

## **Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages**

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### **ABSTRACT**

The relationship between the climate change and human rights regimes has been the subject of much scholarly debate. The Paris Agreement and work carried out under the auspices of the Human Right Council have shed new light on states' understanding of the interplay between these two bodies of law. This chapter analyses these recent developments, placing them in the context of the scholarly debate on the fragmentation of international law, analysing means to avoid conflicts and exploit synergies between the climate change and the human rights regimes.

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## 1 Introduction: The interplay between human rights and climate change law

The adverse effects of climate change threaten the enjoyment of a range of human rights, such as the right to life, adequate housing, food, and the highest attainable standard of health.<sup>1</sup> Qualifying the effects of climate change as human rights violations, however, poses a series of technical difficulties, including disentangling complex causal relationships and projections about future impacts.<sup>2</sup> Conversely, measures adopted to tackle climate change may themselves have (and indeed have reportedly already had) negative impacts on the enjoyment of human rights.<sup>3</sup> This is especially the case for activities affecting access to and use of natural resources, such as land, water and forests. Adaptation and mitigation action can interfere with the enjoyment of human rights, such as that to culture, the respect for family life, access to safe drinking water and sanitation, indigenous peoples' self-determination, as well as the gamut of procedural rights concerning access to information, justice and participation in decision-making.<sup>4</sup> While climate change response measures can engender perverse outcomes for the protection of human rights, human rights protection can also engender problematic outcomes, when it is pursued without factoring in climate change obligations.<sup>5</sup>

This complex relationship between climate change and human rights obligations has increasingly been recognized in the literature,<sup>6</sup> as well as by human rights bodies. Starting with 2008, the Human Rights Council (HRC) has adopted a string of

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<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, Report on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61, 15 January 2009, at 16.

<sup>2</sup> *Ibid.*, at 70.

<sup>3</sup> *Ibid.*, at 65-68.

<sup>4</sup> 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, at 50-64.

<sup>5</sup> See for example Pedersen, 'The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation' 80 *Nordic Journal of International Law* (2011) 403; and Lewis, 'Balancing Human Rights in Climate Policies' in O. Quirico and M. Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (2016) 39.

<sup>6</sup> See for example S. Humphreys (ed.), *Human Rights and Climate Change* (2009); Special issue, 38 *Georgia Journal of International and Comparative Law* (2009); Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' 22 *Journal of Environmental Law* (2010) 391; S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change. A Review of the International Legal Dimensions* (2011); O. Quirico and M. Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (2016); and Special Issue, 34 *Journal of Energy & Natural Resources Law* (2016).

resolutions emphasising the potential of human rights obligations, standards and principles to ‘inform and strengthen’ climate change law- and policy-making, by ‘promoting policy coherence, legitimacy and sustainable outcomes’.<sup>7</sup> The HRC also encouraged its special procedures mandate holders to consider the issue of climate change and human rights within their respective mandates.<sup>8</sup> As a result, the special procedures mandate-holders unprecedentedly engaged with the making of the Paris Agreement, suggesting, amongst others, the inclusion of human rights language in the treaty, and that Parties refrain from viewing their human rights responsibilities as stopping at their borders.<sup>9</sup>

This impassioned plea was laden with potentially significant legal implications. As not all Parties to climate treaties have ratified human rights treaties, adhesion to the Paris Agreement could have become a means to impose upon states obligations enshrined in treaties they have not ratified.<sup>10</sup> Furthermore, states commonly interpret their human rights instruments as jurisdictionally limited to individuals or entities within their effective control.<sup>11</sup> It is, in other words, difficult to argue that states have specific obligations to undertake positive action to secure the protection of human rights associated with climate change impacts beyond their territorial boundaries. Finally, states’ discretion in choosing the means for implementing their international obligations renders striking a balance between competing societal interests and needs

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<sup>7</sup> Human Rights Council Resolution 7/23, Human Rights and Climate Change, UN Doc A/HRC/7/78, 29 March 2008; 10/4, Human Rights and Climate Change, UN Doc A/HRC/RES/10/4, 25 March 2009, preamble; Human Rights Council Resolution 18/22, Human Rights and Climate Change, UN Doc A/HRC/RES/18/22, 17 October 2011, preamble; and Human Rights Council Resolution 26/27, Human Rights and Climate Change, UN Doc A/HRC/RES/26/27, 15 July 2014, preamble.

<sup>8</sup> Resolution 26/27, *supra* note 7, at 7.

<sup>9</sup> 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 (20-25 October 2014), 17 October 2014, available at: <http://newsroom.unfccc.int/media/127348/human-rights-open-letter.pdf>.

<sup>10</sup> While 197 States have ratified the UNFCCC, no human rights treaty enjoys universal ratification. Even the most widely ratified human rights treaties do not enjoy universal membership. The International Covenant on Civil and Political Rights (1966) has 168 Parties; and the International Covenant on Economic, Social and Cultural Rights (1966) has 164 Parties. The UN Convention on the Elimination of All Forms of Racial Discrimination (1966) has 177 Parties whereas only 22 States have ratified International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989).

