

HUMAN RIGHTS OBLIGATIONS AND ACCOUNTABILITY IN THE FACE OF CLIMATE CHANGE

Marc Limon*

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* Marc Limon works as an Advisor for the Ministry of Foreign Affairs of the Republic of Maldives, where he specializes in international human rights law and international environmental law. Mr. Limon drafted and negotiated the Male' Declaration on the Human Dimension of Global Climate Change, and Human Rights Council Resolutions 7/32 and 10/4 on Human Rights and Climate Change. He was also part of the Maldives negotiating team at the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Copenhagen, which secured the inclusion of human rights wording in the draft outcome document on Long-Term Cooperative Action. The views expressed in this Article are those of the author alone and do not represent or reflect the official position of any government or organization.

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I. INTRODUCTION

In November 2007, Small Island Developing States, meeting in the Maldives, adopted the Male' Declaration on the Human Dimension of Global Climate Change.¹ The declaration laid down a roadmap for actions within the UN system designed to explore and draw attention to the relationship between global warming and the full enjoyment of human rights. In June 2009 the various steps foreseen in the Male' Declaration reached their conclusion when the United Nations Human Rights Council (the Council or the Human Rights Council) held a dedicated interactive panel debate on the relationship between human rights and climate change during its Eleventh Session in June 2009.

The present time, therefore, offers an important opportunity to take stock of progress achieved since the Male' Declaration was adopted, to assess the current situation, and to consider possible next steps. This Article will offer an assessment of what has been achieved by the rapidly evolving international agenda on human rights and climate change. It will do so by looking at how the international understanding of the complex and multifaceted relationship between climate change and human rights has evolved over the past one and a half years. This will entail an analysis of the degree to which the international community, through the process launched by the Male' Declaration, has answered three crucial questions pertaining to the human rights climate change interface:

1. Is there a relationship between climate change and human rights, and if so, what is the nature of that relationship?
2. Does climate change constitute a violation of human rights, especially the rights of vulnerable people?
3. Irrespective of whether climate change represents a human rights violation, what are states' national-level and international-level human rights obligations pertaining to climate change?

After assessing progress in addressing these three central questions, the Article will then move to propose possible next steps, on behalf of the international community, to further clarify the issues at hand and to transpose

¹ Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf [hereinafter Male' Declaration].

that understanding into actual mechanisms to better promote and protect human rights in the face of climate change.

This Article will focus solely on actions undertaken within the context of the United Nations Human Rights Council² and related international human rights mechanisms.³ Although academia and non-governmental bodies have played a crucial role in the evolution of the human rights, climate change agenda,⁴ their contribution will not be covered here. Moreover, in analyzing progress, the Article will focus on the evolution of hard and soft law in the area, and not on the broader perceptual achievements of the human rights and climate change agenda. Notwithstanding this necessary (for reasons of space) omission, it is clear that such perceptual achievements (i.e., how seeing climate change through a human rights lens has changed the nature of the international conversation on the subject) have been extremely significant (and probably more so than legal achievements).

II. THE MALE' DECLARATION

On November 13–14, 2007, a group of the world's most vulnerable Small Island Developing States convened in the Maldives to discuss the possible human rights implications of climate change.⁵ The impetus for the meeting, which would be the first time that any group of states had made a concerted attempt to draw linkages between hitherto separate bodies of law, was three-fold.⁶ First, there was a general frustration on the part of vulnerable communities at the slow pace of progress in tackling climate change using the traditional politico-scientific approach. This in turn suggested that a new supplementary framework was needed. Second, there was a growing sense on the part of these groups that, with a scientific consensus on climate change largely in place, it was time to shift the debate onto the victims of the

² The Human Rights Council is an inter-governmental body within the UN system made up of forty-seven states responsible for strengthening the promotion and protection of human rights around the globe. UN Human Rights Council, Membership of the Human Rights Council, <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited July 13, 2010). The Council was created by the UN General Assembly on March 15, 2006 with the main purpose of addressing situations of human rights violations and to make recommendations on them. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

³ Especially human rights Treaty Bodies and human rights Special Procedures.

⁴ See Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439 (2009).

⁵ Male' Declaration, *supra* note 1, pml.

⁶ See Limon, *supra* note 4, at 440–41.

problem—namely individual people and communities around the world. Third, and linked to the previous point, those communities most at risk from climate change became increasingly frustrated at the lack of any kind of accountability framework to deal with a phenomenon caused by man and with devastating human consequences.

The outcome of the meeting—the Male’ Declaration on the Human Dimension of Climate Change—stated explicitly, and for the first time in an international agreement, that “climate change has clear and immediate implications for the full enjoyment of human rights”⁷ and called on the United Nations human rights system to address the issue as a matter of urgency.⁸ The declaration lays down three key steps that it wishes the human rights system to take. First, it calls for the Human Rights Council to actively consider the human rights implications of global warming by holding a dedicated debate on the matter.⁹ Second, it requests “[t]he Office of the United Nations High Commissioner for Human Rights [OHCHR] to conduct a detailed study into the effects of climate change on the full enjoyment of human rights” in order to inform the Council’s considerations.¹⁰ Finally, it recommends that the Council process feed into and complement the ongoing United Nations Framework Convention on Climate Change (UNFCCC) climate change negotiation process.¹¹

Beyond defining this roadmap for taking forward the issue of climate change and human rights, the Male’ Declaration did not offer any substantive guidance on how the Small Island Developing States themselves viewed the interface between the two. This was because the vague frustration felt by Small Island Developing States at the inadequacies of the current UNFCCC process, and the parallel sense that, in order to confront those inadequacies, vulnerable states must move human beings and their fundamental rights to the center ground of the debate, delegates were not yet sure how to leverage human rights law to achieve their ends.

The Small Island Developing States thus opted for a largely procedural declaration that would, through the OHCHR’s report and the subsequent

⁷ Male’ Declaration, *supra* note 1, at pmb. para. 12.

⁸ *Id.* ¶ 1.

⁹ *Id.* ¶ 5.

¹⁰ *Id.* ¶ 4.

¹¹ *See id.* ¶ 3 (requesting “[t]he Conference of the Parties of the [UNFCCC] . . . to seek the cooperation of the Office of the United Nations High Commissioner for Human Rights and the United Nations Human Rights Council in assessing the human rights implications of climate change”).

Council debate, provide greater clarity on the precise nature of the interface between climate change and human rights, and suggest ways in which that interface might be mobilized to energize and improve international climate change policy and to better protect the rights of vulnerable individuals.

III. OHCHR REPORT

The Male' Declaration had an immediate impact both within the UNFCCC process and within the international human rights community.

Regarding the former, the Thirteenth Conference of Parties to the UNFCCC (COP-13) in Bali featured keynote speeches by both then President of the Maldives, Maumoon Abdul Gayoom, and the UN Deputy High Commissioner for Human Rights, Kyung-wha Kang, which both made clear reference to the human rights implications of climate change. In his address, during which he presented the Male' Declaration to assembled delegates, President Gayoom stated:

[Small Island Developing States] believe that climate change must be viewed not only as a danger to natural systems, but also as a direct threat to human survival and well-being. We are convinced that this negotiation process must not be viewed as a traditional series of governmental trade-offs, but as an urgent international effort to safeguard human lives, homes, rights and livelihoods.¹²

Echoing these sentiments, Deputy High Commissioner Kang said: “[A]ny strategy to deal with climate change, whether in terms of adaptation or mitigation, must incorporate the consequences for humans, as individuals and communities, and the human rights framework is the most effective way to do so.”¹³

¹² Maumoon Abdul Gayoom, President of the Maldives, Address at the Thirteenth Session of the Conference of the Parties of the UNFCCC and the Third Session of the Meeting of the Parties to the Kyoto Protocol (Dec. 12, 2007), http://www.maldivesmission.ch/fileadmin/Pdf/Environment/President_at_Bali_Conference_2012122007_final_.pdf.

¹³ Kyung-wha Kang, Deputy High Comm'r for Human Rights, Address at the Thirteenth Conference of the Parties to the UNFCCC and the Third Session of the Meeting of the Parties to the Kyoto Protocol (Dec. 14, 2007), http://www.maldivesmission.ch/fileadmin/Pdf/Environment/DHC_Statement_Bali_Final.pdf.

The theme of human rights and climate change was also widely discussed during the Human Rights Council session held immediately after the adoption of the Male' Declaration—the Seventh Substantive Session in March 2008. During the session's ministerial and general segments,¹⁴ Bolivia, Bhutan, Greece, the Maldives, Nigeria, Indonesia, and the Philippines all noted the serious consequences of climate change for the full enjoyment of human rights and called on the Council to address the human rights dimension.¹⁵ Then, on March 28, 2008, the Maldives together with seventy-eight co-sponsors from all regional groups, secured the adoption, by consensus, of United Nations Human Rights Council Resolution 7/23 on "Human rights and climate change"¹⁶ which, for the first time in an official UN resolution, stated explicitly (in preambular paragraph 1) that climate change "poses an

¹⁴ General segments feature keynote statements on human rights (ambassador-level) by states that were not able to be represented at the ministerial-level, or senior government-level. See Office of the High Comm'r of Human Rights, Modalities for a High-Level Segment of the Human Rights Council at its Seventh Session in March 2008, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/ModalitiesHLS.pdf> (discussing the purpose of the general segment).

¹⁵ OJO MADUEKWE, MINISTER OF FOREIGN AFFAIRS OF NIG., STATEMENT AT THE HIGH-LEVEL SEGMENT OF THE SEVENTH SESSION OF THE HUMAN RIGHTS COUNCIL (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Nigeria-E.pdf>; SONAM T. RABGYE, PERMANENT REPRESENTATIVE OF BHUTAN TO THE UNITED NATIONS, STATEMENT AT THE HIGH-LEVEL SEGMENT OF THE SEVENTH SESSION OF THE HUMAN RIGHTS COUNCIL (Mar. 5, 2008) (on file with the *Georgia Journal of International and Comparative Law*); ALBERTO G. ROMULO, SEC'Y OF FOREIGN AFFAIRS OF THE PHIL., STATEMENT AT THE HIGH-LEVEL SEGMENT OF THE SEVENTH SESSION OF THE HUMAN RIGHTS COUNCIL, BEHIND A COMMON CAUSE: ADVANCING WITH RESOLVE, FINDING STRENGTH IN SYNERGY (Mar. 3, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Philippines-E.pdf>; ABDULLA SHAHID, MINISTER OF FOREIGN AFFAIRS OF THE MALDIVES, STATEMENT AT THE HIGH-LEVEL SEGMENT OF THE SEVENTH SESSION OF THE HUMAN RIGHTS COUNCIL (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Maldives-E.pdf>; N. HASSAN WIRAJUDA, MINISTER FOR FOREIGN AFFAIRS OF INDON., STATEMENT AT THE HIGH-LEVEL SEGMENT OF THE SEVENTH SESSION OF THE HUMAN RIGHTS COUNCIL (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Indonesia-E.pdf>; Webcast: Sacha Sergio Llorenti Soliz, Vice Minister of Coordination with Soc. Movements & Civil Soc'y of Bol., Statement at High-Level Segment of the Seventh Session of the Human Rights Council (United Nations Human Rights Council, Mar. 3, 2008), <http://www.un.org/webcast/unhrc/archive.asp?go=080303>; Webcast: Franciscos Verros, Permanent Representative of Greece to the United Nations at Geneva, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (United Nations Human Rights Council, Mar. 5, 2008), <http://www.un.org/webcast/unhrc/archive.asp?go=080305>.

