

Accommodating human values in the climate regime

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1. Introduction

There is currently great speculation as to the future climate regime. As the first Kyoto commitment period will expire in 2012, there is uncertainty and excitement about the next developments. While a substantial reflection on the Kyoto targets and flexible mechanisms¹ is occurring,² the social and human implications of climate change remain under-represented. These human aspects of climate change should be fundamental considerations of the climate regime, the connection and importance of which is evident. Increased droughts, severe flooding, food shortages and the spreading of diseases³ all immediately affect human life. They raise broader social implications too, on equality and justice, posing ethical challenges.⁴

This challenge has not gone unnoticed.⁵ There is a significant discussion on the human rights law implications of climate change, and how to realise environmental objectives. The debate on human rights climate litigation is a prominent example of this.⁶ However, the idea is based on a rather isolated consideration of human issues and without a strong connection to the existing climate regime. In this way, human rights law does not contribute to the evolution of the climate regime, which should develop to take the human effects into account.

These human effects are integrated in the concept of sustainable development. This concept requires the consideration of social, ethical and human rights aspects. We refer to these as 'human values'. The term 'human values' is taken here to mean modern human rights law as a whole – that is, civil, political and economic, social and cultural rights and the common values emerging therefrom. Thus, it is broader than human rights law alone, and wider than specific human rights articles. It is part of the social element of sustainable development.

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1 These are the Clean Development Mechanism (CDM), Joint Implementation (JI) and Emissions Trading (ET), Arts. 12, 6, and 17 of the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change.

2 See for example, D. Bodanksy, *International Sectoral Agreements in a Post-2012 Climate Framework*, Pew Centre on Global Climate Change 2007, and M. Wara, 'Is the Global Carbon Market Working?', 2007 *Nature* 595.

3 For an elaboration of the health effects see A.J. McMichael, 'Global Climate Change and Health: an Old Story Writ Large', in: A.J. McMichael *et al.* (eds.), *Climate Change and Human Health: Risk and Response*, 2003, pp.1-17.

4 For a presentation of the necessarily ethical side of environmental policy see I. Rens, 'Sur quelques controverses relatives à l'éthique, à la politique et du droit international de l'environnement', in: I. Rens *et al.* (eds.), *Le droit international face à l'éthique et à la politique de l'environnement*, 1996, pp. 9-18.

5 United Nations Human Rights Council Resolution of 26 March 2008, *Human Rights and Climate Change*, A/HRC/7/L.21/Rev.1.

6 E. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal', 2007 *University of Pennsylvania Law Review*, pp.1925-1945, and H. Osofsky, 'Climate Change, Environmental Justice, and Human Rights: A Response to Professor Posner', Paper Presented at the annual meeting of The Law and Society Association, TBA, 24 July 2007.

It is proposed here that the climate regime itself should be changed to accommodate the human considerations that arise within it. This change can be inspired by instruments in the human rights regime such as individual claims, authoritative interpretation and progressive realisation. In this way, the climate regime would become more reflexive,⁷ and the infrastructure and capacity to realise ambitious aims would be strengthened. This flexible approach will allow the regime to evolve with changing circumstances rather than trying to solve predefined problems. It is envisaged that by using human rights instruments in parallel with market-based instruments, the result will be a more holistic, systematic and integrated approach to climate mitigation and adaptation.

The structure of this article is as follows: First, the human aspects of climate change are described, and the necessity of their inclusion is elaborated upon in Section 2. Section 3 presents the current climate regime and Section 4 expands on the current approaches to integrating human values and environmental considerations, concluding with the link between human rights and human values. In Section 5 the link between institutional design, regime characteristics and process outcomes will be expanded, before Section 6 presents some instruments from the human rights regime and discusses possibilities for their inclusion in the climate regime.

2. Human considerations in climate change

Examples of connections between climate change and the threat to human values are numerous. Generally, the link between the state of the environment and basic human needs has been internationally recognised. Klaus Töpfer, the former Executive Director of the UN Environment Programme is commonly cited as stating '[e]nvironmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture.'⁸ Although most environmental problems will have human rights effects, climate change is a special case. It is a global problem that will remain for decades, possibly centuries, to come.⁹ Climate change leads to specific threats to human values in terms of the fulfilment of basic human needs, equity, justice and social tensions. It is argued here that an alternative way of looking at these problems is to incorporate them in the social side of sustainable development.