<sup>11</sup> As reiterated for example also in: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *supra* note 4, at 41.

a rather context-specific matter, on which legislators enjoy a great deal of leeway.<sup>12</sup>

These arguments were forcefully made in the lead up to the adoption of the Paris Agreement.<sup>13</sup> As a result, the Paris Agreement only partially follows the suggestions made by the special procedures mandate-holders. The preamble specifies that Parties ‘should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.’<sup>14</sup> The operative part of the Paris Agreement also makes specific references to the need to be responsive to gender concerns as well as to the rights of indigenous peoples.<sup>15</sup> Albeit timid, these textual references break new ground, and may have significant implications for the interpretation and further development of Parties’ obligations under the climate regime.

This chapter analyses these recent developments, placing them in the context of the scholarly debate on the fragmentation of international law. This literature has investigated at length questions of coherence within and interplay between sectors of the international legal order. It is used here as a conceptual lens to better understand interactions between international human rights and climate change law, as well as the means available to manage the interplay between the two. The chapter is structured as follows. The second section introduces the debate on fragmentation of international law, as well as tools that have been devised to tackle it. The third section analyses how the tools identified in the scholarship on fragmentation have been deployed to address the interplay between the climate change and the human rights regimes. The conclusion offers some reflections on future interrelations between these two regimes.

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<sup>12</sup> As argued also in Quirico, Brömer and Szabó, ‘States, Climate Change and Tripartite Human Rights: The Missing Link’ in Quirico and Boumghar, *supra* note 6, at 21.

<sup>13</sup> As reported for example in Human Rights Watch, ‘Human Rights in Climate Pact under Fire’ (7 December 2015), available at: <https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire>.

<sup>14</sup> Paris Agreement, Preamble.

<sup>15</sup> Paris Agreement, Articles 7.5 and 11.2. Cross-reference to chapters on IPOs and gender.

## 2 The fragmentation of international law

The debate on the fragmentation of international law emerges from concerns that international law-making and institution-building increasingly tends to take place ‘with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.’<sup>16</sup> The perceived compartmentalization of the law into highly specialized branches that develop in relative autonomy from each other is not only *inter-specific*, i.e. between different areas of the law (e.g. environmental law, human rights law, trade law, etc.), but also *intra-specific*, thus affecting instruments belonging to the same area of international law (e.g. climate change law, biodiversity law, etc.). This state of affairs is arguably the result of institutional deficiencies of the international legal system, which is inherently devoid of a clear normative and institutional hierarchy and a comprehensive judicial jurisdiction,<sup>17</sup> as well as of the progressive transposition of governance functions from the national to the international plane.<sup>18</sup>

After two decades of debate, fragmentation is widely accepted as an intrinsic characteristic of the international legal order. So while early scholarship focused on problematizing fragmentation,<sup>19</sup> more recent scholarship acknowledges fragmentation as part of the natural state of things, and rather focuses on ways to manage it.<sup>20</sup> How, in other words, is it possible to enhance the coherence between elements in the international legal architecture, avoiding the threat of ‘antagonistic developments’?<sup>21</sup>

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<sup>16</sup> ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, at 11.

<sup>17</sup> *Ibid.*, at 493.

<sup>18</sup> Simma, ‘Universality of International Law from the Perspective of a Practitioner’ 20 *European Journal of International Law* (2009) 265, at 270.

<sup>19</sup> See e.g. G. Teubner, *Global Law Without a State* (1997); and Fischer-Lescano and Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ 25 *Michigan Journal of International Law* (2003) 999.

<sup>20</sup> See for example M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012); R. Michaels and J. Pauwelyn, ‘Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law’ 22 *Duke Journal of Comparative & International Law* (2012) 349; and H. van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (2014).

<sup>21</sup> For the use of this term, see Pollack and Shaffer, ‘The Interaction of Formal and Informal Lawmaking’ in J. Pauwelyn, R. A. Wessel and J. Wouters, *Informal International Lawmaking* (2012), at 250-4.

And what is the relationship between rules embedded in separate but overlapping international regimes?

The International Law Commission (ILC) addressed these matters in one of its reports.<sup>22</sup> The report points out that the increased specialization of international law poses challenges associated with the collision of norms and regimes, deploying the term ‘conflict’ to refer to a situation whereby ‘two rules or principles suggest different ways of dealing with a problem’.<sup>23</sup> This definition encompasses not only mere ‘logical incompatibility’ between norms, but also ‘policy-conflicts’, i.e. when a treaty frustrates the goals of another without there being any strict incompatibility between their provisions.<sup>24</sup> These conflicts have been also described in the literature as ‘implementation conflicts’ - i.e. conflicts that are engendered by implementation of perfectly compatible treaty obligations<sup>25</sup> - or ‘functional conflicts’ - i.e. interference in the operation of concurrent norms, that takes place for example when a norm reinforces the behaviour another seeks to discourage.<sup>26</sup> The notion of policy conflict draws attention to the fact that interaction between international law regimes is not a one-off phenomenon, but concerns the ‘day-to-day working’ of legal instruments, starting from their very making and continuing with their interpretation and implementation.<sup>27</sup> So, rather than simply focus on establishing the applicable legal regime and related set of rules in a given context, scholars are increasingly presuming that multiple international regimes interact with one another in an iterative manner and searching for constructive ways of making them work together.<sup>28</sup>

