



**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES**  
**POLICY DEPARTMENT**

# **HUMAN RIGHTS AND CLIMATE CHANGE: EU POLICY OPTIONS**

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**HUMAN RIGHTS AND CLIMATE CHANGE: EU POLICY OPTIONS**





DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

**DIRECTORATE B**

POLICY DEPARTMENT

**STUDY**

## **HUMAN RIGHTS AND CLIMATE CHANGE: EU POLICY OPTIONS**

### **Abstract**

Our study provides a survey of the state of the relationships currently established between human rights and climate change. It examines the external diplomacy of the European Union in the fields of human rights and climate change. The relationship between these two fields is addressed from two different perspectives: the integration of the climate change topic within EU human rights diplomacy; and the inclusion of human rights concerns within EU climate change diplomacy. We analyse its effectiveness, efficiency and the interrelationships with the EU's external development policy by showing, where appropriate, their coordination, coherence and mutual support. In this respect, special emphasis is put on migration issues. Our study then turns the analysis towards internal EU climate change policies, which are explored from the perspective of human rights. We assess the compatibility of European Union mitigation policies with human rights and the gradual integration of the EU adaptation framework within other key European Union policies. Finally, this work concludes with a clarification of how the environmental human right to public information and participation in decision-making, which is transversal by nature, appears and may evolve in both EU internal and external climate policy.

This study was requested by the European Parliament's Subcommittee on Human Rights.

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ACHPR	African Commission Human & Peoples' Rights
ACP	African, Caribbean and Pacific Group of States
AOSIS	Alliance of Small Island States
AWG-LCA	Ad hoc Working Group on Long-term Cooperative Action under the Convention
CBDR	Common But Differentiated Responsibilities
CCS	Carbon Capture and Storage
CDDH	Steering Committee for Human Rights
CDM	Clean Development Mechanism
CoE	Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDE	Conseil Européen du Droit de l'Environnement
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CIEL	Center for International Environmental Law
CO2	Carbon Dioxide
COP	Conference of the Parties
COP16	16th Conference of the Parties to the UN Framework Convention on Climate Change
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRS	Creditor Reporting System
CSDN	Civil Society Dialogue Network
DAC	Development Assistance Committee
DEVCO	Development and Cooperation
DG CLIMA	Directorate-General Climate Action
DG DEVCO	Directorate-General EuropeAid Development & Cooperation
DG ECHO	Directorate-General Humanitarian Aid
DG ENER	Directorate-General Energy
DG ENV	Directorate-General Environment
DG HOME	Directorate-General Home Affairs
DG	Directorate-General
DPI-NGO	Department of Public Information Non-Governmental Organization
EC	European Commission
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECSR	European Committee of Social Rights
ECtHR	European Court on Human Rights
EEA	European Environment Agency
EEAS	European External Action Service
EESC	European Economic and Social Committee
EIDHR	European Instrument for Democracy and Human Rights
ENVSEC	Environment and Security Initiative
EP	European Parliament
ESC	European Social Charter
ESS	European Security Strategy
EU	European Union

EU ETS	European Union Emissions Trading Scheme
FRA	Fundamental Rights Agency
GA	Global Approach
GAERC	General Affairs and External Relations Council
GAMM	Global Approach to Migration and Mobility
GCCA	Global Climate Change Alliance
GDP	Gross Domestic Product
GEF-NGO	Global Environment Facility for Non Governmental Organization
GHG	Greenhouse Gas
GNI	Gross National Income
GSP	Generalised System of Preferences
GT-DEV-ENV	Working Group on Environment of the Committee of Experts for the Development of HR
HCR	Human Rights Committee
HLWG	High Level Working Group
HR	Human Rights
HR & CC	Human Rights and Climate Change
HRBA	Human Rights Based Approach
HRC	Human Rights Council
HRIA	Human Rights Impact Assessment
IACHR	Inter-American Commission on Human Rights
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICT	Information and Communication Technology
IDP	Internally displaced persons
IFIPCC	International Forum of Indigenous Peoples and Climate Change
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
JHA	Justice and Home Affairs
JI	Joint Implementation
MDG	Millennium Development Goals
MRV	Monitoring, Reporting, and Verifying
MS	Member States
NATO	North Atlantic Treaty Organization
NCP	National Contact Points
NGLS	The United Nations Non-Governmental Liaison Service
NGO	Non-governmental organization
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights



OMC	Open Method of Coordination
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PDD	Project Design Document
RBA	Rights-Based Approaches
REDD	Reducing emissions from deforestation and forest degradation
RELEX	DG for External Relations
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN-AGF	United Nations Advisory Group on Climate Change Financing
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UN-OHCHR	United Nations Office of the High Commissioner for Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNSC	United Nations Security Council
US EPA	United States Environmental Protection Agency
WHO	World Health Organization
WWF	World Wide Fund for Nature

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## EXECUTIVE SUMMARY

Although science has provided many early warnings about the consequences of climate change on human well-being and is becoming increasingly precise regarding its impacts, particularly on the most vulnerable populations, policies have not yet actually addressed the question of links between climate change and human rights. The role played by the European Union in both of these fields of its internal and external competence, puts it in a rather unique position. In its forthcoming report and resolution on the relationship between human rights and climate change already planned, the European Parliament (EP) should first focus on:

- **The establishment of the link between human rights and climate change:** The EP could, in the very short-term, undertake to adopt a specific resolution on human rights and climate change, as has already been done by the Organization of American States (OAS) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), thereby politically registering the relevance of this relationship and thus encouraging its promotion. The European Union could reinforce and develop a new approach to “Human rights impact assessment” (HRIA). Given the complexity of the set of themes, the European Union should develop a specific methodology. In its assessment, it should take into account the effects on human rights in the short, medium and long-terms, in accordance with the intergenerational dimension of human rights with respect to the environment.
- **The diplomatic action of the European Union:** Confronted with the challenges posed by climate change, the European Union has a primary role to play in international negotiations. While the European Union has demonstrated its involvement and commitment to the fight against greenhouse gas (GHG) emissions, it can reiterate this leadership by integrating the human rights dimension into its external climatic policy. Several challenges must be met at the institutional and diplomatic level so that the voice of a united Europe is clearly heard and understood, both inside and outside of the United Nations forums. The development of a European Union external human rights diplomacy coincides with the progressive inclusion in its objectives of various contemporary concerns, among which climate change issues seem to cover an increasingly large scale. However, the “original” European Union legal framework still offers an adaptable and useful basis for specific actions that are not concentrated into a single external or internal policy area, but which require a more holistic approach, which is considered more pertinent for such transversal issues. An increasing role for institutional European Union actors, as well as the development of both “traditional” and new normative “tools”, make this new aspect of European Union diplomacy as flexible as necessary to respond to these rather new concerns. Finally, taking into consideration the interaction with other international organisations operating in the same field, this paper describes the new challenges and perspectives, and suggests strategies and methods to highlight human rights problems in the framework of a new global European Union leadership on climate change issues.
- **The establishment of an accountability mechanism within European Union foreign aid policy:** Similarly to development banks such as the World Bank and its Inspection Panel, the European Union should consider setting up an accountability mechanism to check that its funds are not used for projects that harm the environment or human rights and to allow project-affected people to access a specific complaint and/or ombudsman forum. In doing so, the European Union would be acknowledging that respect for the environment and human right is essential to sustainable development. Also, the progressive consideration of environmental and human rights implications when making its lending decisions could help improve aid efficiency.

The European Union should commission a study to explore the rationale and design of such a mechanism.

- **The institutional restructuring for addressing climate migration:** Climate migration is by definition an international issue, and in particular one that is oriented towards third countries. While the Directorate-General Home Affairs (DG HOME) sector continues to react to the requirements of interior ministers from Member States (MS), internal considerations remain its dominant rationale. In this sense, DG HOME does not appear as the most relevant institution for tackling this issue. Giving a clear mandate, if not a lead role, to the development sector could strengthen policy making in this field.
- **The distributional consequences of mitigation policies:** Mitigation policies imply distributional consequences and may generate negative human rights impacts, which can disproportionately affect certain social groups within and outside the European Union. More care should be taken in matters of environmental justice to address discrimination in the sharing of mitigation benefits, risks and costs. The European Union could achieve this through the integration of human rights criteria into the impact assessment of mitigation policies and by using the revenue from auctions, by selecting Joint Implementation (JI)/Clean Development Mechanism (CDM) credits admitted within the European Union Emissions Trading Scheme (European Union ETS), by taking due account of the right to property when amending mitigation legislation, and by favouring a better access to courts for private individuals.
- **The integration of human rights into adaptation policies:** The mainstreaming of human rights into European Union adaptation policies follows on from the application of binding human rights instruments, such as the Charter of Fundamental Rights of the European Union (CFREU) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), but also the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), according to which the European Union shall ensure consistency between all of its policies and activities, and take all of its objectives into account. At present, some structural and substantial barriers are, however, hampering the effective integration of human rights into the definition and implementation of European Union policies. This study makes concrete proposals for the enhanced integration of human rights into adaptation policies.
- **The environmental democracy and human rights:** The implementation of the principle of participation in the fight against climate change requires the establishment in each MS of interconnected structures that allow full support of the public concerned, from the development stage until the implementation of decisions, and with sufficient resources to systematically forward all collected information to the European Union. In parallel, it would be appropriate to create an independent commission to verify the implementation of national and European legislation and, correspondingly, the principle of participation.

## INTRODUCTION

The fourth report of the Intergovernmental Panel on Climate Change (IPCC) has shown the impacts that climate change has on populations and how it can seriously affect the fundamental human rights of present and future generations. It systematizes several climate change phenomena and processes that will affect human society. Thus, events such as current sea level rise, an increasing frequency and severity of flooding and extreme weather events (hurricanes, storms), melting permafrost, changes in precipitation patterns and the increasing salinization of fresh water resources will change the lives of people, their means of production for food and goods, particularly in coastal areas with high population densities. Conflicts induced by constraints on natural resources and human displacements have already been predicted. Indeed, global warming will affect the health of populations and the basic elements of life for people around the world. The fifth report of the IPCC, which is now in preparation, evokes an even clearer picture of the impacts of climate change on human livelihoods and living conditions. Moreover, a range of adopted measures to fight climate change also questions the role that has to be given to human rights in framing policies for the most vulnerable. Thus, there has been an increasing call for the inclusion of human rights in mitigation and adaptation policies.

Although science has linked climate change impacts to human vulnerabilities, the issue of defending the rights of populations in this context has only recently started receiving attention from the international community. Since the late 2000s, scholars, think tanks, non-governmental organizations (NGOs) and other stakeholders have been discussing the relationship between human rights and climate change policies. Their work has highlighted the weaknesses of human rights to tackle climate change related issues: the inefficiency of the responsibility regime with a complexity of attribution, the non-effectiveness of second-generation human rights and the contradictions between certain imperatives for human rights and a number of climate change policy priorities.

In this context, it is necessary to question the role of the European Union and to have a better understanding of its domestic and external policies. Indeed, the European Union has played a leading role in the fight against climate change. Since the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, it has continually called for ambitious goals and pushed for the adoption of the Kyoto Protocol. Despite the rejection of this treaty by the United States, the European Union had implemented it even before it entered into force, demonstrating a leading by example type of diplomacy. A dynamic that we can consider as ongoing in the current negotiations. The European Union human rights policy can be viewed in much the same light, and possibly even more so in the context of the entry into force of the Lisbon Treaty which gives a binding character to the CFREU, implies the ratification by the European Union of ECHR and favours an increasing role of the European Union on the international scene. Thus, the focus of European Union options regarding climate change and human rights corresponds to an internal requirement that may have external influences. This research aims to address both aspects, individually and together.

The first part of our study gives an overview of the link between human rights and climate change within the work of academic research, international organisations (IO) and NGOs (1). The second part of our report considers the European Union's level of commitment to human rights in recent discussions at the UN (particularly on the climate justice debate) and highlighting climate change issues within the framework of the European Union's external human rights policy (2). The third part of our research demonstrates how the European Union can enhance the integration of human rights into its development aid and climate change-induced migration policies (3). Then, we outline the plans of European Union institutions to address climate change from the perspective of human rights consequences, and the possible entry points for the European Union to integrate human rights concerns into its climate change mitigation and adaptation policy (4). Finally, we focus on the

overlapping principles of public information and of participation in the decision-making processes of the European Union's climate change policies (5).

## CHAPTER 1 OVERVIEW OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

### 1. AN EMERGING RELATIONSHIP

#### 1.1 Origin and context of the relationship

While the relationship between human rights and climate change became clear during the 2000s, it has at the same time been part of an older and more general approach concerning a broad awareness of environmental damage and its consequences on human rights. Few international or regional instruments deal directly with "human rights and the environment". It must be remembered that after World War II, the international texts on human rights dealt primarily with individual, civil and political rights; these first-generation texts aimed particularly at protecting the individual against arbitrary states. Subsequently, second-generation collective economic and social rights have gradually achieved greater recognition, but are still sometimes regarded as "second rank" rights, despite the assertion of the indivisibility of all rights, and consequently suffer from ineffective enforcement. Yet environmental damage causes obvious impacts on the exercise of these universal rights, such as the right to life, the right to housing (Hohmann, J.) and the right to food (De Schutter, O.). The third generation of rights and freedoms, the so-called "solidarity" rights, including those on environmental protection, have emerged much more recently<sup>1</sup> and their actual inclusion remains an ongoing, and sometimes difficult, process (Anton & Shelton, D.; Francioni, F.).

The relationship between "the environment and human rights", however, was initially laid out implicitly in a number of declarative texts of international scope, although ones that lacked any binding force. For example, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment<sup>2</sup> and the 1992 Rio Declaration on Environment and Development<sup>3</sup>, which evoked in substance this relationship in their first principle. Binding agreements that better embody this relationship include Article 24 of the African Charter on Human and Peoples' Rights, which is of regional scope, that was adopted in Nairobi on 27 June 1981 and states that "*All peoples shall have the right to a general satisfactory environment favourable to their development*". While Section 11 of the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, known as the "Protocol of San Salvador", from 17 November 1988, is also particularly evocative of this issue<sup>4</sup>. Finally, the Indigenous and Tribal Peoples Convention of 1989 addresses the issue of indigenous peoples' human rights with regard to violations of their environment (Box 1). Moreover, through dynamic case law on human rights, regional and national jurisdictions are establishing, consolidating, refining and strengthening this relationship between human rights and the environment that a part of the doctrine systematizes around a right to the environment (Pallemmaerts, M.). Furthermore, according to the latest report from the Office of the United Nations High Commissioner for Human Rights (OHCHR), over 140 UN MS have added constitutional guarantees for the protection of the environment, and many of them are specific human rights to the environment (OHCHR, 2011).

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<sup>1</sup> Cf. Article 37, Charter of Fundamental Rights of the European Union, 2001.

<sup>2</sup> Which states that: "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*"

<sup>3</sup> Which states that: "*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*"

<sup>4</sup> Entitled "*Right to a Healthy Environment*", this article proclaims that: "*1. Everyone shall have the right to live in a healthy environment and to have access to basic public services and 2. The States Parties shall promote the protection, preservation, and improvement of the environment.*"

The promotion of this relationship between "the environment and human rights" was advanced in important discussions, academic circles and within UN institutions. Thus, a proposed Draft Declaration of Principles on Human Rights and the Environment, prepared by Mrs. Fatma Zohra Ksentini, UN Special Rapporteur in 1994, was attached to the Special Report on "human rights and the environment"<sup>5</sup>. The draft declaration contained a series of general principles, the most noteworthy being: the human rights to a safe and healthy environment for the needs of present generations, without compromising the rights of future generations.

The complexity and multidimensional nature of the impacts of global environmental change on humans have in recent years accelerated the promotion of this relationship within UN institutions. In 2002, an important seminar on environmental issues and human rights was organised jointly by the United Nations Environment Programme (UNEP) and OHCHR. One of its aims was to establish an inventory of different national trends, regional and international texts and relevant case law on the relationship between "human rights and the environment," which has ever since been profoundly enriched by the doctrine (Shelton, D.; McInerney-Lankford, S., Darrow, M., Rajamani, L.). It may be considered as a preliminary work that led to the adoption by the OHCHR of Resolution No. 2005/60 of 20 April 2005 on human rights and the environment as part of sustainable development. This text states that environmental damage, caused by natural phenomena or disasters in particular, can have potentially negative effects on human rights, and that environmental protection and sustainable development contribute to the welfare of populations and are therefore likely to support the exercise of these rights. The recent 2011 OHCHR report summarizes the relationship between human rights and the environment by offering a threefold approach that is included schematically in the appendix of this study (Diagram 1). It is within this context that the relationship between human rights and climate change has been discussed.

## **1.2 Advocates of the relationship between human rights and climate change**

Throughout the 2000s, there has been a real development or even a "theorization" of the relationship between human rights and climate change, which has materialized through a series of meetings, seminars<sup>6</sup> and conferences that have brought IOs, NGOs, scholars and some state delegations together.

**Legal policy** in particular has demonstrated the relationship between human rights and climate change through extensive research that has highlighted many legal and ethical arguments (Cameron, E., 2011).

**Think tanks** such as the International Council on Human Rights Policy (ICHRP), the Centre for International Environmental Law (CIEL, 2009) and The Mary Robinson Foundation - Climate Justice, have produced stimulating and beneficial analyses which have thus helped to put this theme on the agenda. Stephen Humphreys, Research Director of ICHRP, has also contributed to the establishment of this relationship through his expertise and research (Humphreys, S.). His studies highlight the shortcomings of human rights when confronted with climate impacts such as inadequate responsibility (liability for offshore damage), the difficulty in attributing responsibility, the low level of effectiveness of second-generation rights which are particularly affected, and the contradictions between the priorities necessary for the protection of human rights and those for the struggle against climate change. He summarizes clearly the need and relevance of this relationship between human rights and climate change as follows: "Our aim has been to identify, on one hand, whether human rights principles, law and policy are equipped for the immense problems generated by global warming and, on the other,

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<sup>5</sup> Doc, E/CN.4/Sub.2/1994/9.

<sup>6</sup> One of the latest seminars organised within the HRC was held on 23 and 24 February 2012 in Geneva: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCseminaronHRandclimatechange.aspx>



how human rights tools can aid in constructing a just regime to manage and mitigate climate change effects”.

**Certain “environmental” and “human rights” NGOs<sup>7</sup>** have also begun work on establishing this relationship through the unequivocal promotion of the concept as an important new factor in the current climate negotiations. Although it seems that some important human rights NGOs have been much slower in reaching this level of awareness (Dudai, R.). For example, the annual reports of Human Rights Watch and Amnesty International did not make clear mention of the many existing links between “climate change and human rights” in their analyses, but dwelled more on issues of industrial environmental degradation with respect to the rights of people (the Bhopal disaster and the Union Carbide Corporation, the Niger Delta and Shell, etc.). While as early as 2007, *Earthjustice* published a report on *Human Rights and the Environment*, in 2008 OXFAM published a report entitled “*Climate Wrongs and Human Rights: Putting People in the Heart of Climate Change Policy*” and in 2009 CARE launched an action on The Human Face of climate change<sup>8</sup>. NGOs have also mobilized their lobbying activities at the Conference of the Parties (COP) 15 and 16 with highly specialized side events<sup>9</sup> including the participation of the former High Commissioner for human rights, Mary Robinson. The scientific approach and economic climate negotiations have been renewed by these ethical and legal approaches (Limon, M.). Some environmental NGOs have chosen, in this sense, to communicate more the “encompassing” concept of climate justice that puts the emphasis of the human rights and climate change theme on to values and ethics.

**Vulnerable populations and their representatives** have constructed an argument based on human rights to develop a strategy to transform the means of the fight against climate change, following a lack of success with other means of action and mobilization based particularly on the principle of Common But Differentiated Responsibilities (CBDR). The most emblematic example is the 2005 petition<sup>10</sup> of the Inuit of Canada and the United States, which benefitted from the legal assistance of Earthjustice and CIEL, that was put before the Inter-American Commission of Human Rights (IACHR). They argued that climate change - for which the United States is historically implicated, through its high GHG emissions - has a negative impact on the rights of the indigenous peoples of the Arctic (right to life, health, property, cultural identity and self-determination) (Knox, J. H., 2009 (b), Osofsky, H. M.). The IACHR has not yet acted on this petition but held a hearing in 2006 and began working on the problem. Ultimately, this initiative, which is as much for the media as it is for the law, has helped broaden and guide the thinking on the link between human rights and climate change.

**Some IOs** have also begun working on this relationship between human rights and climate change. For example, the OAS adopted a Resolution on human rights and climate change in June 2008. However, it is mainly the impetus of the HRC and the OHCHR, which from 2009 onwards have helped to put this theme on the agenda at the international level. This relationship between human rights and climate change is built “through capillary action” by way of exchanges and multiple discussions between the different stakeholders mentioned above.

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<sup>7</sup> Earthjustice, Greenpeace, Climate Justice for a Changing Planet, Friends of the Earth.

<sup>8</sup> <http://www.care.org/campaigns/human-face-of-climate-change/index.asp>

<sup>9</sup> <http://regserver.unfccc.int/seors/reports/archive.html>

<sup>10</sup> [http://s3.amazonaws.com/isuma.attachments/ICC\\_Petition\\_7Dec05.pdf](http://s3.amazonaws.com/isuma.attachments/ICC_Petition_7Dec05.pdf)

## 2. RECENT AGENDA SETTING

### 2.1 The relationship between human rights and climate change within HRC and OHCHR activities

Since the end of the nineties, the UN has engaged in action to integrate human rights within its various activities (programmes, mandates of the UN agencies) by developing in particular the approach based on the right to development. In continuity of this action, which was reinforced in 2003<sup>11</sup>, the HRC has played a decisive role in the relationship between human rights and climate change. In its Resolution of 28 March 2008, it gave a mandate to the OHCHR to carry out a detailed analytical study of the relationship between human rights and climate change. An initial series of exchanges was organised throughout 2008, involving experts, UN agencies, NGOs and certain States. On the basis of this first consultation, on 15 January 2009 the OHCHR adopted a report on the relationship between climate change and human rights by presenting its first results. On the basis of this report, the HRC adopted Resolution 10/4 human rights and climate change on 25 March 2009 and decided to continue and consolidate these discussions. An important panel of discussants<sup>12</sup> met on 15 June 2009 at the Palais des Nations. The OHCHR received about thirty written tenders from about 30 States, 10 UN agencies, 17 NGOs, certain national institutions of human rights, etc. Moreover, the European Commission (EC) has contributed to this action<sup>13</sup> by highlighting the few European initiatives underway on these themes (it has financed projects such as the climate change project and impact research, the Mediterranean environment, the EACH-FOR project, Migration and Global Environmental Change project; and adopted a report on climate change and International Security and the EC Green Paper of 29 June 2007 on adapting to climate change in Europe, etc).

These various consultations have stimulated preliminary awareness and certainly participated in the inclusion of human rights and climate change themes in international negotiations on the climate (Knox, J. H., (a)).

### 2.2 The entry into international negotiations on climate

While science has been gradually establishing the consequences of climate change on human societies, the question of the protection of affected populations has only been rather recently and reluctantly addressed within climate negotiations.

Since the adoption of the Bali Action Plan on climate in 2007 and successive COP, it is clear that there is a gradual awareness, albeit one that is still embryonic, of the relationship between human rights and climate change. During some sessions of the 15th COP, it was suggested, but without success, that "human rights" references should be taken into consideration. It was not until the 16th COP and the Cancún Agreements that a stage was reached where direct and indirect references to human rights were included. This still marginal inclusion is the result of a series of stakeholder games, particularly by countries of the South.

Thus, for example, during discussions on enhanced action at the national and international level for climate change mitigation of the Ad hoc Working Group on Long-term Cooperative Action (AWG-LCA) under the Convention held in Accra in August 2008, an original proposal was introduced during the workshop by Bangladesh and Gambia that involved the granting of a financial compensation to victims

<sup>11</sup> The Human Rights Based Approach to Development Cooperation Towards has Common Understanding among UN <http://www.undg.org/index.cfm?P=221>

<sup>12</sup> Human Rights Council panel discussion on human rights and climate changes: <http://www.ohchr.org/EN/issues/HRAndClimateChange/Pages/Panel.aspx>

of climate and to climate refugees<sup>14</sup>. Then, during the workshop preparations for the Poznan COP, the Alliance of Small Island States (AOSIS), Argentina, Sri Lanka and Bangladesh came up with the idea of mutual aid funds/insurance mechanisms designed to promote financial resilience in the event of extreme weather, disasters, collective losses and compensations for climate change victims and climate refugees and to make provisions for micro insurance schemes<sup>15</sup>. Certain NGOs (WWF, Christian Aid, Friends of the Earth, etc.) proposed to assess positive and negative social and environmental impacts, especially for local communities and indigenous people concerning income, employment, migration and cultural identity; and Bolivia defended the compatibility of mitigation measures with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In June 2009 in Bonn, the reflections on human rights started to take on a more concrete dimension in the discussions<sup>16</sup>, particularly on climate-induced population displacements<sup>17</sup>. This work is the result of a close cooperation, particularly between voluntary organisations working on the question of climate refugees (HCR, NRC & al., (a), (b), (c); IASC).

Then, a reference to Resolution 10/4 on human rights and climate change of the HRC was included in the Cancún Agreements in the Preamble to the decision on the Outcome of the work of the AWG-LCA. The Cancún text then referred to the relevant provisions of UNDRIP (Appendix I, 2 (c)), the effective participation of women (point 7), indigenous peoples (point 72) and local communities including the economic and social consequences of the "response measures" and the Reducing Emissions from Deforestation and forest Degradation (REDD) mechanism. But it is point 8 that is especially significant because it "emphasizes that Parties should, in all climate change-related actions, fully respect human rights" and thus clearly associates respect for human rights with climate governance. There may be reason for scepticism regarding the scope and actual feasibility of these "human rights" references within the framework of future actions. Admittedly, they testify to a "formalization" of the set of themes, but do not (yet) provide binding obligations for States. This UNFCCC-derived law is too vague and will have little or no effect so long as the methods of application are not given. As for the CIEL, it is certainly regrettable that at this stage of the negotiations, contracting State Parties have not more clearly recognised their obligations to "protect, promote and fulfil" (CIEL, 2011 (a)). This next stage will undoubtedly be more delicate to accomplish, define and impose on the contracting State Parties.

### **2.3 Relevance and implementation of a human rights-based approach**

While 22 experts have encouraged a human rights-based approach (HRBA)<sup>18</sup> for the Rio+20 Summit on Sustainable Development, one may question its relevance and its implementation within climate governance. Will the dual foundation of an HRBA, ethical and legal, make climate governance and ultimately the protection of humans in their environment (Woods, K.) more consistent? Is the individual approach of the HRBA compatible with the overall objectives of international negotiations? If so, how can this HRBA be concretely built? Based on what methodology? In this regard, recent works on the HRIA<sup>19</sup> (Harrison, J.; Harrison, J. & Goller, A.) provide some routes for exploration and experimentation, while adopting and implementing local, national or international response measures.

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<sup>13</sup> <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/EuropeanCommission.pdf>

<sup>14</sup> FCCC/AWGLCA/2008/11, point 44 iv).

<sup>15</sup> FCCC/AWGLCA/2008/16/Rev.1.

<sup>16</sup> For more examples: Rajamani, L., 2010 (b), pp. 9-14.

<sup>17</sup> "[Activities related to national and international migration/planned relocation of climate [refugees] [migrants] [displaced persons by extreme climate events].]" <http://unfccc.int/resource/docs/2009/awglca6/eng/inf01.pdf> p.45.

<sup>18</sup> Background Note: Human Rights Essential Role for Sustainable Development, March 2012.

<sup>19</sup> Defined as "measuring the impact of policies, programmes, projects and interventions on human rights", see Human Rights Impact Resource Centre at <http://www.humanrightsimpact.org/hria-guide/overview/>

The EC has developed a methodology<sup>20</sup> to establish systematic verification of the fundamental rights involved in the development of legislative proposals (see Box 3, Fundamental Rights Check List). Similarly, the Impact Assessment Board systematically verifies aspects of human rights in the draft impact analysis submitted to it and forms an opinion where necessary. This work must be pursued beyond the mere preparatory acts but also throughout the legislative process and its implementation, as noted by the European Council in the Stockholm Programme. This type of human rights assessment on the impacts of climate change and response measures presents real methodological difficulties, reflecting the scientific uncertainty and lack of knowledge on the effects of these phenomena on people.

Moreover, will the legal constraints of this approach slow the fight against climate change? Will the prior, fair and necessary involvement of affected populations always result in the adoption of optimal response measures in terms of the fight against climate change? Nevertheless, the legitimisation of measures through the involvement of the people concerned will also promise better understanding, acceptability and, therefore, applicability of response measures (see Chapter 5). It is anticipated that a strict HRBA will probably sometimes work against the response measures that are emerging today by redirecting them. For example, in France in 2009 the Constitutional Council<sup>21</sup> censured the 2010 Finance Act regarding the contribution of carbon for non-compliance with the principle of equality. It alleged that the total number of exemptions from the carbon tax were contrary to the objective of fighting against climate change and generated some tax discrimination in relation to public contributions (inequality as regards the contributions of companies). The judge, therefore, simultaneously considered the analysis of the measure's environmental effectiveness and that of its compatibility with the fundamental rights of the French Constitution's Declaration of the Rights of Man and of the Citizen. Implementation of an HRBA would re-examine the legitimacy of certain actions by indirect responses to the values and respect for human rights (liberty, equality, fairness, etc.). We should not forget that most of the States that are party to the human rights treaties are also part of the UNFCCC. These dual obligations require them to understand climate change as an environmental challenge but henceforth also as an human rights issue. They are, therefore, required to identify when human rights are violated by climate change impacts and response measures. Furthermore, they are required to adopt consistent climate change mitigation and adaptation policies with regard to the exercise of these human rights. In this sense, the authors believe that a HRBA should also guide the development, implementation and monitoring of financial mechanisms and climate policies (Johl, A. and Lador, Y.; Jodoin, S.).

### **3. HUMAN IMPACTS OF CLIMATE CHANGE, RESPONSE MEASURES AND HUMAN RIGHTS**

#### **3.1 The difficulty in identifying the human impacts of climate change**

The state of knowledge on climate change has evolved over the course of the various IPCC reports from a simple awareness of the causes of climate change, to an understanding of the complexity of the phenomenon in terms of the impacts on the planet and among human societies. The 4th IPCC report addresses the impacts of climate change on populations particularly regarding the work of the Working Group II Report "Impacts, Adaptation and Vulnerability" (IPCC, (a), (b)). It provides a better systematization of climate change events and the resulting processes that will have an impact on

<sup>20</sup> Report COM(2009) 205, 29.4.2009; Impact assessment guidelines, COM(2010) 573 final, 15.1.2009; Commission staff working paper, SEC(2011) 567 final, 6.5.2011.

<sup>21</sup> Decision No 2009-599, 29 December 2009.

human societies. It provides details of how the increase in sea level, the multiplication of extreme weather events (hurricanes, storms), floods, melting permafrost and increased drought conditions are expected to change people's lives and their production modes for food and other goods, particularly in coastal areas with high population densities. The 5th IPCC report, which is currently in preparation<sup>22</sup>, dedicates further discussion to the impacts on people and their living conditions and focuses more on those populations that are particularly vulnerable to climate change. Chapter 12 on "Human Security" addresses, among other things, the specifics of local communities, including for example those that show "resilience", that benefit from traditional knowledge, that exhibit migration and population displacement or where conflicts exist. The expected consequences include the aggravation of poverty and hunger with direct effects on health (WHO), the displacement of populations (UNHCR, (b)) and an increase in conflicts over resources (Solana, J.; UNGA Resolution 2009).

Consequently, there are many questions regarding climate change and its affects on human security and its impacts on human rights. The advancement of knowledge will make it easier to understand and anticipate these impacts. However, one of the first questions raised regarding these human impacts of climate change has been their qualification in terms of human rights violation. This question raises real theoretical difficulties relating to the structure of international law (Voigt, C.). If one reasons along the classic lines of the implementation of inter-state liability, the complexity of the causes of climate change make it almost impossible to establish today a correlation between a State's GHG emissions and a particular climate change impact on a population. It is often the interaction between a set of environmental and socio-economic phenomena that produces the impacts that affect human beings (Rajamani, L. (a)). Moreover, the temporal dimension of climate change-related harm that will occur in future also blurs the traditional reference points for the determination of human rights violations, which are built on the establishment of actual and concrete damage (ICHRP).

However, while it is difficult to qualify the impacts of climate change in terms of human rights violations due to the uncertain establishment of a direct link between climate change impacts and the actions or omissions of States, many recent studies have endeavoured to demonstrate that climate change has obvious implications for the very exercise of human rights. There are six fundamental rights that are mainly affected: the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing and the right to self-determination (Tab. 1).

Finally, it must be remembered that to regard inaction in the fight against climate change as a violation of human rights, which is the viewpoint of the "Inuit" petition to the Inter-American Commission of Human Rights, is not a position that should be excluded. Although this argument has not yet been officially recognised as legally valid.

### **3.2 Climate change impacts and response measures with respect to the exercise of human rights**

Legal studies show that human rights apply when climate change violates the human rights of populations affected by climate change *and* by the implementation of climate change response measures (mitigation and adaptation). Therefore, this relationship between human rights and climate change can be regarded as "Janus-headed" (Pedersen, O. W.).

Thus, mitigation measures, such as the CDM, face challenges regarding their compatibility with human rights (Roht-Arriaza, N.). More generally, human rights conflicts may arise between the exercise of the right to food and the production of biofuels; or even between the rights of indigenous peoples and the delivery of REDD programmes (Orellana, M.; Seymour, F.; Griffiths, T.).

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<sup>22</sup> <http://www.ipcc.ch/pdf/ar5/ar5-outline-compilation.pdf>



Similarly, climate change adaptation occurs through a combination of multiple actions, including: strategies, initiatives, individual and collective measures and reactive and proactive measures, to strengthen the capacities and resilience mechanisms of populations and ecosystems by reducing the vulnerability of natural and human systems (construction of sea defences, the resettlement of populations away from flood zones, early warning systems, etc.). The action of such adaptation measures can generate “side effects” that are detrimental to certain populations.

It is thus both present and future climate governance that must be called into question with respect to human rights, particularly in terms of the short or long-term consequences on vulnerable populations. While response measures may be shown to be of undeniable value to the environment in the short term, they are not always relevant over the long term in terms of human rights. And paradoxically, inaction or non-compliance with these response measures will also affect the living conditions of these vulnerable populations. Various doctrinal works thus highlight the potential value of human rights by showing that they constitute a fundamental basis both for defending the exercise of the rights of the climate change-affected populations, and for directing response measures that are more favourable to human rights. Recourse to an human rights assessment such as HRIA could thus prove relevant for the establishment of a true HRBA within climate governance.

### 3.3 Vulnerable groups affected

The relationship between human rights and climate change is based on the construction of certain types of people that are deemed vulnerable because of, for example, their geographical situation, their sex, age or status as indigenous people, their membership of a minority group, etc. While not all of these vulnerable groups constitute legal categories, they raise crucial legal issues regarding human rights (such as, whether certain rights need to be strengthened, whether there is there a need for new or specific rights and to consider the effectiveness of law). Local communities, indigenous people (Oviedo, G.; IUCN), women<sup>23</sup> (Lambrou, Y. & Laub, R.), children (UNICEF the UK), island populations and displaced people (McAdam, J., 2012) particularly attract our attention because of their exposure and vulnerability to climate change; whereas such discussions do not always identify people living in poverty as being part of a vulnerable group (Dudai, R.). The Declaration of NGOs to the 3<sup>rd</sup> Social Forum explicitly referred to this issue<sup>24</sup>.

