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***The Right to an Evergreen Future:***

**Examining a Universal Right to a Safe, Clean, Healthy, and  
Sustainable Environment at the Intersection of Human Rights and  
Climate Change**

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## Abstract

*Climate change is an existential and escalating threat to human life. In 2018, UN Special Rapporteur on human rights and the environment, John Knox, made a call for the United Nations to formally recognize a human right to a safe, clean, healthy, and sustainable environment. This right, he argued, would help address some of the gaps in human rights architecture when it comes to the environment and climate change. This paper seeks to identify what those gaps are, and how a human right to a healthy environment could prove beneficial. In order to do so, it examines the extent to which established human rights in UN human rights treaties have been ‘greened’, or reinterpreted in the context of climate change to impose specific obligations on States to combat climate change and protect the environment. Then, this paper explores the UN Climate Change Regime to determine to what extent human rights are protected within the highest existing system of international climate governance. These examinations illustrate that, despite the overlapping and mutually reinforcing nature of International Human Rights Law and International Environmental Law, significant gaps in protection for the intersection of human rights in the context of climate change exist. This paper will finally examine the Special Rapporteur’s proposal for the right to a healthy environment, as well as institutions that have already recognized this right at national and regional levels, to evaluate the benefits of such a right. This paper ultimately concludes that a universal right to a healthy environment would significantly improve the unification of environmental and human rights efforts to combat climate change and protect individuals.*

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I would finally like to dedicate this paper to those who have risked their lives in order to secure a safer and healthier future for all, those who are already suffering from the devastating effects of climate change, and to the children I hope to one day have, without fear that they may not know where their next meal, drink of water, or breath of fresh air may come from.

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# Introduction

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Global climate change is an existential threat to humanity. It necessitates the efforts of all States, institutions, groups, and individuals to cease contributions to climate change and avoid reaching the point of no return. In March of 2019, the Intergovernmental Panel on Climate Change (IPCC) published a grim conclusion: if the necessary action is not taken, in 11 years the damage done to the planet will be irreversible. At the time of submittance of this paper, that leaves approximately 9 years.<sup>1</sup>

The current COVID-19 pandemic has not only illustrated the incredible interconnectedness and interdependence of the modern world; it has exposed the weaknesses and inequalities of a global system that has largely prioritized economic growth at the expense of the planet and human welfare. What the pandemic has also illustrated is the capacity that exists for change and reform in day-to-day life. In the midst of tragedy and heartbreak, there have been some encouraging environmental developments, like in New Delhi, where “air quality index (AQI) levels are usually a severe 200 on a good day (anything above 25 is deemed unsafe by [the] World Health Organization)... But as Delhi’s 11m registered cars were taken off the roads and factories and construction were ground to a halt, AQI levels have regularly fallen below 20.”<sup>2</sup>

Though the grinding halt and devastating economic and social fallout caused by this pandemic is in no way desirable, it provides an opportunity to see how so many of the behavioural changes discussed by scientists *can* have positive impacts - impacts that are, in some cases, almost immediate.

How the world is rebuilt from this cataclysmic moment will shape the foreseeable future. In order to ensure that climate change is addressed, and addressed in a way that is inclusive and considerate of existing disparities and inequalities, human rights must be an integral part of the response. The urgency and necessity of incorporating and protecting human rights is heightened by the worsening of climate change - and the acceleration of government action to keep up. This paper will examine what the United Nations, as the highest existing body of international human rights protection and international climate governance, can do to compel States to honor their human rights obligations while encouraging stronger action on climate change.

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<sup>1</sup> (UN General Assembly 2019)

<sup>2</sup> (Ellis-Petersen et al. 2020)

This question is specifically inspired by the call of the former Special Rapporteur on human rights and the environment, John Knox, for the UN to formally recognize a human right to a safe, clean, healthy, and sustainable environment. In his 2018 report on human rights obligations and the environment, Knox refers to the ‘greening’ of human rights around the world, and the gaps in the architecture of the human rights system he argues would benefit from a right to a healthy environment; This paper seeks to examine the extent of ‘greening’ at the universal level, identify specific gaps in the protection at the intersection of human rights and climate change, and determine the benefit of a human right to a healthy environment.

Engaging with the idea of a right to a healthy environment at the universal level is an important next step in the international effort to combat climate change. This paper will explore this idea from a few angles.

In order to determine what the gaps at the intersection of human rights and climate change are and how a right to a healthy environment could ameliorate them, chapter 1 of this paper first establishes the threats to human rights posed by climate change, and the position of the UN to compel and enhance State action.

Chapter 2 will then delineate the systems of International Human Rights Law and International Environmental Law. As a human right to a healthy environment would be implemented and regulated at the intersection of these legal systems, it is necessary to understand their overlapping principles and frameworks, in order to illustrate that the systems can be mutually beneficial and reinforcing. This means that a right to a healthy environment could be supported by both systems and would not be stymied by conflicting institutions with contradictory goals and structures.

Chapter 3 of this paper studies the UN human rights system to determine what exactly the gaps in protection are when it comes to human rights and climate change. In order to do this, this paper identifies rights within UN human rights treaties that are threatened by climate change, either substantively or procedurally. It evaluates to what extent they have been ‘greened’, in order to require State obligations to combat climate change and protect the environment, or protect certain rights in the process of responding to climate change. This chapter concludes that, despite some progress made by certain Treaty Bodies, the engagement is unequal and gaps still exist regarding specific legal obligations and protection of procedural rights. Therefore, a right to a healthy environment would standardize the approach of the UN human rights system towards climate change, elevate its

significance within the regime, and address some of the gaps in substantive and structural protection.

Because provisions of International Environmental Law have such influence on the protection and enjoyment of human rights, chapter 4 of this paper examines the UN Climate Change Regime, the highest existing system of international climate governance. This is in order to determine the extent to which human rights have been incorporated into the system responsible for structuring the global response to climate change. This chapter finds that human rights are minimally included within key documents, meaning that a human right to a healthy environment would have benefits outside just the UN human rights system.

Finally, chapter 5 reviews John Knox's call for a formal right in order to determine what the right would look like and what benefits or effects it would have. This is augmented by a review of national and regional systems where this right has already been recognized. This chapter concludes that the right to a healthy environment has a number of significant benefits that could help specifically address the gaps in protection identified in chapters 3 and 4.

John Knox's call for a new UN human right provides an opportunity to examine the interaction of the UN human rights system with climate change - and vice versa. The ever-worsening situation of climate change itself makes research on this topic all the more necessary. This paper ultimately concludes that despite progress, enough has not been done to protect human rights in the context of climate change in either the human rights or climate change apparatuses. Thus, a right to a healthy environment would improve this protection and further enhance the United Nations' engagement with climate change as one of the singular most pressing and serious threats of this era.

# *Chapter 1 - Climate Change and Human Rights*

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## **Introduction**

It is difficult to overstate the threat climate change poses to human life and livelihoods as they are known. A 2020 report by the World Meteorological Organization identified just a few consequences of climate change that jeopardize human life and health, including droughts, rising sea levels, dying marine and land ecosystems, and increases in the frequency and intensity of extreme weather events.<sup>3</sup> In order to clarify the urgency and importance of the following discussion, this chapter will introduce the phenomena of climate change and delineate some of the threats to human rights that it poses. It will also introduce the United Nations as the primary host of this discussion, due to its role as the highest existing forum for international cooperation in the fields of both human rights and climate change mitigation, and its potential to unite these issues and provide a more cohesive basis for the protection of international human rights in view of this unprecedented, existential global threat.

The type of change required to prevent the worst effects of climate change and secure a safer future is considered radical by many because it stands counter to some the ways of life and economic organization that have developed over centuries. These changes, however, are much less radical when viewed through the lens of a society concerned first and foremost with the welfare of its inhabitants.

This paper will take an anthropocentric view of climate law and policy at the international level for two reasons. First, there is more research and material in this field, as well as precedent to push for change in an anthropocentric context. It is important to note that the attitude of law towards the environment, especially in regions with strong Indigenous presence and activism, is taking a different approach in recent years by granting nature its own rights and elevating its status to one of legal subject, instead of just object. The second reason is that, in these high-stakes and worsening conditions, it seems difficult enough to get powerful countries to work together to accept even a marginal broadening of the view of the traditional relationship between man and nature. At this time, it may be imprudent to structure a proposal at the international level for rights of the environment, when it has not even recognized a human right to a healthy environment. This being said, somewhere in the future this new attitude will need to be meaningfully examined

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<sup>3</sup> (Nullis 2020)

and perhaps adopted, as some argue that in many ways, the structure of environmental laws themselves is causing harm.<sup>4</sup>

## **1.1 Climate Change**

The IPCC defines climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods... Climate change may be due to.. persistent anthropogenic changes in the composition of the atmosphere or in land use.”<sup>5</sup>

In other words, certain climate deviations over time are expected - but the climate change occurring on the planet now is severe, and a direct result of human activity in sectors like food and goods production, land use, pollution, and transportation.

One well known ramification of climate change is “global warming”, which refers to an increase of the overall temperature of the Earth’s atmosphere. This is primarily due to the augmentation of ‘greenhouse gases’, or GHGs, in the Earth’s atmosphere. Greenhouse gases are pollutants like carbon dioxide and methane, which act as veritable ‘insulators’ (hence the name greenhouse). As such, GHG emissions are a main focus of climate change mitigation efforts around the world. The scientific consensus is that a global temperature rise of 2°C or more above pre-industrial levels would have devastating, irreversible effects on global climate, food production, water availability, and more.<sup>6</sup>

Global warming is already having alarming effects on the delicate ecosystem of the planet. The notorious melting of the polar ice caps has led to rising sea levels, threatening coastlines and low lying island nations. There is a marked uptick in the number of droughts, floods, and extreme weather occurrences over the past 20 years.<sup>7</sup> This volatility has tremendous effects on animal species and plants, pushing many to endangerment or extinction, which in turn impacts agriculture, water systems, and more. A culture of disposability and overconsumption has only augmented the damage, contributing to depletion of natural resources and pollution of oceans and landfills.

All of this, of course, continues to have devastating consequences on livelihoods, forcing many to flee environments rapidly becoming inhospitable to human life. One New York Times report found that “the planet could see a greater temperature increase in the next 50 years than it did in the last 6,000 years combined. By 2070, the kind of extremely hot

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<sup>4</sup> (Bakkar 2016)

<sup>5</sup> (IPCC 2012)

<sup>6</sup> (Buis 2019)

<sup>7</sup> (Pidcock, Pearce and McSweeney 2020)

zones, like in the Sahara, that now cover less than 1 percent of the earth's land surface could cover nearly a fifth of the land, potentially placing one of every three people alive outside the climate niche where humans have thrived for thousands of years.”<sup>8</sup> In his report on climate change and poverty, Special Rapporteur Philip Alston stressed the mass migratory effects of climate change, reporting that “by 2050, climate change could displace 140 million people in Sub-Saharan Africa, South Asia, and Latin America alone.”<sup>9</sup>

This is only a brief illustration of the causes and effects of climate change. It is clear that human activity has massively exacerbated systems that contribute to the depletion of the planet's natural resources and spur on rapid climate change, which can lead to water and food shortages, flooding, wildfires, loss of human habitat, and more, which will ultimately force humans to seek shelter and stability elsewhere, and stretch an already finite amount of resources even thinner.

## **1.2 Human Rights**

The natural environment is essential and integral to human survival. As outlined above, the ways in which climate change can impact humans' way of life are wide and not able to be fit into finite categories. However, it is obvious that the projected impacts of unmitigated climate change will severely hinder the ability of humans to live healthy lives with dignity. Throughout this paper, how particular rights are affected by climate change will be explored more, but for a general idea, a few examples are as follows.

A number of substantive rights are threatened by worsening climate change. Food and water shortages, of course, impinge on the human rights to adequate food, nutrition and water. These can be compounded by air and water pollution, which have injurious effects on rights to health and adequate standards of living. Sea level encroachment on coastlines threatens the right to shelter of thousands, and the perils faced by low-lying island nations may result in the loss of entire countries and cultures, contributing to the infringement of rights to self-determination. There are also a number of procedural human rights whose enjoyment is paramount to the process of combating climate change in a comprehensive, inclusive, and judicious way (this distinction will be further elaborated in coming chapters). These are rights like access to justice, access to information, the right to public participation, and the right to redress in the event of rights violation.

Climate change is a threat to everyone. It is crucial to understand, however, that while climate change does not discriminate in its effects, who it will effect first and worse, is

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<sup>8</sup> (Lustgarten 2020)

<sup>9</sup> (Alston 2019)

a direct consequence of systemic discrimination. Crises, like climate change, exacerbate existing inequalities and injustices, of which the impacts of the Coronavirus pandemic serve as a harrowing reminder. The ways in which existing inequalities intersect with the impacts of climate change are vast and varied, but the following section will briefly draw attention to several examples.

### **1.2.1 Vulnerable Groups**

#### **Poverty**

Poverty is a compounding factor for many of the following groups, and further worsens the impact of climate change. Dinah Shelton writes that “poverty has come to be seen both as a major source of environmental degradation and as a human rights issue because it means that individuals lack an adequate standard of living...”<sup>10</sup> Those who live in poverty already have reduced access to adequate shelter, nutrition, and health. People experiencing poverty are incredibly vulnerable to the volatility and extreme impacts of climate change.

Disadvantaged, marginalized, and impoverished areas would especially benefit from an improved dedication to the protection and enforcement of procedural obligations, which would have advantages beyond inclusion and access to justice. States can encourage investment and capacity building in these areas by incentivizing climate change education, accessibility to cleaner technologies, etc., which in turn contributes to the resiliency of climate change adaptation and mitigation.

#### **Indigenous peoples**

Indigenous peoples suffer greatly from worsening climate change. They are often forced to leave sacred lands in the pursuit of business and economic interests, crop failures, and extreme weather. This can threaten the right to cultural life (which in many cases is intrinsically linked to particular lands). In addition to being largely excluded from conversations about policies and practices regarding climate change (further marginalizing them politically and economically), Indigenous peoples face an increased risk of suffering health impairments, loss of land, culture, resources, and autonomy.<sup>11</sup>

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<sup>10</sup> (Dooley and Parihar 2016, p. 144)

<sup>11</sup> (United Nations Department of Economic and Social Affairs 2008)

### ***Racial minorities***

In the United States and elsewhere, “communities of colour carry a disproportionate burden of the country’s air pollution and other environmental hazards.”<sup>12</sup> Dr. Robert Bullard coined the term ‘environmental racism’ to refer to this intersection, stating that those who are “poor, working class, or communities of colour... get less protection... less enforcement of environmental laws.”<sup>13</sup> Dr. Bullard emphasizes that the discriminatory policies and practices that have long resulted in civil and political injustice, also contribute to environmental injustice. Communities of color, especially in the United States, are more likely to suffer from negative health effects of pollution and climate change, and have less access to effective justice and remedy when their rights are infringed upon.

### ***Women***

Multiple studies have shown that women are and will be more impacted by climate change than men. Global Citizen reports that women “are more likely to live in poverty than men, have less access to basic human rights... and face systematic violence that escalates during periods of instability.”<sup>14</sup> Women are typically less protected in political, social, and economic systems, increasing their vulnerability to crises like climate change. With less infrastructure and support in the aftermath of disasters, women may be forced to flee; the UN has estimated that “80% of people displaced by climate change are women.”<sup>15</sup>

### ***Persons with disabilities***

Many persons with disabilities also have a heightened vulnerability to climate change, as a significantly marginalized and under-resourced group. In 2019, the Stakeholder Group of Persons with Disabilities submitted paper to the High-Level Political Forum, stating that “Collectively, persons with disabilities are one of the most resource-poor groups in the world, and often face other marginalization due to intersecting factors such as their gender, sexuality, ethnicity,” and that “they are globally among the most at risk people to the impacts of accelerating climate change.”<sup>16</sup> Many persons with disabilities already lack access to resources like adequate education, healthcare, and personal care. Climate change will further strain a system that even now struggles to provide the necessary support.

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<sup>12</sup> (Friedman and Rosen 2020)

<sup>13</sup> (Bullard 1993, p. 23)

<sup>14</sup> (Halton 2018)

<sup>15</sup> *Ibid.*

<sup>16</sup> (World Blind Union 2020)

## ***Environmental Defenders***

Environmental defenders are often marginalized and even ridiculed. At best, they are dismissed by governments and the media, at worst they face extreme risk of violence and persecution for their activism, which can vary based on where they work. In recent years, this has escalated, and the “number of murders of land and environmental defenders tracked by the monitoring group Global Witness increased to 197 [in 2019], compared with 147 in 2012.”<sup>17</sup> The enforcement of procedural rights, like access to justice, legislative protection, and access to information, are crucial for the protection of environmental defenders as they continue to bring attention to pressing issues.

This is by no means a comprehensive examination of the increased risks faced by vulnerable groups; which, of course, are not mutually exclusive. But it is important to consider the situations of the most vulnerable and accommodate them in mitigation and adaptation plans. Crises strike along existing fault lines, and a society and its resilience is only as strong as its least supported members.

