members of treaty bodies.

Climate change regime

- Expertise and a focal point on human rights could be established at the UNFCCC secretariat to facilitate coordination between the different UN agencies and to serve as a contact point for the outside.
 - This has already been done in practice with respect to adaptation and could now be officially announced.
- A mechanism to provide greater participation of indigenous peoples and local communities in negotiations could be adopted, including explicitly with respect to REDD, supported by funding to facilitate participation of indigenous and local leaders.
- States must reach an agreement that adequately protects against the harms to human rights resulting from climate change and potential harms to human rights from response measures. To ensure protection, the agreed outcome (whatever form it takes) of COP 15 could include:
 - A statement recognizing that climate change affects the realization of human rights,
 - The principle that States and other entities must observe human rights in their mitigation and adaptation measures, including those with respect to REDD, technology transfer, capacity building and financing activities, and
 - The creation of a new subsidiary body to study, monitor, report on, and provide guidance regarding the human dimension of climate change, including human rights.
- The Subsidiary Body for Scientific and Technical Advice (SBSTA), the Subsidiary Body for Implementation (SBI), or the Clean Development Mechanism Executive Board could produce technical papers that identify existing or potential problems relating to climate change and human rights.
- The UNFCCC secretariat could be requested to produce a paper, or organize a workshop or an expert meeting on the linkages between climate change and human rights as they relate to the work of the UNFCCC.
- Training programs could be held regarding human rights and climate change for personnel within the climate change regime.

Introduction

This report describes practical measures that may be taken within the international climate change and human rights legal regimes for addressing the human rights implications of climate change, that is, for integrating human rights and climate change law and policy. These measures can facilitate, encourage and supplement the national actions that are necessary to protect and respect human rights within the context of climate change.

There is consensus within the world's scientific community that climate change is well established and is attributable largely to the increasing atmospheric concentrations of greenhouse gases resulting from human activity.² It has also been widely recognized that the environmental changes brought about by global warming interfere with the realization of fundamental, internationally recognized human rights – including both civil and political rights and economic, social, and cultural rights. Furthermore, it is clear that States must observe human rights when taking actions to mitigate climate change or adapt to its impacts, just as they must respect human rights when taking any other government action.

Climate change impacts and measures taken to mitigate or adapt to it are already seriously affecting individuals, communities, and peoples. At the extreme, climate change and mitigation and adaptation measures threaten to destroy the cultures of individuals and peoples around the world, render their lands uninhabitable, and deprive them of their means of subsistence. Particularly vulnerable to the physical impacts of climate change are peoples whose ways of life are inextricably tied to nature, and low-lying coastal or island nations that lack the economic resources necessary to adapt to the severe changes.

Under international human rights law, countries (“States” in international parlance) have a duty to cooperate to prevent the violation of human rights, including by taking effective action in the fight against climate change. Increased understanding of the human dimensions of climate change thus can inspire and drive renewed efforts, including those at the UN Framework Convention on Climate Change (UNFCCC), to achieve an effective and equitable solution to climate change. States also have duties to protect human rights within their own territory. Increased attention to the human dimension of climate change, including in the outcome to the current international climate change negotiations, can improve the likelihood that future climate-related activities at the international and domestic levels will respect human rights. For these and other reasons, understanding and addressing the human consequences of climate change lies at the very heart of the negotiations themselves. Moreover, linking the UNFCCC negotiations and structures to existing human rights norms and standards lies in enabling States to use indicators, mechanisms and instruments anchored in the well established human rights system to help effectively address the challenges posed by the human impacts of the changing climate and of response measures.

While the understanding of the relationship between climate change and human rights (CC&HRs) has evolved significantly over the past few years, insufficient attention has been paid to possible institutional approaches to effectuating and advancing it. This is perhaps understandable given that the human rights and the climate change processes have developed on separate tracks. The foundational human rights instruments were con-

2 Intergovernmental Panel on Climate Change (IPCC), Fourth Assessment Report: Contribution of Working Group I, *Climate Change 2007: The Physical Science Basis* 97 (Susan Solomon, et al., ed., Cambridge University Press 2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg1.htm> (last visited Feb. 11, 2009).

cluded well before awareness of climate change existed; and the climate change discussions began with a strong focus on climate change science and economics, leaving the human dimension of climate change largely aside.

This report describes practical measures that can effectively and efficiently achieve institutional linkages between climate change and human rights, so that human rights are protected at the same time as we combat climate change. As this report demonstrates, taking account of human rights in the international climate negotiations and beyond need not burden the already complex structure of those negotiations, as long as a deliberate and coordinated approach is undertaken.

The report first provides background to the UN Human Rights Council (Council) resolution on CC&HRs, which set the stage for the Council's forthcoming consideration of CC&HRs in March 2009. The report then analyzes a set of coordinated approaches and measures to institutionally advance the CC&HRs linkage, focusing on the global human rights framework and the UNFCCC. As explained in the report, these approaches and measures differ with respect to their timing and institutional involvement. While other institutions also have roles in protecting human rights in the context of climate change, the principal efforts and leadership, however, should come from the two most directly involved regimes – climate change and human rights.

Because of the complexity of regional differences, the report does not address approaches pertaining to regional and national institutions and processes, including regional human rights bodies, though such approaches could be valuable. Similarly, the report does not discuss the possibilities of: the involvement of other parts of the UN framework, such as the Office of the UN Secretary-General's Climate Team and Special Envoys, the United Nations Environment Programme (UNEP),

the United Nations Development Programme (UNDP), the UN Permanent Forum on Indigenous Issues (UNPFII), the Food and Agriculture Organization (FAO), the International Labour Organization (ILO) (particularly, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries),³ or multilateral environmental agreements other than the UNFCCC; dispute settlement regarding possible claims to redress climate change-related harm, such as the use of existing human rights mechanisms to hear individual claims relating to climate change; the responsibilities of NGOs, business entities and foundations with respect to their climate change-related activities that affect individuals or local communities; the creation of a new binding international agreement relating to CC&HRs; or requesting an advisory opinion from the International Court of Justice to clarify aspects of the CC&HRs linkage. Finally, the report does not address in detail the ways that institutions involved in financing climate change-related activities, such as the World Bank (e.g. with respect to REDD and adaptation funding) and UNEP (e.g. with respect to REDD financing and Montevideo IV, section 24), should be transparent and allow meaningful opportunities for public participation, because of the multiplicity of those institutions. The report does, however, point out the need for transparency and public participation regarding those decisions and institutions. The details will have to be worked out by the relevant institutions with appropriate consultation.

Background

Manifestations of climate change are numerous and include: rising sea-level; increasing sea and surface temperatures; multiplication of extreme weather events such as storms, droughts, and cyclones; receding coastline and melting of perma-

³ A number of other ILO Conventions are relevant to the link between climate change and human rights. Climate change will cause many shifts in the way people earn a living. The move from dirty to clean jobs will go more smoothly when the people directly affected have a chance to steer the course of economic and social adjustment. ILO Conventions guaranteeing collective bargaining rights, which are based on freedom of association and the right to organize, along with ILO Recommendations and Conference conclusions relating to social dialogue, pave the way for this. Furthermore, rights that guarantee safety in the working environment are linked to protection of the external environment. Each of these and other instruments presents opportunities for fleshing out the CC&HRs linkage

frost; and changes in precipitation patterns. These climatic phenomena have a direct impact on the population and their livelihoods.

- Rising sea-level and storms are direct causes of the flooding of territories, population displacement, salination of fresh-water resources, and diminishing habitable or cultivable land. These impacts in turn affect, for example, the right of self-determination, the right not to be deprived of one's means of subsistence, the right to own property, the right to life, the right to work, and the right to development.
- Rising surface temperatures also leads to greater occurrence of diseases such as scrub typhus, diarrheal diseases and other mosquito-borne diseases. These impacts affect, for example, the right to health and the right to life.
- The increasing number and intensity of weather events affects, for example, the rights to life, health, and housing.
- Receding coastlines and permafrost melting cause damage to land, houses, and other infrastructure, affecting, for example, the right to an adequate standard of living, including the right to housing.
- Changes in precipitation patterns and the melting of glaciers affect access to water, an essential component of the right to water, as well as the ability to irrigate lands and secure access to food, an essential component of the right to food.
- Mitigation actions relating to reducing emissions from deforestation and forest degradation (REDD) will affect, perhaps profoundly, the livelihoods, lifestyles, living conditions and cultures of indigenous peoples and other forest dwellers, affecting, for example, the right to enjoy culture and their way of life.

Women and children are particularly vulnerable to the effects of climate change. In the poorest regions of the world women often feel the effects of climate change most directly because, for example, women in these countries bear the primary responsibility for gathering the essential food, water and fuel

supplies for their families. Droughts caused by climate change make their work extremely hard as wells run dry, crop production declines and wood that is used as fuel has to be collected from far distances. Girls are more likely than boys to stay out of school in order to help perform these tasks. Moreover, the effects of climate change intensify the existing inequalities between men and women. Women, for instance, often lack equal access to resources and health services, the effects of which will be exacerbated by climate change as malaria epidemics spread to wider regions.

Similarly, children in developing countries will severely feel the effects of climate change.⁴ Shortages of food and water will not only increase malnutrition among children in developing countries; the shortages will also diminish their chances to receive school education since their families will be less able to afford it. Children are more vulnerable to natural disasters as they lack physical strength and often remain helpless when they become orphans or separated from their families. The increased health risks caused by climate variation pertain particularly to children as well.