Since the 2000s, the fate of **island populations** has been a topic at the heart of many academic publications and policy initiatives due to their exposure to the most significant climate change impacts, particularly the increase in sea level and the consequences for small Pacific islands. The political and legal issues surrounding the plight of these people has received special attention from AOSIS, a group consisting of States that are directly concerned with this issue, but also by the United Nations High Commissioner for Refugees (UNHCR) (UNHCR, (b) and International Organization for Migration (IOM)<sup>25</sup>). Indeed, theoretical legal issues such as the disappearance of the Island States (McAdam, J., 2010), climate statelessness and the right of peoples to self-determination (Fabregoule, C.) have been raised (Cournil, C. & Gemenne, F.; Pigué, E., Raimana Lallemand, H.). Among recent actions one can mention the Male’ Declaration on the human dimension of climate change, from 13<sup>th</sup> and 14<sup>th</sup> November 2007, which is supported by CIEL and signed by representatives from small island states. This Declaration called for action from the OHCHR and HRC with regard to assessing the human rights implications of

<sup>23</sup> See the last EP Report of 9 March 2012 on women and climate change, Committee on Women's Rights and Gender Equality, Rapporteur: Nicole Kiiil-Nielsen, A7-0049/2012.

<sup>24</sup> “Acknowledging the negative effects on vulnerable populations, especially indigenous peoples, women and children, and the poor” <http://www.ohchr.org/EN/NewsEvents/Pages/2010SFClimatechangeaHR.aspx>

<sup>25</sup> See its publications on the subject: <http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/intersessional-workshops/climate-change-environmental-degradation-and-migration/lang/fr>

climate change. More recently, in September 2011, Johnson Toribiong, the President of the Republic of Palau, announced<sup>26</sup> his intention to address the UN General Assembly on the question of seeking an advisory opinion from the International Court of Justice (ICJ) on the responsibility of GHG-emitting States for the flooding of Pacific Islands and the consequences on human security. This however was more of a publicity stunt ahead of the Durban COP rather than a credible attempt to start an assessment of the responsibility of polluting States for causing the impacts of climate change.

**Climate refugees** provide an example of a situation where questions are raised on the relevance of human rights protection and the deficiencies or inadequacies of international migration law (McAdam, J., 2012). In recent years, climate change-related displacements and response measures have been the subject of a particularly rich field of study and knowledge building (Kraler, A., Cernei T., Noack, M.). Organisations specialising in the rights of refugees and migrants (UNHCR and IOM), in environmental and humanitarian sectors (OCHA and IASC), and in disaster prevention, met for the first time in June 2011 at the occasion of an international conference on climate change and displacement in the 21st Century<sup>27</sup> in Oslo, to establish a framework for the management of climate displacements. These organisations adopted the “Nansen Principles” which, in our view, mark the beginnings of a “Human Rights” approach to the human impacts of climate change. It is worth remembering that climate-induced displacements mainly occur within official borders. For the moment, only the Convention on the protection and assistance of Internally Displaced Persons (IDP) in Africa, which was adopted in October 2009 in Kampala by the African Union, devotes an article to this subject (Article 5(4) stating that contracting State Parties “shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change”. This text is the first to have legally binding force on IDP in Africa. The European Union however is only at a very early stage of reflection on the issue, announcing in a communication on 8 October 2008<sup>28</sup> that it plans to define a policy in response to recent developments relating to the increasing impacts of climate change on migratory movements (see Chapter 3, 2.). In 2011, the European Union held a first consultation in Brussels entitled “Migration and Climate Change”, which particularly brought into focus the necessary new legal frameworks and the existing ones that require modification. A first study in December 2011 entitled “Climate Refugees: Legal and Policy Responses to Environmentally Induced Migration” was conducted at the initiative of the Directorate General for Internal Policies and its *Policy Department of Citizens’ Rights and Constitutional Affairs* briefing note. In international negotiations, the acknowledgement of this vulnerable group has been officially recognised for the first time in point 14 f) of the AWG-LCA text which provides for “Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels”<sup>29</sup>.

Finally, the vulnerability of **aboriginal and indigenous peoples** is also at the heart of many scientific and academic publications (Macchi, M.; Tsosie, R.; Gerrard, E.). The claims of indigenous peoples, as shown by the example of the Inuit petition, have crystallized the relationship between human rights and climate change. In 2008, the seventh session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) developed a distinctive theme far beyond the legal questions on climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges<sup>30</sup>. Since 2010, the reflections of the UNPFII have been directed towards a more specific area through its

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<sup>26</sup> <http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1>

<sup>27</sup> <http://www.nansenconference.no/>

<sup>28</sup> Communication COM (2008) 611 final, 8.10.2008, p. 8.

<sup>29</sup> Decision 1/CP.16, Cancun Agreement, Article 14, f), p. 3.

<sup>30</sup> <http://social.un.org/index/IndigenousPeoples/UNPFIIISessions/Seventh.aspx>

focus on the compliance of policies and projects relating to climate change and the rights of the UNDRIP. This orientation confirms the requirement affirmed by the Cancún Agreements. The study launched by the Directorate-General for External Policies of the Union clearly shows the work that has been undertaken to date and what work will be carried out in future by the various international, and particularly European, authorities (Oviedo, G. & Fincke, A.).

## **4. EUROPEAN EXPERTISE ON THE RELATIONSHIP BETWEEN THE “ENVIRONMENT AND CLIMATE CHANGE”**

### **4.1 The voluntarism of the bodies of the Council of Europe**

The Council of Europe (CoE) has worked on both the protection of the environment and of human rights through the adoption of treaties and recommendations.

However, the relationship between the two sets of themes appeared only recently (Déjeant-Pons, M. and Pallemarts, M.) with the works of the Committee of Ministers to MS on the European Conservation Strategy and the Parliamentary Assembly of the CoE (PACE) (Recommendation 1614/2003 on the environment and human rights) (see CoE Texts). More recently, in its Recommendation 1883 of 2009, the PACE identified the challenges posed by climate change in the light of various bodies of the EC and insisted on the important contribution that human rights instruments aiming at the development of international politics can make towards climate change (§4.2). In its Declaration before Copenhagen, the CoE Commissioner for Human Rights emphasized the fact that climate change is causing an unprecedented human rights crisis which must be fought through coordinated and rights-based action. The Working Group on Environment of the Committee of Experts for the Development of human rights (GT-DEV-ENV) recently proposed that one of the topics for its work should be the positive obligations of States to protect individuals against threats to human rights associated with climate change. From this point of view, within the framework of the inter-secretariat group created at the EC, it should be noted that one of the more recent initiatives concerns the upcoming organisation of a cross-disciplinary conference on “climate change and human rights” during 2012. These multiple actions show the progressive integration of the relationship between human rights and climate change with a setting on the agenda of the EC work. In addition, in the decisions of the European Court of Human Rights (ECtHR), the human rights that aim at the protection of the environment form today a particularly rich set of principles and obligations (See Council of Europe, Manual on human rights and the Environment, 2012).

Without any explicit reference to the environment in the text of the ECHR, case law has developed in particular with reference to articles 2, 8 and 1 of Protocol no. 1 on the assertion of both substantial and procedural rights. In the same manner, the European Committee of Social Rights (ECSR) extended its jurisprudence to the protection of health and the environment on the basis of Article 11 of the European Social Charter (ESC). Lately, the Steering Committee for Human Rights has adopted the 2<sup>nd</sup> edition of the Manual on human rights and the Environment, which includes the principles drawn from the ECtHR and ECSR jurisprudences, as well as the good practices of States. This rich jurisprudence appears very relevant when taking into consideration the impact of climate change (Table 7) and response measures, and deserves further study.

However, let us recall, on the one hand, that the obligations of Article 6(3) of the TEU provides that the European Union respects fundamental rights as they are guaranteed by the ECHR and, on the other hand, that the Charter should be interpreted in light of the ECtHR jurisprudence and its protection standards should not be lower as the one recognized by the Strasbourg Court (Article 52(3) TEU). Furthermore, since the entry into force of the Lisbon Treaty (Article 6(2) TEU) and of Protocol no. 14 of the ECHR, the European Union’s adherence to the ECHR has become a legal obligation. From this point of



view, the European Union will become the 48<sup>th</sup> High Contracting Party to the ECHR and will be integrated into the fundamental rights protection system. The European Union is now obliged to respect the ECHR and will be placed under the control of the ECtHR. This external jurisdictional control provides even greater encouragement for the European Union to follow an ambitious policy with respect to fundamental rights. As stated in the 2010 Strategy for the effective implementation of the Charter of fundamental rights of the European Union (CFREU), the more the European Union ensures that its acts fully respect fundamental rights, the less the ECtHR is likely to censure them. The European Union will have to take account of this European jurisprudence during the adoption of its secondary law on climate change. By doing so the accession would bring greater protection to individuals against the actions of the European Union, just as they already have against the actions of all States Parties. Furthermore, the ECtHR case law may become even more ambitious regarding the human rights component of the environment if it adopts an *additional protocol to the ECHR concerning the right to a healthy environment* which was proposed – so far without success – in 2009 by PACE.

#### **4.2 “Human rights and the environment” within the European Union**

The EU has a specific tool relating to human rights: the CFREU. This text contains the civic, political, economic, social and environmental rights of the three generations of rights. As with the ECHR, a series of articles offers potentialities with regard to human rights violations caused by climate change and the response measures, in particular with regards to the principal fundamental rights (Table 7). Since the Lisbon Treaty, the CFREU has had binding force and the same value as the treaties. It applies in the same manner to the EU's internal as well as external actions. According to Article 51(1), the CFREU applies initially to institutions, bodies and organisations of the EU and must guide the legislative and decisional work of the EC, EP and European Council, with the European Court of Justice (ECJ) having the ability to censure actions. The Treaty of Lisbon thus strongly reinforces the human rights protection system of the EU by specifying that fundamental rights, as they are guaranteed by the ECHR and as they result from the constitutional traditions common to the MS, form part of EU law as general principles. They provide complementary support to the ECJ to improve the protection of human rights by taking into account social changes to a level beyond that which the Charter allows (Benoit-Rohmer, F.). The CFREU is presented in the form of a key instrument of human rights compatibility during the adoption of response measures to climate change (see Chapter 4).

Although less ambitious than the corresponding provision in the project of the European Constitution, Article 52 of the CFREU clarifies the conditions for the interpretation of the rights and principles guaranteed according to the Charter. In addition, a distinction is made between rights and principles and the CFREU does not automatically confer them with the status of enforceable rights. Nevertheless, according to Article 51, by virtue of the subsidiarity principle, MS have to take them into account when applying EU law. The only reference to the environment is in Article 37 of the CFREU: *“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”* When assessing the impact on the fundamental rights of the legislative proposals, the Commission services have to take into account the impact of the proposed measure on the obligation as recognized in this article. Any measure which would contradict the principles recognized there needs to be justified. However, this article does not proclaim any right to a clean and healthy environment and thus does not constitute a subjective right that individuals are able to invoke. Directly inspired by Article 130 R 2 of the Treaty of Maastricht (integration), by Articles 2, 6 and 174 of the TEC and the Preamble to the TEU (principle of sustainable development), this provision was strongly criticised by the doctrine (Conseil Européen du Droit de l'Environnement - CEDE) which considers it to be a backwards step compared to national and international engagements undertaken by MS and NGOs (Greenpeace, WWF, etc.), which

have been calling for the introduction of a right to a healthy environment in the Treaty since the 1990s. Indeed, this article does not reflect the level of evolution desired by European institutions<sup>31</sup> regarding the reinforcement of fundamental rights within the EU as well as in its external actions. This disparity can also be seen by taking into consideration the voluntarist goals of the EU since the Lisbon Treaty as regards the fight against climate change. It is clear that at the continental level, Africa and America have made a qualitative jump ahead of the EU by the inclusion of much more ambitious formulas in their texts<sup>32</sup>.

Admittedly, the weakness of the CFREU with regard to environmental rights will be compensated by its adhesion to the ECHR, which will supplement the EU's fundamental rights protection system. In the view of the authors of this paper, this system seems to be further reinforced through the adoption of a Protocol concerning the right to a healthy environment, which is an annex of the ECHR. The need for the integration of new environmental human rights is clearly desirable in the light of climate change impacts and response measures as it will help to create an explicit link between environmental protection and human rights within a European instrument.

## 5. PROPOSALS

### – **Strengthening of the EU's role in promoting the relationship between human rights and climate change at the diplomatic level**

The EU could appoint a representative to monitor and promote an HRBA to climate issues in the international arena and at international negotiations.

The EU could support the creation of a specific UN Special Rapporteur or ensure that the independent expert (Professor of law John H. Knox)<sup>33</sup>, appointed by the HRC in March 2012, on the relationship between human rights and the environment will specifically address the issue of climate change and human rights (see Box 2). The EU could assist this expert by developing its own analysis on regional climate change and human rights dimensions.

As a leader in climate negotiations, the EU could encourage, in the work of the next COP and the future Durban Platform, the development of a HRBA. This approach would encourage particular attention on the aforementioned vulnerable population groups (displaced people, indigenous peoples, island populations, children and women).

### – **To develop the dialogue between “communities” within the European Union**

Within the EU and its institutions, a fruitful dialogue could be initiated between “communities” that have become highly “sectorized” and that rarely if ever meet, in order to engage in long-term common strategies. There should be better collaboration in important areas, for example, the various Directorate-Generals (DG) of the EC, in particular the DG CLIMA, DG HOME, DG ECHO, DG DEVCO, DG ENER and DG ENV. A good starting point could be the organisation of regular joint workshops that encourage an exchange of views, with inputs from EU officials, experts, MS representatives and NGOs. More details on this subject can be found in the analysis of the DG HOME on migration issues (Chapter 3.2), and in the discussion on the legal tools relating to the EU's external policy (Chapter 2.2.2.2.2).

<sup>31</sup> The EP and the European Council have made the promotion of fundamental rights in the EU one of their priorities for the future, see for example the *Area of freedom, security and justice* policies

<sup>32</sup> See the African Charter on Human and Peoples' Rights (Article 24); and the Additional Protocol to the American Convention on Human Rights in the Area of the Economic, Social and Cultural rights (Article 11).

<sup>33</sup> Independent Expert established in the UNHRC Resolution on Human Rights and the Environment, 20 March 2012, A/HRC/19/L.8/Rev.1.

– **To put the relationship between human rights and climate change on the political agenda of the European Parliament**

In the very short term, the EP could adopt a specific resolution on human rights and climate change, as the OAS and the OHCHR have already done, thereby politically registering the relevance of this relationship and thus encouraging its promotion. In this sense, the Parliament is already planning a report and a resolution on human rights and climate change.

– **To take into account certain categories of vulnerable populations**

Initial studies show that population movements associated with climate change will occur mainly within State borders, with only a small number of them crossing national boundaries. The EU could initiate a deliberation process on its own mechanisms for the protection of migrants, as well as on the prevention and anticipation of these movements. The EU could incorporate the 1998 Guiding Principles on Internal Displacements into its legislation. Even if the movements are less significant than those on the African continent, the EU could consider the creation of a European mechanism for the protection of the rights of IDP similar to the one provided for in the 2009 Convention on the protection and assistance of IDP in Africa. The EU could, as a regional power, contribute to the observance of the non-binding framework of the 2011 Nansen principles and encourage its adoption by the UN General Assembly, in particular point IV which states *“When national capacity is limited, regional frameworks and international cooperation should support action at national level and contribute to building national capacity, underpinning development plans, preventing displacement, assisting and protecting people and communities affected by such displacement, and finding durable solutions”*. Certain countries<sup>34</sup> have already committed to working on the basis of these principles.

– **Development of tools for assessing the effects of climate policy in the European Union with regard to human rights**

Within the framework of the impact assessment system of the EC, an integrated approach to assessment has been developed to analyse the benefits and costs of the economic, social and environmental impacts of new EU standard-setting initiatives. From this point of view, the EU could reinforce and develop a new approach to HRIA. The EU should define a specific methodology due to the complexity of the set of themes. In its assessment of the effects on human rights in the short, medium and long terms, it should take into account the intergenerational dimension of human rights impacts on the environment. The EU could base itself on HRIA works that underline the importance of at least four essential points for a qualitative assessment of human rights: participation, non-discrimination, equality and attention vis-à-vis vulnerable groups, indivisibility, inter-dependence and accountability. Its objectives would be to both prevent the negative impact of policies and to maximize the positive effects regarding human rights in the context of mitigation and adaptation measures. This HRIA approach might also be recommended for EU-funded projects with partner countries.

– **Strengthening the empirical research on climate issues and human rights**

The EU could demonstrate clear support for the relationship work initiated by the HRC and the OHCHR while contributing to its enrichment by funding the production of new scientific knowledge in humanities and social sciences. At the present stage of scientific thinking, it is essential to develop more empirical studies and to collect data at local, national, regional and international levels in order to begin an assessment of the intensity of the impacts on human rights from climate change-related events, both inside and outside of Europe. A census could be conducted of European policies, measures,

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<sup>34</sup> Norway, Switzerland, Germany, Mexico and Costa Rica.

actions, as well as public and private initiatives, in the fields of mitigation and adaptation that may have an human rights impact in the short, medium and long-terms, including those that have been adopted and those whose adoption is currently underway. The EU could encourage MS to provide this information, thus enabling it to highlight human and social vulnerabilities and to prioritize European actions. The new European Climate Adaptation Platform, CLIMATE-ADAPT will be a key tool in this regard for decision-makers and researchers. With this intention, the EU must continue to fund research on populations that are particularly vulnerable to climate change impacts, such as, for example, the EC-funded research in this field that began in 2007 in the framework of the EACH-FOR programme<sup>35</sup>. Programmes similar in scale to the Foresight programme (Migration and Global Environmental Changes<sup>36</sup> 2011), which is funded by the United Kingdom, or the research project on Climate-Induced Migration in Asia and the Pacific<sup>37</sup>, which is funded by The Asian Development Bank, could be funded by the European research funding programmes (7th Framework Programme (FP7)).

– **Initiation of reflections on the compatibility of European policy with regard to human rights and the ECHR on the relationship between "environment and climate change".**

In continuity of the accession process of the EU to the ECHR (6 TEU), the EU could support the adoption of an additional protocol to the ECHR on the right to a healthy environment. Article 37 of the CFREU does not include the individual right to a clean environment. The emergence of this normative framework would reinforce the European human rights standards and thereby guide the European climatic governance in accordance with the regional inter-American and African systems. As a future party to the ECHR, the EU may reinitiate the discussion in the CoE on the appropriateness of this Protocol, the negotiations of which have for the moment been stopped by the Committee of Ministers.

The Fundamental Rights Agency (FRA) could engage with the CoE to work on a compilation of the relationships that exist between the environment and human rights, such as that which has already been achieved on non-discrimination (Handbook on European non-discrimination Law). This work could form the basis for the initiation of a deeper perspective on the EU's experience of the relationship between climate change and human rights.

With regard to the functional powers of the new Justice, Fundamental Rights and Citizenship Commissioner, the relationship between human rights and climate change could be the subject of a particular study.

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<sup>35</sup> The EACH-FOR research project is within the frame of FP6 (Priority 8.1, Policy-oriented research) of the EC, (2007-2009).

<sup>36</sup> <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/foresight/our-work/projects/current-projects/global-migration>

<sup>37</sup> <http://beta.adb.org/news/climate-linked-migration-poses-growing-humanitarian-threat-study>

## CHAPTER 2 EUROPEAN UNION HUMAN RIGHTS AND CLIMATE CHANGE EXTERNAL DIPLOMACY

Human rights and climate change are two fields of international relations in which the EU is leading the way. In this part of our study, we analyse how the human rights dimension integrates with climate change diplomacy and how the latter assimilates human rights concerns. We also show how the internal and external sides of these policies interact with each other.

### 6. EUROPE AND THE HUMAN RIGHTS DIMENSION IN INTERNATIONAL CLIMATE NEGOTIATIONS

#### 6.1 Relevance

##### 6.1.1 Reaffirming European leadership

For Jose Manuel Barroso, who has chaired the EC since 2004, the fight against climate change is fundamental for protecting the future of our planet and providing Europe with excellent prospects. For several years the EU has been committed to tackling climate change at the domestic level and on the international scene, making it a priority on its agenda, as was pointed out by the EC in its Communication to the EP, the Council, the European Economic and Social Committee of the Regions, which states: "*The international dimension has always been an essential part of the EU's ambitions on climate change*"<sup>38</sup>. All parties are aware that to tackle climate change, coordinated efforts at the international level are essential. For this reason the EU has continued to encourage this UN-initiated process, even though it has sometimes proved disappointing, especially at the Copenhagen Summit. It is certainly true that since 1992 and 2007, following confirmation of the IPCC's predictions of impending climate crisis in the absence of radical policy change. In particular, climate has forced its way onto the international agenda. On a domestic level, Europe managed to adopt credible measures at the European Council on 11-12 December 2008, where a political agreement was reached on a set of EU measures on energy and climate (the famous climate and energy package)<sup>39</sup>. At the international level, Europe was also ready to take the initiative on a future climate regime, but circumstances were not favourable. The roadmap adopted in Bali in 2007 at the COP 13 did not fulfil its promise and the European proposal of a 25-40% reduction in GHG by 2020 for industrialised countries was met with strong opposition from the USA. At the Copenhagen Summit, the adoption of a non-binding text was the result of a compromise between the USA and key emerging countries. The non-binding approach was extended during the Cancun and Durban summits. Action on international climate policy must be continuous and regularly revitalised, while the leading role of the EU requires confirmation. With expectations running high, the EU has a leading role to play on the international scene, particularly in the divide between developed and developing countries, a gap which has widened regarding climate change since the 2009 talks in Bonn on a future climate agreement. The EU is particularly well placed to serve as an interface in this dialogue between developed and developing countries, whether with regards to emerging nations or others. Indeed, emerging nations continue to favour the umbrella of the UN as a forum for debates on climate related issues, in so far as this arena reinforces their negotiation margin, while the G77 remains their bulwark, providing the opportunity to invoke the "right to development" and while the human rights dimension forms part of it.

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<sup>38</sup> Communication COM (2010) 86 final.

<sup>39</sup> Directive 2009/28/EC; Directive 2009/29/EC; Decision 406/2009/EC; Directive 2009/31/EC; Regulation 443/2009; Directive 2009/30/EC.

### 6.1.2 Human rights: an additional point of entry in the fight against climate change

The human rights angle may provide an additional entry point for the achievement of the objectives of the fight against climate change and its effects. After having focused on the physical consequences of climate change, it is indeed necessary or even decisive, to look more into their human consequences. Taking account of human rights data is a logical extension to the EU strategy on climate change that was initiated as early as 2005<sup>40</sup> because it is through the prevention of damage due to climate change consequences that damage to the exercise of human rights can also be prevented. Europe has integrated GHG control into many of its areas of action (particularly in energy terms). A new initiative integrating human rights could provide a complementary approach to the fight against GHG emissions. The economic and energy dimension of the climate change problem has shown its limitations in international negotiations, targeting human rights therefore probably has the potential to reinforce and justify the process of defining policies to address climate change, which will help to obtain the greatest number of adherents to such policies. The new European strategy, which should open new perspectives on human rights and climate change, can be anchored in both European interests and values. Global climate change is also a question of development and, consequently, a serious security issue that requires the EU to develop genuine climate diplomacy, as well as the Ministers for Foreign Affairs of EU MS, as stated on 18 July 2011<sup>41</sup>. Such diplomacy must be ambitious and based on human rights.

### 6.1.3 The benefits for Europe of a human rights approach to climate change

European environmental policy is exemplary in many accounts, but the implementation of a comprehensive policy to combat climate change still fails due to the lack of supranational authority to implement appropriate instruments, and also due to the discrepancies between sovereign States. European negotiations have also highlighted the influence of certain "industrial lobbies", and the risk of these groups hijacking proceedings. For example, it should be noted that prior to the Cancun Conference, the EP had adopted a common resolution<sup>42</sup> (with little opposition), intended for the EC and heads of States, calling for more ambitious attempts to resolve the contradictions between the EU's "climate diplomacy" and its commercial policy. The conservatism of some parliamentarians and the exclusively economic approach to the issue, in part, explained the soundness of the adoption of the resolution, showing by this act that competitiveness (especially in a context of crisis) is at odds with the fight against climate change. Moving the discussion of the "economic" field to the human consequences and the ethics of climate change is, therefore, a means to legitimize EU action in this area and give more scope to its proposals in international climate negotiations, because a strictly economic positioning has ultimately led to failure. This new doctrine based on human rights, which is also ultimately one of social justice, must be relayed in the texts and by the institutions. Thus, public opinion, which is also an *actor* in international relations, will be able to have more of an influence on government decisions. In climate negotiations, Europe is traditionally positioned as the champion of a hugely ambitious agreement, commensurate with the challenge represented by climate change. Europe has also aimed to demonstrate the feasibility of such a strategy. To achieve this, the European strategy on climate has focused on presenting a convincing economic argument (such as the introduction of Emissions Trading) to serve as an example. However, climate negotiations have shown that the definition of mechanisms likely to make all stakeholders adhere en masse is particularly difficult. In a context of the failure of international negotiations or, at least, of insufficiently rapid progress, it may be advisable to find another common denominator. In this sense, placing the human being at the centre of discussions and actions may perhaps give another dimension to the process. It is difficult for 190 States

<sup>40</sup> Communication COM(2005)35 final, 9.2.2005.

<sup>41</sup> Council conclusions on EU Climate Diplomacy, 18.7.2011.

<sup>42</sup> European Parliament resolution of 25 November 2010, (2010/2103(INI)).



to reach an agreement, and even within these States, it is difficult to reconcile the point of view of an African fisherman with that of a Chinese merchant: the concerns of some are different to those of others. To allow agreements to be made in these circumstances, the role of the dissemination of scientific data and communication in general is very important, and the human rights standard must remain constant.

Asserting the European commitment to human rights in climate change will strengthen its credibility internationally and consolidate its foreign policy domestically. Even if the EU is increasingly distinguishing itself at the international level, there remains the continued need to assert itself through a federating and legitimate political project. While European citizens have real expectations with regard to "Europe", and particularly with regard to the environment<sup>43</sup>, the fight against climate change has become a real environmental challenge, but also a challenge in terms of energy, economies, technology, politics and, of course, societies. The EU, in coordination with MS, is legitimate and qualified to support this project.

#### 6.1.4 External climate policy, a component of environmental policy (and a branch of economic policy and human rights?)

European climate policy is to be considered in terms of its environmental policy. The latter has not always existed, and there is nothing in the Treaty of Rome to evoke it. It was a directive on waste in 1967 that first signalled the Community's attention to the environment, but it did not become a major impetus until a series of steps that followed. It was the Single European Act of 1986 that gave birth to a true common environmental policy, which was then strengthened by the Treaty of Amsterdam through the integration of the principle of sustainable development into the Community's objectives. Subsequently, the Lisbon Treaty added a new objective to EU policy in the environmental field: to promote measures on an international scale to address regional or global environmental problems, in particular the fight against climate change (Article 191). The Treaty affirms the values and interests of the EU in the rest of the world, and the importance of its contribution, in addition to sustainable development, to peace and security; solidarity and mutual respect between people; the elimination of poverty and the protection of human rights. While effort directed towards sustainable development was not in itself a new development, its strengthening by the Lisbon Treaty has helped it to become one of the fundamental objectives of the EU in its relations with the rest of the world. The Treaty established the global fight against climate change as one of the specific aims of the EU's environmental policy. In doing so, it clearly recognised that in this respect the EU has a leading role to play on the world stage. On an institutional level, this new jurisdiction was accompanied by the creation of a Climate Action Commissioner and a Directorate General on "Climate" at the Commission, in addition to the Commissioner of the environment and the DG Environment. Furthermore, the Lisbon Treaty defines the principles and objectives of the external action of the Union, namely, democracy, the rule of law, the universality and the indivisibility of human rights and fundamental freedoms, respect for human dignity, as well as equality and solidarity.

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<sup>43</sup> A survey conducted in 2009 by the EC with the citizens of Europe shows that CC is considered the most urgent global concern for 47% of the Europeans interviewed. In addition, most interviewees also believed that solutions to this global problem must be found on a global scale. 67% of those surveyed preferred decisions on environmental protection to be taken jointly within the EU. Eurobarometer, *European's Attitude Toward Climate Changes*, November 2009.

However, in spite of these proclamations and new developments, the facts show that it remains essential for the 27 MS to reach mutual agreement on the important issues, especially in a context of crisis<sup>44</sup>. The challenges are multiple.

## 6.2 Challenges

### 6.2.1 The integration of a human rights dimension into the European Union's external climate policy

As described earlier in this study, climate change is a cause of many human rights violations, including the rights to life, water, food, housing and health. Addressing this overarching problem may require a global response involving international cooperation, since climate change is a direct threat to the achievement of the Millennium Development Goals (MDG). It is, therefore, crucial that climate change is integrated into European external policies, especially into cooperation and development policy (cf. contribution in this study). A strategy to combat climate change represents a fourfold challenge: at the level of climate risk itself and obtaining the political goodwill to tackle it; at the level of international participation in the fight against climate change; at the level of the innovation necessary to enable a change of production and energy-use modes; and at the level of adaptation by countries to inevitable climate change effects. An additional significant challenge is now to integrate human rights with a view to contributing to development and cooperation policies and to show the EU's determination to act in this area and to defend ethics, values and common principles that it plans to promote abroad.

Given the leading role that the EU has played in the climate change issue, it is imperative to think about the best ways to increase its effectiveness and influence in international negotiations and the manner in which the principles and obligations relating to human rights can reinforce national, European and international policies regarding climate change. The EU must demonstrate its ambition for its own purposes, for the European States in the broad sense, and for the world. At least three terms - exemplarity, responsibility and opportunity - must qualify the EU's approach: exemplarity in terms of the attachment of the European human rights values and its concrete involvement in the fight against climate change; ethical and legal responsibility based on the common but differentiated responsibility principle and the responsibility to protect principle; and the opportunity for European policy to assert itself more on the international scene. For this reason, the EU must support the protection of human rights vis-à-vis climate change within international negotiations. Moreover, for Europe, which for a long time has sought to promote and defend human rights in general (see Chapter 2, 2.), there are advantages in moving the field of the fight against climate change towards human rights, in order to address both climate change itself, but also human rights. It may be hoped that a cross reinforcement of these two privileged fields of action can be engendered. For example, climate protection can participate in the strengthening of a subjective environmental right, while human rights could guide and promote climate change adaptation measures.

### 6.2.2 Appearing united on the international scene

In the global geopolitical reconfiguration<sup>45</sup>, it is the emerging powers that are continuing to assert themselves. The strategic challenges they face, which include the climate crisis, are affected by the

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<sup>44</sup> For example, European States were able to agree to the terms of EC proposals, in an agreement described as historic, on climate and the economy, in Brussels on 11 and 12 December 2008, because in the context of crisis, one (the climate) does not go without the other (the economy).

<sup>45</sup> It was indeed observed that the climate negotiations have reshaped the contours of geopolitics. The principal actors in these negotiations are: the EU, AOSIS (43 island states directly threatened by sea-level rise), the *Umbrella* (traditional allies of the USA), the G77 (which gathers the majority of developing countries), the 49 least developed countries as well as the oil



severity of the economic, financial and food crises. The situation calls for a greater EU presence on the international scene to create or recreate the trust between countries and groups of countries, but in a difficult context. In a world that has become multipolar, the principal European challenge is to achieve a coordinated standpoint, lest the European influence should face opposition.

On an institutional level, the environment is an area of shared jurisdiction between the EU and its MS, which are all contracting parties to the UNFCCC and the Kyoto Protocol. Achieving unity in European climate foreign policy is a challenge because of the "multiple actors" nature of the EU. The system of representation and coordination, which has been set up since the Lisbon Treaty, is extremely valuable in the reinforcement of European coherence in international negotiations. But there is still much room for progress and unity remains a central condition to enable the EU to exercise its diplomatic persuasion in the defence of the human rights dimension of climate change. At the Copenhagen Summit, the complexity of the representation of the EU and its MS was criticized (Kazynski, P. M.). At present, the methods and organisation of the discussions on the fight against climate change raise questions on the implications of this shared issue. We are dealing with regular meetings and negotiation rounds, which for some observers still appear "*disconnected from traditional diplomacy*"<sup>46</sup>. Moreover, the essential and cross-cutting issue of sustainable development is not considered to be a crucial parameter of the foreign policies of MS. In addition, the actions of some States may give the impression that they are working independently to advance the negotiations. France for example joined Brazil in a diplomatic tour on climate change in 2009 in African countries, awkwardly giving the impression that they were working in the margins of the EU. It is essential that the voices of the European Commissioner for climate change, the rotating Presidency of the EU and the EU High Representative for Foreign Affairs are all heard in international negotiations and that they are in unison, in order to avoid giving the impression that there is a gap between the stated ambitions and the contents of the agreements being presented.

Another difficulty has emerged in the representation of the EU in international climate negotiations: the 27 European diplomats, after spending long periods together in internal negotiations, are arriving at the international summits in an exhausted state<sup>47</sup>. A rationalization of the European diplomatic "marathon" in advance of international negotiations would be beneficial.

In addition, the subject of human rights remains a source of tension between certain States. The national and regional disparities that remain must be taken into account so that the debate is not unproductive or, worse still, cancels out the efforts already undertaken and the objectives of this new tactic. Admittedly, the reinforcement of the coherence of its human rights policy and the fight against climate change, as well as the dissemination of this policy, is likely to reaffirm European leadership on the matter, but because the challenge requires an institutional and global reaction, it is necessary to raise the question of the action framework because it is only through global action that it will be possible to restrict climate change and its impacts. Henceforth, the question of the fight against climate injustice, after having been considered as a physical and economic issue, must now be integrated into the heart of international justice. The current compromise between economic and human costs is contrary to the ethics and risks jeopardizing global goals to reduce GHG emissions. International negotiations must from now on move beyond the rhetoric and begin to deliver concrete commitments.

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producers. Recently it has appeared that some "groups" are divided. Brazil, Mexico, China and India are no longer opposed to carbon constraints, thus going against the traditional position of the G77.

<sup>46</sup> Comments by Serge Grouard at the (French) National Assembly meeting of 24 November 2010, following the hearing (open to journalists) of Brice Lalonde, the Ambassador in charge of climate negotiations.

<sup>47</sup> Opinion of Brice Lalonde, Ambassador in charge of the climate negotiations, at the (French) National Assembly meeting of 24 November 2010.

### 6.2.3 To act within a suitable framework

The development of the fight against the climate change could benefit from an imagining of the way in which the field of human rights could become an integral part of it. The specificity of the UNFCCC and the Kyoto Protocol is built around the idea that an international framework should take precedence over national policy. In the middle of the 1990s, climatic policy was not yet part of an elaborate political field, and it remained so until international objectives had been established. The UNFCCC is the most appropriate framework for dealing with these changes, as it is for dealing with human rights in climate change. It represents the first attempt of the UN to understand and to contemplate climate change remedies and their consequences. The COP, which meets periodically, provides the place for exchange and decision-making.