¹⁶ Human Rights and Climate Change, H.R.C. Res. 7/23, U.N. Doc. A/HRC/7/78 (July 14, 2008) [hereinafter UNHRC 7/23].

immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.”¹⁷

Yet, that single sentence aside, Resolution 7/23, like the Male’ Declaration, was silent on the substantive nature of the “implications” of climate change for the enjoyment of human rights and what those implications should mean in practice. This reticence, which even included a refusal on the part of some states (especially certain industrialized states) to countenance the inclusion of a list of those rights most affected by climate change (as had been included in preambular paragraph 12 of the Male’ Declaration), demonstrated that it was not just Small Island Developing States that were unsure as to the exact nature of the relationship between climate change and human rights and, more importantly, as to the legal implications of that relationship for both climate change policy and human rights policy.

As with the Small Island Developing State representatives in Male’, the members of the Human Rights Council responded to these doubts by agreeing to give further consideration to the issue, and for that consideration to be informed by an expert analysis by the OHCHR. Through Resolution 7/23, states, therefore, asked the OHCHR to prepare “a detailed analytical study on the relationship between climate change and human rights, to be submitted to the Council prior to its tenth session.”¹⁸

The OHCHR published its report on climate change and human rights in January 2009.¹⁹ The report was based on written and oral submissions by over thirty states, and thirty-five international agencies, national human rights institutions, NGOs, and academic bodies.²⁰ Although many of those submissions were largely descriptive in nature—for example explaining what steps individual states were taking to adapt to climate change—others (especially the national submissions of Canada, Mali, the Maldives, the Marshall Islands, the United States, and the United Kingdom) began the process of identifying and considering key issues and questions pertaining to

¹⁷ *Id.* at pmb. para. 1.

¹⁸ *Id.* ¶ 1.

¹⁹ U.N. High Comm’r for Human Rights [OHCHR], *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report].

²⁰ See OHCHR, *Study on the Relationship Between Climate Change and Human Rights: Submissions and Reference Documents Received*, http://www2.ohchr.org/english/issues/climate_change/submissions.htm (last visited July 13, 2010) (providing list with links to all documents received by OHCHR).

the intersection of human rights and climate change.²¹ These individual analyses were distilled and built-upon by OHCHR and, in its published report, it identified three key legal questions:

1. Is there a relationship between climate change and human rights, and if so, what is the nature of that relationship?
2. Does climate change constitute a violation of human rights, especially the rights of vulnerable people?
3. Irrespective of whether climate change represents a human rights violation, what are states' national-level and international-level human rights obligations pertaining to climate change?²²

Each of these questions will be explored in the sections that follow.

A. Is There a Relationship Between Climate Change and Human Rights, and If so, What Is the Nature of That Relationship?

It may appear surprising that the OHCHR needed to answer the question of whether there is any kind of relationship between climate change and the full enjoyment of human rights. That linkages exist would seem self-evident. However, during negotiations on Resolution 7/23, a number of states argued strongly against the assertion in preambular paragraph one, that climate change “has implications for the full enjoyment of human rights.”²³ The basis of this opposition becomes clear by referring to the national submissions to the OHCHR report of Canada, the United Kingdom, and the United States. Canada, for example, only “acknowledges that there *can be* an impact on the effective enjoyment of human rights as a result of situations *arising from* environmental degradation *amplified by* climate change.”²⁴ Similarly, the

²¹ *Id.*

²² See OHCHR Report, *supra* note 19, ¶¶ 92–99 (outlining the conclusions made by the OHCHR).

²³ UNHRC 7/23, *supra* note 16, at pmb. para. 1.

²⁴ Submission of Canada to OHCHR Report, Government of Canada Response to Request for Information by the Office of the High Commissioner for Human Rights Concerning a Request in Human Rights Council Resolution 7/23 for a Detailed Analytical Study of the Relationship Between Climate Change and Human Rights, at 1 (Nov. 2008), <http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf> [hereinafter Canada OHCHR Report Submission] (emphasis added).

United Kingdom “recognises that climate change *may* impact on the full enjoyment of human rights *at the national level . . .*”²⁵ The United States meanwhile took a different approach—agreeing with the language in Resolution 7/23, that “climate change . . . has implications for the full enjoyment of human rights,” but noting “of course, that [such] statements are factual observations rather than statements of international law.”²⁶ The U.S. submission also points out that the effects of climate change on the enjoyment of human rights can be positive as well as negative.²⁷

In its report, the OHCHR responded decisively to these obfuscations by clearly concluding that:

Climate change-related impacts . . . have a range of implications for the effective enjoyment of human rights. The effects on human rights can be of a direct nature, such as the threat extreme weather events may pose to the right to life, but will often have an indirect and gradual effect on human rights, such as increasing stress on health systems and vulnerabilities related to climate change-induced migration.²⁸

After clearly stating that there *is* an important connection between climate change and the enjoyment of human rights, OHCHR then provides its views on the exact nature of the relationship. It draws four broad conclusions.

First, although “global warming will potentially have implications for the full range of human rights,”²⁹ certain specific rights are most directly affected. OHCHR lists these as: the right to life; the right to adequate food; the right to water; the right to health; the right to adequate housing; and the right to self-determination.³⁰

²⁵ Submission of U.K. to OHCHR Report, Assessment at National Level of the Impact of Climate Change (Experienced or Anticipated) on Human Lives and on Population Most Affected and Vulnerable (2008), <http://www2.ohchr.org/English/issues/climatechange/docs/submissions/uk.pdf> [hereinafter U.K. OHCHR Report Submission] (emphasis added).

²⁶ Submission of U.S. to OHCHR Report, Observations by the United States of America on the Relationship Between Climate Change and Human Rights ¶ 14 (2008), <http://www2.ohchr.org/English/issues/climatechange/docs/submissions/USA.pdf> [hereinafter U.S. OHCHR Report Submission].

²⁷ *Id.* ¶ 15.

²⁸ OHCHR Report, *supra* note 19, ¶ 92.

²⁹ *Id.* ¶ 20.

³⁰ *Id.* ¶¶ 21–41.

Second, the report notes that the human rights impacts of climate change will be felt unevenly both between and within nations. Regarding the former, the report highlights the particular geographic vulnerability of those living “on the ‘front line’ of climate change,” where global warming can have often “catastrophic consequences” for human rights.³¹ Moreover, climate change “disproportionally affect[s] poorer regions and countries”³² which also suffer from a “low capacity to adapt.”³³ Unfortunately the OHCHR fails to place these observations within the context of “climate justice”³⁴ or “climate injustice”³⁵—the recognition that those states that are the most vulnerable to climate change and have the lowest adaptive capacity, are also the same countries that have contributed least (through green house gas emissions) to the problem. Regarding the latter, the OHCHR argues that climate change impacts will be felt most acutely “by those segments of the population who are already in vulnerable situations owing to such factors as geography, poverty, gender, age, indigenous or minority status and disability.”³⁶ OHCHR notes that “[u]nder international human rights law, States are legally bound to address such vulnerabilities in accordance with the principle of equality and non-discrimination.”³⁷

Third, the report notes that climate change is very likely to lead to large-scale human rights crises with horizontal impacts *across* the aforementioned specific rights and *across* the aforementioned vulnerable population groups. In particular, the report draws attention to the human rights implications of mass displacement caused by climate change—recalling the Intergovernmental Panel on Climate Change (IPCC) prediction that 150 million people might be displaced by 2050.³⁸

Finally, the OHCHR makes the often overlooked point that as well as the direct and indirect impacts of climate change itself, measures taken to mitigate and adapt to global warming can also have adverse secondary effects on human

³¹ *Id.* ¶ 93.

³² *Id.* ¶ 10.

³³ *Id.* ¶ 93.

³⁴ Term coined by Kofi Annan’s Global Humanitarian Forum.

³⁵ Kyung-wha Kang, Deputy High Comm’r for Human Rights, Opening Remarks at Human Rights Council Panel Discussion on the Relationship Between Human Rights and Climate Change, Eleventh Session of the Human Rights Council, at 2 (June 15, 2009), http://www2.ohchr.org/english/issues/climatechange/docs/openingHRC_PanelHR15June2009.pdf.

³⁶ *Id.* at 3.

³⁷ OHCHR Report, *supra* note 19, ¶ 42.

³⁸ *Id.* ¶¶ 55–60.

rights. For example, agro-fuel production can negatively affect the right to food.³⁹

B. Does Climate Change Constitute a Violation of Human Rights, Especially the Rights of Vulnerable People?

The second key question identified and answered by the OHCHR is whether climate change can be called a violation of human rights.⁴⁰ After reading its assessment of the many ways in which climate change undermines human rights, one might expect the OHCHR to respond to this question in the affirmative. Instead, it states: “While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.”⁴¹ It described three obstacles to treating the effects of climate change as human rights violations: (1) “it is virtually impossible to disentangle the complex causal relationships” linking the emissions of a particular country to a specific effect;⁴² (2) “global warming is often one of several contributing factors to climate change-related effects, such as hurricanes [or] environmental degradation” which makes it “often impossible” to establish how such an event is attributable to global warming;⁴³ and (3) the “adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.”⁴⁴

John Knox has argued that although not trivial, these problems are not insurmountable. Regarding the first obstacle, Knox argues that “[i]t is not necessary to link the emissions of a particular state to a particular harm in order to assign responsibility for the harm” and that it is possible to assign responsibility for a climate change-induced harm based on relative emissions levels (although historical emissions are problematic).⁴⁵ For example, he notes that just seven states are responsible for more than two-thirds of global emissions. “On this basis, it would be possible, at least in principle, to

³⁹ *Id.* ¶ 65.

⁴⁰ For an excellent critique of the OHCHR’s analysis of this question, see John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 493–96 (2009).

⁴¹ OHCHR Report, *supra* note 19, ¶ 70.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Knox, *supra* note 40, at 489.

conclude that even if all states contribute to climate change and are therefore joint violators of the human rights affected by it, some states are far more culpable than others, and to allocate responsibility [for the violation] accordingly.”⁴⁶ Another solution was suggested by the well-known Inuit Petition to the Inter-American Commission on Human Rights⁴⁷ which “sought to hold one state responsible for activities undertaken in several different states—applying both criminal law principles of joint liability and, more innovatively, the UNFCCC’s own principle of ‘common but differentiated responsibilities.’”⁴⁸ During a public hearing on the case, Martin Wagner (of Earthjustice), counselor for the petitioners, contended that each state is responsible separately as well as jointly.⁴⁹ In its national submission to the OHCHR study, the U.S. obliquely recognises that “novel theories of responsibility” such as these might be devised.⁵⁰ On the second obstacle, Knox argues that while some climate change-related effects such as hurricanes may well have diffuse contributing factors, others effects such as sea-level rise, receding glaciers, and the thawing of permafrost manifestly *are* caused by climate change.⁵¹ Finally, regarding the applicability of human rights law to future projections, the OHCHR itself acknowledges that an effect on a human

⁴⁶ *Id.* This argument is supported by the International Council for Human Rights Policy (ICHRP) which has argued that “specific actors *are* responsible for climate change – namely, those who overuse carbon fuels, albeit in highly varying degrees The question is whether this group can be broken into definite and identifiable parties to whom responsibility can be attributed in a specific and discrete manner.” INT’L COUNCIL ON HUMAN RIGHTS POL’Y, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 65 (2008) [hereinafter CLIMATE CHANGE AND HUMAN RIGHTS].

⁴⁷ Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) [hereinafter Inuit Petition], available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/finalpetitionicc.pdf>.