### **1.2.2 Why a Human Rights-Based Approach to Climate Change?**

A human rights-based approach to climate change will ensure that not only are individuals protected from the impacts of climate change, but also from the measures taken to prevent them. The incorporation of human rights ensures that no one is left behind, and that the policies and practices adopted do not further augment existing inequalities. Magraw, Rosemberg, and Padmanabhan argue that “a human rights-based approach “has the potential to strengthen the effectiveness, long term success, and sustainability of climate finance policies and measures at both the national and international levels” moreover, that can occur in a manner entirely consistent with the need for environmental justice.”<sup>18</sup>

But the changes required to prevent the worst effects of climate change are not temporary. The climate crisis warrants a fundamental shift in the structures of the economy, production, governance, energy, technology, and social welfare. If human rights and social justice are not incorporated at this ground level, then they will not feature in whatever world system that develops in a post-climate change world, inevitably leading to more of the same problems faced today.

Because the environment is so entangled with human life, the phenomena of climate change affects many sectors, meaning that the “focus of law and policy has never been

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<sup>17</sup> (Watts 2018)

<sup>18</sup> (Magraw, Rosemberg and Padmanabhan 2016, p. 317)

exclusively environmental.”<sup>19</sup> When examining the body of international environmental law that exists today, “economic and trade issues have, for instance, played a key role from the outset. While environmental and economic considerations have been central to the climate change legal regime, the same cannot be said for its human rights aspects.”<sup>20</sup>

As outlined above, the effects that climate change will have on the environment that humans so heavily rely on are severe, and will lead to the direct and indirect violation of a number of international human rights; a human rights based approach ensures the protection of human rights and ensures their incorporation into laws and policies adopted to combat and adapt to climate change.

### **1.3 The United Nations**

2020 marks the 75th anniversary of the United Nations, a landmark achievement for such an organization. This provides an opportunity to examine how the UN can stay relevant and continue to contribute to its core mandate of protecting human rights and fostering international cooperation.

In 2018, UN Special Rapporteur on Human Rights and the environment John Knox, formally called on the United Nations to recognize a human right to a safe, clean, healthy, and sustainable environment (this call has since been echoed by his successor, Special Rapporteur David R. Boyd). This paper seeks to identify the gaps in human rights protection in the UN when it comes to the intersection of climate change and human rights, and examine whether the recognition of such a right could address those gaps and more meaningfully link human rights and climate change systems at the international level.

This paper has chosen to examine the UN, in part due to the release of John Knox’s proposal for the new right, but also due to its position as the highest forum for international political dialogue and cooperation, with the capacity to draft international legal documents with universal application, unify States, and contribute to global standard-setting.

The United Nations currently houses the highest international human rights protection system, typically referred to as the ‘universal human rights system’, which occupies an incredibly influential standard-setting position in human rights theory, practice, and legislation around the world. The United Nations is also the home of the current highest level of climate governance: the UN Climate Change Regime. This Regime, also referred to as the UNFCCC, is a group of agreements that structure the international response to

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<sup>19</sup> (Cullet and Robinson 2009, p. 1)

<sup>20</sup> *Ibid.*

climate change. This paper will expand on the mutual relationship between these systems, and explore how they work together to protect human rights where they intersect with climate change.

## **Conclusion**

In July of 2020, the New York Times reported on the consequences of climate change on a farming region of Guatemala, reporting that “rainfall is expected to decrease by 60 percent in some parts of the country, and the amount of water replenishing streams and keeping soil moist will drop by as much as 83 percent. Researchers project that by 2070, yields of some staple crops... will decline by nearly a third.”<sup>21</sup> Climate change poses an existential threat to human life, the likes of which has never been seen before. Addressing this issue requires a coordinated global effort, and this effort must hold the norms and values of human rights at its core in order to protect all persons and pave the way for a future that is safe, clean, healthy, and sustainable for everyone.

The following chapter will provide an overview of International Human Rights Law and International Environmental Law in order to illustrate their overlapping frameworks and contextualize the subsequent discussion around the human right to a healthy environment.

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<sup>21</sup> (Lustgarten 2020)

# **Chapter 2 - International Human Rights Law and International Environmental Law**

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## **Introduction**

This paper will examine provisions of both International Human Rights Law (IHRL) and International Environmental Law (IEL) in order to determine the gap in human rights protection when it comes to State obligations to combat climate change. Due to its content and obligations, a universal human right to a healthy environment would be affected by both of these spheres, and operate within both of their frameworks.

Therefore, in order to understand the following discussion and the factors at play, this chapter will provide an overview of how International Human Rights Law and International Environmental law interact with each other. It will discuss their similar structures and normative frameworks, review their overlapping principles, and explore how these branches can mutually benefit each other. Altogether, this chapter will illustrate how these branches of International Law are compatible and mutually reinforcing, meaning that a human right to a healthy environment could be supported by both systems and would not be obstructed by contradictory institutions.

## **2.1 What are International Human Rights Law and International Environmental Law?**

IHRL and IEL are both branches of Public International Law, a body of law that regulates the interactions of States with each other (and oftentimes, with individuals). IHRL and IEL have developed in similar ways and in many cases deal with overlapping issues.

IHRL is the branch of Public International Law that has developed to protect the human rights of individuals at the national, regional, and international levels, and delineate the obligations of States towards individuals. It is derived from customary law and treaty law. Depending on the scholar and school of thought, human rights law, or provisions resembling it in some form, has existed for centuries. In the 20th century, with the globalization of almost all spheres of life, including politics and the economy, human rights standards became ingrained in the functioning of new international organizations, like the International Labour Organization, the United Nations, and the European Union. Human rights were included in the Charter of the United Nations and the Universal Declaration of Human Rights, which has arguably elevated many human rights standards to the status of customary international law. Since the mid-20th century, the United Nations and other

regional human rights bodies have made human rights enforceable, justiciable, and binding on States through a number of treaties and other legally binding instruments.

IEL is a much younger branch of Public International Law. IEL, at its core, is “concerned with protecting the environment, primarily through bilateral and multilateral international agreements,” either for the sake of the environment per se, or as it relates to human health and welfare.<sup>22</sup> Environmental law was largely confined to national and regional issues prior to the mid-20th century. In the 1960s, as it became increasingly understood that the global climate was changing rapidly due to human activities, IEL emerged in order to mitigate and adapt to this new reality. Environmental law concerns itself with many different areas of the environment, including air quality, the global climate, pollution, deforestation, waste management, water quality, and more.<sup>23</sup>

Both IHRL and IEL developed out of international concerns, primarily for humans and their wellbeing, and seek to address issues through international agreements and treaties.

## **2.2 How Do These Branches Interact?**

At the most basic level, International Human Rights Law and International Environmental Law have overlapping concerns, namely individuals and their health and wellbeing. The legal subjects of both systems are the same, and provisions primarily bind States, with certain exceptions in the case of international corporations (although this usually falls under the principle of State responsibility for private action). The objects of the law are also similar, typically consisting of individuals and the conditions that affect their wellbeing. In the case of International Environmental Law, there is a growing trend of granting the environment itself (like forests, rivers, etc.) the status of legal subject.

The questions explored throughout this paper unfold here, at the intersection of these spheres of law. Due to the interdependent nature of human rights and the tremendous impact of the environment on human rights, these spheres are not rigid, and matters that concern one often concern the other. In fact, IHRL and IEL frequently reference each other within provisions and agreements, acknowledging not only the overlap but the reinforcing capabilities of the other branch.

The principles of both of these bodies of law provide a basis for comparison and mutual interest - and the obligations imposed by both of these systems on States establish grounds for compatibility and coordinated efforts. This chapter will highlight some of these,

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<sup>22</sup> (Hyder 2020)

<sup>23</sup> (Field.org.uk 2018)

including the use of substantive v. procedural obligations, extraterritorial obligations, and State responsibility for private action, to illustrate that these regimes have compatible foundations and can work together seamlessly in order to enhance the protection of both the environment in IHRL, and human rights within IEL.

### **2.2.1 Overlapping Principles**

International Law, like all systems of law, operates based on a series of general principles. These tend to be more abstract concepts that act as a guide for how a legal system should function, and can fill in gaps when there is no applicable treaty or customary provision. IHRL and IEL operate on the basis of many similar principles, meaning both systems are guided by similar ideas, norms, and values. This is significant because it means that the spheres are more in line with each other than opposed, and provisions of either system based on these shared principles will reinforce the other, and make it less likely that they should contradict each other. These overlapping principles provide a common functioning, goal, and basis for IHRL and IEL to not only co-exist, but cooperate with each other.

The Stockholm Declaration, written in 1972, outlines a number of principles that have become significant in international environmental law. The Rio Declaration, signed in 1992, is a document outlining the guiding principles of the UN Climate Change Regime. These documents are good examples of the guiding principles of IEL, and can be examined for principles that reflect those of IHRL, many of which were outlined in the Universal Declaration of Human Rights (UDHR).

Both of these branches of International Law place human welfare at the center of policy and legislation, prioritizing the dignity and equality of all human beings. Principle 1 of the Stockholm Declaration linked environmental protection to human rights norms, stating, ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’<sup>24</sup> Principle 1 of the Rio Declaration states that humans remain at the center of concerns. It, of course, goes without saying that humans are the primary focus of human rights. The Stockholm declaration also highlights the importance of freedom, equality, and non-discrimination, which are trademark foundational principles of human rights, and can be found in the first 3 articles of the UDHR.

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<sup>24</sup> (Santosa, n.d.)

Both the Rio and Stockholm Declarations stress the need to consider the positions of the most vulnerable, identifying women, Indigenous people, those in poverty, youth, and other underprivileged persons. It is an important feature of international human rights law to give due consideration to those in a disadvantaged position, to recognize systematic disenfranchisement, and advocate not just for the protection of these individuals, but to ensure that they are included in processes that affect their wellbeing. This is, of course, reflected in the number of more specialized human rights treaties published by the UN since the 1960s.

This leads to a discussion of some more procedural principles. These include education, access to information, and public participation. Education is a substantive human right in and of itself, but it also refers to the idea of being provided with the necessary information to function in society. This can range from receiving pertinent information on health and hygiene, to being informed about opportunities for civic engagement. Both Environmental Law and Human Rights Law stress the importance of an engaged public. An informed and engaged public is crucial to the development and success of fair, transparent, and inclusive laws and policies. Another key procedural principle of IHRL and IEL is the establishment of compensation and reparations in the event of violation, as well as fair access to justice (in order to secure said compensations). This creates a system of accountability, and serves to transport human rights from standards of protection to incentivized, enforceable obligations with direct consequences for infringement.

One final principle of significance to the following discussion is unique to IEL but increasingly referenced in IHRL: the precautionary principle. This is explained in the Rio Declaration, Article 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>25</sup>

It is also important to note that both systems recognize the primacy of State sovereignty and territorial integrity. This is an integral principle of the United Nations, enshrined in Article 2 of the UN Charter. State sovereignty in International Law ensures the mutual respect for States’ control over their territories and domestic affairs. It speaks to not only International Law’s complex history with intervention and invasion, but also the decolonization era of the latter 20th century. The premise of international treaties is that States exchange some of this Sovereignty in order to contribute towards international

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<sup>25</sup> (“Rio Declaration on Environment and Development” 1992)

cooperation on issues of mutual concern. IHRL and IEL are heavily influenced and shaped by the tension between State sovereignty and International Law.

The overlapping nature of these principles is acknowledged throughout literature and politics. In 2016, the Special Rapporteur on human rights and the environment, John Knox, published 16 framework principles under human rights law that relate to the enjoyment of a healthy environment, commenting that he “believes that States should accept the framework principles as a reflection of actual or emerging international human rights law.”<sup>26</sup> This statement illustrates the overlapping interests of both branches and their mutual reinforcement.

Chapter 4 features a more in-depth examination of how integrated human rights are into legal instruments of the climate change regime, but the principles of the Stockholm and Rio Declarations illustrate the possibility to honor human rights in matters of environmental law.

## **2.2.2 Overlapping Normative Frameworks**

A normative framework is, essentially, a set of evaluating standards that contribute to the structure of something. In this instance, IHRL and IEL have comparable normative frameworks in that they have similar structures; they use international treaties and various other international instruments to impose obligations of conduct on State parties and work towards certain international goals or standards. Both systems rely on international efforts to meet and draft documents, as well as set up appropriate functioning and monitoring bodies to handle the administration of provisions. The policy making process of each system is similar, adhering to related norms, principles, and processes. Both branches rely heavily on political influence to create momentum, and the support of powerful countries to reprimand violations and push for progress.

There are a few key features of these normative frameworks that are especially relevant when considering the intersection of climate change and human rights and the compatibility of IHRL and IEL. These are the differentiation of substantive and procedural obligations, extraterritorial obligations, and State responsibility for private action.

### **2.2.2.1 Substantive v. Procedural Rights and Obligations**

Human rights and the obligations they impose can be described and categorized in many different ways. One important distinction, especially when looking at the overlap

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<sup>26</sup> (Knox 2018, p. 3)

between IHRL and IEL, is that of substantive and procedural rights. This distinction is highly significant in the context of climate change and the rest of this paper.

Throughout this paper, a number of international human rights will be identified as ‘threatened’ by climate change. This ‘threat’ varies in intensity and form. A substantive right is “a right ... recognized for its own sake,” or legal rights in and of themselves.<sup>27</sup> Substantive rights are threatened because the content of the right itself is impacted by the physical consequences of climate change. For example, the right to food is threatened because climate change can lead to failed crops and the inability to grow food in certain regions.

Procedural rights and rules refer to the “methods by which both the state and the individual enforce their rights” in courts.<sup>28</sup> In human rights, this refers to the right to a fair trial, or equal access to justice. It is also concerned with things like compensation, redress, and due diligence.<sup>29</sup> Procedural rights are crucial for the process of combating climate change. In order to combat climate change in an effective, holistic, and sustainable way, individuals must be informed about risks and hazards, and must be included in the processes of drafting policies (to ensure their inclusivity and wide applicability). In the event of violations, individuals must be able to seek effective redress via a fair system. Procedural rights are threatened when individuals are not able to engage with the issue of climate change, and cannot hold States or other actors accountable if and when substantive rights are violated. Procedural duties also contribute to the resiliency of climate change efforts by encouraging investment, for example, in green energy, ensuring accessibility to new technologies, or strengthening capacity building at grassroots levels.

Both IHRL and IEL impose substantive and procedural duties on States. In IHRL, for example, States have a duty to protect everyone's right to life (substantive). If this right to life is violated, States have a duty to investigate the violation and provide compensation to the victim, if the court deems this necessary (procedural). In IEL, States have a duty to prevent transboundary international harm, like ensuring oil rigs are secure and safe (substantive). Should transboundary harm be triggered, like in the event of an oil spill, States have a duty to notify neighboring States that may be affected in an appropriate time frame with all necessary information (procedural).

Though the proposed universal right to a healthy environment is understood as a substantive right, it will invoke procedural obligations. This right would be a substantive human right within the IHRL system, but would require the enforcement of provisions of Environmental Law. In other words, States would need to abide by their commitments under

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<sup>27</sup> (Dictionary.com 2020)

<sup>28</sup> (Jescheck 2017)

<sup>29</sup> (Brunnée 2018)

IEL in order to guarantee enjoyment of the right to a healthy environment (prevent climate change, ensure high water quality, practice sustainable agriculture, etc.). Procedural obligations would require States to more widely perform environmental impact assessments, enable individuals to claim the right in the event of violation, and require States to compensate in some way.

### **2.2.2.2 Extraterritorial obligations**

A key element of both IHRL and IEL is the importance of extraterritorial obligations of States. Extraterritoriality is a controversial but firmly established aspect of IHRL, and now IEL, where it is usually referred to as ‘transboundary’ harm. Extraterritoriality refers to the obligations States have beyond their territorial borders. Considering the emphasis on State sovereignty and territorial integrity in Public International Law helps explain the controversy around this topic. Human Rights Law makes it clear that a State is responsible for its actions whether they occur on their own territory or not.

In the realm of human rights, States can still infringe on the rights of individuals not within or from their own countries, making the transboundary element of IHRL necessary.<sup>30</sup> Extraterritorial obligations are seen as “essential to ensuring a global framework built on human rights” and are codified in the ‘Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social, and Cultural Rights’.<sup>31</sup> This outlines the obligation of States to respect, protect, and fulfill all human rights within their territories and extraterritorially.<sup>32</sup>

Due to the nature of climate and the environment, harm done in one place can have effects anywhere else. As Nanda and Pring write, “environmental degradation challenges traditional notions of national sovereignty, since the environment does not stop at political borders.”<sup>33</sup> Therefore, the extraterritorial nature of the environment spreads across many provisions of IEL - for example, one of the main goals of international climate change mitigation is to reduce GHG emissions that have an indiscriminate effect on the global climate. In more finite terms, States have an obligation to prevent transboundary environmental harm. This could refer to a State ensuring it does not pollute a river that runs through several countries and is relied on by multiple different States. It could also refer to

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<sup>30</sup> An example of this might be the use of torture. An actor from State A that has ratified the Convention Against Torture, who commits an act of torture against an individual from State B on State B’s territory, can still be held accountable for the act.

<sup>31</sup> (ESCR-Net 2015)

<sup>32</sup> (Cerquiera and Montgomery 2018)

<sup>33</sup> (Nanda and Pring 2012, p. 8)

something like a nuclear meltdown, which, in the event one occurs, triggers the procedural duty to notify potentially affected parties.