The ILC report considers three main avenues to address policy conflicts: conflict avoidance; resolution through the application of interpretative principles; and institutional cooperation and coordination. On conflict avoidance, the report suggests

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<sup>22</sup> ILC, *supra* note 16.

<sup>23</sup> *Ibid.*, at 25.

<sup>24</sup> *Ibid.*, at 24.

<sup>25</sup> R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (2003), at 24.

<sup>26</sup> M. Prost, *The Concept of Unity in Public International Law* (2012), at 63.

<sup>27</sup> See Young, *Regime Interaction in Creating, Implementing and Enforcing International Law*, in Young, *supra* note 20, at 89 and 91.

<sup>28</sup> Dunoff, ‘A New Approach to Regime Interaction’ in Young, *supra* note 20, at 137 and 157.

including in treaties guidance on how to deal with subsequent or prior conflicting treaties, distinguishing different typologies of so-called conflict clauses.<sup>29</sup> These clauses typically specify that a treaty ‘is subject to,’ or that ‘it is not to be considered as incompatible with, an earlier or later treaty,’ or that ‘the provisions of that other treaty prevail’. The report nevertheless, recognizes the limits to such clauses, which oftentimes merely ‘push’ the resolution of problems to the future.<sup>30</sup>

On treaty interpretation, the ILC points to rules in the Vienna Convention on the Law of Treaties (VCLT)<sup>31</sup> as the ‘tool-box’ for dealing with fragmentation.<sup>32</sup> The VCLT codifies treaty interpretation rules that are commonly regarded as an embodiment of customary international law.<sup>33</sup> Whilst recognising that VCLT rules give insufficient recognition to special types of treaties and rules concerning their interpretation and implementation, the ILC points to the continued relevance of these rules to dealing with conflict of norms.<sup>34</sup>

In particular, the report underscores the role of systemic integration as an aid to deal specifically with policy conflicts.<sup>35</sup> Systemic integration suggests that when creating new obligations, states are assumed not to derogate from existing ones, as embodied in any rules of international law that are both ‘relevant’ and ‘applicable’ in the relations between the Parties.’<sup>36</sup> The rationale behind this interpretation tenet is quite simple: rights and obligations established by treaty provisions exist alongside rights and obligations enshrined in other treaties. As none of these rights or obligations has any intrinsic priority against the others, the ILC suggests that their relationship be approached through a process of reasoning that ‘makes them appear as parts of some

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<sup>29</sup> ILC *supra* note 16, at 278-281.

<sup>30</sup> ILC *supra* note 16, at 276.

<sup>31</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 8 International Legal Materials, 679 (entered into force: 27 January 1980) (hereinafter the ‘VCLT’).

<sup>32</sup> ILC, *supra* note 16, at 250.

<sup>33</sup> Cf. e.g. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, at 41; *Kasikilil/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, at 18; *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, at 99.

<sup>34</sup> ILC *supra* note 16, at 251.

<sup>35</sup> ILC, *supra* note 16, at 410-480.

<sup>36</sup> VCLT, Article 31.3(c).

coherent and meaningful whole.’<sup>37</sup> Such systemic thinking is arguably part of the very essence of legal reasoning, and perhaps the only possible solution to the ‘clustered’ nature in which legal rules and principles appear.<sup>38</sup>

In times of increasing fragmentation of the international legal order, systemic integration has unsurprisingly been the subject of much scholarly attention.<sup>39</sup> Some scholars have cautioned against the dangers of conflating treaty ‘interpretation’ with treaty ‘modification’,<sup>40</sup> pointing out that the presumption of coherence is to be ‘handled with care’ and assessed on a ‘case by case basis,’ as states may indeed have adopted the new instrument with the specific purpose to do away with their extant international commitments.<sup>41</sup> Admittedly, systemic integration may only resolve ‘apparent’ conflicts, and not instances of actual incompatibility.<sup>42</sup> Systemic integration therefore tends to operate before an irreconcilable conflict of norms has arisen, and provides a tool to engender coherence in international law,<sup>43</sup> by urging the interpretation of state obligations in as much as possible in an integrated fashion.

Finally, the ILC report sets aside the question of institutional interaction, expressing the conviction that ‘the issue of institutional competencies is best dealt with by the

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<sup>37</sup> ILC, *supra* note 16, at 414.

<sup>38</sup> *Ibid.*, at 35.