⁴⁸ CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 46, at 42.

⁴⁹ *Id.* & n.102. ICHRP has noted that:

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

Id. at 43.

⁵⁰ U.S. OHCHR Report Submission, *supra* note 26, ¶ 26.

⁵¹ Knox, *supra* note 40, at 488–89.

right does not have to have occurred in order to indicate a violation; the effect may be “imminent.”⁵²

C. Irrespective of Whether Climate Change Represents a Human Rights Violation, What Are States' National-level and International-level Human Rights Obligations Pertaining to Climate Change?

After stating that “[t]he physical impacts of global warming cannot easily be classified as human rights violations” the OHCHR report continues “[y]et, addressing that harm remains a critical human rights concern and obligation under international law.”⁵³ In Section III of the report, the OHCHR clarifies that such obligations exist at both the national-level and the international-level.⁵⁴

The OHCHR identifies three distinct layers of national human rights obligations applicable to climate change. Firstly, “irrespective of the additional strain climate change-related events may place on available resources, States remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights under any given circumstances.”⁵⁵ Second, the full enjoyment of procedural rights including access to information, participation in decision-making, and access to administrative and judicial remedies, especially on the part of vulnerable groups, are of critical importance to the success of national efforts to address climate change.⁵⁶ Third, human rights standards and principles, such as equality, non-discrimination, and universal access to at least basic levels of economic, social, and cultural rights must be applied to climate change policy-making in order to promote “policy coherence and sustainable outcomes”⁵⁷ and to ensure that policy solutions are directed towards those parts of the population that are most in need—including marginalized and vulnerable members of society.⁵⁸

While the second and third layers, which essentially suggest that well-governed societies are more adaptable and climate-resilient than less progressive ones, are clearly important and relevant points, the first layer of

⁵² OHCHR Report, *supra* note 19, ¶ 70 n.104.

⁵³ *Id.* ¶ 96.

⁵⁴ *Id.* ¶¶ 69–91.

⁵⁵ *Id.* ¶ 77.

⁵⁶ *Id.* ¶¶ 78–79.

⁵⁷ *Id.* ¶¶ 80–83.

⁵⁸ *Id.*

human rights obligations identified by OHCHR—which posits that irrespective of the additional burden placed on states by climate change such states still retain the same level of legal obligation to fulfill the human rights of their citizens—seems perverse from the viewpoint of small vulnerable states like the Maldives, Bhutan, or Tuvalu. Those states are, in effect, being asked to shoulder additional strain because of a downward drag on the enjoyment of economic, social, and cultural rights caused by the irresponsible environmental actions of countries beyond their borders and far beyond their effective control. Taken to the extreme, it suggests that even if industrialized nations defy their legal obligations under the UNFCCC and Kyoto Protocol, causing Small Island Developing States to become slowly uninhabitable, those small states nevertheless retain exactly the same level of legal obligation to fulfill the rights of their people to, for example, adequate housing and food.

However, importantly, the OHCHR balances its judgement on the absolute and inalienable nature of national-level obligations with an equally forceful conclusion on the existence of parallel, mutually-inclusive obligations held at the international-level.⁵⁹ In a summary of a number of different General Comments by the Committee on Economic, Social and Cultural Rights, the OHCHR in its report proposes four distinct types of international or extraterritorial human rights obligations. The OHCHR argues that states have a legal obligation to:

1. Refrain from interfering with the enjoyment of human rights in other countries[;]
2. Take measures to prevent third parties (e.g., private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries[;]
3. Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfillment of human rights in other countries . . . [;] and
4. Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.⁶⁰

In its conclusions, OHCHR builds on this analysis and states that: “International human rights law complements the United Nations Framework

⁵⁹ *Id.* ¶¶ 84–88.

⁶⁰ *Id.* ¶ 86.

Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.”⁶¹

This is without question the most progressive and important contribution of the OHCHR to both the evolution of human rights law (as it pertains to international cooperation) and, potentially, to the evolution of climate change policy.

In short, it suggests that all states that are party to the ICESCR have a legal obligation through international cooperation (i.e., the UNFCCC process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other countries (especially vulnerable countries), to fund adaptation measures in vulnerable countries (depending on the availability of resources), and to ensure that the international climate change agreement due to be penned at COP 15 in Copenhagen is consistent with those human rights obligations and, at the very least, does not adversely impact human rights.⁶²

Thus, on the issue of human rights obligations as they pertain to climate change, the OHCHR clearly concludes that important obligations exist at both the national-level and the international-level and, moreover, both sets of obligations are interdependent and interrelated. Irrespective of whether or not they are responsible for climate change, all states nevertheless retain the legal obligation to pursue the widest possible enjoyment of human rights for their people. However, at the same time and to an equal degree, states also have an extraterritorial legal duty not to interfere with the enjoyment of human rights in other countries (i.e., to reduce greenhouse gas emissions to safe levels) and to help vulnerable states adapt to the adverse impacts of inevitable climate change. The OHCHR Report clearly suggests that these two sets of obligations—national and international—must be viewed together in the context of climate change if universal human rights are to be fulfilled. Climate change cannot be used as an excuse by states not to pursue the full enjoyment of human rights, but equally the fulfilment of human rights by vulnerable states

⁶¹ *Id.* ¶ 99. OHCHR made this point in the very last paragraph of the report in order to emphasize its importance.

⁶² Limon, *supra* note 4, at 455.

will only be possible in a permissive international environment in which all states also abide by their extraterritorial duties and obligations.

IV. RESOLUTION 10/4

On March 6, 2009, during the Tenth Session of the Human Rights Council, the United Nations Deputy High Commissioner for Human Rights, Ms. Kyung-wha Kang, introduced report A/HRC/10/61 on the relationship between climate change and human rights.⁶³

Only a few states responded immediately (i.e., during the Tenth Session) to the report. Other interested delegations had already informed the lead sponsor, the Maldives, that the importance of the issue warranted a dedicated half-day Council debate on the subject (during the Tenth Session the report would only be considered en masse with a range of other unrelated OHCHR reports) and that they would withhold their comments until such a debate could be convened.

Those states that did respond to the report during the Tenth Session were Bhutan, Canada, Costa Rica, Israel, the Maldives, the Philippines, and Switzerland.⁶⁴ Although small in number, these interventions already provided

⁶³ Kyung-wha Kang, Deputy High Comm'r for Human Rights, Introduction of Reports by the Secretary-General and the High Comm'r for Human Rights at the Tenth Session of the Human Rights Council (Mar. 6, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

⁶⁴ See, e.g., Doma Tshering, Deputy Permanent Representative of Bhutan, Statement During General Debate Under Agenda Item 3 at the Tenth Session of the Human Rights Council (Mar. 16, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Bhutan, Tenth Session]; Shazra Abdul Sattar, First Sec'y, Maldives Permanent Mission to the United Nations at Geneva, Statement During General Debate Under Agenda Item 3 at the Tenth Session of the Human Rights Council (Mar. 16, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the Maldives, Tenth Session]; Jeffrey Heaton, Second Sec'y, Can. Permanent Mission to the United Nations at Geneva, Statement During General Debate Under Agenda Item 3 at the Tenth Session of the Human Rights Council (Mar. 16, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Canada, Tenth Session]; Jesus Enrique G. Garcia II, Second Sec'y, Phil. Permanent Mission to the United Nations at Geneva, Statement During General Debate Under Agenda Item 2 at the Tenth Session of the Human Rights Council (Mar. 6, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the Philippines, Tenth Session]. The World Bank also made an intervention. Richard S. Newfarmer, Special Representative to the United Nations and the World Trade Org., The World Bank, Statement During General Debate Under Agenda Item 3 of the Tenth Session of the Human Rights Council (Mar. 12, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

a sense of the range of views in the Council chamber on the three core questions identified by the OHCHR Report.

On the presence and nature of the relationship between climate change and human rights, it was already becoming evident that a clear majority view was evolving not only on the idea that a relationship existed between the two but also on the character of that relationship. This emerging consensus was neatly summed up by Bhutan: (1) “[c]limate change both directly and indirectly impacts the effective enjoyment of human rights including . . . the right to life, the right to adequate housing, the right to adequate food, the means to subsistence, the right to water, and the right to health”;⁶⁵ (2) “those who contribute least to the causes of climate change, and who can least afford to meet the challenges and costs, are among the most vulnerable to its adverse effects”;⁶⁶ and (3) climate change can and will lead to large-scale human rights crises through, *inter alia*, sea-level rise, flooding, and drought.⁶⁷ Similarly, the Maldives noted in its statement that the OHCHR Report “provides definitive recognition that climate change has important negative implications for a wide-range of internationally-protected human rights. Moreover, the Report demonstrates that the impacts of global warming fall heaviest on the rights of those people who are already vulnerable due to geography, poverty, age, or gender factors.”⁶⁸

Notwithstanding, as had been apparent a year earlier, during the Seventh Council Session, a small number of industrialized countries continued to take a much more limited, cautious, and nuanced view of the extent of any relationship between climate change and human rights. Specifically, these countries promoted the view that any relationship is at most a loose causal one and is a statement of fact rather than a statement of law. For example, Canada repeated the mantra, used in its national submission to the OHCHR Report, that “situations may occur in which environmental degradation amplified by climate change may set conditions that impact on the effective enjoyment of human rights”; but that, “Canada is concerned with assertions in the report by the OHCHR regarding possible linkages between climate change and human rights obligations, in the absence of consensus on these issues by States.”⁶⁹ In other words, climate change may, through various intermediary steps,

⁶⁵ Statement of Bhutan, Tenth Session, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Statement of the Maldives, Tenth Session, *supra* note 64.

⁶⁹ Statement of Canada, Tenth Session, *supra* note 64.

influence the enjoyment of human rights, but this is no more than an observation; there is no formal link whatsoever between human rights law and climate change law.

In contrast to the broad convergence on the question of the relationship between climate change and human rights, states showed themselves to hold widely differing views on whether climate change impacts might be considered a human rights violation and on the scope and nature of human rights obligations as they pertain to global warming.

On the question of whether climate change constitutes a violation of human rights, the Philippines found significant fault with the OHCHR supposition that “ ‘[t]he physical impacts of global warming cannot easily be classified as human rights violations, not the least because climate change-related harm often cannot be [sic] clearly be attributed to acts or omissions of specific States.’ ”⁷⁰ The Philippines’ objection focused on the claim by OHCHR that climate change-related harm cannot be clearly attributed to acts or omissions of specific states—i.e., it is difficult to attribute responsibility for a human rights harm caused by climate change.⁷¹ According to the Philippines, such an argument is not only wrong—it is possible to apportion responsibility for climate change in both a contemporary and historical sense.⁷² Indeed, the Philippines argues that such an exercise lies at the very heart of the international climate change negotiations, and it is possible to state categorically that a given phenomenon such as sea-level rise is caused by anthropogenic climate change.⁷³ However, it is also dangerous as it calls into question the fundamental basis of international efforts to tackle the problem (i.e., common but differentiated responsibility). “[T]he concern of developing countries, particularly small island states,” argued the Philippines,

is not the singular effect of a specific act or omission that need[s] to be traced to a specific state but to the cumulative effect of climate change, such as rising sea level, that can be attributed to the accumulation of acts and omissions that can be historically traced and measured through the carbon footprints of states.⁷⁴

⁷⁰ Statement of the Philippines, Tenth Session, *supra* note 64.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

On the question of the nature of human rights obligations vis-à-vis climate change, at both the national and international level, there was also a clear disagreement between developing and developed states on the correct balance between the two levels of obligation.