### **2.2.2.3 State responsibility for private action**

Not only are States responsible for the full extent of their actions, whether that be confined to their territory or not, they also have a responsibility to regulate the actions of corporations, and take effective measures should these corporations engage in behaviour that violates human rights. States have an obligation “to monitor multinational companies domiciled in their jurisdiction and refrain from supporting them whenever they are involved in human rights violations in the territory of third countries.”<sup>34</sup> This obligation is enshrined in multiple UN human rights treaties. Environmental Law also places significant responsibility on States to regulate business or private activities, especially when those activities contribute to pollution or environmental exploitation, however it is still largely an issue that remains in the domestic domain.<sup>35</sup> The notion of ‘sustainable development’ warrants a nod here. This is a concept that first appeared in the 1987 Brundtland Report, “which, among other things, created a new terminology ‘sustainable development’ and placed economic development activities within the context of environmental limitations.”<sup>36</sup> A future built on the idea of sustainable development would capitalize on and likely increase the overlaps of these two branches of law. The Sustainable Development Goals, a series of targets drafted by the United Nations in reference to some of the most pressing global challenges, also capitalize on this convergence.<sup>37</sup>

### **2.2.3 Mutual benefits**

In addition to pursuing goals for the benefit of human beings, there are a few specific ways in which IHRL and IEL can bolster each other. At present, International Human Rights Law is a more established system of International Law, especially when it comes to individual communications with international institutions. As most instruments of IEL do not currently have individual communications capacities, this allows individuals and groups to enforce environmental laws through human rights mechanisms, expanding the protection and implementation of environmental obligations.

Human rights instruments can help clarify how States must fulfill their obligations under both IHRL and IEL. When environmental concerns overlap with human rights

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<sup>34</sup> (Cerquiera and Montgomery 2018)

<sup>35</sup> (Ribeiro n.d.)

<sup>36</sup> (Santosa n.d.)

<sup>37</sup> (United Nations Development Programme 2020)

interests, human rights institutions, courts, and other bodies can clarify what State obligations are regarding human rights and the environment (which subsequent chapters will illustrate).

International Environmental Law can work to incorporate human rights into its provisions, and require that States honor their human rights obligations when fulfilling their duties under environmental law. In addition, by trying to protect and preserve a healthy environment, IEL contributes to the protection and enjoyment of human rights themselves.

These branches of law can also uphold each other in courts, as seen in the recent *Urgenda* ruling by the Dutch Supreme Court. In this case, the Urgenda Foundation believed that the 20% emissions reduction from pre-1990 levels by 2020 required by the EU of the Netherlands was not stringent enough to prevent serious effects of climate change. The Urgenda foundation argued that failure to take effective action against climate change threatened their right to life, as granted by Article 2 of the European Convention on Human Rights. A Dutch district court ruled in favour of the Urgenda Foundation, ruling that the Dutch government needed to reduce its emissions by 25% by the end of 2020. In 2019, this ruling was upheld by the Dutch Supreme Court. Thus, the Dutch Supreme Court used international human rights law to advance provisions of international environmental law.

## **Conclusion**

The focus of this paper is the incorporation of climate change policies into International Human Rights Law, and the incorporation of human rights into International Environmental Law. Therefore, it is important to understand the plausible (and existing) ground for these branches to not only concern themselves with similar aims, but to cooperate and reinforce each other in reaching them (as seen in the *Urgenda* case example). This chapter has illustrated this overlap and mutual reinforcement by outlining the similar principles and normative frameworks of these branches, to demonstrate that an international human right to a healthy environment would be supported by both branches, not stymied.

## Chapter 3 - UN Human Rights and Climate Change

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### Introduction

This chapter seeks to identify where the gaps in protection are for human rights in the context of climate change, in order to ascertain what benefits a universal right to a healthy environment may have.

In his 2018 Report on the right to a safe, clean, healthy, and sustainable environment, Special Rapporteur John Knox stressed that, when it came to the intersection of human rights and the environment, one of the most important tasks of the UN was to clarify State obligations regarding climate change. This goes beyond acknowledging the predicted impacts of climate change on the enjoyment of human rights or a blanket nod to the ‘dangers of climate change’; it requires international institutions to clearly state why and how States must take concrete measures to mitigate, adapt to, and at all costs avoid anthropomorphic climate change in order to fulfill their obligations towards human rights and avoid grave, potentially irreversible, violations. In a 2019 Report, Special Rapporteur on extreme poverty and human rights, Philip Alston, corroborated this. Alston stated that UN Treaty Bodies have remained largely inactive when it comes to climate change and human rights. He writes that “most international rights organizations have not devoted urgent attention to it ... much more needs to be done to fill in significant gaps and uncertainties about States’ obligations.”<sup>38</sup> Alston goes on further to say that “human rights actors must be willing to translate States’ obligations in a way that more clearly engages with policy making choices, or will lose relevance to this debate.”<sup>39</sup>

Knox also discusses a phenomena referred to as the “greening” of established human rights which has been occurring at both national and regional levels. The “greening” of established rights can clarify obligations relating to specific rights as well as bolster the attention and energy for climate change action in more sectors than just environmental protection. Knox argues that though this has been happening across the world and works to build a framework of jurisprudence, the right to a healthy environment would still help consolidate networks of environmental protection, climate change laws, policies, and more. But how much have rights been “greened” in the UN?

At the UN human rights level, Treaty Bodies have the power to clarify the content of treaty rights, guide States on their obligations, and the measures they must take to ensure

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<sup>38</sup> (Alston 2019, p. 6)

<sup>39</sup> (Alston 2019, p. 18)

they respect, protect, and fulfill those rights. As an extension of this role, Treaty Bodies are the instruments that can formally 'green' established rights.

Therefore, in order to determine where the gaps in UN human rights protection are when it comes to climate change, this chapter will examine the extent of 'greening' among rights protected in UN treaties. This chapter will illustrate that General Comments are the best way for Treaty Bodies to clarify State obligations and, as necessary, 'green' rights. It will thus examine the General Comments of Treaty Bodies to see whether they have delineated a clear State obligation to combat climate change in order to protect human rights. This includes not only how they have drawn attention to rights whose full enjoyment is threatened by worsening climate change (largely substantive), but also those rights whose protection is a crucial part of combating climate change (procedural). This chapter will therefore demonstrate that while significant progress has been made, it is not equal across the Treaty Bodies and comes short of providing cohesive, concrete obligations to prevent climate change and protect the environment, providing the opportunity for a right to a healthy environment to fill in 'architectural gaps'.

### **3.1 UN Treaty Bodies**

The UN has a few Charter-based and treaty-based mechanisms that deal with the global protection and promotion of human rights. They organize and engage in thematic discussions in the field of human rights. Special Rapporteurs can be appointed to investigate specific thematic issues. They research and prepare reports in order to inform and recommend action or progress in certain regards. The General Assembly, Human Rights Council, Special Rapporteurs, and other UN bodies, like the United Nations Environmental Programme, have engaged with the issue of climate change to some degree or another for several years.

However, UN human rights are contained within the UN human rights treaties, and it is the Treaty Bodies that have the power to draw States into specific dialogues about their climate change actions, and clarify their obligations regarding climate change and human rights.

#### **3.1.1 What Role do Treaty Bodies play?**

The United Nations Treaty Bodies are the guardians and de facto interpreters of their respective treaties. They possess a number of tools in order to monitor and enforce State compliance with the rights enumerated within the treaties. There are ten UN treaty bodies

serving nine so-called “core” human rights treaties, some of which have engaged with the issue of climate change much more than others. The Treaty Bodies are as follows:

1. The Committee on the Elimination of Racial Discrimination
2. The Committee on Economic, Social and Cultural Rights (CESCR)
3. The Human Rights Committee (HRCte)
4. The Committee on the Elimination of Discrimination against Women (CEDAW)
5. The Committee against Torture (CAT)
  - a. The Subcommittee on the Prevention of Torture (SPT)
6. The Committee on the Rights of the Child (CRC)
7. The Committee on Migrant Workers (CMW)
8. The Committee on the Rights of Persons with Disabilities (CRPD)
9. The Committee on Enforced Disappearances (CED)

#### **3.1.1.1 *UN Human Rights Treaties as Universal Standard-Setting Documents***

There is a lot of debate over whether human rights are truly universal, or if they reflect the views and values of a select few and are ‘imposed’ on others. While this essay will not reengage this debate, United Nations human rights treaties are drafted through an international effort, and are ratified by large numbers of states across the world. Many regional and national human rights bodies and institutions build on the foundations of the so-named universal system when creating their human rights infrastructure, from Europe to the Americas, to Africa, reinforcing their global nature. It can be understood, for the purposes of this paper, that the UN human rights treaties reflect a near-universal consensus on the basic standards of certain rights.

Since the signing of the Universal Declaration of Human Rights in 1948, the UN Human Rights system has continually had to ‘meet the moment’ as society’s concern over different issues evolves. As standard setting documents, these treaties have substantial influence over how human rights are conceptualized around the world. Therefore, if the UN were to recognize a human right to a healthy environment, it would signal to States that protecting the environment is an imperative aspect of human rights protection.

#### **3.1.1.2 *Ensuring States Understand and Comply with Obligations***

Treaty Bodies have different mechanisms for monitoring the implementation of provisions contained within their respective treaties. The tools they can use depend on the contents of the treaties and whether Optional Protocols provide for additional mechanisms. These tools include State Reporting (mandatory for all State parties to any human rights treaty), State Communications, Individual Communications, and Inquiry Procedures. These

tools, at present, allow for the issue of climate change to be addressed through the prerogative of individuals or committee members, but in the future, could help to ensure the compliance with a right to a healthy environment.

### **3.1.1.3 *Elaborating on the Content of Treaties***

As the ‘guardians’ and official interpreters of the rights enumerated within their treaties, Treaty Bodies are the authority on how rights are to be interpreted and what they entail. These interpretations are published via General Comments and Recommendations.<sup>40</sup> In the event that certain provisions come under question, new information requires a right to be reexamined, or society’s concerns evolve, General Comments can elaborate on the content of a treaty or a specific right, and expand on certain duties States have with respect to certain rights.

According to Mechlem, Treaty Bodies “interpret human rights treaties largely in lieu of states.”<sup>41</sup> This is significant because it contributes to a global understanding of human rights, as opposed to the jurisprudence and interpretations that are developed only at the State or regional level. These interpretations ensure that rights are being protected in the same way, regardless of where an individual lives (of course, in reality, State compliance with these standards is not equal across the board - but the existence of a standard interpretation gives States something to work towards in their implementation efforts). This is also significant as it gives Treaty Bodies the authority to expand the scope or content of a right. This is of major relevance to the climate change debate, as it provides the opportunity for Treaty Bodies to clarify State obligations, and ‘green’ established rights.

The content of treaties themselves is relatively fixed, but the world of human rights, and how rights are understood, evolves with society. For this reason, General Comments are important for keeping a Treaty relevant to the progress of human rights movements.<sup>42</sup> Mechlem writes that “United Nations human rights treaty bodies play an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations.”<sup>43</sup> While the substance of rights is often determined and fleshed out by courts systems, the Treaty Body itself has significant power in determining what a right means, and what is required to fulfill it.

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<sup>40</sup> (OHCHR 2012, p. 36)

<sup>41</sup> (Mechlem 2009, p. 905)

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, p. 908

At the right time, General Comments can push the scope of a right further than may have been possible when the original treaties were negotiated. It can also significantly broaden an understanding of a right, or create a new right altogether. An example of this is the 2003 General Comment published by the Committee on Economic, Social and Cultural Rights, which recognized an official right to water, even though it did not appear in the Covenant itself. This is encouraging for those advocating for a right to a healthy environment. Like water, a healthy environment is understood as a factor that guarantees the enjoyment of other rights, and warrants its own protection, incentivising its recognition at the UN level.

#### **3.1.1.4      *What is the Legal/Political Nature of General Comments?***

Considering the above, it is clear that the power to incorporate new understandings of rights in the context of a climate-changing world lies with the treaty bodies. This recognition can legitimize national movements and provide human rights defenders with more legitimacy for their activism regarding climate change and human rights.

Seeing as one of the most significant issues at the universal level is what/whether human rights require States to prevent climate change, General Comments are the most direct way a Treaty Body can relate the impacts of climate change to a particular right, and instill in States the responsibility to abstain from violating said right(s), by combating climate change.

But what tangible legal or political effect does a General Comment have, other than standard setting? While States views of the legitimacy of General Comments may vary greatly, academics and theorists seem to agree on their significance. According to Mechlem the assigned value varies, but overall they are seen at least as valuable guides to the interpretation of a right and at most as a “practical authority”.

Speaking to their “legal status or effect”, Ando concludes that General Comments/Recommendations “have no legally binding effect as such (see also Soft Law)” Though they may not have a hard legal status themselves, General Comments can speak to the legal obligations of States, and Treaty Bodies can examine State compliance with those interpretations; therefore, General Comments “tend to have a quasi-legislative character. In that sense, they are not a mere reflection of the human rights situation of a State Party, rather, they could and should reflect goals ... and serve as authoritative interpretations of the provisions of treaties.”<sup>44</sup>

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<sup>44</sup> (Ando 2008)

Elaborating on the influence of General Comments, Keller and Grover remark that “General Comments of the Committee have the potential to increasingly influence the national implementation of Covenant obligations ... Moreover, their legal analytical function offers a means of ... highlighting interpretive reasoning, filling legal gaps ... as well as fleshing out the rights and obligations contained in the Covenant and embedding them further into state party practice.”<sup>45</sup> This conclusion crucially recognizes the ability of General Comments to “fill legal gaps,” and explicate rights and obligations.

Therefore, for the purposes of this paper, the General Comment is the primary and most effective way for a Treaty Body to clarify State obligations where they meet the intersection of climate change and human rights. Though some Treaty Bodies have engaged with climate change in other ways, the following sections will focus on how Treaty Bodies have utilized General Comments to invoke specific substantive/procedural obligations on States to address climate change.

### **3.2 Climate Change and UN Treaty Bodies**

Many of the human rights threatened by climate change are contained within at least one of the UN Human Rights treaties, and often appear in multiple treaties (like the rights to life, health, education, etc). It is important to bear in mind that “those [individuals] threatened [by climate change] do not divide up neatly,”<sup>46</sup> However, these rights can be roughly categorized as substantive (requiring protection from the physical consequences of climate change) and procedural (crucial for the process of fighting climate change).

#### *Substantive:*

1. *The right to life* - Climate change may lead to deaths due to lack of adequate nutrition, dehydration, displacement, extreme weather events, and overall diminishing quality of life.
2. *The right to an adequate standard of living* - Climate change can cause mass displacement, as well as impact those living in coastal regions or are more susceptible to drought, flooding, wildfires, etc.
3. *The right to water and sanitation* - Increased global warming leads to droughts, and pollution impacts water quality.
4. *The right to health* - lack of adequate nutrition, as well as poor air and water quality due to pollution, impacts this right.

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<sup>45</sup> (Keller and Grover 2012, p. 197)

<sup>46</sup> (Alston 2019, p. 7)

5. *The right to take place in cultural life* - Communities who are at risk to lose their lands, like Indigenous peoples and those living in low-lying island nations (which may become uninhabitable), stand to lose a crucial part of their culture.
6. *The right to benefit from science and its applications* - those living in poorer countries may not benefit from the same advancements that wealthier countries can use to dampen the impacts of climate change unless equitable exchange programmes are utilized.
7. *The right to work and social protection (safe working environment)* - Many individuals could lose their jobs or livelihoods. For example, agricultural workers will suffer in the event of wide scale crop failures, and those working in energy sectors like coal and oil may suffer when States switch to clean energy systems, if the appropriate social protection is not in place.
8. *The right to self determination* - Individuals forced to migrate from their homes or those whose lands have become inhospitable lose their right to self-determination.

#### *Procedural*

1. *The right to education* - States must educate their citizens about the impacts of climate change and any policies they may adopt in order to mitigate these impacts. Citizens must be informed so that they are able to offer input and get involved in processes that will shape their lives.
2. *The right of meaningful and informed participation* - Similar to the above, individuals must participate in the processes of drafting legislation and policies to ensure fairness, equality, and inclusivity.
3. *Freedom of expression* - Individuals must be free to express their concerns whether that be for a State's lack of action, or to provide input into the measures that are taken.
4. *Access to justice (right to a fair trial)* - Individuals must be able to claim their environmental rights in court to create a system of responsibility and liability.

#### **3.2.1.1 Thematic concerns of Treaty Bodies**

Because of the interdependent and indivisible nature of human rights, as well as the far-reaching effects of climate change, many treaty bodies have overlapping, or thematic, concerns regarding the protection of human rights in a climate volatile world. These

concerns can relate back to a specific right, or a principle of human rights. It is important to be familiar with these thematic concerns, as they repeatedly appear in human rights discussions and the selection of General Comments examined below. While mention of these themes does not in itself reflect the greening of a right, they are significant in establishing patterns within the human rights framework. The repetition of themes consolidates the attitudes of UN human rights institutions towards climate change, and guides their work as well as the work of States. Many of these themes and principles relate to guiding principles of the UN Climate Change Regime, discussed in Chapter 4.