<sup>39</sup> For example, McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ 54 *International and Comparative Law Quarterly* (2005) 279; Klabbbers, ‘Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’ in M.C.R. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law* (2007); Linderfalk, ‘Who Are “The Parties”? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the “Principle of Systemic Integration” Revisited’ 55 *Netherlands International Law Review* (2008) 343; Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the “WTO-and-Competing-Regimes” Debate?’ 21 *European Journal of International Law* (2010) 649; Samson, ‘High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties’ 24 *Leiden Journal of International Law* (2011) 701.

<sup>40</sup> Simma and Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’ in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), at 692-4. The same view is expressed in R.K. Gardiner, *Treaty Interpretation* (2008), at 266.

<sup>41</sup> Simma, ‘Foreign Investment Arbitration: A Place for Human Rights’ 60 *International and Comparative Law Quarterly* (2011) 573.

<sup>42</sup> ILC, *supra* note 16, at 42.

<sup>43</sup> McLachlan, *supra* note 39, at 318. Similarly, B. Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (2008), at 248.



institutions themselves'.<sup>44</sup> This matter has nevertheless subsequently been addressed in a literature strand that builds upon international relations theories on interplay management.<sup>45</sup> One of the most important studies on the issue distinguishes between various levels of coordination and institutionalisation, ranging from the macro-level, where the interplay between regimes is managed by an overarching institution, to the micro-level, where interplay management is left to the autonomous efforts of national governments.<sup>46</sup>

The next section considers how the techniques suggested in the ILC report and in the literature may be used to make sense of the interplay between climate change and human rights instruments.

### **3 Addressing conflicts between the climate change and the human rights regime**

By virtue of its subject matter, the climate regime is particularly likely to overlap with other international regimes, and, as such, it is particularly prone to policy conflicts.<sup>47</sup> This is especially the case in relation to human rights law. So whereas in principle there is no incompatibility between these two sets of international norms, in practice policy conflicts between the two have emerged. This section considers how tools to manage the fragmentation of international law have been deployed and may be deployed in future as an aid to address the interplay between the human rights and the climate change regimes. The role of conflict avoidance techniques, such as conflict

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<sup>44</sup> ILC, *supra* note 16, at 13

<sup>45</sup> See for example S. Oberthür and O.S. Stokke, *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (2011); Young, *supra* note 27; and van Asselt, *supra* note 27.

<sup>46</sup> Oberthür, 'Interplay Management: Enhancing Environmental Policy Integration Among International Institutions' 9 *International Environmental Agreements: Politics, Law and Economics* (2009) 371, at 375-6.

<sup>47</sup> On the issue, see for example van Asselt, Sindico and Mehling, 'Global Climate Change and the Fragmentation of International Law' 30 *Law & Policy* (2008) 423, at 424; Carlarne, 'Good Climate Governance: Only a Fragmented System of International Law Away?' 30 *Law & Policy* (2008) 450, at 450; Haines and Reichman, 'The Problem That Is Global Warming: Introduction' 30 *Law & Policy* (2008) 385-393, at 385; and McNeely, 'Applying the Diversity of International Conventions to Address the Challenges of Climate Change' 17 *Michigan State University College of Law Journal of International Law* (2008) 123.

clauses and systemic integration, is considered first, to then look at institutional cooperation as a means to better integrate human rights concerns into climate change action.

### *3.1 Conflict clauses*

Neither the UNFCCC nor the Kyoto Protocol includes a conflict clause. Nevertheless, the Cancún Agreements say that Parties ‘should, in all climate change related actions, fully respect human rights.’<sup>48</sup> Because of its hortatory tone, and the fact that it was included in a COP decision, rather than in treaty text, the all-embracing reference to human rights in the Cancún Agreements was not particularly contentious.

Conversely, the inclusion of a textual reference to human rights in the Paris Agreement was hotly debated.<sup>49</sup> On the one hand, some Parties supported the inclusion in the Paris Agreement of a blanket reference to human rights - e.g. ‘All Parties (...) shall ensure respect for human rights and gender equality in the implementation of the provisions of this Agreement’.<sup>50</sup> On the other, some Parties expressed reservations, based on the fact that not all states have ratified international or regional human rights treaties.<sup>51</sup>

The possibility to address this tension by means of a conflict clause was put forward in a report by the International Law Association (ILA), which suggests the following formulation: ‘states shall formulate, elaborate and implement international law relating to climate change in a mutually supportive manner with other relevant

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<sup>48</sup> 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, at 8.

<sup>49</sup> For an overview of references to human rights in the Paris Agreement negotiating text, see: Annalisa Savaresi and Jacques Hartmann, ‘Human Rights in the 2015 Agreement’ (Legal Response Initiative 2015), available at: [http://legalresponseinitiative.org/wp-content/uploads/2015/05/LRI\\_human-rights\\_2015-Agreement.pdf](http://legalresponseinitiative.org/wp-content/uploads/2015/05/LRI_human-rights_2015-Agreement.pdf).