For their part, developing countries, such as Bhutan, the Maldives, and the Philippines, argued, in their interventions, that if states, led by industrialized nations, do not meet their international legal obligation not to interfere with the enjoyment of human rights elsewhere (i.e., to mitigate emissions to safe levels) and to help the “victims” of the problem adapt to the changing environment (through international commitments on adaptation), then one cannot reasonably expect vulnerable states to bear sole responsibility for fulfilling human rights through domestic remedy. In this regard, the Philippines asked: “What domestic remedy or relief can the governments of small island states offer their citizens against the onslaught of rising sea level?”⁷⁵ Building on this theme, Bhutan described its strong and successful environmental protection policies including in the area of climate change mitigation (for example, the law requires that over 60% of the country remain forested at all times). However, it notes that despite this commitment to create a natural environment conducive to the full enjoyment of human rights as well as “tangible even disproportionate contributions to international mitigation efforts, Bhutan is not spared the adverse effects of global climate change” including the retreat of glaciers and related “Glacial Lake Outburst Floods” which threaten the lives, livelihoods and welfare of a significant part of the Bhutanese population.⁷⁶

These vulnerable states therefore called for a much greater emphasis on the international obligation of states, especially industrialized states, to cooperate internationally to arrest dangerous interference with the global climate and thus to protect human rights. As the Maldives clearly stated: “international cooperation to mitigate and adapt to climate change is not merely desirable, it is in fact a legal obligation under international human rights law.”⁷⁷

This emphasis on international legal obligations to address an international problem was strongly contested by Canada which argued that: “It is the primary responsibility of States to promote and protect the human rights of individuals under their respective jurisdictions”⁷⁸ “In the event that the

⁷⁵ *Id.*

⁷⁶ Statement of Bhutan, Tenth Session, *supra* note 64.

⁷⁷ Statement of the Maldives, Tenth Session, *supra* note 64.

⁷⁸ Statement of Canada, Tenth Session, *supra* note 64.

human rights of a person within Canada's borders are endangered due to a situation arising in whole or in part from environmental degradation and/or the impacts of climate change, existing legal protections, policies and programmes would apply."⁷⁹ To demonstrate its point, the Canadian delegation addressed the argument, from the OHCHR Report, that extreme weather events may pose a direct threat to the right to life. "[I]n our view, it's the ability and willingness of States to effectively prepare, prevent and respond to natural hazards that ensures the protection of basic human rights."⁸⁰

In order to officially respond to the OHCHR Report, and after considering the initial responses of states, the Maldives tabled a follow-up resolution to 7/23 on human rights and climate change. Resolution 10/4 was adopted by the Council on March 25, 2009 by consensus and with eighty-nine co-sponsors.⁸¹

While, Resolution 10/4⁸² is necessarily (in view of the deep political sensitivities around the subject) silent on the question of whether the physical impacts of climate change violate fundamental human rights, it does address and seek to draw clear conclusions regarding the other key legal questions raised by the OHCHR Report.⁸³

First, on the relationship between climate change and human rights, Resolution 10/4 clearly states (in preambular paragraph 7) that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights."⁸⁴ It then offers a definitive list of those rights *most* affected by climate change, namely: the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination, and human rights obligations related to access to safe drinking water and sanitation. The resolution also recalls that "in no case may a people be deprived of its own means of subsistence."⁸⁵

While the list may not seem extraordinary (it replicates the list proposed in the OHCHR Report—with the addition of reference to deprivation of means

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ A list of co-sponsors is on file with the author.

⁸² H.R.C. Res. 10/4, at 11, U.N. Doc. A/HRC/10/29 (Nov. 9, 2009) (*prepared by* Elchin Amirbayov) [hereinafter UNHRC 10/4].

⁸³ *Id.* at pmb1.

⁸⁴ *Id.* at pmb1. para. 7. Attempts by the U.S. and Canada to weaken preambular paragraph 7 of Resolution 10/4 by saying that "climate change-related effects may have a range of implications . . ." were rejected by the main co-sponsors.

⁸⁵ *Id.*

of subsistence), it is nevertheless significant that Council Members agreed to its inclusion in the adopted resolution, as it represents a definitive acceptance that there is a clear relationship between climate change and specific internationally protected human rights. Such universal recognition had not been possible a year previously during negotiations for Resolution 7/23. A second important point to note is that states, especially developed states, agreed to the inclusion of reference in the list to the right to life and the right to self-determination. Only nine days earlier, on March 16, 2009, Canada had openly argued to the Council against the notion that climate change impacts, such as more frequent extreme weather, may pose a direct threat to the right to life—stating instead that “it’s the ability and willingness of States to effectively prepare, prevent and respond to natural hazards that ensures the protection of basic human rights.”⁸⁶ Similarly, there did not appear to be a clear view among states, in the run-up to the vote on Resolution 10/4, that there was any solid legal link between climate change and the right to self-determination. The OHCHR Report states that: “Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States.”⁸⁷ Such impacts “would have implications for the right to self-determination.”⁸⁸ However, not all states agreed with this reading during initial consultations on the draft resolution, with some arguing that the right to self-determination is a collective right of peoples to freely determine their political status and pursue their development *within* a defined geographical space, rather than a right that can be applied to peoples’ collective right to *continue to live in a disappearing* geographical space.

In addition to clarifying which human rights are most implicated by climate change, Resolution 10/4 also dealt with the issue of which population groups are most affected. In preambular paragraph 8, the Council recognizes that “while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.”⁸⁹ Again, this list mainly borrows from the OHCHR Report, although with the additions of geographic vulnerability (a crucial omission in

⁸⁶ Statement by Canada, Tenth Session, *supra* note 64.

⁸⁷ OHCHR Report, *supra* note 19, ¶ 40.

⁸⁸ *Id.*

⁸⁹ UNHRC 10/4, *supra* note 82, at 12, at pmb. para. 8.

the OHCHR Report) and indigenous status. Like the OHCHR Report, Resolution 10/4 does not take the next step of taking this analysis and placing it in the context of “climate injustice”—i.e., noting that those communities least responsible for climate change and least able to adapt are the ones that are also the most vulnerable to its impacts.

After clarifying the existence and nature of the relationship between climate change and human rights, Resolution 10/4 moves on to tackle the question of national versus international human rights obligations in the context of climate change.

Regarding national-level obligations, the resolution takes up the argument, made by OHCHR, that the observance of procedural rights, such as access to information and decision-making as well as of core human rights principles, such as equality and non-discrimination, are crucial in order to effectively address climate change. A rather vaguely worded preambular paragraph 10 affirms that “human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”⁹⁰ An early draft of the resolution was more explicit on national obligations in the area of procedural rights, affirming that “access to information and participation in decision-making are critical to efforts to address climate change.”⁹¹ However, this paragraph was deleted at the insistence of several developing countries which felt the resolution was too heavily weighted towards national obligations over international (i.e., developed country) obligations.

Almost inevitably, considering that it was the most significant and controversial part of the OHCHR Report, the preambular paragraph in Resolution 10/4 dealing with international human rights obligations in the context of climate change was the most fiercely contested part of the Resolution. The first draft of the resolution borrowed exact wording from the OHCHR Report, stating that “international human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realisation of human rights.”⁹²

⁹⁰ *Id.* at pmb1. para. 10.

⁹¹ H.R.C. Res. 10/4 (unpublished First Draft on file with the *Georgia Journal of International and Comparative Law*).

⁹² *Id.*

However, developed countries strongly objected to any suggestion of the existence of an international-level obligation to protect human rights as this would, they feared, dilute the state-centric nature of the international human rights protection system. The adopted draft, therefore, makes clear that international cooperation is significant in the context of climate change and human rights insofar as it provides an enabling environment which supports national efforts for the realization of human rights. What is more, the resolution only describes such international cooperation as “important”⁹³ rather than as a legal obligation.⁹⁴

After attempting this initial delineation of key aspects and implications of the relationship between climate change and human rights, Resolution 10/4 put forward a number of operative paragraphs designed to further refine the international human rights machinery’s understanding of that relationship and to explore ways in which the interface might be leveraged in order to support international human rights policy and climate change policy. The most important of the proposed steps were the call (in operative paragraph 3) for all relevant human rights Special Procedures (independent experts) to “give consideration to the issue of climate change within their respective mandates”,⁹⁵ and the Council’s decision (in operative paragraph 1) to “hold a panel discussion on the relationship between climate change and human rights at its eleventh session.”⁹⁶

V. HUMAN RIGHTS COUNCIL DEBATE ON HUMAN RIGHTS AND CLIMATE CHANGE

On June 15, 2009, the Human Rights Council’s Eleventh Regular Session dedicated a half day to an interactive panel debate on the relationship between climate change and human rights. The debate was introduced by the Deputy High Commissioner for Human Rights and the Head of Legal Affairs at the UNFCCC Secretariat, Feng Gao.⁹⁷ Then, after hearing four expert

⁹³ The third draft of the resolution suggested alternatives such as “expedient” or “a moral and legal imperative” but these were not accepted. H.R.C. Res. 10/4 (unpublished Third Draft on file with the *Georgia Journal of International and Comparative Law*).

⁹⁴ The Maldives could have insisted on the inclusion of a reference to international cooperation as a human rights obligation and pushed the resolution through with a vote. However, it was considered more important to secure a consensus document.

⁹⁵ UNHRC 10/4, *supra* note 82, ¶ 3.

⁹⁶ *Id.* ¶ 3.

⁹⁷ Feng Gao, Dir. for Legal Affairs, UNFCCC Secretariat, Panel on Human Rights and

presentations on different aspects of the relationship,⁹⁸ thirty-seven states and four NGOs⁹⁹ took the floor to offer their views and ask questions. Although a wide range of issues and points were raised, much of the discussion once again revolved around the three core questions identified in the OHCHR Report.

A. Is There a Relationship Between Climate Change and Human Rights, and If so, What Is the Nature of That Relationship?

First and foremost, the debate demonstrated that a remarkable transformation of opinion had taken place between March 2008, when Resolution 7/23 had been negotiated and adopted, and June 2009, when the issue was finally considered in-depth by states. During the Seventh Session of the Council in March 2008, a wide range of states refused to accept that there was any relationship between climate change and human rights, arguing instead that they were two completely separate bodies of law and that climate change policy must be dealt with by the UNFCCC, and human rights policy by the Human Rights Council. Even the seemingly innocuous language used in preambular paragraph 1 of Resolution 7/23—that climate change “has

Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*). The mere presence of such a senior UNFCCC Secretariat official was significant. It was illustrative both of heightened contact and cooperation between UNFCCC Secretariat and OHCHR (which was also recognized in operative paragraph four of Resolution 10/4), and of the heightened interest among the climate change community about the potential benefits of applying human rights principles to climate change policy.

⁹⁸ Atiq Rahman, Executive Director, Bangladesh Ctr. for Advanced Studies, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council: Implications of Anthropogenic Climate Change on Human Rights (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*); Dalindyabo Shabalala, Managing Att’y, Geneva Office of the Ctr. for Int’l Envtl. Law (CIEL), Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*); Raquel Rolnik, United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-discrimination in This Context, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*); John Knox, Wake Forest University, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council: Climate Change as a Challenge to Human Rights Law (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

⁹⁹ Limited for reasons of time.

implications for the full enjoyment of human rights”¹⁰⁰—was the subject of fierce debate. In the end, it was only accepted by the Council because it was vague enough to mean different things to different delegations and because, at the time, the United States¹⁰¹ was not a member.