These themes include:

- Protection of already vulnerable groups
- Non-discrimination
- International cooperation
- Maintaining human rights due diligence
- Rights of present and future generations
- High income states supporting the adaptation and mitigation efforts in lower income countries
- Advocacy for sustainable development

### **3.2.1.2 “Greening” Rights**

As has been mentioned, Special Rapporteur Knox and his successor, David Boyd, have discussed the “greening” of human rights at different institutional levels. In so many words, to green a right would be to clarify the link between climate change and a procedural or substantive human rights obligation. So, for example, to acknowledge a duty to prevent climate change in order to guarantee the right to life would ‘green’ the right to life.

There are a few different paths that tribunals, courts, or human rights bodies can take that lead to the same destination of connecting human rights claims and climate change. This can include requiring that States must “protect the environment on which the enjoyment of such rights depends,” like the rights to water or adequate food.<sup>47</sup> Another method is the formal recognition/confirmation of the symbiotic relationship between a particular right and the environment.<sup>48</sup> This can be done through court and expanding jurisprudence, or as established in the case of Treaty Bodies, through General Comments.

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<sup>47</sup> (Knox 2015)

<sup>48</sup> (Krstić and Čučković 2015, p. 189)

In order to evaluate the extent of ‘greening’, the following section will look for references to IEL, climate change, environmental protection, and other relevant themes to get an idea of the attitude of treaty bodies towards these issues. It will look for specific legal language, like ‘States shall’, and inclusion of duties regarding climate change or protection of the environment within sections titled ‘Legal Obligations’ or similar, in order to determine whether/how State obligations are clarified to require specific efforts to combat climate change or protect the environment.

To collect the material for the following section, each General Comment of each Treaty Body was scanned for keywords including “climate change”, “environment” and other related terms such as “sustainability” or terms relating to key principles of the UN Climate Change Regime.

Each of the following subsections will feature a summary of a General Comment and, if available, examples from the text featuring language that explicitly incorporates climate change into States obligations, usually by way of expanding existing obligations to encompass climate change considerations.

### **3.3 The Committee on Economic, Social, and Cultural Rights**

#### ***Introduction***

The CESCR so far has taken the “most extensive and focused response ... by a treaty body.”<sup>49</sup> In addition to publishing a Joint Statement with CEDAW, CMW, CRC, and CPD outlining State obligations relating to human rights and climate change, the CESCR has stated that “failure to prevent foreseeable human rights harm caused by climate change... could constitute a breach” of State Party obligations. This is the most explicit language referencing obligations by Treaty Bodies to date.<sup>50</sup>

Most of the aforementioned threatened substantive UN rights are found in the ICESCR. This includes some of the most immediately and tangibly affected rights, like the rights to food, water, housing, sanitation, and cultural rights.

#### ***The Joint Statement***

In 2019, five UN Human Rights Bodies issued a Joint Statement on “Human Rights and Climate Change”, to recognize the Climate Action Summit held by the UN Secretary

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<sup>49</sup> (Alston 2019, p. 7)

<sup>50</sup> (OHCHR 2019)

General held in September 2019, acknowledge the IPCC’s 2018 report, and to “[confirm] that climate change poses significant risks to the enjoyment of the human rights protected” by the respective Covenants and Conventions.<sup>51</sup> The Committees encourage national courts and human rights institutions to hold States to “comply with their duties under existing human rights instruments to combat climate change.”<sup>52</sup>

This report represents a step forward in how seriously the Treaty Bodies view this threat, and starts to unify action among the treaties. However, only five out of the existing nine bodies participated, and even then to varying extents.

### **General Comments**

In 1999, the CESCR published General Comment No. 12 on the Right to Adequate Food (Article 11). In it, they state that sustainability plays a key role in the right to food and food security, a concept popularized by IEL and sustainable development. They also acknowledge the rights of future generations.

*“Adequacy and sustainability of food availability and access”, Point 7 “The notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations.”<sup>53</sup>*

In 2000, the CESCR published General Comment No. 14 pertaining to the Right to the Highest Attainable Standard of Health (Article 12). In this General Comment, the CESCR identifies a healthy environment as a contributing factor to the level of health enjoyed by individuals. The Committee also acknowledges Principle 1 of the Stockholm Declaration as well as Principle 1 of the Rio Declaration, regarding detrimental environmental conditions.

*Point 1 “Health is a fundamental human right indispensable for the exercise of other human rights,”<sup>54</sup> and*

*Point 4 “the right to health... extends to the underlying determinants of health, such as a healthy environment.”<sup>55</sup>*

In 2003, the CESCR published General Comment No. 15 on The Right to Water (Articles 11 and 12 of the Covenant). Though the right to water is not listed within the ICESCR, this

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> (CESCR 1999, p. 2)

<sup>54</sup> (CESCR 2000, p. 1)

<sup>55</sup> *Ibid.* p. 2

General Comment designates the human right to water “indispensable for leading a life in human dignity,” and “fundamental for life and health”, and declares it not only its own right to be protected, but links it to the fulfillment of the aforementioned Covenant articles.<sup>56</sup> Here, the CESCR again recalls the rights of present and future generations, and urges States to consider the impact of climate change on the availability of water, and thus the protection of the right.

*Section C, “**Obligations to fulfill**”, Point 28 - “states parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.”<sup>57</sup> Subpoint e: States should “[assess] the impacts of actions that may impinge upon water availability... such as climate changes...”<sup>58</sup>*

In 2009, the CESCR published General Comment No. 21 pertaining to the Right of everyone to take part in cultural life (Article 15). Here the CESCR states that cultural heritage must be considered, respected, and protected in the process of writing and implementing policies, specifically environmental. This reinforces the procedural rights of indigenous peoples, who often rely heavily on and have special relationships with nature and the natural environment.

*Section B, “**Specific Legal Obligations,**” Point 50, subsection (b): “Respect and protect cultural heritage of all groups and communities..., in economic development and environmental policies and programmes,”<sup>59</sup>*

In 2017, the CESCR published General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities. In this General Comment, the CESCR restate that States have extraterritorial obligations with regard to the rights in the Covenant, and invoke the principle of international environmental law which prohibits States from allowing or causing harm in another territory. They also invoke procedural rights by stating that remedies must be made available in the context of private sector violations, including through environmental protection agencies.

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<sup>56</sup> (CESCR 2003, p. 1)

<sup>57</sup> (CESCR 2003, p. 7)

<sup>58</sup> *Ibid.* p. 10

<sup>59</sup> (CESCR 2009, p. 13)

**Part II, “Context and Scope”:** Recognition that individuals “enjoy direct recourse against business activities for violations”<sup>60</sup> of ESCR, and “There are also a large number of domestic laws designed to protect specific economic, social and cultural rights, that apply directly to business entities, such as in the areas of ... the environment...”<sup>61</sup>

**Part III, “Obligations of States Parties under the Covenant”, Section C, “Extraterritorial obligations”, Point 27:** “The obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction... the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, ... Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.”<sup>62</sup>

**Part IV, “Remedies”, Section B, “Types of remedies”, Point 50** “State parties should consider the use of administrative sanction... States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities...”<sup>63</sup>

- i. **Subsection 2, “Non-judicial remedies”, Point 54** - “States parties should make use of a wide range of administrative and quasi-judicial mechanisms... such as... environmental protection agencies.”<sup>64</sup>

In 2020, the CESCR published General Comment No. 25 on science and economic, social, and cultural rights (Article 15). This General Comment invokes multiple principles of climate change adaptation and mitigation (like international cooperation and the precautionary principle), and flags multiple Covenant rights as significant in the context of climate change, including the Right to information and participation and the right to food. The exchange and use of science and technology plays a significant role in the international handling of climate change, as discussed in the UNFCCC and the principle of ‘transfer of technology’.

**Part V, “Special topic of broad application”, Section B, “Participation and the precautionary principle, Points 56 and 57** “when an action or policy may lead to unacceptable harm to the public or the environment, actions will be taken to avoid or

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<sup>60</sup> (CESCR 2017, p. 2)

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* p. 8

<sup>63</sup> *Ibid.* p. 14

<sup>64</sup> *Ibid.* p. 15

diminish that harm. Unacceptable harm includes harm to humans or to the environment that is (a) threatening to human life or health; (b) serious and effectively irreversible; (c) inequitable to present or future generations; or (d) imposed without adequate consideration of the human rights of those affected. Technological and human rights impact assessments are tools that help to identify potential risks early in the process and the use of scientific applications.”<sup>65</sup>

**Part V, “Special topic of broad application”, Section D, “Interdependence with other rights”, “Right to Food”, Point 64** “Nevertheless, the environmental impacts of certain technologies associated with the Green Revolution and the risks associated with increased dependency on technology providers has led, inter alia, the General Assembly to acknowledge that peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty.”<sup>66</sup>

**Part VI, “International cooperation”, Point 81** “International cooperation is essential because the most acute risks to the world related to science and technology, such as climate change, the rapid loss of biodiversity,... are transnational and cannot be adequately addressed without robust international cooperation.”<sup>67</sup>

### **3.4 The Human Rights Committee**

#### ***Introduction***

Where the CESCR might cover a majority of the threatened substantive UN human rights, it is within the ICCPR that the most valued and important human right is found - the right to life. When it comes to incorporating the context of climate change into human rights, the HRCte has not been as prolific as the CESCR. However, it has published two General Comments on the rights to life and opinion and expression, both of which are highly significant procedural and substantive rights for combating climate change.

#### ***General Comments***

In 2011, the Human Rights Committee published General Comment No. 34 relating to Article 19, Freedoms of opinion and expression.

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<sup>65</sup> (CESCR 2020, p. 12)

<sup>66</sup> *Ibid.* p. 14

<sup>67</sup> *Ibid.* p. 17

**“The application of article 19(3)”, Point 30** “It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”<sup>68</sup>

In 2018, the Human Rights Committee published General Comment No. 36 pertaining to Article 6, The right to life. In it, the Committee identified climate change as one of the “most pressing and serious threats” to the right to life of both present and future generations.<sup>69</sup> The Committee posits that in order to fulfill the obligation to respect the right to life States must take action to preserve the environment and prevent harm. In the comment, the committee goes into further detail with some suggestions how this can be done, including sustainable resource use, environmental impact assessments, and more.

**Part III, “Duty to protect life”, Point 26** “states should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.”<sup>70</sup>

**Part V, “Relationship of Article 6 with other articles of the Covenant and other legal regimes”, Point 62** - “Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.”<sup>71</sup>

### **3.5 The Committee on the Elimination of Discrimination against Women**

#### **Introduction**

CEDAW has worked to expand understandings of the Convention in the era of climate change. The Committee participated in the 2019 Joint Statement where they echoed

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<sup>68</sup> (HRCte 2011, p. 7)

<sup>69</sup> (HRCte 2018, p. 14)

<sup>70</sup> *Ibid.* p. 6

<sup>71</sup> *Ibid.* p. 14

much of what they establish in General Comment No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change.

Recognizing that women are a group with particular vulnerability to situations of humanitarian crisis and natural disaster, CEDAW has worked to ensure the protection of women in the climate change crisis, and advocate for their inclusion in the shaping of a climate-conscious future.

### **General Comments**

In 2018, CEDAW published General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change. In this General Recommendation, the Committee outlines Convention provisions they deem “relevant to disaster risk reduction and climate change” (like extraterritorial obligations, international cooperation, access to technology) and outline specific recommendations to states for how to best comply with these principles. The Committee also draws attention to specific rights that require special consideration and protection in the context of climate change and other disasters. Each highlighted right is accompanied by recommendations to States on how to protect and fulfill them. The Committee acknowledges that the Recommendation is not exhaustive in its considerations of the gender-related dimensions of climate change.

*Part II, “Objective and scope”, Point 10 “Pursuant to Article 21(1) of the convention... general recommendations guide states on the implementation of their obligations under the Convention in relation to disaster risk reduction and climate change.”<sup>72</sup>*

*Part II, “Objective and scope”, Point 12 “The objective of this general recommendation is to underscore the urgency of mitigating climate change and to highlight the steps that need to be taken to achieve gender equality as a factor that will reinforce the resilience of individuals and communities globally in the context of climate change and disasters.”<sup>73</sup>*

*General principles of the Convention applicable: Assessment and data collection, Extraterritorial obligations, international cooperation and resource allocation, Non-State actors and extra-territorial obligations, Capacity Development and Access to Technology<sup>74</sup>*

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<sup>72</sup> (CEDAW 2018, p. 4)

<sup>73</sup> *Ibid.* p. 5

<sup>74</sup> *Ibid.*

*Specific areas of concern: Right to live free from gender-based violence against women and girls, Rights to education and information, Rights to work and social protection, Right to health (article 12), Right to an adequate standard of living, Right to freedom of movement*<sup>75</sup>

### **3.6 The Committee on the Rights of the Child**

#### ***Introduction***

The Committee on the Rights of the Child has always oriented its work around centering and prioritizing the “best interests of the child”. In their work publishing General Comments, as well as via their other functions like State reporting, the CRC has increasingly invoked climate change concerns while protecting and promoting children’s rights around the world. The CRC also participated in the 2019 Joint Statement.

#### ***General Comments***

In 2003, the CRC published General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child. This General comment links economic, social, and cultural rights with civil and political rights by recognizing “a clear link between children’s right to health and right to life.”<sup>76</sup>

In 2009, the CRC released General Comment No. 11 on Indigenous children and their rights under the Convention. This General Comment touches on two themes relevant to climate change and human rights: ensuring a healthy natural environment for children, and ensuring access to information and education, especially relating to health, nutrition, and environmental sanitation.

*“The right to life, survival, and development”, Point 35 “States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.”*<sup>77</sup>

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<sup>75</sup> *Ibid.*

<sup>76</sup> (Bakkar 206, p. 84)

<sup>77</sup> (CRC 2009, p. 8)

**“Basic health and welfare”, Point 53** “States should take all reasonable measures to ensure that indigenous children, families... receive information and education... on issues relating to health and preventative care like nutrition... environmental sanitation...”<sup>78</sup>

In 2013, the CRC published General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Article 24). This Comment discusses the provision of adequate nutritious food and clean drinking water. It calls on States to address climate change and place the interests of the child at the center of climate change policies and programmes.

**Part I, “Introduction”, Point 5** “Children’s health is affected by a variety of factors, many of which have changed during the past 20 years and are likely to continue to evolve in the future... There is also a growing understanding of the impact of climate change and rapid urbanization on children’s health;”<sup>79</sup>

**Part III, “Normative content of article 24, Section B, “Article 24, paragraph 2), subsection d, “Environmental pollution”, Points 49 and 50** “States should take measures to address the dangers and risks that local environmental pollution poses to children’s health in all settings... The Committee draws attention to the relevance of the environment, beyond environmental pollution, to children’s health. Environmental interventions should, inter alia, address climate change, as this is one of the biggest threats to children’s health and exacerbates health disparities. States should, therefore, put children’s health concerns at the centre of their climate change and mitigation strategies.”<sup>80</sup>

In 2013, the CRC published General Comment No. 16 on State obligations regarding the impact of the business sector on children’s rights. This General Comment speaks to States’ obligations to not only prevent (environmental) harm through their own actions, but those of businesses and private companies.

**Part I, “Introduction and objectives”** “Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children’s rights, such as exposure to

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<sup>78</sup> *Ibid.* p. 12

<sup>79</sup> (CRC 2013, p. 4)

<sup>80</sup> *Ibid.* p. 12

violence, child labour or unsafe products or environmental hazards may have lifelong, irreversible and even transgenerational consequences;<sup>81</sup>

**Part III, “General Principles of the Convention as they relate to business activities”, Section C, “The right to life, survival, and development (art. 6)** “The activities and operations of business enterprises can impact on the realization of article 6 in different ways. For example, environmental degradation and contamination arising from business activities can compromise children’s rights to health, food security and access to safe drinking water and sanitation.” ... “Measures for implementing article 6 with regard to the business sector will need to be adapted according to context and include ... the environmental impact of business.”<sup>82</sup>

**Part IV, “Nature and scope of State obligations”, Section B, “The obligation to respect, protect, and fulfill, Point 3, “The obligation to fulfill”** “States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children’s rights. This includes clear and well-enforced law and standards on ... health and safety, environment...”<sup>83</sup>

**i. Point 4, “Remedies and reparations”** “Agencies with oversight powers relevant to children’s rights, including ... environmental tribunals ... can also play a role in the provision of remedies.”<sup>84</sup>

In 2016, the CRC published General Comment No. 20 regarding the implementation of the rights of the child during adolescence. In this Comment, the CRC emphasizes the importance of recognizing children and adolescents as agents of change, and that their participation in aspects of daily life, like climate change activism and climate justice, contributes positively to the betterment of society. The CRC incorporates ideas of public participation and the importance of providing adolescents with the necessary education to help them understand and get involved with combating the world’s most pressing issues.

**Part I, “Introduction”, Point 2** “Adolescents are agents of change and a key asset and resource with the potential to contribute positively to their families, communities and countries. Globally, adolescents engage positively in many spheres, including ... human rights,

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<sup>81</sup> (CRC 2013a, p. 3)

<sup>82</sup> *Ibid.* p. 6

<sup>83</sup> *Ibid.* p. 9

<sup>84</sup> *Ibid.* p. 10

environmental sustainability and climate justice... and hold potential in terms of political engagement and monitoring accountability.<sup>85</sup>

**Part III, “The case for a focus on adolescents”, “Challenging Environment”, Point 12**  
*“Reaching adolescence can mean exposure to a range of risks ... As they approach adulthood, adolescents need suitable education and support to tackle local and global challenges, including ... climate change and environmental degradation... Investment is needed in measures to strengthen the capacities of adolescents to overcome or mitigate those challenges,”*<sup>86</sup>

### **3.7 Other Bodies**

The CRPD, CERD, CPMW, CAT, and CED have all, to varying extents, engaged with the topic of climate change, but none of them have published General Comments on the issue. This section will briefly synthesize why climate change is still a major concern for these Bodies (despite perhaps not seeming relevant at first glance), and highlight any work they may have done regarding the topic.

