THE HARD WORK OF REGIME INTERACTION: CLIMATE CHANGE AND HUMAN RIGHTS*

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ABBREVIATIONS

ACCC	Aarhus Convention Compliance Committee
ACHPR	African Commission on Human and People's Rights
ASEAN	Association of Southeast Asian Nations
CESCR	United Nations Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
GEF	Global Environment Facility
GHGs	Greenhouse gasses
HRC	Human Rights Council
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IPCC	International Panel on Climate Change
NGOs	Non-governmental organizations
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

1. Introduction

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The authors thank Willem van Genugten and Evert Stamhuis for their helpful comments on a previous version of this essay. The usual disclaimer applies. All links to websites checked 30 May 2018.

The 2015 Paris Agreement is the first climate change treaty that explicitly refers to human rights.[1] In its 11th paragraph, the Preamble of the Agreement provides as follows:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

In addition, other paragraphs of the Preamble refer to "equitable access to sustainable development and the eradication of poverty", "safeguarding food security and ending hunger" and "the imperatives of a just transition of the workforce and the creation of decent work".[2] It thereby indirectly referrers to a right to sustainable development, the right to food and labour rights. Importantly, article 7 of the Paris Agreement, on adaptation, includes the concept of vulnerability and thus incorporates distributional effects of climate change for groups and communities into the climate change regime.

The inclusion of a human rights approach in the climate change regime is the result of the hard work of a coalition of non-governmental organizations (NGOs), international bodies and some states over the past few decades.[3] Regime interaction, then, requires time and perseverance. We suggest that the hard work of regime interaction will need to continue if climate change and human rights regimes are to develop an integrated narrative. With this in mind, we explore the role that international human rights courts and court-like bodies could play in this process.

This essay first addresses the conceptual framework that informs our analysis. Thereafter it briefly considers the distinct conceptual narratives that underpin the human rights regime and the climate change regime. The second section focuses on how the interaction between human rights and climate change regimes has transpired at the level of normative development. In order to contextualize this development, this section first addresses the interaction between human rights and environmental regimes more generally. Subsequently, it considers how the climate change regime has interacted with human rights *en route* to Paris. The essay then proceeds to address the role of international human rights courts and court-like bodies in the interaction between human rights and environmental regimes, including the climate change regime.

2. Conceptual framework

Regime interaction has been analysed from many different perspectives and defined through different taxonomies. Often, analyses have focused on what happens when international courts

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1 The Paris Agreement entered into force on 4 November 2016 and is available at https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.

2 Paras. 9 and 10 Paris Agreement, respectively.

3 Daniel Magraw, Anabella Rosemberg, Deepika Padmanabhan, 'Human Rights, Labour and the Paris Agreement on Climate Change', 46(5) *Environmental Policy and Law* 2016, pp. 313-318.

are confronted with competing norms originating in different regimes.[4] Alternatively, regime interaction has been characterized as involving politics and struggles for influence.[5] While both approaches provide valuable insights, with Jeffrey Dunoff, we suggest that more is on-going when regimes interact.[6] Dunoff suggests that regimes interact in various ways, including interactions before courts, which he refers to as transactional,[7] and three types of relational interactions. Dunoff argues that the latter are key if we are to understand regime interaction.

The three relational interactions concern regulatory and administrative interactions, operational interactions and conceptual interactions.[8] Regulatory and administrative interactions involve treaty bodies, international organizations, and state and non-state actors engaged in continuous and collaborative interactions with the purpose of developing formal and informal rules of general application, aimed at affecting the behaviour of a variety of actors.[9] An example relevant in international environmental law is the Global Environmental Facility (GEF) established by the World Bank, the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). Within the GEF these organizations cooperate with other international organizations as well as state and non-state actors to develop and implement projects in support of international environmental law in developing states.[10] In so doing, general rules applicable to GEF-supported projects are developed on a continuous basis. In other words, the organizations involved in the GEF engage in normative development.[11] Operational interactions involve the same types of actors as those involved in regulatory and administrative interaction, but at an implementation level. Actors are engaged in cooperative decision-making on a continuous basis in order to implement projects, such as GEF-supported ones.[12] Through this operational cooperation, decision-making consolidates rules of general application that are applied to a specific project. In other words, the organizations involved engage in decision-making in individual situations.[13] Finally, conceptual interactions involve different narratives or social understandings that come with distinct regimes, with law functioning "as a filter through which humans understand and experience the world around them".[14] These narratives typically focus on *who* and *what* matters and *how* they matter in a given regime and thus involve politics, even if not exclusively.[15] Conceptual regime interaction, then, may lead to the reconceptualization of a certain issue and the development of *new* narratives or social understandings about the *who*,

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4 Jeffrey L. Dunoff, 'A New Approach to Regime Interaction' in Margaret A. Young (ed.), *Regime Interaction in International Law*, Cambridge: Cambridge University Press 2012, pp. 136-174, see text and references on pp. 139-141.

5 Martti Koskenniemi, 'Hegemonic Regimes' in Young (ed.), supra n. 4, pp. 305-324.

6 Dunoff, supra n. 4, at pp. 166-173.

7 Ibid., at pp. 157-158.

8 Ibid., at p. 137.

9 Ibid., at pp. 158-163.

10 See https://www.thegef.org/; Empire Hechime Nyekwere, 'International Environment Financing: A Review of the Global Environment Facility', 5(2) *Groningen Journal of International Law* 2017, pp. 278-297.

11 See Ellen Hey, 'International Institutions' in: Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.) *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press 2007, pp. 749-769, at pp. 755-761.