The human rights impacted by climate change have been recognized in many international human rights instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), and selected Conventions adopted under the auspices of specialized agencies of the United Nations, in particular the ILO. Under these international treaties, the State has the primary duty not only to respect the covered rights, but to protect and fulfill these rights through positive action.

⁴ Cf. UNICEF, *Climate Change and Children*, available at http://www.unicef.org/publications/files/Climate_Change_and_Children.pdf (Jan. 29, 2009)

The Inuit Petition & The Malé Declaration

The climate change and human rights linkage has been recognized in different contexts, and first steps have been taken to further clarify the relationship. For example, in 2006, the Inter-American Commission on Human Rights (IACHR) held a “thematic hearing” to begin investigating the CC&HRs connection from a more general perspective. This was the consequence of a 2005 petition filed by the Inuit from Canada and the United States with the IACHR.⁵ The Inuit petition (which the Commission decided not to proceed with “at present”) avers that global warming caused substantially by the United States has had a devastating impact on the rights of the indigenous peoples of the Arctic. The effort by the Inuit before the IACHR illuminated the CC&HRs linkage and contributed to broadening and re-focusing the terms of the climate change debate.

In November 2007, representatives of the Small Island Developing States drew attention to the human dimensions of climate change when they negotiated and signed the Malé Declaration. Noting that the environment provides the infrastructure for human civilization, and that the impacts of climate change pose the most immediate, fundamental and far-reaching threat to the environment, individuals and communities around the planet, and also noting that the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights has been recognized by the international community, the Malé Declaration expresses concern that climate change has clear and immediate implications for the full enjoyment of human rights. The Malé Declaration further calls for the cooperation of the UN High Commissioner for Human Rights (OHCHR) and the Council in assessing the human rights implications of climate change. Shortly thereafter, the Council adopted Resolution 7/23.

UN Council Resolution 7/23

In March 2008, the Council adopted Resolution 7/23 on human rights and climate change. The resolution observes that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.⁶ The resolution also requests the OHCHR to conduct a detailed analytical study of the relationship between climate change and human rights.⁷ The OHCHR study shows definitively that climate change interferes with a wide range of human rights, that States have obligations under human rights law to protect those rights from the effects of climate change – including in particular through international cooperation, and that States’ efforts to mitigate and adapt to climate change must comply with their duties under human rights law. These conclusions should both increase the moral and ethical imperative for governments around the globe to act to combat climate change and inform how States must act in mitigating and adapting to climate change.⁸

In response to the Council’s request in Resolution 7/23 for contributions to its study, the OHCHR received submissions from States, UN bodies, regional intergovernmental organizations, and NGOs. The submissions address the human dimension of climate change, analyzing the physical impacts of climate change on society; the implications of climate change for human rights; and the role of the international community in protecting and fulfilling the rights threatened by climate change. Some of the submissions also list approaches for operationalizing the climate change and human rights relationship.⁹

The OHCHR study will serve as the basis for a discussion in the Council on the relationship between human rights and climate change during its March 2009 Session. The study, together with a

5 The petition was the result of a multi-year effort by the Center for International Environmental Law (CIEL), Earthjustice, and the Inuit Circumpolar Conference.

6 H.R.C. Res. 7/23, U.N. H.R.C., at introduction, ¶ 1, 7th Sess., U.N. Doc. A/HRC/RES/7/23 (Mar. 28, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf (last visited Aug. 13, 2008).

7 *Id.*

8 Submission of the Maldives Under Resolution H.R.C. 7/23.

http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf.

9 See e.g., Submission of the Maldives.

summary of the discussion held during the Council's session, will be made available to the Conference of Parties to the UNFCCC for its consideration.¹⁰

Approaches to Advance the Climate Change and Human Rights Linkage

This paper analyzes the following five approaches that might be used, either alone or in combination, by the international community to effectuate and advance the CC&HRs linkage:

1. Existing human rights special procedures address the implications of climate change for their mandates.
2. The Human Rights Council establishes a special procedure on CC&HRs.
3. The Human Rights Council remains directly engaged on CC&HRs in ways other than special procedures.
4. Human rights treaty bodies address the CC&HRs linkage within their mandates.
5. The UNFCCC Conference of the Parties recognizes the principle that climate change-related activities must respect human rights and tasks a new or existing specialized body or process with the operationalization of the CC&HRs linkage.

¹⁰ H.R.C. Res. 7/23, U.N. H.R.C., *supra* note 6, ¶ 3.

Approach 1:

Existing Human Rights Special Procedures Address the Implications of Climate Change for their Mandates

Existing special procedures could be utilized to encompass the effects of climate change on the enjoyment of the human rights covered by the respective mandates. Climate change is already mentioned in the resolutions extending the mandates of the Special Rapporteurs on the right to food¹¹ and on adequate housing,¹² indicating that a formal review of a mandate is not necessary to incorporate climate change considerations. Addressing climate change in existing special procedures could co-exist with the creation of a new special procedure on CC&HRs (Approach 2). The creation of a new special procedure on CC&HRs could be usefully supplemented by other relevant thematic or country-specific special procedures, and could serve a coordinating role bringing the climate change-related findings of the various special procedures together.

a) Background

Special procedures are mandates created by the Council to monitor and implement international human rights.¹³ Existing mandate-holders could address the effects of climate change on the enjoyment of the human rights covered by their man-

dates. Currently there are thirty-eight special procedures: thirty thematic and eight country mandates.¹⁴ The following mandates reflect the closest link with CC&HRs:

- Special Rapporteur on Adequate Housing as Component of Right to Adequate Standard of Living;
- Independent Expert on the Question of Human Rights and Extreme Poverty;
- Working Group on the Right to Development;
- Special Rapporteur on the Right to Food;
- Special Rapporteur on the Right of Everyone to the Enjoyment of Highest Attainable Standard of Physical and Mental Health;
- Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People;
- Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation;
- Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights; and
- Special Representative of the UN Secretary-General on Business & Human Rights.

11 Resolution on the Right to Food, H.R.C. Res. 7/14, A/HRC/RES/7/14, (Mar. 27, 2008) (“Noting that environmental degradation, desertification and global climate change are exacerbating destitution and desperation, causing a negative impact on the realization of the right to food, in particular in developing countries”).

12 Resolution on Adequate Housing, H.R.C. Res. 6/27: A/HRC/RES/6/27 (Dec. 14, 2007) (*Expresses concern* at the prevalence of homelessness and inadequate housing, the growth of slums worldwide, forced evictions, the increase in challenges faced by migrants in relation to adequate housing, as well as of refugees in conflict and post-conflict situations, challenges to the full enjoyment of the right to adequate housing caused by the impact of climate change, natural disasters and pollution, insecurity of tenure, unequal rights of men and women to property and inheritance, as well as other violations of and impediments to the full realization of the right to adequate housing”).

13 Annual Meeting of Special Procedures, *Manual of Operations of the Special Procedures of the Council*, ¶ 5 (Aug. 2008), available at <http://www2.ohchr.org/english/bodies/chr/special/index.htm> [hereinafter *Manual of Operations*].

14 See Special Procedures Assumed by the Council: Thematic Mandates, <http://www2.ohchr.org/english/bodies/chr/special/themes.htm>; special procedures assumed by the Council: Country Mandates, <http://www2.ohchr.org/english/bodies/chr/special/countries.htm>.

The Council is already in the process of reviewing and revising existing mandates to fill thematic gaps, observing that “[a]reas which constitute thematic gaps will be identified and addressed, including by means other than the creation of special procedures mandates, such as by expanding an existing mandate, bringing a cross-cutting issue to the attention of mandate-holders or by requesting a joint action to the relevant mandate-holders.”¹⁵ The Council thus is open to using existing mandate-holders to address new thematic issues. However, the Council has resisted other attempts to use broadly worded rights-based approaches to address environmental issues. For example, the mandate of the Independent Expert on Safe Drinking Water and Sanitation was specifically worded so as not to imply a right to clean water or sanitation.¹⁶

Consideration of climate change by existing special procedures could be achieved by at least three methods. First, mandate holders could decide on their own to address climate change impacts in their work – or in collaboration with other mandate holders – without an express reference or request by the Council, just as they may consider any other impact on the topic they are covering. For example, the Special Rapporteur on adequate housing explicitly addressed the issue of climate change in his statement as early as 2002 at the World Summit on Sustainable Development (WSSD) and again in his 2008 report without any request or reference by the Commission on Human Rights or its successor, the Council.

Second, the Council could decide to bring the CC&HRs linkage to the attention of specific mandate-holders. The Council could introduce specific language in a resolution that would request the mandate holder to address the effects of climate change on the mandate. Or, less directly, the Council could refer to climate change in a resolution on a mandate, as the Council recently referred to climate change as a challenge to the full enjoyment

of the right to housing and as causing a negative impact on the realization of the right to food in December 2007 and March 2008 resolutions, respectively. This approach would be easier than subjecting a mandate to formal review in order to include climate change considerations in a mandate. So far, the Council has not determined when each mandate will come up for review and has simply extended most mandates that had been in effect at the time of its creation.