<sup>50</sup> UNFCCC, Negotiating Text, 12 February 2015, available at: [https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf), at 12bis.

<sup>51</sup> Human Rights Watch, *supra* note 12.

international law.’<sup>52</sup> Such a conflict clause formulation would not create new obligations for states that are not Parties to human rights treaties already. Instead, it would merely underscore states’ existing obligations in relation, *inter alia*, to human rights, signalling to Parties that these too should be taken into account when implementing the Paris Agreement. The importance of this interpretative guidance would be limited, but not insignificant. As by its own nature the climate regime is prone to policy conflicts with other international instruments, reminding states of the need to align also with these when implementing climate treaties seems important. Not only would a conflict clause have the effect to emphasise that Parties should take their existing human rights commitments into account when they implement the Paris Agreement. It would also provide an important signal for institutions within and without the climate regime on the need to consider human rights in their guidance and standards concerning climate change response measures.

No conflict clause was eventually included in the Paris Agreement, or even made it in the negotiating text. Nevertheless, the Paris Agreement’s preamble points to Parties’ ‘respective human rights obligations’. This reference draws attention to Parties’ obligations under treaties they have ratified already, or may ratify in future, rather than foreshadowing new ones. Even with this limited remit, this preambular reference is not devoid of legal consequence. Preambular text carries political and moral weight. By forging an explicit link with human rights instruments, the Paris Agreement’s preamble engenders an expectation that Parties will take into account their existing human rights obligations concerning matters such as, for example, public participation, or the rights of women and indigenous peoples when they adopt climate change response measures. So in spite of its limited legal force and the lack of a conflict clause, the reference to human rights in the Paris Agreement is in many connections groundbreaking. This is especially so in relation to the interpretation of Parties’ obligations under the new treaty. The next section looks at this issue in detail.

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<sup>52</sup> International Law Association, *Legal Principles Relating to Climate Change*, (2014), available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1029>, Draft Article 10.1. Draft Article 10.3(b) included a specific textual suggestion on human rights, according to which: ‘States and competent international organizations shall respect international human rights when developing and implementing policies and actions at international, national, and subnational levels regarding climate change’.

### 3.2 Treaty interpretation and systemic integration

The ILC report points out the fact that conflict resolution maxims, such as *lex specialis derogat generali*, have clear limitations in addressing policy conflicts such as those engendered by overlaps between the climate and human rights regimes.<sup>53</sup> Identifying what is to be regarded as *lex specialis*, for example, may be difficult with regimes that tend to be all encompassing in scope.<sup>54</sup> Similarly, the *lex posterior* rule is of limited utility, when dealing with ‘living instruments’ that are constantly kept under review by their treaty bodies, such as those on climate change.<sup>55</sup> As a result, the ILC rather suggests relying upon systemic integration to deal with policy conflicts. Consequently, state obligations under climate treaties should be interpreted in a way that is mutually supportive, rather than conflicting with, obligations under other treaties, including human rights ones.

In the lead up to the adoption of the Paris Agreement, a string of HRC resolutions drew attention to potential conflicts, overlaps and synergies between the climate change and human rights regimes.<sup>56</sup> These decisions underscore the need for policy coherence, thus implicitly making reference to systemic integration in the interpretation of states’ obligations concerning human rights and climate change. Most saliently in 2014 the (then) Independent Expert on Human Rights and the Environment issued a report on the human rights threatened by climate change and the human rights obligations relating to climate change.<sup>57</sup> This report was the first comprehensive effort to systematically map the human rights affected by climate

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<sup>53</sup> ILC, *supra* note 16, at 22.

<sup>54</sup> As argued also in Wolfrum and Matz, *supra* note 25, at 170-173; Chambers, *supra* note 42, at 50-60; and van Asselt ‘Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes’ 44 New York University Journal of International Law and Politics (2012) 1205, at 1250-1252.

<sup>55</sup> As argued also in Pauwelyn, *Conflict of Norms in Public International Law*, *supra* note 20, at 378; and van Asselt, *supra* note 54, at 1250-1252.

<sup>56</sup> *Supra* note 7 and corresponding text.

<sup>57</sup> Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change, June 2014, available at: <http://srenvironment.org/mapping-report-2014-2/>

change, as well as relevant guidance adopted by human rights bodies, thus providing an important *vademecum* for systemic integration.

The Paris Agreement's preambular reference may be read as an invitation to practice systemic integration in the interpretation of Parties' obligations, at least insofar as human rights are concerned. Well ahead of the adoption of the Paris Agreement, such an approach has already been experimented with in some areas of the climate regime, where potential conflicts with human rights obligations are particularly evident. As other contributions in this volume show,<sup>58</sup> matters like REDD+<sup>59</sup> and climate finance<sup>60</sup> have already confronted states and international agencies with challenging questions over the interplay between climate change and human rights law. COP decisions on REDD+ already make reference to systemic integration.<sup>61</sup> The need to ensure compatibility with human rights has instead been specifically emphasised by one of the international agencies facilitating REDD+, which has adopted a human-rights-based approach to its work,<sup>62</sup> including specific free prior consent guidelines elaborated in partnership with human rights bodies.<sup>63</sup> Equally, standards adopted by some climate finance institutions specifically refer to human rights.<sup>64</sup> In both

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<sup>58</sup> Crossreference to Delgado's chapter.