For many people, climate change will have direct adverse effects. Besides the evident threat to life as a result of severe weather events caused by climate change,¹⁰ climate change also affects the ability of the individual to fulfil his/her needs, and thus threatens his/her freedom.¹¹ The link is direct, as the freedom from want¹² is a basic freedom. For example, climate change will directly increase the spread of diseases through warmer temperatures.¹³ Another example is that

7 In the sense of 'reflexive law', see G. Teubner, 'Substantive and Reflexive Elements in Modern Law', 1983 *Law & Society Review*, no. 2, pp. 239-285.

8 See for example A.C. Kiss *et al.*, *International Environmental Law*, 2004, p. 664, or Office of the High Commission for Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water: A Background Paper*, 2002, p. 1.

9 Compare S. Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change', 2007 *Hastings International and Comparative Law Review*, no. 2, pp. 231-265, p. 243.

10 *Ibid.*, p. 242.

11 This link between the fulfilment of needs and freedom is also drawn by Amartya Sen. Compare, for example, S. Fukuda-Parr, 'The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities', 2003 *Feminist Economics*, pp. 301-317.

12 As first defined in the 'Four Freedoms' speech by F. Roosevelt on 6 January 1941, retrievable from <http://www.feri.org/common/news/details.cfm?QID=2089&clientid=11005> (accessed 10 November 2008) and as explained in the Report of the Secretary-General of the United Nations for decision by heads of states and government in September 2005, UN Doc. A/59/2005 entitled 'In Larger Freedom', Chapter 2.

13 M. Depledge *et al.*, 'Sick of the Weather: Climate Change, Human Health and International Law', 2007 *Environmental Law Review*, pp. 231-240, pp.232 *et seq.*

it affects individuals through contributing to rising food prices,¹⁴ and thus restricting the access to food of many of the most vulnerable individuals. This problem is complicated by the fact that climate mitigation policies can also contribute to a rise in food prices.¹⁵

Expanding on this, climate change has equity consequences. Due to their lack of capacity, the most vulnerable communities and countries will be less able to deal with the effects of climate change and, as a result, will be less able to engage in mitigation efforts.¹⁶ Climate change in many respects presents a vicious circle, the dynamic of which will also engulf individual capacities and freedoms. A lack of resources will lead to poor mitigation and adaptation policies, which in turn will lead to greater harm occurring in resource-deprived areas. One effect of this harm will be a further diminishing of the resources, which will consequently serve to impede the fight against climate change. As the fulfilment of human rights in most cases also uses finite resources,¹⁷ a country's ability to provide basic human freedoms will progressively diminish in the face of climate change.¹⁸

Additionally, the reality of climate change gives rise to considerations of justice and accountability. Countries which have historically emitted, and are still emitting, the least greenhouse gases are the ones that are likely to be the most adversely affected by climate change. This is not only due to the fact that the historically most significant emitters now have plenty of resources to implement adaptation policies, but it is also geographically coincidental.¹⁹

In more abstract terms, Ulrich Beck has phrased the problem as one of social tensions. The current situation of social and environmental change could be thought of as the crash of increasing global expectations of equity, which are based, among other things, on the global advocacy of human rights, and increasing global inequalities brought about by climate change.²⁰ This tension is potentially the cause of conflict and global instability. As it is the climate regime's mandate²¹ to deal with the effects of climate change, it is arguably obliged to incorporate this social effect. It should then accommodate this tension and transform it into a constructive force for change.