Third, the Council could request selected relevant mandate-holders to take joint action on climate change. This joint action could range from examining the effects of climate change in a report, to elaborating on guidelines recognizing and effectuating the linkage between climate change and human rights. Such guidelines could set forth general principles and a possible list of compliance indicators or best practices. The United Nations Guiding Principles of Internal Displacement (1998), for example, were promoted by the Special Representative of the Secretary-General on Internally Displaced Persons.¹⁷ The Commission on Human Rights and the General Assembly requested the Special Representative to prepare an appropriate normative framework for the internally displaced, which led to the drafting of the Guiding Principles. The Principles both restated existing norms and clarified areas of contention in international law. The Commission on Human Rights later adopted a resolution taking note of the Guiding Principles and of the decision of the Inter-Agency Standing Committee that had welcomed the Principles and encouraged its members to share them in the field. Since then, organizations such as USAID have adopted the Guidelines and resolved to promote them within their advocacy.

The role of special procedures in the area of climate change could be discussed at the June 2009 annual meeting of special procedure mandate holders, possibly by adding an especially dedicated

15 Institution-Building Package, HRC Res. 5/1, ¶58, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007).

16 See, e.g., *UN Council moves forward on the right to water and sanitation*, Euro-Mediterranean Information System on Know-How in the Water Sector, (Mar. 31, 2008), <http://www.emwis.net/topics/WaterRight/snews587370>.

17 Office of the High Commissioner for Human Rights, *Guiding Principles on Internal Displacement*, Extract from E/CN.4/1998/53/Add.2 (Feb. 11, 1998), available at <http://www.unhcr.ch/html/menu2/7/b/principles.htm>.

meeting day on CC&HRs. Members of treaty bodies might also join the June meeting. Special procedure mandate holders could also engage in the UNFCCC process through public statements or submissions to negotiating processes.

b) Potential Strengths of Including Climate Change in Existing Special Procedures

Including climate change in existing special procedures could draw on their established infrastructure. It would highlight the harms climate change can cause to a wide variety of rights, and it could provide more resources to examine those harms. Existing mandates may also have more legitimacy than newly created mandates.

Existing mandates are generally based on widely, if not universally, recognized human rights (e.g., indigenous peoples' rights) and related problems (e.g., extreme poverty). Including the CC&HRs linkage within these existing mandates would therefore benefit from the legitimacy of those rights, the reputation of the United Nations, and the expertise of their mandate-holders. For example, a statement by the Special Rapporteur on the Right to Food regarding the negative impacts of climate change on access to food would carry the institutional weight of the UN human rights system, in addition to the weight of the expertise of the special procedure. While mandate holders may examine impacts of climate change on the subject of their mandate without a request from the Council, an explicit Council request would help with resources and reporting.

c) Potential Limitations of Including Climate Change in Existing Special Procedures

Including climate change in existing special procedures without some kind of additional structured coordination or focal point may not be sufficient

to address an issue as large and complex as the effects of climate change on human rights. Existing mandate-holders may not be experts on climate change or even on the effects that climate change may have on their particular mandate topic. Thus, they may or may not be qualified to expand their mandate in this manner. Training and capacity building for mandate holders and staff of the OHCHR will be essential to increase their understanding of the complex inter-relationship between CC&HRs.

Existing mandate-holders also have limited funding and support staff,¹⁸ so they may be over-taxed to expand their mandate. Likewise, mandate-holders may already have defined their schedules of work, planned country visits, and other activities. Even where expanding their mandate is feasible, CC&HRs would compete within that mandate with issues that may be closer to the mandate-holder's area of expertise and consequently receive greater priority.

Addressing climate change effects in existing mandates could be comparatively ineffective for publicizing CC&HRs connections or motivating change, unless the work of the mandate-holders was coordinated and compiled. The effects of climate change on enjoyment of human rights would not be the focus of any one report, but would be included as a side issue in all of the special procedures' reports addressing climate change. To understand the total effect of climate change on human rights, a person would have to collect and analyze the relevant passages in all the reports issued by thematic (and possibly country) mandate-holders, in addition to trying to understand the context of the specific climate-related passages.

Such a division increases the risk that the effects of climate change on human rights would be overlooked or underestimated by the international community. Four of the special procedures listed earlier in this section as being related to climate change have recently explicitly referred to climate change in their work (housing, food,

18 Oliver Hoehne, *Special Procedures and the New Council – A Need for Strategic Positioning*, 4 Essex Human Rights Review 1, 5 (2007).

health, and indigenous people).¹⁹ Though this is a very important development, the overall implications of climate change appear somewhat diluted given the very specialized focus on the particular rights implicated. This problem could be overcome if the findings of the different mandate holders were systematically compiled and their

activities relating to climate change coordinated. This could be done by the OHCHR Secretariat through a designated focal point, through a new mandate holder on CC&HR, or through a joint report by the mandate-holders who address climate change in their work.

¹⁹ See, e.g., Miloon Kothari as the Special Rapporteur on adequate housing in the 2008 Annual Report to the Human Rights Council, Jean Ziegler as the Special Rapporteur on the right to food in both the 2007 and 2008 Annual Report to the Human Rights Council as well as in the 2007 Report to the General Assembly on the right to food, Paul Hunt as the Special Rapporteur on the right to health in the 2007 Report to the General Assembly and Rodolfo Stavenhagen as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in the 2007 Report to the Human Rights Council.

Approach 2:

The Human Rights Council Establishes a Special Procedure on CC&HRs

One mechanism to advance the linkages between CC&HRs is for the Council to establish a special procedure on climate change and human rights.

a) Background on Special Procedures

Under the Council's special procedures, also known as its "mandates" system, the Council gives independent experts mandates to monitor and report publicly on human rights situations in specific countries ("country mandates") or on situations involving a particular human right worldwide ("thematic mandates"). Country mandates have one-year, renewable terms; thematic mandates have renewable three-year terms. Currently, the Council has eight country mandates and thirty thematic mandates.

To carry out the mandates, the Council appoints either an individual or a working group. Individuals have received various titles: the most common is "Special Rapporteur," although they have also been called "Independent Expert" or "Special Representative of the Secretary-General."²⁰ Although the titles vary, the Council's Operations Manual states that "there are no major differences in the general responsibilities and methods of work."²¹ The Council is currently moving towards a uniform system of nomenclature such that in the

future "Special Rapporteur" may be the only special procedure title.²² Nevertheless, for the creation of a new special procedure on climate change, it may be necessary to revisit the question of whether in practice there are substantive differences between the various special procedures, and whether, as long as different types of special procedures continue to co-exist, it would be preferable to choose one over another to cover a mandate relating to climate change. To establish a new special procedure, a sponsor State must propose a draft mandate to the Council. If the Council approves the mandate, the President of the Council, acting on the recommendation of a Consultative Group (established to propose potential candidates), appoints a mandate-holder.²³

The resolution creating the mandate sets out the specific duties of the mandate-holder, and those duties always include conducting studies and making recommendations. Although specific roles vary according to mandates, generally, special procedures research human rights issues, provide advice on measures to be taken by relevant actors, and mobilize the international community to address global issues in a cooperative manner.²⁴ In the course of fulfilling these functions, special procedures conduct country visits to locations experiencing alleged rights violations, coordinate meetings of relevant stakeholders, and submit annual reports

20 *Manual of Operations*, *supra* note 13, ¶ 5 (In the past, the Commission of Human Rights, the predecessor to the Human Rights Council, established mandates for Representatives of the Secretary-General and the Secretary-General appointed the mandate-holder.)

21 *Id.* at 6 n.5.

22 See HRC Res. 5/1, *supra* note 15, ¶ 59 (stating "It should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more understandable").

23 *Manual of Operations*, *supra* note 13, ¶ 8. Thematic Special Rapporteurs are appointed for a term of three years and may be re-appointed once for a total of six years. HRC Res. 5/1, *supra* note 15, ¶ 59.

24 *Manual of Operations*, *supra* note 13, ¶ 5.

to the Council presenting findings and suggesting further actions.²⁵ An increasingly important role of mandate-holders is to receive information alleging specific human rights violations and ask governments to respond or take steps to cease the violations. In 2007, mandate-holders sent more than 1000 such requests to 128 States.

The Council has taken steps to review and consolidate existing special procedures and has established criteria for creating new mandates.²⁶

For example:

- the creation of new mandates must enhance all rights;²⁷
- mandates should “offer a clear prospect of an increased level of human rights protection”;²⁸ and
- the Council should always respect “the principle of non-accumulation of human rights functions”²⁹ and “avoid unnecessary duplication.”³⁰

While there currently is no special procedure expressly on climate change or the environment, there are special procedures on clean water and sanitation, toxic waste disposal, the right to food, the right to housing, indigenous cultural rights, corporate responsibility, and other relevant issues implicated by climate change,³¹ as well as Special Envoys of the Secretary-General on Climate Change.³² (A special procedure on CC&HRs would not duplicate or overlap with the mandates of the Special Envoys on Climate Change, which are not

appointed by the Council and whose function is to provide diplomatic support to the Secretary-General, rather than research, reporting, and advocacy with respect to human rights.³³)

Since its foundation in 2006, the Council has established only two special procedures, both continuations of projects already in existence when the Council began.³⁴

b) Potential Strengths of Special Procedures

Special Rapporteurs have been praised as the “front-line protection”³⁵ of human rights, the “conscience of humanity”³⁶ and the “[t]rue defenders of the Universal Declaration of Human Rights.”³⁷ Special Rapporteurs enjoy a great deal of “moral authority,”³⁸ and their appointment is considered a powerful normative signal.³⁹

The creation of a special procedure would effectively raise awareness of the linkages between climate change and human rights. A special procedure would help develop regional or global approaches to the problem, encourage cooperation, and address complaints by victims. A special procedure could also develop norms regarding the connections, build a comprehensive record of relevant harms, and establish a focal point for joint efforts to deal with them.