<sup>59</sup> As argued for example in Savaresi, 'The Human Rights Dimension of REDD' 21 *Review of European Comparative & International Environmental Law* (2012) 102; Savaresi, 'REDD+ and Human Rights: Addressing Synergies between International Regimes' 18 *Ecology and Society* (2013) 5; Savaresi, 'The Role of REDD in Harmonising Overlapping International Obligations' in E. Hollo, K. Kulovesi and M. Mehling (eds), *Climate Change and the Law. A Global Perspective* (2013).

<sup>60</sup> As argued for example in Johl and Lador, 'A Human-Rights Based Approach to Climate Finance' (Friederich Ebert Stiftung 2012), available at: <http://library.fes.de/pdf-files/iez/global/08933.pdf>; and D. S. Olawi, *The Human Rights-Based Approach to Carbon Finance* (2016).

<sup>61</sup> Decision 1/CP.16, *supra* note 48, Appendix I, at 2 (a), where specific reference is made to the fact that REDD+ actions 'complement or are consistent with the objectives of national forest programmes and relevant international Conventions and agreements'.

<sup>62</sup> See e.g. UN-REDD Programme Social and Environmental Principles and Criteria (2012), at 2.

<sup>63</sup> UN-REDD Programme, Guidelines on Free, Prior and Informed Consent (2012), available at: [http://www.un-redd.org/Launch\\_of\\_FPIC\\_Guidelines/tabid/105976/Default.aspx](http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx); and UN-REDD Programme, Legal Companion to the UN-REDD Programme Guidelines on FPIC (2012), available at: [http://www.unredd.net/index.php?view=document&alias=8792-legal-companion-to-the-un-redd-programme-guidelines-on-fpic-8792&category\\_slug=legal-companion-to-fpic-guidelines-2655&layout=default&option=com\\_docman&Itemid=134](http://www.unredd.net/index.php?view=document&alias=8792-legal-companion-to-the-un-redd-programme-guidelines-on-fpic-8792&category_slug=legal-companion-to-fpic-guidelines-2655&layout=default&option=com_docman&Itemid=134).

<sup>64</sup> See e.g. Adaptation Fund Environmental and Social Policy (2013), at 15: 'Projects/programmes supported by the Fund shall respect and where applicable promote international human rights'. GCF Environmental and Social Safeguards explicitly mention ensuring full respect of the human rights of indigenous peoples, and their FPIC, at least in certain circumstances. Compare: GCF, Guiding framework and procedures for accrediting national, regional and international implementing entities and intermediaries, including the fund's fiduciary principles and standards and environmental and social safeguards, GCF/B.07/02, 7 May 2014, at 1.7.

connections, therefore, while not all countries seeking climate/REDD+ finance may have ratified human rights treaties, human rights protection has been elected as one of the criteria they should satisfy to obtain such finance.<sup>65</sup>

Experience accrued thus far with REDD+ and climate finance standards is an important term of reference to understand how obligations under the Paris Agreement may be interpreted in light of human rights law and practice, as well as challenges that can emerge in this process. This experience is likely to be particularly useful in relation to inter-state collaboration through the so-called Sustainable Development Mechanism (SDM).<sup>66</sup> In this connection, the Special Rapporteur on human rights and the environment has already drawn attention to the need to ensure that the latter mechanism incorporates strong social safeguards that accord with international human rights obligations.<sup>67</sup> Institutional cooperation could be an important means to streamline human rights considerations into such safeguards. This section looks at this matter next.

### *3.3 Institutional cooperation*

Ensuring that obligations under the climate regime are interpreted and implemented in line with states' human rights obligations has long been left to the autonomous efforts of national decision-makers and single institutions, in what Sebastian Oberthür has aptly described as 'autonomous' or 'unilateral interplay management'<sup>68</sup> - as opposed to forms of interplay management, where such coordination endeavours are carried out by a set of institutions together, or by an overarching international institution. The risk that autonomous or unilateral interplay management ends in incoherence is palpable when one considers that standards concerning e.g. climate finance already differ greatly.

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<sup>65</sup> These examples are further discussed in: Savaresi, 'The Legal Status and Role of Safeguards' in C. Voigt (ed.), *Research Handbook on REDD+ and International Law* (2016).

<sup>66</sup> Paris Agreement, Article 6.4.

<sup>67</sup> Letter from the Special Rapporteur on human rights and the environment to climate negotiators, 4 May 2016, available at: <http://srenvironment.org/wp-content/uploads/2016/06/Letter-to-SBSTA-UNFCCC-final.pdf>.