Connecting all these different issues gives a view of the (un)sustainability problems from the social aspect of this concept. Sustainable development is an integrative principle that provides an infrastructure to debate the integration of the substantive ecological, social and economic considerations. It is a threefold concept that serves to connect the spheres of international economic law, international environmental law and international social law.²² Since it first received international attention in the Stockholm Declaration 1972, where it stated that human rights lie at the heart of sustainable development,²³ the term has become accepted as one of normative value and an integral part of modern international law.²⁴ The term is now considered

14 M. Robinson, 'Foreword', in: International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, p. iv.

15 This happens as the increased demand for bio-fuels leads to an increase in food prices. World Bank, *Rising Food Prices: Policy Options and World Bank Response*, 2008, p. 1.

16 International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, p. 1.

17 *Ibid.*

18 There are more reasons why poor countries are more vulnerable than rich countries, compare: R. Tol *et al.*, 'Distributional Aspects of Climate Change Impacts', 2004 *Global Environmental Change*, pp. 259-272, pp. 264 *et seq.* However, most of these theses are based on a country-level approach rather than linked to specific features of poverty and thus not necessarily applicable to sub-country entities.

19 International Council on Human Rights Policy 2008, *supra* note 16, p. 1.

20 U. Beck, 'Ungleichheit ohne Grenzen', 2008 *Die Zeit*, no. 42, pp. 12-13.

21 See Art. 3(3) 1992 UN Framework Convention on Climate Change.

22 M.-C. Cordonier Segger *et al.*, *Sustainable Development Law*, 2004.

23 International Law Association Conference, *International Law on Sustainable Development*, 2004.

24 Opinion of Judge Werementry in *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Reports, p. 7.

by some commentators to be a principle of customary international law and at least an ‘emerging international legal principle’.²⁵

Sustainable development as a concept incorporates the tension between many aspects of development and progress. These tensions are based on the fact that sustainable development is a vision of the future and not all of its aspects are possible to implement at the same time. The social side of sustainable development focuses on the dignity, freedoms and needs of the individual in his/her social context. Taking a global view, the major issue lies in this social context itself, such as with equity and justice issues between developed and developing countries. With a more regional or local perspective the problem lies in making a trade-off between the different aspects of sustainability, for example, in the trade-off between bio-fuel and food production.

3. The climate regime

3.1. The current regime

Accommodating the social aspect of sustainable development in the climate regime is fundamental. However, integrating this aspect into the current regime is more difficult. The climate regime substantially consists of the 1992 Framework Convention on Climate Change (UNFCCC),²⁶ the subsequent 1997 Kyoto Protocol and the Decision of the Conference of the Parties (CoP) and Conference of the Parties, Meeting as the Parties to the Protocol (CoP/MoP).²⁷ The Framework Convention was signed at the Rio Conference on Environment and Development, which focused on the concept of sustainable development.

Sustainable development is one of the underlying principles of the climate regime and is found throughout the UNFCCC and the Kyoto Protocol. However, it is often strongly linked with the inclusion of economic aspects in the UNFCCC.²⁸ This is a reflection of the focus on the costs of compliance and the concern about the implications of climate policies on the market economy. Consequently, the three flexible mechanisms have a strong economic grounding and show the economic orientation of integration efforts in the climate regime,²⁹ although the CDM has a twofold objective: cost effectiveness and sustainable development.³⁰

The climate regime does incorporate some human considerations. The preamble to the UNFCCC makes explicit reference to the climate being a ‘common concern of humankind’ and acknowledges that human activities contribute to increasing greenhouse gases, although there is no formal recognition of human concerns and human rights implications. It has been argued that the Kyoto Protocol expands upon standards set by binding international human rights law and

25 P. Sands, ‘International Law in the Field of Sustainable Development: Emerging Legal Principles’, in: W. Lang (ed.), *Sustainable Development and International Law*, 2005, pp 53-67, and International Law Association Conference, *International Law on Sustainable Development*, 2004. The current *Pulp Mills* case which is pending before the ICJ (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*) indicates that sustainable development lies at the heart of many environmental disputes. See P. Bekker, ‘Introductory Note to Pulp Mills on the River Uruguay (Argentina v Uruguay)’, 2007 *International Legal Materials*, p. 311.