25 *Id.* ¶¶ 23-27.

26 HRC Res. 5/1, *supra* note 15.

27 *Id.* ¶ 54.

28 *Id.* ¶ 58(a).

29 *Id.* ¶ 44.

30 *Id.* ¶ 58(c).

31 See Special Procedures Assumed by the Council: Thematic Mandates, <http://www2.ohchr.org/english/bodies/chr/special/themes.htm> (last visited Nov. 13, 2008).

32 The Secretary-General can establish Special Representatives, Special Envoys, or Special Advisors, independently of the Council.

33 *Compare Secretary-General Appoints Two New Special Envoys on Climate Change*, SG/A/1159, U.N. Doc. ENV/DEV/1003 SG/A/1159 (Sept. 18, 2008) (stating that the purpose of the Special Envoys is to support the Secretary-General in facilitating the ongoing UN-FCCC negotiations with a view to reaching a new agreement) with Manual of Operations, *supra* note 13, ¶¶ 4-5 (describing the role of Special Rapporteurs as responding to allegations by victims and providing analysis and advocacy regarding violations).

34 The two special procedures created by the Council since 2006 are the Special Rapporteur on Slavery (replacing the larger and more expensive Working Group on Slavery) and the Independent Expert on Clean Water and Sanitation (proposed since 2000 and in process of being established when the Council was instituted).

35 B. Ramcharan, *The Special Rapporteurs and Special Procedures of the United Nations Commission on Human Rights and Human Security*, in *Human Rights and Human Security* 81 (B. Ramcharan, ed., 2002).

36 N. Al-Hajjaji, *Annual Meeting of the special procedures 2003*, UN Doc. E/CN.4/2004/4, ¶ 44 (Aug. 5, 2003).

37 C. Flinterman, J. Gutter, ‘The UN and Human Rights, Achievements and Challenges’ in UNDP, *Human Development Report 2000 Background Papers* (2000), http://hdr.undp.org/docs/publications/background_papers/flinterman2000.pdf.

38 Paulo Pinheiro [Special Rapporteur on Myanmar], *Musings of a UN Special Rapporteur on Human Rights*, 9 *Global Governance* 7, 7 (2003).

39 Hoehne, *supra* note 18, at 5.

Raising Awareness: Special procedures are generally surrounded by a great deal of attention, including news coverage, diplomatic commentary, and UN press releases.⁴⁰ Publicity surrounding a special procedure with “Climate Change and Human Rights” would connect the linkage in the public’s mind. The special procedure’s conclusions have a high level of credibility and influence because they draw on a broad range of sources, including government agencies, NGOs, victims, witnesses, and academics.⁴¹

Building Norms: Both the act of creating a special procedure and the subsequent work done by the mandate-holder could contribute to building norms regarding the linkages between CC&HRs. The annual reports submitted by a special procedure to the Council are also extremely valuable for establishing norms that, while not binding, are nevertheless persuasive and even used by international courts.⁴²

Creating a Comprehensive Record: Work by a special procedure would create a comprehensive record on the linkages between climate change and human rights. Such a record would help educate the international community on the severity of the issue and could prove useful for campaigns or litigation on the issue. A special procedure could also fill gaps left by other mandates, as climate change affects rights that are not addressed by current thematic mandates. It would also build a record about small nations experiencing severe human rights effects, yet often unable to produce their own

record of harms. Due to their high credibility and moral authority, special procedures can also sometimes gain entry into nations where other human rights institutions are not permitted.⁴³ Even if existing mandates and organizations could address all rights and nations affected by climate change, there is some additional benefit to having all relevant data collected in a single location to allow for tracking and comparison between locations and years.

Serving as a Focal Point: A special procedure would serve as a focal point for efforts by the various special procedures and even throughout the UN system to address the CC&HRs linkage. This role may be particularly important because of the global and transboundary aspects of climate change’s causes and harms, and because mitigation and adaptation measures may also involve more than one State.

c) Potential Limitations of Special Procedures

Several limitations affect special procedures. Some are inherent to the procedure and some are specific to CC&HRs.

General Limitations: The effectiveness of a Special Rapporteur depends a great deal on the mandate-holder.⁴⁴ The Council has emphasized that expertise and experience are of “paramount importance” for the selection of a mandate-holder.⁴⁵ Another limitation facing any special procedure is lack of adequate funding. Resources for

40 For example, a Google News search of “United Nations and Special Rapporteur” yields 227 news articles for the week of Nov. 4 – Nov. 11, 2008.

41 *Manual of Operations*, *supra* note 13, ¶ 8.

42 For the European Court see, e.g., *NA v. United Kingdom*, 25904/07 Eur. Ct. H.R. 25904/07 (2008) (referencing the Special Rapporteur on Torture); *Bevacqua and another v. Bulgaria*, 71127/01 Eur. Ct. H.R. (2008) (referencing Special Rapporteur on violence against women); *Stoll v. Switzerland*, 69698/01, Eur. Ct. H.R. (2007) (referencing Special Rapporteur on freedom of expression). The International Court of Justice cites Special Rapporteur reports in both its cases and advisory opinions. See, e.g., *Democratic Republic of the Congo v. Rwanda*, 2006 I.C.J. 126 (Feb. 3, 2006) (referencing Special Rapporteur on reservations to treaties); *Democratic Republic of the Congo v. Uganda*, 2005 I.C.J. 116 (Dec. 19, 2005) (Referencing Special Rapporteur to Congo); *see also, e.g.*, *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9, 2004) (referencing Special Rapporteur on the Right to Food). The European Committee of Social Rights refers to work of the Special Rapporteur on the Right to Adequate Housing, *Miloon Kothari*, in *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006 (Dec. 5, 2007) and in *International Movement ATD Fourth World v. France*, Complaint no. 33/2006 (Dec. 5, 2007).

43 Pinheiro, *supra* note 38, at 8.

44 *See* Hoehne, *supra* note 18, at 5 (arguing that “even the strongest mandate stands and falls with the choice of the individual [mandate-holder]”).

45 HRC Res. 5/1, *supra* note 15, ¶ 39. The criteria of “paramount importance” for selecting a mandate-holder include: “a) expertise; b) experience in the field of the mandate; c) independence d) impartiality; e) personal integrity; and f) objectivity.” *Id.*

special procedures generally are slight,⁴⁶ even “overloaded” and “inadequate” according to one Special Rapporteur,⁴⁷ and may be particularly slim when divided among thirty-eight special procedures. Funding may be particularly important for a Special Rapporteur addressing climate change since the topic is so broad and would require extensive reporting.

Specific Limitations: Special procedures often monitor human rights by naming and shaming governments that violate the rights of their citizens.

This approach is more complicated with climate change because the causes and harms are often located in separate nations and because of the difficulty of determining causality and allocating responsibility for any particular harm. Other special procedures, however, have been established for thematic issues with geographically disparate aspects in order to establish linkages between human rights and other issues, such as the mandate of the Independent Expert on Human Rights and Extreme Poverty.⁴⁸

46 The 2004 annual budget for all thirty-nine HRC special procedures was US\$1.5 million from the regular budget and US\$3.1 million requested from extra budgetary sources. Human Rights Commission Budget (2004). The Council has discussed increased funding and support efforts but no official decisions have been made.

47 Pinheiro, *supra* note 38, at 9.

48 The mandate of the Independent Expert on Human Rights and Extreme Poverty, for example, “was established to evaluate the relationship between the enjoyment of human rights and extreme poverty.” Introduction to Independent Expert on Human Rights and Extreme Poverty, <http://www2.ohchr.org/english/issues/poverty/expert/index.htm>.

Approach 3:

The Human Rights Council Remains Directly Engaged on CC&HRs in Ways Other Than Special Procedures

Requesting that the Council remains engaged in the CC&HRs issue in ways other than special procedures could tap existing mechanisms available to the Council. The Council could use its mechanisms to elaborate guidelines, monitor effectiveness, and follow-up on those guidelines as tools for addressing human rights concerns in the face of climate change. When the Council instructed the OHCHR to produce a report on CC&HRs, the Secretariat established a focal point, which could now become permanent and be publicly announced as such.

a) Background

The Council, established by the UN General Assembly in April 2006,⁴⁹ has several mechanisms and processes that could address the CC&HRs linkage.⁵⁰ In addition to the special procedures discussed above, the relevant Council mechanisms include: the Universal Periodic Review, Working Groups,

the Complaints Procedure, the Advisory Committee, the Expert Mechanism on the Rights of Indigenous Peoples, the Forum on Minority Issues, and the Social Forum. This section will focus primarily on the Universal Periodic Review and the Advisory Body, though it is important to note that the other mechanisms could potentially also play a role in clarifying or even operationalizing CC&HR linkages. For example, the Expert Mechanism on the Rights of Indigenous Peoples and the Forum on Minority Issues could help to analyze the ways in which human rights and climate change guidelines affect indigenous peoples and minority populations. The Social Forum, promoting interactive dialogue amongst diverse participants,⁵¹ hosted a panel to discuss climate change, within the broader theme of the “social dimension of the globalization process” in 2008.⁵² Working Groups provide services from research and drafting declarations to monitoring the implementation of proposed guidelines.⁵³ The Council could request the High Commissioner to attend the climate change

49 The General Assembly created the Council to replace the Commission on Human Rights. The Council is “responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.” Council, G.A. Res. 60/251, (2006). In order to fulfil this mission, the Council addresses cases of violations, undertakes universal periodic reviews, makes recommendations, and submits annual reports to the General Assembly for the development of international human rights law. The Council consists of forty-seven member States, which are elected by secret ballot by the majority of the members of the General Assembly. *Id.*

50 The Council’s website distinguishes between: Universal Periodic Review; Human Rights Commission Mandates and Mechanisms assumed by the Council (including special procedures, working groups and complaints procedures); and Council Mechanisms (including Advisory Committee, Expert Mechanism on the Rights of Indigenous Peoples, Forum on Minority Issues, and Social Forum).