However, by June 2009, no delegation argued with the notion that climate change has implications for a wide-range of explicitly identified,¹⁰² internationally-protected human rights; that already vulnerable “climate frontline” countries are most at risk (and the least able to adapt); and that the human rights impacts do not fall evenly across a given population, but rather target marginalised or vulnerable groups, such as women and children.¹⁰³ For

¹⁰⁰ UNHRC 7/23, *supra* note 16, at pmbl. para. 1.

¹⁰¹ Under the Bush Administration, the United States was not a member of the Human Rights Council, UN Human Rights Council, Membership of the Human Rights Council, <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited July 14, 2010).

¹⁰² In addition to the list of rights cited in Resolution 10/4, many states (e.g., India, Philippines, and Brazil) also used the debate to emphasize the impacts of climate change on the right to development. Rajiv Kumar Chander, Permanent Representative of India to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of India, Eleventh Session]; Jesus Enrique G. Garcia II, Second Sec’y, Phil. Permanent Mission to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the Philippines, Eleventh Session]; João Ernesto Christófolo, Permanent Mission of Braz. to the United Nations at Geneva, Panel on Human Rights and Climate Change of the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹⁰³ Moreover, it was noted during the debate that this emerging consensus in the Human Rights Council was being mirrored in the UNFCCC process as well as other related fora. For example, the Deputy High Commissioner pointed out in her opening statement that the text on long-term cooperative action [prepared by the Chair of the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA)] includes wording from Human Rights Council resolution 10/4. Paragraph 2 . . . highlights that “the adverse effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to such factors as geography, poverty, gender, age, indigenous or minority status and disability.”

Kyung-wha Kang, Deputy High Comm’r for Human Rights, Opening Remarks at Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*). Similarly, Azerbaijan noted that a joint statement by the eighteen organizations of the Inter-Agency Standing Committee (including UNHCR, IOM, and OCHA) published on June 8, 2009, “emphasizes that any new agreement on climate change . . . should take the human rights dimension into account.” Emil Aghaahmadov, Delegation of Azer., Panel on Human Rights and

example, Mauritius stated that: “It is [now] an undeniable fact that climate change poses a direct and major threat to a wide range of universally recognized human rights”,¹⁰⁴ while the Maldives commented: “[t]here is now no doubt, legal or otherwise, that climate change has wide-ranging and deep negative implications for the full enjoyment of human rights, especially amongst vulnerable population groups.”¹⁰⁵ Nor was this shift in perceptions limited to developing states. Australia, for example “recognise[d] this significant threat to human rights posed by climate change.”¹⁰⁶

What is more, an impressive number of states¹⁰⁷ accepted and even promoted the idea, during the June debate, that the various aspects of the relationship between climate change and human rights could and should be placed within an overall concept of “climate injustice.”¹⁰⁸ Thailand, for example, noted that, “[t]he impacts of climate change are unevenly distributed. They disproportionately affect certain regions and countries, which have generally contributed the least to human-induced climate change”,¹⁰⁹ while the

Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Azerbaijan, Eleventh Session].

¹⁰⁴ Subhas Gujadhur, Second Sec’y, Permanent Mission of Mauritius to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Mauritius, Eleventh Session].

¹⁰⁵ Shazra Abdul Sattar, First Sec’y, Maldives Permanent Mission to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the Maldives, Eleventh Session].

¹⁰⁶ Philip Kimpton, First Sec’y, Austl. Permanent Mission to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹⁰⁷ See Pitchayaphant Charbhumidol, Minister Counselor, Permanent Mission of Thail. to the United Nations at Geneva, Panel on Human Rights and Global Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Thailand, Eleventh Session]; Doma Tshering, Deputy Permanent Rep. of Bhutan to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Bhutan, Eleventh Session]; Statement of the Philippines, Eleventh Session, *supra* note 102.

¹⁰⁸ See *supra* text accompanying note 35 (defining climate injustice).

¹⁰⁹ Statement of Thailand, Eleventh Session, *supra* note 107.

Philippines argued that “[i]t is not fair that the least responsible and the most vulnerable suffer the most from climate change.”¹¹⁰

Despite progress in forming a consensus on the broad parameters of the relationship between climate change and human rights, significant differences in emphasis nevertheless persisted in June 2009, especially regarding the legal implications of the relationship. In particular, while many developing and vulnerable states argued that human rights law creates legal obligations which are applicable to international action on the issue of climate change, developed countries by-and-large continued to insist that climate change and human rights inhabit two separate and very different bodies of law with no formal connection between the two. For example, during the panel debate, the U.S. delegation agreed that “climate change . . . has implications for the full enjoyment of human rights” but at the same time noted that “there is no direct formal relationship between climate change and human rights as a legal matter.”¹¹¹ Similarly, Canada argued that situations may occur in which environmental degradation amplified by climate change may set conditions that impact on the effective enjoyment of human rights but went on to make clear that there is no legal link between the UNFCCC and the international human rights conventions.¹¹²

These differences in emphasis were amplified in the context of the other two key questions posed by the OHCHR Report, namely whether climate change impacts constitute a human rights violation, and what human rights obligations exist, at national and international-levels, in relation to climate change.

B. Does Climate Change Constitute a Violation of Human Rights, Especially the Rights of Vulnerable People?

As had been the case throughout the evolution of the human rights, climate change issue within the Human Rights Council, during the June 2009 panel

¹¹⁰ Statement of the Philippines, Eleventh Session, *supra* note 102.

¹¹¹ Anna Chambers, Delegation of the U.S., Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the U.S., Eleventh Session].

¹¹² Webcast: Victoria Berry, Permanent Mission of Can. to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights (United Nations Human Rights Council, June 15, 2009), http://www.un.org/webcast/unhrc/arc_hive.asp?go=090615 [hereinafter Statement of Canada, Eleventh Session].

debate, states largely avoided the question of whether the physical impacts of climate change might be construed as a human rights violation in the strict legal sense.

Although OHCHR, in its report, focused on the legal difficulties inherent in labeling climate change a “human rights violation,” the more pertinent consideration from the viewpoint of states was always political. To begin with, the main cosponsor, the Maldives, consistently avoided use of the word “violation” on the grounds that the aim of their initiative was to draw attention to the human suffering caused by climate change and to increase the pressure on states to pursue an effective negotiated settlement. Pursuing a more litigious strategy was never a preference. Secondly, states were also aware that pursuing such a path might well lead to a dead end—even if it was able to prove that a human rights violation had occurred, what could a country like the Maldives realistically do about it?¹¹³

Notwithstanding this general reluctance to address the issue of violation of human rights law (as had been the case during the shorter discussion on human rights and climate change during the Tenth Session in March 2009), some states did use the June panel debate to question the assertion made by OHCHR, that “[t]he physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States.”¹¹⁴

The strongest opponent of this reading of the situation was Pakistan.¹¹⁵ Pakistan argued that it is possible to establish responsibility for climate change and to link a derogation of this responsibility to human rights harm, stating “we believe it is important and possible to ‘disentangle’ [the] basics of this causal relationship.”¹¹⁶ According to Pakistan, responsibility for climate change can be easily determined at two levels—historical responsibility and failure to comply with international legal obligations. Regarding the former,

¹¹³ For an informative description of the difficulties facing a state considering pursuing such a path, see the case of Tuvalu. See Akiko Okamoto, Problems and Prospects of International Legal Disputes on Climate Change (Dec. 2, 2005) (unpublished manuscript), available at <http://www.sprep.org/att/IRC/eCOPIES/countries/Tuvalu/47.pdf>; Tom Price, *The Canary is Drowning: Tiny Tuvalu*, GLOBAL POL’Y F., Dec. 3, 2002, <http://www.globalpolicy.org/compoent/content/article/172/30312.html>.

¹¹⁴ OHCHR Report, *supra* note 19, ¶ 96.

¹¹⁵ Marghoob Saleem Butt, Counselor, Permanent Mission of Pak. to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of Pakistan, Eleventh Session].

¹¹⁶ *Id.*

Pakistan argued that “[t]he principle cause of climate change is emissions by and from developed countries, representing less than one fifth of the world’s population but responsible for almost three quarters of all historic emissions. On per person basis, their historical emissions are more than ten times those of the developing countries.”¹¹⁷ Regarding the latter, Pakistan notes that those same countries which bear a historic responsibility for climate change “continu[e] to violate their international obligations under the [UNFCCC] and its Kyoto protocol. None of the countries which assumed binding obligations to reduce emissions contained in the Annexes of the UNFCCC [and] Kyoto Protocol has [sic] fulfilled its [international] obligations.”¹¹⁸ Regarding harm, Pakistan argued that the victims of climate change are also easy to identify and are mainly “people and communities in the developing countries which did little to cause climate change.”¹¹⁹

Thus, according to Pakistan: “[C]ertain countries have imposed climate change and consequently [have] created conditions of violations of human rights in the developing countries.”¹²⁰

India also questioned the idea that it is difficult to assign responsibility and, like Pakistan, posited that responsibility can be determined on the basis of both historic emissions and of failure to abide by legal (UNFCCC) obligations on contemporary emissions:¹²¹

The present crisis that we are now discussing is the result of activity over the past two centuries, where the contribution of developing countries had been minimal

. . . .

It is a matter of concern that despite the targets for reductions in emissions that [developed] countries assumed under the Kyoto Protocol, there are few signs that these will be met. The question of accountability for failure to implement legally binding and internationally agreed provisions relating to emissions reduction targets needs to be looked at closely.¹²²

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Statement of India, Eleventh Session, *supra* note 102.

¹²² *Id.*

The Philippines had already made similar arguments to Pakistan and India during the March 2009 debate¹²³ and once again returned to the theme of responsibility in June:¹²⁴

While we take note of the analytical study of the OHCHR . . . we feel that it did not fully take into account the important concepts of international responsibility, historical responsibility, international obligations, and common, but differentiated responsibilities Scientific evidence tells us that the carbon footprints of states and their accumulated effects over time have produced the climate change crisis. 20% of the world's population is responsible for over 70% of global emissions.¹²⁵

C. Irrespective of Whether Climate Change Represents a Human Rights Violation, What Are States' National-level and International-level Human Rights Obligations Pertaining to Climate Change?

The major division between states during the June 2009 panel debate was on the question of the relative weight of national human rights obligations in the context of the climate crisis as against extraterritorial obligations. As was the case during similar debates in the Council focusing on the human rights implications of other global crises, including the financial crisis and the food crisis, the fault line between states ran roughly along developed-developing country lines.

For their part, most (but not all) developed countries insisted that while the climate crisis may be international in scope, human rights promotion and protection is the sole purview of national governments vis-à-vis their citizens and others within their jurisdiction. It is therefore up to individual states to promote and protect the human rights of their people in the face of such crises, irrespective of the additional burden placed upon them. Moreover, if *all* states abide by their national human rights obligations at the national-level, it would go a long way to solving important problems at the international-level. For example, Canada restated its view that even in the context of global climate change, states have the primary responsibility to protect the rights of their

¹²³ Statement of the Philippines, Tenth Session, *supra* note 64.

¹²⁴ Statement of the Philippines, Eleventh Session, *supra* note 102.

¹²⁵ *Id.*

people,¹²⁶ while Germany argued that “[a]ddressing climate change, and the consequences thereof, is the primary responsibility of States. Of course, climate change is a global problem requiring a global solution. But every global solution consists of individual commitments from every State to deal with the issue at hand.”¹²⁷ Building on the theme of national responsibility for human rights and the view that by complying with their human rights obligations at the domestic level states will ultimately solve the problem of climate change at a global-level, many developed country delegations used their interventions to elaborate on the ways in which this might be achieved.