In its *submissions*, the EU should bring human rights issues closer to the heart of multilateral climate negotiations. Indeed, a systematic analysis of these *submissions* since the Bonn Conference in April 2010 shows that Europe does not demonstrate a direct relationship between human rights and climate change at the heart of international climate negotiations, unlike countries such as Ecuador, New Zealand, Bolivia, Maldives or even Uzbekistan<sup>48</sup>. It appears, however, that human rights and climate change are sometimes mentioned side by side in European positions, specifically regarding the capabilities of development assistance<sup>49</sup>. The concept of development may in some respects, seem to provide a bridge between the concept of human rights and climate change, a natural relationship. Similarly, sustainable development became a priority matter for attention to climate change when Belgium and the Commission on behalf of the EU and its MS recalled, for example, that a “*special attention should be given to issues relevant to developing countries and highly vulnerable regions*”. In addition, it has been suggested that new estimates should be carried out on the costs and the global and regional benefits from a socio-economic point of view<sup>50</sup>. Whatever such estimates would show, the lack of reference to the relationship between human rights and climate change can be explained by the choice of an economic and technological approach to climate change and, in particular, the reduction of GHG and energy transitions on the part of the EU. However during the COP 17 in Durban, Ireland’s Minister for the Environment emphasised in his address the link between human rights and climate change, stating that: “*CC is the greatest threat to human health in the 21<sup>st</sup> century*”. He specifically pointed out the problem of global food security, recalling Ireland’s historical experience of famine and recognising that the right to food is a key fundamental human rights<sup>51</sup>.

A UN process is undoubtedly essential in obtaining a broader commitment to the fight against climate change at the global level. These changes have effects on human rights which, even if they are

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<sup>48</sup> This can be seen when these countries refer to HR as such (like a generic term) or its components, such as public health or water resources. For example, the Bolivian position is “*Ensuring the full respect of HR, including the inherent right of indigenous people, women, and children, migrants and all vulnerables sectors*”, as stated at the AWG-LCA in Bangkok 5-8 April 2011, Bonn 7-17 June 2011 and Panama City, 1-7 October 2011. While the Maldives, for example, state that the fight against CC is about “*protecting the HR and fundamental freedoms of its citizens*”, UNFCCC, AWG-LCA, tenth session, Bonn, 1-11 June 2010, Submissions from Parties, 30 April 2010. For others positions, see: [http://unfccc.int/documentation/submissions\\_from\\_parties/items/5900.php](http://unfccc.int/documentation/submissions_from_parties/items/5900.php) “*submission from parties*”.

<sup>49</sup> Submission by Poland and the EC on behalf of the EU and its MS, 16 August 2011, on Capacity building under the Convention and under the Kyoto Protocol, Information on the activities undertaken pursuant to decision 2/CP.7, 2/CP.10 and 29/CMP.1; and Submission by Denmark and the EC on behalf of the EU and its MS, on Capacity-building under the Convention and under the Kyoto Protocol: Information on the activities undertaken pursuant to decisions 2/CP.7, 2/CP.10 and 29/CMP.1, 23 March 2012.

<sup>50</sup> Views on issues related to the Research Dialogue including possible ways to enhance its effectiveness, Cancun submission from Belgium and the EC on behalf of the EU and its MS, 20 September 2009.

<sup>51</sup> Letter addressed by Mr. Phil Hogan, Minister for the Environment, Community and local Government, Ireland, at COP 17, Durban, 7 December 2011.

localized, will in the long term have an impact on a planetary level, thus requiring the commitment of the entire international community to control and solve them efficiently. The achievement of the MDG objectives is at stake. This approach is more likely to strengthen the universality and indivisibility of human rights. The unprecedented nature of climate change undoubtedly means that the UN framework on human rights is not optimal for addressing the consequences of climate change on human rights. However, it is essential that there is collaboration between organisations (COP at the UNFCCC, HRC and other specialised UN agencies...) so as to draw attention to the importance of the interaction between human rights and climate change policies. Complementarity is essential for an organisation such as the HRC, which can draw attention to areas that have not been addressed in climate negotiations, but which have human rights implications. The EU must, therefore, strengthen the dialogue with all the stakeholders, bodies and institutions involved in the UN, because it provides a solid and transparent framework for a legally binding target with regard to human rights, and for asserting their indivisibility and universality.

The European defence of human rights in climate change can be also expressed within the United Nations General Assembly (UNGA), which is an important place of discussion and momentum. Since the Lisbon Treaty entered into force, the EU has replaced the Commission as an observer to the UNGA. The President of the EU, the High Representative for Foreign Affairs and Security Policy, the President of the Commission, the head of the EU delegation or his/her collaborators now have the vocation to represent the EU in different UN instances, whereas prior to the Lisbon Treaty it was the MS currently holding the EU Presidency, or the Commission on matters within its jurisdiction, which spoke on behalf of the EU and its MS. However, the EU, because of its observer status, does not enjoy the same prerogatives as those granted to the MS (such as the right to timely intervention in debates, the right of reply, the right to distribute official documents...). To improve this situation, the EU proposed a resolution to secure EU participation in UN work, specifically to allow its representatives to fully express themselves and participate on good terms in the work of UNGA. This resolution was passed on 3 May 2011<sup>52</sup> by a vote of 180 in favour, allowing EU representatives to be registered on the list of speakers, together with the representatives of major groups. As a result, it can from now on call for its communications be circulated directly and to verbally present amendments and proposals. The EU should be able to benefit from this improved position in order to strengthen its influence and ideas, particularly on the environment, climate and human rights, although since EU representatives remain observers, they have neither the right to vote nor to sponsor any resolutions or decisions, nor the right to present candidates.

### **6.3 Proposals**

In view of the situation in the countries of the South, especially their geopolitical instability, international negotiations are an indispensable requirement for obtaining commitments from key emerging countries to reduce their emissions and to ensure that all climate justice issues are addressed. Nevertheless, it is necessary for actions to be coherent to prevent the defence of a human rights dimension, if it is poorly conducted, from becoming an additional obstacle to negotiations. The terms and conditions of actions must primarily be taken into account.

#### **– To act diplomatically on the triple multilateral, regional and bilateral arena**

Europe must show a greater political will in the pursuit of a clear political message in international negotiations and in the need to affirm a common vision of the EU's MS. But it is possible for Europe to adopt a triple approach on the human rights and climate change issue, that functions on a multilateral level (in the UN framework, as previously mentioned) and on a bilateral and a regional level. All could

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<sup>52</sup> Resolution A/RES/65/276, 3 May 2011, "Participation of the EU in the Work of the UN".

evolve gradually, allowing precautions to be taken to protect the unity of the discourse, which is necessary to support the multilateral framework.

In the knowledge that the human rights issue often creates tensions with certain countries, such as China for example, it is clearly necessary to consider the approach method carefully. The direct approach has the merit of being clear and well defined, but a more progressive (entryist) approach may also be worth considering, so long as the general objective is not forgotten.

Moreover, multilateral negotiations (including those of Copenhagen) have clearly shown that UN progress and advancements depend on the good will of States. An active programme to bring together the EU and the third countries is thus essential to provide support for the UN process. The objective is to achieve a better understanding of the positions, concerns and expectations of the EU's partners on key issues and to clearly explain the requirements for integrity, ambition and exhaustiveness with regards to the EU's climate and environmental work. The draft of a joint declaration with African countries should be revived and continued to endorse a diplomatic strategy.

– **Achieve a coherent approach between the European Union and its MS policies on the diplomatic level of the United Nations Security Council**

The absence of a permanent EU seat in the United Nations Security Council (UNSC) is an obstacle to the achievement of its international ambitions, which is why the new German coalition, which came to power in 2009, abandoned its ambitions and claims for a permanent seat on the UNSC, for the benefit of the EU. The generalisation and realisation of a debate on this issue could be a way to strengthen the power and visibility of EU foreign policy and to facilitate a common security policy in the broad sense, i.e. to include climate change.

If such events do not take place, and the realisation of these objectives does not occur within a reasonable time frame (given that permanent members such as Great Britain and France are not likely to relinquish their privileges), the EU cannot participate in the informal meetings on resolution negotiation that are held behind closed doors with only one Ambassador and two delegates from each country. To enable the EU to advance its ideas and debate on climate change and human rights, a temporary solution could be for the EU member elected to the UNSC for two years, to include or accept to associate a diplomat from the European External Action Service and/or a representative of the country that holds the EU Presidency at that time.

In any case, when the EU has defined a position on a subject on the UNSC's agenda, the High Representative for Foreign Affairs under Article 34 TEU also has an opportunity to present the EU's position at the request of MS that sit on the council. Indeed, in 2011, Catherine Ashton called for the members of the UNSC to invest more in the field of conflict prevention<sup>53</sup>.

There are also many coordination meetings involving the EU's MS in the UNSC, where human rights and climate change policy is likely to be advanced: weekly meetings of the delegation heads and of political advisers from the 27 MS (so-called Article 34 meetings). This informal work, which is preparatory, can constitute a springboard towards the UNSC.

– **Achieve a coherent approach between the European Union and its MS policies on the diplomatic level of the UN HRC**

At the HRC, the EU was able to convene special sessions to initiate investigations by UN Rapporteurs on the human rights situation in some countries (Darfur, Burma, DRC). It may well do the same to defend the human rights climate change issue.

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<sup>53</sup> Security Council, 6577<sup>th</sup> meeting, 8 February 2011

Moreover, the recently updated *EU guidelines on human rights dialogues with third countries*<sup>54</sup>, reveal the emergence of a level of coherence that is not necessarily (and paradoxically) in line with the unity of opinion between the EU and its MS. The EU is not bound by the conduct of MS, and more specifically the existence of a dialogue on human rights between the EU and a third country will not prevent the EU from denouncing, in the appropriate international forums, the human rights violations in that country, nor from addressing the issue in meetings with the countries concerned at all levels<sup>55</sup>. Without ignoring the MS, the EU can thus work towards a greater consistency through a strong synergy and above all by initiating actions at international forums, particularly through resolution, regardless of the diplomatic activity initiated in parallel by the MS and the EU in other areas. One sees here a certain diplomatic voluntarism, or even an "educational" function of the EU, which has recently been asserted in a different way, in particular through its adhesion for the first time to an international instrument of human rights protection, the Convention on the Rights of Persons with Disability, even though not all of the MS have joined as yet. Displaying European consistency on the subject of the debate will polarize around a powerful ideological bloc. So if another opposition bloc must be created, it must define itself in relation to the ideology proposed by the EU.

– **Maximise European Union influence in building an international coalition to pursue the integration of climate change and human rights policy objectives**

The practice of *international coalitions* offers an alternative to government processes. Generally, we refer here to coalitions within civil society, NGOs and various associations that seek to influence international organisations or to promote a new ideology.

We have seen in NGO practices some international coalitions that have started in the wake of international observance days, or after international conferences. The EU and its MS, through its new Special Representative on human rights, could initiate such a movement by approaching NGOs in particular, during the international conference on human rights and climate change that we propose. Such a coalition could serve as a platform to strengthen joint action and to send a strong message to global bodies such as the UN and the UN HRC that calls for action and the inclusion of this new human rights/climate change dimension.

Finally, it is important to reinforce the diplomatic dialogue in other forums, including non-institutionalised ones such as the G20, where the EU has the opportunity to promote its ideas with key partners, including emerging countries.

– **Defending human rights and targeting needs**

It may be asked whether it is appropriate to discuss human rights in general or even to target specific issues: in particular vulnerable European populations, the invasion of natural resources (water), health issues, etc. In the view of the authors, it is very important that these values are defended in the name of human rights, but the targeting of specific needs is likely to provide the most practical and pragmatic approach. In the same way, questions may be raised on whether it is appropriate to classify, calibrate or prioritise targeted human rights, to which there is no simple answer. In the Fifth National Communication from the European Community under the UNFCCC in 2009<sup>56</sup>, the EU examines the impacts of climate change by focusing firstly on the biophysical aspects, and then by addressing the projects on the socio-economic consequences of these changes. On this last point, it is noted that the impacts on human health or on the economic activities of tourism and agriculture are treated on the

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<sup>54</sup> <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.fr08.pdf>

<sup>55</sup> Ibid. point 9.

<sup>56</sup> [http://unfccc.int/resource/docs/natc/ec\\_nc5.pdf](http://unfccc.int/resource/docs/natc/ec_nc5.pdf)



same level, without mention of the "human rights" issue as such. Therefore, it appears that the "human rights" impact is usually included in development in general and absorbed by it, particularly by the economic criteria. The "human rights" dimension of climate change must be added, not only at the level of "intentions", but also at the negotiation level.

– **Defending and reinterpreting human rights, taking climate risks into consideration**

Given the ideological differences and accepting that pragmatism should guide EU action, one particular method or diplomatic tactic may be considered preferential, which is the circumvention, if necessary, of the difficulties involved in identifying and determining the effects of climate change on human rights. In short, knowing whether these changes can be regarded as human rights violations, but also reinforcing the approach where obligations as regards human rights provide protection for individuals that suffer the adverse effects of climate change (Knox, J.). Time savings and efficiency can therefore be obtained by focusing on the obligations of States (in general) for the effective protection of human rights in terms of climate change.

– **To promote the expression of the views of the most affected communities**

The authors of this paper consider that the key issues and possible compromises should be identified to promote the expression of views from the most affected communities. Europe could offer to host an International Conference on the subject, in the same way as the states of West Africa hosted in 2009 (as part of the Economic Community of West African States) the first international conference on climate and human rights. The EU could initiate and host such an event, bringing together international experts and representatives of national, regional and international commissions on human rights and climate. The event could provide the opportunity for Europe to finalise its position on the matter and to make proposals for the upcoming international climate negotiations, as part of its efforts in terms of human rights.

Reconciliation activities must be organised at all levels and with all major stakeholders. A number of bilateral and multilateral meetings, including summits and ministerial meetings, regional meetings and *ad hoc* meetings can be envisaged to ensure that partners from all regions of the world are approached, including vulnerable countries, and that the EU improves its understanding of their concerns.

Although the EU's influence at the UN has waned over the past few years, especially at the HRC<sup>57</sup>, in favour of China and Russia, the forging of links and alliances, with African countries in particular, could enable it to highlight this new policy and help to restore its image. On an institutional level, this approach could be implemented by the newly appointed independent expert in charge of human rights and climate change.

– **To reinforce the European diplomatic corps**

The focus on the human rights dimension in the context of climate change should be the manifestation of a great political will to continue to give a clear political message in the international negotiations while signifying an EU commitment. While the shared competences remain a problem and evolution towards federalism is not the order of the day, the strengthening of European diplomacy can be a valuable way to concentrate some of its efforts on the development of "its soft power capabilities" (Oberthur, S. & Roche K., p. 46). The EU diplomatic corps and in particular the new European External Action service, could be responsible for the building of a diplomatic alliance on this subject. The many

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<sup>57</sup> According to a publication of the think tank of the European Council on Foreign Relations, the EU could count on the support of 72% of UN countries; today, it can count only on approximately half of them. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20081013STO39207+0+DOC+XML+V0//EN>

contacts available in European countries can reinforce this ambition. A work plan should be developed, and the institutions could evolve. A true European diplomatic corps could be created because the national diplomatic corps still prefer the status quo and continuing inertia in order to minimize European diplomacy (Emerson, M., Balfour, R., Corthaut, T., Wouters, J., Kaczynski, P., Fox, T.). The European diplomatic potential must be fully exploited. It is certainly true that since the entry into force of the Lisbon Treaty, European delegations from abroad that attend the international climate negotiations have a considerable amount of extra work in properly coordinating the actions of MS. The European delegations in countries where the negotiations take place must therefore assume a new role of communication (one that was formerly vested in the rotating Presidency), by ensuring that they show that MS positions correspond well to the joint positions taken in Brussels. There is an increasing amount of preparatory work for delegations to complete, that is probably more complete and diverse than before (informal meetings with journalists and civil society, awareness campaigns...). While the authors of this paper regard this change as encouraging, it must however be ensured that in future these delegations will really have the means to take the common positions adopted in Brussels and to implement them in the outside world.

Within the UN, it may also be appropriate to move the question into the arena of the UNSC. After a heated debate on 20 July 2011 the UNSC acknowledged that climate change constitutes a real threat to peace and international security<sup>58</sup>. Indeed, many conflicts are generated by desertification, water shortages and cross-border migration. The discussions in this field date back to 2007, following proposals from Germany in particular, but there is a reluctance from some states, particularly island countries, to acknowledge this aspect for fear of moving to a "security" approach to the problem. However, security and human rights issues remain closely connected in the context of climate change. Nevertheless it is essential to allow ideas to progress in the UN framework, and to intensify the UN's cooperation with third countries by encouraging confidence in other parties. For this it is essential to achieve a common intra-European vision and to reach across the divides to speak with a single voice, to coordinate on these issues in advance and to strengthen the dialogue to allow the resolution of disagreements between the MS.

– **As a first step and to enable prompt action, it would be necessary to:**

**Identify** emergencies and to draw up a roadmap for the next stages of negotiations with the view to integrating the human rights dimension into all its components in order to define priorities and recognise situations of vulnerability;

**Encourage** the implementation of immediate actions, Europe in particular can offer technical and logistical assistance to the national actions of developing countries, in particular with regard to vulnerable communities. The establishment of a special fund could be considered and an *ad hoc* group could be formed;

**Support and strengthen** the role of science and expertise to better understand and predict phenomena, this is important because in the climate change area, the role of knowledge and learning is paramount;

**Strengthen the dialogue** because the evolution of global governance makes it increasingly necessary to involve the public, civil society and other private actors. Europe must continue to reinforce this dialogue which makes it possible to take into account the various perspectives and to better understand all situations. The public dissemination of this new doctrine to the European public is useful and likely to reinforce the EU's legitimacy on the subject. The authors believe that when suitably

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<sup>58</sup> Declaration of the President of the Security Council, 20 July 2011, S/PRST/2011/15.

informed, international public opinion will support policies and help to advance the progression of ideas and action;

The adoption of an official European statement on climate change and human rights although deprived of binding legal value would be a powerful symbolic gesture. It could raise awareness of the relationship between climate change and human rights and articulate the associated problems. A realistic account of the main concerns, such as housing, health, access to water and other difficulties, may be able to demonstrate the severity of the situation and also the relevance of these questions. It could also highlight European determination and commitment to support the fight against climate change and to defend this important theme for the global society for the coming years at the highest level of international responsibility;

**Pleading for a special procedure in the HRC procedure** as it indeed was proposed in the OHCHR last report<sup>59</sup>;

The debates on global governance have highlighted the need for greater consideration to be given to the views of developing countries, especially emerging countries in the decision-making process. From the European perspective, the question should be raised regarding the redesign of European representation in international institutions and forums, so that Europe speaks with one voice and that this representation concurs with the division of responsibilities within the EU. Without doubt, this will put the EU's diplomatic capacities to the test in order to generate effective political results *with* and *within* international organisations and in the multilateral authorities. It is the entire dynamic of the EU as a diplomatic player that will thus be tested.

## 7. EUROPE AND THE CLIMATE CHANGE DIMENSION OF HUMAN RIGHTS EXTERNAL DIPLOMACY

The increasing role of the EU as a global actor for the protection and promotion of human rights has revealed the need to adapt both internal and external EU policies, as well as the specific missions of the institution, to a series of new concerns and approaches to “traditional” human rights issues. Within this framework, environmental and climate change impacts on the human rights situation at the global scale have become a major element for inclusion in the planning of strategies and actions in the sphere of EU international relations.

The concept of EU “human rights diplomacy” itself has been developed and specified recently throughout the evolution of scope and objectives that placed the human rights discourse at the centre of the EU’s principal actions aiming to promote its proper constitutional values in almost every domain of external action. This alternative model of diplomacy that is nowadays advocated by the EU is adapted to the ever-changing international landscape in a globalization era, marked by the emergence of new concepts, and offers new methods for serving the goals of the EU’s standard vocation of endowing international society with an organisational model based on the respect of “human” values<sup>60</sup>.

The impact of climate change issues in the development of the various external human rights policies of the EU, from both a legal and political perspective, cannot be considered separately from the interaction and mutual influence that occurs between internal and external actions and policies in the field of human rights protection – especially in very “sensitive” matters such as environmental migration or specific measures targeted towards the most vulnerable populations.

<sup>59</sup> A/HRC/19/34 of 16 December 2011.

<sup>60</sup> For the evolution of the “HR diplomacy” concept in the framework of EU external action, (see Sinou, D.).



The core element that characterizes this new aspect of EU human rights diplomacy is the evolution and adaptability of the concepts as well as of the methods applied – an element that is apparent throughout the implementation of the fundamental policies in this field, such as the common foreign and security policy (CFSP), the common commercial policy and trade policy and the EU development cooperation policy.

## 7.1 The Legal Framework

The evolution of a legal environment and primary EU law following the entry into force of the Lisbon Treaty has once again raised the question of the existence of the general competence of the EU to lead a policy – and *a fortiori* an external policy – in the field of human rights. Despite the absorption of the construction “pillar” and the logic of the new “constitutional” model, and despite an apparent unification of the various legal bases that had previously founded EU legal initiatives, it still seems difficult to deduce from the existent legal framework a united EU competence in matters of human rights. This competence, in areas where it exists, can rather be founded upon the doctrine of the EU’s *implied powers* (or in *foro interno* and *in foro externo*), a doctrine that recognises implied powers of intervention for the Union in human rights matters, based on the current Article 352 TFEU – in so far as the protection of human rights can be treated as an “objective” of the EU, in the sense of this provision (Eeckhout, P., pp. 95’s; EU Network of Independent Experts on Fundamental Rights)<sup>61</sup>.

### 7.1.1 Objectives

The application of this aforementioned doctrine of the EU’s *implied powers* in external human rights policies inevitably leads us to question the pertinence of the traditional division between internal and external approaches to human rights issues. The transversal and global character of the issues addressed under this new sphere of EU competence, as well as the ever-closer synergy of the leading EU actors, presume that this “split” – which to a large extent is artificial – is no longer relevant.

Therefore, should the EU maintain the same “traditional” human rights approach as an objective of its external diplomacy and external legal policy for matters that involve climate change? A combined reading of new articles 2, 3(5) and 21(1) and (2) of the TEU reveals an explicit evolution in common values and objectives that calls for a level of adaptability in the scope of the EU’s legal and political actions, especially in areas of transversal interests such as climate change and human rights. The vocabulary of the provision of Article 21(2) is explicit in this sense: “*The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (...) (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (...) (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters (...)*”.

Furthermore, the new provision in Article 22 of the TEU refers not only to “objectives” but also to “strategic interests” offering EU institutions a perspective to institutionalise common targets through the implementation of concrete external policies rather than a vague declaration of general orientations (Baker, S., pp. 82-88).

### 7.1.2 Legal sources

The adaptability of EU objectives, as described above, is most reflected in the “constitutive” and legislative functions of the EU, in the sense that both primary and secondary EU law consequently

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<sup>61</sup> Also ECJ, case C-327/91, *France v. Commission* (decision of 9 August 1994), p. I-3641.

adapted the content of the notions referring to human rights and the legal nature of the rights involved to include new features and to respond to new or current social and global needs.

The recent modification of the European legal environment, especially after the entry into force of the Lisbon Treaty, had a considerable impact on the reformulation of external policy human rights targets in a sense of a larger, common EU vision of what constitutes its global role as a world leader for the promotion and protection of "human" values. The above-mentioned provisions of Articles 2, 3(5) and 21(1) and (2) of the TEU, as a legal basis for the Union's external action, as well as Articles 6 and 7 of the TEU, as a *lex generalis* for the Union's competence in matters of human rights, mark the adaptability of legal sources to this new legal and political environment, leaving an open window for perspectives of further developments.

The integration of the Charter of Fundamental Rights, which Article 6 of the TEU refers to, has to be considered as the first step in this direction, even if the text is intended to concern *a priori* the internal scope of the protection of fundamental rights. The Treaty of Lisbon has recognized the legal force of this text through its inclusion in the treaties and the proclamation of its binding effect in the terms of this provision (Article 6(1) TEU): "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*" Nevertheless, the doctrine has pointed out some limits in the implementation of the Charter that may still refrain its full legal potential: these limits concern principally the direct invocability of the rights contained in the Charter before the judge – especially the degree of invocability of social rights – as well as the formulation of reservations by some Member States by means of protocols (Genevois, B.; Anderson D., Murphy, C.). In some circumstances, the difficulty inherent to the language of the Charter to distinguish between general principles – that are non-justiciable – and concrete, opposable rights may be another fault in the effectiveness of the new legal framework. However, in spite of these particularities, the ECJ seems to have opted for a rather dynamic approach in its recent jurisprudence, confirming the full legal value of the text. On the other hand, the impact of the Charter is that of an international vocation, confirmative of a EU *acquis* in matters of human rights and constitutive of an inter-textual dialogue with other European and non-European relevant instruments of human rights protection – *inter alia* the ECHR. In this logic, the Charter has the vocation to be a reference instrument intended to inspire the whole action of the EU in the fields of human rights, through a holistic approach of the matter (Benoit-Rohmer, F.).

The choice of a holistic approach in the decision-making of a human rights external diplomacy for climate change issues is probably the only way to cover thematic areas and concerns that could not be treated effectively under a rather technocratic view, considering the mainly human impacts in this field. The global perception of these impacts in addition to the identification of new vital needs – or a new dimension of permanent needs – leads inevitably to the development of a human rights-based approach, as the more realistic method to face these kinds of complex and multi-level issues. Furthermore, while traditionally the "justiciability" of emergent rights is still contested, the jurisprudence of international judicial mechanisms at a universal and regional level demonstrated that the enlargement of scope and content of "traditional" recognised rights is legitimate and legally possible. In this sense, the recent recognition of concrete rights, such as the right to food or the right to water, provides material to believe that the formulation of concrete human rights covering climate change issues is nowadays possible (Cameron, E., 2010, pp. 691's).

Finally, the recent evolution of the ECJ jurisprudence in environmental matters seems to pass the vision of these matters through the prism of health policy and the protection of the European consumer, to reveal a firm political will to create a global legal policy for the EU in these matters (Clément, M.).

### 7.1.3 Legal actors

The last decade saw the considerable evolution of the role of EU institutions as “traditional” legal actors in the elaboration and realisation of the EU’s external diplomacy, in particular in the fields of the protection and promotion of human rights.

The Lisbon Treaty sealed this development with the establishment of a permanent Presidency of the European Council and especially the creation of the new mandate of the High Representative of the EU for Foreign Affairs and Security Policy. The diplomatic role of this new function, ensuring the consistency and coordination of the EU’s global external action, can support a large proportion of potential actions in matters involving human rights and climate change, with an added value in terms of coordination between the Council and the Commission organs – as the new High Representative also assumes the functions of the Vice-President of the Commission and has absorbed in a sense the previous domains of action of the Commissioner for External Relations.

The recent setting up of a European External Action Service (EEAS), in spite of the criticisms formulated as regards its current lack of reactivity and visibility, offers a new field of diplomatic and legal action, evolving from a rather “intrinsic” approach towards a more “instrumentalised” one, with improved margins of intervention (Cameron, E., 2010). Considering especially the link between climate change and human rights, the EEAS can make concerted efforts to help institutionalise climate negotiations with third countries. In this sense, the appointment of EU Special Representatives in some “sensitive” countries or regions of the world consists of a complementary tool for the implementation of an accomplished external EU policy.

The Commission also holds a core role, through its own political and legal methods. Its contribution in the sense of an affirmative action is not negligible, especially in terms of funding mechanisms and supporting local actions: as an example, the last EU Annual Report on Human Rights and Democracy in the World in 2010 points out that the Commission’s funding action to support projects for the Cuban population intended to improve food security and adaptation to climate change, among others (EU Annual Report, p. 171).

Finally, the new FRA role can also be considered as part of a holistic approach to external human rights and climate change policy. FRA’s mandate is indeed very limited for external policy matters. However, extensions of the FRA’s competence have proved possible for transversal issues, under the current Commission’s proposal for a new multiannual framework for 2013-2017, which plans a considerable enlargement of the current mandate, with an increased focus on highly sensitive issues such as Roma integration, social rights and social exclusion<sup>62</sup>. This evolution, coming as a result *inter alia* of the interaction with civil society actors, allows the consideration of the prospects for a future extension of the FRA competence in thematic areas such as the protection of the environment, including climate change issues, as a part of a global human rights-based approach for this institution.

## 7.2 The Legal and Political Means

### 7.2.1 Traditional legal “tools”

#### – Human rights dialogues and traditional diplomatic methods (negotiations, declaration statements and *démarches*)

The EU’s “human rights diplomacy” as practiced in the framework of institutionalized and political dialogue with third countries – also known as “human rights dialogue” – is another field where the EU plays, and will continue to play, a major role on the perception of climate change concerns and their

<sup>62</sup> COM(2011) 880 final, 13.12.2011.

influence on the human rights situation in specific countries or regions of the world. Therefore, human rights dialogue is probably the most constructive instrument of the EU's external human rights policy, as far as it concerns more than 40 countries in the world (EU Annual Report, p. 12).

The EU Guidelines on human rights Dialogues constitutes a concrete legal basis that is at the same time sufficiently flexible as a *soft law* mechanism for considering a large proportion of legal and political situations (EU Guidelines). Recently, the EU seems to have admitted the necessity to include climate change concerns in the current forms of human rights dialogues: as an example of this development, the new human rights dialogue conducted with Indonesia includes debates on "*human rights, democracy and climate change*" (EU Annual Report, p. 151).

More traditional diplomatic methods such as negotiations, declaration statements or *démarches* continue to be used on a large and progressive scale in relatively new areas including the environment, climate change and human rights. The recent example of the explicit recognition of a "right to water" in two official declaration statements pronounced by the EU's High Representative for Foreign Affairs and Security Policy, Catherine Ashton, on the occasion of the celebration of World Water Day in 2010 and 2011 opens the way for new perspectives and methods to implement a HRBA in climate change issues<sup>63</sup>.

– **Political and human rights conditionality in European Union bilateral and multilateral relations with third countries.**

The multilateral relations between the EU and its MS, on the one hand, and third countries or regional organizations on the other, is another field of interest, especially regarding the inclusion of the "climate change" parameter when implementing a political conditionality based on the so-called "human rights clauses".

This "political" or "democratic" conditionality has recently been an almost generalised practice covering various EU external policies, from the common commercial and trade policy to the development cooperation policy and finally the European Neighborhood Policy. This conditionality is based on two aspects: "positive" conditionality, aiming to encourage the respect and promotion of democratic and human rights values in EU partner countries, and "negative" conditionality focusing on sanctions for States whose practices are non-compatible with the above criteria. The most common feature of this double-faceted conditionality is definitely the system of human rights clauses, largely used both to promote affirmative action as well as in a more dissuasive or coercive role. Even if this type of clause refers mainly to the classic triptych "human rights-democracy-rule of law", without mentioning environmental and climate change issues, a thorough reading of these provisions in a holistic approach, according to the aims of the specific agreements, provides the option to extend this instrument for a human rights conditionality adapted to climate change specificities.

The same holistic approach should allow the future negotiations of the Cotonou Agreement to establish a partnership between the EU and ACP States. In fact, the second revision of this Agreement on 11 March 2010 included a new provision, in the terms of Article 32*bis*, referring to multilateral cooperation in climate change issues, which offers a new broad legal basis, even without specifying the link with human rights violations and concerns<sup>64</sup>. It is worth mentioning that, according to Article 9 of

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See <http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/10/12&format=HTML&aged=1&language=FR&guiLanguage=en>; <http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/11/77&format=HTML&aged=1&language=FR&guiLanguage=en>.

<sup>64</sup> See [http://ec.europa.eu/development/icenter/repository/second\\_revision\\_cotonou\\_agreement\\_20100311.pdf](http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf).

the first Cotonou Agreement (December 2000), “respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development”<sup>65</sup>.

In terms of external trade policy the Generalised System of Preferences (GSP) and particularly its latest version, the GSP+, function as special incentive arrangements for sustainable development and good governance for those countries that commit to embracing core universal values on human and labour rights, the environment and governance.<sup>66</sup> This instrument is likely to reinforce the consistency between environmental protection and human rights objectives and can be used in a rather constructive manner.

## 7.2.2 New or emerging legal “tools”

### – Guidelines and general orientation documents

Guidelines form a recent *soft law* tool that has been largely exploited by the EU to elaborate a coherent external strategy in matters concerning human rights. According to the recent Annual Report on Human Rights and Democracy in the World in 2010, “the eight so-called ‘guidelines’ form the backbone of EU human rights policy [and] represent a strong political expression of the EU’s priorities”<sup>67</sup>. Their flexible legal form and content probably make them the most practical tool available for the adaptation of different levels of external policy in human rights and climate change issues, as well as offering a united view of the EU’s objectives and methods in this field.

Other general orientation documents, such as the recent Joint Reflection Paper entitled “Towards a renewed and strengthened EU climate diplomacy”, developed by the EEAS and the EC<sup>68</sup>, reflect the need to explore new normative forms that are capable of a more adequate expression of evolutionary objectives and concepts, such as those of a HRBA to climate change. Even if this document particularly refers *inter alia* to international security issues of climate change and does not explicitly mention the human rights parameter, it does recognise, however, that “extreme weather events may lead to increased demands for EU Member States to provide humanitarian aid including civil / military co-operation, in disaster relief operations in third states”<sup>69</sup>.

### – Strategies

The “strategy” instrument is not new, but it has been used in various ways with a rather flexible legal force depending on the subject and the policy area that the instrument was supposed to serve. In the environmental and climate change domains, the strategy is likely to be a significant legal tool, especially due to its inherent flexibility in its legal nature and the orientation scheme it can offer. Recent examples prove the pertinence of this instrument for the purposes of adaptability and consistency between internal and external approaches to these matters.

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<sup>65</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:317:0003:0286:EN:PDF>. Other provisions may be taken into account, such as Article 54 referring to food security.

<sup>66</sup> Regulation (EU) No 512/2011. See also the explanatory memorandum included in the relevant Commission proposal: COM(2011) 241 final, 10.5.2011.

<sup>67</sup> See Annual Report on Human Rights and Democracy in the World in 2010, *op. cit.*, p. 11.

<sup>68</sup> Text in [http://eeas.europa.eu/environment/docs/2011\\_joint\\_paper\\_euclimate\\_diplomacy\\_en.pdf](http://eeas.europa.eu/environment/docs/2011_joint_paper_euclimate_diplomacy_en.pdf)

<sup>69</sup> *Ibid.* p. 3. Furthermore, the text recommends that the EU’s external action could “further strengthen dialogue and co-operation with third countries and international organisations in promoting a better understanding and predictability of inter-linkages between climate change, development, environmental degradation, natural resources, migration or conflict”: *ibid.* p. 4.

### – **Open Method of Coordination (OMC) for external policies**

The OMC represents an alternative form of governance that lies between intergovernmental cooperation and legislative integration (Pitseys, J., pp. 12'ss). It was introduced by the Lisbon European Council in 2000 as a form of EU *soft law*, i.e. a policymaking process that is not intended *a priori* to lead to binding EU legislative measures nor to require internal legislative reforms by MS<sup>70</sup>.

The OMC was first used on a large scale in areas such as the EU's employment and social policy; the main objectives being to encourage intervention from stakeholders involved in a national legislative process, from third actors and civil society, and also to spread best practices and achieve greater convergence towards the main EU goals. The process of open coordination itself is gradual and implies many features, such as guidelines, indicators, benchmarks, national plans, as well as peer review, monitoring and feedback. The whole method lies on the principles of participation and transparency (De La Rosa, S.; Dehousse, R.; Radaelli, C. M.).

The OMC has already been used in broader fields than the "traditional" areas of employment and social policy. It has been exploited within the framework of the EU enlargement policy and in the EU neighbourhood policy, in areas that largely involve elements and actions that fall into both internal and external policy categories. This precedent highlights the potential for the activation of this flexible method for other purposes of EU diplomacy, such as climate change strategies, where the necessity for coordinated global action from every stakeholder is evident (Tulmets, E.).

The recent policy meetings of the Civil Society Dialogue Network (CSDN) – the last of which was held in June 2011 on the subject of Women, Peace and Security in EU Common Security and Defence Policy Missions<sup>71</sup> – provide a good example of the possibilities offered by the extension of this method in areas such as human rights and climate change issues.