12 Dunoff, supra n. 4, at pp. 163-166.

13 Hey, supra n. 11, at pp. 760-765.

14 Dunoff, supra n. 4, at p. 173.

15 Ibid., at p. 172 and Koskenniemi, supra n. 5.

what and *how*. The interaction between human rights and climate change regimes offers an example, as we shall see below.

In Dunoff's proposal for a new approach to studying regime interaction, the author makes two main points relevant for our analysis. Firstly, that the transactional regime interactions before courts are retrospective in nature, since they assess an event that occurred in the past, and "revolve around efforts to harmonize legal regimes, or to privilege one set of international legal norms and subordinate others".[16] Secondly, that the three types of relational interactions, described above, result in the development of new norms that aim to govern behaviour prospectively.[17]

Taking our cue from Dunoff, we propose the following. Firstly, we fully engage with his second point about the prospective nature of the three types of relational interactions, even if our focus in this essay is on conceptual interactions between the human rights and climate change regimes. Secondly, we amend his first point. We propose that regime interaction before international human rights courts and court-like bodies, besides being retrospective, can also be prospective and suggest that the interaction between human rights and environmental regimes before these bodies provides an example.

3. The distinct narratives of the human rights and climate change regimes

The human rights regime and the climate change regime come with their own conceptual underpinnings and distinct narratives. The differences between these two regimes[18] generate what has been referred to as the "disciplinary disconnect".[19] This section briefly discusses the nature of these distinct narratives of the human rights and climate change regimes.

Human rights are typically conceived as norms that protect interests vested in individuals.[20] They are defined in relational terms, in that they seek to protect an individual from someone else's wrongdoing, in particular from acts or omissions by public authorities in the exercise of their public powers.[21] These acts and omissions include the positive obligations held by public authorities to ensure that private actors respect the rights of others. Contrariwise, the effects

16 Dunoff, supra n. 4, at p. 138.

17 Ibid.

18 On the relationship see e.g. Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities*, Abingdon: Routledge 2015; Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law*, Oxford: Oxford University Press 2017, at pp. 295-313; Ottavio Quirico, Mouloud Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective*, Abingdon, Routledge 2016.

19 Stephen Humphreys, 'Competing claims: human rights and climate harms' in Stephen Humphreys (ed.), *Human Rights and Climate Change*, Cambridge: Cambridge University Press 2010, pp. 37-68, at p. 38. See also Stephen Humphreys, 'Conceiving Justice: articulating common causes in distinct regimes', in the same publication, pp. 299-319; Stephen Humphreys, 'Climate Change and Human Rights Law', in Rosemary Rayfuse and Shirley V. Scott (eds.), *International Law in the Era of Climate Change*, Cheltenham (UK) and Northampton (US): Edward Elgar 2012, pp. 29-57.

20 Francesco Francioni, 'International Human Rights in an Environmental Horizon', 21(1) *European Journal of International Law* 2010, pp. 41-55.

21 Amy Sinden, 'Climate Change and Human Rights', 27(2) *Journal of Land Resources and Environmental Law* 2007, pp. 255-271, at pp. 259-262.

of climate change are likely to have collective dimensions, which resound with economic, social and cultural rights, but which international human rights courts and court-like bodies generally have difficulties accommodating.[22]

Moreover, in the case of climate change, both the causal nexus and the attribution of responsibility are difficult to establish.[23] As to the causal nexus, this is the case because the violation of the right in question in most cases is a secondary consequence of the emitted greenhouse gasses (GHGs), the intermediate consequences being rising temperatures followed by climatic conditions such as storms or droughts, which are the immediate cause of the ensuing harm.[24] This raises the sensitive issue whether the harm is to be linked to the emissions of GHGs elsewhere in the world or also to the possible omission of the state where the harm materializes to take adequate adaptation measures. Furthermore, responsibility is difficult to attribute because the harm cannot be clearly traced to a specific act or omission, but is instead grounded in multiple acts and omissions engaged in by a variety of actors at different locations and times on Earth.[25]

In addition, once human rights are part of a treaty, in most cases, their implementation is supervised by an international court or court-like body, as well as national courts. As a result the human rights regime has a strong legal character that is focused on thresholds that states should meet.[26] The climate change regime conversely is more political in nature with its obligations reflecting considerable compromise and without international courts or court-like bodies to supervise implementation.[27] The manner in which the climate change regime conceptualizes climate change action might be characterized as a collective endeavour of the parties to the regime to prevent further climate change and its future effects. The parties to the climate change regime, then, commit to engage in mutual action through, what Daniel Bodansky refers to as reciprocal obligations owed to each other, as opposed to human rights obligations which parties to a regime also owe to each other, but more importantly to individuals.[28] Furthermore, market mechanisms characterize the regulatory measures adopted by parties to the climate change regime. These mechanisms tend not to address the distributive consequences for individuals and their communities.[29]

The climate change regime narrative, then, is both collective and market-based in nature. The collective orientation of the climate change regime makes it difficult to construct the effects of

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22 Francioni, supra n. 20. The exception of course are those human rights treaties that provide justiciable collective rights, see text at n. 40, as well as the European Committee on Social Rights (ECSR) which can consider collective complaints, see text at n. 86 infra.

23 Ottavio Quirico, 'Systemic Integration between climate change and human rights in international law?', 35(1) *Netherlands Quarterly of Human of Human Rights* 2017, pp. 31-50, at pp. 44-45.

24 Ibid.

25 Ibid.

26 Daniel Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues', 38(3) *Georgia Journal of International and Comparative Law* 2010, pp. 511-524, at pp. 514-516. On thresholds and human rights, see Simon Caney, 'Climate Change, Human Rights and Moral Thresholds', in Humphreys (ed.), supra n. 19, at pp. 69-90.