<sup>68</sup> Oberthür, *supra* note 45, at 376.

In the lead up to the adoption of the Paris Agreement, human rights bodies became increasingly proactive in their efforts to engage with legal developments in the climate regime. HRC resolutions set the premises for increased institutional cooperation, by encouraging the Office of the High Commissioner on Human Rights (OHCHR) and of the HRC Special Procedures mandate-holders to engage with the climate regime. Ensuing initiatives include the Special Procedures Mandate-holders' open letter to climate negotiators issued in lead up to the adoption of the Paris Agreement,<sup>69</sup> as well as OHCHR's submissions on various matters under considerations at climate negotiations, such as gender, adaption, and the SDM,<sup>70</sup> as well as the recent elaboration of expert recommendations on climate change and human rights.<sup>71</sup> Especially notable in this context are the activities undertaken by the Special Rapporteur on human rights and the environment, who through his reports, statements and letters has made remarkable efforts to engage with the making of climate change law and to provide recommendations on how to better factor in human rights in climate change law and policy.<sup>72</sup>

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<sup>69</sup> Open Letter from Special Procedures Mandate-holders, *supra* note 9.

<sup>70</sup> See: OHCHR response to UNFCCC Secretariat request for submissions on the Nairobi Work Programme: impacts, vulnerability and adaptation to climate change: Health impacts, including occupational health, safety and social protection, FCCC/SBSTA/2016/2, para 15(a)(i), 2016; OHCHR response to the UNFCCC Secretariat request for submissions on the Lima Work Programme on Gender: Views on possible elements and guiding principles for continuing and enhancing the work programme (SBI), FCCC/SBI/2016/L.16, paragraph 5, 2016; OHCHR response to the UNFCCC Secretariat request for submissions on the Paris committee on Capacity-Building: Views on the annual focus area or theme for the Paris Committee on Capacity-Building for 2017 (SBI), FCCC/SBI/2016/L.24, 2016; OHCHR response to UNFCCC Secretariat request for submissions on the Paris Agreement (APA): Views and guidance related to intended nationally determined contributions, adaption communications, the transparency framework, and the global stocktake, and for information, views and proposals on any work of the APA, FCCC/APA/2016/2, 2016; and OHCHR response to UNFCCC Secretariat request for submissions on the future UNFCCC Sustainable Development Mechanism: Regarding the rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement, FCCC /SBSTA/2016/2, para. 100, 2016. All submissions are available at: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx>

<sup>71</sup> The OHCHR hosted an expert meeting on climate change and human rights on 6 - 7 October 2016 in Geneva. The Draft Recommendations elaborated at the meeting are available at: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/ClimateChange.aspx>

<sup>72</sup> Most notably: Report of the Special Rapporteur on human rights and the environment, *supra* note; and Letter from the Special Rapporteur on human rights and the environment to climate negotiators, *supra* note 67. The OHCHR has also been mandated to organise an expert meeting providing guidance on the same issue: Expert Meeting on Climate Change and Human Rights 6-7 October 2016, Draft Recommendations available at: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/ClimateChange.aspx>.

Arguably, the very inclusion of a reference to human rights in the Paris Agreement is the result of advocacy by key epistemic actors, such as the Special Rapporteur on human rights and the environment, and former United Nations High Commissioner for Human Rights Mary Robinson. Aside from this milestone achievement, however, it is hard to say how receptive the climate regime has been to human rights bodies' progressive institutional cooperation efforts. Historically UNFCCC Parties have been reluctant to establish inter-institutional linkages. Even when they have done so, as, for example in the context of the Joint Liaison Group to enhance coordination between the UNFCCC, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification, very limited results have been obtained, based on the argument that the Rio Conventions have a 'distinct legal character, mandate and membership'.<sup>73</sup> Institutional cooperation with human rights bodies could be trickier, as treaty membership is more heterogeneous than that of the Rio Conventions. Yet again, the inclusion of a reference to human rights in the Paris Agreement may be a game-changer in this connection.

The HRC Special Procedures mandate-holders have, for example, invited UNFCCC Parties to launch a work program to ensure that human rights are integrated into all aspects of climate actions.<sup>74</sup> The creation of a work program would constitute an institutional space for Parties to consider whether and how to better integrate human rights in the climate regime. The work program could also become a forum for Parties to exchange information on experience with integrating human rights into climate action and share good practices. Finally, a work program could discuss institutional linkages between climate change bodies and international and regional bodies with a specific mandate on the protection of human rights. For example, Parties could entrust the UNFCCC Secretariat to collaborate with the OHCHR to integrate human rights consideration into climate action. Moving forward, a dedicated grievance mechanism for those complaining for human rights violations specifically associated with the implementation of climate change response measures could be established, such as a

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<sup>73</sup> See for example the position by the US in Views on the Paper on Options for Enhanced Cooperation Among the Three Rio Conventions, Submissions from Parties, UN Doc. FCCC/SBSTA/2006/MISC.4, 23 March 2006, at 16. The same point was made by Australia, *ibid.*, at 5.