The Committee on the Rights of Persons with Disabilities was the fourth UN Treaty Body to participate in the 2019 Joint Statement regarding human rights and climate change. The primary motivation of the CRPD for calling attention to matters of climate change lies in their understanding of disabled persons as a group with heightened vulnerability to climate change, natural disasters, and the like, with one organization saying, “for persons with disabilities, especially in rural or remote areas in the Pacific region, the impact of climate change can be especially devastating because of attitudinal, environmental, and institutional barriers.”<sup>87</sup>

The CRPD, as of yet, has not published any General Comments relating to climate change and the environment, or brought up these issues within other General Comments. The Office of the High Commissioner of Human Rights (OHCHR) did, however, release a Thematic Study on the rights of persons with disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies. The objective of this study was to “clarify the scope of the Convention in the context of ongoing global discussion relating to disasters and humanitarian emergencies.”<sup>88</sup>

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<sup>85</sup> (CRC 2016, p. 3)

<sup>86</sup> *Ibid.* p. 5

<sup>87</sup> (Sera 2013, p. 1)

<sup>88</sup> (OHCHR 2015)

This study invokes a number of familiar principles and themes including international cooperation, accessible information, and the participation of disabled persons in the designing of policies and programmes. The terms “risk” and “humanitarian emergencies” can be interpreted as including events resulting from climate change, like natural disasters, although climate change is not mentioned in the study.

The Committee on the Elimination of Racial Discrimination overlooks the first UN Human Rights Treaty. While many groups (including several indigeneous groups) have asked the Committee to take a more prominent role in addressing climate change and issues of racial inequality, indigeneous rights, and more that face a severe threat of worsening in the context of climate change, the CERD has yet to publish any General Comments that establish Convention rights as rights threatened by climate change, requiring specific action from States to ameliorate, mitigate, or adapt to. The CERD has brought up the issue of climate change in a few State reporting procedures, but considering the devastating impacts climate change has on existing racial inequalities (and the potential for adaptation and mitigation policies to be discriminatory), the Committee has yet to weigh in strongly on the matter.

The Committee on Migrant Workers is the fifth Committee to participate in the 2019 Joint Statement. Migrants are a group enormously impacted by climate change, and the number of climate migrants will only increase as land becomes uninhabitable, especially low lying island nations, regions affected by flooding and droughts, etc. The CMW has yet to publish their own General Comment linking the rights of their Convention to matters of climate change. The Committee has published two Joint General Comments with the CRC regarding the rights of migrant children, but they do not feature any mention of climate change, the environment, or natural disasters, (factors that can, do, and will lead to mass migration).

At a 2018 UN General Assembly meeting, the Chair of the CMW acknowledged food insecurity, environmental degradation, and climate change as factors leading to migration and displacement.<sup>89</sup> This was also recognized at a panel discussion on the rights of migrant children the same year.<sup>90</sup>

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<sup>89</sup> (UN General Assembly 2018)

<sup>90</sup> (OHCHR 2018)

The CAT has yet to meaningfully engage with the issue of climate change and human rights. Perhaps at first glance it may seem unnecessary for the CAT to specifically weigh in on the issue of climate change. It remains as important as ever to protect the lives and rights of human rights defenders, activists, and anyone who may wish to speak out on the violent, life-threatening consequences of climate change, including actions taken by States that only make the effects of climate change worse.

In a 2013 Report, the CAT recognized the risks faced by those who speak out about indigenous right and matters of climate change and the environment. They write, “The Committee remains concerned about the persistently high number of threats and attacks, including murders of and violence against human rights defenders, particularly those defending the rights of indigenous peoples and those working on issues related to the right to land, labour rights and the environment.”<sup>91</sup> This demonstrates an understanding on the part of the Committee that worsening climate change puts defenders in increasingly dangerous positions.

In a similar vein as the CAT, the CED has not taken any specific action regarding climate change, nor has it acknowledged its threat in any significant way.

Though some of these treaties may not seem relevant to the issue of climate change, this paper has substantially exhibited that all rights are threatened by climate change, whether they be direct or indirect, substantive or procedural. Each of these Bodies has the capacity to illustrate that climate change impacts individuals in ways relevant to their fields. CEDAW offers an example of how they could do this. CEDAW’s General Comment echoed understandings of the rights to life, health, etc, not only relating to climate change, but within the context of how women are disproportionately affected. However, women do not belong to one clearly demarcated group, and can have the effects of climate change compounded by their race, migration status, and more. This only emphasizes the necessity of all Treaty Bodies to evaluate their rights in this capacity.

### **3.8 Analysis**

As clearly shown above, some Treaty Bodies have engaged much more with the issue of climate change than others. This can lead to the first conclusion that, while some significant strides have been made, there is a lack of overall cohesion among the Bodies in both the gravity of the threat of climate change, and the capacity Bodies themselves have to

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<sup>91</sup> (UN General Assembly 2013, p. 116)

help (mainly by clarifying State obligations). This analysis will clearly extrapolate where the gaps in protection are for UN human rights in the context of climate change.

### 3.8.1 *The CESCR*

In their work, the CESCR has sought to clearly link climate change to rights enumerated within the ICESCR, and detail how this pertains to State obligations already required by the treaty. The CESCR has invoked procedural and substantive rights relating to the effects of climate change.

As early as 1999, the CESCR invoked themes of IEL and climate change, by referencing the link between sustainability, food security, and the rights of present and future generations. Though not invoking specific obligations, the CESCR's references to principles of IEL exhibits an early unity between IEL and IHRL.

General Comment No. 14 references principles of IEL (from the Stockholm and Rio Declarations) and identifies a healthy environment as a factor contributing to health. Based on this it could be interpreted that ensuring an environment conducive to the highest standard of health is a State obligation regarding the fulfillment of this right.

General Comment No. 15 includes references to “present and future generations” and assessing the impacts of “climate changes” on the availability of water.<sup>92</sup> Because these references are included under the “obligations to fulfill” section, it implies that combating climate change may be a necessary duty to fulfill the right to water. This being said, language is “States should” instead of the more binding “States shall”.<sup>93</sup>

General Comment No. 21 on the right to participate in cultural life invokes a “specific legal obligation” on the procedural duty to consider cultural heritage in the design of environmental policies, but does not reference how climate change impacts the substantive right to take part in cultural life.<sup>94</sup>

General Comment No. 24, while not speaking on a specific right per se, invokes multiple themes of IEL, including a specific reference under the section “Obligations of State Parties” relating to “extraterritorial obligations”. This section writes that States are prohibited from “allowing its territory to be used to cause damage on the territory of another State,” reinforcing the compatibility and reciprocity of IHRL and IEL.<sup>95</sup> The “Remedies” section of this Comment references procedural duties to prioritize environmental impact assessments, but again the use of ‘should’ withholds a specific legal obligation.

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<sup>92</sup> (CESCR 2003, p. 7)

<sup>93</sup> *Ibid.* p. 10

<sup>94</sup> (CESCR 2009, p. 13)

<sup>95</sup> (CESCR 2017, p. 8)

General Comment No. 25 utilizes multiple IEL themes, mainly international cooperation and the precautionary principle, to emphasize the impact of climate change, and the need to participate in a concerted, cooperative effort to ameliorate the worst effects. There is no relevant legal obligation to be invoked, but this Comment does a lot to formalize the overlap and cohesion of IHRL and IEL, painting them as coinciding, mutually reinforcing bodies.

Based on the evidence gathered, the CESCR has done a lot of work to thematically embrace the issue of climate change, engaging substantially with how the topic impacts rights within the ICESCR. The CESCR has gone the furthest in the ‘greening’ process, by acknowledging a duty to either prevent climate change/ protect the environment within the rights to water and health. More could be done to specify the obligations to combat climate change regarding the right to food, rights to relevant climate education, the substantive right to engage in cultural life, the right to an adequate standards of living (considering factors like housing and air quality, for example), and the rights to work and adequate social protection.

### **3.8.2 *The HRCte***

While not expressly linking the right to freedom of expression in General Comment No. 34 to obligations of States to ensure climate change does not affect this right, the HRCte does emphasize that important information shall not be held from anyone, including environmental activists, which relates back to earlier themes of procedural obligations to guarantee public information and participation.

General Comment No. 36 does not contain a clear obligation to combat climate change within the ‘duty to protect life’ section, instead blanketly recommending that States address the “general conditions in society” that may result in threats to life.<sup>96</sup> However, Part V clearly stipulates that obligations of States under IEL “should thus inform the content of article 6 of the Covenant,” and vice versa, that obligations towards the right to life should inform obligations under IEL. This General Comment thus fully embraces the overlap of IHRL and IEL, and encourages States to also consider the provisions of this branches in tandem when addressing climate change and fulfilling human rights. However, the use of ‘should’ and the fact that addressing climate change is not included within the ‘duty to protect life’ sections may somewhat hinder its fully legal effect.

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<sup>96</sup> (HRCte 2018, p. 6)

While the HRCte could do more to ‘green’ ICCPR procedural rights, like freedom of expression, the clear link between the right to life and IEL is a significant development that can be considered the, at least thematic, ‘greening’ of the right to life at the UN level.

### **3.8.3 *The CEDAW***

General Comment No. 37 is a dense document, of which this chapter provides a brief synthesis of the most relevant aspects. The Comment goes into significant detail on different recommendations for States on how to honor their commitments under the ICEDAW in the context of climate change, recontextualizing many of the enumerated rights and principles and really bringing the Convention into the current era.

While the Comment elaborates on recommendations for States in fulfilling their various obligations, including extraterritorial, towards non-State and private actors, etc., there is no mention of specific, legal duties. This being said, this General Comment can be viewed as a considerable effort to ‘green’ the ICEDAW and encourage States to examine the intersections of rights and nuances of climate impacts on gender.

### **3.8.4 *The CRC***

While General Comment No. 5 does not explicate duties of a State to take action against climate change, previously discussed expansions of the rights to life and health by the HRCte and the CESCR have firmly established climate change as a threat to these rights, therefore threatening their enjoyment by children (an especially vulnerable group). In a later General Comment (No. 15) the CRC goes further to recognize climate change as a threat to children’s health and therefore, life.

General Comment No. 11 clarifies that the quality of the natural environment is a contributing factor to the enjoyment of cultural rights, specifically regarding Indigenous peoples. This incorporates a substantive understanding of the environment and cultural rights. Later on, this Comment references procedural aspects of these rights, especially to “receive information and education” on relevant matters.<sup>97</sup> Both of these elements are strongly recommended to States.

General Comment No. 15 expands the normative content of the right of the child to the highest attainable standard of health, pinpoint environmental degradation and climate change as significant factors in declining health in children.

General Comment No. 16 regarding business activities, the CRC clearly outlines how business activities can have negative consequences on the climate and environment, and

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<sup>97</sup> (CRC 2009, p. 8)

thus children's right to life. The CRC highlights the procedural obligations of States to regulate business projects and their impacts on health and the environment in the "obligation to fulfill" section. A later reference to environmental tribunals serves as a reinforcement of procedural duties and ties in the system of IEL.

Overall, there have been substantial efforts on the parts of a handful of Treaty Bodies to 'green' established UN Human Rights. However, there remains much to be done, especially on the part of those Bodies that have yet to clarify the scope of State obligations when it comes to climate change.

In general, much more attention seems to be paid to the impacts of climate change on substantive aspects of rights, like food, water, and health. Procedural rights, like access to information, inclusion in drafting processes, and access to environmental justice in the event of violation are generally less engaged with. This provides an opportunity for the right to a healthy environment to fill this gap, particularly that of access to justice, and establish a framework for individuals to claim environmental rights and States to provide appropriate redress. This right would also require the inclusion of all groups in the processes of drafting policies and programmes, and more clearly set out the obligations of States to regulate non-State actor activities.

Thematically, there is a pattern developing in how Treaty Bodies address climate change and human rights, when they do. This is largely helped by principles of IEL, which Bodies reference frequently. This is an encouraging development that helps unify the attitude of the UN Human Rights System, and carves out room for less active bodies to adopt similar framing if and when they release more substantial material - but this approach would be much more unified should a right to a healthy environment be recognized. When examining the Treaty Bodies as part of a bigger system designed to protect human rights, Phillip Alston critiques that "human rights actors need a more robust, detailed, and coordinated interdisciplinary approach, that brings together law, climate science, labour rights, and economics to tackle issues around emissions, mitigation, social protection, and just transition."<sup>98</sup>

## **Conclusion**

Special Rapporteur John Knox seems to imply that established human rights have been 'greened' at the UN level, but there is evidence to suggest that they have not been greened to the fullest extent possible, and that a right to a healthy environment would

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<sup>98</sup> (Alston 2019, p. 20)

bolster environmental protection across the board, further consolidate the UN's approach to human rights and climate change, and enhance the protection of procedural rights.

This chapter has examined the work of the UN Human Rights Treaty Bodies, arguing that they stand in the best position to clarify State obligations regarding climate change through the use of General Comments. These General Comments have then been examined and analyzed to determine that, though significant 'greening' has occurred, it has not been equal across all Treaty Bodies, and there are significant gaps in human rights protection in the context of climate change.

## **Chapter 4 - The UNFCCC and Human Rights**

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### **Introduction**

The United Nations Human Rights System is not the only place where human rights and climate change meet at the universal level. To what extent are human rights incorporated into the UNFCCC, Kyoto Protocol, and Paris Agreement?

At the universal level, the highest infrastructure for the protection of human rights is the UN Treaty Body System. Similarly, at the universal level, the highest infrastructure for action against climate change is the UN Climate Regime. As has been repeatedly emphasized throughout this paper, human rights must be ingrained in the response to climate change in order to ensure their protection. While ‘greened’ UN human rights may increase protection within State Parties, if the most globally applicable climate treaties do not incorporate human rights, that protection can be compromised.

In 2010, the Conference of the Parties to the UNFCCC stated that, “Parties should, in all climate change related activities, fully respect human rights”.<sup>99</sup> But are human rights built into the treaties? Do they reference, operationalize, or enforce rights? Or are they simply alluded to in theme rather than in practice? This chapter will examine the most influential documents of the UN Climate Change Regime to evaluate the engagement with and incorporation of human rights into the international response to climate change.

Here, the terms UNFCCC and UN Climate Change Regime will be used interchangeably.

### **4.1 The UN Climate Change Regime**

#### **4.1.1 Introduction**

In the last 5 years, climate change has been discussed with more frequency, especially among younger generations, than ever before - but many argue that climate change still does not receive the meaningful attention it deserves. This being said, the importance of environmental protection and the concept of anthropogenic harm to the environment are relatively new, at least when it comes to the general public.

While evidence of legislation regarding environmental regulation can be found as early as 1273, and the relationship between many Indigenous groups and the environment is

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<sup>99</sup> (Magraw, Rosemberg and Padmanabhan 2016, p. 317)

understood as sacred and paramount to their ways of life, “It was not until the late 20th century that serious scientific, public, and political attention focused on the world’s environmental problems.”<sup>100</sup>

Prior to the 1970s, issues regarding the environment made their way to the realm of policy and legislation sporadically - these issues were largely local or regional, and addressed in such a way. However, over the course of the 1950s and 60s, academic research into anthropogenic harm to the environment became more common, and began producing alarming results that illustrated the harmful consequences of a society and economy dependent on fossil fuels and the exploitation of natural resources, and alerted the international community to the global nature of the issue and its effects.

The 1972 UN Conference on the Human Environment in Stockholm, Sweden, was the first major international effort to address this ‘new’ concept of global climate change. This Conference established several important principles that would be incorporated into the later Climate Regime Framework Convention. In the late 1980’s, the discovery of the hole in the ozone layer led to the landmark Montreal Protocol, and marked the transition of climate change from an academic subject and periodic national concern to an international policy issue.

In 1992, the UN held the Conference on the Environment and Development in Rio de Janeiro, Brazil. It was here that the Rio Declaration and the UN Framework Convention on Climate Change (UNFCCC) were signed, and the foundation for the UN Climate Change Regime was laid.

The United Nations Climate Change Regime is a system of treaties, decisions, and agreements that aim to coordinate the efforts of States in the fight against climate change. It represents a universal effort to not only legislate actions to be taken, but exchange the latest scientific information and best policies and practices, and host representatives, like NGO’s, other UN bodies, etc. to receive inputs on the matters at hand. This system capitalizes on the structure of the United Nations as the highest existing forum for international coordination and cooperation.

The key documents of the UNFCCC are the Framework Convention, which establishes the goals and principles of the regime, the Kyoto Protocol, which was the first legally binding instrument (and will remain in effect until the end of 2020), and the Paris Agreement, the most recent (and second) legally binding instrument, set to take effect in January, 2021.