27 Bodansky, supra n. 26, at pp. 515-516.

28 Ibid., at p. 516.

29 Atieno Mboya, 'Human Rights and the Global Climate Change Regime', 58 *Natural Resources Journal* 2018, pp. 51-74.

climate change in terms of the relational nature of human rights, while the market-oriented nature of the regime leaves the human rights dimension unaddressed.

Given the different narratives that characterize each of the two regimes, how might human rights and climate change interact? Below we suggest that regime interaction happening at the level of normative development provides a conceptual basis for international human rights courts and court-like bodies to further develop that interaction.[30]

4. Normative development and interaction between human rights and environmental instruments

The interaction between human rights and the climate change regime takes place against the backdrop of how international environmental law and human rights law have interacted over time. We therefore first explore these interactions and then proceed to address the interaction between the climate change and human rights regimes in the negotiations leading up to the Paris Agreement.

4.1 *Interaction between human rights and environmental instruments in general*

A right to a clean or healthy environment has not been codified in general international law. Several United Nations human rights conventions, however, include environmental considerations in the formulation of the human rights that they seek to protect.[31] For example, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that to achieve the right to the highest attainable standard of physical and mental health "all aspects of environmental and industrial hygiene" shall be improved.[32] Similarly, the 1989 Convention on the Rights of the Child, requires that the "risks of environmental pollution" be taken "into consideration" in the implementation of "the right of the child to the enjoyment of the highest attainable standard of health".[33] Moreover, the 1989 ILO Convention on indigenous and tribal peoples recognizes the special cultural and spiritual relationship that indigenous peoples have with their lands and environment and requires that these be protected.[34] The relationship between indigenous peoples, their culture, their lands and the environment is also recognized in other human rights instruments and in environmental regimes. The 1992 Convention on Biological Diversity and its 2010 Nagoya Protocol, in particular, provide an example.[35] The Nagoya Protocol provides a legal framework for implementing the rights of indigenous and local populations in the context of access to and use of genetic resources by way of benefit sharing. The principle of benefit sharing provides the basis for the development of a new narrative in which human rights and environmental considerations can be integrated. Such integration takes place by way of regulatory and

30 National courts also play a crucial role in this process. See the contribution by Jaap Spier in this volume.

31 For an overview see Lynda Collins, 'The United Nations, human rights and the environment', in Anna Grear and Louis J. Kotzé (eds.), *Research Handbook on Human Rights and the Environment*, Cheltenham (UK) and Northampton (US): Edward Elgar 2015, pp. 219-244.

32 Art. 12.

33 Art. 24.

34 International Labour Organization, C169, Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989), Part II.

35 Both the Convention and the Nagoya Protocol are available at https://www.cbd.int/.

administrative interactions as well as operational interactions, involving benefit sharing projects that seek to implement the Nagoya Protocol.[36] United Nations Human Rights Treaty Bodies and Human Rights Rapporteurs also have addressed the relationship between human rights and the environment. Of particular relevance are the work of the Special Rapporteur on human rights and the environment, John Knox,[37] and the General Comments adopted by the CESCR that address the relationship between human rights and the environment e.g. in the context of the right to food, health and housing.[38]

At the regional level, a right to a clean environment has been incorporated into the 1981 African Charter on Human and Peoples' Rights (Banjul Charter) and the 1988 Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador).[39] The Banjul Charter formulates a collective right to a "general satisfactory environment favourable to their development"[40] and the Protocol of San Salvador provides an individual right "to live in a healthy environment".[41] Other regional human rights instruments such as the 2004 Arab Charter of Human Rights and the 2012 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration formulate a right to a healthy or clean environment as part of the right to an adequate standard of living.[42] In Europe, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in its article 1 provides for "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[43] While the provisions of the Banjul Charter are justiciable, the provision of the Protocol of San Salvador is not,[44] nor is the right formulated in article 1 of the Aarhus Convention. The Aarhus Convention instead provides procedural environmental rights, i.e. access to information, participation in decision-making and access to justice, that are justiciable. Interestingly, the

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36 Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing', 27(2) *European Journal of International Law* 2016, pp. 353-383. See also The BeneLex Project, Benefit-sharing for an equitable transition to the green economy, at <https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/benelex/>.

37 See <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>. John Knox, then Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, in June 2014 issued a report entitled *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change*, available at <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/ClimateChange.aspx>. For his most recent report on the topic see *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/31/52, 1 February 2016, available at <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>.

38 See in particular CESCR, General Comments 4, 12, 14 and 15, available at <http://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>.

39 Available at <http://www.achpr.org/instruments/achpr/ and http://www.oas.org/juridico/english/treaties/a-52.html> respectively.

40 Art. 24.

41 Art. 11.

42 Art. 38 Arab Charter, available at <http://www.jus.uio.no/english/services/library/treaties/02/2-01/arab-human-rights-revised.xml> and Art. 28 ASEAN Declaration, available at <http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf>.