Essentially, these states made two arguments. First, the U.S. argued that states which have a strong human rights record, with independent democratic institutions, a free press, the rule of law, an independent judiciary, and active civil society, will be inherently more climate resilient than other less fortunate countries.

We acknowledge that these issues [of human rights and climate change] do overlap and efforts to address climate change and to advance human rights have a number of common and mutually reinforcing elements.

Notably, the United States considers that the attributes that contribute to climate solutions—good governance, transparency, and rule of law—are also essential to the promotion of democracy and human rights.¹²⁸

Second, developed countries maintained that human rights obligations and principles (such as equity, non-discrimination, access to information, and access to decision-making) represent important tools in the development of better and more effective climate change policies at the domestic-level. For example, the U.K. said that, “[t]he existing international human rights framework offers a powerful tool to assist States in overcoming the human impacts of some of these challenges, providing for protection of the most marginalised and vulnerable, and emphasising participation, transparency and accountability in deciding how to respond,”¹²⁹ while the European Commission

¹²⁶ Statement of Canada, Eleventh Session, *supra* note 112.

¹²⁷ Anke Konrad, Permanent Mission of Germany to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹²⁸ Statement of U.S., Eleventh Session, *supra* note 111.

¹²⁹ Peter Gooderham, Permanent Representative of the U.K. to the United Nations in Geneva,

asked the expert panelists to elaborate on the extent to which human rights law can help national climate change responses by focusing on vulnerable groups within a population and by improving access to information and justice in environmental matters, and participation in decision-making.¹³⁰ Finally, the U.S. continued its theme of solving climate change through democratic “business-as-usual” when it concluded that: “Certainly, governments should be mindful of their international human rights obligations when considering any significant domestic policy initiatives, including those related to climate change”¹³¹

There are a number of problems with this developed country perspective on the nature of human rights obligations as they pertain to climate change. First, looking at the U.S. argument about democratic societies being better able to respond to climate change, it is important to note that vulnerable countries like the Maldives or Tuvalu can have the finest and most democratic institutions in the world as well as the most robust human rights protection mechanisms, but this would not stop the sea from rising, their land from being flooded or, ultimately, their territory from being lost. Moreover, turning this argument around, it is equally clear that the United States, which is often seen (and is certainly projected) as a model democratic society built upon a strong human rights framework, is, in terms of cumulative emissions over time, the state that has on its own done the most to cause the global climate crisis. A strong Executive, a democratic Congress, independent courts, free press, and strong civil society have not resulted in the country showing any kind of leadership or foresight on the question of climate change; in fact it could be argued that the opposite is the case.

Second, although the argument of the U.K. and others that human rights principles can be applied to the evolution and implementation of domestic climate change policy in order to improve the policy’s quality, effectiveness, coherence, and sustainability, is more attractive than that offered by the U.S., it only runs so far. Certainly, being mindful of human rights obligations such as equity and non-discrimination will help to ensure that adaptation support is

Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹³⁰ Joëlle Hivonner, First Counselor, Eur. Comm’n Delegation to the United Nations in Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹³¹ Statement of the U.S., Eleventh Session, *supra* note 111.

directed to those in society who need it most, while access to information and decision-making can help the victims of global warming understand national mitigation policy and exert pressure for improvement. However, it is equally clear that good domestic policy alone cannot protect the human rights of a population against climate change. The Maldives, for example, has a National Adaptation Plan of Action (NAPA) developed in broad consultation with affected groups in society;¹³² but irrespective of the plan's merits, it cannot conceivably protect the human rights of 300,000 people spread across 200 tiny coral islands. Or, turning to access to information and decision-making, the voices of vulnerable groups in the Maldives have been able to exert pressure on the central government which has, in turn, committed to an ambitious mitigation policy aimed at achieving carbon neutrality by 2020.¹³³ However, such a policy, irrespective of its qualitative value, will have little or no impact on global emissions if the U.S. continues to pollute at current levels.

What is more, the "good policy" argument of the U.K. et al. assumes that vulnerable states have the resources to implement those policies—either in the area of mitigation or adaptation. Yet this is not the case. As Azerbaijan clearly noted: "[A] lack of resources [means that developing countries cannot] deal effectively with climate change" and thus cannot fully protect and promote human rights.¹³⁴ To complicate the picture even more, as argued by Pakistan, the ability of developing countries to adapt to climate change and thus to protect the rights of their people is, in the case of climate change, dependent on the degree to which developed country Parties comply with their international obligations under the UNFCCC on mitigation, the provision of financial resources and technology transfer.¹³⁵ To highlight this point, Pakistan drew attention to Article 4.7 of the UNFCCC which states that "[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments."¹³⁶

¹³² Republic of Maldives, National Adaptation Plan of Action (Draft for Comments, Nov. 19, 2006), http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_National_Adaptation_Plan_of_Action.pdf.

¹³³ Letter from the Republic of Maldives to Yvo de Boer, Executive Sec'y, UNFCCC, Submission of the Maldives (Jan. 29, 2010), available at http://unfccc.int/files/meetings/application/pdf/maldivesphaccord_app2.pdf.

¹³⁴ Statement of Azerbaijan, Eleventh Session, *supra* note 103.

¹³⁵ Statement of Pakistan, Eleventh Session, *supra* note 115.

¹³⁶ United Nations Framework Convention on Climate Change art. 4.7, *opened for signature* May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107.

What is clearly missing from the analyses presented by these developed states¹³⁷ is, of course, the importance, in the case of protecting human rights in the face of global warming, of combining national-level human rights obligations with international-level obligations.

The importance of recognizing and enforcing extraterritorial human rights obligations in the face of climate change was made, in varying formulae, by almost all developing country delegations that took part in the debate, as well as by some more progressive developed country representations. Most vocal were small vulnerable states which, regardless of the merit of their domestic institutions and laws can, in practical terms, do little or nothing on their own to solve the problem of climate change.

Bangladesh offered the most frank rebuttal of the myopic assessment offered by industrialized states:

It is often said that human rights protection is the responsibility of the national authorities—basically downgrading international cooperation. Even in dealing with the climate change, which is a global issue, too much emphasis is put on national responsibility. As has been said by the Deputy High Commissioner [in her introductory remarks], the least developed countries and small island states will be the worst affected by climate change although they have contributed least to global greenhouse gas emissions. It is not only unfair but also unjustified to hold these countries responsible fully for protecting their people.¹³⁸

Many vulnerable states were quick to emphasize that the need to give greater emphasis to international-level obligations should not be seen as commensurate with a reluctance to accept and honor national-level obligations. Indeed many developing countries (e.g., Thailand) used their statements to explain how they and others should apply human rights principles, such as the

¹³⁷ Most such states (e.g., the U.K.) chose to ignore the international perspective entirely, while others such as the U.S. chose to openly discount it: “[T]he United States does not consider that human rights law provides an optimal framework for addressing climate change internationally.” Statement of the U.S., Eleventh Session, *supra* note 111.

¹³⁸ Webcast: Mustafizur Rahman, *Chargé d'affaires*, Permanent Mission of Bangl. to the United Nations, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (United Nations Human Rights Council, June 15, 2009), <http://www.un.org/webcast/unhrc/archive.asp?go-090615>.

elimination of discrimination and the empowerment of vulnerable groups, more robustly to national climate change policy in order to make those policies more effective.¹³⁹ Others, such as Mauritius, openly welcomed national-level obligations and extolled the value of doing so:

[A] human rights dimension . . . introduces an accountability framework . . . by holding governments, the duty-bearers, accountable to reducing the vulnerability of their citizens to global warming and by assisting them in adapting to the consequences. A focus on human rights also means that the views of those who will be disproportionately affected by climate change—the poor, vulnerable and marginalized—must have to be duly taken into account in policy responses devised to address the causes and consequences of global warming.¹⁴⁰

However, while accepting the importance of domestic action, developing states were also robust in their defense of the idea that in order to effectively protect human rights in the face of climate change, observance of national-level commitments must necessarily be combined with respect, on the part of the international community, for extraterritorial human rights obligations—most particularly the obligation “to refrain from taking action which interferes with the enjoyment of human rights in other countries, and to take steps through international cooperation to facilitate the fulfillment of those rights.”¹⁴¹

For example, the Maldives, speaking on behalf of twelve Small Island Developing States, emphasized the fact that they were committed through domestic policies to address the human rights implications of climate change,

[h]owever, with emission levels continuing to rise and considering the barriers preventing direct and simplified access to adaptation funding, as well as the current inadequacy of new and additional adaptation funding, the fact is that it will become increasingly difficult for us [acting alone] to fully safeguard the fundamental freedoms and rights of our island populations . . .

. . . .

¹³⁹ Statement of Thailand, Eleventh Session, *supra* note 107.

¹⁴⁰ Statement of Mauritius, Eleventh Session, *supra* note 104.

¹⁴¹ Statement of the Maldives, Eleventh Session, *supra* note 105.

This then raises the issue of international cooperation We believe that such cooperation is not only desirable; it is vital and, moreover, is a legal obligation under the core international human rights instruments. Under these agreements there is a clear extraterritorial obligation beholden on State Parties to refrain from acting in such a way as knowingly undermines human rights in other countries; a fact reinforced by reference to Principle 2 of the Rio Declaration. There is also an extraterritorial legal obligation to take steps through international assistance to facilitate the fulfilment of human rights in other countries.¹⁴²

Speaking along the same lines, Mauritius and Bhutan argued that they were already doing their utmost (and certainly more than their fair share) to arrest climate change, to protect the environment, and to promote human rights, but that their small size and limited resources, coupled with the global nature of climate change, meant that they could not win the fight alone. For example, Mauritius noted that:

[D]espite our significant resource constraints; we have made environmental protection one of our development priorities.

....

Mauritius, as many other small island developing states, has demonstrated its commitments to ensuring environmental protection and sustainability as well as promotion and protection of human rights through the utilization of its limited resources. While we are fully engaged at the national level, it is clear that closer international cooperation is essential to enable mitigation, disaster preparedness and adaptation measures My delegation notes in this regard OHCHR's analysis, in Report A/HRC/10/61, that States Parties to core human rights treaties have an extraterritorial legal obligation to refrain from taking action which knowingly interferes with the enjoyment of human rights in other countries, and to take steps through international

¹⁴² Shazra Abdul Sattar, First Sec'y, Maldives Permanent Mission to the United Nations, Statement on Behalf of Twelve Small Island Developing States, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*) [hereinafter Statement of the Small Island Developing States, Eleventh Session].

cooperation and assistance to facilitate the fulfillment of those rights¹⁴³

Speaking along similar lines, Bhutan stated that:

With one of the lowest green house gas emissions and 70% of land under forest cover, [Bhutan has] surpassed carbon neutral status and ha[s] a net sequestration of greenhouse gases. Yet the threats we face as a result of climate change are multiple, with devastating implications on the full and effective enjoyment of human rights.¹⁴⁴

It was significant during the June 2009 debate that a number of smaller developed countries including Slovenia, Monaco, and New Zealand expressed sympathy for the more balanced position taken by vulnerable developing states. These countries were probably influenced by a sense of empathy with other small states as well as a related understanding of the limitations of national action in the context of global challenges such a climate change. Some, such as Slovenia, openly broke ranks with their Western group and EU colleagues, arguing that while it is “well aware of the primary obligation of states to protect individuals against the foreseeable threats of climate change to human rights, [it] nevertheless believe[s] that international cooperation and solidarity should be enhanced in order to minimize the effects of climate change on the full enjoyment of human rights” and, in that context, “fully agrees with the conclusion that international cooperation in [the field of climate change] is a human rights obligation and that its central objective is the realization of human rights.”¹⁴⁵ Other, such as Monaco, did not openly support the concept of extraterritorial human rights obligations, but did at least recognize that climate change (and related problems such as climate-induced migration) seriously challenge the traditional state-centric view of human rights law and, consequently, highlights the need for new thinking on “the policies of cooperation.”¹⁴⁶ Finally, although it did not take a hard position,

¹⁴³ Statement of Mauritius, Eleventh Session, *supra* note 104.