51 The former Commission on Human Rights founded the Social Forum to create space within “the United Nations system for the exchange of diverse views and concerns... to formulate new ideas and proposals for action to address the challenge currently facing human rights.” Social Forum: 2008 Social Forum Geneva, Switzerland, Sep. 1-3, 2008, <http://www2.ohchr.org/english/issues/poverty/sforum.htm> (last visited Nov. 20, 2008).

52 See http://www2.ohchr.org/english/issues/poverty/docs/2008Social_ForumProgramme_of_Work.pdf.

53 The Council divides working group activities into three categories: special procedures Standard-Setting, and Open-Ended. Standard-Setting Working Groups draft legal reports on particular issues. Open-Ended Working Groups focus on monitoring and reviewing progress under previously articulated rights, making recommendations for implementation and preparing international standards. The proceedings of Open-Ended Working Groups are open to the public, and in the performance of their mandate, they evaluate research and reports submitted by outside entities (Council Working Groups, <http://www2.ohchr.org/english/bodies/chr/workinggroups.htm>). For example, the Working Group on the Right to Development evaluated the research of the High-Level Task Force on the Implementation of the Right to Development, created by the former Commission on Human Rights in 2005, <http://www2.ohchr.org/english/issues/development/taskforce.htm>.

negotiations to be held in Bonn in June and COP 15, in order to express the Council's interest in climate change's impacts on the realization of human rights and to describe related activities. Finally, the Council could convene a panel discussion or call for a special session of the Council dedicated specifically to CC&HRs.

Universal Periodic Review. The Council conducts a Universal Periodic Review of UN Member States' compliance with their human rights obligations. The Universal Periodic Review is a process that involves a review of the human rights records of all 192 UN member States once every four years. It provides an opportunity for all States to explain what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights, as well as sharing best human rights practices. In this new process, climate change issues have already been raised. For example, as part of the Universal Periodic Review process Tuvalu stressed that it, as a small island state, had unique vulnerabilities to the predicted impacts of climate change and sea-level rise and that as a consequence, it faced important challenges in implementing the economic, social and cultural rights of the Tuvaluan people. In 2007, the Council adopted a calendar for the reviews; under this schedule, the Council reviews sixteen countries at each of its three sessions a year, beginning in 2008.

The Advisory Committee. The Advisory Committee was established in March 2008 in an effort "to provide expertise in the manner and form requested by the Council, focusing mainly on studies and research-based advice."⁵⁴ The Committee is composed of eighteen experts representing different regions of the world. The Advisory Committee is permitted to conduct research under two circumstances: 1) if the Council requests research on a particular topic or 2) if the Council accepts a research proposal submitted by the Advisory Com-

mittee. The Advisory Committee could play an important research role by addressing specific issues relating to the CC&HRs linkage. For example, the Advisory Committee could research the obligation to cooperate that appears in various human rights instruments or the interpretation of common but differentiated responsibility. Member States would have to carefully draft a question submitted to the Advisory Committee. This would not preclude the additional use of Special Rapporteurs.

b) Potential Strengths of the Council Remaining Engaged on CC&HRs

This part looks into the potential use by the Council of the Universal Period Review and the Advisory Committee.

Universal Periodic Review: The Council could request countries to include in their reports statements on how climate change is affecting their ability to comply with their human rights obligations, what steps they are taking to deal with that situation, and what steps they are taking to ensure that their efforts to mitigate or adapt to climate change respect human rights. Doing so might help to highlight CC&HRs connections and pave the way for more effective linkages elsewhere.

Advisory Committee: One potential strength of research conducted by the Advisory Committee flows from its level of expertise. The Committee is composed of eighteen human rights experts⁵⁵ and the nomination procedures and requirements for appointment are designed to ensure that the Committee is able to provide the best advice possible.⁵⁶

The Advisory Committee is well informed by a variety of sources, and presumably would be regarding CC&HRs. The Committee gives States, Special Rapporteurs, academics, representatives from NGOs, and observers from intergovernmental

54 Council Advisory Comm., <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm> (last visited Nov. 20, 2008).

55 Five experts each are from African and Asian States, three each are from Latin American and Caribbean States, and Western European and other States and two are from Eastern European States. The members serve for three years and are only eligible for re-election once.

56 The technical and objective requirements of candidates are, "recognized competence and experience in the field of human rights, high moral standing, and independence and impartiality." H.R.C. Decision 6/102, Follow-up to H.R.C. Resolution 5/1 (2007).

organizations opportunities to speak or present written findings at Committee meetings. Advisory Committee research would thus incorporate this practical knowledge and create an interdisciplinary final product.

The Committee's research and advice also has the potential strength of focusing on the implementation of guidelines for protecting human rights in the face of climate change. One of the Council's purposes for forming the Advisory Committee was to create a body of experts who could provide well-informed insight and whose research would be implementation oriented. In its short history, the Committee has already made strides towards developing implementation strategies for newly articulated rights.⁵⁷

c) Potential Limitations of the Council Remaining Engaged on CC&HRs

The Advisory Committee and the Universal Periodic Review exhibit certain limitations.

Universal Periodic Review: The Council's use of the universal periodic review to address CC&HRs faces several problems. First, it depends primarily on self-reporting by the countries subject to review, and focuses almost exclusively on domestic obliga-

tions, when climate change is an overarching, transboundary problem. Second, the reviewers will be the Council members, who have little incentive to criticize each other, or other countries, too harshly. Third, even with the best of intentions, the Council lacks the resources to effectively review 48 countries a year with respect to the entire range of their human rights obligations.

Advisory Committee: Given that the OHCHR has conducted an analytical study of CC&HRs, similar research by the Advisory Committee could be seen as duplicative and potentially causing delay. Climate change requires immediate action, and requesting additional research by the Advisory Committee could unnecessarily delay such action. Requesting research on some related topics, however, may not be duplicative and might enhance monitoring or progress in other ways. The size of the Committee (eighteen members) is somewhat unwieldy, with the potential to water down its final products, given the need to secure agreement by all its members.

Finally, the Advisory Committee cannot enforce guidelines. While the Advisory Committee's research is oriented towards implementation, the Committee does not engage in implementing or monitoring its proposed strategies.

⁵⁷ At the first meeting, the Advisory Committee discussed the right to food. As part of the right to food initiative, the Committee focused on hunger refugees and the realization of the right to food in United Nations refugee camps. The Council requested that the Committee make recommendations which would render the right to food initiative achievable in practice. This strategy of using the Advisory Council to recommend how to make certain rights achievable could be used to suggest an implementation strategy for climate change abatement. Council Advisory Comm., Report of First Session of Council Advisory Committee, 11-12 (2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm>.

Approach 4:

Human Rights Treaty Bodies Engage the CC&HRs Linkage Within Their Mandates

This section will explore the prospects and likely outcomes of obtaining a treaty body's recognition of climate change and human rights linkages through either Concluding Observations in response to State reports or the issuance of interpretive General Comments or statements.

a) Background

Eight treaty bodies of the United Nations human rights treaty system have both monitoring and interpretive procedures.⁵⁸

- The International Covenant on Civil and Political Rights (ICCPR), whose treaty body is the Human Rights Committee;
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has the Committee on Economic, Social and Cultural Rights;
- The Convention Against Torture (CAT), which has the Committee Against Torture;
- The Convention on the Elimination of Racial Discrimination (CERD), which has the Committee on the Elimination of Racial Discrimination;
- The Convention on the Elimination of Discrimination Against Women (CEDAW), which has the Committee on the Elimination of Discrimination Against Women;

- The Convention on the Rights of the Child (CRC), which has the Committee on the Rights of the Child;
- The Convention on the Protection of the Rights of All Migrant Workers (CMW), which has the Committee on Migrant Workers; and
- The Convention on the Rights of Persons with Disabilities (CRPD), which has the Committee on the Rights of Persons with Disabilities.

State Parties to each of these treaties are required to submit periodic reports detailing “the measures which they have adopted and progress made in achieving the observance of the rights recognized.”⁵⁹ The treaty bodies then examine the reports and communicate concerns and recommendations through “Concluding Observations.”⁶⁰

To assist States in their fulfillment of treaty obligations, the treaty bodies also interpret their respective treaty provisions and respond to common issues found in the periodic reports through the publication of General Comments.⁶¹ General Comments have been directed at a particular provision of a treaty or at a cross-cutting issue. General Comments “assist and promote the further implementation of the [treaty] by providing guidance to State Parties on practical ways and means to respect, protect and fulfill specific [human] rights.”⁶² Treaties provide little or no guidance to treaty bodies as to when, whether, and how they should issue General Comments. There is no for-

58 Office of the U.N. High Commissioner for Human Rights [OHCHR], *The United Nations Human Rights Treaty System: An introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, 24-25 (2005).