43 Available at <https://www.unece.org/env/pp/treatytext.html>.

44 See Art. 19(6), Protocol of San Salvador.

Inter-American Court of Human Rights (IACtHR) in a recent Advisory Opinion ruled that, based on article 26 (progressive development), the American Convention on Human Rights encompasses an autonomous right to a healthy environment.[45] As a result, the right to a healthy environment presumably has become justiciable under the Inter-American system. In addition, the IACtHR extended the jurisdiction of the state where the harm originates beyond its own territory, to individuals in other states where the harmful effects materialize.[46]

Documents resulting from summits on the environment and development have also recognized the link between environmental protection and human rights. Yet, they often reiterate the importance of upholding human rights in developing activities to protect the environment but generally do not address *how* the protection of the environment might be ensured in view of human rights obligations. Paragraphs 8 and 9 of *The Future We Want*, the declaration adopted at the 2002 RIO+20 Conference on Sustainable Development, provide an example.[47]

> 8. We also reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development.
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> 9. We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Moreover, these documents also remain short of formulating a right to a clean or healthy environment. Principle 1 of the 1992 Rio Declaration on Environment and Development (Rio Declaration)[48] provides as follows:

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45 IACtHR, Advisory Opinion OC-23/17, 15 November 2017, Requested by the Republic of Columbia, paras. 62-63. The full text of the opinion in Spanish and an English summary is available at <http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda_opiniones_consultivas.cfm?lang=en>. See also Maria L. Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights', 22(6) *ASIL Insights*, 10 May 2018, available at <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>; Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR', *EJIL: Talk!*, 28 March 2018, available at <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/comment-page-1/>, and Giovanny Vega-Barbosa and Lorraine Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights", *EJIL: Talk!*, 26 February 2018, available at <https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/>.

46 IACtHR, Advisory Opinion OC-23/17, para. 81.

47 Available at <https://sustainabledevelopment.un.org/futurewewant.html>.

48 Available at < http://www.unesco.org/education/pdf/RIO_E.PDF>.

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 1 has been criticized for downgrading the human rights dimension in international environmental law because it watered-down Principle 1 of the 1972 Stockholm Declaration on the Human Environment (Stockholm Declaration).[49] Principle 1 of the Stockholm Declaration states:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Also relevant in the context of the interactions between human rights and environmental law regimes is Principle 10 of the Rio Declaration. It formulates procedural environmental rights and reads as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10, among other developments, inspired the adoption of the aforementioned Aarhus Convention. The Aarhus Convention and the various bodies operating within its framework, including the Aarhus Convention Compliance Committee (ACCC), have given rise to a new narrative, based on procedural environmental rights,[50] which, as we illustrate below, has been integrated into human rights discourse by the decisions of courts and court-like bodies.[51]

Both instruments related to human rights law and instruments related to environmental law, then, address the relationship between these two bodies of law. Several elements characterize the ensuing narrative(s). Firstly, at the global level, neither body of law codifies a right to a clean or healthy environment *per se*, meaning that a new integrated narrative based on a distinct

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49 Available at <https://sustainabledevelopment.un.org/milestones/humanenvironment>.

50 Ellen Hey, 'The interaction between human rights and the environment in the European 'Aarhus space'', in Grear and Kotzé, supra n. 31, pp. 353-379.

51 See also John H. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Compilation of Good Practices* (A/HRC/28/61), 3 February 2015, available at <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/GoodPractices.aspx>.

human right has not emerged at that level. Secondly, while reiterating the importance of existing human rights, international environmental law seems reluctant to incorporate the implications of human rights law into its narrative, whereas the human rights regime seems more receptive towards assimilating environmental considerations. The Nagoya Protocol to the Convention on Biological Diversity is an exception to this general trend.

4.2 En Route *to Paris*

While prominently featuring in the academic literature and NGO-reports,[52] it took some time before the relationship between human rights and climate change was acknowledged in international policy making. Scholars often identify the 2005 Inuit petition to the Inter-American Commission on Human Rights (IAComHR) as the first episode triggering a policy debate about the interconnection between the two regimes.[53] It led to a series of initiatives advocating the inclusion of explicit rights-oriented language in climate change policies, both at an intergovernmental and NGO level.

In 2007, the Inter-governmental Panel on Climate Change (IPCC) published its Fourth Assessment Report, which emphasized the importance of linking climate change and sustainable development policies and made the point that

> [f]or a development path to be sustainable over a long period, wealth, resources, and opportunity must be shared so that all citizens have access to minimum standards of security, human rights, and social benefits, such as food, health, education, shelter, and opportunity for self-development.[54]

Around the same time, the Small Island Developing States Representatives adopted the 2007 Male' Declaration on the Human Dimension of Global Climate Change.[55] The Declaration points to the implications of climate change for the full enjoyment of human rights. It requests the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct a detailed study on the topic and the United Nations Human Rights Council (HRC) to place the

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52 See e.g. Alan E. Boyle and Michael H. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford: Oxford University Press 1998; International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008), available at <http://www.ichrp.org/files/reports/45/136_report.pdf>; and Center for International Environmental Law and Friedrich-Ebert-Stiftung, *Human Rights and Climate Change: Practical Steps for Implementation* (2009), available at <http://www.ciel.org/Publications/CCandHRE_Feb09.pdf>.

53 The petition was filed against the United States by representatives of Inuit communities in Canada and the United States. It was dismissed on the grounds that "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration" (quoted in Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?', 7(1) *Transnational Environmental Law* 2018, pp. 37-67, at p. 47). The Inter-American Commission on Human Rights, however, did invite the petitioners to a hearing. For additional information, search <https://earthjustice.org/library>.

54 Bert Metz, Ogunlade Davidson, Peter Bosch, Rutu Dave and Leo Meyer (eds.), *Climate Change 2007 Mitigation, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge: Cambridge University Press 2007, at p. 696, available at <http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg3_report_mitigation_of_climate_change.htm>.