26 UN Doc. A/AC.237/18 (Part II)/Add.1.

27 Annex to Decision 1/CP.3: FCCC/CP/1997/7/Add.1.

28 For example Art. (2) UNFCCC: ‘allow economic development to proceed in a sustainable manner’, Arts. 3(5) and 4(2)(a) UNFCCC: ‘sustainable economic growth’.

29 They can even be seen as proof of the important role of cost-effectiveness in International Environmental Law. P. Sands, *Principles of International Environmental Law*, 2003, p. 8.

30 See Art. 12 Kyoto Protocol. For a discussion on whether the CDM is meeting its sustainable development objectives see L. Schneider, *Is the CDM Fulfilling Environmental and Sustainable Development Objectives*, Oeko Institute for WWF 2007.

that the two ‘powerfully reinforce each other’.³¹ However, this positive view ignores the reality that they are treated as completely separate regimes.

There are legal integration principles to overcome conflicting international law, for example, *lex posterior* and *lex specialis*. Additionally, the Vienna Convention on the Law of Treaties provides for *systemic integration* through Article 31(3)(c) stating that the interpreter of a treaty should take into account ‘any relevant rules of international law applicable in relations between the parties’. Furthermore, the WTO Appellant Body has approached the problem of reconciling the human and social realities of international trade.³² However, integrating human values into the climate regime goes beyond linking the legal aspects as they arise and applying integration principles. Applying legal tools of integration to separate regimes is insufficient. The issue is far deeper, requiring an infrastructure that accommodates integrated action.

There is a legal basis for such an infrastructure within the climate regime. The principle of common but differentiated responsibilities is the strongest expression of human values in the regime. It recognises the difference in the capacities of states and effectuates redistributive instruments in the climate regime to address inequalities. However, this instrument alone cannot fully incorporate human values into the regime. The principle of common but differentiated responsibilities currently addresses the capacities of states, but not of the individual. The focus on capacities furthermore takes into account mainly the economic dimension of human values and lacks a more holistic approach. Additionally, while the implementation of this principle in the climate regime is regarded as the most advanced among environmental regimes,³³ it is strongly guided by practical rather than ethical considerations.³⁴

3.2. *Limitations of an economic focus*

In the above section, the preference in the climate regime for economic instruments has been stated. This approach is not unusual in international environmental law; treaties often integrate economic concerns with significant success. The reasons why the Montreal Protocol³⁵ is regarded as so successful was certainly its cost effectiveness.³⁶ The flexible mechanisms of the Kyoto Protocol, including emission trading, present an innovation also in terms of the high level of integrating economic rationale into environmental regulation, thereby allowing market mechanisms to determine the place and form of emission reductions. While the inclusion of economic instruments most likely leads to the reduction of the cost of compliance with emission-reduction targets, as they had been intended to do, there is a limit to what economic instruments can achieve.

Translating environmental protection into economic terms and economic policy will necessarily result in some aspects being lost in translation.³⁷ While this is the case for any translation into a policy instrument, it is important to be aware of which aspects are the most crucial to be preserved, and what disadvantages can be remedied alongside the distortions that

31 M. Robinson, ‘Climate Change and Justice: Barbara Ward Lecture’, International Institute for Environment and Development, December 2006.

32 See for example *US Shrimp-Turtle*, WT/DS58/AB/R and *EC Hormones*, WT/DS48/AB/R.

33 L. Rajamani, *Differential Treatment in International Environmental Law*, 2006, p. 214.

34 This is apparent from the strong link to the fulfilment of obligations under the convention in the operative articles of this principle. The redistributive and economic rights dimension is given less attention.

35 The Montreal Protocol is the Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer.

36 S. Oberthür, ‘Linkages between the Montreal and Kyoto Protocols: Enhancing Synergies between Protecting the Ozone Layer and the Global Climate’, 2001 *International Environmental Agreements: Politics, Law and Economics*, pp. 357-377.