59 Committee on Economic, Social and Cultural Rights [CESCR], *Rules of Procedure of the Committee: Provisional Rules of Procedure Adopted by the Committee at its Third Session*, ¶ 17, U.N. Doc. E/C.12/1990/4/Rev.1 (Sept. 1, 1993).

60 Office of the U.N. High Commissioner for Human Rights [OHCHR], *The United Nations Human Rights Treaty System: An introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, 31 (2005).

61 *Id.* at 37.

62 Office of the U.N. High Commissioner for Human Rights [OHCHR], *Committee on Economic, Social, and Cultural Rights – NGO Participation*, <http://www2.ohchr.org/english/bodies/cescr/ngos.htm> (last visited Nov. 20, 2008).

mal mechanism for States or individuals to request a General Comment; treaty bodies issue them on their own initiative. Committees often state that they have issued a comment in order to clarify an issue that has arisen during their review of States' reports, which are showing lack of clarity or agreement among States on how they should comply with an obligation. Although it is not required, treaty bodies (in particular, the CRC committee) have held one-day sessions on provisions or issues, which may lead to a General Comment.

Treaty bodies could also use statements to address the CC&HRs linkage. Although statements do not have the same status as a General Comment, they could provide clarification on issues such as States' international cooperation obligations under existing human rights treaties. Treaty bodies could produce their own statements or align themselves with a joint special procedures statement.

b) Potential Strengths of a Concluding Observation, General Comment or Statement on CC&HRs by a Treaty Body

Concluding Observations, General Comments, or statements exhibit common potential strengths, such as the legitimacy of their processes. They also have unique strengths explored below.

The strength of elaborating a General Comment or statement, or responding to State reports with Concluding Observations, is that it could enhance the legitimacy of the CC&HRs linkage. The success of the process has been attributed to the independence of the experts sitting on treaty bodies as well as the treaty bodies' ability to gather information from a variety of disciplines.

The independence of experts on the treaty bodies allows General Comments, statements and Concluding Observations to serve as useful tools in developing and explaining the normative content of protected rights. For treaty bodies, the proceedings of the meeting are arguably not marked by "ideological partisanship;" therefore, the questioning can be useful and often penetrating resulting in a better final product.⁶³

The General Comments and Concluding Observations reflect well-rounded perspectives drawn from a variety of sources. When drafting General Comments and evaluating State performance in Concluding Observations, treaty bodies tend to rely on more than just the text of the treaties and the expertise of committee members. They also analyze international and domestic jurisprudence, other human rights treaties and international legal instruments, UN reports, resolutions and recommendations, expert opinions, and days of general discussion.⁶⁴ Treaty bodies could therefore specifically ask States about their reporting to the UNFCCC and take those reports into account. Moreover, treaty bodies generally consider submissions from civil society when drafting General Comments and again when revising proposed drafts.⁶⁵ Because the work of treaty bodies on human rights and climate change would incorporate expertise from such a variety of sources, the final products could acquire enhanced quality and strength.

Treaty bodies' General Comments are probably their highest-visibility interpretations of treaties. Although not legally binding, they are intended to give interpretive guidance to the Parties, and courts have taken the General Comments into account when evaluating cases.⁶⁶ Because they are carefully reasoned and issued by independent experts with particular authority over the oversight of the

63 Jack Donnelly, *International Human Rights: A Regime Analysis* 3 International Organization 600, 610 (1986). available at <http://classes.maxwell.syr.edu/intlmgt/readings/donnelyhr.PDF>.

64 *Id.* See also Dianne Otto, *Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women*, 14 *Canadian J. Women & L.* 1, 10-11 (2002).

65 See CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights: NGO participation in activities of the Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/1993/WP.14 (Dec. 5, 1993).

66 For instance, the Constitutional Court of South Africa, in *Government of the Republic of South Africa v. Grootboom and Others*, (2000) CCT/11/00, considered CESCR's view "that States are bound to fulfill a 'minimum core' obligation by providing essential levels of economic and social support, protection and integrity." Graham Hudson, *Neither Here nor There: The (Non-) Impact of International Law on Judicial Law on Judicial Reasoning in Canada and South Africa*, 21 *Can. J.L. & Juris.* 321, 344 (2008).

treaty, they often serve as points around which States' and others' interpretations coalesce.

By elaborating on a treaty's provisions as they relate to climate change, a General Comment could clarify the normative content of protected rights as they relate to climate change, for example, by establishing minimum core obligations for State Parties, and by suggesting methods of compliance. A General Comment would help States to know when their activities are infringing on human rights, and it would also assist NGOs and others in identifying States that have violated their obligations.

Treaty bodies have succeeded in exercising objectivity and independence by successfully publishing General Comments on politically sensitive issues.⁶⁷ In addition, treaty bodies have issued General Comments discussing the relationship between environmental factors and the enjoyment of certain rights.⁶⁸ For example, CESCR General Comment No. 14 explicitly recognizes the connection between the protection of the natural environment and the enjoyment of the right to health protected by the ICESCR, CEDAW, CRC, and CERD.⁶⁹

Treaty bodies can also issue separate or (more unusually) joint statements on CC&HRs. The advantage of a statement is that it can be more easily obtained than General Comments. Like General Comments, statements are not legally binding but can nevertheless enhance the understanding between CC&HRs.

The primary mandate of treaty bodies is to review States' reports on their compliance with their obligations. Each State presents its written report at a lengthy meeting with the committee,

at which the committee asks the State representatives questions about particular problems or issues. Some Concluding Observations have stated that environmental degradation negatively impacts the realization of certain rights.⁷⁰

The treaty body could ask States to include information in their written reports, and/or their oral responses to questions, about how they are responding to the threat of climate change. The questions could address harm to human rights in other countries as well as in the territory of the reporting State. The treaty bodies' Concluding Observations would evaluate State progress, provide valuable insight into the implementation of strategies, and help to hold State Parties accountable for their impact on climate change as it affects human rights.

Treaty bodies would require capacity building and training for their members in order for the committees to be able to ask appropriate climate-related questions and to evaluate responses. They could ask the OHCHR for assistance in considering indicators of linkages between CC&HRs or, conversely, the OHCHR could directly, or pursuant to a request by the HRC, provide the treaty bodies with information. Treaty bodies can also be educated about the effects of climate change through information in reports of particularly affected states, and in NGO reports submitted in the compliance review process. Revised and more targeted reporting guidelines could also help streamline and improve climate-related reporting. Ultimately, effective climate change related reporting would help identify vulnerable populations, States and victims. Concluding Observations are less high-profile than General Comments, but they have the

67 Examples of General Comments involving sensitive political issues include CEDAW General Comment No. 25 affirming the validity of affirmative action programs and CRC General Comment No. 4, which amongst other things, calls for adolescent access to sexual and reproductive information. Office of the U.N. High Commissioner for Human Rights [OHCHR], *Human Rights Bodies – General Comments*, <http://www2.ohchr.org/english/bodies/treaty/comments.htm> (last visited Nov. 20, 2008).

68 See e.g., Interpreting Article 27 of the ICCPR, General Comment No. 23 of the Human Rights Committee recognized that in certain cases the implementation of the right to culture requires the protection of natural resources. U.N. Human Rights Comm., ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994).

69 U.N. Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 15, U.N. Doc. E/C.12/2000/4 (Nov. 8, 2000).

70 See e.g., Comm. on the Rights of Child, *Concluding Observations: South Africa*, 23rd session, ¶ 30, U.N. Doc. CRC/C/15/Add.122 (Feb. 23, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.122.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.122.En?Opendocument); Comm. on the Rights of Child, *Concluding Observations: Ecuador*, 19th session, ¶ 24, U.N. Doc. CRC/C/15/Add.93 (Oct. 9, 1998), available at <http://www1.umn.edu/humanrts/crc/ecuador1998.html>.

advantage of forcing States to pay more attention to the issue. Often, raising issues in this way serves as a precursor to a General Comment.

The process works in the other direction as well: once a General Comment is issued expressing a particular interpretation, States can be sure that the committee will expect their report to reflect that interpretation. And if States fail to meet the standards outlined in a General Comment, including the minimum core observations, the treaty body would respond with Concluding Observations detailing the violations and suggesting strategies for compliance. Repeated references to treaty obligations in Concluding Observations would signal the importance of climate change abatement to compliance with human rights treaties. This process of establishing universal norms would provide an opportunity for dialogue among various treaty bodies and enhance international recognition of climate change as a human rights issue.

Treaty bodies also consider alternative/parallel reports from non-State stakeholders, who wish to comment during States' periodic reviews. As in the case of General Comments noted above, the ability of the public to input information into the process potentially strengthens the Concluding Observation by incorporating expertise from a broader range of informed sources.

c) Potential Limitations of a Concluding Observation, General Comment or Statement on CC&HRs by a Treaty Body

Using General Comments and Concluding Observations as a way to advance the understanding between CC&HRs presents a longer term option, the process for creating General Comments being rather slow. Most bodies publish a General Comment, at most, every year, and more recently they have published General Comments every two years. Moreover, General Comments are based on reporting and past practice, both of which are not yet available with respect to climate change.