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<sup>100</sup> (Nanda and Pring 2013, p. 6)

#### 4.1.2 The UNFCCC

The UNFCCC is a Framework Convention that aims to unite all countries and “stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>101</sup> The UNFCCC establishes the foundations of an international climate change regime to address this issue, and other contributing factors of climate change. The Rio Declaration, signed at the same session, consists of 27 principles to guide this regime, and any national or international environmental policies Parties may develop. The UNFCCC (used to refer to both the Convention and the system) has developed into a range of political and legal agreements on different ways to achieve the stated objective, as well as manage many other facets of climate change response, including adaptation, mitigation, climate finance, transparency, and more. It is based on international treaty law, with binding mechanisms varying across the different protocols and agreements.

Most of the operationalization of the goals of the Framework Convention are left to the succeeding agreements and instruments of the UNFCCC, but the initial convention arranges for the Parties to meet regularly at Conferences of the Parties (COPs), so that these decisions can be made. It also identifies areas for policy focus and development. Highlighted areas include “comprehensive response strategies” at multiple government levels, consolidating the most up-to-date scientific information, education and public awareness, research and observation, as well as seeking to obtain the widest possible cooperation among countries.

The Convention also established two Subsidiary Bodies to carry on the work of the Convention and liaise with Member States: the Subsidiary Body for Implementation (SBI), and the Subsidiary Body for Scientific and Technological Advice (SBSTA). In addition, the UNFCCC states that all Parties are to develop, update, and publish “national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to form as the basis for contribution determinations and to help with the consolidation of current scientific information.”<sup>102</sup>

The COP has met every year subsequent to the signing of the UNFCCC. They have signed a number of additional declarations and agreements, but as mentioned, only two legally binding documents have been drafted and ratified.

The 1997 Kyoto Protocol is the first legally binding protocol to the UNFCCC. It shares its ultimate objective with the Framework Convention; the reduction of greenhouse

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<sup>101</sup> (UNFCCC 2020)

<sup>102</sup> (“United Nations Framework Convention on Climate Change (UNFCCC)” 1992)

gas (GHG) emissions. The Protocol establishes emissions reductions targets that apply only to so-called Annex I Parties, a group of ‘developed’<sup>103</sup> States/ economies deemed both more responsible for a large portion of the GHGs currently and historically in the atmosphere, and able to make the required reductions without substantial economic repercussions.<sup>104</sup> These commitments are officially referred to as “quantified emission limitation and reduction objectives”.

The 2015 Paris Agreement is the second legally binding agreement of the Climate Change Regime, and utilizes emissions reductions targets, like the Kyoto Protocol. It is set to enter into effect once the commitment period of the Kyoto Protocol expires at the end of 2020. However, unlike the Kyoto Protocol, the Paris Agreement does not limit its reduction requirements solely to Annex I Parties. All Parties to the Paris Agreement have agreed to reduce their GHG emissions, and the resulting Nationally Determined Contributions, or NDCs, represent “each country’s self-defined mitigation goals for the period beginning in 2020.”<sup>105</sup> These NDCs reflect the unique situation of each State and their economy, while also reflecting the highest possible ambition.

The COPs and the work they have produced has varied in success over the past two decades. While the Paris Agreement was lauded as a step forward in the fight against climate change, it was only 6 years earlier, in 2009, when the COP meeting at Copenhagen was deemed “‘disappointing’ by EU leaders and condemned by NGOs as a ‘shameful, monumental failure.’”<sup>106</sup> The resulting document, the Copenhagen Accord, is a three-page political agreement concluded through last minute efforts by the US, China, South Africa, India, and Brazil that pales in comparison to the lofty initial goals of the meeting (which were to conclude a legally binding agreement with more uniform requirements for States, something the Paris Agreement was able to achieve later).

Because they are the most significant documents in shaping the goals and actions of the UN Climate Regime, the following section will evaluate the text of the UNFCCC (with

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<sup>103</sup> It should be noted that the terms “developed” and “developing” are utilized throughout this paper. This is due their usage and significance within the UNFCCC documents, and does not reflect an endorsement of the terms on the part of the author.

<sup>104</sup> Though increasing evidence points to the contrary, many countries still hold the view that to adopt climate conscious technology and means of production would harm them economically. This is not necessarily the case, but there could be some short-term economic repercussions for countries that do not yet have stable and diversified economies. The concept of sustainable development works to reform this traditional understanding by demonstrating how States can “decouple” economic growth with environmental degradation. For more information, please see: (Everett et al. 2010) especially pages 7-11 and 21-26.

<sup>105</sup> (The Center for Climate and Energy Solutions 2019, p. 2)

<sup>106</sup> (Phillips 2020)

the Rio Declaration included in the consideration of principles), Kyoto Protocol, and Paris Agreement for how they interact with human rights.

The following section will examine the texts of these documents for language that references human rights obligations or specific human rights. The subsequent section will analyze the evidence found, using academic discourse to ultimately conclude that while progress has been made regarding incorporation of human rights into the pillars of the UN Climate Change Regime, it is insufficient to invoke specific obligations on the part of States to protect human rights in both the processes of drafting policies and their end goals. However, due to the nature of the documents and the regime, because they explicitly call for the protection of the environment in multiple capacities and make provisions for this to happen, a right to a safe, clean, healthy, and sustainable environment would provide a solid link for these two spheres to reinforce each other more clearly and enough for States to understand what is required of them.

## **4.2 Human Rights and the UNFCCC**

### **4.2.1 The United Nations Framework Convention on Climate Change**

The significance of this document lies in a few different areas. It's loftiest task at the time of its drafting was to unite States under a common philosophy and goal; to reduce emissions of harmful greenhouse gases (GHGs) and prevent anthropogenic climate change. Another feature of the UNFCCC was the plan for structuring the following regime. The final significant aspect of the UNFCCC was, along with the Rio Declaration, to establish the guiding principles of the Climate Change Regime. These principles are important not only in the functioning of the regime, but also in how climate change law has developed and how nations and regions have shaped their climate change and environmental policies. These principles also provide ground to link the UN Climate Change Regime with principles of the human rights system, as discussed in previous chapters.

#### **4.2.1.1 *The Rio Declaration***

As mentioned, the Rio Declaration is a list of the guiding principles of the UNFCCC. Principle 10 states that “environmental issues are best handled with the participation of all concerned citizens...” and that “Each individual shall have appropriate access to information... and the opportunity to participate in decision-making processes.”<sup>107</sup> Though this is only a principle and not a binding commitment, it speaks to the previously established

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<sup>107</sup> (“Rio Declaration on Environment and Development” 1992, p. 2)

procedural human rights to participation, education, and information. Principles 20, 21, and 22 encourage States to involve and consider a number of marginalized and vulnerable groups in the processes of adapting to and mitigating climate change, namely women, the youth, and Indigenous people. The Declaration also emphasizes the centrality of the human person and the eradication of poverty (but these principles were not restated or incorporated into the Framework Convention or the Kyoto Protocol). These principles provide a unifying philosophy for the Regime and a mutual basis for reinforcement with IHRL.

#### **4.2.1.2      *The Framework Convention***

Article 3 (“Principles”) of the UNFCCC includes two principles of relevance to human rights protection. Principle 1 states that “Parties should protect the climate system for the benefit of present and future generations,” echoing the language of the Human Rights Committee and other Bodies in their General Comments recognizing the rights of present and future generations.<sup>108</sup> Principle 4 states that “Parties have a right to, and should, promote sustainable development.”<sup>109</sup> Sustainable development is a system which emphasizes the inclusion of human rights, but this principle does not mandate nor commit States to practice, nor does it move towards implementing a system of sustainable development.

Article 4, which outlines the commitments Parties shall undertake, includes several themes or requirements that are reminiscent of previously discussed human rights obligations, like the transfer of technologies (1(c)), or the requirement to develop plans to protect coastal zones, water resources, and agriculture (1(d))<sup>110</sup>. In Article 41(f), States are encouraged to consider climate change “to the extent feasible” in relevant social, economic, and environmental policies and actions, “with a view to minimizing adverse effects on the economy, on public health, and on the quality of the environment.”<sup>111</sup> This provision encourages, but does not strongly require, States to incorporate [an understanding of climate change] into various sectors of public interest. Article 41(i) outlines a provision for States to promote public education, awareness, and training, although the obligation is not framed in reference to the human right to education or information. Article 6, “Education, training, and public awareness”, reaffirms this.

Article 7 of the Convention, “Conference of the Parties”, allows for non- State Party organizations, like specialized UN agencies, NGO’s, etc, to be “represented at sessions of the

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<sup>108</sup> (“United Nations Framework Convention on Climate Change (UNFCCC)” 1992, p. 4)

<sup>109</sup> *Ibid.* p. 5

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* p. 6

Conference of the Parties as observers.”<sup>112</sup> This has provided the opportunity for various human rights organizations to participate in later COP’s, especially the Paris Agreement, discussed later.

### ***Evaluation***

There is some overlap between the content of many human rights and commitments that States have pledged to in the UNFCCC, like the commitment to provide information to the general public, or the principles to include women, Indigenous people, and other marginalized groups in the process of drafting and implementing policies and programmes. This understanding, coupled with earlier discussions of the overlapping normative frameworks between human rights law and environmental law, show that there is precedent and ample fodder for these systems to pursue their objectives in tandem, and not in opposition.

#### **4.2.2 The Kyoto Protocol**

The Kyoto Protocol was signed in 1997, went into effect in 2005, and marked the first legally binding facet of the UNFCCC (and, as such, the first global legal agreement to reduce GHGs). It represented a formidable step in operationalizing the goals of the Framework Convention, and implemented some highly significant provisions that have become foundational features of the international effort to tackle climate change. One such feature is that all Parties were required to collect and make public “data to establish its level of carbon stocks in 1990 and to enable an estimate to be made of its changes in carbon stocks in subsequent years.”<sup>113</sup> These data have proved crucial for tracking progress in emissions reduction.

Another significant feature of the Kyoto Protocol is the designation of Parties as either “Annex I” or “non-Annex I”, in order to organize those Parties with ‘developed’ economies who could and should take more powerful climate action, and those States with ‘developing’ economies who may not make the transition as easily. The third main feature of the Kyoto Protocol was to establish emissions reductions targets for Annex I Parties based on the provided data for the first commitment period, from 2008-2012, where “participating countries committed to reduce their emissions by an average of 5% below 1990 levels.”<sup>114</sup> These commitments are referred to as “common but differentiated responsibilities”, and

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<sup>112</sup> *Ibid.* p. 10

<sup>113</sup> (“Rio Declaration on Environment and Development” 1997, p. 3)

<sup>114</sup> (European Commission n.d.)

along with the Annex I distinction, speak to the founding principles of the climate regime to consider the capacities of ‘developed’ vs. ‘developing’ States. A second commitment period is currently active, although not technically ratified, and will expire in December of 2020.

Much like the Framework Convention, the only link to human rights within the Kyoto Protocol that could potentially be argued is the requirement of States to engage with information and training regarding education about climate change issues and capacity building. Article 10 says that States shall “(e) Cooperate in and promote at the international level ... the development and implementation of education and training programmes, including the strengthening of national capacity building, in particular human and institutional capacities ... and facilitate at the national level public awareness of, and public access to information on, climate change.”<sup>115</sup>

### ***Evaluation***

At first glance, there does not seem to be any engagement with human rights in the Kyoto Protocol. Though not an acknowledged reference, Article 10 does emphasize the significance of procedural rights, and outline how they are necessary for the success of climate policies and the climate change regime.

### **4.2.3 The Paris Agreement**

Negotiations for a second legally binding instrument under the UNFCCC for the post-2020 period began in Durban in 2011. The Paris Agreement was signed in 2015 and entered into force in 2016. According to Dooley and Parihar, “In 2014, a special procedures committee of the Human Rights Council issued an open letter to parties to the UNFCCC, calling for human rights protections in the Paris climate agreement. The following year over 200 organisations made a submission to the UNFCCC with the same demand.”<sup>116</sup>. As a result, the Paris Agreement became the first legally binding agreement in the UNFCCC to explicitly mention human rights. The Paris Agreement also established ‘nationally determined contributions’, or NDCs. As opposed to the Kyoto Protocol, which required emissions reductions only of Annex I parties, the Paris Agreement required emissions reductions of all Parties, based on their unique national situation. The Preamble of the Agreement features the most explicit human rights language, reading:

*“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective*

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<sup>115</sup> (“Rio Declaration on Environment and Development” 1997)

<sup>116</sup> (Dooley and Parihar 2016, p. 140)

*obligations on human rights, the right to health, the rights of Indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”<sup>117</sup>*

As shown, this text explicitly calls upon States to respect their human rights obligations when implementing their climate change action and not only incorporates specific rights, but draws attention to human rights themes like gender equality and the rights of current and future generations. However, due to this text’s location within the Preamble, it’s compulsion is a “should”, and not “shall”, exempting it from the legally binding commitments found later in the document.

The Preamble acknowledges the great significance of poverty in discussions on climate change by writing:

*“Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty,”<sup>118</sup>*

It also invokes human rights relevance by discussing the subjects of certain substantive rights, like food and water, as well as procedural rights, like education and access to information:

*“Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change, and...*

*“Affirming the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement,”<sup>119</sup>*

Article 2 of the Agreement outlines some of the main pillars of the global response to climate change, “in the context of sustainable development and efforts to eradicate poverty.” Already, a concerted effort to recontextualize climate action in the light of human rights can be seen. Human rights themes are woven throughout the body of the Paris Agreement, like

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<sup>117</sup> (“Paris Agreement to the United Nations Framework Convention on Climate Change” 2015, p. 2)

<sup>118</sup> *Ibid.* p. 1

<sup>119</sup> *Ibid.* p. 1-2

in Article 6, which provides that States may choose to voluntarily pursue higher ambitions in their NDC's "to promote sustainable development and environmental integrity."<sup>120</sup> This article continues to mention sustainable development and the enhancement of public and private sector participation in pursuing their NDC's and beyond.

Article 7, which deals with adaptation, uses human rights themes by writing that "Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of Indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate."<sup>121</sup>

### ***Evaluation***

The Paris Agreement features the most straightforward incorporation of human rights of any legally binding agreement of the UNFCCC so far. Human rights are included by name in the Preamble, and tangentially within Article 2. Human rights themes are indirectly referenced throughout the rest of the document.

#### **4.2.4 Analysis**

In both the Rio Declaration and UNFCCC, there is no explicit mention of human rights. The Rio Declaration certainly incorporates elements of a human rights based approach to climate governance, but these were not incorporated into the UNFCCC, which was and still is the guiding document of the regime. The UNFCCC, for its part, does acknowledge certain human rights themes like the rights of present and future generations and the concept of sustainable development. When outlining the Parties' commitments, the Framework Convention identifies a number of obligations that relate to substantive and procedural human rights, like requiring States to exchange technologies and protect food and water resources. While these commitments do relate, by nature, to human rights, they are not referenced here in a human rights capacity, and thus fail to invoke or pay homage to States' human rights obligations concerning them. For a document that has shaped the structure of the UN Climate Change regime for the past two decades, the failure to include human rights obligations or allow for provisions for them to be considered in pursuing the ultimate objective of the Convention has created a system of global climate governance that

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<sup>120</sup> *Ibid.* p. 7

<sup>121</sup> *Ibid.* p. 9

has only recently begun to reckon with its human rights responsibilities. The engagement with human rights within these two documents is largely symbolic.

It is difficult to glean any amount of human rights protection from the Kyoto Protocol. The facilitation of education, information, and awareness deserves some credit, as it is precisely these procedural obligations that seem to have been less contended with in the human rights system. But, there is little other reference to any human rights or human rights obligation within this text.

The only other link between the system created by the Kyoto Protocol and the system of human rights protection is that of common but differentiated responsibilities (the CBDR principle). Because international law is a system based on the formal equality of States, “the notion of differential treatment refers to instances where, because of pervasive differences or inequalities among states, formal legal equality and reciprocity are sidelined to accommodate extraneous factors,” like varying levels of economic development, or capacities to address different issues.<sup>122</sup> This technique is clearly utilized by the CBDR technique, but it is also present in the implementation of economic, social, and cultural human rights, as the principle of “progressive realization”<sup>123</sup>. While it would not be prudent to identify this incorporation of differential treatment as an indicator of human rights protection within the Kyoto Protocol, it does reinforce the idea that the human rights protection and climate change governance frameworks are more compatible than divergent.

As illustrated, the Paris Agreement is leaps and bounds ahead of its predecessors when it comes to incorporating human rights into the global response to climate change. The opening text of the Agreement clearly states that Parties should honor their human rights obligations, which, Dooly and Parihar say, “guides interpretation of the treaty towards taking these obligations into account when acting on climate change.”<sup>124</sup>

Terminology that appears in more recent UN Human Rights statements regarding rights and climate change is prevalent, like the term “food security”, and other human rights themes like sustainable development, the eradication of poverty, and access to education and information regarding climate change.