55 Available at <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf>.

topic on its agenda.[56] Starting in 2008, the HRC adopted a series of resolutions on the topic.[57] The HCR highlighted that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights"[58] and requested the OHCHR to conduct a study on the topic.[59] The 2009 OHCHR study further clarified the wide array of human rights potentially affected by climate-related disruptions.[60] It illustrates that climate change driven events might compromise, among other rights, the right to food, health, water, housing and self-determination.[61] Based on the concept of vulnerability, the study also shows how certain factors, such as age, poverty, gender and being part of an indigenous people, co-determine how the impacts of climate change will affect individuals or communities.[62] It thus highlights the distributional aspects of the impacts of climate change.[63] In the climate change regime, based on the principle of common but differentiated responsibilities, distributional aspects play an important role, but are addressed in inter-state terms.[64] The human rights narrative, based on the notion of vulnerability, thus, sought to expand the distributional dimension of the climate change regime beyond the inter-state level to the level of individuals and communities.

The climate change regime first acknowledged the relationship between human rights and climate change in the 2011 Cancun Agreements.[65] The relevant COP decision in its preamble refers to the resolutions adopted by the HRC, including the concept of vulnerability, and its paragraph 8 emphasizes that all climate change actions should fully respect human rights. The Cancun Agreements also determined that mitigation and adaptation have the same priority, instead of prioritising mitigation, as was the case previously in the climate change regime.[66] Since adaptation relates directly to the impacts of climate change, together with the concept of vulnerability, it facilitates the foregrounding of the distributional aspects of climate change.[67]

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56 Paras. 4 and 5 of the Male' Declaration respectively.

57 HRC Res. 7/23, 28 March 2008; 10/4, 25 March 2009; 18/22, 17 October 2011; 26/27, 15 July 2015; 29/15, 2 July 2015, available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx.

58 Para. 1, Preamble, HRC Res. 7/23.

59 Para. 1, HRC Res. 7/23.

60 OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* (A/HRC/10/61), 15 January 2009, available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx>.

61 Ibid., at pp. 20-41.

62 Ibid., at pp. 15-18.

63 On the distributional aspects of climate change and the notion of vulnerability, see e.g. Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?', 7(1) *Transnational Environmental Law* 2018, pp. 17-36; Edward Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach', 38(3) *Georgia Journal of International and Comparative Law* 2010, pp. 673-716, at pp. 707-712, and Humphreys, 'Competing claims', supra n. 19.

64 Jutta Brunnée and Charlotte Streck, 'The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities', 13(5) *Climate Policy* 2013, pp. 589-607.

65 The Cancun Agreements are a set of decisions adopted at COP 16 of the UNFCCC, which took place in Cancun in 2011 and focused on long term cooperation within the climate change regime. See COP Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, available at <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>. See also Benoit Mayer, 'Human Rights in the Paris Agreement', 6(1-2) *Climate Law* 2016, pp. 109-117.

66 COP Decision 1/CP.16, para. 2(b).

67 See references at n. 63 supra.

Subsequently to the Cancun Agreements, proposals for the inclusion of the human rights perspective in the Paris Agreement were submitted to the negotiators.[68] Eventually, the explicit reference to protection of human rights was included in the 11th paragraph of the preamble, quoted above. Moreover, the Paris Agreement, besides focusing on mitigation, also prioritizes adaptation and importantly includes the concept of vulnerability in its article 7. Article 7(5) provides as follows:

> Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.

Furthermore, article 7(9)(c) requires parties to engage in adaptation planning processes, which may include the following:

> The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems;

This approach is further reinforced through the incorporation of the notions of "loss" and "damage" in article 8 of the Paris Agreement. The enhanced attention to adaptation, loss and damage refocuses climate change responses and links them to "affectedness" and vulnerability, thus opening the door for human rights considerations. As a result, the Paris Agreement extends the distributional effects of climate change beyond the inter-state level to the level of groups and communities.[69]

In addition, the Paris Agreement also incorporates procedural environmental rights both in article 7(5) by referring to "a […] participatory and fully transparent approach" and in article 12. The latter provides:

> Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement.

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68 See e.g. *A New Climate Change Agreement Must include Human Rights Protection for All, An Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn*, 17 October 2014, available at <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/ClimateChange.aspx>;
Briefing Paper drafted for the purpose of informing the Climate Justice Dialogue on 7 February 2015, co-hosted by the OHCHR and the Mary Robinson Foundation in Geneva, *Embedding human rights informed climate action into the Paris climate agreement and beyond*, 7 February 2015, available at <https://www.mrfcj.org/media/pdf/2015/BriefingNoteforClimateJusticeDialogue7Feb2015.pdf>.

69 See also text at n. 62-64 supra.

This provision in the climate change context, besides requiring the development of education and training programmes, refers to the duty resting on public authorities to collect environmentally relevant information and inform the public about the state of the environment (public awareness), to engage members of the public in decision-making procedures (public participation) and to make environmental information accessible upon request (public access to information). The Paris Agreement does not incorporate access to justice and as a result does not fully implement Principle 10 of the Rio Declaration.

The Paris Agreement, then, acknowledges that action to address climate change should respect human rights (paragraph 11, preamble) and that the effects of climate change impact human rights (article 7(5), 7(9)(c) and 8), and to an extent recognizes procedural human rights. Paragraph 11 of the preamble, as many of the other provisions of international environmental law referred to above, remains at the level of recognizing that human rights may be impacted, in this case by measures to address climate change, including both mitigation and adaptation actions. The provisions of article 7, however, move beyond the mere recognition of human rights, by asserting that vulnerable groups and communities matter. Article 7 thereby expands *who* matters in the climate change regime beyond the inter-state level. Moreover, it also offers a basis for developing *how* these groups matter, namely based on their vulnerability and the distributional effects of climate change. In other words, the interaction between the human rights and the climate change regimes has introduced a new narrative into the latter. The procedural human rights included in articles 7(5) and 12 of the Paris Agreement also offer a basis for public authorities to engage in a policy dialogue with those affected by climate change, thus opening up sites *where* interaction might happen and further developing the human rights and climate change narrative. In what follows, we suggest that the new narrative introduced by the Paris Agreement is likely to both provide a basis and continue to develop, amongst other ways via procedures before international human rights courts and court-like bodies.