<sup>74</sup> Open Letter from Special Procedures Mandate-holders, *supra* note 9.



Special Rapporteur on climate change and human rights.<sup>75</sup> Alternatively, human rights considerations may be specifically factored into the mandate of existing grievance mechanisms, such as, for example, the Independent Redress Mechanism established under the Green Climate Fund.

Inter-institutional cooperation could furthermore galvanise the use of extant human rights bodies as means to seek redress for human rights breaches associated with the implementation of climate change measures and/or impacts. There are already precedents of this happening in practice,<sup>76</sup> and more may be in the pipeline, due to imaginative climate change litigations strategies emerging around the globe.<sup>77</sup> The UN Universal Periodic Review (UPR) could be tasked to specifically highlight human rights concerns associated with climate change,<sup>78</sup> and thus become a means to see how UNFCCC Parties address human rights concerns associated with climate change and a way to disseminate best practices. A dedicated institution to support the consideration of human rights issues could also be established under the climate regime. This institution could be entrusted with the task to promote the sharing between Parties of information and of good practices on the integration of human rights in climate action. To support this task, Parties could be required to report efforts to integrate human rights into climate actions and policies in their national communications, or as part of their reporting obligations under human rights instruments.

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<sup>75</sup> Cf. the petition launched by Environmental Justice Foundation, available at: [http://ejfoundation.org/petition/special\\_rapporteur](http://ejfoundation.org/petition/special_rapporteur)

<sup>76</sup> For an example of how the UN Convention on the Elimination of All Forms of Racial Discrimination has been applied in connection with REDD+ in Indonesia, see Savaresi, *supra* note 59; and Johnstone, 'Indonesia in the "REDD": Climate Change, Indigenous Peoples and Global Legal Pluralism' 12 *Asian-Pacific Law & Policy Journal* (2011) 93.

<sup>77</sup> As suggested e.g. in Chia, Mueller and Warland, 'Roundtable Summary - Human Rights & Climate Change: Connecting the Dots' (UNICEF UK and UCL Global Governance Institute 2016), available at: <https://www.ucl.ac.uk/global-governance/ggi-publications/john-knox-climatechange-publication>.

<sup>78</sup> This suggestion has been made in e.g. International Bar Association, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014), available at: <http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

#### 4 Conclusion: where next?

As other chapters in this volume show, the interplay between human rights and climate change law is far from unproblematic.<sup>79</sup> As not all Parties to the climate regime have ratified human rights treaties, adherence to Paris Agreement cannot be a means to impose upon states obligations enshrined in treaties they have not ratified. Furthermore, even for those states that do have human rights obligations, the conventional interpretation of the jurisdictional limitations of these obligations presently undermines arguments concerning the protection of human rights beyond state territorial boundaries. States' margin of appreciation in implementing their obligations under both climate and human rights treaties is a considerable obstacle. Finally, thus far fundamental limitations in the climate regime have constrained synergies between human rights and climate change law, due to the primacy accorded to economic concerns and development in climate politics; the construction of climate change as a technocratic and scientific policy problem, rather than a human-centered one; and differences between mechanisms to assess compliance with climate obligations versus those used in the human rights regime.

Even bearing these complexities in mind, states' human rights obligations in relation both to the impacts of climate change and response measures have pervasive legal ramifications. With the adoption of the Paris Agreement, these ramifications have been put in the spotlight. The agreement is potentially a game changer, opening up new avenues to improve coordination and address synergies between distinct international legal regimes. This chapter has shown that techniques devised to address the fragmentation of international law have already been deployed in this connection. Whilst not a conflict clause, the Paris Agreement's reference to human rights draws attention to systemic integration, at least for those Parties that have ratified human rights treaties already. Human rights bodies have underscored the potential for systemic integration, and there is evidence that, at least in some cases, institutions in the climate regime have attempted to address human rights considerations in the standards they adopted. At the institutional level, human rights bodies have

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<sup>79</sup> Cross-reference to Jodain's chapter.

increasingly engaged with the making of international climate change law, from the drafting of the Paris Agreement to the nitty-gritty decision-making of climate treaty bodies.

Moving ahead, much more could be done to address the limitations of the climate regime: institutional cooperation could be systematised, and become instrumental to the streamlining of human rights considerations into the climate regime. Human rights bodies may even provide institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures. The Paris Agreement could thus become the foundation for unprecedented cross-fertilisation between international human rights and environmental law. Indeed, when an issue has over-arching implications for a range of different international regimes, it seems wise to emphasise and vigorously explore avenues for coordination.<sup>80</sup> How far states will be willing to go down this route., however, largely remains to be seen.

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<sup>80</sup> As suggested also in Boyle, 'Climate Change and International Law – A Post-Kyoto Perspective' 42 *Environmental Policy and Law* (2012) 333, at 342.