¹⁴⁴ Statement of Bhutan, Eleventh Session, *supra* note 107.

¹⁴⁵ Andrej Logar, Permanent Representative of Slovn. to the United Nations, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹⁴⁶ Webcast: Robert Fillon, Permanent Representative of Monaco to the United Nations, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights

New Zealand drew attention to the OHCHR conclusion that “international obligations under human rights treaties provide for non-interference in the enjoyment of others’ rights” and asked for further consideration of this point.¹⁴⁷

D. Climate-induced Migration

In addition to comments on and responses to the three major legal questions highlighted above, the other major theme raised by many delegations and experts during the interactive panel debate was that of the human rights implications of climate-induced migration.

While no delegation offered substantive views or policy prescriptions, there was a widespread sense that climate-induced displacement, both within and across borders, is already a major humanitarian challenge and will become increasingly significant as the planet continues to warm. There was also a sense that there exists a serious human rights protection gap for persons displaced across borders. Azerbaijan, in its statement, referred to a June 2009 report by the Norwegian Refugee Council¹⁴⁸ which showed that in 2008 alone, more than twenty million people were displaced as a result of climate change,¹⁴⁹ while Monaco cited IPCC estimates that by the end of the century around 150 million people will have been displaced.¹⁵⁰ Both Azerbaijan and Monaco noted that this new phenomenon does not fit within existing international refugee law and creates “new and complex judicial issues,” and therefore urged further consideration of the issue for “above and beyond the legal issues, are, already, human emergencies linked to [climate change].”¹⁵¹

In addition to the legal gap concerning individuals forced to move across borders because of climate change, a number of delegations also highlighted

Council (United Nations Human Rights Council, June 15, 2009), <http://www.un.org/webcast/unhrc/archive.asp?go=090615> [hereinafter Statement of Monaco, Eleventh Session].

¹⁴⁷ Amy Laurenson, Second Sec’y, Permanent Mission of N.Z. to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (June 15, 2009) (on file with the *Georgia Journal of International and Comparative Law*).

¹⁴⁸ Statement of Azerbaijan, Eleventh Session, *supra* note 103.

¹⁴⁹ NORWEGIAN REFUGEE COUNCIL REPORTS, CLIMATE CHANGED: PEOPLE DISPLACED 6 (2009), available at http://www.nrcfadder.no/arch/img.aspx?file_id=9913616.

¹⁵⁰ Statement of Monaco, Eleventh Session, *supra* note 146.

¹⁵¹ *Id.*; see also Statement of Azerbaijan, Eleventh Session, *supra* note 103 (stating that current international refugee law does not recognize terms like “climate refugees” or “environmental refugees”).

the fact that, according to the latest scientific estimates, the entire population of some vulnerable Small Island Developing States may have to leave their homeland by the end of this century due to rising sea levels. For example, the Maldives, on behalf of twelve Small Island Developing States, drew attention to the submission of the High Commissioner for Refugees to the UNFCCC's Bali Process which states that "[t]he entire populations of low-lying States such as the Maldives, Tuvalu, Kiribati and the Marshall Islands may in [the] future be obliged to leave their own country as a result of climate change. Moreover, the existence of their State as such may be threatened. Entire populations of affected states could thus become stateless."¹⁵² The twelve Small Island Developing States asked the panel what actions the Human Rights Council should take "to protect the rights of these nations and their people, and specifically the right to statehood, the right to self-determination and the right of a people not to be deprived of its own means of subsistence."¹⁵³

VI. HUMAN RIGHTS UNDER THE UNFCCC

Although it is not the main focus of this Article, it is important not to lose sight of the fact that the original goal of the Male' Small Island Developing States Conference and the Male' Declaration was to use human rights law and its related mechanisms to influence and improve international climate change policy as governed by the UNFCCC. That any actions of the Council should be premised on complementing and encouraging (not duplicating) progress under the UNFCCC framework was reiterated by both Resolution 7/23 (paragraph 5) and Resolution 10/4 (paragraph 2). In other words, as well as understanding how the issue of climate change has influenced international human rights law and thinking (the focus of this Article), it is important not to lose sight of the parallel question of how human rights law and thinking can be integrated into existing international climate change policy in order to make that policy fairer and more effective. Although this crucial question is not covered by the present Article, it is worth noting that a considerable amount of progress has been made in linking the work done at the Human Rights Council with the ongoing programme of work under the UNFCCC, which is

¹⁵² Office of the U.N. High Comm'r for Refugees, Submission to the 6th Session of AWG-LCA 6 Under the UNFCCC, Climate Change and Statelessness: An Overview (May 15, 2009), available at <http://unfccc.int/resource/docs/2009/awglca6/eng/misc05.pdf>.

¹⁵³ Statement of the Small Island Developing States, Eleventh Session, *supra* note 142.

due to conclude with a new climate change agreement at the Sixteenth Conference of Parties (COP-16) in Mexico City in December 2010.

In November 2009, as per Resolutions 7/23 (operative paragraph 3) and 10/4 (operative paragraph 2), the Office of the High Commissioner for Human Rights transmitted both resolutions together with a summary of the June 2009 panel debate to the Conference of Parties to the UNFCCC “for its consideration” ahead of the crucial climate change talks that were due to be held the following month in Copenhagen (COP-15).¹⁵⁴

In truth, long before November 2009, human rights language and concepts had begun to cross-fertilize with and feed into the Bali Process of UNFCCC talks. Geneva-based diplomats from the Maldives, Switzerland, and other countries that had led the Human Rights Council process, with the support of various NGOs, had been working closely with their climate change experts ever since COP-13 in Bali to try to integrate human rights into the evolving post-Kyoto climate change framework.¹⁵⁵

Despite initial resistance, by the end of COP-15 in Copenhagen, these efforts had begun to bear fruit. In the draft outcome of work contained in the report of the Ad Hoc Working Group on Long-term Cooperative Action (AWGLCA) following COP-15,¹⁵⁶ the preambular section of the draft text contains a number of references to human rights and/or human rights principles:

Preambular paragraph 8:

Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change¹⁵⁷

¹⁵⁴ U.N. Human Rights Council [UNHRC], Panel Discussion on the Relationship Between Climate Change and Human Rights: Summary of Discussions, ¶ 2 (June 15, 2009), available at <http://www2.ohchr.org/english/issues/climatechange/index.htm>.

¹⁵⁵ U.N. Framework Convention on Climate Change [UNFCCC], Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Ideas and Proposals on Paragraph 1 of the Bali Action Plan: Revised Note by the Chair*, ¶ 97, U.N. Doc. FCCC/AWGLCA/2008/16/REV.1 (Jan. 15, 2009).

¹⁵⁶ U.N. Framework Convention on Climate Change [UNFCCC], Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention on its Eighth Session*, U.N. Doc. FCCC/AWGLCA/2009/17 (Feb. 5, 2010), available at <http://unfccc.int/resource/docs/2009/awglca8/eng/17.pdf> [hereinafter AWGLCA/2009/17].

¹⁵⁷ *Id.* at Annex I, pmbl. para. 8. While it would have been preferable for the text to “recognise” or “endorse” Resolution 10/4, it is nevertheless significant that the resolution has

Preamble paragraph 9:

Mindful that the adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights, including living well, and that the effects of climate change will be felt most acutely by those parts of the population that are already vulnerable owing to youth, gender, age or disability.¹⁵⁸

Preamble paragraph 10:

Recognizing the right of all nations to survival¹⁵⁹

Preamble paragraph 11:

Further recognizing that a broad range of stakeholders needs to be engaged on global, regional, national and local levels, be they governmental, including subnational and local government, private business or civil society, including the youth and persons with disability, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.¹⁶⁰

been explicitly mentioned as it provides an entry point for those concepts contained in Resolution 10/4 to be applied to, and inform the implementation of, the Convention.

¹⁵⁸ *Id.* at Annex I, pmbl. para. 9. This paragraph is an amalgam of preambular paragraphs seven and eight of Resolution 10/4. It is extremely positive in that it clarifies for the first time in a climate change agreement, or any environmental agreement, that environmental degradation has a range of direct and indirect impacts on a wide range of explicitly cited human rights. It also introduces a new concept into the climate change negotiations—namely intra-state equity. Equity between states (common but differentiated responsibility) has long been a core principle of the international climate change architecture; but equity within states (i.e., that certain population groups are more affected, and thus require higher protection) has long been neglected. The second part of preambular paragraph nine addresses this weakness.

¹⁵⁹ *Id.* at Annex I, pmbl. para. 10. This paragraph was inserted at the insistence of countries of the Alliance of Small Island States (AOSIS). Notwithstanding, the right does not exist under human rights law—Resolution 10/4 talks instead of the right to self-determination and the right of a people not to be deprived of its own means of subsistence. A number of developed countries oppose reference to the “right of all nations to survival” because it goes beyond international law.

¹⁶⁰ *Id.* at Annex I, pmbl. para. 11. Although it does not mention the words “human rights,”

In addition, the section of the draft dealing with Reduced Emissions from Deforestation and Forest Degradation (REDD) in developing countries contains numerous references to the rights of indigenous peoples. For example, it affirms that all REDD policies must respect “the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples.”¹⁶¹ The REDD section also reaffirms the importance of guaranteeing full participatory rights for affected populations, especially indigenous peoples.¹⁶² Indigenous rights are also cited in the section on “Cooperative sectoral approaches and sector-specific actions in agriculture.”¹⁶³

While the human rights language in the AWGLCA draft text is far from perfect and while, disappointingly, the draft decision on adaptation contains no reference to human rights or participatory rights, it remains noteworthy that, at the end of COP-15, no country was advocating the removal of the above mentioned references. This represents a remarkable turnaround for the acceptance by states of the links between climate change and human rights and, by extension, of the links between the environment and human rights. In early 2008, a majority of states represented in the Human Rights Council in Geneva did not accept there was any link between climate change and human rights. By March 2008, states in the Council were willing to accept that climate change has implications for the full enjoyment of human rights, but beyond that there was no consensus. By March 2009, states in the Council not only agreed on the clear presence of a relationship, but on the broad parameters

this paragraph strongly promotes universally recognized participatory and procedural rights; namely the right to information, the right to participate in decision-making, and the right to equality and non-discrimination. In the past, climate change policy has often been implemented without the knowledge or participation of affected population groups, and has been ineffective or even counterproductive as a result. Human rights have often been infringed rather than promoted by national adaptation plans, for example. Promoting participatory and procedural rights should help to address this. Promoting participatory rights for marginalized groups, including women, is also cited in the Draft Decision on Enhanced Action on Capacity-Building, operative paragraph 4(f). *Id.* at 30–31.

¹⁶¹ Draft Decision on Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries, operative paragraph 2(c). *Id.* at 35.