5. The interaction of human rights and environmental law before courts and court-like bodies

Over the past decades international human rights courts and court-like bodies have integrated environmental considerations into their decisions by way of basically two approaches.[70] Firstly, they have ruled that specific human rights may be violated substantively as a result of acts or omissions that endanger human health or cause environmental degradation. Secondly, courts and court-like bodies have found that specific human rights may be violated procedurally.

Under the first approach, regional courts and court-like bodies, including the African Commission on Human and People's Rights (ACHPR), the European Court of Human Rights (ECtHR) and the IAComHR and IACtHR have ruled that human rights can be violated as a

[70] For further information see Werner Scholtz, 'Human rights and the environment in the African Union context', in Grear and Kotzé (eds.), supra n. 31, pp. 401-420; Sophie Thériault, 'Environmental justice and the Inter-American Court of Human Rights, in Grear and Kotzé (eds.), supra n. 31, pp. 309-329; Council of Europe, *Manual on Human Rights and the Environment*, Council of Europe, 2nd ed., 2012, available at <https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf>.

result of environmental degradation. Relevant rights include the right to life, the right to health, the right to property and the right to family and private life. Examples of relevant rulings include those of the ACHPR in the *Ogoniland Case*;[71] the ECtHR in *López Ostra v. Spain*,[72] *Őneryildiz v. Turkey*,[73] *Taşkin and others v. Turkey*[74] and *Fadeyeva v. Russia*;[75] the IAComHR in *Maya Indigenous Community of the Toledo District v. Belize*;[76] and the IACtHR in *Saramaka People v. Suriname*[77] and in *Kichwa Indigenous People of Sarayaku v. Ecuador*.[78] Conversely, courts and tribunals have also ruled that, if properly balanced, environmental law, as part of the general interest, may provide a justification for limiting human rights. ECtHR's ruling in *Hatton v. UK* provides an example.[79]

The above-mentioned rulings illustrate that states have a duty to have in place proper legal and enforcement systems for realizing the human rights in question, including relevant environmental aspects. The rulings also show that states have the positive duty to ensure that private sector actors do not infringe these same human rights while engaging in their activities. Importantly, based on these rulings courts or court-like bodies can also order measures of redress, including compensation. Although redress is an import element of human rights law, it is also this aspect which points to a drawback of using human rights litigation to address environmental issues. Firstly, human rights litigation tends to be retrospective in that it deals with harm that has already occurred and assess whether the harm in question amounts to an infringement of a human right. Secondly, the harm considered usually is conceptualized in terms of harm to an individual instead of a community.[80] Exceptions to this second point of course are the ACHPR, which on the basis of article 24 of the Banjul Charter is able to address collective aspects,[81] and the Inter-American institutions, which in considering the rights of tribal or indigenous peoples have recognized communal rights, e.g. to property.[82]

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71 ACHPR, 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria (*Ogoniland Case*) ACHPR, 7 October 2001, available at <http://www.achpr.org/communications/decision/155.96/>. The ACHPR found violations of the right to health and the right to a satisfactory environment (paras. 50-53), the right to freely dispose of natural resources (paras. 55-58), the right to adequate housing (paras. 59-63), the right to food (paras. 64-66) and the right to life (paras. 67-69).

72 ECtHR, Judgment 9 December 1994. The ECtHR found a violation of the right to private and family life (paras. 44-58). Decisions of the ECtHR are available through the HUDOC system at <https://www.echr.coe.int/Pages/home.aspx?p=home&c=>.

73 ECtHR, Judgment 30 November 2004 (Grand Chamber). The ECtHR found a violation of the right to life, among other violated rights (paras. 89-118).

74 ECtHR, Judgment 10 November 2004. The ECtHR found a substantive violation of the right to private and family life (paras. 116-117).

75 ECtHR, Judgment 9 June 2005. The ECtHR found a violation of the right to private and family life (paras. 116-134).

76 IAComHR, Report Nº 40/04, Case 12.053, Merits. The IAComHR found violations of the right to property of an indigenous people who communally held that property (paras. 192-193). Available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm>.

77 IACtHR, Judgment 28 November 2007. The IACtHR found a violation of the communal property rights of a tribal people (para. 154).

78 IACtHR, Judgment 27 June 2012. The IACtHR found "serious jeopardizing of the rights to life and personal integrity in relation to the obligation to guarantee the right to communal property" (operative para. 4).