Treaty bodies typically issue Concluding Observations on any given State only once every two to five years, and thus evaluating compliance and improvements would not occur quickly. The issue of climate change could be channeled into the compliance process more quickly, however, if States under review bring up the issue themselves, or if climate change is addressed in alternative/parallel reports. In the longer term, however, the committees could revise their reporting guidelines to include climate change and members of committees.

General Comments only directly impact States party to the treaty in question. Those States that are not a party to the treaty would not, necessarily, feel obligated to incorporate the tenants of a General Comment into their State policy. Concluding Observations have an even narrower audience because, even though other States might consider them, they are directed at an individual State.

The impact of a General Comment or Concluding Observation by some treaty bodies would address only limited populations. For instance, CEDAW, CRC, and ICERD each address specific subgroups of the population. As such, any pronouncement of the linkage between climate change and human rights by these treaty bodies – while extremely important – would presumably be narrow in scope. Although General Comments and Concluding Observations from these bodies would be very useful for recognizing and addressing the impacts of climate change on often marginalized populations, the universal recognition of the CC&HRs linkage would require broader efforts.

In addition, General Comments and statements are typically considered merely persuasive, and not legally binding. That would also be the case with a General Comment on CC&HRs. Concluding Observations based on climate change could attempt to hold individual States accountable, but again, the analysis and suggestions provided would be merely suggestive.

Approach 5:

The UNFCCC Conference of the Parties Recognizes the Principle that Climate Change-Related Activities Must respect Human Rights and Tasks a New or Existing Specialized Body or Process with Operationalizing the CC&HRs Linkage

Approach 5 discusses several aspects of measures that could be taken under the UN Framework Convention on Climate Change (UNFCCC) and related negotiations, including in particular expressly recognizing the principle that climate change-related activities must respect human rights, creating a new specialized subsidiary body or expert group, and providing greater opportunity for participation in negotiations by indigenous peoples and forest-dependent communities, to address the CC&HRs linkages as a long-term objective. This approach also examines other institutional options through which the CC&HRs linkage can be enhanced within the existing UNFCCC framework.

a) Background

Not only is it important to address the climate change issue in human rights bodies, but it is also essential to consider human rights aspects in the UNFCCC bodies and processes, as well as other agencies and processes. The so-called “mainstreaming” of human rights was officially called for in 1997 by the then UN Secretary-General, Kofi Annan, and the then High Commissioner for Human Rights, Mary Robinson, as they designated human rights as a cross-cutting issue that needed integra-

tion into the broad range of United Nations activities.⁷¹ This mainstreaming has taken place to various degrees across UN agencies. The United Nations Children’s Fund (UNICEF), for example, began to include human rights in its mission statement in 1996 following the adoption of the Convention of the Rights of the Child, resulting in the development of tools for integrating women’s and children’s rights in programs identifying appropriate human rights benchmarks. This was achieved through continued training programs targeting all levels of the organization.

The United Nations Development Programme (UNDP), on the other hand, has entered into a partnership with the OHCHR and created a specific program to assist its Country Offices and national partners in implementing a policy on the integration of human rights in sustainable human development. Similarly, the OHCHR has worked with the ILO to further promote the acceptance of the human rights-based approach internationally and at country level.⁷²

Given the effects of climate change and of measures taken to combat or adapt to climate change on a wide range of human rights, it will be essential to integrate human rights considerations into the processes and the institutional framework of the UNFCCC, including whatever legal and in-

71 See Extracts from the report of the Secretary-General to the General Assembly, *Renewing the United Nations: A Programme for Reform*, A/51/950, (July 14, 1997), available at <http://www.unhchr.ch/html/hchr/unrefor.htm>.

72 André Frankovits, *The Human Rights based approach and the United Nations system*, (UNESCO 2006) Executive Summary, 5-6, (<http://unesdoc.unesco.org/images/0014/001469/146999e.pdf>).

stitutional architecture emerges in the agreed outcome of the current negotiations. This section explores ways in which this mainstreaming could be achieved.

Express recognition of the principle that climate change-related activities must respect human rights

Express recognition of this principle in the agreed outcome of the current negotiations would eliminate any question that some actors might have regarding the relevance of human rights in the context of climate change and would provide direction to those involved in mitigating or adapting to climate change regarding the need to consider human rights. A clear statement of this principle, together with the creation or tasking of a body responsible for this within the climate change regime and the provision of adequate transparency and opportunity for public participation leading to the agreed outcome (which are discussed below), would also provide a straightforward, elegant way to deal with human rights in the agreed outcome. Details of implementing the principle would not need to be specified, because they could best be left to the institution tasked with this within the climate change regime as well as other actions taken within the human rights regime and elsewhere.

Institutional responsibility within the UNFCCC and agreed outcome

The UNFCCC reflects the efforts of the international community, working through the UN system, to address climate change. The UNFCCC is governed by a Conference of the Parties (COP) that includes all State Parties and is serviced by a Secretariat.⁷³ In that role, the Secretariat takes note of issues, such as human rights, that may be important to the COP and thus to the current negotiations. It is noteworthy that the UNFCCC Secretariat recently designated a focal point on human rights

with respect to adaptation. This designation should be made public and possibly be extended to other areas as well. For Secretariat staff, including the focal point, to be effective in integrating human rights considerations into their work, it will be essential that they be appropriately trained.

The COP bears responsibility for keeping international efforts to address climate change on track. It periodically reviews the implementation of the Convention and examines the commitments of Parties in light of the Convention's objective. The COP has the power to establish subsidiary bodies that it deems necessary for the implementation of the Convention.⁷⁴ Such bodies report on their activities to the COP, and the COP reviews and provides guidance on the reports submitted. Whereas the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) were established in the Convention itself, the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) was created at COP-13 (Bali) to advance negotiations on a future climate regime. The COP could task a new subsidiary body with exploring the CC&HRs linkage as a necessary element for the implementation of the Convention, but this would require considerable international political support and require a unanimous agreement by the COP since its decisions are taken by consensus, in line with the draft rules of procedure.

Alternatively, the COP could create an expert group to be responsible for the intersection of CC&HRs. Expert groups are a type of subsidiary body, but differ from SBSTA and SBI in that its members are individuals acting in their personal capacity, whereas SBSTA and SBI are composed of State Parties. Currently there are three such expert groups: a Consultative Group of Experts on National Communications from "non-Annex 1 Parties;" a Least Developed Country Expert Group; and an Expert Group on Technology Transfer. A COP decision could establish an expert group on

73 See United Nations Framework Convention on Climate Change, art. 7, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

74 See *id.* at art. 7(i).

CC&HRs, define its membership and specify the scope of its activities, including advising the COP or one of the subsidiary bodies on matters relating to human rights and providing a focused forum for discussion of the issues within the climate regime.

On its part, the Kyoto Protocol to the UNFCCC created four subsidiary bodies; three standing and one ad hoc. Two of them, the Executive Board for the Clean Development Mechanism (CDM) and the Supervisory Committee for Joint Implementation (JI), are tasked with the effective implementation of those mechanisms created under the protocol. The third one, the Compliance Committee, seeks to secure compliance with the commitments under the Protocol. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) advances negotiations on the future climate regime under the Kyoto "track".

The existing bodies under the UNFCCC and/or Kyoto Protocol could be tasked with taking up CC&HRs linkage issues. While there are extensive overlaps between the substantive content of climate negotiations and human rights, a couple of areas of overlap seem particularly obvious. For example, the concept of adaptation enters into play when climate change causes alterations to the physical environment such that people must take action to accommodate the changes. The CDM under the Kyoto Protocol supports projects in developing countries that result in emission reductions and thus generate carbon credits that can be sold and ultimately used by industrialized countries to offset their own emissions. These projects may have human rights implications, for example, a large scale hydroelectric project could displace people or entire villages. Similarly, negotiations under way on REDD are likely to have a significant impact on forest dwelling indigenous peoples and local communities, and thus on their human rights.

While negotiations within the UNFCCC will ultimately define the scope of REDD, activities are underway within the World Bank and a partnership of UNEP, UNDP and FAO (known as UN-REDD) to conduct preparatory activities or pilot projects that will influence the development of the REDD

mechanism under the UNFCCC. Clearly these efforts must also take the human rights of indigenous peoples and local communities into account as well both in the elaboration and implementation phases of their work.

Independent of any new specialized subsidiary body or expert group, there is room for mainstreaming human rights considerations into existing institutional arrangements and processes. Bodies within the climate regime that could take on the CC&HRs linkage include the two standing subsidiary bodies created in the Convention – the Subsidiary Body for Scientific and Technical Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) – and the CDM Executive Board.

While there is no direct precedent for climate treaty bodies to address human rights issues, there are a number of ways that they could do so. They could produce technical papers that identify existing or potential problems relating to climate change and human rights, or they could request the secretariat organize a workshop, produce a paper or call for an expert meeting on the same issues. UNFCCC bodies could also be tasked to consider ways to include human rights concerns in the ongoing negotiations or in the post Copenhagen discussions. They could be tasked with coordinating a common approach or response in collaboration with other international bodies or efforts to address CC&HRs, such as the OHCHR.