However, the placement of the explicit invocation of human rights obligations in the Preamble means that it is not legally binding. Human rights featured much more prominently in earlier drafts of the Paris Agreement, and in ways that would have resulted in

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<sup>122</sup> (Cullet and Robinson 2009, p. 185)

<sup>123</sup> *Ibid.*

<sup>124</sup> (Dooley and Parihar 2016, p. 148)

a stronger commitment to their protection within the climate governance agenda for the post-2020 period.<sup>125</sup> Dooley and Parihar write that “initial versions of the draft of the Paris Agreement included reference to human rights obligations in the overall objective”<sup>126</sup>. However, over the course of multiple negotiations, “these variations were whittled down... so that in the waning days before the meeting in Paris, there were only two direct references to human rights in the draft text: one in the Preamble and one in Article 2.”<sup>127</sup>

## Conclusion

As shown, neither the Framework Convention nor the Kyoto Protocol meaningfully address human rights obligations. Due to the efforts of civil society and other UN human rights groups, the first explicit reference to human rights appeared in the 2010 Cancun agreements (which were a series of decisions as opposed to a treaty), and said that States should fully respect human rights in all climate-related actions. After concerted lobbying by various actors in 2014, human rights were more meaningfully incorporated into the 2015 Paris Agreement; but the substantial inclusion of human rights into the UN Climate Regime still falls short.

Some scholars conclude that the Paris Agreement is “a significant development towards a regime that considers the impact on human rights obligations when states take action to address climate change, as well as the differentiated responsibilities of states to ensure the global conditions necessary for upholding human rights for all.”<sup>128</sup> This may be a significant step forward, and for the time the Paris Agreement was drafted, perhaps quite substantial. But climate change and environmental problems have worsened since then, and public opinion and fervor for action has gained momentum. If the Paris Agreement is the most substantial advancement of the protection of human rights within the UN Climate Change Regime, it does not go far enough to create specific obligations for States to protect human rights in procedural and substantive capacities. If the UNFCCC system relies on the UN Human Rights system to comprehensively incorporate human rights obligations into responses to climate change, Chapter 3 has clearly illustrated that these rights have not been ‘greened’ significantly enough to do so.

The common link here is the need to protect the environment in order to prevent catastrophic climate change and protect human rights by clarifying State obligations in both

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<sup>125</sup> *Ibid.* p. 140

<sup>126</sup> *Ibid.*

<sup>127</sup> (Magraw, Rosemberg, and Padmanabhan 2016, p. 317)

<sup>128</sup> (Dooley and Parihar 2016, p. 141)

branches of International Law. This introduces the opportunity for a right to a safe, clean, healthy, and sustainable environment to bolster substantive human rights protection within the UNFCCC, and procedural protection within the UN human rights system, more concretely uniting the ambitions of both systems.

# **Chapter 5 - Examining the proposal for a right to a safe, clean, healthy, and sustainable environment at the universal level**

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## **Introduction**

Chapter 3 of this paper found that established human rights at the UN have not been ‘greened’ to appropriate extents that would consolidate human rights protection when it comes to adjusting to and attempting to prevent climate change. Chapter 4 has illustrated that the incorporation of human rights protection and consideration into the UNFCCC, the largest international legal effort to respond to climate change, is sparse, and represents a contextual but non-legally binding element of the Paris Agreement. Throughout this paper, the right to a healthy environment has been presented as a possible solution to some of these gaps in protection.

This chapter will examine the Special Rapporteur on human rights and the environment’s 2018 proposal that the United Nations consider formal recognition of a human right to a safe, clean, healthy, and sustainable environment.

First, this chapter will look into how this discussion evolved. Next, it will examine the 2018 proposal by Special Rapporteur John Knox to evaluate incentives for recognizing the right and the projected effects of doing so. It will then look for examples of regional human rights systems and national governments who have already recognized this right, to determine its added value to human rights protection in the context of climate change. This chapter will ultimately conclude that a universally recognized right to a safe, clean, healthy, and sustainable environment will enhance protection of human rights in climate change responses, as well as elevate protection of the environment as a priority among human rights, especially within the universal system itself., contributing to both substantive and procedural elements of rights.

## **5.1 Background**

As demonstrated throughout this paper, it usually takes some time for academic, scientific, or social developments to become reflected in policy, and for acknowledgment of a problem to gain enough momentum for concrete political and legal action to be taken to ameliorate it. The same goes for the idea of a substantive right to a healthy environment. While Special Rapporteurs Knox and Boyd made their calls for a right to a healthy

environment in 2018, the UN acknowledged the importance of a healthy environment for human rights as early as the 1970s.

The earliest recognition that individuals may have a claim to a healthy environment came in 1990, when “the UN General Assembly reaffirmed the linkage...in resolution 45/94, stating that all individuals are entitled to live in an environment adequate for their health and well-being and calling for enhanced efforts to ensure a better and healthier environment.”<sup>129</sup> The 1992 Rio Declaration on principles for the UNFCCC states that humans are “entitled to a healthy and productive life in harmony with nature”, emphasizes the responsibility of States to ensure that they do not “cause damage to the environment of other States”, and writes that States “shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage”, and crucially to supporting the push for an internationally recognized right, states that “States shall also cooperate... to develop further international law regarding liability and compensation for adverse effects of environmental damage.”<sup>130</sup> These principles allude to elements of a substantive right to a healthy environment, as well as the procedural obligations it would require.

Since then, many States have gone on to recognize a substantive right to a healthy environment in one sense or another. Two regional human rights systems, the Inter-American System and the African System, have also recognized this right. The African Charter on Human and Peoples’ Rights was the first international human rights instrument to unreservedly declare a healthy environment a human right.<sup>131</sup> Article 24 confirms that everyone has “the right to a general satisfactory environment favourable to their development.”<sup>132</sup> In 2018, the Inter-American Court of Human Rights “affirmed that the American Convention on Human Rights, a regional treaty obliging states parties to respect rights, protects the right to a healthy environment... ‘A clean environment is a fundamental right for the existence of humanity,’”<sup>133</sup>

According to Dinah Shelton, over 100 countries around the world “guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or call for protection of the environment or natural resources. Over half of the constitutions, including nearly all adopted since 1992, explicitly recognize the right to a clean and healthy environment. Ninety-two constitutions impose a duty on the government

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<sup>129</sup> *Ibid.*

<sup>130</sup> (“Rio Declaration on Environment and Development” 1992, p. 3)

<sup>131</sup> (Kota 2016, p. 14)

<sup>132</sup> *Ibid.*

<sup>133</sup> (Human Rights Watch 2018)

to prevent harm to the environment.”<sup>134</sup> Countries can also recognize the right through legislation, for example like the Indonesia Environmental Management Act (EMA), which states in Article 5 that “every person has the same right to an environment which is good and healthy.”<sup>135</sup>

According to John Knox and his successor, David Boyd, recognizing this right at regional and national levels, along with increased ‘greening’ of established rights, has contributed to a developed jurisprudence on the convergence of human rights and the environment.<sup>136</sup> Through constitutional rights, emerging procedural rights, and the work of international human rights tribunals, it has been widely established that “environmental protection is thus deemed a prerequisite to the effort to secure the effective enjoyment of human rights.”<sup>137</sup>

However, the United Nations has yet to formally, legally call for the protection of the environment. While the UN Human Rights System has taken a number of steps to link protection of the environment with human rights obligations (as demonstrated in chapter 3), they have also failed to take the specific step of declaring a healthy environment a human right.

It is important to note that the fact that the UN still does not recognize a human right to a healthy environment is indicative of a pervading attitude towards human rights, present since the mid-century when many of the landmark human rights texts were drafted prioritizing individualism and the primacy of State sovereignty. A common understanding that a healthy environment is fundamental to human life is integral to many cultures across the world, particularly Indigenous communities. It has also become much more noticeable in these regions, which are overwhelmingly considered “developing” and typically may not have the resources necessary to hide or mitigate the devastating effects of climate change, how quickly a degrading environment can diminish the quality of life for hundreds of thousands of people.

Indigenous groups are traditionally viewed as having a close relationship with nature and the environment that is not shared by the majority.<sup>138</sup> However, it is repeatedly recognized that everyone’s rights and healthy life depend on the environment. Further to this, it has been established in the international sphere and in this paper, that Indigenous groups are not just a demographic of people to be protected from climate change, but

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<sup>134</sup> (Shelton 2011, p. 267)

<sup>135</sup> (Santosa, Mas Achmad. n.d.)

<sup>136</sup> (Knox 2018)

<sup>137</sup> (Shelton 2011, p. 265)

<sup>138</sup> *Please see* (United Nations Environment Programme 2017)

themselves agents of change and progress that must be included at all levels of decision making. Of course, the same goes for all under-represented groups.

The pattern emerges that those countries who play powerful roles in drafting human rights texts at the international level, who happen to be Annex I countries, who have “developed” economies and are the worst historical (and, in many cases, current) emitters of GHGs, and who, across the board, [overwhelmingly] disappoint when it comes to reducing emissions and taking positive climate actions, are those who, as climate change worsens, will feel it the slowest. Of course, internal disparities will exist, and the poorest communities of these countries will experience more devastating effects than the wealthier ones. Nevertheless, the pattern persists.

So while this paper focuses on the institutional and legal advantages of a right to a healthy environment, the idea goes beyond a ‘booster’ for human rights protection and the elevation of climate issues within institutions. It speaks to a commitment to protect the most vulnerable, and to create equality in the quality of life all humans are entitled to enjoy.

In 2018, John Knox seemed to recognize this and understood that the largest international governance body did not go far enough to protect human rights in the context of climate change; calling on the United Nations to consider introducing the right to a safe, clean, healthy, and sustainable environment. What does this proposal look like, and how would it be practically adopted and integrated at the universal level?

## **5.2 The Report**

### **5.2.1 Background**

The A/HRC/37/59 Report is not the first time the former Special Rapporteur, John Knox, has commented on human rights obligations as they relate to a healthy environment. In 2013, in his capacity as Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, Mr. Knox published a Mapping Report on how human rights obligations relate to a healthy environment.

In 2016, in his role as Special Rapporteur on the same topic, Knox published report A/HRC/31/52, which emphasized the effect climate change has on the enjoyment of human rights, and the significance of human rights norms in addressing the matter. Knox references the UNFCCC, stating that “based on the duty of international cooperation”, States needed to implement their commitments to the Paris Agreement, “in order to ensure that global

temperatures do not rise to levels that would impair a vast range of human rights.”<sup>139</sup> Knox also invoked human rights bodies, highlighting their capacity to “inform and improve climate policy by providing forums for issues concerning climate change and human rights”, which also reinforces the idea that well-established human rights framework provides a paved path for environmental issues as they relate to human rights that does not exist in the converse, as a paved path for human rights issues in the sphere of environmental law. This was notably demonstrated by the only recent inclusion of human rights references in the 2015 Paris Agreement and the lack of individual communications provisions. In the conclusion of the report, Knox writes that “human rights norms clarify how States should respond to climate change... Complying with human rights obligations not only helps to protect the rights of everyone affected by climate change.”<sup>140</sup> Knox then published 16 Framework Principles on Human Rights and the Environment in 2018. The Framework principles did “not create new obligations. Rather, they reflect the application of existing HR obligations in the environmental context.”<sup>141</sup>

This body of work laid a considerable foundation for the issue of climate change and human rights. This culminated in the publication of report A/HRC/37/59 in 2018, endorsed by the incoming Special Rapporteur, David R. Boyd, on the issue of a human right to a healthy environment at the international level.

While both Rapporteurs had already established the importance of a healthy environment on the enjoyment of all human rights, this report injected new momentum into the idea that guaranteeing a healthy environment as a human right at the international level would not only increase human rights protection, but provide a stronger basis for cohesion in addressing climate change within the human rights framework.

### **5.2.2 The Proposal**

In Report A/HRC/37/59, The Special Rapporteur comments that, after observing the right in practice at national and regional levels, he perceived that “recognition of the right has proved to have real advantages.”<sup>142</sup> He observed these advantages to be:

1. Raise[ing] the profile and importance of environmental protection
2. Provid[ing] a basis for the enactment of stronger environmental laws

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<sup>139</sup> (Knox 2016, p. 20)

<sup>140</sup> *Ibid.*

<sup>141</sup> (Knox 2018, p. 3)

<sup>142</sup> *Ibid.*

3. When applied by judiciaries it helped to provide a safety net to protect against gaps in statutory laws
4. Created opportunities for better access to justice<sup>143</sup>

Knox thus concluded that “On the basis of this experience, the Special Rapporteur recommends that the HRC consider supporting the recognition of the right in a global instrument.”<sup>144</sup> He goes on to suggest two potential ways of how this could be done. One is via the Global Pact for the Environment, which was proposed to the General Assembly by the government of France in 2017. The Global Pact is an initiative to codify in a legal instrument the principles of the 1972 Stockholm Declaration and 1992 Rio Declaration, similarly to how the ICCPR and ICESCR codified the Universal Declaration of Human Rights.<sup>145</sup> Article 1 of the Global Pact includes a substantive right to a healthy environment.

The other more practical and more likely suggestion is that of a General Assembly resolution. The significant expansion of the scope of a right or even the establishment of an entirely new human right via a General Assembly resolution is not unprecedented. In 2010, The General Assembly recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>146</sup> The Special Rapporteur argues that this is a more feasible option, and the right to water in itself poses a useful model for comparison, as it was frequently understood to have an effect on the enjoyment of human right and required protection by proxy, until it was recognized as its own right.

It is important to understand that existing human rights obligations at the international level would not change should this right be introduced. The substantive elements of environmental protection are already required through other established human rights, like the right to water. A right to a healthy environment would invoke procedural duties in the event of environmental harm, but as demonstrated, these are not new obligations per se in either IHRL or IEL. This right would elevate the cohesion of these obligations, and as the Human Rights Council has affirmed, promote policy coherence, legitimacy and sustainable outcomes.”<sup>147</sup>

The aforementioned Framework Principles and Mapping Report provide a good basis for the obligations that would result from a right to a healthy environment. This is in part

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<sup>143</sup> (Knox 2018, p.4)

<sup>144</sup> *Ibid.*

<sup>145</sup> (Orellana 2018)

<sup>146</sup> (Knox 2018, p.4)

<sup>147</sup> (Knox 2016, p. 20)

because those documents reflected an understanding that one of main goals of the mandate of the Special Rapporteur was “to clarify what human rights law requires with respect to environmental protection.”<sup>148</sup> The Special Rapporteur envisioned the following effects of recognizing this right at the global level:

1. Raising the awareness that human rights norms require protection of the environment
2. Highlighting that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity, equality, and freedom
3. Helping ensure that human rights norms relating to the environment continue to develop in a coherent and integrated manner

Has the right to a safe, clean, healthy, and sustainable environment had these effects in the national and regional spheres it has been applied in? What have been some of the more practical, legal effects of recognizing this right, especially in the regional systems (which are more comparable to the universal system)? To find out, the following section will look at examples of other countries and regional human rights bodies that have introduced this right.

### **5.3 Examination of Right Recognition and Implementation**

#### **5.3.1 Reviewing Incentives**

While Knox summarizes some projected benefits of this right, its still relatively unclear how a universal right to a healthy environment would function. Therefore, this section will review some of the theoretical incentives for right recognition, while the following section will review real-life examples at two different levels.

The right to a healthy environment would have substantive requirements, like maintaining certain levels of air and water quality, reducing pollution, protecting biodiversity, and preserving forests and other ecosystems. These features of a substantive right would contribute to the enjoyment of other substantive rights, including food, water, health, and adequate standards of living. It would also help bring together the standards of environmental protection required to ensure each of these rights.

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<sup>148</sup> (Knox 2018, p.5)

The procedural rights associated with this right would prove invaluable to those seeking justice for violation of environmental rights, which can be especially pertinent for environmental activists. In response to the deaths of two prominent human rights defenders and environmental activists, Isidro Baldenegro López and Berta Cáceres, the Director of the Environment and Human Rights Program at Human Rights Watch, Marcos A. Orellana, wrote that “Their deaths have thrown into sharp relief the need for accountability and redress for those who suffer most as a result of environmental harm: women, the poor, racial and ethnic minorities, and the young. They also have underlined the need to establish global recognition for the right to a healthy environment. Doing so could empower individuals and communities to defend their environments, providing a framework for holding offenders accountable and finding new legal arguments and recourse.”<sup>149</sup>

Based on the evidence gathered in this paper so far, a right to a healthy environment at the international level would have significant incentives. On a substantive basis, it would unify the level of environmental protection required to maintain a healthy environment, thus standardizing the bases required to protect other rights like adequate food, water, etc. On a procedural basis, it would increase access to justice at international levels, which helps individuals who cannot get justice at the national level, and help settle disagreements between States in the event of transboundary instances. As there is no existing example of this right at the universal level yet, the closest comparison is that of regional bodies, which are still internationally structured, just on a smaller scale.

### **5.3.2 National Recognition and Implementation**

As the study of right implementation across so many legal systems is incredibly dense and varied, experts like Dinah Shelton and David Boyd have compiled overviews of the subject, collecting information from the more than 100 countries with a constitutionally recognized right to a healthy environment. This section will consolidate some of their findings to give an illustrative idea of how this right can function at the domestic level.