#### 7.2.3 Global perspectives

European human rights diplomacy in climate change issues would be unfulfilled if it did not consider the interaction between the EU and other international organisations dealing with environmental issues at a European level.

From this point of view, the inter-institutional cooperation with the Council of Europe is of great importance. In parallel to the sharing of common political values and a common vision for the protection of human rights, the future accession to the European Convention of Human Rights may offer a new perspective of concerted action and mutual influence in both normative and procedural levels, given the evolution of the Strasbourg Court's jurisprudence in environmental issues.

Furthermore – and without presuming any future accession of the EU to the revised European Social Charter, which is rather improbable in the present circumstances – it is worth considering the potential influence of this original instrument, especially through the decisions of the European Social Committee on the basis of collective claims introduced before its monitoring mechanism – collective claims that have recently addressed environmental and public health issues and concerns.

Another potential pole of mutual influence and concerted intervention for the EU is the Organization for Security and Co-operation in Europe (OSCE), which presents a well-developed "human dimension" as well as an "environmental dimension" mechanism, and has made a huge contribution especially in the area of climate change<sup>72</sup>. The two organisations currently demonstrate a convergence of similar

<sup>70</sup> Lisbon European Council, *Presidency Conclusions*, SN 100/00, 23-24 March 2000, §37.

<sup>71</sup> [http://eeas.europa.eu/human\\_rights/women/docs/2011\\_0621\\_csdn\\_wps\\_en.pdf](http://eeas.europa.eu/human_rights/women/docs/2011_0621_csdn_wps_en.pdf).

<sup>72</sup> Cf. <http://www.osce.org/what/environmental>; <http://www.osce.org/what/human-rights>.



strategies in the fields of environmental and human security: the OSCE has recently developed, among others, a project entitled “Security Implications of Climate Change in the OSCE region”, which considers several food security scenarios in Eastern Europe and develops recommendations on how to address risks deriving from climate change<sup>73</sup>. This organisation is also actively involved in the Environment and Security Initiative (ENVSEC), an inter-institutional programme governed by the OSCE, the UNDP, the UNEP and NATO, among others<sup>74</sup>. A more institutionalised approach of existing common practices and new perspectives of synergy, taking advantage of the diversity of political methods of the OSCE, can endow the EU with a broader, pan-European vision of its role as a leader in human rights and climate change issues.

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<sup>73</sup> See especially <http://www.osce.org/eea/climatechange>.

<sup>74</sup> See <http://www.envsec.org/index.php?lang=en>.



### 7.3 Recommendations and proposals

- **Make a constructive effort to overcome the long-term division between the internal and external approaches of EU human rights policy, in order to give global and transversal answers to problems arising from environmental and climate change issues.**

At the same time, this new approach should be accompanied by – and based on – the definition of **specific objectives** rather than the general objective of respect and promotion of human rights as defined in the recent EU treaties, after Lisbon. The efficiency of a new human rights and climate change external diplomacy is dependent to a great extent on the **identification of special needs** that are real, as well as the **definition of specific criteria** for legal and political action in this field.

- **Re-evaluate the roles and competences of leading actors.**

The impacts of climate change on the global situation of human rights as well as with regard to particular countries must guide a large part of the diplomatic action of the new EEAS. The European diplomacy henceforth has at its disposal a number of political means and *soft law* acts, ranging from “traditional” negotiations to official statements made by the current High Representative, which can and must be used to promote the human rights dimension of the climate change diplomatic discussions at a bilateral and multilateral level. The recent example of the explicit recognition of a “right to water” through two official statements pronounced by Catherine Ashton may serve as a precedent for an improved and concerted action in other areas, such as the promotion of a human rights-based approach in climate change issues.

The multiplicity and variety of the problems related to these issues imply the coordination and synergy of more than one EU institution and actor. In this perspective, it is necessary to build a stronger and narrower cooperation between the two major poles of EU governance, especially between the European Council and the High Representative as political leaders, on the one hand, and the Commission as the executive power on the other, in particular the new DG CLIMA.

- **Include climate change concerns in the mandate of the newly established European Union Special representative on human rights.**

The very recent creation of a new EU Special representative on human rights represents a very positive step towards the achievement of effective protection and promotion of human rights in the field of EU external diplomacy. The nature of this new mandate, combined with the successful experience of the EU’s special representatives that supervise the situation in different countries and regions of the world, argues in favour of the possibility of enlarging and adapting its capabilities to include climate change issues and concerns into a global human rights approach for the new EU Special representative – following the model of UN thematic mandates. EU diplomacy in this field should take its inspiration from the recent establishment by the UN human rights Council of a new independent Expert on human rights and the environment<sup>75</sup>.

- **Extend FRA’s mandate in thematic areas such as the protection of the environment, including climate change issues, as a part of a global HRBA for this institution.**

The Commission’s proposal for a Council Decision to establish a Multiannual Framework for the European Union Fundamental Rights Agency for 2013-2017 offers an improved ground for intervention, with the considerable enlargement of the current FRA mandate giving an increased focus on highly sensitive issues such as Roma integration, social rights and social exclusion<sup>76</sup>. This evolution, coming as

<sup>75</sup> A/HRC/19/L.8/Rev.1, 20.03.2012.

<sup>76</sup> COM(2011) 880 final, 13.12.2011.

a result *inter alia* of the interaction with civil society organisations, allows the consideration of prospects for the future extension of the FRA competence in thematic areas such as the protection of the environment, including climate change issues, as a part of a global HRBA for this institution. The FRA's contribution is particularly necessary to enable data collection and to improve information and sensitisation with regards to the current problems in this field.

- **Extend political and human rights dialogues with third countries to include climate change problems.**

The political and human rights dialogue with third countries is at present mainly based either on traditional human rights issues, involving the respect and promotion of civil, political or cultural rights, or on other sensitive political matters of common interest for both sides. The inclusion of a new parameter combining climate change issues and human rights concerns could offer new perspectives to the EU diplomacy and for the planning of a long-term policy in this domain, in so far as many third countries are concerned by environmental and climate change problems.

- **Extend human rights conditionality with third countries to climate change situations when involving human rights parameters and concerns.**

Both "positive" and "negative" conditionality clauses are parts of the current EU bilateral and multilateral agreements with third countries, based on various EU policy areas. The new EU leadership in the climate change negotiations must include the use of well-tried political and legal "tools" such as human rights clauses, in order to improve the way in which the human rights parameter is taken into account by these countries in climate change situations.

This conditionality could, therefore, imply new forms of the GSP+ special incentive arrangements in the fields of sustainable development and good governance, where the respect and promotion of universal values in the environment is still a priority<sup>77</sup>.

- **Adopt guidelines on human rights and climate change.**

Specific guidelines on human rights and climate change can be adopted on the model of the existing eight thematic guidelines, as a general orientation, to provide a flexible legal "tool" capable of improving the visibility of the problem and to encourage MS to conduct affirmative action.

- **Establish indicators for an in-depth study of the relation between climate change and human rights in different countries and regions of the world, as well as in the European Union's internal legal order.**

The technique of indicators is a rather new formula that is mainly used in the framework of the OMC's policies. In its recent works, the FRA recommended the establishment of indicators to measure social exclusion and situations of extreme poverty. It is not too much to assume that indicators could also serve as a useful evaluation method for climate change and human rights issues.

- **Encourage participation of private organisations, NGOs and civil society<sup>78</sup>.**

In the framework of an OMC technique or in a less institutionalised way, the participation and cooperation of "third" actors, must be encouraged and facilitated at both national and EU levels. The organisation of events such as civil society *forums* as well as private consultations with NGOs that have special experience in both human rights and environmental fields, should precede every decision-making process on these matters.

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<sup>77</sup> Regulation (EU) N° 512/2011.

<sup>78</sup> See Chapter 5.

- **Encourage a large-scale consultation and/or coordination of actions with other non-European Union organisations operating in this field or dealing with these issues: the Council of Europe and OSCE.**

## CHAPTER 3 EUROPEAN UNION COOPERATION, DEVELOPMENT AND MIGRATION POLICY

The challenge of climate change has led the European Union to formulate a genuinely ambitious development cooperation policy. In this part of our study, we analyse the efficiency of this policy through the stakeholders involved, the content of the accomplished actions and the support that was provided. We will also give special attention to climate change induced migration.

### 8. EUROPEAN UNION EXTERNAL DEVELOPMENT AND CLIMATE CHANGE ADAPTATION POLICIES

The European development policy has been drastically reformed since the late 1990s. This process was initiated by the European Council in response to the highly critical outcomes of an evaluation of European Union development instruments and programmes. This assessment had highlighted the lack of an overall strategy for European Union development policy, as well as the multiplicity and ambiguity of its objectives (Gupta, J. & Van der Grijp N., 2010). Protecting the environment in general and as regards climate change in particular was rapidly identified as a supportive, crosscutting issue, which needed to be integrated into all thematic priorities in order to make development more sustainable, and also to take its social dimension into account.

Even before the Kyoto Protocol came into force, climate change and development issues were linked for the first time in the conclusions adopted by the European Council on 11 November 1999, in which it reaffirmed that addressing climate change was a priority for the EU. A political impulse was given to the addition of a new sectoral dimension to the European cooperation policy. The Commission answered in 2003 with the adoption of a communication entitled *Climate Change in the Context of Development Cooperation*, a key document that laid the foundation for “an integrated strategy for addressing climate change and poverty reduction concerns” and defined an “action plan” for 2004-2008. The EC recognised that the fight against climate change requires both environmental issues and development cooperation to be addressed as one: “climate change is not only an environmental problem. It is also clearly a development problem”. It aimed to increase the consistency and effectiveness of all actions and measures by defining a framework (EC, 2003). As a result, an Action Plan was adopted by the Council on 22 November 2004. In 2007, a second key document was adopted by the Council that attempted to build *A Global Climate Change Alliance (GCCA) between the European Union and poor developing countries most vulnerable to climate change* (European Council, GCCA, 2007). In the same vein, linking development cooperation and climate change policies, the European institutions addressed two politically complex issues, climate change being what is more at the heart of complementary development agendas, including the MDG (in particular Goal 7, *Ensure environmental sustainability*) and the overall human rights framework (Humphreys, S.).

#### 8.1 The legal framework

The EU development cooperation policy is of particular importance as the EU, together with its MS, represents approximately 60% of the flow of global Official Development Assistance (ODA). The EU is a unique actor in development cooperation. It is both a bilateral donor (providing direct support to developing countries) and a multilateral organisation with a coordinating role for the development aid policies of its 27 MS.

In fact, the competence of the EU to adopt a “climate policy” towards developing countries is shared with its MS. We face here two “parallel competences” (Article 4.4 TFEU), according to which there may be a common policy that does not prejudice the right of member states to conduct their own policies.

The Lisbon Treaty has introduced very important and potentially far-reaching changes in the area of EU external relations with the aim of reinforcing the coherence and effectiveness of the EU as a global actor, with major consequences on cooperation policy. First, pursuant to Articles 208 and 209 TFEU, development cooperation has become a “policy” of the Union. This Union policy and those of the MS “*complement and reinforce each other*” (Article 208(1) TFEU) by consulting each other on their assistance programmes, by undertaking “*joint actions*” and, “*if necessary*”, by the MS contribution “*to the implementation of Union aid programmes*”. The Commission shall take “*any useful initiative with this regard*” (Article 210 TFEU).

Various legal grounds can be invoked to support a climate policy towards developing countries, a variety which results in a complex scheme. The legal bases that can be mobilized vary from case to case, depending on the closeness of the relationship with partner countries: Cotonou association agreements with African, Caribbean and Pacific countries (ACP countries, Article 217 TFEU), development cooperation with non-ACP countries (Article 208-211 TFEU), and financial and technical cooperation with middle-income countries from Latin America, Asia and Eastern Europe (Article 212-213 TFEU). For example, Article 9 of the Cotonou Agreement (2011) links explicitly human rights compliance and sustainable development. Furthermore, the Agreement states that the cooperation shall take account notably of “*the vulnerability of small island ACP countries, especially to the threat posed by climate change*” (Article 32).

The objective of this new European policy (“*reduction and, in the long-term, eradication of poverty*”) is to be interpreted broadly (Article 208 TFEU). It has to be read together with Article 3 TEU that states that “*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights (...)*”. In addition, Article 191 TFEU invites the Union to be a leading global actor in “*combating climate change*”. This is after all consistent with the fundamental principle of mainstreaming environmental goals. Article 11 TFEU states that: “*environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities... in particular with a view to promoting sustainable development*”.

In addition, Article 208 TFEU henceforth states that: “*The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations*”. In this regard, the political declaration adopted in December 2005 by the European Council is of particular importance. It sealed a “*European consensus*” on development, which means “*for the first time, a common vision*” shared by the EU and its MS that is consistent with the MDG (notably, to “*end poverty and hunger*”, and achieve “*environmental sustainability*”). Heralding a major change, this consensus is in line with the approach previously announced by the Commission in the integrated strategy adopted in 2003. It endorsed general values such as good governance, democracy, the rule of law and multilateralism. It also stressed specific development principles, notably including development countries ownership and partnership, political dialogue and the participation of civil society. The Consensus set the scene for the conclusions of November 2007 on the Global Climate Change Alliance. In this document the Council, in a sombre tone, noted “*Climate Change is becoming a major threat to achieving the MDG and may have a considerable impact on international security issues*”. The Consensus was reinforced by the adoption of a –voluntary and non-binding– EU Code of Conduct on Complementarity and the Division of Labour in Development Policy (European Council, 2007). These instruments are congruent with the OECD’s 2005 Paris Declaration on Aid Effectiveness or the 2006 OECD Declaration on Integrating Climate Change Adaptation into Development Co-operation, in which Development and Environment Ministers from

OECD countries called for “*meaningful co-ordination and sharing of good practices on integrating climate change adaptation in development co-operation*”. Moreover, the OECD has provided in 2009 a specific policy guidance document on Integrating climate change Adaptation into Development Cooperation, which reflects the state of the art in confronting the challenge of the integration of adaptation within core development activities (OECD, 2009).

Beyond this, the international legal framework fully justifies the mainstreaming of climate change into the EU cooperation policy. The CBDR principle and the commitments under the UNFCCC and the Kyoto Protocol to supply new and additional resources provide impetus for the EU and Member States to act. Finance has been one of the four building blocks of the international climate negotiations since the Bali Road Map (2007) and it is still central in the Durban Platform for an Enhanced Action. Furthermore, the EU is also bound by global commitments in the field of development cooperation, whether in terms of the volume of aid or its effectiveness as evidenced, for example, by its contribution to the MDG as a result of the 2002 Monterrey Conference on financing for development.

Therefore, a solid legal basis and a strong political consensus exist to incorporate climate change into EU development cooperation policy.

## **8.2 An ambitious discourse**

European strategic documents put forward a very ambitious position. But climate change is a multidimensional issue crosscutting different policy sectors that have their own rationalities and policy practices. Thus, one could wonder to what extent old policy practices have evolved, in order to effectively insert the climate variable throughout the policy process, and to what extent this discourse is taking into account a rights-based approach.

The EU Action Plan on Climate Change and Development (2004) and more recently the Global Climate Change Alliance (2007) provide support for the mainstreaming of climate change issues into the EU development cooperation. In particular, with the “Alliance”, the Council took decisive steps in 2007 to reshape its strategy. The new discourse has created distinct categories among developing countries: emerging countries on the one hand, and poor developing countries and those most vulnerable to climate change, particularly Least Developed Countries and Small Island Developing States, on the other. While big emerging countries are encouraged to mitigate their emissions “in line with the general principle of common but differentiated responsibilities and respective capabilities”, “*The European Council stands ready to continue and further strengthen its support for developing countries in lessening their vulnerability and adapting to climate change*” (European Council conclusions, March 2007). The GCCA is a central piece in the EU’s ambition to be a leading global actor. It states “*the GCCA will provide the EU with a unique opportunity to show international leadership and re-affirm the principles of multilateralism and global responsibility that underpin its international relations*” (EC, COM(2007) 540 final).

Actually –and even if since the 2000s the importance of the adaptation issue has grown on the EU climate agenda and the EU has included adaptation in both its development and climate change initiatives–, priority is still given to mitigation over adaptation. Support for adaptation to climate change is certainly one of the four priorities of the integrated strategy and the Action Plan of 2003. Some adaptation actions in targeted areas are listed. But from this point of view, the Plan gives a nuanced impression: the observer is struck by the ambition of the discourse and the expertise it reflects. However, the plan seems to be a smorgasbord of miscellaneous ideas rather than a programme with clear, prioritized and achievable goals. Moreover, neither the 2003 Action Plan nor the 2007 Global Climate Change Alliance follow or even mention a human rights approach, which is still lacking in more recent documents (Council conclusions on EU Climate Diplomacy, 18 July 2011). Finally, all European



policy documents continue to put the emphasis on mitigation, whereas the requirement of human rights protection calls for a rebalancing in favour of adaptation issues.

### 8.3 Climate finance: trends and stakes

If the EU Action Plan (2004) reflects a significant step by explicitly linking climate change and development, its implementation will crucially depend on resources. A closer look shows that there were no financial commitments attached. The Global Climate Alliance (2007) remedy to this shortcoming is the provision of €60 million to the Alliance under the Environment and Natural Resources Thematic Programme to cover the 2008-2010 period, while over €300 million is available from various budget lines to fund its objective (Oberthur S., Pallemmaerts, M.).

The financing of climate change actions has broadly increased. Comparatively, the amount dedicated to the GCCA seems to be quite low. This is a more general trend as climate change-related aid has increased in recent years, representing 15% of total ODA in 2010 (OECD, 2011).

Within the UNFCCC, governments will endeavour to provide agreed Fast-Start Finance for developing countries approaching \$30 billion up to 2012. The EU committed to mobilising €7.2 billion for Fast-Start Finance for 2010-2012 that it seems to be delivering: *“Despite the difficult economic situation and tight budgetary constraints, the EU has so far mobilised €2.34 bn in Fast-Start Finance in 2011. This figure is preliminary as the accounting year for many Member States has not been concluded yet. Together with the €2.34 bn provided in 2010, this brings the EU’s fast-start contribution to date to €4.68 bn, or 65% of the overall pledge for 2010-12. The EU remains on track to meet its commitment of €7.2 bn for the full period”* (EU, Fast-Start Progress Report 2011). Estimations are that the different vehicles –the EU and its MS– will leverage around €14 billion in climate finance by the end of 2013 (EC, 2012, (c)). In November 2011, the overall pledges totaled \$28.22 billion, but only \$16.23 billion were budgeted. However, actual payment remains uncertain (Stasio K. et al.).

In addition, developed countries have committed to mobilizing \$100 billion in climate change financing by 2020. Even if it is a commitment to mobilise resources, not only public funds, it will be a considerable challenge to take up. It is close to the current total global ODA flows (\$129 billion in 2010). Thus, as climate aid should be “new and additional”, the Cancun agreements would result in a doubling of ODA at the global level. The Cancun Agreements established a Green Climate Fund to channel financial resources to developing countries. In Durban, Parties to the UNFCCC approved the Fund’s governing instrument, which will provide a significant portion of the \$100 billion per year. Regarding the economic context and the difficulties of industrialized countries to comply with their Fast-start Finance commitments, other options must be explored, including private investments, as was stated by the High-Level Advisory Group on Climate Change Financing appointed by UN Secretary-General Ban Ki-moon (UN-AGF, 2010). It pointed out that mobilising \$100 billion annually by 2020 will be difficult, but possible through a mix of new public sources, a scaling-up of existing public sources and increased private flows (green bonds from the World Bank, export-credit insurance, etc.). It will be at the heart of the Green Fund action and will depend on the future of international climate negotiations, which are really important in order to restore confidence. The necessity to find “innovative sources” has been a leitmotiv in most of the Commission’s documents, encouraged by the European Parliament that has thought of several options from this point of view (European Parliament, 2008).

### 8.4 Effectiveness Issues

The effectiveness of the European development cooperation policy has come under heavy criticism (Dearden, S.). The European Commission itself has stated: “We do not need new promises. Instead, we should translate existing commitments into tangible results” (EC, 2008 (c)). Some have noted the gap existing between the amount of aid and the low visibility of the policy (Balleix, C.). The debate about its

effectiveness has spanned the following issues: the consistency, relevance, predictability and monitoring of European aid issues.

#### 8.4.1 Consistency

Consistency is probably the first challenge to address in order to improve the effectiveness of aid. In 2003, at the time of the adoption of the Action Plan, there was a lack of centralized funding for development actions on climate change. The situation was even more complex and unsatisfactory given that additional activities were undertaken by individual EU member states with other sources of funding: bilateral or through the Global Environmental Facility or other multilateral channels. There was, therefore, an urgent need to rationalize the EU policy and improve consistency both within and outside the EU. At the internal level, within the EU, consistency can be analysed vertically (the relationship between MS and the EU) and horizontally (consistency between sectoral policies of the EU).

- Regarding **vertical consistency**, internal unity is seen as a precondition for aid efficiency, but also for European influence internationally (Vogler, J. & Hannes, S. R., p. 408). But as the cooperation for development policy is a responsibility shared by the Community and its MS, in practice both the EU and the MS are executing large aid programmes. It gives rise to (in)consistency issues between MS and the EU. The development cooperation policy used to be a poorly coordinated assembly of 27 + 1 European development policies (Balleix, C., p. 377). Despite guidelines, pilot experiences, action plans and codes of conduct, the MS continued their efforts to maintain their own policy visibility. Given the political dimension of aid, they pressed in opposite directions (Balleix, C., p. 386). The Lisbon Treaty intended to remedy multiple overlaps, duplications, omissions and even inconsistencies in policy-making that had been previously identified. The EC itself recognizes, *“However, until now, truly effective aid coordination at the programming stage has remained an exception rather than a rule”* (EC, COM(2010)629 final). *“Coordination has to become much more systematic and effective”*, as required by the Council (Council Conclusions on the MDG, 14 June 2010).
- The Lisbon Treaty also contains key provisions to improve **horizontal consistency** between different sectoral European policies. A lot of EC texts and documents pursue this objective. One could mention the European Council Resolution on Coherence of the EC’s development cooperation with its other policies (1997), and the subsequent Parliament Resolutions on the coherence of the various policies with development policy (2000), the Strategy on the integration of environmental concerns into EC economic and development cooperation to promote sustainable development, which was adopted in 2001, or the Commission’s Communication on *Policy Coherence for Development, Accelerating progress towards attaining the MDG* (2005).

The EU is not alone in facing difficulties in achieving horizontal consistency: every state is confronted with the same complications. But the issue is more acute at the European level; as Bretherton and Vogler explain, *“[t]he “overarching objective” of sustainability would challenge the Policy coherence mechanisms of any political system, and the complex and fragmented nature of the EU generates unique coordination problems”* (Bretherton, C. & Vogler, J.). The EU tries to ensure the consistency of its policies with development goals by conducting impact assessments of the sustainability of all its major proposals within the framework of its “Better Regulation” initiative (EC, 2002 & 2008 (d)) and the European Consensus on Development (2005). Given the “European Consensus”, in 2006, the European Commission adopted a series of concrete measures to improve consistency, creating in particular the Commission’s internal Interservice Group on Environmental Mainstreaming in Development Cooperation. Policies in various fields —trade, security, migration, environment— are now expected to be analysed in order to assess their contribution to the achievement of the MDG (EC, 2008 (c)). Regarding climate issues in particular, a report highlighted the many deficiencies that had to be overcome

(External consultant, 2006). Its negative assessment was echoed by a special report from the European Court of Auditors, which found that the process of environmental mainstreaming in projects was not being systematically implemented (European Court of Auditors).

Nevertheless, the main UN conferences have facilitated the definition of global frames of reference (e.g., the Monterrey consensus and the MDG), thereby contributing to building consistency among the policies of various development cooperation actors, at least at the strategic level if not at the operational level (Bretherton, C. & Vogler, J.). The “European consensus” is also based on instruments issued from these initiatives, with some specificity such as support to European integration. Of course, multilateral agreements in the environmental field also contribute to the building of a common discourse. This is true in particular as regards the international climate change regime (UNFCCC and Kyoto Protocol) due to the number of State parties to these treaties, their importance and their coverage in the media. But there again, “extensive scholarship has noted how the EU role as an external trade actor and a promoter of environmental protection values has led to internal conflict, often resolved in favour of other interests like the trade interests” (Bretherton, C. & Vogler, J.). Again, despite these good intentions, administrative and political difficulties and obstacles are real and persistent. Some studies show that, in practice, the impact assessment process is not an efficient tool to implement European commitments that promote sustainable development in developing countries (Adelle, C., Hertin, J., & Jordan, A.). Risks of inconsistency are numerous (Balleix, C.; Zito, A. R.).

One could wonder whether the revamped institutional framework in accordance with the Lisbon Treaty has enhanced the coherence and the effectiveness of the Union’s external action, and whether it has raised the visibility of the Union’s role. Even if it is too early to answer these questions, the Treaty has certainly given rise to extremely high expectations from this point of view. It has also resulted in a renewed institutional framework, with a European External Action Service, whose organisation and functioning has, pursuant to Article 27(3) TEU, been established in Council Decision 2010/427/EU of 26 July 2010. A few months before this, in February, a new directorate “Climate Action” was set up. According to the TEU, the “*Union shall ensure consistency between the different areas of its external action and between these and its other policies*” (Article 21(3)). This is subsequently reinforced by Article 7 of the TFEU, which states “*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*”. With the use of the word “shall”, consistency became a legal obligation. Recently, the Commission has made some significant efforts intended to improve coherence. In 2010, it issued a new action plan on policy coherence for development for the 2010–2013 period. The objective is to further refine the coherence between development assistance and other relevant EU policy areas with a bearing on external relations, for example as regards climate change (European Commission, SEC(2010)421 final). Some €400,000 will finance “*Support services and studies in relation to mainstreaming of climate mitigation and adaptation in other policies in the Union*” in 2012 (Commission decision, 12 October 2011). Furthermore, and following a request by the Council, the Commission refers specifically to progress in terms of coherence in its annual report on development policy.

Thus, although policy integration has long been recognised as a cornerstone for sustainable development, for now progress has been limited.

#### 8.4.2 Relevance

Indeed, the European strategy and its objectives are becoming clearer with time. These objectives were not even articulated before 1985. Nevertheless, according to the European Court of Auditors report mentioned above, while projects are often “relevant” they often achieve only half of their objectives (European Court of Auditors, p. 15). Even the EC recognises that: “*[f]urther improvements are required regarding the integration of climate change concerns into the policy dialogue with developing countries as*

*well as into development cooperation programmes*" (EC, COM(2007) 545 final). Among the overarching principles of the OECD Paris Declaration, ownership (partner countries exercising effective leadership over their development policies and strategies and co-ordinating development actions) and alignment (donors base their overall support on partner countries' national development strategies, institutions and procedures) are key reference points for guiding policy dialogue and shaping development co-operation programmes in all sectors.

But it is often difficult to find a balance between creating a climate and/or environmental conditionality, on the one hand, and respecting the principle of national ownership, on the other. Using ODA for adaptation to climate change in developing countries may be contentious because not all adaptation actions are development actions, and also because not all development actions reduce vulnerability to climate change. Long-term adaptation priorities may conflict with short-term development priorities (Oberthur S., Pallemmaerts, M.). A rights-based approach can help to solve these contradictions, at least partially. From this point of view, fast-start projects funded by the EU have to take into account the priorities identified by developing countries in their National Adaptation Plans for Action, National Communications and other relevant planning documents (*European Union's Fast-Start Funding for Developing countries*). Stakeholders must also be included and mobilized. The literature unanimously supports the increasing commitment and mobilization of stakeholders in the scoping, design and implementation of aid projects (Bird, N. & Cabral, L.). An integrated human rights and climate change approach fits well with this trend.

The Busan Conference – the High Level Forum (HLF4) on aid effectiveness, which took place between 29 November-1 December 2011 in Busan, South Korea – strengthened previous commitments on country ownership and the use of country systems. Incentives were given to cooperation agencies to conduct new approaches using country systems and supporting democratic ownership throughout their programme execution, guidelines adaptation, and guidance development for their staff. Far too little progress has been made to date. But an EU Transparency Mechanism has been recently set up in the view, among other objectives, to strengthen democratic ownership and improve development results. It aims to make available to partner countries the information on all the aid, and in particular to help increase transparency towards parliaments, civil society and citizens. Beyond, these new trends reflect a deep shift in development cooperation policies, development agencies becoming facilitators and supporters of partner-led change. Then they need to rely on – and sometimes to promote – spaces for multi-stakeholders' dialogue related to domestic policy-making, sector and state reform processes in partner countries. Projects and programs must also be underpinned, further upstream, by a more solid context analysis of partner countries (ECDPM, 2012).

### 8.4.3 Predictability

The issue of predictability has been well known for a long time, including in the "European Consensus". At stake is the enablement of States and multilateral institutions to sustain policies in the long-term, and also to encourage the private sector to engage in climate finance. Predictability can be assessed by looking at the percentage of payments made according to annual or multi-year schedules and it can be reinforced, according to the Commission, in three ways: by improving the predictability of financial flows through the use of multi-year schedules, by establishing joint multi-year programmes, and by ensuring the predictability of disbursements (EC, 2008 (c)). Progress has been made in the first two of the areas, at least. Following the Copenhagen Accord (2009), the UNFCCC Cancun agreements (2010) stressed the need to mobilize predictable, stable, new and additional sources of climate finance. Financial commitments (Fast-start and for 2020) should not only allow increased flows, but also ensure a greater predictability. The Commission has also launched the MDG contracts, under which countries

receive six years of assistance to support their domestic budgets, in exchange for allowing the close monitoring of their results in terms of the achievement of the MDG.

#### 8.4.4 Monitoring and transparency

One of the five overarching principles of the OECD Paris Declaration is “Mutual Accountability”, under which donors and partners are accountable for development results. The monitoring of development cooperation policies was, however, notoriously inadequate. For example, a follow-up of the 2003 Action Plan was planned with the drafting of a bi-annual report. The first evaluation critically concluded that policy coherence for development was still at an early stage (EC, COM (2007) 545 final). The EP thus proposed to reinforce monitoring procedures, stating that the Alliance needed “*effective reporting mechanisms, including detailed indicators of progress and follow-up schemes*” (EP, 2008). It also proposed the establishment of a “*permanent advisory and monitoring body for Sustainable Development*”, which would include MS and civil society representatives, and would scrutinize the mainstreaming of the concept into EU policies and programmes, with a particular focus on development cooperation (EP, 2006).

Extending the International Aid Transparency Initiative, the Busan Partnership for Effective Development Co-operation (2011) includes an agreement to “implement a common, open standard for electronic publication of timely, comprehensive and forward-looking information on resources provided through development co-operation”. This “common standard” is to be agreed by December 2012 and implemented by 2015. In this framework, the new EU Transparency Guarantee is intended to ensure that the EU member states publicly disclose all information on aid programmes so that it can be more easily accessed, shared and published through a common standard. On the “donor” side, this is essential for promoting effectiveness, identifying gaps or problems, building trust with developing country parties, and reporting back to taxpayers on the use of public funds. It also helps European countries and donors to coordinate their aid. On the recipient side, transparency helps recipient countries to best articulate their own policies and their own expenses in relation to international aid. It helps improve the coordination of projects and financial flows and ensures that finance is being used in accordance with national priorities. It is also a tool to ensure that pledges made within the UNFCCC are being met. However, the complexity of the emerging climate finance architecture is exacerbating the challenges associated with the Monitoring, Reporting and Verifying (MRV) of what finance has gone from where, to whom, and how (AEA, 2011).

Since 1998, the OECD’s DAC has monitored aid that targets the objectives of the Rio Conventions through its Creditor Reporting System (CRS), using the so-called “Rio markers”. The Rio marker on climate change mitigation was established by the DAC Secretariat in close collaboration with the Secretariat of the UNFCCC to track aid flows in support of the efforts of developing countries to implement the Convention. Following the Bali Climate Conference (2007), a new policy marker to track ODA was developed in support of climate change adaptation, accompanied by a common definition of adaptation-related activities. Data on aid in support of climate change adaptation became available in 2011.

From this point of view, the Cancun Agreements marked an important step towards achieving transparency in the actions taken by countries. In addition to the creation of a new standard for the way countries report on their national climate commitments and actions, the agreements mandated advances in the reporting and review of the climate finance contributions (MRV) of countries. There is, however, one problem, namely that there is no clear and agreed definition of “new and additional” finance. States are yet to spell out what is meant by “new and additional”, or specify whether eligible projects will need to have climate action as a principal, or only a significant, objective (UNFCCC, 2010, para. 41, §§ 61-62, § 112). In addition, the EC committed to ensuring transparency through the provision



of a bi-annual progress report on the implementation of the EU's fast-start funding commitment, with a first report published for the Bonn UNFCCC session in June 2010 (EC, COM(2010)86 final).

For now, while existing reporting channels such as UNFCCC National Communications, the OECD's Rio markers, the efforts of bilateral and multilateral development banks, and the EU's Fast-start Finance report, attempt to address some of these challenges, they have not been systematically implemented. For example, while public finance can be traced through the OECD's DAC and Rio Markers, private finance is more difficult to track down. The international community has to explicitly define which private flows will be included and how they will be accounted for and monitored. Since reporting does not cover all Parties or all flow types, it does not capture everything that might be considered as "climate finance". The coverage of finance sources and the time frames and guidelines of reporting also differ considerably. Moreover, there are huge overlaps between the various reporting channels, thus increasing the risk of double counting when information from different reporting channels is brought together (AEA, 2011). It will take several years to develop the process and bring it up to a sufficient standard.

## 8.5 Conclusions

The mainstreaming of human rights and climate change crosscutting issues in European external cooperation policy is calling into question the development of the EU's "actorness" (Vogler, J.). The challenge of adaptation to climate change has inspired the EU in the formulation of a genuinely ambitious policy. It is a challenging process, which is still in a consolidation phase. For now, the EU has articulated a clear policy intention towards the integration of climate change concerns. But the EU has not yet integrated the human rights dimension. Moreover, there is (so far) a discrepancy between the EU's policy intentions and their implementation in practice (Gupta, J. & Van der Grijp N., 2010). Beyond which, the EU's role is evolving: "*The EU's function as a distributor of development assistance is diminishing in importance, while its regulatory role as Policy setter is becoming more significant*" (Orbie, J., & Versluys, H., p. 88). Nevertheless, it could have a substantial guiding influence on other countries.

## 8.6 Proposals

### 8.6.1 Step up efforts to mobilize public and private finance

To improve the consolidation of its policy in light of the latest developments of international negotiations, the EU should deepen its efforts to mobilize public and private finance in order to deliver and comply with its international commitments. It should also participate closely to the global process of defining climate finance MRVs and could propose the inclusion of human rights and human development indicators. Until a strong and robust MRV has been set up, long-term pledges will lack plausibility.

### 8.6.2 Step up efforts to improve the coherence of the European cooperation policy

Applying the OECD guidelines and the European Consensus, the EU should continue to improve the European cooperation policy's consistency by working on:

- the coherence of its policy with those of its 27 MS. Coordination or even harmonization is of singular importance given that 80% of development cooperation resources are managed at the MS level;
- the coherence of its own sectoral policies by mainstreaming climate change and human rights related concerns into its cooperation policy, but also by making other policies beyond aid more supportive of development objectives (as stated in the Twelve-point EU action plan in support of the MDG, EC, 21 April 2010). The EU should endeavour to balance its own objectives and ensure



the incorporation of climate change into development cooperation, along with the recognition of the critical importance of partner country “ownership” for successful aid implementation. The EU must avoid the risk of its own goals of environmental integration and climate mainstreaming leading to the creation of “conditionality”, and must engage in dialogue with partner countries (Gupta, J. & Van der Grijp N., 2010).