79 ECtHR, Judgment 8 July 2003.

80 See n. 20 supra.

81 See text at and n. 40 supra.

82 See cases referred to at n. 76-78 supra.

We suggest that the second approach adopted by human rights courts and court-like bodies goes some way towards addressing the retrospective and individualized nature of human rights decisions. Under this second approach, human rights courts and court-like bodies have found that specific human rights may be violated procedurally as a result of public authorities' failure to meet their duty of care to inform themselves of the state of the environment, to inform the public about the state of the environment, and to engage members of the public in decision-making procedures that affect them or to provide access to justice. Human rights courts and court-like bodies have read these procedural rights into the substantive human rights at stake. For example, in the *Ogoniland Case*, *Taşkin* and *Kichwa Indigenous People of Sarayaku v. Ecuador* these procedural rights were read into (1) the rights to health and to a satisfactory environment,[83] (2) the right to private and family life[84] and (3) the property rights of an indigenous people.[85] Procedural rights thereby have become part of the human rights protected by the instruments in question.[86]

In terms of climate change litigation, international human rights courts and court-like bodies, to date, have only considered a limited number of cases, concerning specifically mitigation measures. These cases have involved both the need to take such measures and challenged the adoption thereof. In *Marangopoulos*, a claim related to emissions from lignite mines and lignite fuelled power plants, the European Committee on Social Rights (ECSR) extended the two-pronged approach to a climate change case, i.e. focusing on both substantive violations of particular rights as well as on procedural environmental rights.[87] Challenges to the adoption of mitigation measures have been brought particularly in relation to the placement of windmills. Cases have been brought mainly before the ACCC, which unsurprisingly has found that procedural environmental rights need to be respected also when taking action to mitigate climate change.[88] To the best of our knowledge, cases involving the need to adopt adaptation measures have not been brought before international human rights courts or court-like bodies. We note that several cases involving the need to adopt climate change mitigation measures are pending before or planned for submission to international human rights courts or court-like bodies.[89]

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83 *Ogoniland*, supra n. 71, at para. 53.

84 *Taşkin*, supra n. 74, at paras. 118-125.

85 *Kichwa Indigenous People*, supra n. 78, operative para. 2.

86 Ulrich Beyerlin, 'Aligning international environmental governance with the 'Aarhus principles' and participatory human rights', in Grear and Kotzé (eds.), supra n. 31, at pp. 333-352.

87 ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, 7 June 2007, paras. 216-221, available at <http://hudoc.esc.coe.int/eng/#{"ESCDcIdentifier":["cc-30-2005-dmerits-en"]}>.

88 See e.g. ACCC/C/2010/54 (European Union), ACCC/C/2013/81 (Sweden), ACCC/C/2015/133 (The Netherlands, not yet decided). ACCC cases are available at <https://www.unece.org/env/pp/cc/com.html>.

89 See *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, available at <http://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/>, and reportedly Portuguese Children are preparing a case before the ECtHR against 47 countries, see <https://www.crowdjustice.com/case/climate-change-echr/>.

The activation of procedural environmental rights might bypass some of the difficulties highlighted above, and enhance both a prospective and a collective dimension in decisions of international human rights courts and court-like bodies. While remaining neutral with respect to "which justice claim will win out, regardless of the substantive outcome",[90] procedural rights guarantee the involvement of the general public in policy and decision-making processes prospectively and collectively. Therefore, we suggest that, if implemented, the activation of procedural rights fosters a prospective approach to both the protection of human rights and the environment. Public authorities, by collecting and making available environmental information as well as granting the public access to environmental information upon request and by facilitating public participation in decision-making as well as access to justice, promote a precautionary context in which the public is able to participate in the development of environmental policy. In such a context, the consequences of both climate change, i.e. the need for adaptation measures, and of action to prevent climate change, i.e. mitigation measures, can be addressed in a proactive participative manner, with access to justice as a last resort and access to an international court or court-like body as a safety net in case proper procedures are not engaged in at the national level.

As has been well documented, climate change litigation at the national level is also developing rapidly and is taking a rights-based approach.[91] For example, in the *Urgenda* case, the The Hague District Court found that the Government of the Netherlands violated its duty of care by failing to adopt appropriate and effective mitigation measures to avoid "severe and life-threatening consequences for man and the environment".[92] The Court determined the nature of this duty of care with reference to articles 2 and 8 of the European Convention on Human Rights. Moreover, in *Leghari* the Lahore High Court Green Bench in Pakistan concluded that by not adopting appropriate adaptation policies, the Government violated, among other principles and standards of Pakistani law, the rights to life, to a healthy and clean environment, and to human dignity enshrined in Constitution of Pakistan.[93] Interestingly, the court ordered and later established the Climate Change Commission for the Punjab in which government representatives, experts, and NGOs are to participate,[94] thereby linking in to the right of NGOs to participate in decision-making. More generally, these cases illustrate that national courts can engage with climate change in a prospective manner, i.e. with a view to anticipating and avoiding future foreseeable harm, by basing their assessment on the substantive aspect of human rights.

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90 Humphreys, 'Competing claims', supra n. 19, at p. 46.

91 See e.g. Peel and Osofsky, supra n. 53; Evert F. Stamhuis, 'A Case of Judicial Intervention in Climate Policy: The Dutch *Urgenda* Ruling', 22 *New Zealand Association of Comparative Law Yearbook* 2016 (2017), pp. 43-60, available at <https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/nzacl-yearbooks/yearbook-22,-2016>; and the contribution by Jaap Spier in this volume.

92 *Stichting Urgenda v. Government of the Netherlands*, The Hague District Court (C/09/456689 / HA ZA 13-1396), 24 June 2017 (Urgenda), paras. 4.35, 3.45-4.52, and 4.74, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>.

93 *Ashgar Leghari v. Federation of Pakistan*, Lahore High Court Green Bench, Orders of 4 and 14 September 2015, available at <https://elaw.org/PK_AsgharLeghari_v_Pakistan_2015>, para. 7 (Order of 4 September 2015).