37 For an elaboration of these problems see J.B. White, ‘Establishing Relations between Law and other Forms of Thought and Language’, 2008 *Erasmus Law Review*, pp. 5-24.

society can live with. If crucial aspects are lost, this will leave an illegitimate and possibly malfunctioning environmental policy.³⁸

The translation of environmental targets into economic terms leads to a focus on material (financial) aspects disregarding non-material values. The major determinant for value in economics is price and cost,³⁹ through trade it is at the same time the main allocation mechanism. For example, the most widely known economic analysis, the cost-benefit analysis, requires a translation of all costs and benefits into monetary value.⁴⁰ However, human values, dignity and freedoms are priceless. Allowing the market to put a price on these, through approximation by trading with environmental constraints,⁴¹ will not result in fulfilling the basic needs of all human beings.

Economics is not a system for an absolute valuation; instead it is one for making a relative valuation and trade-offs.⁴² Precisely because there are needs which all humans share and which are immensely important for human existence, the human rights regime has not allowed such a partial and conditional fulfilment of these needs. Instead it has treated them as absolute values, which are inalienable and have to be available to all individuals regardless of their financial or other assets.

Incorporating economic considerations into the climate regime is valuable and necessary. Cost effectiveness and efficiency are crucial for ensuring the acceptance of environmental policy. This is evident from state behaviour when signing international environmental treaties. However, the liberal markets are not in themselves sufficient to bring about holistic well-being.⁴³ The human and moral dimensions which are the original basis for environmental policy must likewise be represented.

4. The human rights regimes⁴⁴

As climate change has human impacts, it raises human rights law implications. The effects will impact on the ability to secure and realise rights such as the right to life, liberty and security,⁴⁵ and the right to a standard of living which is adequate for good health and well-being.⁴⁶ Consequently, human rights lawyers are increasingly trying to raise climate change problems in the courts in terms of violations of these rights.⁴⁷ This section examines this approach and the subsequent discussion on the right to the environment that has emerged alongside. The analysis indicates that looking specifically at human rights articles does not solve the core of the problem.

38 So also J. Gupta, 'Climate Change and International Relations: Urgent Challenges Anno 2007', in: N. Teesing (ed.), *Klimaatverandering en de Rol van het Milieurecht*, 2007, p. 23.

39 One could also say that the major determinant of value in economics is scarcity (see R. Gill: *Economics*, 1973, p. 14), but the quantification of scarcity can be seen as the cost price of a resource, at least in a market economy (*ibid.*, pp. 40 *et seq.*).

40 For one such method and its difficulties see M. Common *et al.*, 'Do Existence Values for Cost Benefit Analysis Exist?', 1997 *Environmental and Resource Economics*, pp. 225-238.

41 In economic terms tradable emission units are an internalisation of environmental constraints.

42 This is connected to the fact that economics is for a large part a quantitative science (Gill, *supra* note 39, p. 12), while absolute valuation is practically inherently qualitative.

43 See for an argument on the limits of markets S. Marglin, *The Dismal Science*, 2008, p. 2 *et seq.*

44 Different human rights treaties and processes can be defined as each having its own regime. See D. Hanschel, *Environment and Human Rights – Cooperative Means of Regime Implementation*, 2000, p. 3.

45 Art. 3 Universal Declaration of Human Rights (UNDHR), UN General Assembly Resolution 217 A (III), UN Doc. A/810, p. 71 (1948).

46 Art. 25 UNDHR.

47 *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005, http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (accessed 26 November 2008).

4.1. Protecting the environment and human rights through litigation

Increasingly, environmental problems are being phrased as human rights law violations. In the European Convention on Human Rights (ECHR) there is significant case law on this issue. The ECHR does not expressly address environmental rights or concerns, which reflects the fact that environmental degradation was not an issue at the time of its creation. Since then, the Commission has explicitly stated that no environmental rights are guaranteed.⁴⁸ Critics have responded that as the ECHR is a flexible framework designed to protect democratic rights and to provide protection against misuse of power by the state, it should, in principle, evolve with new developments such as the human implications of environmental threats.⁴⁹ Nonetheless, the analysis indicates that, to date, it is difficult to raise environmental issues through human rights.