### 8.6.3 European cooperation policy must further take account of the human rights dimension

In line with the principles and objectives of the Paris Declaration on Aid Effectiveness and the OECD Guidelines, the focus must be on the strengthening of the capacities of partner countries to identify and prioritise adaptation responses and, where necessary, integrate them through relevant measures at various levels (projects and programmatic level). Countries should pay special attention to the development of climate strategies that are inclusive and transparent, advancing people’s rights in relation to good governance, participation in decision-making and the right to free and informed consent. Solutions to climate concerns that are a result of such inclusive processes are more likely to integrate and respond to the needs of a greater share among the community where they are implemented, not just to the needs of the most powerful (United Nations Task Team on social Dimensions of climate change).

### 8.6.4 Set up a European accountability mechanism

Similarly to development banks such as the World Bank and its Inspection Panel, or even the OECD National Contact Points which monitor the implementation of the OECD Guidelines for Multinational Enterprises, the EU should consider the establishment of a bottom-up accountability and recourse mechanism to check that its funds are not used for projects that harm the environment or human rights and to allow those affected by projects to access a specific complaint and/or ombudsman forum. This would constitute an important step toward a rights-based approach to sustainable development. In doing so, the EU would be acknowledging that respect for environmental and human rights is essential to sustainable development. It could also help environmental and human rights implications to gradually become more of a consideration in its lending decisions, and in this way help improve aid efficiency.

According to us, it could be designed on the model of the non-jurisdictional Inspection Panel of the World Bank, which already inspired another international agencies (Asian Development Bank, Inter-American Development Bank, African Development Bank, European Bank for Reconstruction and Development). Basically, such a mechanism:

1. should be set as a permanent institution composed of independent personalities;
2. could receive complaints from project-affected (or potentially affected) communities;
3. could investigate EU financed projects to determine whether the EU has complied with a set of substantial and procedural commitments including economic benefits but also social, human rights and environmental safeguards;
4. could address related issues and make some recommendations beyond findings;
5. should have transparent proceedings. The mechanism should provide an annual report, including summaries of ongoing and past requests and outreach activities undertaken during the year.

The National Contact Points (NCP) for the OECD Guidelines for Multinational Enterprises gives an alternative model, more decentralized and flexible, which could also be studied from this point of view even though the NCP is applying to enterprises and not to an international agency or organization.

**The EU should commission a study to explore further the rationale and design of such a mechanism.**

## **9. CLIMATE CHANGE AND MIGRATION: TOWARDS A NEW NEXUS FOR POLICY MAKING IN THE EUROPEAN UNION?**

This contribution examines how the EU has been tackling the consequences of climate change induced human displacement. This is being done by taking into consideration the growing importance of climate-induced migration on the agenda of international policy makers. It is argued that the way migration is framed as an external policy issue, within the current institutional balance of power in the EU, is preventing the emergence of a new climate change migration nexus.

The research community and a number of international organisations have been addressing the "environmental dimension" of migration for more than twenty years. The UNEP's report produced by E. El-Hinnawi in 1985 introduced the term "environmental refugee" (El-Hinnawi, E.). It was followed by the Conference on "Migration and Environment", organised by the International Organization for Migration and the Refugee Policy Group in 1992, which recommended the urgent need to address the root causes of environmental displacement and the needs of those affected. These initiatives were followed by a growing literature on the subject and further *ad hoc* Conferences, such as the one organised by the UNHCR and the IOM in 1996, entitled "Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migrations". Recently, and particularly since the COP14 at Poznan, the international debate has shifted its focus onto the impacts of climate change on human displacement (see Chapter 1).

The long lasting debate on environmental migration had not been reflected in the EU's documents and communications on migration until the Stockholm Programme which, in 2010 for the first time, recognised climate change as a driver for migration and invited the Commission to study the links between climate change, migration and development. Given the rising international attention on the problem of climate migrants, it is essential to investigate the European institutional and policy context into which the EU begins to take into account the consequences of climate change in its migration policies.

The first section of this chapter reviews the development–migration nexus, which constitutes the dominant framework of the current European migration policies vis-à-vis third countries. We discuss how migration is defined as an external policy issue and to what extent this definition is sufficiently flexible in order to recognise new forms of migration. In the second section, we shall examine the balance of power between policy actors involved in the external dimension of migration policy, and in the light of the most recent evolutions, consider the possibility of adding a new climate-migration nexus to the current development–migration one. Lastly, our study puts forward certain proposals for the better integration of climate change and relevant human rights considerations into the EU's migration policy.

### **9.1 Migration as a development issue**

For more than twenty years, the EU has recognized the need to integrate migration issues into its external policies. In 1991, a communication from the Commission to the Council asked for a new approach linking the two policy domains<sup>79</sup>. In December 1992, the Edinburgh European Council agreed, "*coordination in the fields of foreign policy, economic cooperation and immigration and asylum policy*"

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<sup>79</sup> Communication, SEC(91) 1855 final, Brussels, 23.10.1991.

should “contribute substantially to addressing the question of migratory movements”<sup>80</sup>. This requirement gave an “external dimension” to migration policy by opening this field to foreign policy and development-cooperation objectives.

The external dimension of the EU migration and asylum policy has been established via what is called the “comprehensive approach” to migration. The idea behind this development was that the control of migration by border police was ineffective, not only for the European countries, but also for the sending countries in the sense that the root causes driving people away from their homelands were not being addressed. In practice, this new type of trans-sectoral policy-making could be reinterpreted in two ways by policy makers: either that migration is no longer considered a “problem”, but as a “tool” for achieving development in sending and receiving countries; or that development cooperation is considered as a means to better control migration and to lessen migration pressure in host European countries (Lavenex, S. & Kunz, R., p. 442-443). Research on this topic leans rather toward the latter interpretation. Additionally, the creation of a migration-development nexus has neither questioned nor narrowed the dichotomy between “legal” and “illegal” migrants. In this context, the possibility of recognising new forms of migration seems weak.

#### 9.1.1 Development serves migration or vice versa?

The comprehensive approach is the one in which asylum-seeking and immigration are not isolated as domestic policy issues, but that takes into account the foreign policy implications of these issues, as well as the implications that foreign policy has for them (Van Selm, J., p. 2). This approach is defined as an alternative “win-win” strategy for both sending and host countries. However, the perception of migration in the EU is negative; migration is perceived as a “problem”. The EU’s most urgent policy objective is not only to limit migration flows, but also to provide development aid on the basis of a “*donnant-donnant*” (give and take) rationale: development funds are made available on the condition that receiving countries effectively control their own borders.

By introducing the comprehensive approach, the Edinburgh Conclusions<sup>81</sup> clearly define as the EU’s main objective “*the reduction of migratory movements*” in order to respond to “*the pressures on Member States*” resulting from these movements (p. 46). In order to attain this objective the Council recognizes the importance of elaborating development aid measures from the Community and Member States in order to “*promote economic development and increasing prosperity [...] and so reducing the economic motives for migration*” (p. 47). However, in order to assist third countries, the latter are encouraged to apply the Community’s standards of migration control management: “*in their relations with third countries [the Community and its Member States] will take into account those countries’ practice in readmitting their own nationals when expelled from the territories of the Member States*” (p. 48).

The 1998 Austrian Presidency’s Conclusion Strategy Paper supported and further developed this policy orientation by emphasizing the crucial role that the EU has to play in the “*reduction of migratory pressure in the main countries of origin of immigrants*” (§43). In addition, C. Boswell notes (Boswell, C., p. 628) that for these countries, progress on addressing the causes of migration “*should serve as an important criterion when development aid decisions are taken*”. In that sense, a preventive-root causes approach was to be combined with established control instruments.

In the same year, the Dutch government, on the basis of a Foreign Ministry initiative, proposed the creation of a new body, the High-Level Working Group on Asylum and Migration (HLWG). This was institutionalized by the decision of the General Affairs Council with the purpose of applying a common,

<sup>80</sup> European Council, Presidency conclusions, Edinburgh, 11-12 Dec. 1992, SN 456/92.

<sup>81</sup> *Declaration on Principles of governing external aspects of migration policy*, Conclusions of the Presidency, Edinburgh December 12, 1992, SN 456/92 Annex 5, Part 2.

integrated and cross-pillar approach, targeting the situation in the countries of origin of asylum seekers and migrants. The perception of migration as a problem influenced the functioning of the HLWG which perpetuated the restrictive control-orientated approach by focusing mostly on issues of readmission and the return of irregular migrants, rather than on the root causes of migration and development (Lavenex, S. & Kunz, R., p. 444). The EP criticized the inconsistency between the HLWG's goal of addressing the root causes of refugee flows and measures to curb immigration which could have a harmful impact on countries of origin (Scholdan, in Boswell C., p. 630).

This policy frame started changing slowly in 1999 after the Presidency's conclusions of the Tampere Council<sup>82</sup>, at least at the discursive level. The need to reduce migratory movements has been replaced by the need to manage migration flows, and the conditionality of development aid has been substituted by the need to set up partnerships with third countries with a view to promoting co-development. Nonetheless, until 2005 policy practices focused mainly on getting countries to sign readmission agreements and to cooperate in the area of border controls (Lavenex, S., and Kunz, R., p. 445). Indeed, the Presidency's Conclusions of the Seville European Council in 2002 re-engaged the debate towards the prevailing political concerns of restricting migration flows and establishing collaboration on border control: *"the use of all appropriate instruments in the context of the European Union's external relations [...] to tackling the root causes of illegal immigration must remain the European Union's constant long-term objective"* (p. 10)<sup>83</sup>; *"The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration [...] Insufficient cooperation by a country could hamper the establishment of closer relations between that country and the Union"* (p. 11)<sup>84</sup>.

In this context, the externalization of migration policies remained weak as it continued to be dominated by internal EU considerations. This was a major obstacle to the inclusion of new forms of migration, such as migration caused by environmental degradation and climate change, into the EU's policy objectives. It is only after the emergence of an active international debate on development and migration in the 2000s and the events in Ceuta and Melilla in 2005, which made apparent the failure of the restrictive border control approach, that development considerations have been more concretely integrated into the EU migration policies. The Council's communication on "Global approach to migration: Priority actions focusing on Africa and the Mediterranean" marks a turning point. Since then, and particularly since the adoption of the Global approach to Migration and Mobility (GAMM) in 2011, new objectives were drawn up, like the facilitation of the flows of remittances, the engagement of Diasporas in home country development or the promotion of circular migration. As will be discussed, this re-orientation offers new opportunities in order to think about a climate–migration nexus, even if environmental degradation is rarely considered in the EU documents as a root cause of migration or, if so, it is perceived as a source of "illegal" immigration.

### 9.1.2 "Legal" and "illegal" migration: the root causes approach

The need to address the root causes of migration has always been recognised by the EU as the most relevant preventive approach within the external dimension of migration. Migration is defined either as "legal" or "illegal" depending on the causes that drive people to flee. Although the definition of these causes changes over time, only the migrants defined as refugees under the 1951 Geneva Convention are considered legal migrants. Environmental factors, when considered, are seen as a cause of economic

<sup>82</sup> European Council, Presidency conclusions, Tampere, SN 200/99, 15-16 Oct. 1999.

<sup>83</sup> EC, Presidency Conclusions, Seville, 21-22 June 2002 Brussels, 24.10.2002, 13463/02, POLGEN 52.

<sup>84</sup> Idem.

“illegal” immigration and existing legal instruments cannot be used for the protection of displaced populations. The Council is less innovative than the Commission, which is the sole EU body that has integrated environmental degradation as a root cause of migration.

The Development Council and Representatives of Governments of Member States adopted a Resolution on 18 November 1992 where it is recognised that the relationships between demographic trends and factors and environmental change should be subject to continuous analysis. This link between development and environment has not been reproduced within the Justice and Home Affairs (JHA) Council to build a link between migration and environment. The 1994 communication from the Commission to the Council and the European Parliament on immigration and asylum policies refers for the first time to *“those following a famine or ecological disaster”*. The third category of migratory flows is of a mixed character. Today, most often, these movements will amount to illegal migration. This category also comprises, however, those mass movements that do not come under the second category, for example, those following a famine or ecological disaster<sup>85</sup>.

The Commission distinguishes between three categories of migrants. First, refugees who *“must have a well-founded fear of persecution in their country of origin”*. In that case, it is clearly stated that *“the pressures which cause refugees to seek asylum will therefore always be human rights related”*. The second group includes other persons, for example, ethnic or religious minorities, *“in need of international protection”* but not fulfilling the definition of refugee. In their case, root causes are equally considered involving violation of human rights. A *“mix of human rights policies, other elements of foreign and security policies, and humanitarian assistance”* are seen as the most relevant responses to these situations. The third group refers to mass movements whose root causes are *“economic disparities, demographic pressures and sometimes ecological developments”*. As previously mentioned, *“today, most often, these movements will amount to illegal migration”*. This consideration has not changed since then. Economic cooperation, liberal trade policy and effective forms of development cooperation are presented as the most effective responses in this case. Thus, human rights are considered here as irrelevant.

Following the UNHCR and the UNFPA, which argued that environmental factors are often neglected, the Commission’s communication points not only to incidental migration pressures due to natural disasters, but also to long-term migratory movements due to extreme drought erosion, desertification and the rising sea level. This was the sole recognition of environmental-climate factors as root causes of migration until the Stockholm Programme.

In which institutional context does the issue of climate-induced migration emerge? The section below examines the balance of power between policy actors involved in the external dimension of migration policy and considers whether a new climate–migration nexus is possible. Some proposals are formulated at the end of the section.

## **9.2 Climate-induced migration: new challenge, old practices**

The AWG-LCA includes a paragraph inviting parties to undertake *“Measures to enhance understanding, coordination and cooperation with regard to CC induced displacement, migration and planned relocation”*<sup>86</sup>. By adapting to international evolutions, the JHA referred to a similar statement included in the GAMM: *“The Stockholm Programme recognized CC as a global challenge that is increasingly driving migration and displacement and invited the Commission to present analysis of this phenomenon [...] Addressing environmentally induced migration, also by means of adaptation to the adverse effects of CC, should be considered part of the Global Approach”*. Although it was made clear that the new policy

<sup>85</sup> Communication COM(94) 23 final Brussels, 23.2.1994. p. 15.

<sup>86</sup> Decision 1/CP.16, Cancun Agreement, Article 14, f).



consideration should be dealt with as part of the “external dimension” of migration policies, the question of who must do what has not been answered. Coordination between policy sectors dealing with the externalization of migration policy is far from being clear. Incoherencies are further exacerbated by the introduction of the climate change dimension and the relevant policy sector into the institutional arena. Interviews within the Commission show that the environmental dimension of migration can be defined in different ways and only a consensus on a common ground can guaranty its consideration by policy makers. This common ground tends to confirm the construction of a climate-development nexus, rather than a climate-migration one. Some proposals are formulated in order to help the reinforcement of climate migration as an EU policy issue.

### 9.2.1 A polyphonic institutional venue

Traditionally, migration policy is the *domaine réservé* of JHA, but the external dimension of this policy has introduced new actors into the field, particularly those of foreign affairs and development cooperation. The need for a triadic cooperation was announced in the Edinburgh Conclusions, which called for a “*co-ordination of action in the fields of foreign policy, economic co-operation and asylum policy*”, leaning on the TEU to “*provide an adequate framework for this coordinated action*” (p. 46-47). Although the expected co-operation proved to be difficult, the need for inter-sectoral cooperation on migration is repeatedly confirmed and still present in the EU’s 2005 adoption of the Global Approach (GA), which was revised in 2010. This difficulty is linked to the differences between the priorities established by the Council and those of the Commission, but also to differing perceptions and objectives between DGs concerned with the external dimension of migration policies.

The evolution from the Treaty of Maastricht (where JHA cooperation fell under the third Pillar of inter-governmental cooperation) to the 1997 Amsterdam Treaty (which moved migration policy to the first Pillar) and to the Lisbon Treaty (where inter-governmental decision-making became subject to qualified majority voting, new legislative procedures were introduced, and the Commission’s role was strengthened) is undoubtedly a step forward, but it far from constitutes an adequate institutional venue for the implementation of the development-migration nexus. As mentioned above, the Commission’s more innovative stance is counterbalanced by the Council’s decisions, which remain dependent on the internal concerns of MS to limit rather than manage migration. Furthermore, as Abdelkhalik (Abdelkhalik, N., p. 9) remarks, inside the Commission, each DG has a different perception and policy practices depending on its mandate, interests or resources.

Indeed, the Commission did not (and does not) act as one in respect to the objectives of the development-migration nexus. The DG Home Affairs (DG HOME) mostly tackles migration as an internal EU security issue. The DG HOME’s international affairs unit officials are in charge of the external dimension of migration policy, but cannot free themselves from the dominant rationale of their institution, which corresponds to the concerns of national interior ministries. The main objective of the DG Development and Cooperation EuropeAid (DG DEVCO) is the development of third countries, which are not necessarily the same countries that are the focus of the DG HOME sector in terms of emigration. Its mandate is not oriented towards satisfying internal EU preoccupations. EEAS (ex-DG Relex) officials are involved with the external dimension of internal policies. As they are concerned with improving relations with partner countries, they guarantee better negotiating conditions. Restrictive border control policies are seen more as a source of potential tension for interstate relations rather than as an EU solution. In that sense, they have been critical towards the HLWG, which is viewed as insufficiently sensitive to relations with third countries (Boswell, C., p. 631).

Development and external affairs policy actors have expressed concern about the possible distortion of development and external relations goals if migration considerations are factored into them. Because of these cognitive divergences and differences on policy objectives, the leading role of JHA policy actors



has been criticized for not providing the best institutional structure for developing the external dimension (Boswell, C., p. 632).

The 2005 events in Ceuta and Melilla which illustrated the limitations of the predominant border control approach, along with the important international debate in 2006 - the UN High-Level Dialogue on Migration and Development, helped with the re-assessment of the established balance of power at the EU level. JHA then became more open to the negotiation of migration as a development issue, and recruited new migration correspondents in development and external relations sectors, which helped institutionalize the formal and informal structures for a triadic collaboration. In this context, the Commission prepared two communications that in 2005 gave rise to the Council's GA to migration: priority actions focusing on Africa and the Mediterranean. However, for Levanex and Kunz the new mobility instruments developed by the GA failed because migration control elements continued to predominate and development goals remained almost absent (Lavenex, S. & Kunz, R., p. 451). During the same period, two initiatives were undertaken by Members of the EP: in 2001, Green Members of the EP tried unsuccessfully to insert a reference to environmental refugees into an EP report on the common European asylum policy; and in 2004, two Green Members, from France and the UK, asked for a written declaration of the community status of ecological refugees (Sgro, A., p. 5). These initiatives remained as dead letters and no reference to them can be found in the Commission's communications.

### 9.2.2 Climate migration: a development issue?

Although institutional frictions have somewhat diminished since the publication of the "Global Approach" in 2005, a new coherent institutional venue has yet to emerge. Old institutional equilibriums seem to persist and in practice serve to cancel out the efforts made to forge a link between the EU migration and development goals. In this context, the 2010 Stockholm Programme recognised a new environmental dimension of migratory movements by considering climate change as a global challenge that is increasingly driving migration. The integration of environmentally (climate) induced migration into the GAMM signifies that the JHA sector shall take the lead on this issue which becomes part of the external migration policy. This adds complexity to the policy-making process as well as to the current institutional venue.

The consideration of climate change as a root cause to be included into the external dimension of migration policies is perceived differently by each policy sector. The European Security Strategy (ESS) adopted by the European Council in December 2003 considers climate change as a security issue to be integrated into the EU's foreign policy: "*Competition for natural resources - notably water - which will be aggravated by global warming over the next decades, is likely to create further turbulence and migratory movements in various regions*". In the 2008 Report on the Implementation of the ESS - Providing Security in a Changing World - (S407/08), climate change is defined as a "threat multiplier": "*Natural disasters, environmental degradation and competition for resources exacerbate conflict, especially in situations of poverty and population growth, with humanitarian, health, political and security consequences, including greater migration*" (p. 5).

In that sense, the problem to tackle is climate change and not migration. For EEAS officials, climate migration flows are not perceived as a tangible problem triggering the security of EU MS, but rather as a potential scenario that can be prevented by integrating climate change considerations into its regional policies: "*we cannot engage actions towards migration flows that do not exist. We consider issues of economic migration by linking CC to poverty reduction and adaptation concerns*" (personal interview, March 2012)<sup>87</sup>. Climate migration is thus seen as only one of the many causes of "economic migration"

<sup>87</sup> The EEAS organised a conference on CC in June 2012 without integrating the question of climate-induced migration.

that must be addressed through adaptation measures, with security considerations being the preeminent concern.

Since the adoption of the “Policy Coherence for Development” in 2005<sup>88</sup>, the development sector is considering both climate change and migration issues relative to development policies. The issue at stake here is not climate-induced migration, but climate change and migration as separate opportunities (and less as problems) for development in third countries. On the one hand, the use of mitigation and adaptation to climate change is suggested to provide an opportunity for development (particular attention is given to biofuel-related policies); on the other hand, (orderly) migration is seen as a win-win-win situation, for the developing countries, the developed countries and for the migrants themselves<sup>89</sup>.

According to a DG DEVCO official, the link between climate change and migration is viewed with caution by the DG DEVCO because, from the development point of view *“both issues, if considered positively, can enhance development in third countries”* (personal interview, March 2012). To the extent that sustainability is introduced as a criterion for development policies and new legal instruments for migration that respect human rights are established, DG DEVCO considers that there is no reason to define a separate problem of climate migrants: *“The link between migration and CC does not seem credible. We already deal with migratory issues through poverty reduction measures and sustainable development policies”*. Climate-friendly development policies are thus supposed to avoid migration flows. But if climate-induced migration becomes a reality, it can be managed by different mobility instruments establishing new legal roots for the migration of the most vulnerable people.

Since the recognition of climate change by the Stockholm Programme as a root cause of migration, DG Climate Action (DG CLIMA) has become a new actor invited to discuss the elaboration of the GAMM. Only one unit in DG CLIMA deals with adaptation issues and is charged with following climate migration discussions. The Global Climate Change Alliance (GCCA) is the main financial mechanism serving mainstream climate adaptation (and mitigation) concerns in the EU's development policy by engaging in dialogue between the EU and target developing countries. As such, it is seen by CA officials as the most relevant means to cope with climate-induced migration, although it is recognised that the lead on this issue is taken by the DG HOME through the GAMM.

For the DG CLIMA, climate migration is defined as a risk, and no separate policy measures are deemed necessary regarding climate adaptation measures and development policies, which seem sufficient to prevent migratory flows and, if necessary, to help people move in an orderly manner. Human rights considerations are not considered as a priority because they *“add further complexity, so we try to keep them out from the negotiations”* (personal interview, March 2012). As for the MS ministries of the environment, the dominant approach of the DG CLIMA is mostly “ecocentric”, pointing to the environmental impacts of climate change, and less “anthropocentric”, considering its human rights dimension. To the extent that the EU's (and the DG CLIMA's) prime objective is to avoid dangerous climate change, climate migration is not considered as a problem per se. It is simply a variable to include into climate change adaptation strategies.

In 2011, DG HOME was the last to include climate change considerations into its mandate following the Stockholm invitation. DG HOME is the main author of the GAMM document, which was created in close collaboration with the DG DEVCO. Even though its climate-related experience is lagging<sup>90</sup>, it became the “leader” on climate migration because of the JHA's leading role on the external dimension of

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<sup>88</sup> Policy Coherence for Development - Accelerating progress towards attaining the MDG, COM(2005) 134 final.

<sup>89</sup> Commission Staff working paper, SEC(2008) 434/2.

<sup>90</sup> It is interesting to note that DG HOME do not participate at the GCCA.

migration. In order to further examine the links between migration and climate change, DG HOME set up a multi-sectoral working group with the aim of publishing a special Staff Working Paper on climate change and migration. As a DG HOME official said, “DG DEVCO and DG CLIMA were the most active partners in this working group. On the contrary, EEAS has not been reactive enough, maybe because it has not yet identified the added value of this issue for EU diplomacy” (personal interview, March 2012). DG HOME decided to postpone the publishing of this Staff Working Paper because: “we realized that our analysis corresponds mainly to development considerations and we are wondering whether GAMM is the most suited framework to deal with climate migration” (personal interview, March 2012). DG HOME regards climate migration as a problem and considers the introduction of climate adaptation measures into development policies as the most relevant response to the problem.

GAMM offers some new instruments to deal with new migratory movements, but it is questionable whether they are appropriate for the needs of those fleeing their native lands because of environmental degradation. First, the use of the term “mobility” is a much broader concept than migration and can apply to a wide range of people. Environmentally-induced migrants mentioned in the GAMM can be considered as one of the categories that could benefit from the new mobility instrument suggested in the document. Particular attention is given to the facilitation of circular migration for skilled and seasonal workers. This is a policy proposal that has already been formulated by the IOM, which considers that planned migration can constitute a response to climate-induced vulnerability (IOM, p. 23). The constitution of a global labour market with an adaptable workforce is seen as beneficial for sending and host countries as well as for migrants themselves. Nevertheless, this evolution marks the shift from a broader, more “rights-based” approach, towards a narrower “money-based” migration (Lavenex, S. & Kunz, R., p. 449; McNamara, K.E., p. 17). It is indeed questionable whether labour mobility and benefits from the transfer of remittances and know-how is experienced as a solution by those who are forced to leave their homes and families due to climate change, for which they are not responsible (Faist, T.). Furthermore, GAMM proposes that special attention should be paid to protecting and empowering vulnerable migrants (p. 6). However, nothing in the document allows for the classification of climate-induced migrants as “vulnerable” people. Reference is made also to “stateless people”. While the UNHCR considers that climate change could produce statelessness (Guterres, A., p. 4), no association is proposed here between the two phenomena. Only the Commission's Staff Working Paper “Migration and Development”, which accompanies the GAMM<sup>91</sup> (written under the responsibility of DEVCO) qualifies climate migration as “forced” displacement, but this term is not included in the GAMM.

Most of the instruments proposed in the GAMM are not new. They are already present in documents relating to “Coherence for Development”. Thus, the GAMM concluding remarks recognise the “*need to promote migration governance from a development perspective [...] those aspects should be in line with the Policy Coherence for Development Work Programme*”. The Staff Working Paper accompanying the GAMM also points to the fact that “*More focused attention should be paid to the debate on the connection between forced displacement and development, in particular the links among migration, CC and environmental degradation*”.

Adaptation to climate change seems to be the common ground for consensus among policy actors associated with GAMM implementation. Adaptation is considered to respond simultaneously to security risks, development objectives, climate-induced vulnerability and the displacement of populations. Thus, sustainable development, taking into account social, economic and environmental needs of third countries, must constitute the main guiding line of all EU external policies.

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<sup>91</sup> Commission Staff Working Paper, COM(2011) 743 final.

### 9.3 Proposals for progress in the climate migration challenge

#### – **EU from follower to leader**

The introduction of climate change concerns into the external dimension of migration policies is closely linked to the way the international debate has evolved. It is only after the recognition of the links between climate change and migration by the AWG-LCA, that the EU integrated climate concerns into the GAMM.

The EU rather adapts than leads the international climate migration debate. This is related to the reluctance of MS to implement immigration policies and the pressure they exert for the promotion of border control measures. Further “communitarization” of this policy field and the establishment of a permanent policy forum for collaboration between the EU and leading international bodies such as the IOM or UNHCR can reinforce the EU’s position on the opposition from MS.

#### – **Removing climate migration from the development-migration nexus**

Since its origins, the development-migration nexus has experienced the recurrent problems of understanding and collaboration between the parties involved. The creation of a unit for international affairs into the DG HOME, as distinct from the directorates working on internal security, asylum, visas or border control, is a positive step forwards for the better management of the external dimension of migration. However, it also brings in further complexity by adding an environmental-climate dimension, which risks creating more incoherence. As far as the DG HOME sector’s responses to MS interior ministers, internal considerations remain the dominant rationale. Climate migration is by definition an international issue, and one that mainly involves third countries. In that sense, giving a clear mandate, if not playing a lead role, to the development sector could strengthen policy-making in this field.

#### – **Reconsidering DG DEVCO's internal organisation**

Officials, inside and outside of DG DEVCO, have pointed out the complexity and inefficiency of DG DEVCO’s organisation. Indeed, its structure corresponds to the old bipolar perception that distinguishes between “ecocentric” (environmental) issues and “anthropocentric” (human-related) issues. DEVCO C is responsible for sustainable growth and development while DEVCO D is responsible for human and society development<sup>92</sup>. The former specializes in environmental and natural resource issues, while the latter includes a special unit that works on human rights issues (D1), and another unit (D3) that works on migration issues. A more holistic, transversal organisation would be better equipped to deal with problems relating to the interaction between societies and their environment.

#### – **Officially recognise the vulnerability of climate migrants and that they move under compulsion**

The ambition of the GAMM is to “respond to the challenges of changing migration trends”. The persistent distinction between “legal” and “illegal” migrants based on the 1951 Geneva Convention does not correspond to today’s reality of a globalized world. Humanity faces new challenges which cannot be addressed without overturning old classifications. The EU should officially recognise climate migrants as “vulnerable” people inclined to experience “forced” displacement. This is a sine qua non condition for envisaging the application of legal instruments of protection, as the UNHCR has started doing for those fleeing homelands that are becoming uninhabitable due to global warming.

The DG HOME should review its policy on asylum including its external dimension in terms of climate change impacts. It could extend its temporary protection to include cross-border displacements related

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<sup>92</sup> It is interesting to note that DEVCO C2 officials ignored the GAMM.

to extreme weather events, as well as its silent subsidiary protection on this aspect. The EC should reorganise its regulatory framework to make displacement, other than labour-oriented migration, a strategy for climate change adaptation, as a number of studies have encouraged. More generally, the EU could give more consideration to the lines of thought initiated by the UNHCR on displacement arising from the flooding of island nation states.

– **Creation of a new institution**

The collaboration between the Commission and the EEAS inherited the limits and obstacles of collaboration between the DG HOME, which viewed development assistance as a tool in the control of migration flows, and DGs Development and for External Relations (RELEX), considering development assistance as part of foreign policies. The creation of the HLWG on asylum and migration, in December 1998, was expected to establish a common, integrated and cross-pillar approach but failed in its effort to integrate these policy areas marked by competing objectives. This is, in a large part, due to the fact that HLWG has been mainly composed of JHA officials supporting a control-oriented approach.

Although, the General Affairs and External Relations Council (GAERC) is also competent in external migration policy issues, its influence remained limited in comparison to the JHA Council because the HLWG was the only committee within GAERC responsible for migration issues. The creation of a new institution representing all the actors involved in the migration – development nexus could be an important step forward in order to succeed a better political equilibrium between those focussing on safeguarding the national territory and those dealing with external relations and development cooperation. According to the authors of this report, the abolishment of the DG RELEX and the creation of EEAS as an institution outside the Commission risks to further complicate the realization of the migration-development nexus. A permanent inter-agency ad hoc working group on the subject could be necessary for guarantying the elaboration of coherent policy proposals.

## CHAPTER 4 EUROPEAN UNION INTERNAL CLIMATE POLICIES FROM THE PERSPECTIVE OF HUMAN RIGHTS

The protection of human rights is occupying an increasingly important place in the EU. With the entry into force of the Lisbon Treaty, the CFREU gets a binding character and the EU is now engaged in a process of ratification of the ECHR. In the field of the environment, the current human rights influence also comes from regional agreements. For instance, the Aarhus Convention on, *inter alia*, access to justice in the field of the environment binds the EU and its MS, as they both ratified it. Apart from the initiatives creating links between climate change and human rights at the international level, this new EU context invites an analysis on the EU's internal climate change policies, and their potential evolution, from the perspective of human rights. Do EU climate policies respect or, at least, are they designed in conformity with these human rights sources? Is there room for contestation of EU climate policies on the grounds of violation of these instruments? How could, or should, EU climate policies evolve in order to be in accordance with EU fundamental rights? To address these questions, we will first focus on mitigation policies, and then turn to adaptation policies.

### 10. EUROPEAN UNION MITIGATION POLICIES AND HUMAN RIGHTS

Mitigation policies are those that aim at reducing emissions of GHG that lead to climate change. One of the core components of the EU climate mitigation policy is its emissions trading scheme (EU ETS). Indeed, for the first two periods of its application it covered 50% of the EU's CO<sub>2</sub> emissions and 40% of the EU's GHG emissions. For the post-2012 period, the scheme will even be extended. However, some changes have now occurred, with the EU ETS becoming a component of a more comprehensive so-called "climate and energy package" (Jordan, A., & al., p. 136). It will thus run alongside other mitigation policies, which also need to be analysed from the perspective of human rights.

#### 10.1 European Union ETS and human rights

Under the Kyoto Protocol, the EU aims to reduce GHG emissions by 8% in 2012, compared to 1990 levels. Although an inclusive international climate agreement for the period after 2012 is still absent, the EU has already decided to reduce GHG emissions by at least 20% by 2020 (or 30% if other major emitting countries make comparable reductions). To achieve these targets in a cost-effective way, in 2003 the EU adopted Directive 2003/87/EC on GHG emissions trading, regulating the emissions of most CO<sub>2</sub> emitting sectors. This market has been up and running since 2005. In 2009, the EU ETS Directive was amended to become Directive 2009/29/EC (thereafter "the amended EU ETS Directive"). The process leading to the adoption of this amended EU ETS Directive included an impact assessment, but it did not encompass consideration on human rights. Hence, the EU ETS may have some impacts on human rights or be better designed to be in conformity with human rights requirements. Indeed, it provides grounds for proceedings in this regards by stating, "*this directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*" (preamble, §50), even if it is necessary to give some substance to this provision. This is particularly true when considering the ETS cap, the method of allowance allocation and the use of credits from the CDM/JI project.



### 10.1.1 Human rights concerns for the emission cap

#### – **The principle of a high level of environment protection and the improvement of the quality of the environment**

During the learning phase of the EU ETS (2005-2007), allowances were allocated to the industries under the scheme by the EU MS themselves. However, in 2006 it emerged that overall CO<sub>2</sub> emissions in the EU ETS were only about 4% lower than the number of allowances distributed to installations for 2005. The emissions caps were not stringent enough, partly because they were based on uncertain emission estimates and partly due to lobbying efforts of energy intensive industries. This over-allocation by governments affected the incentive to invest in clean technology, and thus lessened the environmental effectiveness of the EU ETS, as the allowance price decreased to almost zero in 2006. This “race to the bottom” by MS was solved by reinforcing the Commission’s control of the National Allocation Plans during the current phase (2008-2012), and for the next phase it will be addressed by setting a more stringent cap and distributing the emissions rights at the EU level (Ellerman, D. A., & al, p. 442). According to Article 9 and 10(a) of the amended EU ETS Directive, the cap, which is fixed on the basis of experience and data from the previous periods, will be set for the EU as a whole and will decline by 1.74% each year from 2013. However, the EU might have gone further: EU leaders offered to increase the EU’s emissions reduction to 30%, on the condition that other major emitting countries in the developed and developing worlds committed to do their fair share under a global climate agreement.

The environmental effectiveness of the EU ETS is determined by the level of the emissions cap. Hence, the question is: should the EU ETS cap be challenged for not being stringent enough on the grounds of an EU fundamental right? Article 37 of the CFREU on “environmental protection” reads as follows: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. This article, which is directly inspired by Articles 2, 6 and 174 of EC Treaty (now Article 3(3) of EU Treaty and Articles 11 and 191 of the FEU Treaty), does not in itself create a right for individuals. It is merely a principle imposed on the EU’s actions. Thus, it raises the question of its enforcement in front of the courts. With the abandonment of Article II-112(5) of the Treaty establishing a Constitution for Europe (“The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of MS when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”) it is not clear whether this principle may be invoked regarding the amended EU ETS directive for not targeting a high level of, or not improving, environmental quality. But if we assume this to be the case, the “high level of environmental protection” referred to by Article 37 may not mean the highest level possible<sup>93</sup>.