94 Ibid., para. 11 (Order of 14 September 2015).

These cases also show that national courts engage in conceptual interaction, by employing human rights to normatively determine both climate change threats and the positive obligations of states in the specific context of national adaptation and mitigation policies. As is often the case, national case law may well spur development at the international level, initiating transversally what has been referred to as a "persuasion" process.[95] Therefore, international human rights courts and court-like bodies might sooner or later follow the example set by national courts. The recent IACtHR Advisory Opinion might be an example.[96] Notwithstanding its shortfalls,[97] this opinion reads the duty to prevent transboundary harm into the duty to respect and guarantee the rights to life and personal integrity, clearly stating that this duty is similar to positive human rights obligations and not limited to inter-state relations.[98] Interestingly, as in *Urgenda*, the IACtHR also relies on a due diligence obligation, albeit to construct an expanded extraterritorial application of the American Convention. In other words, all victims of environmental harm caused by activities within the country of origin are considered to be "within the jurisdiction"[99] of that state, including those victims in the territory of other states. The state of origin, then, could be held to account under the Convention, if a causal nexus is established between the facts and the harm. The extension of positive human rights obligations beyond the territory of the state of origin of environmental harm potentially opens the door for climate change litigation – if a sufficient causal nexus between GHG emission and an impairment of affected individuals' or communities' rights is found.

International human rights and courts and court-like bodies have thus approached the link between human rights and environmental rights in a two-pronged manner. On the one hand, they have addressed the violation of specific rights contained in relevant instruments involving a retrospective approach. On the other hand, they have included a prospective approach by requiring that states implement procedural environmental rights. The latter, we suggest, enables the further development of an integrated narrative between human rights and environmental regimes. Importantly, national courts also are facilitating the interaction between rights, either human rights or constitutional rights, and climate change. Most importantly, they are doing so in a prospective manner and in relation to substantive human rights, that is to say, not only by way of procedural human rights.

6. Conclusions

The interaction between the human rights and environmental regimes, including the climate change regime, at the level of normative development illustrates considerable friction between the two regimes. In particular, it shows considerable reluctance on the part of international environmental regimes, including the climate change regime, to fully engage with the human rights regime. The Paris Agreement is a step in that process. It provides a basis for further

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95 See on this Luca Pasquet, '*Jurisdiction* ed elemento territoriale. Riflessioni su un mondo multilivello, interconnesso e specializzato', in Adriana Di Stefano (ed.), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law*, Turin: Giappichelli 2015, pp. 143-164.

96 See n. 45 supra.

97 See Banda, n. 45 supra.

98 IACtHR, Advisory Opinion OC-23/17, supra n. 45, at para. 133. See also n. 45 and 46 supra.

99 The Court uses the term 'jurisdiction' throughout the Opinion. It is the authors' impression, however, that in some sections, by relying on the causal nexus, the Court appears to conflate jurisdiction with responsibility.

regime interaction. We suggest that this interaction will further develop conceptually within both regimes, but also in other institutions engaged with climate change, such as the international development banks and United Nations specialized agencies. Within these institutions, interactions of a regulatory or administrative nature and of an operational nature are also likely to develop as they engage in projects to implement the Paris Agreement.

In addition, we suggest that international human rights courts and court-like bodies have laid the basis for engaging with climate change retrospectively, so far based mainly on non-climate change related environmental litigation. They are in a position to assess climate change action in view of the right to a healthy environment or in view of other human rights such as the right to life, the right to property and the right to private and family life. Additionally, procedural environmental rights are firmly grounded in the case law of international human rights courts and court-like bodies and we suggest these will also be applied to climate change related cases, having a prospective effect. It will be interesting to see if the prospective approach based on constitutional or human rights adopted by some national courts will find its way to international courts and court-like bodies. The recent Advisory Opinion of the IACtHR, which has added a new theme to the climate change and human rights narrative, might be pointing the way forward.

Finally, we submit that studying regime interaction from the point of view of conceptual interaction indeed, as Dunoff suggests, offers the insight that more than politics and struggles for influence are involved. What also seems to be on-going is the development of new narratives or new social understandings. In terms of interaction between the human rights and climate change regimes, that narrative or understanding has evolved to include the special position of vulnerable groups and communities, the notion that human rights may be violated as a result of climate change action, both mitigation and adaptation, and procedural environmental human rights. This new narrative has to some extent been developed by international human rights courts and court-like bodies in terms of environmental law and to a very limited extent for climate change law. We suggest that development of the human rights and climate change narrative does not end here. It will develop further by way of conceptual interaction, but also in terms of regulatory or administrative interactions and in operational interactions, in the climate change and human rights regimes, but also through the work of international institutions seeking to implement the Paris Agreement.

7. Propositions and Points for Discussion

1. In terms of human rights law, the inclusion of the concept of 'vulnerability' in article 7 of the Paris Agreement is more significant than the reference to human rights in the 11th paragraph of the Preamble of the Agreement.

2. Provisions in Articles 7, 8 and 12 of the Paris Agreement partially integrate a human rights narrative, thereby providing a basis to develop a new understanding of the *who*, *how* and *where* of the climate change regime.

3. International human rights courts and court-like bodies approach the human-rights/ climate change link in a two-pronged manner, i.e. focusing on violations of particular substantive human rights as well as procedural environmental rights.

4. International human rights courts and court-like bodies engage in prospective regime interaction, in particular when they read procedural environmental rights into substantive human rights obligations.

5. National courts are equally engaged in conceptual and prospective regime interaction, by employing human rights to define positive obligations of states in the context of mitigation and adaptation policies.

6. Considering regime interaction from a conceptual point of view illustrates that the hard work of regime interaction is about integrating distinct narratives that have developed over time and in their own realms.