Thematically, human rights aspects should be considered in discussions on climate justice, the principle of common but differentiated responsibilities and its implications for the architecture and mechanisms of a future climate agreement, and in the area of response measures. Injecting human rights considerations into the discussions on response measures would offer an opportunity to ensure that responses to climate change in adaptation, mitigation, technology transfer and financial support respect human rights. In this context, written submissions of States, intergovernmental organizations and observers could be directed to the AWG-LCA for consideration at the sixth session of the AWG-LCA (to take place in June 2009 in Bonn). Alternatively, submissions could inform the form and content of the agreed outcome (to be finalized during COP-15 taking place in Copenhagen from

7–18 December 2009), in line with the open-ended mandate of the AWG-LCA.

Participation in current climate change negotiations

Climate change and States' mitigation and adaptation measures to confront it will not affect all segments of society equally. For example, the inclusion of REDD in the new climate change regime has the potential to profoundly affect the livelihoods, traditional lands and cultures of indigenous peoples and other forest-dependent communities in ways that other elements of society will not confront. Similarly, indigenous peoples and communities in the Arctic are facing climate-related changes that are fundamentally altering their way of life, destroying their culture, and in some cases literally eroding their homes.

Some of those who are being affected, and who potentially will be among the most adversely impacted, have historically been oppressed or under-represented domestically and in international processes. Examples include indigenous peoples and forest-dwellers, already referred to above. The current climate change negotiation process provides some opportunity for participation by civil society and intergovernmental organizations, such as through submissions to the various subsidiary bodies, the organization of side events and statements during some sessions in consultation with the bureau. UNFCCC events also offer a number of informal opportunities for influencing delegates and presenting papers and reports to be disseminated to the UNFCCC audience. Nevertheless, many feel that these public participation mechanisms are inadequate. For example, the UN Permanent Forum on Indigenous Issues has recommended that the UNFCCC and relevant parties "develop mechanisms for indigenous peoples' participation in all aspects of the international dialogue on climate change, particularly the forthcoming negotiations for the next Kyoto Protocol commitment period, including by establishing a

working group on local adaptation measures and traditional knowledge of indigenous peoples."⁷⁵ A similar mechanism might be appropriate for forest-dependent communities whose members are not indigenous people. Such a working group would be characterized by the strengths and limitations of other new mechanisms created by the UNFCCC COP, discussed below.

Alternatively, indigenous peoples and local communities could be granted greater specific participatory rights than they currently enjoy within the UNFCCC negotiations, such as: the right to obtain and submit documents on par with Parties; the right to take the floor and speak in the negotiations, on par with State Parties; and the right to participate in or chair contact groups or other bodies that are dealing with issues of particular relevance to indigenous peoples or local communities. In addition, funding could be made available to support greater participation by indigenous leaders and special translation arrangements could also improve the ability of indigenous and other local representatives to participate.

b) Potential Strengths of a UNFCCC Subsidiary Body for CC&HRs

A UNFCCC subsidiary body or expert group for CC&HRs (either existing or newly created) could help draw global attention to the human rights angle of climate change. Such a body would provide resources and human capacity necessary for advancing a rights-based approach to climate change. It could also contribute toward capacity-building regarding the CC&HRs linkage in State Parties.

Depending on its mandate, a subsidiary body or expert group for CC&HRs could inject a rights-based approach to every aspect of the UNFCCC. Whether the issue concerns mitigation, adaptation, technology transfer, financial mechanisms, or other aspects involved in the implementation of the UNFCCC, this subsidiary body could have the mandate to address any and all these issues from a

75 U.N.Econ & Soc. Council [ECOSOC], Report on the 7th session, *Permanent Forum on Indigenous Issues*, 6, U.N.Doc. E/C.19/2008/13 (Apr. 21 – May 2, 2008).

human rights perspective. Accordingly, the work of the subsidiary body would not be limited by the scope of any particular human right or any particular climate change issue, as it would have the ability to take a holistic and broad approach to advancing the CC&HRs linkage in the UNFCCC context.

Because of the central position of the UNFCCC in the international efforts to address climate change, a subsidiary body or expert group for CC&HRs would build on the wealth of experience already established by the UNFCCC. Also, a subsidiary body or expert group for CC&HRs would enhance the UNFCCC's primacy in leading the efforts toward effective and equitable climate change solutions. Thus, this approach would preclude any perception that the CC&HRs linkage is an external threat to the UNFCCC.

There is certain logic to considering the CC&HRs relationship within the treaty regime responsible for negotiating responses to climate change. It would allow for a close feedback between the identification of a problem and negotiating a multilateral solution to the problem.

While the strengths enumerated above apply equally to using an existing or creating a new body within the UNFCCC structure, using an existing body may provide additional benefits. For example, tasking an existing body within the UNFCCC framework with the CC&HRs linkage would reduce the perception that human rights are a distinct and separate body of international law with limited relevance to the legal framework for climate change. Moreover, using an existing body within the UNFCCC framework would eliminate the need to create a new body within the already complex climate regime.

c) Potential Limitations of a UNFCCC

Subsidiary Body or Expert Group for CC&HRs

The creation of a new subsidiary body would only be feasible after the current negotiations have been concluded since a COP decision is required for this and the next scheduled COP is for December 2009 – the target date for conclusion of the nego-

tiations. There is no precedent for the creation of a “thematic” subsidiary body, such as on human rights – this would therefore likely meet considerable resistance. An expert group, which has several precedents under the UNFCCC and also provides a high degree of institutional linkage, would therefore be the more realistic option but would still be likely to require extensive discussions within the UNFCCC process. Similarly, establishing a new mandate for an existing body to consider CC&HRs would likely entail significant discussions within the UNFCCC process.

Subsidiary bodies do not have absolute control of their own activities or mandate. They not only get their funding from, but also report to, the COP. Thus, a subsidiary body under the UNFCCC can only go as far as State Parties allow. Another potential limitation of a UNFCCC subsidiary body for CC&HRs relates to its composition. State Parties actively participate in the work of subsidiary bodies, and thus a significant number of Parties can stall progress by delaying, diverting, and distracting, which would diminish the potential effectiveness of the subsidiary body.

In addition, some Parties to the UNFCCC have noted potential drawbacks associated with introducing human rights issues within the UNFCCC framework. In this vein, bringing human rights concerns into the climate negotiations could slow progress towards climate solutions and render the negotiations too complex to reach an agreement by the end of 2009. Similarly, the climate framework should not become a back door for implementing or enforcing other, non-climate regimes.

Some Parties have actually resisted the introduction of human rights considerations into the UNFCCC, an example of which occurred in Poznan last December 2008. A number of Parties and many observers sought language in the SBSTA deliberations on REDD that would have called particular attention to the rights of indigenous peoples and local communities. An early draft included language to that effect, but in the course of negotiations certain Parties objected to the “rights” language, and it was removed from the final version.



Center for International Environmental Law



Conclusion

This report identifies and discusses many concrete, practical steps that may be taken within the international climate change and human rights legal regimes to address the human rights implications of climate change, that is, to integrate human rights and climate change law and policy. Other regimes and institutions should also be involved in this effort; but the principal efforts and leadership should come from the two most directly involved regimes – climate change and human rights. The measures discussed in this report vary with respect to their timing – some are shorter term and some longer – and they do not comprise a closed list and are not mutually exclusive. They all, however, promise to advance the international community’s ability to confront the implications of climate change for the full realization of human rights.

Annex

An earlier version of this report informed a one and one half day consultation with an expert group which met in Geneva on 23 and 24 of January, 2009. Comments by the participants and other reviewers are reflected in this final report. The expert participants were:

Catarina de Albuquerque, International Expert on Water (OHCHR)

Virginia Bras-Gomes, Member of Committee on Economic, Social and Cultural Rights (CESCR)

Olivier De Schutter, Special Rapporteur on Food (OHCHR)

Martin Frick, Global Humanitarian Forum

Angus Friday, Former Chair of the Alliance of Small Island States (AOSIS)

Ulrik Halsteen, OHCHR

Stephen Humphreys, International Council on Human Rights Policy

Türkan Karakurt, Friedrich Ebert Stiftung

John Knox, Wake Forest University, formerly at the US Department of State

Miloon Khotari, Housing and Land Rights Network, Former Special Rapporteur on Housing

Yves Lador, Earth Justice

Daniel Magraw, Center for international Environmental Law (CIEL)

Marc Limon, Mission of the Republic of the Maldives, Geneva

Siobhan McInerny-Lankford, World Bank

Marcos Orellana, Center for International Environmental Law (CIEL)

Kilaparti Ramakrishna, UNEP

Mary Robinson, former High Commissioner for Human Rights

Martin Schönberg, UNFCCC secretariat

Vicky Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues

Ibrahim Wani, OHCHR

Nathalie Bernasconi-Osterwalder, Center for International Environmental Law (CIEL), Giovanni Mejia (Harvard University) and Anne Siders (Harvard University) served as rapporteurs for the meeting. Mr. Magraw and Ms. Karakurt moderated the discussion.

Graciela Dede (assistant to the Special Rapporteur on Housing (OHCHR)), Bonnie Docherty (Harvard University), and Barbara Ruis (UNEP) participated as observers and contributed to the discussions.

In addition to those mentioned above, Niranjali Amersinghe, Frank Biermann, Laurence Boisson De Chazournes, Edith Brown Weiss, Paul Crowley, Tyler Giannini, Felix Kirchmeier, Donna Little, Giovanni Mejia, James Nickel, Damilola Olawuyi, Anne Siders and Lauren Wood did research and drafting for, or commented on drafts of, this report.