Thus, it is highly improbable that the EU ETS will be judicially challenged, even if it may be, and actually is, criticised on political grounds (see, *inter alia*, De Bruyn, S., Markowska, A., Davindson, M., p. 56).

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<sup>93</sup> See Judgment of 14 July 1998 in Case C-284/95: *Safety Hi-Tech c/S et T.*, [1998] ECR I-4301, §49: “whilst it is undisputed that Article 130r(2) of the Treaty requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible. As stated in paragraph 43 of this judgment, Article 130t of the Treaty authorises the Member States to maintain or introduce more stringent protective measures”.

## – The principle of equal treatment, solidarity and the right to development

The establishment of the cap for the EU ETS must be understood within the context of the -20% target for GHG emissions in 2020. Indeed, in addition to the EU ETS, the Effort Sharing Decision fixes national targets for sectors that are not included in the EU ETS and contains a directive on renewable energy. Globally the package was designed to take into account fairness considerations (Lacasta, N., & al in Oberthür, S., Pallemarts, M.). The European Council of March 2007 recognised the necessity to take into account the different circumstances of MS and the reality that differing levels of prosperity have an impact on the capacities of MS to invest in clean technologies.

Fairness is more an ethical notion, or even an economical concept, than a human rights (Kaswan, A., in Arnold, D.G.). Nevertheless, it might relate to the principle of equal treatment (Article 20 of the CFREU). This principle endeavours to treat different situations differently, but not similar ones<sup>94</sup>. Hence, the burden remains on criterion to consider that two situations differ, which needs a case-by-case interpretation.

This principle was invoked in the Arcelor cases aiming to invalidate the EU ETS directive (Case T-16/04 and C-127/07). The Court held that exclusion of the non-ferrous metal and chemical products sectors from the initial phases of the scheme did not violate the principle of equal treatment because there were sufficient objective criteria to justify different approaches for different industrial sectors (Ghaleigh, N. S.).

Such an argument should also be mobilised to justify the different treatment of MS in the post-2012 phase. Indeed, poorer countries, and those who achieved early cuts in their GHG emissions, will receive more allowances. Furthermore, within the Effort Sharing Decision the Commission's proposal introduced the differentiation of MS targets according to the relative level of GDP per capita. It reflected the so-called principle of solidarity between MS (Article 24 TEU mentions "*mutual political solidarity among Member States*"; and "*the spirit of solidarity between Member States*" is also referred to in Article 191(1) of the TFEU as regards the need to preserve and improve the environment in the internal market; the Union's policy on energy, according to Article 194(1) TFEU, will likewise be performed "*in a spirit of solidarity between Member States*") coupled with the recognition of the need for sustainable economic growth across the Community (Article 3 TEU), while also taking into account the relative per capita GDP of MS. If the level of development is an objective criterion for differentiation purposes, isn't it a form of recognition of the right to development? This does not exist as such in the CFREU and is advocated in international negotiations by some developing countries as an understanding of the CBDR principle (Article 2 UNFCCC; Rajamani, L., 2010 (b), p. 36). That Article 37 of the CFREU is inscribed in the "solidarity" Chapter, and that it refers to "sustainable development" are two key points in support of this conclusion.

### 10.1.2 Human rights concerns in the allowance allocation method (free v. auctioning)

The 2003 EU ETS Directive requires that governments primarily allocate emission rights, known as "allowances", free of charge. To be more precise, in the current period (2008-2012) at least 90% of the allowances must be allocated for free and only 10% have to be auctioned (Article 10 of the EU ETS Directive).

This allocation mechanism will change substantially after 2012. The amended EU ETS Directive requires that the auctioning rate for the electricity sector will be as much as 100% after 2012. Transitional free allocation is possible for existing power plants, primarily in Eastern European MS (transitional free allocation is possible for MS with poor interconnectivity of their electricity grid, or in relatively poor MS

<sup>94</sup> See for instance Judgment of 13 November 1984 in Case 283/83: *Racke*, [1984] ECR 3791, §7.

where more than 30% of the electricity is produced with a single fossil fuel), but the auctioning rate must be at least 30% in 2013, and 100% by 2020. For the scheme as a whole, the European Commission expects that about 50% of all available allowances will have been auctioned off by 2020.

It may be assumed that this shift from free allocation to auctioning happened for human rights-related reasons, even if it was not expressed in those terms. Indeed, auctioning may be perceived as fairer than free allocation. Furthermore, the granting of the transitional free allocation took into account the special situation of certain MS that can be linked to human rights concerns (see above).

The implications of the auctioning of allowances to increase the scheme's equity actually depends on whose equity we are talking about (Farber, D. A., p. 39). It is clear that auctioning is more acceptable than free allocation to consumers because it removes the windfall profits, a phenomenon that appears when operators charge their customers the "opportunity cost" of the allowances, even when they received these allowances free of charge (Woerdman, E., Arcuci, A., Clo, S., pp. 14's). However, free allocation seems more acceptable than auctioning to emitters, because they receive an asset with a market value for free (Woerdman, E., Weishaar, S.). This shift to auctioning could even be seen by the emitters as a form of opportunistic behaviour by the government as the capital gift, which results from creating scarcity of emission space, will shift from the shareholders to the government. Furthermore, the cost of purchasing allowances by auction will still be passed on to the consumer price. It may even increase, as the cap of the EU ETS will be more stringent. Hence, this shift may affect the human rights of both consumers and emitters, while serving the purpose of the protection of the environment.

Emitters may consider that auctioning affects their right to property (Article 17 CFREU and Article 1 Additional Protocol no. 1 to the ECHR) and freedom to pursue an economic activity (Article 16 CFREU), as it was invoked in the Arcelor cases (Case T-16/04 and C-127/07). However, the Court rejected these arguments, noting the directive's requirement that MS consider the technological potential for emissions reductions when establishing obligations, and holding that neither a sufficiently serious breach or disproportionate restriction nor an infringement causing damages had been established. It may be assumed that the shift to auctioning will not change the Court's perception on the matter.

Indeed, Article 191(2) TFEU indicates that the EU action has to be based, *inter alia*, on the polluter-pays principle. Even if not incorporated as such into the CFREU, this principle has to be taken into consideration for the implementation of the Article 37 of the CFREU, as it constitutes a means to achieve a high level of environmental protection and may justify limitations to other rights, such as the right to property or to pursue an economic activity.

However, what needs to be addressed from a human rights perspective is the problem of access to essential supplies, such as electricity (Panneels, A., pp. 187-197; Schiellerup, P., Chiavari, J., Bauler, T., Grancagnolo, M., p. 47; Wilson, S., Davis, J., p. 47). In the absence of a minimal access to certain goods and services, it may be assumed that the right to respect for private and family life or the right to dignity (Article 8 ECHR; Article 1 and 7 CFREU) are not attained. The Article 36 of the CFREU on access to services of general economic interest seems relevant in this respect. However, the effects of this provision are limited. Formulated as a principle and not as a subjective right, it means that the EU's acts must respect this principle as guaranteed by national legislations and practices. The threshold thus relies on MS, while Article 36 of the CFREU may justify some sort of subsidy in this area. The provision of the amended EU ETS Directive opens some room of manoeuvre, however, through its recommendation that at least half the revenue, and all of the revenues from auctioning allowances in respect of aviation, should be used to fight and adapt to climate change, and lists a number of purposes, mainly within the EU, but also in developing countries (Article 10(3)).

### 10.1.3 Human rights concerns regarding the acceptance of JI and CDM credits in the EU ETS

Most categories of credits issued from JI and CDM projects may be used by participants in the EU ETS, in order to fulfil their GHG emissions reduction obligations. Credits from afforestation, reforestation and nuclear projects cannot, however, be used.

According to the NGO CDM Watch, there have been human rights abuses linked to two registered projects, the Aguán Biogas Project in Honduras and the Barro Blanco Hydropower Project in Panama<sup>95</sup>. However, the CDM Executive Board has stated that it has no mandate to investigate human rights abuses and that all matters related to the sustainable development of the project are determined by the government that hosts the project, in conformity with the principle of State independence and equal sovereignty. In reaction, it has been advocated that the UN Charter<sup>96</sup>, which is applicable to the UN and includes all its bodies, alongside the Cancun agreements<sup>97</sup>, should be used as a basis to give the necessary mandate for the CDM Executive Board to address the issue.

It can also be assumed that the EU, as the major purchaser of CDM credits, may play a determinant role in that respect. Indeed, EU institutions are also bound by human rights texts. The CFREU states, *"the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the MS only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties"* (Article 51(1)). Furthermore, the EU is engaged in a process of acceding to the ECHR. Hence, the Convention states, *"the European Union may accede to this Convention"* (Article 59(2)) of the Convention for the Protection of human rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14). Therefore, the EU should take these requirements into account to ban JI/CDM credits generated by projects that violate human rights from the EU ETS.

The question is: how can such a rights-based approach be introduced for the delimitation of credits admitted into the EU ETS? First, it is necessary to identify the relevant criteria to assess whether a project may violate or has violated human rights<sup>98</sup>, and then to evaluate when the EU and/or its MS may verify the result of the HRBA (Greiber, T., & al., pp. 37-60; Orellana, M.A., pp. 145-171). Regarding the latter it must be kept in mind that the manoeuvre room of the EU and/or its MS is small, but it does exist. Indeed, investors may participate in JI/CDM projects only under the responsibility of their home State, which has to be a Party to the Kyoto Protocol. Thus, the project cycle calls for the signature of a letter from the home State of the investor that agrees to such participation on the basis of the project design document (PDD). Hence, the EU may request for such a PDD to be signed by the nationally designated authority of a MS only if it contains provisions regarding the potential HRIA of the project (Augustein, D, pp. 27-28). Such a requirement would entail a pre-project analysis identifying all stakeholders that may be affected, human rights that may be infringed, and the availability of alternative less harmful options or compensation or resettlement plans. It must not be forgotten that most CDM projects constitute an improvement on the actual environmental and social conditions on the ground, and thus this pre-project analysis would help balance the positive and negative social impacts of each project. Furthermore, the EU and/or its MS may request the project sponsor located in their territory to set up a grievance mechanism in their PDD to receive and address any claims that people affected by the

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<sup>95</sup> CDM Watch Newsletter No 2, April 2011, available online at: [http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/04/cdm\\_watch\\_newsletter\\_2\\_april\\_2011.pdf](http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/04/cdm_watch_newsletter_2_april_2011.pdf)

<sup>96</sup> *"To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for HR and for fundamental freedoms..."* (Article 1 of the UN Charter). *"The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction"* (Article 55(c) of the UN Charter).

<sup>97</sup> *"Parties should in all climate change related actions fully respect human rights"* (Decision 1/CP.16, §8).

<sup>98</sup> The criteria set for that purpose in the EC staff working paper, SEC(2011) 567 final, may be used in that respect.

project may have (Miles, K., pp. 63-92). The EU and/or its MS may also seek to ensure that project sponsors provide stakeholders with access to information about the projects, in a suitable time frame, format, quantity and quality as to enable participation and to explain how those affected by the project were taken into consideration.

All these measures exist only to prevent the implementation by an EU-located sponsor of a CDM project that may potentially violate human rights. What if a project passes this test but violates human rights once it is up and running? How can the credits generated by such a project be banned from entering into the EU ETS? Here, the EU has less room for manoeuvre. The ban on the use of credits derived from afforestation, for example, is enforced through the use of an automatic system based on the coded numbers given to credits. Those credits with numbers that correspond to this type of project are automatically rejected by the EU transaction log. However, the same system could not operate for credits from projects that violate human rights, as they do not have specific associated codes. One solution may be to identify the types of project that are more likely to induce such violations. Indeed, certain kinds of projects are likely to affect certain rights more than others and thus warrant a focused approach. However, even if this solution might put some pressure on the CDM executive board to develop its mandate, it is not a panacea as the interdependence and indivisibility of human rights must be remembered.

## 10.2 Other European Union mitigation policies and human rights

In addition to the EU ETS, the EU mitigation policy, which is enshrined in the climate and energy package, comprises three other complementary legislations. The first is the "Effort Sharing Decision"<sup>99</sup>, which governs emissions from sectors that are not covered by the EU ETS, such as transport, housing, agriculture and waste. Under this Decision, each MS has agreed to a binding national emissions limitation target for 2020. The second is the binding national targets for renewable energy that have been assigned to MS<sup>100</sup>. The third legislation is a legal framework<sup>101</sup> to promote the development and safe use of carbon capture and storage (CCS). Revised EU guidelines on state aid for environmental protection, issued at the same time as the legislative package was proposed, enable governments to provide financial support for CCS pilot plants. Finally, it is worth noting that the climate and energy package creates pressure to improve energy efficiency, but does not address it directly. This is being done through the EU's energy efficiency action plan. All these EU mitigation policies need to be appraised from the right of access to justice for individuals and the right to property.

### 10.2.1 Mitigation policies and access to justice

Although all the policies of the climate and energy package will ultimately have to be implemented by private persons, they are formulated in such a way that they do not create rights or duties for individuals. Thus, any attempt to contest, through an annulment proceeding, the validity of these acts, for violation of Fundamental rights, seems void. Indeed, admissibility conditions for such an action are strict. Citizens and undertakings can only proceed against decisions that are personally addressed to them or, though addressed to others, have a direct individual effect on them. The Court of Justice deems this to be the case if a person is affected in such a specific way that a clear distinction exists between him or her and other individuals or undertakings. Hence, this is a very unlikely scenario in relation to the current EU mitigation policies.

The applicant would thus only be able to indirectly plead the invalidity of such acts before the Community Courts under Article 277 TFEU ("*any party may, in proceedings in which an act of general*

<sup>99</sup> Decision 406/2009/EC.

<sup>100</sup> Directive 2009/28/EC.



*application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act<sup>101</sup>)* or to approach the national courts and request for a preliminary reference to the Court of Justice (Article 267 TFEU) since such courts would not be empowered themselves to declare those measures invalid. But here again the applicant would not have guaranteed access, even indirectly, to the Court of Justice as conditions under Article 277 TFEU are still restrictive, and if the national judge considers the provision as valid, it may, using the discretionary power, even decide not refer the case to the Court of Justice.

The right to have access to courts is inscribed in the CFREU (Article 47). Furthermore, this right is especially guaranteed in the field of the environment by the Aarhus Convention, which both the EU and its MS have ratified. Hence, it can be said that these judicial proceedings do not guarantee access to the judge for the violation of human rights or environmental law.

Regarding the violation of human rights however, the EU's adhesion to the ECHR may create new opportunities for private individuals to contest EU acts for violating human rights.

Regarding the violation of environmental law, it must be acknowledged that legislation adopted within the climate and energy package, such as for instance the Effort Sharing Decision, does not create a right for a clean environment. In other words, an individual or NGO cannot invoke this decision to contest a national measure or EU act for contravening the aim of reducing GHG in non EU ETS sectors. Indeed, for an individual to invoke EU law in support of a proceeding aiming to invalidate a national measure or another EU act, whether before the national judge or the Luxemburg Court, this disposition needs to be sufficiently clear, unconditional and complete. In some way, rights for individuals must be created, which is certainly not the result of the effort sharing decision and, more broadly, of legislation adopted within the climate and energy package.

Thus, as the Aarhus convention compliance Committee considered, in its decision of 14 April 2011 (Decision no. ACCC/C/2008/32), the preliminary proceedings cannot compensate for the restrictive admissibility condition of the annulment, or for the lack of action proceeding before the Court of Justice. The Lisbon Treaty amendments in that respect (Article 263(4) TFEU: "*Any natural or legal person may (...) institute proceedings (...) against a regulatory act which is of direct concern to them and does not entail implementing measures*") that intervened after the Committee was seized, are to be welcomed. However, they still seem unable to counterbalance the insufficiencies of EU judicial proceedings towards the right of access to a Court in the case of a violation of environmental law.

So, given the current status of mitigation policies, it cannot be assumed that people affected by mitigation policies – or a lack of them – will have access to justice.

#### 10.2.2 Legal certainty of mitigation policies and the right to property

EU mitigation policies are generally directed towards the creation of an incentive to invest in clean technology, in order to – *inter alia* – achieve the target of 20% of clean energy in 2020. However, these policies are quite unstable. This is even truer given that, for now, these policies are still decentralised. The EU is content to set national targets that MS have the discretion to implement through the means they want.

Indeed, within the framework of the Directive 2001/77/EC, which set targets for 2010 for the share of electricity from renewable energy sources for each MS, an important number of MS established support schemes (i.e. subsidy regimes). These included investment support (capital grants, tax exemptions or

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<sup>101</sup> Directive 2009/31/EC.



deductions on the purchase of goods) and operating support (price subsidies, green certificates, tender schemes and tax exemptions or reductions on the production of electricity). These incentives enabled market participants that commit to investments in renewable energy to build their business cases on the basis of these policies and promises of support. However, given the financial consequences of these policies on State budgets, some MS reneged on these promises once the needed investments have been made. France for instance discretionarily cut feed-in tariffs on solar energy in 2010.

Directive 2009/28/EC does not really address this problem of political instability, and thus of legal uncertainty. It also sets targets at the MS level for 2020, without harmonising a way to achieve them. The main difference with the former Directive is that it also sets the trajectory for each MS. Whilst the trajectory offers “indicative targets”, MS are required to introduce “effectively designed” measures to ensure that the trajectory is reached (Article 3(2) of the 2009 Directive). This is a welcome improvement, but one that may be insufficient.

Hence, the Directive should not be challenged on these grounds. In this regard, the Arcelor cases (T-16/04 and C-127/07) may once again be used by analogy, as the Court held that the (former) absence of a cap on the market price of emissions allowances did not violate the principle of legal certainty because it was within legislative discretion to conclude that imposing such a cap would undermine economic incentives to reduce emissions. Indeed, the same might be said about the renewable energy Directive. However, since then, regulatory stability and predictability has been increasingly recognised as a core principle of EU policies regarding climate, renewable energy and electricity<sup>102</sup>.

Besides the legal certainty, the right to property is also at stake. In this respect, a market participant could use the ECHR. Indeed, it may be assumed that the right to benefit from the renewable energy support schemes would fall within the ambit of Article 1 of the First additional Protocol (Boute, A., pp. 93-102). While the Strasbourg Court leaves a large margin of appreciation to States in the justification of measures of social and economic policy that constitute the control of property, these measures must always respect a fair balance between the public interests pursued and the right to property of the affected subjects. It means that States may not withdraw support schemes for renewable energy as long as it is necessary to recover the investment and operating costs of the installation concerned. By guaranteeing this fair balance between public and private interests, human rights could thus contribute to the improved credibility and efficiency of the EU’s climate and energy policies.

### **10.3 Proposals**

Generally, it may be said that it is equity that is at the heart of the HRBA of EU mitigation policies. Thus, our proposals are all directed towards increasing this level of fairness, while also questioning the desirability of the use of market mechanisms:

- Impact assessments of climate change mitigation policies should include indicators linking social justice, poverty and environmental justice.
- Auctioning revenue from the EU ETS should be used to prevent or redress human rights impacts from climate change.
- The issue of windfall profits for sectors covered by the EU ETS should be addressed by taking into account the price of first necessity goods and services.
- The auctioning process within the EU ETS should be designed in a way that does not contravene the property rights of producers, in order to prevent them from challenging this new allocation system and/or a notable rise in energy prices.

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<sup>102</sup> See, for instance, points 6, 8 and 11 of the preamble of the Directive 2009/29/EC.

- The EU should be clear on the fact that JI/CDM credits from projects that violate or risk violating human rights may not be used within the EU ETS. Relevant criteria should be set up and imposed on investors located in MS territories. Bilateral agreement with host countries may be appropriate in this respect.
- climate change policy should be formulated in a way that ensures a direct effect in favour of effective access to justice for individuals. For example: “Mitigation policies should respect the right to access energy, the right to mobility...”
- The EU and MS should take due account of the necessity for legal certainty and the right to property when modifying EU climate change mitigation policies.

## 11. EUROPEAN UNION ADAPTATION POLICIES AND HUMAN RIGHTS

### – Defining adaptation policies

Adaptation policies are meant to “anticipat[e...] the adverse effects of climate change and tak[e] appropriate action to prevent or minimise the damage they can cause” (European Commission, 2008). As climate impact is likely to cause human impact, the risk that human rights are affected is real. For instance, in the Venice Lagoon, sea level rise is likely to increase the frequency of high-water events, thus causing harm to the urban environment, but also to economic assets and the comfort of citizens (Von Doussa, J.).

While mitigation of climate change effects has become more comprehensive through the realisation of multiple studies and the adoption of coherent policies on the international, regional and national levels, adaptation to climate change remains a huge challenge. To start with, neither the UNFCCC nor the IPCC Working Group I, which assesses the physical scientific aspects of the climate system and climate change, provide a clear definition of adaptation (Garnaud, B.)<sup>103</sup>. One of the underlying reasons for this is “the fundamental difference between definitions of climate change provided by the UNFCCC and the IPCC”<sup>104</sup>. Another reason is the adaptive capacity’s dependence on each specific context (geographical, economic, political and socio-cultural) of a country or region. Even within a MS, it turns out to be difficult to adopt a uniform, national preventative adaptation strategy. Among the various forms of adaptation, we may distinguish between anticipatory and reactive adaptation, private and public adaptation, and autonomous and planned adaptation (IPCC, 2007). Indeed, in the past, adaptation measures were very often adopted as a response to punctual crises. As examples we may quote the 2001 floods and Gudrun storm in Sweden, as well as major floods in the UK, Germany, Hungary, the Netherlands and Norway, but also the 2003 European heat wave, which hit France in a particularly severe manner. As opposed to mitigation policies, adaptation policies are more recent (Rayner, T. and Jordan, A.) and they aim to alleviate the impacts of climate change (and not to avoid them, Hunter, D.B.), and are adopted more on the local and regional scale than on the global and national levels (Termeer, C. et al.). Some MS such as the UK, Finland, Sweden and Italy may be considered as the front-runners in matters of adaptation (Keskitalo, E.C.H.).

<sup>103</sup> [http://www.iepf.org/media/docs/publications/338\\_LEF85web.pdf](http://www.iepf.org/media/docs/publications/338_LEF85web.pdf) ; [www.ipcc.ch/ipccreports/tar/wg1/518.htm](http://www.ipcc.ch/ipccreports/tar/wg1/518.htm).

<sup>104</sup> Dutch Climate changes Spatial Planning Programme, <http://climatechangesspatialplanning.climateresearchnetherlands.nl/programme/key-terms-climate-change>. According to Article 1 (2) UNFCCC, “climate change means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”. According to the IPCC, “Climate change refers to a statistically significant variation in either the mean state of the climate or in its variability, persisting for an extended period (typically decades or longer). Climate change may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the composition of the atmosphere or in land use” ([www.ipcc.ch/ipccreports/tar/wg1/518.htm](http://www.ipcc.ch/ipccreports/tar/wg1/518.htm)).

However, as the Commission pointed out in its Green and White Papers on Adaptation, even though much of the practical climate change adaptation measures will have to be taken at local, regional and national levels, there is also a need to develop a strong European strategy on adaptation. In conformity with the principle of subsidiarity, the European Commission intends to set up an Impact and Adaptation Steering Group (IASG) composed of representatives from the EU MS involved in the formulation of national and regional adaptation programmes (European Commission, 2009) in order to *“help develop the EU strategy and consider the appropriate level at which action should be implemented”* (Rayner, T. and Jordan, A.).

#### – **Integrating human rights into European Union adaptation policies**

EU action for climate change adaptation is required by Article 4 of the UNFCCC, which stipulates that every effort must be made to adopt national or regional adaptation strategies. The aim of mainstreaming a human rights approach into EU adaptation to climate change lies in enhancing resilience (European Commission, 2009), that is *“the possibility for a system to be able to absorb disturbances while still retaining its basic functions”* (Walker and Salt, 2006). Optimizing the resilience of health and social policies, of agriculture and forests, biodiversity, ecosystems and water, coastal and marine areas, production systems and physical infrastructure, is not merely required by a selected number of values or ethical considerations, but follows from the CFREU, which applies to all EU institutions, bodies, offices and agencies, as well as to MS, but only when they are implementing EU law.

According to Article 2 TEU, *“[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”*. It is the EU's aim to promote these values, together with peace and the well-being of its peoples (Article 3(1)), be it within the EU or *“[i]n its relations with the wider world”* (Article 3(5)). The Union's commitment for the respect of human rights is furthermore reflected in the CFREU - which enjoys the same legal value as the Treaties since the entry into force of the Lisbon Treaty in December 2009 - in the case law of the ECJ, as well as in the ongoing negotiations over the Union's accession to the European Convention for the Protection of Human Rights.

The object of this contribution is to first address the challenges to the integration of human rights into adaptation policies on the EU level, and second to come up with proposals for enhanced integration of human rights into existing and future EU adaptation policies.

### **11.1 Challenges to the integration of human rights into adaptation policies**

Two types of obstacles are currently encountered when mainstreaming a human rights approach into EU adaptation policies, which are linked to both structural and substantial barriers to integration.

#### **11.1.1 Structural barriers to integration**

The main structural barriers to integration are the lack of competences and resources.

#### – **Lack of competences**

Several policy fields in which the human rights impact of adaptation measures is tangible remain a national competence, such as urban planning, the choice of energy mix or the taxation of energy products. Indeed, even though it seems to be widely recognized that *“spatial planners can play a significant role in adaptation – think of the siting of certain infrastructures on river and coastal flood plains for example – such a logic has not yet convinced national governments that a significant EU dimension is warranted”*. Faced with these tensions, the EC may *“decide to push for joint action more quickly in areas*

where EU competence is already well established (such as agriculture, water and biodiversity protection) than where it is contested (e.g. land-use planning matters)" (Stripple, J. et al.). Here may lie one of the reasons why the EU has not managed to adopt an effective, uniform, coherent and overarching approach to adaptation. Another reason may be found in the fact that so far, only soft law instruments explicitly address the challenge of adaptation (2005 Communication, 2007 Green Paper, 2009 White Paper). One is tempted to ask, however, whether the potential negative impact on neighbouring countries of the failure to act in one country (such as experienced with flooding in the Netherlands induced by flooding in Germany) does not legitimize the EU to take coercive legislative action (as shown by the floods directive<sup>105</sup>).

On the national levels, it follows from studies comparing adaptation policies between several MS that the division of tasks varies according to different governance patterns and traditions. For instance, in Sweden, the State assumes responsibility for adopting larger-scale measures, whereas municipalities are entrusted with the mainstreaming of adaptation measures into existing policies. Finland has developed a cross-sectoral national adaptation strategy through inter-ministerial cooperation, which is expected to be implemented by existing administrative bodies, *"but thus far without dedicated funding"*. In Italy, the lack of a formal national adaptation policy has led sub-national levels (regional, local) to integrate adaptation requirements into existing frameworks. The risk of such fragmented action on the national level is that regions or smaller municipalities may lack the necessary resources for implementing adaptation policies. In the Italian case, for example, even though regions enjoy a considerable decision-making power, autonomous action for adaptation on the regional level is necessarily limited in the absence of a national adaptation strategy due to strong national control over financial matters (Keskitalo, E.C.H.).

E.C.H. Keskitalo furthermore notes that sometimes it is less the lack of competences which creates an obstacle to integration of adaptation into existing frameworks than rather an *"unclear distribution of competencies and inter-institutional competition at the national level"*. This author thus sees an opportunity for EU and international level policy-making to have an impact especially in MS where national adaptation strategies have not been adopted or are not being implemented efficiently (*"EU policy development may impact laggards more than leaders who actively attempt to upload their existing policies and therefore experience less of an impact from changes at the EU level"*). Austria and Italy are examples of MS where the Green and White Papers on adaptation were decisive for the adoption and strengthening of national adaptation policy initiatives. So far, the EU has influenced adaptation at the national level mostly through the adoption of directives in the fields of land and water use (such as the Water Framework Directive and the Floods Directive), as well as through funding and supporting of *"adaptation-relevant development"*. More resources of different kinds seem, however, to be needed.

#### – **Lack of resources**

Indeed, the second type of structural barriers to the integration of human rights into adaptation policies are those induced by the lack of human, financial and information resources. The Stern Review identified financial constraints as one of the main barriers to adaptation. R. Cook observes that *"[w]hile the objectives of the EU external adaptation policy are ambitious and commendable, a significant weakness is the lack of commitment on financial assistance and complicated procedures to access the funds"* (Cook, R.). Stakeholders have criticized EU funding sources for putting the emphasis on the development of innovative methodologies rather than the establishment of basic data, which is felt to be a prior necessity (Keskitalo, E.C.H.). As a matter of fact, lack of information about climate change impact on the regional or local levels and about the scale of the costs of climate change, including on the EU level,

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<sup>105</sup> Directive 2007/60/EC.

turns out to be an obstacle to the effective integration of human rights into adaptation policies (Economic and Social Committee, 2009). Finally, there might be a lack of trained human resources for dealing with the mainstreaming of human rights into EU adaptation policies.

EU responses to the lack of human and financial resources may consist in training and funding measures (see Chapter 5). Prior funding should be dedicated to the creation of incentives for multiplying research efforts on the mainstreaming of human rights concerns into adaptation policies. As a matter of fact, existing research on adaptation in general seems to be insufficient as compared to research on mitigation. Another, though, closely linked barrier to the integration of human rights into adaptation policies is the lack of information resources. However, the launch of the long-awaited Clearing House Mechanism by the Commission on 23 March 2012 (<http://climate-adapt.eea.europa.eu/>) is supposed to remedy this obstacle to the mainstreaming of human rights into adaptation policies. In fact, the aim of this web-based, publicly accessible European Climate Adaptation Platform is to support policymakers at EU, national, regional and local levels in the development of adaptation measures and policies through the sharing of best practices. The Platform, which is hosted and managed by the EEA in Copenhagen, helps users to access, disseminate and integrate information on expected climate change in Europe, the vulnerability of regions, countries and sectors now and in the future, as well as information on national, regional and transnational adaptation activities and strategies, case studies of adaptation and potential future adaptation options, online tools that support adaptation planning, and adaptation-related research projects, guideline documents, reports information sources, links, news and events.

#### 11.1.2 Substantial barriers to integration

As to substantial barriers to integration, the main obstacles turn out to be induced by prioritising conflicting interests and conflicting timescales.

##### – **Prioritising conflicting interests**

The integration of climate objectives into other policy sectors is a stated political aim of the European Council (European Council Conclusions, March 2007). The EC has been integrating adaptation to climate change into its development policy since 2003, then suggested including it in additional sectors, such as aviation, maritime transport and forestry (European Commission, 2005), before setting out a framework for mainstreaming adaptation into all EU policies, including energy, water management, agriculture, biodiversity and health (European Commission, 2009). However, mainstreaming adaptation into other policies bears the risk of making interests collide as is shown by a local-level example, where retaining water in city squares might conflict with safety standards, as children could drown in reservoirs (Termeer, C. et al.). At present, there is no formally binding legal requirement to integrate systematically adaptation needs into other EU policies. Political statements and soft law instruments have only the force to encourage EU institutions and MS to take into consideration adaptation needs while defining and implementing other policies.

The mainstreaming of human rights into EU adaptation policies responds to the requirements set out in articles 2 and 3 TEU and Article 7 TFEU, according to which the EU shall ensure consistency between all its policies and activities and take all of its objectives into account. Consequently, the respect for human rights being a legal requirement, subject to the scrutiny of the ECJ, any restriction in the exercise of these rights attributable to the EU institutions is likely to be brought to the Court. In practice, this suggests that the human rights impact (both, beneficial or negative) of various policy options on populations which are likely to be most affected by climate change due to their particular vulnerability, such as the elderly, persons with disabilities, as well as low-income households (European Commission, 2009) and coastal communities (Farber, D.A.) must be taken into due account in the definition and



implementation phases of EU policies. Indeed, a human rights approach requires to take into account in addition to the geographical and intergenerational dimension of climate change, age, ethnicity, class, religion and gender, as “[e]mpirical research has shown that entitlements to elements of adaptive capacity are socially differentiated” along these criteria (IPPC, 2007).

However, whereas a substantial, legally binding requirement for taking into account human rights concerns in the definition of new EU adaptation policies may be deduced from articles 2 and 3 of the TEU read in combination with Article 7 TFEU, a mandatory procedural requirement does not at present exist that prescribes the concrete steps that need to be followed by EU institutions and agencies in order to enhance the mainstreaming of human rights concerns into existing and future EU policies. Here lies some room for action of the EP, following the example of its efforts in pushing for environmental integration into key sectoral policies. Indeed, the environmental integration principle could serve as a model for pushing for the formulation of an explicit procedural requirement on the EU level according to which human rights concerns must be taken into account when EU policies are being defined and implemented. For the time being, the only document which provides for guidance in the assessment of impacts which EU legislative proposals may have on human rights and which explains how human rights aspects should be taken into account is a 2011 Commission Working Paper<sup>106</sup>, which does not have any binding legal effects. Up until now, integration of human rights into adaptation policies such as the Venice lagoon example has been the result of strong political commitment, such as it happens to be stimulated very often in the aftermath of a crisis. However, an effective mainstreaming of human rights concerns into adaptation policies requires a systematic evaluation of the human rights impact - both, beneficial or negative - of various policy options. The 2011 Commission Working Paper could be a basis for discussions on the elaboration of a hard law instrument requiring a human rights impact assessment for any EU adaptation actions and policies - existing and future.

#### – **Prioritising conflicting timescales**

As a matter of fact, industry operates in a totally different way compared to public authorities, as it is used to shorter timescales, is being subject to competition law and has only little need for coordination between divergent sectors (Keskitalo, E.C.H.). Another difficulty encountered by policymakers is that long-term planning in strategy policy documents often means 20 to 30 years, whereas long-term impacts of climate change are counted in a time span of 100 years or more (Biesbroek, R. et al.). A balance needs thus to be struck between economic and non-economic values, but also between long-term objectives and issues that often have a more pressing nature, more certain impacts, more visible short-term results than adaptation measures to long-term climate change. Last but not least, scientific uncertainty adds to the difficulties in prioritising conflicting timescales.

## **11.2 Proposals for enhanced integration of human rights into adaptation policies**

Adaptive capacity is “reflected in a unit’s management of current and past stresses, its ability to anticipate and plan for future change, and its resilience to perturbations” (Smit, B. and Wandel, J., 2006). As it is commonly admitted that adaptive capacity can be better achieved by the MS, either at central level or regional and local levels, the so far limited action for adaptation on the EU level partly results from the application of the principle of subsidiarity. Nevertheless, Community action bears some added value whenever trans-border conflicts need to be resolved or prevented. For this, a comprehensive understanding of the barriers to integration of human rights into adaptation policies is a *conditio sine qua non*. Lessons can be drawn from national experiences, where the mainstreaming of a human rights approach into adaptation policies could be enhanced through political commitment for increased

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<sup>106</sup> Commission Staff Working Paper, SEC(2011) 567 final.



stakeholder involvement, and where promoting research on the re-allocation of responsibilities is a widely suggested solution.