¹⁶² *Id.*

¹⁶³ *Id.* at 43, pmb1. para. 3.

of that relationship. However, there was still enormous resistance, on the part of states within the Bali Process—even many Small Island Developing States—to accept this evolving consensus and transfer it into the climate change talks. This was mostly due to what the ICHRP has termed “path dependence.”¹⁶⁴ And yet, by the end of 2009 at COP-15, all states in the UNFCCC accepted the link between global warming and related environmental degradation, and the full enjoyment of human rights. Moreover, all states accepted the idea that human rights principles, when employed in the context of climate change “have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”¹⁶⁵

VII. CONCLUSIONS

It is clear that much progress has been made by the international human rights community in addressing and understanding the interface between climate change and human rights. In March 2008, there was strong objection to the mere notion that climate change has implications for the full enjoyment of human rights. By June 2009, there was not only broad acceptance of the existence of a relationship between climate change and human rights, but also a clear convergence of views on the nature and character of the relationship.

Moreover, by June 2009, thanks to the OHCHR’s report and the subsequent debates in the Human Rights Council, there was also a very clear sense of the key outstanding issues and questions created by the effort to link climate change policy with international human rights law, as well as of the fault lines running between different state views on those issues and questions. The first of these questions is whether the physical impacts of climate change can be construed as a human rights violation in the strictest legal sense, with identifiable victims and perpetrators, and thus whether they can be placed within an accountability and redress framework. The second concerns the character and the extent of state human rights obligations both *vis-à-vis* their own citizens and *vis-à-vis* persons living outside their territory.

The first outstanding question (regarding the presence or otherwise of a human rights violation) may not have been answered to the satisfaction of all

¹⁶⁴ Climate change negotiators tend to be experts in the natural sciences with little or no interest or knowledge of human rights law or its potential utility in environmental matters.

¹⁶⁵ UNHRC 10/4, *supra* note 82, at pmb. para. 10.

states but nonetheless is unlikely, for political reasons, to be a key focus of the human rights and climate change agenda in the near term.

The second question, on the other hand, is likely to be a continuing source of interest, debate, and disagreement in the Human Rights Council. This is because demonstrating that international action to reduce emissions and to provide adequate adaptation support is a legal obligation under international human rights law is likely to be one of the major contributions of the human rights community to global efforts to address climate change. It is also because climate change, as one of the ultimate manifestations of globalization, neatly encapsulates the schism that exists between the concept of human rights that exists in most parts of the developed world—as essentially a contract between a state and its citizens—and the one that exists in most parts of the developing world—as a contract that exists both within and between states.

Thus there seems little doubt that the Human Rights Council and related mechanisms will continue to wrestle, over the coming years, with the following three questions:

1. How can human rights obligations and principles be best applied to national climate change policy (across both mitigation and adaptation) in order to improve the quality and effectiveness of that policy, including ensuring that priority is given to the most vulnerable segments of society?
2. What is the precise nature of extraterritorial human rights obligations as they relate to climate change and how can the international community, through the international human rights mechanisms, best draw attention to and enforce those obligations in a manner that complements and supports the UNFCCC process?
3. What is the exact balance or relationship, in the context of climate change, between national-level obligations and international-level obligations? For example, if extraterritorial obligations are applicable insofar as they construct an enabling environment in which individual states can effectively protect the human rights of their citizens, how might we know when those extraterritorial obligations are being honoured and when they are not? In the context of climate change, would such obligations be met if emissions and temperature rises were restricted to “safe levels?” If extraterritorial obligations are not honored, what is the

consequence of this vis-à-vis the national-level human rights obligations of, say, a small, vulnerable state? Can such a state really be held responsible for failure to fulfill the human rights of its people in the absence of an international enabling environment?

In addition to these questions, the June 2009 debate also highlighted widespread concern on the part of the international community about the status of “climate-induced migrants” and about the human rights protection afforded to them. Questions raised in this regard include:

1. What is the legal status of these people; should they fall under a reformed Refugee Convention, under the new UNFCCC treaty or under a new and separate international convention?
2. Who is responsible for protecting their human rights?
3. What are the rights of people fleeing so-called “disappearing states”?¹⁶⁶

Following the adoption of Resolutions 7/23 and 10/4, the publication of the OHCHR Report, and the conclusion of the June 2009 panel debate, the challenge facing the Human Rights Council is now whether, and, if so, how it should tackle these questions. There are a number of options:

1. Do nothing: Many states (especially certain industrialised states, oil producing states, and emerging economies) do not wish the climate change human rights agenda to be taken any further.
2. Further mobilization of UN Special Procedures: Special Procedures, as independent human rights experts, are uniquely well-placed to address the difficult questions outlined above. Taking their lead from operational paragraph 3 of Resolution 10/4 and following the Sixteenth Joint Meeting of Special Procedures in July 2009 which dedicated an explicit agenda

¹⁶⁶ For an excellent summary of these issues, see Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009) (discussing several of the issues and concerns surrounding climate-induced migrants).

item to the issue of climate change,¹⁶⁷ many mandate-holders, including on the right to adequate housing, on the right to food, on access to safe drinking water, on poverty, and on internally-displaced persons, are already undertaking research into the implications of global warming within their mandate. However, there is certainly scope for deeper engagement, both individually and jointly. For example, states might use the regular interactive dialogues with Special Procedures to encourage them to develop joint guidelines on applying human rights obligations and principles to domestic climate change policy.

3. Pursue a new Special Procedure mandate specific to human rights and climate change: While such a mandate would be useful in terms of keeping the issue “alive” at the Human Rights Council and in terms of helping to clarify some of the legal questions referred to earlier, it is not certain how effective such a mandate would be in reality or whether it would accomplish more than existing mandates operating in tandem.
4. Await developments in the Human Rights Treaty Bodies: Because many of the arguments about the nature of extraterritorial obligations in the context of climate change are in effect issues of interpretation of the core international human rights treaties, Treaty Bodies have the potential to play a key role in clarifying the issues (for example, through a General Comment), as well as in integrating climate change considerations, where appropriate, into the national reporting process. As with Special Procedures, there is evidence that Treaty Bodies are taking an increasing interest in the human rights implications of climate change. For example, during the Forty-Fourth Session of the Committee on the Elimination of Discrimination against Women (CEDAW) from July 20 to August 7, 2009, the Committee issued a statement on the

¹⁶⁷ See U.N. Human Rights Council [UNHRC], *Report of the Sixteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council*, ¶¶ 40–41, U.N. Doc. A/HRC/12/47 (July 22, 2009).

gender implications of climate change.¹⁶⁸ Moreover, on May 13, 2010, the Committee on Economic, Social and Cultural Rights held an informal half-day session in Geneva on the implications of climate change for economic, social and cultural rights. During the session, the Committee discussed a paper, published by the Center for International Environmental Law (CIEL), the Geneva Office of Friedrich Ebert Stiftung (FES), and the Housing and Land Rights Network (HLRN), entitled "Climate Change in the Work of the Committee on Economic, Social and Cultural Rights."¹⁶⁹ The Committee is now considering holding a formal one-day meeting on the issue.

5. Universal Periodic Review (UPR): National reviews under the UPR mechanism are a useful forum in which to highlight and explore the obligations of states not to interfere in the enjoyment of human rights elsewhere as well as to extend adaptation assistance. Such issues are increasingly being raised in both national UPR reports, and in UPR working group dialogues, especially by Small Developing Island States.¹⁷⁰
6. Follow-up resolution: It seems unlikely that states will pursue a third resolution on the general subject of human rights and climate change largely because it would be almost impossible to secure agreement between states on the key outstanding questions, such as the balance between national and international human rights obligations. However, because of the growing international interest in the subject of climate-induced migration and the human rights implications thereof (including the related problem of statelessness), there is a possibility that the Council would consider a new resolution on this subject designed to explore the issue and suggest ways

¹⁶⁸ Statement of the CEDAW Committee on Gender and Climate Change (July 20–Aug. 7, 2009), available at http://www2.ohchr.org/english/bodies/cedaw/docs/Gender_and_climate_change.pdf.

¹⁶⁹ Center for International Environmental Law, CIEL Publishes Climate Change in the Work of the Committee on Economic, Social and Cultural Rights, http://ciel.org/Hre/CESCR_13Jul10.html (last visited Aug. 6, 2010).

¹⁷⁰ See Limon, *supra* note 4, at 465 (discussing the use of the UPR mechanism to "explore the human impacts of climate change").

in which the apparent human rights protection gap might be filled.

7. Reintroduce broader issue of human rights and the environment: It is clear that the core issues that emerged from the June 2009 panel debate (such as the character of extraterritorial human rights obligations, and the balance between those obligations and national-level obligations) are not only important in the context of climate change – they are also relevant to the issue of environmental degradation more broadly. Thus, one way of moving forward would be to reenergize the wider agenda on human rights and the environment – an agenda which has unfortunately made little progress since the 1972 Stockholm Declaration¹⁷¹ and has largely ground to a halt since Commission on Human Rights resolution 2003/71 on human rights and the environment as part of sustainable development. Resolutions 7/23 and 10/4 have taken the international community's understanding of the links between human rights and the environment further than at any moment since Stockholm, and certainly much further than states were willing to go at the time of the 2003 Commission on Human Rights resolution. It could therefore be argued that now is an opportune time to table a new resolution at the Human Rights Council on human rights and the environment; a resolution which might, for example, establish a new Special Procedure mandate on the subject and who would address the difficult issues raised by states in the June 2009 debate.

In addition to these options in the Human Rights Council and related mechanisms, it is important not to lose sight of the fact that the original goal of the Male' Small Island Developing States Conference and the Male' Declaration was to use human rights law and mechanisms to influence and improve international climate change policy as governed by the UNFCCC. That any actions in the Council should be premised on complementing and encouraging (not duplicating) progress under the UNFCCC framework was

¹⁷¹ U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), reprinted in 11 I.L.M. 1416 (1972).

reiterated by both Resolution 7/23 (paragraph 5) and Resolution 10/4 (paragraph 2). In other words, as well as understanding how the issue of climate change has influenced international human rights law and thinking, it is important not to lose sight of the parallel question of how human rights law and thinking can be integrated into international climate change policy in order to make that policy fairer and more effective. Although this crucial question is not covered by the present Article, it is worth noting that a considerable amount of progress has been made in linking the work done at the Human Rights Council with the UNFCCC's Bali Roadmap, which had been due to adopt a new climate change agreement at the Fifteenth Conference of Parties in Copenhagen in December 2009.

In November 2009, as per Resolutions 7/23 (operative paragraph 3) and 10/4 (operative paragraph 2), the Office of the High Commissioner for Human Rights transmitted both resolutions together with a summary of the June panel debate to the Conference of Parties of the UNFCCC "for its consideration." As a result of these steps to link the work of the two bodies, and also following lobbying in the UNFCCC process by a number of countries,¹⁷² the draft outcome of work of the Ad-Hoc Working Group on Long-term Cooperative Action which emerged from Copenhagen (and which should be adopted at COP-16 in Mexico) contains a number of human rights references and concepts, especially in the Shared Vision section which makes explicit reference to Resolution 10/4, and repeats concepts contained in paragraphs 7 and 8 of Resolution 10/4 by noting that "the adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights"¹⁷³ and that such effects will be "felt most acutely by those parts of the population that are already vulnerable owing to youth, gender, age or disability."¹⁷⁴

¹⁷² Particularly the Maldives and Switzerland.

¹⁷³ AWGLCA/2009/17, *supra* note 156, at Annex I, pmb1. para. 9.

¹⁷⁴ *Id.*