National recognition of the right to a healthy environment has developed in two different processes. One is the explicit inclusion within a constitution; the other is the passing of court rulings that find the right implicit within constitutional provisions.<sup>150</sup> A non-exhaustive list of countries with explicit constitutional recognition of a right to a healthy environment includes Norway, Greece, Spain, Mexico, Columbia, Ecuador, Indonesia, the Philippines, South Korea, Thailand, Ethiopia, South Africa, and Rwanda.<sup>151</sup>

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<sup>149</sup> (Orellana 2018)

<sup>150</sup> (Boyd 2011, p. 171)

<sup>151</sup> For more, please see (Boyd 2011)

To use Mexico as an example, Article 4 of the constitution was amended in 1999 to include the right to a healthy environment, and in 2012 was reformed to provide an additional obligation of the State to guarantee protection of that right, and hold those who cause environmental degradation liable for the harm caused, accounting for both substantive and procedural facets. The recognition of this right is a part of a greater effort in Mexico to expand environmental rights across the board, and in recent years, not only for people, but for the environment itself. One example of this came in 2017, when Mexico City amended its constitution “to include the rights of nature,” which certainly springboards off of an established right to a healthy environment.<sup>152</sup>

Other countries have implicitly recognized a right to a healthy environment, like Guatemala and Pakistan. In the constitution of Guatemala, there is no explicit right to a healthy environment, but courts have started to allow NGOs to submit lawsuits on this right, “explain[ing] that the objective of environmental measures is to guarantee the right to health and the achievement of a standard of living that guarantees the survival of future generations.”<sup>153</sup> The same can be said for Pakistan’s constitution, but the Supreme Court there “has recognized that the right to a healthy environment is implicit in the right to life,” enhancing procedural protections.<sup>154</sup>

As seen in both of these examples, an implicit right to a healthy environment is often interpreted via a separate established right. While this does not grant clear justiciability or clear duties like a constitutional right would, it does speak to the overlapping nature of human rights and environmental rights. It can also contribute to the expanded protection of established rights, and set the scene for further jurisprudence to be established regarding the right, implicit or explicit. In many cases, like Greece, Kenya, and Nepal, an explicit constitutional right followed an earlier establishment by courts of an implicit right.

### **Summary**

The recognition of a right to a healthy environment at the domestic level can have many substantive and procedural benefits. As identified above, those include improved access to justice regarding environmental issues, clearer obligations, responsibility, and liability in the event of harm/in a duty to prevent harm, and the greater/wider protection of existing rights.

The most tangible and significant effect of this right at the national level appears to be the increased access to justice. If there is no formal establishment that the degradation of

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<sup>152</sup> (Lee 2017)

<sup>153</sup> (Boyd 2011, p. 173)

<sup>154</sup> *Ibid.* p. 176

the environment affects the enjoyment of established human rights in a country/system, there is no way to bring claims to a court of law when the environment is harmfully degraded. Even where courts have found this law implicitly, access to justice for environmental issues has become easier and more accessible. This can not just aid those suffering from environmental degradation or the effects of climate change in their calls for protection and redress, but it can greatly increase the protection of environmental activists and human rights defenders.

Though domestic systems are not entirely comparable to international systems, this brief review allows for a more nuanced understanding of the positive effects this right has on human rights frameworks and linking human rights and environmental law.

### **5.3.3 The Right to a Healthy Environment in the Inter-American Court of Human Rights**

This section will examine the Inter-American Court due to recent developments regarding the right to a healthy environment within the regional system.

The American Convention on Human Rights (The American Convention) does not explicitly mention the environment. However, Inter-American institutions have acknowledged the intersection between human rights and the environment (understanding not just the importance of the environment for the providing enjoyment of rights, but the importance of a healthy environment in and of itself).

This link was first formally expressed in the 1988 Protocol of San Salvador (an Additional Protocol to the American Convention), which includes a right to live in a healthy environment in Article 11.<sup>155</sup> This Protocol, however, only hosts 16 Parties, and Article 11 is not enforceable through individual petitions.<sup>156</sup> As mentioned above, this eliminates the possibility of claiming violations of the right and seeking justice through this particular international channel, thus significantly diminishing its procedural protection.

In 2016, the Republic of Colombia requested clarification on the “scope of State responsibility for environmental harm” under the American Convention.<sup>157</sup> According to one scholar, this was likely brought on by a “desire for greater legal certainty” about the potential consequences of Colombia’s plans for offshore activities, as well as concerns about the possible harmful effects of “environmental degradation from its neighbors’ new

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<sup>155</sup> (Tigre 2020)

<sup>156</sup> *Ibid.*

<sup>157</sup> (Banda 2018)

infrastructure projects and other actions”, citing Nicaragua’s offshore drilling site as one such example.<sup>158</sup>

In 2018, the Inter-American Court of Human Rights released an Advisory Opinion on the issue, “reaffirming that human rights depend on the existence of a healthy environment.”<sup>159</sup> The Court thus ruled that “States must take measures to prevent significant environmental harm to individuals inside - and outside - their territory.”<sup>160</sup> The right to a healthy environment is justiciable under Article 26 of the American Convention on Human Rights (“Progressive Development”).

This, like any right, will require cases to be brought forward in order to determine some of the parameters. However, one scholar and Counsel in the Advisory Proceedings for the Inter-American Court’s Advisory Opinion, Maria Banda, identified five main impacts and features of the recognition of this right. The first is the protection of the environment ‘*per se*’. Where it was typically possible to bring claims against environmental degradation on the basis of other rights being affected, this particular right views “forests, rivers, and seas... [as] protected juridical interests in themselves,” and “means that harm to the environment could potentially be justiciable - even absent [of] evidence of harm to individuals.”<sup>161</sup> This reflects a non-anthropocentric view of environmental rights, which is a significant aspect of many Indigenous views of the environment and represents a lesser-known attitude of both law and nature. This statement is also reminiscent of the precautionary principle (Banda’s second ‘benefit’), which stipulates that lack of clear scientific evidence that harm may be caused should not be a disincentive for taking action. Banda makes this link clear in her third ‘advantage’, stating that the Court’s recognition of this right imposes a duty on States to “act in accordance with the precautionary principle,” (serving as an explicit unification of IEL and IHRL).<sup>162</sup>

The fourth aspect of this right that Banda highlights is the transboundary implications it carries. The Court specifically mentions that States have a duty to prevent environmental harm to individuals both within and without its territory. This falls in line with principles of both the Climate Change Regime and the Human Rights System at the UN. The final benefit is a blanket recognition of ‘procedural environmental rights’.<sup>163</sup>

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<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

Though many of these ‘benefits’ are principles of IEL, the recognition of this right within the Inter-American systems means that the Court and other human rights instruments can guide States on how to apply them, contributing to the mutual reciprocity of the IHRL and IEL frameworks, and providing an opportunity for jurisprudence to develop, like in 2020, when the Inter-American Court ruled on the first case in which the right to a healthy environment was examined.

The case was brought by Indigenous Communities Members of the Lhaka Honhat Association against Argentina, regarding land ownership rights and issues of environmental exploitation on the part of the State. For the case, the Court examined the rights to “indigenous community property, cultural identity, food... water”, and for the first, time, the right to a healthy environment, all under Article 26 of the American Convention.<sup>164</sup>

In their assessment of the case, the Court found that Argentina had violated these rights and ordered reparations, “including actions for access to adequate food and water, for the recovery of forest resources, and to maintain Indigenous culture.”<sup>165</sup>

This ruling illustrates an expanded and progressive interpretation of the right to a healthy environment and other rights included in Article 26, “which requires states to actively adopt measures to achieve their full realization.”<sup>166</sup> At a surface level, this case reaffirms the substantive rights to an environment of quality, and the procedural rights of individuals were realized just in the filing of the case itself.

This case established two important elements of this ‘new’ right regarding State obligations. The first is that the right to a healthy environment does not just come into relevance when human interest is involved; it also “protects components of the environment, such as forests, seas, rivers, and other natural features, as interests themselves, even in the absence of certainty or evidence about how it affects individual people” (fulfilling Banda’s projected benefits). The ruling also clarifies the obligations of States to actively protect the right to a healthy environment “by preventing violations, including those committed by private actors within their territories.”<sup>167</sup>

### **Summary**

As shown by the above examination, the right to a healthy environment recognized at the regional level has a number of benefits. Not only does it consolidate human rights protection in the context of climate change, it elevates the protection of vulnerable groups

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<sup>164</sup> (Tigre 2020)

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> (Tigre 2020)

like Indigenous people, civil society groups, and environmental activists. It clarifies State obligations regarding duties to prevent both domestic and transboundary harm, take responsibility for the actions of private actors, and provide reparations when harm is caused. This right and its growing jurisprudence also clarifies just how States can implement principles of international environmental law, like the precautionary principle, duties to cooperate, and more. When these events are examined in light of John Knox's intended effects of a universal right, it is clear that a right to a healthy environment can have many of these effects. Perhaps most significant in this case is the improvement of access to justice regarding environmental violations. In terms of further integrating the evolution of IEL and IHRL, this case clearly demonstrates how this right enables human rights instruments to interpret and guide States on the implementation of principles of IEL.

#### **5.4 Analysis**

John Knox's formal call for the recognition of a right to a safe, clean, healthy, and sustainable environment is a result of years of examining the overlaps between IHRL and IEL, and the frameworks utilized to operationalize and implement them. As this paper has demonstrated, there is more than sufficient ground for these two branches of International Law to cooperate, and unify not just the ends but the means of their goals.

Knox makes the argument that recognizing this right at the universal level would help address the 'gaps' when it comes to human rights protection in the context of climate change. This paper has sought to investigate what these gaps are, by examining not just the 'greening' of human rights within the universal system, but the extent of their incorporation into the universal climate governance system. By examining both systems, a fuller picture of UN human rights protection in this context has been obtained.

Chapter 3 found, through examining the General Comments of UN Treaty Bodies, that progress, though significant in some areas, is not equal among Bodies; and where it does take great steps, often falls short of implying specific, legal State obligations to protect the environment or combat climate change, despite great thematic enthusiasm. In addition to this, where substantive elements relating to a healthy environment have been required, there has been much less attention paid to the associated procedural duties, or the intersectional aspects of more vulnerable groups.

Chapter 4 took an in-depth look at both thematic and concrete incorporations of human rights into the three most significant documents of the UN Climate Change Regime: the Framework Convention, the Kyoto Protocol, and the Paris Agreement. Through a close

reading, this paper discovered that references to human rights are primarily thematic, and at best contextual. The most significant protections are (albeit, indirectly) for the procedural rights of individuals and groups (as seen in the Kyoto Protocol). However, the protection of human rights does not play a significant role in shaping the process or goal of combating climate change within this system.

Chapter 5 has taken a closer look at the proposal itself, examining the intended effects of right recognition, and how it has functionally operated on both national and regional levels. Based on the evidence gathered, especially at the regional level, a right to a healthy environment has significant benefits for the protection of human rights, and for the unification of IEL and IHRL. The formal recognition, first and foremost, allows human rights instruments to guide States on how to implement principles and provisions of IEL, closing gaps of confusion or lack of clarity. There is a marked improvement in access to justice and other procedural elements (like duties to provide information and, in the event of harm, redress). This would be especially valuable within the UN human rights system, which as demonstrated, has not awarded this matter due diligence. The substantive environmental protections, including their impact on rights to food, health, etc., would contribute to the cohesion of human rights protection within the climate change regime. As so many of the provisions of the UNFCCC relate to protection of the environment, recognizing it as a universal human right would require those State parties to abide by the standards laid out by the human rights system when implementing their duties under the UNFCCC. Therefore, for the reasons posited throughout this paper, a UN right to a healthy environment would not only improve the protection of established human rights against the threat of climate change, it would augment their protection within the highest existing level of international climate governance, and contribute to a healthier, safer, future for all.

## **Conclusion**

Overall, the recognition of the right to a healthy environment at the regional level appears to address many of the key issues and gaps in human rights protection and international environmental law application identified throughout this piece, ushering in the conclusion that the recognition of a human right to a healthy environment at the universal level will prove a significant step towards filling some of the gaping holes in the ‘architecture’ of both the human rights system in the context of climate change, and the protection of human rights within the Climate Change system.

This chapter has examined the Special Rapporteur's 2018 proposal to determine how a right to a healthy environment would function at the universal level. In order to get more clarity on this, national and regional examples of this right have been reviewed. Based on these examinations, in view of the gaps illustrated in chapters 3 and 4, this chapter has found that a right to a healthy environment at the universal level would likely improve many aspects of human rights protection in the universal system, both within IHRL and IEL frameworks, by enhancing the protection of many existing substantive rights that rely on a healthy environment to be enjoyed, and establish a clearer framework of procedural rights and duties related to environmental human rights.

## ***Conclusion***

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Climate change is an unprecedented phenomenon whose threat to human life cannot be overstated. Discussions about climate change tend towards the economic and the political, but the cost of human life and livelihoods cannot and should not be sidelined. Human rights must be ingrained in the responses to climate change, in order to protect people and ensure the process of adapting to a post-climate change world is fair and sustainable.

Due to the global nature of climate change, international cooperation is essential to success - and all States and institutions must do their part to advance combative efforts and prevent an already dire situation from worsening. This paper has examined what the United Nations can do to further push States to fulfil their human rights obligations and commit to stronger action on climate change. Special Rapporteur John Knox's proposal for a universal human right to a safe, clean, healthy and sustainable environment was used as a means to examine how this could be done.

In order to extrapolate the benefits of a human right to a healthy environment, this paper first established the threat of climate change to human rights - and how important a healthy environment is to the enjoyment of multiple human rights.

Then, it explored the overlapping frameworks of IHRL and IEL to illustrate their compatibility and the room for their mutual enforcement, especially regarding the implementation and protection of a human right to a healthy environment. This section reviewed the overlapping principles and mutually reinforcing frameworks, which set the scene for the discussions in chapters 3, 4, and 5, which frequently capitalized on the common ground of these branches of International Law.

Chapter 3 of this paper evaluated what gaps exist within the architecture of the UN human rights systems when it comes to the intersection of human rights and climate change. In order to do this, chapter 3 identified specific substantive and procedural rights threatened by the impacts of climate change, and the processes used to combat it, and then evaluated how/whether UN Treaty Bodies 'greened' these established rights to the extent required to create specific legal obligations for States to combat climate change and protect the environment. This was done by close-reading General Comments, the main tool with which Treaty Bodies can expand/re-contextualize the interpretation of treaty rights. This chapter ultimately found that some Bodies have done more than others, but significant gaps exist

when it comes to invoking State obligations towards the protection of substantive, and overwhelmingly, procedural rights.

Chapter 4 of this paper investigated the topic from a different angle. Because of the established overlap of IHRL and IEL, the implementation and protection of human rights, in this context, is strongly impacted by provisions of IEL. Thus, this paper also considered the extent to which human rights are protected within the UNFCCC, which guides the international response to climate change. By examining three key texts in the regime (the Framework Convention, the Kyoto Protocol, and the Paris Agreement), this chapter found that the consideration of States' human rights obligations is only a recent addition to this system, found most concretely in the 2015 Paris Agreement; though this is largely symbolic. This examination illustrated the large gaps in substantial, meaningful human rights protection within the UNFCCC, opening an opportunity for a right to a healthy environment to provide a framework for human rights and environmental protection at the convergence of IHRL and IEL.

The final chapter of this paper performed a closer examination of Special Rapporteur John Knox's proposal in order to determine what he envisions the benefits of a right to a healthy environment are. These projected effects were compared to some specific examples from States and the Inter-American System of Human Rights, who have already recognized and implemented this right. This illustrated that the right to a healthy environment has many practical implications, many of which would ameliorate the gaps found in the UN human rights system and the UNFCCC, namely elevated safeguarding for established rights that rely on a healthy environment, and increased protection for procedural rights, like access to justice and information, public participation, and education/capacity building - crucial elements of a sustainable, substantial campaign to address climate change.

This paper has thus determined that a right to a healthy environment at the universal level would better protect existing human rights that rely heavily on a healthy environment and improve procedural rights which remain critical to combating climate change. First and foremost, this right would invoke specific substantive and procedural obligations on the part of the State, addressing some of the most gaping holes in both IHRL and IEL frameworks.

Within the UN human rights system, this right would contribute to the prioritization of climate change as a serious, main-focus issue, and increase the cohesion of the Treaty Bodies' approach to addressing it. This would be especially beneficial when it comes to procedural rights and duties. A right to a healthy environment here would clarify how States must protect and include individuals and groups in the process of developing climate change

strategies, foster better education and capacity building at the ground level, and provide improved access to justice in the event of infringement. Within the UNFCCC, this right would enhance the protection of substantive human rights, which is significantly lacking. It would unite the frameworks of IHRL and IEL further by providing the opportunity for human rights institutions to guide States on how to implement their duties under IEL, bolstering the enforcement of both systems.

Above all, the recognition of this right would represent a commitment by the United Nations to protect human rights and the environment for all individuals, especially those who are incredibly disadvantaged and vulnerable, and those people who risk their lives to secure a safer future for all.

The ongoing COVID-19 pandemic has offered an opportunity to reexamine the systems that have come to shape modern ways of life. It has demonstrated how sustainable and meaningful action must happen at all levels of public and private life for combative efforts to be successful. Individuals, as much as any government or organization have a role to play in contributing to a healthier future - and have demonstrated enormous capacities to bring about great change. This collective responsibility towards the common good has come into the spotlight, serving as a reminder that issues of public health, safety, and wellbeing must remain non-political in order to succeed. Grassroots efforts are hugely impactful and necessary to foster climate change resilience, but this paper has sought to demonstrate just one example of where efforts can be improved - at the highest levels of human rights protection and climate change governance, in the United Nations.

Climate change, though often portrayed as such, is not a political issue; it is an issue of human life and dignity that deserves the utmost attention and action, not just for the health and wellbeing of present generations, but the future of humanity.

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