### 11.2.1 Strengthening political commitment for increased stakeholder involvement

It has been observed in national contexts that political commitment in favour of knowledge transfer and participation of the public has a beneficial impact on stakeholder involvement. Indeed, the city administrations in Toronto, Rotterdam and London may be quoted as examples that show that a strong leadership of mayors, environment agencies and dedicated officers leads to a high political capacity to promote change. More precisely, given the ongoing transition from traditional forms of government (bureaucratic, centralized, top-down policy design and implementation) to new forms of governance (less hierarchical and more inclusive, decentralized and flexible decision-making), active involvement of the private sector is expected to raise governance capacity (Mees, H.-L.P. and Driessen, P.J.). Indeed, the new “multi-actor, multi-sector, and multi-level governance world” seems to respond to the requirements of adaptation to climate change (Termeer, C. et al.) in the sense that decision-making is not only steered by public, but also by private interests, across multiple sectors and geographic scales.

But how to increase the involvement of climate change stakeholders? The UK provides a telling example of a multi-level adaptation network characterized by an extensive focus on stakeholder engagement and vertical and horizontal coordination, where private actors are working hand in hand with State agents representing local, regional and national authorities (Keskitalo, E.C.H.). More generally, it has been observed that the existence of a national adaptation strategy plays a significant role in terms of agenda setting and promoting awareness. *A contrario*, as is shown by examples of municipalities in Sweden, Italy and Greece, the absence of a national adaptation framework hampers the development of local adaptation activities.

#### – Promoting knowledge transfer

The EC, in its 2009 White Paper on Adaptation, stressed that one of the major obstacles to the development of successful climate change adaptation responses is the lack of knowledge. Disposing of reliable data on the likely impact of climate change, the associated socio-economic aspects and the costs and benefits of various adaptation options is indeed essential for strengthening the mainstreaming of a human rights approach into adaptation policies. In a more recent document, the Commission provides operational guidance on how to take account of Fundamental Rights in its Impact Assessments (European Commission, 2011). But integrating human rights considerations into adaptation policies must not be limited to EU institutions and agencies. Providing health-related information and education is essential for the protection of the right to life (Blazogiannaki, M.). Awareness should thus also be raised amongst consumers by promoting adequate information. For instance, the third EU energy liberalization package promotes energy efficiency measures and awareness among consumers by enhancing consumer rights (Dupont, C. and Primova, R.). Admittedly, this is a typical example where the frontiers between mitigation and adaptation measures are being blurred, as energy efficiency measures aim at both, mitigating climate change and adapting to its effects. One possible explanation for this is that adaptation has very often been perceived as an extension of the mitigation policies. As environment ministries were generally leading in the field of mitigation (except in Norway, where the lead ministry was the Ministry of Agriculture and Forestry), either they and/or existing administrative bodies were entrusted with dealing additionally with adaptation issues, or specific bodies were created, such as the *Grenelle de l'Environnement* in France, the inter-ministerial adaptation group in Norway, or the National Climate Council in Spain. But specific secretariats or bodies were also developed on the regional and local levels, such as the German Competence Centre on Climate Impacts and Adaptation or the Dutch Climate Changes Spatial Planning programme (Keskitalo, E.C.H.).

As to the ways for communicating knowledge to the public, existing national action plans for adapting to climate change may be of value for the learning process and promotion of best practices. For example, mobile-phone message alerts, newspaper advertisements, sirens, and maps with safe exit routes have proven to be working in Venice (Munaretto, S. and Klostermann, J.E.M.).

Furthermore, training of vulnerable populations on climate change issues such as farmers should be promoted (AEA Energy & Environment and Universidad de Politécnic de Madrid). As developed in another paragraph of this report, climate change impact on migratory flows *“should also be considered in the broader EU reflection on security, development and migration policies”* (European Commission, 2008).

Last but not least, complete information should be provided about existing possibilities for taking action. As an example, awareness should be raised about the widening of access to justice in environmental matters through the Lisbon Treaty. Additionally and as is shown in the section of this report which deals with access to information, from 1 April 2012 the citizens’ initiative will enable one million EU citizens, coming from at least 7 out of 27 MS, to invite the EC to propose legislation on matters in which the EU has competence to regulate (Regulation 211/2011).

– **Encouraging wider and stronger participation**

Participation and input from members of society who are presently or potentially affected by climate change effects is determining in the development of efficient adaptation policies. Indeed, the EESC stressed in its 2009 Opinion on the White Paper on Adaptation, the necessity *“for the wider public to address adaptation issues that may affect them such as: - where to live, work and take holidays in the light of changing climate patterns; how the management of long-life trees and forests should cope with continuously changing climate conditions; [...] how the distribution of health risks may change and what precautions to take; how our food and diets may have to be altered”*.

With regard to the promotion of wider and stronger participation, it is first of all important to emphasize the stimulating role in agenda-setting played by international forums such as the IPCC or the UNFCCC or national leadership figures. At the same time, the fact that agenda-setting at lower levels has influenced the development of national adaptation strategies shows to what extent adaptation is a multi-level issue. Examples are provided by the strong influence of regional entities such as the counties surrounding Lake Vänern in Sweden, the county of Hampshire in the UK, some Länder in Germany, among which the Land of North Rhine-Westphalia has developed *“a regional adaptation strategy with the aim of raising public awareness, developing research, knowledge and adaptation measures, increasing overall adaptive capacity, and providing assistance to various sectors”* (Keskitalo, E.C.H.).

Secondly, it is essential that the largest number of climate advocates – and thus not only DG ENVIRONMENT, DG CLIMA and the Human Rights committee of the European Parliament - but also other EU institutions and agencies, as well as national, regional and local governments, regulatory agencies, industry, consumers and civil society actors such as NGOs and also media be aware of the extent to which they may each individually contribute to the adoption and implementation of EU adaptation policies that respect and comply with human rights. National experiences show that, in the absence of any (strong) adaptation policies, private actors such as NGOs may come in and occupy a prominent role in the development of independent adaptation strategies (as shown by the Australian, Greek and Italian cases), but also sub-national public actors such as municipalities (as in Sweden) and local authorities (as in the UK) (Keskitalo, E.C.H.).

Thirdly, a unified and stable government seems to be an optimal ground for strong political commitment. Indeed, as was shown by the Italian, Greek, Hungarian and Canadian cases, political fragmentation and instability have proven to be an obstacle to wider and stronger participation, whereas local government associations in the UK, Sweden, Finland and Spain have proven to be

proactive by developing adaptation policy or guidelines. More generally, networking has turned out to be beneficial for fostering understanding of impacts and potential adaptation plans (Keskitalo, E.C.H.).

### 11.2.2 Promoting research on the re-allocation of responsibilities

As mentioned before, adaptation strategies come hand in hand with shifts in governance, which in turn, require a new allocation of responsibilities. It is likely that wider and stronger public participation will lead to a shift towards stakeholders taking more responsibility (Termeer, C. et al.). However, a human rights approach to adaptation policies requires that the most marginalised and disadvantaged populations, such as low-income households, are protected from being burdened with price increases for essential services (such as electricity and water). This can be achieved if such groups are able to benefit from financial and/or other government assistance (Blazogiannaki, M.). According to Hunter, “[i]n the case of natural disasters, for example, the right to housing suggests that people have the right to temporary housing and shelter while their permanent homes are being repaired” (Hunter, D.B.). In this sense also, Gemenne argues that adaptation funds should be allocated according to criteria relating to vulnerability and adaptive capacity rather than to responsibility (Gemenne, F.). In other words, human rights should be taken into account whenever priorities are set regarding the allocation of funds, which are often limited, for adaptation.

On a practical level, the re-allocation of responsibilities may involve legally obliging landowners to conduct “greening” initiatives, inviting insurance companies to create incentives for adapting businesses and buildings and establishing public-private partnerships.

#### – **Legally obliging landowners to carry out greening**

The enforcement of greening policies has been put into practice by several municipalities. However, for these greening policies to be effective, they should apply not only to new urban planning projects, but also to the existing built environment (which is about eighty per cent of the urban environment), which current policy decisions seem to have neglected. Also, clarification is needed regarding the methods according to which private actors as the main owners of buildings could be involved (Mees, H.-L.P. and Driessen, P.J.). More generally, uncertainties must be removed as regards the division of tasks and responsibilities. For instance, while the city of Rotterdam opted for the ‘Green Roofs’ project, based on its ability to reduce heat stress and CO<sub>2</sub> emissions, the division of tasks and responsibilities regarding the construction of and payment for these roofs is still unclear (Biesbroek, R. et al.).

Other greening policy options may consist in the prohibition of tree cutting, or the conversion of paved areas in front gardens into permeable material. In London, the Urban Greening Programme provides for “a green-roof policy, a tree-planting programme, and the establishment of an urban-wide green grid. Green roofs are required on all major developments”. Provinces in the Netherlands have means to create new green space through expropriation of land and public-private partnerships. Quotas help ensure that a certain percentage of newly developed or re-developed areas are allocated for surface water retention, either through the creation of a canal with green borders or wadis. In Toronto, there is a law that requires a doubling of the number of trees by 2050, and since 2010 green roofs have become mandatory for all new larger developments. Expropriation measures are foreseen by the law in order to create new green spaces (Mees, H.-L.P. and Driessen, P.J.).

#### – **Inviting insurance companies to create incentives for adapting businesses and buildings**

Efforts relating to the re-allocation of responsibilities must also be made by insurance companies, by inviting them to “develop new products for reducing risks and vulnerability before disasters strike” (European Commission, 2008). It could be suggested that insurance companies request for homes to be made resistant to extreme weather conditions, thus protecting the right to life (Blazogiannaki, M.) and

creating incentives for farmers to adapt their business and buildings in order to reduce their premiums (AEA Energy & Environment and Universidad de Politécnica de Madrid).

– **Establishing public-private partnerships**

An effective protection of the right to water requires that alternative water access be ensured when climate change limits the supply of water (Blazogiannaki, M.). Private enterprises could carry out such tasks. However, as they may overcharge or refuse to cover some regions, public policy measures may be required to overcome market failures. Another example may lie in the sharing of the most extreme risks between commercial insurers and public authorities. The EC suggested, as early as 2005 in its Communication of that year, for governments *“to step in, either by requiring the provision of adequate coverage or providing solidarity funding”*. Public-private partnerships can also *“help to accelerate investment in infrastructure, which is likely to be the most expensive aspect of adaptation (OECD 2008)”* (Stripple, J. et al.)

In addition to these proposals, it has been suggested that system synchronization may be achieved through *“the appointment of liaison officers or climate-adaptation ambassadors [the introduction of] integrated licences or procedures that synchronize different decision-making processes”* (Termeer et al.). On the EU level, system synchronization could be reached through the creation of a climate change Commission in charge of centralizing the responsibility for adaptation across sectors and MS (Ellison, D.), following the model of the independent climate committee established in the UK (European Economic and Social Committee, 2009).

## **CHAPTER 5 FOCUS ON THE TRANSVERSAL PRINCIPLES OF INFORMATION AND PARTICIPATION IN DECISION-MAKING**

The OHCHR is the first International authority to have examined the relationship between climate change and human rights, highlighting the importance of the participation principle in this relationship (Knox, J. H.). The right to information and the right to public participation in decision-making processes allow citizens and populations to actively take part in the fight against climate change and to ensure the achievement of substantial rights such as: the right to water, the right to health... (Ghezali, M.).

The principle of participation must be taken into account in both its informative and participative components in the strictest sense, with each of these components being further subdivided. Thus, the right to information is assumed to mean "to be informed" and "to inform", and the right of participation requires participation not only in decision-making but also in its application, pursuant to the Aarhus Convention.

Because climate change creates a crisis in the exercise of human rights which supposes the reinforcing the right of the populations concerned to be properly informed and to take part in the decisions within the framework of truly democratic processes (Hammarberg, T.), emphasis must be placed on the proximity between the decisions taken and the citizens (World Bank, 1991). One can then infer that global climate change is appreciated at the regional, indeed even local level (Forum permanent de la Société Civile, 2008).

Currently, the recognition of interdependence without precedent among all peoples (Permanent Forum of European Civil Society, 2011) reinforces the need for participation that brings with it new forms of governance at all inter-institutional and territorial levels. Consequently, it proves necessary to maintain an open and organised dialogue between the Institutions or States and the stakeholders, in so far as NGOs are very close to citizens. NGOs understand the expectations and fears of people and play a pivotal role in their sensitization and environmental education. However, these exchanges with populations lack structures in order to achieve effective collaboration (Ayers, J.).

The success of the 2020 strategy adopted by the EU as regards developing countries cannot be obtained without the active involvement of citizens (EC, 2008 (b); EESC, 2011). This involvement is essential because it enables them to understand, accept and perceive when European climatic measures are translated into concrete actions (EESC, 2008). But this momentum cannot succeed without complementary action by MS to integrate the principle of participation in a concrete and practical way, in the post-2012 period, in their adaptation and mitigation policies, and at the national and local levels (Rajamani, L. 2010 (a)). Integration should not remain theoretical. Because climate change is a challenge to democracy, the promotion of the greater involvement of populations and citizens in decision-making processes is essential.

### **12. OVERVIEW OF THE INTEGRATION IN LAW OF THE PARTICIPATION PRINCIPLE**

In order to consider future EU policy, it is worth observing several normative categories. Firstly, there is the law in Europe which involves taking into account EU law and the policy of the Council of Europe and, secondly, there is the law outside Europe, which consists of international and regional standards.

## 12.1 Law in Europe

### 12.1.1 European law

Among the most significant instruments is the Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EC), Articles 10 and 11 of the Lisbon Treaty, but also Directives adopted on 28 January 2003 on public access to environmental information (2003/4/EC), and on 26 May 2003 which provide for public participation in respect to the drawing up of certain plans and programmes relating to the environment (2003/35/EC). These instruments transposed the Aarhus Convention of 25 June 1998 in its informative and participatory components, while accentuating these obligations. It is on these texts that it would be appropriate to legally found the proposals formulated at the conclusion of these developments. One should not forget the Almaty Declaration of 20 June 2005, which underlined the relationship created by the Aarhus Convention between human rights and environmental protection outside Europe.

The principle of participation remains a concern for the Institutions of the EU and the CoE as stated in several documents, including: the White Paper on European Governance presented by the EC in 2001 (COM (2001) 428FINAL); the EC report to the Council and the EP on 9 October 2001, which laid down a Community Action Programme to promote NGOs that are primarily active in the field of environmental protection (COM (2001) 0337FINAL) 1 c 9; the very recent Communication from the Commission regarding the improvement of the delivery of benefits from EU environmental measures (COM (2012) 95FINAL); and the Manual on human rights and the environment, which was drafted by the Council of Europe in 2006 and 2012 on the basis of the jurisprudence of the ECtHR (Council of Europe, 2012). This handbook posed general principles as regards management of the environment including the obligation of States to disseminate information on environmental risks and reinforce public participation in the decision-making processes.

### 12.1.2 The law of EU MS

In France, the principle of participation was enshrined in Article L. 110-1 of the environment code and in the Charter for the environment of 28 February 2005, which was affiliated to the French Constitution of 1958. In Spain, the principle is repeated in articles 9.2 and 23.1 of the 1978 Constitution and in the 2003 "law of big cities" which prevails upon municipalities to facilitate the participation of all the citizens in local public life through consultations, information and popular initiatives. In Belgium, the Decree of 31 March 2007 that came into effect in 2008 transposed the Aarhus Convention in national law. In Malta, an Operational Programme underlined the intention of the government to set up entities whose role would be to support and facilitate the participation of the civil society during decision-making processes (EESC, 2011). In Denmark, an instrument called the "Greenland Dialogue" has been implemented to improve relations with the populations concerned (OECD, 2007) and in Italy territorial development strategies have also been established in a similar approach (OECD, 2002). In general, most of the MS have adopted rules to promote public information and public participation in the decision-making process. Hence this list is not exhaustive, but merely illustrative.

### 12.1.3 Jurisprudence

The ECJ and the ECtHR reflect the importance of the principle of participation and the need for its observation by the MS. The ECJ has highlighted this in its order of 11 March 2010 (C-24/09). For its part, the ECtHR underlined the binding nature of preliminary information for the public (*Tătar v. Romania*) and pointed out the impossibility for States to avoid the obligation to provide clear and exhaustive information (*Guerra v. Italy*). Moreover, it confirmed the value in obtaining the wide participation of the population in processes and the obligation to produce information on the reality and intensity of identified problems (*Folkman ETA and others v. Czech Republic*). Moreover, we may think that through



successive decisions (Okayay and others v. Turkey; Di Sarno and others. v. Italy; Fadeïeva v. Russia; Băcila v. Romania), the Court has tried to register the right to information in both a procedural and a substantial dimension, in order to build, beyond the simple right to information, a “*right to environmental knowledge*” (Ghezali, M.). Its objective is, it seems, to justify the recognition of a positive obligation that is incumbent on public authorities to deliver environmental information. In all these decisions, whatever the damage asserted by the applicants, the damage to the environment was always in connection, directly or not, with the climate themes: going beyond the threshold of pollution, the operation of thermal and nuclear power stations...

#### 12.1.4 Voluntary partnership agreements and the Euro-Mediterranean agreements

The EU remains vigilant in taking into account the principle of participation in its relations with third countries. It has also integrated participation and information for the public into the agreements of a voluntary partnership with the Republic of Liberia on forest law enforcement, governance and trade in timber products to the EU (COM (2011) 371FINAL), and with the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the EU (2011/201/EU). It should also be noted that the Euro-Mediterranean Association Agreements with the Republic of Tunisia (98/238/EC), the Kingdom of Morocco (2000/204 / CE), the State of Israel (2000/384 /EC), the Hashemite Kingdom of Jordan (2202/337 / EC, ECSC), the Arab Republic of Egypt 52004/635/EC) and the Democratic and Popular Algerian Republic (2005/690 /EC) all highlight this principle.

## 12.2 Law outside Europe

### 12.2.1 International and regional instruments

The principle of participation was officially enshrined in the Aarhus Convention of 25 June 1998, which was ratified by the EU on 17 February 2005. Consideration of this principle can also be found in Articles 1 and 6 of the UNFCCC, ratified by the EU on 15 December 1993, which recommends that States ensure access to public information on the climate change process, that they encourage active participation and develop adequate responses to such participation. Later came the Protocol on Pollutant Release and Transfer Registers on 21 May 2003, which was ratified by the EU on 3 March 2006 and strengthened the right of access to information on pollutants. In addition, it is worth noting the contribution of Annex I of the Cancun LCA Outcome, which has implemented safeguards to protect the rights of local and indigenous populations including deforestation and the degradation of forest areas. According to the text, States are requested to respect the knowledge of indigenous people and members of local communities and to ensure large and effective stakeholder participation (CIEL, 2011 (b)). Finally, the HRC resolution of 25 September 2008 recalled the need to promote access to climate change information to the public, particularly in the form of education and awareness programmes, stressing that this information is an essential precondition for public participation in the decision-making processes relating to climate change (7/23 final).

### 12.2.2 Examples of repercussions: Africa and Australia

Some countries have committed themselves to the development of policies to include public participation in climate change matters. Liberia, through its Liberia Forest Initiative policy that was relayed by the Forest Concession Review Committee, demonstrated its intention to develop transparency and public participation in forest management by conducting more systematic consultations with the population (Earthjustice). In Australia, the adoption in April 2005 of the Regional Agreement and Aboriginal Management Plan for The Queensland Wet Tropics World Heritage Area facilitated the access of aborigines to their land and improved opportunities for their participation and influence in decision-making.

### 12.2.3 Jurisprudence

There has been considerable attention paid to the issue of information and public participation in the decision-making process. For example, the IACHR found that public participation must be considered under section 23 of the American Convention on Human Rights, which states that every citizen must be able to directly take part in the conduct of Public Affairs (Shelton, D.). In addition, it recommended that States take measures to put in place mechanisms for the effective dissemination of environmental information in order to achieve transparency, and also due to the fact that they have a positive obligation to provide the public concerned with all the information at their disposal (Claude Reyes and others v. Chile). Moreover in 2007, the Court recalled the need for the transmission of information to be conducted as soon as possible and underlined the public right to participate, and to be consulted in advance, in regards to risky projects and activities (Saramaka v. Surinam).

The UN HRC for its part re-emphasized the obligation to involve minority community members in decisions affecting them (Ilmari Lansman and others v. Finland), in particular indigenous populations (Apirana Mahuika and others v. New Zealand).

## 13. CASES WHERE THE PRINCIPLE HAS BEEN POORLY APPLIED

Despite the normative acts that encourage or require the application of the principle of participation, and despite frequent reminders of the jurisprudence, it is clear that there is often room for improvement when it comes to providing public information and including the public in decision-making processes. States are regularly punished by supranational courts and there are many examples of official reports and doctrinal reflections that criticize such breaches.

### 13.1 European examples of the non-application of the participation principle

The ECtHR has condemned examples of the non-observance of the principle of participation (Hatton and others v. United Kingdom; Taskin v. Turkey for example), pointing out that the decision-making process must be fair and respect the rights protected by the Convention (Fadeieva v. Russia). It declared that the Convention had also been violated in Turkey when citizens were not granted the right to participate in the planning process of three highly polluting power stations that were constructed near to people's homes (Okyay and others v. Turkey).

The ECJ also frequently threatens to impose penalties for the violation of the principle of participation (Commission v. Ireland) and especially for the non-compliance of the obligation to inform the public (Commission v. Luxembourg).

A further example was the conviction of the Council of the EU by the General Court for refusing access to certain information contained in a note relating to public access to documents of the EP, the Council and the Commission (Access info Europe v. EU Council).

In addition, the EP has for a long time underlined the lack of citizen participation in dialogues about the future. This democratic deficit can be explained by the presence of experts, who tackle the questions that are asked of them concerning the policies under consideration, but from an overly technical angle that ignores the interests at stake (Benz, A. and Papadopoulos, Y.). The result is a lack of interest from citizens, partly because they believe that the dialogue is only understandable to those with technical knowledge but also because the information provided by experts is obscure and incomprehensible. The EC, which highlights the need to involve populations and citizens in the implementation of policies against climate change (EC, annual report 2011), underlines the existence of obstacles to the proper application of the principle of participation, such as for example, legislation that is too detailed and insufficiently adapted to the particularities of MS (EC, 2001 (a)).

This explains *inter alia* the EU's lack of credibility in the eyes of the public, and also the EESC's firm request for additional efforts regarding information, both at the level of data transmission and at the level of the coordination of actions carried out at the European, national and local levels to raise public awareness (EESC, 2006). As a result, citizens show a lack of interest since they feel that only NGOs are able to participate and that these organisations speak "on their behalf" - a representative approach therefore - by applying pressure and by protesting or denouncing EU policy when it is developed without real consultation, or with consultation merely for the sake of form (EC, 2001 (b)) even using what is known as a technique of diplomatic alliances (Rouillé d'Orfeuil, H. and Durao, J. E.). Indeed, it is advisable to distinguish between the full and whole implementation of the principle of participation, which implies direct participation of populations - as illustrated in particular by the European Citizen's Initiative which came into force on 1 April 2012; and participation by representation - which is more common because it involves consultation with NGOs (the Aviation working group for example). NGO participation consists, in theory, of just a single consultation, which is one of the least favourable participation methods for civil society, since the opinions voiced do not have binding force. Also, even though consultative initiatives are multiplying with respect to citizen groups and climate change policy (EC, 2006; EC, 2008 (a); EC, 2010 (a); EC, 2010 (b); EC, 2011 (a); EC 2011 (b); EC, 2012 (a)), which could be evidence of an increase in public involvement in decision-making processes and in the implementation of EU climate change policies, what we actually see is that the weight of NGO opinion in final decisions remains inadequate and marginal. Furthermore, citizens remain outside of these consultations due to the lack of transparency regarding their implementation. The mere mentioning of such consultations on the EC website does not constitute a sufficient mode of information dissemination. There is also a lack of explanation regarding issues or the questions that they raise. It is thus advisable to remain attentive to the negotiations concerning legislation relating to aviation, which is going to open soon, as this will allow observations to be made on the effectiveness of the participation of citizens, and on the efficiency of NGO contributions.

## **13.2 Examples of the non-application of the participation principle outside Europe**

### **13.2.1 Jurisprudence**

The ICJ has recently condemned the violation of the principle of participation (Argentinian v. Uruguay), as did the Cape Town High Court of South Africa in 2005 for the exclusion of any public participation concerning the construction of a nuclear power plant by the South African energy company Eskom and the government of South Africa, thus underlining an absence of information and participation (Earthjustice).

### **13.2.2 Reports**

Reports also show the lack of effective participation from indigenous populations in decision-making processes (E/C.19/2008/CPR.2) and point out the need to promote the full and whole participation of such populations during the drafting and implementation of policies (Oviedo, G. and Fincke, A.). It can also be noted that the right of indigenous populations to participate in decisions that affect their rights to resources that are essential for their survival is not always being applied, while at the same time the constitutions of Ecuador, Venezuela and Guatemala for example, expressly refer to the rights of political participation and consultation (Earthjustice).

Although the right to information is transposed into national legislations, it remains insufficient because it often translates as the right of individuals to have information held by public authorities, rather than the right to benefit from the spontaneous transmission of this information. Furthermore, even though the information is required, sometimes it is not held by the public authority because it had not constituted a "data base" by anticipation (International Committee on Human Rights, 2008). Lastly, the

HCR is critical of situations where information is not available in a comprehensible and understandable form to the public, which cannot therefore appropriate it (7/23 final).

The World Bank has denounced the way in which women and the poorest indigenous peoples are rarely consulted on issues, particularly in relation to climate change (Smith, H. A.; Smith, W. D.). This stems from a lack of national legislation, guidelines, technical resources and the ability to engage in consultation procedures (World Bank, 1999). However, the 2010 Cancún Conference gave hope for improvement, with the COP making efforts to encourage the participation of vulnerable populations at the heart of the debates (Consejo Consultivo Nacional para el Desarrollo Sostenible and Consejo ciudadana Contra el Cambio Climático y por el Desarrollo Sostenible; human rights and climate change working Group). The EESC particularly endorsed this approach and had encouraged it on other occasions (EESC, 2010).

### 13.2.3 Outlines

The 2001 White Paper on European Governance prepared by the Commission highlighted the prospects of participation that are still relevant in the light of the criticism with regard to the application of the principle - transparency, effectiveness, sincerity. This is in addition to other EU ambitions regarding the environment, the proposals of NGOs or other institutions, and the EC strategy for the year 2020 (COM (2007) 2FINAL). Lastly, the EC communication of 7 March 2012 clarified these perspectives and impelled new initiatives to improve the implementation of the principle of participation in the fight against climate change; indeed, it contains essential elements that are well worth developing. Regarding the informational component, the EC emphasized the need to strengthen information networks, to increase the efficiency of data transmission and to create structures to disseminate information and encourage feedback. Concerning the participative component, the EC calls for increased co-operation on the national territory. Generally, the EC suggests setting up monitoring and various checking procedures. Finally, it calls for a reinforcement of collaboration between stakeholders in the implementation of environmental law, both from a national and transnational perspective.

## 14. PROPOSALS

The proposals relate to the EU's domestic as well as its foreign policies.

### 14.1 Proposals relating to the European Union's domestic policy

The proposals are formulated by bearing in mind the will to reinforce the principles of co-operation, integration, subsidiarity and proportionality. From the point of view of the use of regional funds and in order to implement these proposals, financial assistance could be sought from REDF and CAP.

#### 14.1.1 Information

Information for the public must be ensured both within the framework of the decision-making process and also at the time of the application of decisions, and this from the point of view of interactions. Generally, it is necessary to call upon national relays, such as local NGOs, which are closer to citizens. To ensure the monitoring of the installation of measures under consideration in these proposals, it would be advisable to create within each MS an **independent and impartial commission responsible for checking the compliance of national measures taken on the basis of proposals which are going to ensue and which would be formulated by the EU**. This creation of a new level of governance would play a mediating role while being disconnected from the local and national public authorities. To this extent, it would be appropriate to:

- **Develop structures for education and awareness-building** by the provision of premises suitable for public assembly. The purpose of these structures would be to centralize information,

to educate people, to facilitate the integration of environmental knowledge, to ensure access to information at every stage of the decision-making process and to make sure that the public is informed of its role in law enforcement. This implies collaboration between local NGOs and local authorities for the establishment of structures, premises, facilities and technical resources, and collaboration at the national level to ensure harmonization between these structures with regard to their organisation and their operation. These structures would provide information resources tailored to the target population. By identifying the means of communication that a particular public has access to - written material, internet, press and media etc. - they would better target the audience that it is necessary to inform. They would also seek to establish what means of communication the public is most familiar with; what would be the most direct and efficient way of relaying information; what local contacts can be used to assist in the transmission of information; and what language would be the most appropriate.

- **Ensure spontaneous and active exchange of information within each MS** in particular by the creation of national platforms for information (Kulovesi, K., Morgera, E. and Munoz, M.) and relevant use of the mass media, television, radio and press.
- **Ensure transparent and relevant information by means of translation** to help improve the public understanding of information, including the local issues that projects can raise. To this end, it would be advisable to train freelance translators in local NGOs or within the aforementioned independent commission, whose mission would be to popularize the suggested proposals, standards, scientific knowledge, technical documents, etc., and to clarify the climatic stakes that a project may impact upon. At the local level, the understanding of information will enable the formulation of alternatives that are better suited to situations.
- **Develop the ability to gather locally collected information and provide help with networking.** It is advisable to develop information networks at the national level. The information collected would be that which had been amassed by the people and by the public authorities, including information from the reviews of decisions taken at local and national levels by MS, and from examples of the implementation of environmental law with respect to climate change. One can envisage the use of ICT systems and the eGovernment Action Plan.
- **Develop feedback systems to the European Union.** Consideration should be given to the collection of all data obtained from MS in two connected platforms – transnational and European - and to gather all existing information and make it available to the greatest number. This involves providing the financial and technical resources to MS to gather the information collected on their territory and to guarantee that this information is reported to the next level of responsibility, from the local to the European level. The European Climate Adaptation Platform would be able to constitute an effective tool to centralize and depict the climate situation in each MS, the instruments used in adaptation policies, etc.

#### 14.1.2 Participation

Public involvement must be ensured both in the process of decision-making and while implementing decisions, and this from the point of view of interactions. Generally, it is necessary to use national relays such local NGOs, which are close to citizens. To ensure control of the implementation of measures envisaged in these proposals, provision should be made for the creation of an independent and impartial commission within each MS, which could, but need not necessarily, be the same structure as the one described above in the information section. In this regard, it would be appropriate to:

- **Set up structures of participation** by developing technical devices and equipment through which participation could be ensured at the local level. The technical and financial

implementation of participation should not be minimal but must be sufficient. Such structures would promote interaction and exchange, they would determine the type of participation that is more suited to the target population - interviews, focus groups, public meetings, electronic democracy... - and define the most appropriate degree of public involvement, i.e. to *inform, consult, involve, collaborate or empower*. A clear picture of current participation procedures must be provided, with the public being kept informed at all stages of the decision-making process and on who the key actors involved are. These structures would serve as places for the clarification of project objectives on which the public is consulted, the stakes having to be submitted under practical angles of proximity, and from a short-term perspective. For each process, it would be advisable to develop short-term and long-term scenarios to make the project more tangible for populations and to allow their participation in ways that are tailored to their needs. These structures would also enhance the European Citizen's Initiative, which may be used by citizens to develop EU legislation related to the adaptation policies of MS. Technically, these structures could be those established in the information component above or differ from them.

- **Effectively take into account the knowledge of participants.** This would give the public a chance to appropriate projects and allow them to wield a certain amount of control in this regard. Effective participation implies that the public can assuredly and effectively influence decisions, and that no relevant stakeholders are forgotten or disregarded during the process.
- **Strengthen the decentralization of decisions while developing informational feedback on decisions to the European Union,** with a view to making better quality decisions that are adapted to local situations. Rigorous impact studies could be conducted to determine the specific groups that would be affected by a given project, allowing special attention to be devoted to these individuals. This would establish a systematic dialogue between local authorities and stakeholders, particularly NGOs, to be instigated as soon as possible in the decision-making process to achieve the objective of “good governance”. Thereafter, any decisions made could be reported to the EU to help maintain a log of decisions within each MS, in order to open avenues for reflection for future European harmonization.

**Ensure the effective implementation of decisions at the local level** to help provide continuity of civic engagement. It would be appropriate to create partnerships between local NGOs, local businesses and local authorities to determine how much each stakeholder can participate in the implementation of decisions taken locally or nationally. One might consider creating financial and/or tax incentives for companies that collaborate directly with citizens in order to implement the decisions.

## 14.2 Legislation

- Develop a European regulatory tool with procedural and substantive content exclusively devoted to public participation and information to enable an immediate implementation of measures in MS. The contents would cover elements essential for implementing the principle of participation in MS: obligation to install structures, translators, financial incentives, control mechanisms ...
- Develop the use of non-binding instruments and the flexibility of EU legislation to encourage autonomous processes of MS with the view to enabling better adaptation to national policies.

## 14.3 Proposals relating to the foreign policy of the European Union

In general, it would be appropriate to focus on the same measures as those proposed under the EU's domestic policy. The EU in its relationship with the UN would then serve as a source of proposals to: encourage the development of information dissemination structures; ensure a spontaneous and active flow of information from States and the UN to populations in collaboration with local NGOs; increase



understanding and transparency of information by translating scientific expertise as well as indigenous knowledge; develop the ability to gather information from people, to use it efficiently in the decision-making process and to transmit it on to the next level of responsibility, so that it can be taken into account; strengthen democratic participation by establishing participation structures; and finally ensure the implementation of decisions at the local level, through the concerted action of individuals, businesses and local authorities.

Depending on the measures, it would be possible to work in collaboration with the UNGLS and the EU-Brazil Civil Society Round Table, but also to use the DPI-NGO and GEF-NGO to ensure proper coordination.

With a view to developing legislation and regulatory instruments, especially concerning agreements with the Mediterranean region, whose relations with the EU are booming, it is necessary to promote the systematic inclusion of participation principle (in both its informative and participatory component), the systematic involvement of the most vulnerable local people affected by the fight against climate change and the systematic involvement of local communities in implementing decisions locally. These measures must be taken through regional instruments to broaden the scope of the Aarhus Convention; it is only subsequently that harmonization could be envisaged. These measures would be taken in cooperation with the EESC in support of its Euromed policy.

From these perspectives, it would be appropriate to work on the basis of the US EPA initiative which has just launched its Public Participation Guide on its website. Although not binding in nature, this guide proposes instruments that are intended to enable the public to participate in decision-making processes. The guide is particularly interesting as it is addressed primarily to the Middle East, where public participation remains underdeveloped mainly due to the prevailing culture of low participation. There are aspirations for the guide to be applied in future to Central America, Chile, Africa and Asia. Information will thus be effectively and efficiently transmitted to people, who are aware and educated, enabling them to participate in the implementation of US adaptation policies and to help provide solutions to problems that might be encountered, for example, in relation to the particularity of the geographical area and/or the changing climatic conditions.

## CONCLUSIONS

Table 1: Objectives for the European Union

EUROPEAN UNION	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
<p><b>Establishment of the link between human rights and climate change</b></p> <ul style="list-style-type: none"> <li>– To develop the dialogue between “communities” within the EU</li> <li>– To take into account certain categories of vulnerable populations</li> </ul>	<p><b>Establishment of the link between human rights and climate change</b></p> <ul style="list-style-type: none"> <li>– Strengthen the EU's role in promoting the relationship between human rights &amp; climate change at the diplomatic level</li> <li>– Develop tools for assessing the effects of climate policy in the EU with regard to human rights (HRIA)</li> <li>– Strengthen the empirical research on climate change and human rights (FP7)</li> </ul>
<p><b>Europe and the human rights dimension in international climate negotiations</b></p> <ul style="list-style-type: none"> <li>– To promote the expression of the most affected communities</li> <li>– To reinforce the European diplomatic corps</li> <li>– To identify emergencies and to draw up a roadmap for the next stages of negotiations with the view to integrating the human rights dimension</li> <li>– Encourage the implementation of immediate actions, Europe in particular can offer technical and logistical assistance to national actions in developing countries</li> <li>– Support and strengthen the role of science and expertise to better understand and predict the impacts of climate change on human rights</li> <li>– The EU must continue to reinforce the dialogue with key partners</li> </ul>	<p><b>Europe and the human rights dimension in the international climate negotiations</b></p> <ul style="list-style-type: none"> <li>– To act diplomatically on the triple multilateral, regional and bilateral arena</li> <li>– Defend human rights by targeting the needs</li> <li>– Defend and reinterpret human rights, taking into consideration climate risks</li> </ul>
<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>– Encourage participation of private actors, NGOs and civil society</li> <li>– Include climate change issues and concerns in the mandate of the newly established EU Special representative on human rights</li> </ul>	<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>– Make a constructive effort to overcome the long-established division between the internal and external approach of EU human rights policy, in order to give global and transversal answers to problems caused by environmental and climate change issues</li> <li>– Re-evaluate the role and competences of leading actors, especially the European Council, the High Representative for Foreign Affairs and Security Policy and the Commission</li> <li>– Encourage a large scale consultation and/or coordination of actions with other non-EU organizations operating in this field or dealing with these issues: the Council of Europe and OSCE</li> </ul>
	<p><b>Climate change and migration: towards a new nexus for policy making in the European Union?</b></p> <ul style="list-style-type: none"> <li>– EU to move from follower to leader</li> <li>– Create a permanent inter-agency ad hoc working group on the subject could be necessary for guarantying the elaboration of coherent policy proposals between DG HOME and EEAS</li> </ul>

**The integration of human rights into adaptation policies**

- Step up efforts to mobilize public and private finance for greening policies, alternative access to essential facilities and infrastructure
- Promote knowledge transfer on adaptation
- Encourage wider and stronger participation in the development of efficient adaptation policies
- Create a Climate Change Commission in charge of centralising the responsibility for adaptation across sectors and across MS

**Environmental democracy and human rights**

- Develop a European regulatory tool with procedural and substantive content exclusively devoted to public participation and information

**European Union mitigation policies and human rights**

- The EU and MS should take due account of the necessity for legal certainty and the right to property when modifying EU climate change mitigation policies

**Environmental democracy and human rights**

- Develop structures for education and awareness-raising by the construction of buildings suitable for public assembly
- Collect all data obtained from MS in two connected platforms - transnational and European

Table 2: Objectives for the European Parliament

EUROPEAN PARLIAMENT	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
<p><b>Establishment of the link between human rights and climate change</b></p> <ul style="list-style-type: none"> <li>– To put the relationship between human rights &amp; climate change on the forthcoming EP report and resolution</li> <li>– The EP could undertake in the very short term to adopt a specific Resolution on the human rights &amp; climate change</li> </ul>	
<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>– Adopt guidelines on human rights and climate change</li> </ul>	
<p><b>European Union external development and climate change adaptation policies</b></p> <ul style="list-style-type: none"> <li>– Set up a European accountability mechanism</li> </ul>	
	<p><b>Environmental democracy and human rights</b></p> <ul style="list-style-type: none"> <li>– Strengthen the decentralization of decisions while developing an informational feedback of decisions to the European Union</li> </ul>

Table 3: Objectives for the European Commission

EUROPEAN COMMISSION	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
	<p><b>Establishment of the link between human rights and climate change</b></p> <ul style="list-style-type: none"> <li>Common reflection should be conducted primarily for example in the various Directorate-Generals of the EC (DG CLIMA, HOME, ECHO, DEVCO, ENER, ENV)</li> </ul>
<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>Extend human rights conditionality to third countries in climate change problems that involve human rights parameters and concerns</li> </ul>	<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>Extend political and human rights dialogues with third countries to include climate change problems</li> </ul>
	<p><b>European Union external development and climate change adaptation policies</b></p> <ul style="list-style-type: none"> <li>Step up efforts to improve the coherence of the European cooperation policy</li> <li>Further take into account the human rights dimension in European cooperation policy</li> </ul>
<p><b>Climate change and migration: towards a new nexus for policy making in the European Union?</b></p> <ul style="list-style-type: none"> <li>Remove climate migration from the development-migration nexus</li> <li>Reconsider DEVCO's internal organization</li> <li>Officially recognize the vulnerability of migrants and the forced nature of climate migrations</li> </ul>	
<p><b>EU mitigation policies and human rights</b></p> <ul style="list-style-type: none"> <li>Impact assessment of climate change mitigation policies should include indicators linking social justice, poverty and environmental justice</li> <li>Auction revenue from EU ETS should be used to prevent or redress the human rights impacts of climate change</li> <li>The auctioning process within the EU ETS should be designed in a way that does not contravene property right of producers, in order to prevent them from challenging this new allocation system and/or an important rise of energy prices</li> <li>The EU should clarify that JI/CDM credits from projects violating or risking to violate human rights may not be used within the EU ETS. Criteria should be set up and imposed on investors located in MS territories. Bilateral agreement with host countries may be concluded in this respect</li> </ul>	<p><b>EU mitigation policies and human rights</b></p> <ul style="list-style-type: none"> <li>The issue of windfall profits for sectors covered by the EU ETS should be addressed by taking into account the price of first necessity goods and services</li> <li>Climate change policy should be formulated in a way to ensure their direct effect and to favour effective access to justice for individuals</li> </ul>
	<p><b>The integration of HR into adaptation policies</b></p> <ul style="list-style-type: none"> <li>Establish public-private partnerships in order to ensure alternative access to essential facilities and help accelerate investment in infrastructure</li> <li>Promote funding of research efforts on the mainstreaming of human rights concerns into adaptation policies</li> </ul>

**Environmental democracy and human rights**

- Independent and impartial commission in charge of checking the compliance of national measures taken on the basis of proposals, which would be formulated by the EU

**Environmental democracy and human rights**

- Develop the use of non-binding instruments and the flexibility of EU legislation to encourage the autonomous processes of MS



Table 4: Objectives for the Member States

MEMBER STATES	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
<p><b>The integration of human rights into adaptation policies</b></p> <ul style="list-style-type: none"> <li>– Strengthen political commitment for increased stakeholder involvement (city administrations, environment agencies,...)</li> <li>– Adopt national action plans for adapting to climate change on the basis of best practices which have been identified in existing national action plans</li> <li>– Legally oblige landowners to conduct greening projects</li> </ul>	<p><b>The integration of human rights into adaptation policies</b></p> <ul style="list-style-type: none"> <li>– Create incentives for public-private partnerships aiming to ensure alternative access to essential facilities and helping to accelerate investment in infrastructure</li> </ul>
<p><b>Environmental democracy and human rights</b></p> <ul style="list-style-type: none"> <li>– Ensure spontaneous and active information within each MS in particular by the creation of a national platform for information</li> </ul>	<p><b>Environmental democracy and human rights</b></p> <ul style="list-style-type: none"> <li>– Ensure transparent and relevant information, by means of translation, to help the public concerned to understand information, including local issues that a project can raise</li> <li>– Develop the ability to gather locally-collected information and help with networking</li> <li>– Set up participation structures by developing technical devices and equipment through which participation would be ensured at the local level</li> <li>– Effectively take into account the knowledge of participants</li> <li>– Strengthen the decentralization of decisions while developing an informational feedback of decisions to the EU</li> <li>– Ensure effective implementation of decisions at the local level to help provide continuity of civic engagement</li> </ul>

Table 5: Objectives for the Fundamental Rights Agency

THE FUNDAMENTAL RIGHTS AGENCY	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
	<p><b>Establishment of the link between human rights and climate change</b></p> <ul style="list-style-type: none"> <li>– Initiate reflections on the compatibility between the European policy and the ECHR on the relationship between "environment, CC &amp; HR"</li> <li>– The FRA could engage with the CoE to work on the compilation of the relationship between the environment and human rights</li> </ul>
<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>– Establish indicators for an in-depth study of the relation between climate change and human rights in different countries and regions of the world, as well as in the EU's internal legal order</li> </ul>	<p><b>Europe and the climate change dimension of human rights external diplomacy</b></p> <ul style="list-style-type: none"> <li>– Extend FRA's mandate in thematic areas such as the protection of the environment, including climate change issues, as part of a global HRBA for this institution</li> </ul>

Table 6: Objectives for the Private Sector

PRIVATE SECTOR	
SHORT-TERM OBJECTIVES	MEDIUM AND LONG-TERM OBJECTIVES
<p><b>The integration of HR into adaptation policies</b></p> <ul style="list-style-type: none"> <li>– Inviting insurance companies to create incentives for adapting businesses and buildings</li> </ul>	<p><b>The integration of HR into adaptation policies</b></p> <ul style="list-style-type: none"> <li>– Engage in public-private partnerships to provide for alternative access to essential facilities and help accelerate investment in infrastructure</li> </ul>

This study on the relationship between human rights and climate change has enabled us to highlight the many challenges ahead for EU policy, if it chooses to endorse this new approach. These challenges are of several types: legal, political, diplomatic, financial, technical and democratic.

They fully question the institutional reorganisation of the EU since the entry into force of the Lisbon Treaty. Furthermore, it has been shown that the human rights approach can be applied in many areas where EU action is becoming increasingly widespread. This study has highlighted the potential for a better consideration of human rights in the common policy with respect to environment, climate and energy, but also to foreign relations and partnerships, development assistance, cooperation, asylum and immigration, etc. This study also examines the new institutional governance that has been in force since Lisbon, particularly the crucial roles of several of the Commission's DGs, including CLIMA, HOME and DEVCO, and also the European Parliament, the Commission, the FRA, etc. The principle of subsidiarity also appears as a watermark through related issues at the highest level of action, varying according to the topic. Thus, it appears that the provision of information and public participation, as well as adaptation policies involve action close to citizens while coordinated across the EU. The mitigation policies, development aid or asylum deserve to be harmonized. This appears even more clearly as regards foreign policy relating to human rights or climate, where the need for a EU that is truly closer to its citizens will condition its effectiveness and influence.

In substance, while the two fields of climate and human rights have been strengthened by the Lisbon Treaty, there remains no clear link between them. The EU must take advantage of this new context to build this relationship, following the course charted by the recent reflections of the CofE, the HRC, the OCHCR, NGOs and several scholars, reflections that have structured the milestones of this link and demonstrated its relevance.

The achievements of the Lisbon Strategy on fundamental rights are significant due to the creation of a Special Commissioner, the legal force given to the CFREU and especially the accession to the ECtHR. Climate policy has also been consolidated with the adoption of the EU's 2020 climate and energy package, and the inclusion of this objective on an independent basis in the TFEU. These are all key issues that can only help foster the emergence of the relationship between human rights and climate change, and thus enable its reception within EU policies, under the principle of integration. Our study has highlighted the legal validity of the CFREU and its potential has been demonstrated on several occasions with respect to the development of secondary EU legislation, especially the adoption of mitigation and adaptation measures. However, beyond a possible recourse to the judge, priority should be given to the preventive track. In this respect, it seems essential that EU climate policies are systematically subjected to a real human rights impact assessment, that is to say beyond simply analysing their impact on employment. For this purpose, a new methodology with human rights criteria must be developed and certain definitions, including vulnerable populations outside as within the EU ("energy precarious", the internally displaced people in the EU, and more generally the most disadvantaged), should be adopted. But beyond this, all EU policies must include an impact assessment that takes into account both the environmental and human rights constraints.

The logic of internal EU governance was questioned in this report, focusing on the path ahead in terms of the field of information and public participation in the development and implementation of European policy, particularly in climate change. A dialogue should be initiated in the direction of the public and civil society. The emergence of a genuine climate "participatory" democracy implemented through new structures of participation should be sought.

Other highly significant dialogues should be initiated to promote convergence between human rights and climate policies. In addition, they will contribute to establish the EU as a leader on the international scene in both respects. Initially the necessary dialogue between the different sectors involved with the

Commission (DG CLIMA, DG DEVCO, DG ECHO, DG ENER, DG ENV and DG HOME) or between European agencies (FRA & EEA) should be strengthened. Then, the dialogue must be Pan-European and international at the same time. Indeed, the work undertaken by the CofE on human rights and the environment, but also the recent reflections on the relationship between human rights and climate change, should be taken into account by the EU in view of its accession to the ECHR. The strengthening of individual rights to the environment is an interesting possibility, to be built at the pan-European level. As highlighted in this report, international cooperation under the aegis of the UN should be a stated priority of the EU, but the bilateral cooperation it maintains with some key partners could also contribute to the emergence of the relationship between human rights and climate change.

Lastly, the challenges posed by the relationship between human rights and climate change in terms of development aid clearly raise the question of the financing of this aid. Just as the World Bank and its Inspection Panel have done, the EU should consider establishing a mechanism of accountability to ensure that its aid is not used for projects that cause environmental damage or affect the human rights of the populations concerned.

Ultimately, the requirements in terms of human rights involve a more transparent, but also more equitable, EU policies on climate change, to promote the acceptance of the efforts needed to reform lifestyles, production modes and consumption trends towards a sustainable development for all. In parallel, the climatic risk supposes an evolutionary, modernized and voluntaristic interpretation of human rights, so that a true right to the environment will emerge, of which the corollaries would include the right to sustainable energy, to public services relating to mobility or to effective green housing in terms of energy consumption.

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European Social Charter [www.coe.int/T/E/Human\\_Rights/Esc/](http://www.coe.int/T/E/Human_Rights/Esc/)

Parliamentary Assembly Committee on the Environment, Agriculture and Local and Regional Affairs

[http://assembly.coe.int/Main.asp?link=/committee/CULT/index\\_E.htm](http://assembly.coe.int/Main.asp?link=/committee/CULT/index_E.htm)

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

Text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe) <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

Search form for finding case-law of the European Court of Human Rights: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

Thematic list of Factsheets on the European Court of Human Rights' case-law prepared by the Court's Press Service: <http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>

List of 'Human Rights Handbooks' on specific fundamental rights protected under the ECHR [http://www.coe.int/t/dghl/publications/hrhandbooks/index\\_handbooks\\_en.asp](http://www.coe.int/t/dghl/publications/hrhandbooks/index_handbooks_en.asp)

## **UNITED NATIONS**

UN Economic Commission for Europe: activities related to the environment

[www.unece.org/env/welcome.html](http://www.unece.org/env/welcome.html)

Aarhus Convention's official website [www.unece.org/env/pp/welcome.html](http://www.unece.org/env/pp/welcome.html)

United Nations Environment Programme (UNEP) [www.unep.org/](http://www.unep.org/)

## APPENDICES

Box 1: A selection of relevant international texts on “environment and human rights”

### **Declaration of the United Nations Conference on the Human Environment, 1972, A/CONF.48/14/Rev.1**

- **Article 1**, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, **25 Jun. 1998**.
- **Article 6**, International Covenant on Civil and Political Rights, **1966**.
- **Article 2**, European Convention on Human Rights and Fundamental Freedoms, **1950, 213 UNTS 222**.
- **Article 4**, American Convention on Human Rights, **1969**.
- **Articles 2, 8, 6**, European Convention on Human Rights, **1950**.
- **Articles 2, 4, 7 and 15**, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, **1989**.
- **Article 24**, African Charter on Human and People’s Rights, **1981**.
- **Article 11**, Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, **1988**.
- **Article 37**, Charter of Fundamental Rights of the EU, **2001**.
- **Article 24 §2 (c)** Convention on the Rights of the Child, **1989**.

Box 2: Tasks of the independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment

**HRC, Resolution Human rights and the environment, 20 March 2012, A/HRC/19/L.8/Rev.1.**

**2.** *Decides* to appoint, for a period of three years, an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment, whose tasks will be:

**(a)** To study, in consultation with Governments, relevant international organizations and intergovernmental bodies, including the United Nations Environment Programme and relevant multilateral environment agreements, human rights mechanisms, local authorities, national human rights institutions, civil society organizations, including those representing indigenous peoples and other persons in vulnerable situations, the private sector and academic institutions, the human rights obligations, including non-discrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment;

**(b)** To identify, promote and exchange views on best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, especially in the area of environmental protection, and, in that regard, to prepare a compendium of best practices;

**(c)** To make recommendations, consistent with her or his mandate, that could help the realization of the Millennium Development Goals, in particular of Goal 7;

**(d)** To take into account the results of the United Nations Conference on Sustainable Development to be held in Rio de Janeiro, Brazil in June 2012, and to contribute a human rights perspective to follow-up processes;

**(e)** To apply a gender perspective by, *inter alia*, considering the particular situation of women and girls and identifying gender-specific discrimination and vulnerabilities;

**(f)** To work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies and the treaty bodies, taking into account the views of other stakeholders, including relevant regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions;

**(g)** To submit a first report, including conclusions and recommendations, to the Human Rights Council at its twenty-second session and annually thereafter.

Box 3: Fundamental Rights 'Check-List'<sup>107</sup>

**Fundamental Rights 'Check-List'**

1. *What fundamental rights are affected?*
2. *Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?*
3. *What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?*
4. *Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?*
5. *Would any limitation of fundamental rights be formulated in a clear and predictable manner?*
6. *Would any limitation of fundamental rights:*
  - *be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?*
  - *be proportionate to the desired aim?*
  - *preserve the essence of the fundamental rights concerned?*

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<sup>107</sup> From "Strategy for the effective implementation of the Charter of Fundamental Rights by the EU" (COM(2010) 573 final)



Table 7: Summary of international and European human rights affected by climate change<sup>108</sup>

climate change effects	Rights affected	International human rights standards and climate change	European human rights standards and climate change
Extreme weather events	Right to life	<p>UDHR, Article 3. ICCPR Article 5 CRC Article 6;</p> <p>Universal Human Rights Committee, general comment No. 6 (1982) on Article 6 (Right to life). Inter-Agency Standing Committee, <i>Protecting Persons Affected by Natural Disasters - IASC Operational Guidelines on Human Rights and Natural Disasters</i>. Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex).</p>	<p><b>ECHR</b></p> <p>Article 2- Right to life and the environment Article 3 - Inhuman or degrading treatment or punishment Articles 2 &amp; 8 - Access to information on environmental matters Article 6 - Right to a fair trial and to have access to a court Article 13 - Access to justice and other remedies in environmental matters Article 10 - Information and communication on environmental matters</p> <p><b>ESC</b></p> <p>Article 11 – The right to protection of health</p> <p><b>EU Charter of Fundamental Rights</b></p> <p>Article 1 - Human dignity Article 2 - Right to life Article 3 - Right to the integrity of the person Article 6 - Right to liberty and security Article 37 - Environmental protection</p> <p>Recommendation 1614 (2003) of the Parliamentary Assembly on “Environment and Human Rights”</p>
Increased food insecurity and risk of hunger	Right to adequate food, right to be free from hunger	<p>ICESCR Article 11 CRC Article 24(c) CRPD arts. 25 (f), 28, para. 1 CEDAW Article 14, para. 2(h) ICERD Article 5 (e); UDHR, Article 25.</p> <p>CESCR, general comment No. 12 (1999) on the right to adequate food (Article 11) FAO, <i>Voluntary guidelines to support the progressive realization of the right to adequate food</i>.</p>	<p><b>ECHR</b></p> <p>Article 2- Right to life and the environment Article 3 - Inhuman or degrading treatment or punishment Article 6 - Right to a fair trial and to have access to a court Article 10 - Information and communication on environmental matters Articles 2 &amp; 8 - Access to information on environmental matters Article 13 - Access to justice and other remedies in environmental matters</p> <p><b>ESC</b></p> <p>Article 11 – The right to protection of health</p> <p><b>EU Charter of Fundamental Rights</b></p> <p>Article 1 - Human dignity Article 2 - Right to life Article 3 - Right to the integrity of the person Article 6 - Right to liberty and security Article 21 - Non-discrimination Article 37 - Environmental protection</p>

<sup>108</sup> Realized from Report of the United Nations High Commissioner for Human Rights (A/HRC/10/61)

			<p>Recommendation 1614 (2003) of the Parliamentary Assembly on “Environment and Human Rights”</p>
<p><b>Increased water stress</b></p>	<p><b>Right to safe drinking water</b></p>	<p>ICESCR arts. 11 and 12 CEDAW Article 14, para. 2(h) CRPD Article 28, para. 2(a) CRC Article 24, para. 2(c).</p> <p>CESCR, general comment No. 15 (2002) on the right to water (arts.11 and 12 of the Covenant).</p> <p>Report of the United Nations High Commissioner for Human Rights on the scope and content of human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments (A/HRC/6/3).</p> <p>Realization of the right to drinking water and sanitation (E/CN.4/Sub.2/2005/25).</p>	<p><b>ECHR</b></p> <p>Article 2- Right to life and the environment Article 3 - Inhuman or degrading treatment or punishment Article 6 - Right to a fair trial and to have access to a court Article 10 - Information and communication on environmental matters Articles 2 &amp; 8 - Access to information on environmental matters Article 13 - Access to justice and other remedies in environmental matters</p> <p><b>ESC</b></p> <p>Article 11 – The right to protection of health</p> <p><b>EU Charter of Fundamental Rights</b></p> <p>Article 1 - Human dignity Article 2 - Right to life Article 3 - Right to the integrity of the person Article 6 - Right to liberty and security Article 37 - Environmental protection</p> <p>Recommendation 1614 (2003) of the Parliamentary Assembly on “Environment and Human Rights”</p> <p>Recommendation Rec(2001)14 Of the Committee of Ministers to member states on the European Charter on Water Resources (point 5)</p>
<p><b>Stress on health status</b></p>	<p><b>Right to the highest attainable standard of health</b></p>	<p>ICESCR arts. 7 (b), 10 and 12; CEDAW arts. 12 and 14, para. 2 (b); UDHR, Article 25 ICERD Article 5 (e)(iv) CRC Article 24 CRPD Articles 16, para. 4, 22, para. 2, and 25 ICRMW Articles 43, para. 1(e), 45, para. 1(c) and 70.</p> <p>CESCR, general comment No. 14 (2000) on the right to the highest attainable standard of health (Article 12).</p> <p>Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child.</p> <p>Committee on the Elimination of Discrimination Against Women, general Recommendation No. 24 (1999) on Article 12 of the Convention (women and health).</p> <p>Human Rights Committee, general comment No. 6.</p>	<p><b>ECHR</b></p> <p>Article 2- Right to life and the environment Article 3 - Inhuman or degrading treatment or punishment Article 6 - Right to a fair trial and to have access to a court Article 10 - Information and communication on environmental matters Articles 2 &amp; 8 - Access to information on environmental matters Article 13 - Access to justice and other remedies in environmental matters</p> <p><b>ESC</b></p> <p>Article 11 – The right to protection of health</p> <p><b>EU Charter of Fundamental Rights</b></p> <p>Article 1 - Human dignity Article 2 - Right to life Article 3 - Right to the integrity of the person Article 37 - Environmental protection Article 35 - Health care</p> <p>Recommendation 1614 (2003) of the Parliamentary Assembly on “Environment and Human Rights”</p>

**Sea-level  
rise and  
flooding:****Right to  
adequate  
housing**

ICESCR Article 11  
 ICERD Article 5 (e)(iii);  
 CEDAW Article 14, para. 2; CRC Article 27, para. 3;  
 ICRMW Article 43, para. 1 (d);  
 CRPD arts. 9, para. 1 (a), 28, paras. 1 and 2(d)  
 UDHR, Article 25.

CESCR, general comment No. 4 (1991) on the right to adequate housing (Article 11, para. 1 of the Covenant).  
 CESCR, general comment No. 7 (1997) on the right to adequate housing (Article 11, para. 1 of the Covenant): Forced evictions.  
 OHCHR, OCHA, UN-HABITAT, UNHCR, FAO, NRC, Handbook on Housing and Property Restitution for Refugees and Displaced Persons - Implementing the 'Pinheiro Principles'.

**ECHR**

Article 2- Right to life and the environment  
 Article 3 - Inhuman or degrading treatment or punishment  
 Article 6 - Right to a fair trial and to have access to a court  
 Article 10 - Information and communication on environmental matters  
 Articles 2 & 8 - Access to information on environmental matters  
 Article 13 - Access to justice and other remedies in environmental matters  
 Article 1 of Protocol no. 1 - Protection of property and the environment

**ESC**

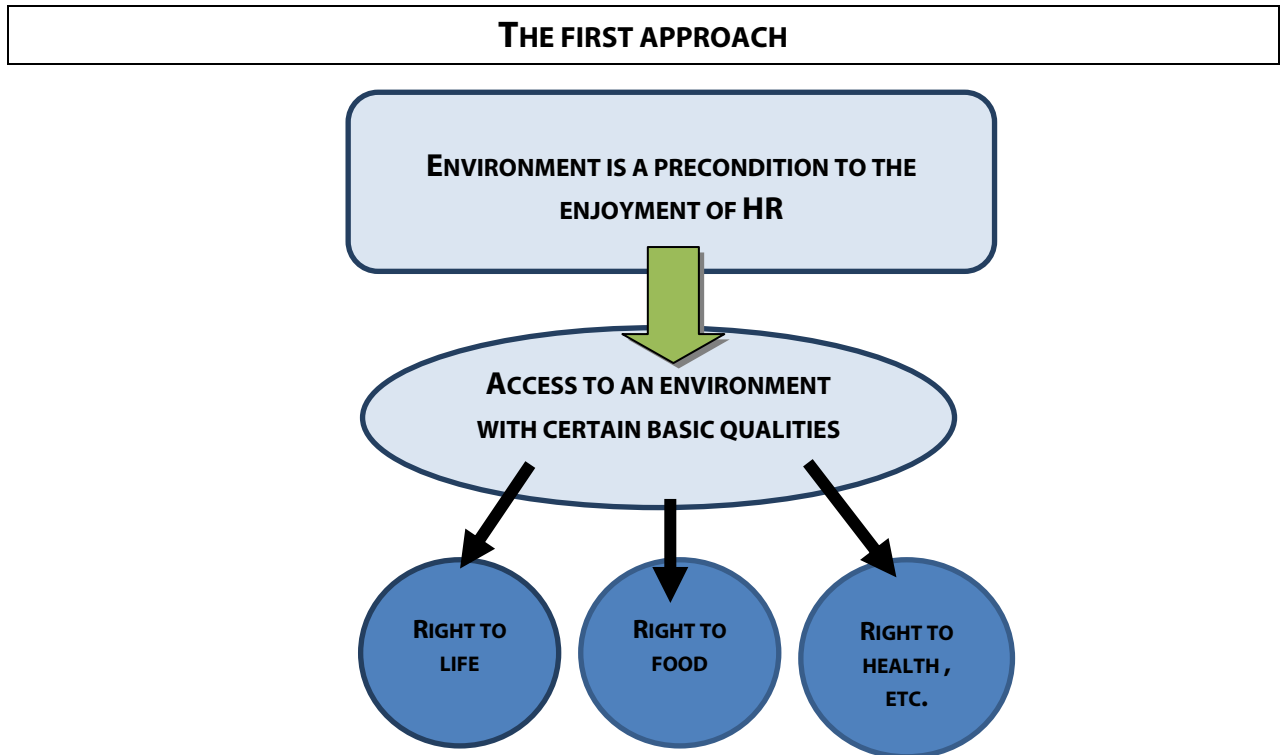
Article 31 – The right to housing

**EU Charter of Fundamental Rights**

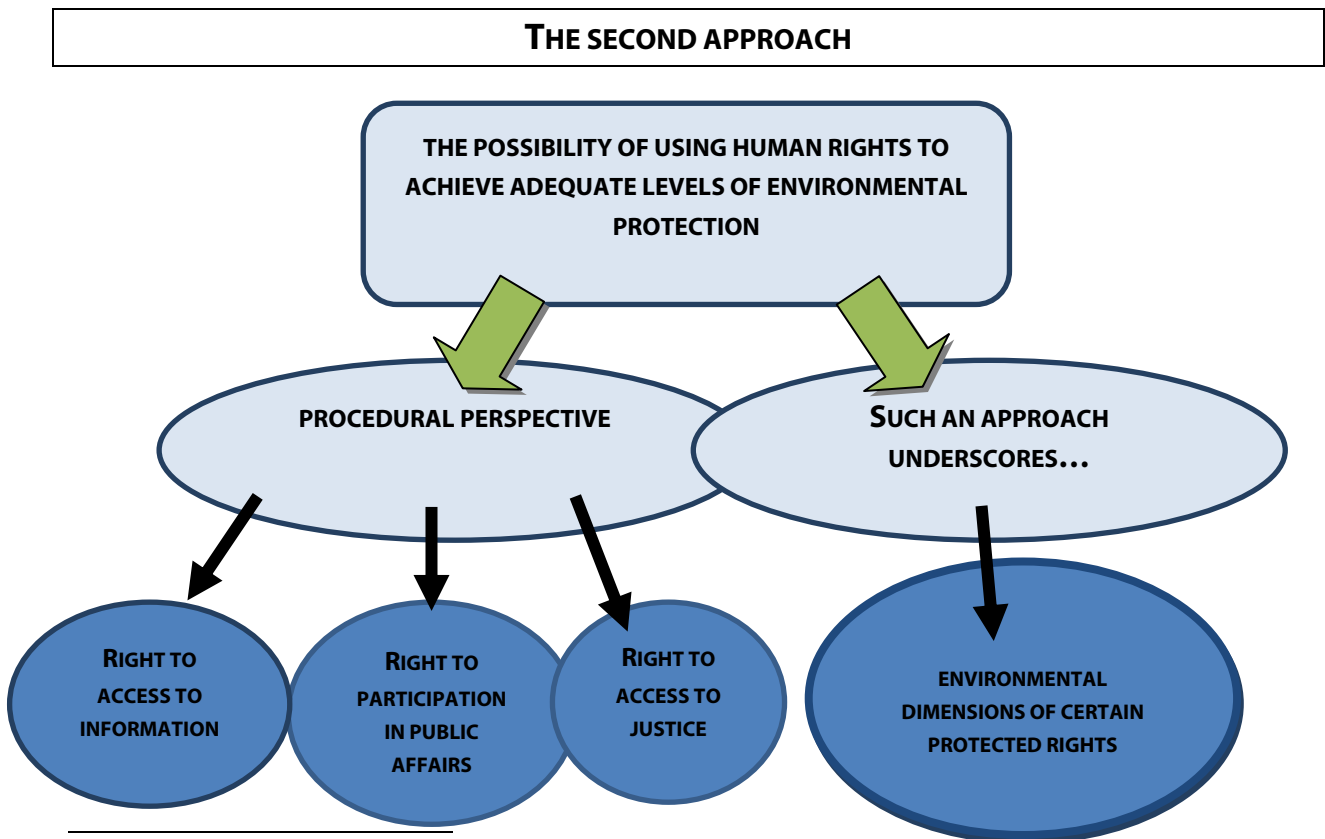
Article 1 - Human dignity  
 Article 2 - Right to life  
 Article 3 - Right to the integrity of the person  
 Article 6 - Right to liberty and security  
 Article 7 - Respect for private and family life  
 Article 17 - Right to property

Recommendation 1614 (2003) of the Parliamentary Assembly on "Environment and Human Rights"  
 Recommendation of the Commissioner for Human Rights on the implementation of the right to housing

**Diagram 1: Schematic diagram of the three complementary approaches developed by the OHCHR on the link between human rights and the Environment: the first approach<sup>109</sup>**



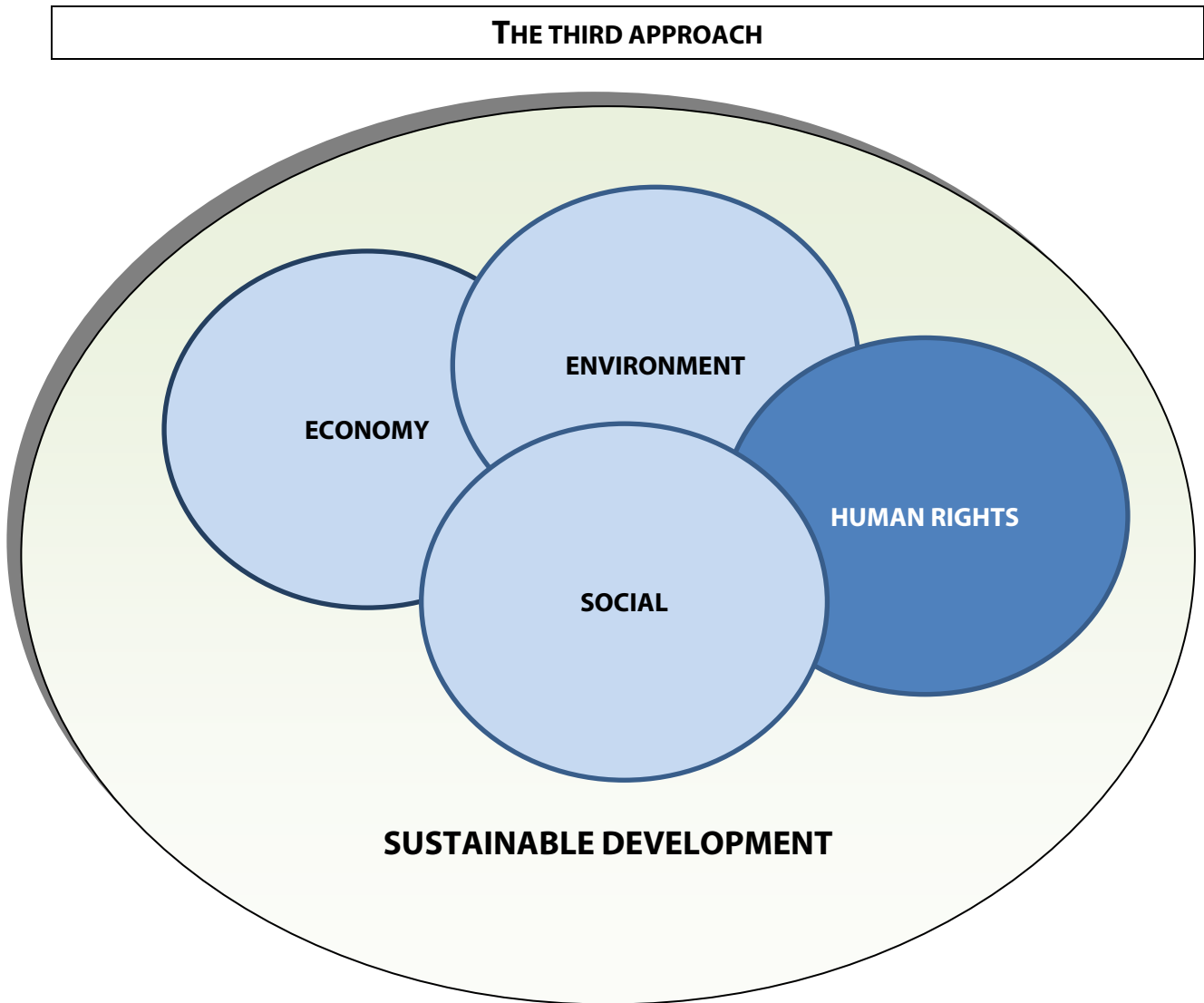
**Diagram 2: Schematic diagram of the three complementary approaches developed by the OHCHR on the link between human rights and the environment: the second approach<sup>110</sup>**



<sup>109</sup> Realized from "Report of the United Nations High Commissioner for Human Rights 2011", (A/HRC/19/34)

<sup>110</sup> Realized from "Report of the United Nations High Commissioner for Human Rights 2011", (A/HRC/19/34)

**Diagram 3: Schematic diagram of the three complementary approaches developed by the OHCHR on the link between human rights and the environment: the third approach<sup>111</sup>**



<sup>111</sup> Realized from "Report of the United Nations High Commissioner for Human Rights 2011", (A/HRC/19/34)

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