Locus standi before the European Court of Human Rights requires an individual interest. Therefore, there must be more than simply an environmental impact; it must be one that impacts on the specific individual.⁵⁰ In addition, there must be a clear causal link between the environmental damage and the human harm suffered.⁵¹ Only in very serious clear-cut cases have the linking and consequent finding of Article 2 violations been successful.⁵² Claims under Article 8, the right to private life, have been the most successful for environmental issues. However, the breach must still be extremely severe, such as in *Lopez Ostra v. Spain* where the applicant lived in close proximity to extremely high pollution levels. In *Powell and Rayner*⁵³ and *Hatton and others v. UK*⁵⁴ involving less severe environmental harm, this being noisy aircraft in residential areas, the applicants were unsuccessful. The Grand Chamber justified this with a need for a balance between collective economic necessity and individual private life. Dissenting Judges Costa, Ress, Turmen, Zupancic and Steiner were very critical of this position. They argued that there is a ‘close connection between human rights protection and the urgent need for a decontamination of the environment.’⁵⁵ In their progressive opinion, it was suggested that the Government was giving too much weight to economic considerations, ignoring the very important human and environmental considerations.

Similar conclusions for cases before the African Commission on Human and Peoples’ Rights and the Inter-American Commission on Human Rights can also be drawn on the difficulty of environmental protection through human rights. In the *Ogoniland* case,⁵⁶ the African Commission found that Nigeria had violated a number of rights including the right to life and the right to property, as well as right to health.⁵⁷ Although a landmark case, and a triumph over the devastating action of multinational corporations,⁵⁸ it was one of very extreme and clear human rights violations. Ogoni leaders were executed, civilians killed, villages destroyed and toxic waste

48 In *Rayner v. UK* it was stated that Article 1, Protocol 1 on the Protection of Property did not guarantee the quality of the environment.

49 L. Loucaides, ‘Environmental Protection through Jurisprudence of the European Convention on Human Rights’, 2004 *British Yearbook of International Law*, pp. 249-268.

50 *Kyrtatos v. Greece*, Application No. 41666/98.

51 *LCB v. UK*, 14/1997/798/1001.

52 *Oneryildiz v. Turkey*, Application No. 48939/99. This was the case where city mayors had failed to take action to prevent a methane explosion in a rubbish tip killing nine members of the applicant’s family.

53 [1990] 12 *EHR* 355.

54 Application No. 36022/97.

55 Dissenting Judges Costa, Ress, Turmen, Zupancic and Steiner, *Introduction. Case of Hatton and others v. United Kingdom*, Application No. 36022/97 Joint Dissenting Opinion.

56 *Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria*. Case No. ACHPR/COMM/A044/1, and D. Shelton, ‘International Decisions’, 2002 *The American Journal of International Law*, pp 937-942.

57 It is noticeable that the 1981 African Charter on Human and Peoples’ Rights is the only human rights treaty to explicitly recognise a right with a relation to the environment.

58 D. Shelton, ‘Comment on the Ogoniland Decision’, 2002 *American Journal of International Law*, pp. 937-943, p. 941.

emitted into the local soil and water. Thus, the violations and perpetrators were clear. However, in climate change violations they are often not as pronounced.

In the Inuit Petition to the Inter-American Commission on Human Rights against the United States,⁵⁹ the claim was rejected. Instead, the Commission held a hearing in 2007 to explore and understand, at a general level, the relationship between climate change and human rights. The legal argument in the petition made evident the link between climate change and human rights violations. It asserted that the United States is the largest emitter of greenhouse gases and it had failed to ratify the Kyoto Protocol and should therefore be held accountable for this under international law.⁶⁰ In addition, it was argued that the effects of climate change violate a number of Inuit rights, including the right to use and enjoy personal, intangible and intellectual property, the right to the preservation of health and the right to life, physical protection and security.⁶¹ Although the claim failed, it has given rise to discussion and a potential starting point for future claims. Most significantly, though, the rejection illustrates the difficulty in using litigation in response to climate change.

This can be primarily explained by the problems in translating environmental protection into human rights violations. The result of this process is that a higher threshold, or burden of proof, is required to trigger the violation. This is because it is not the environment that is protected; it is human rights, and therefore the environmental problem must directly affect an individual. This is a considerable issue and suggests that using litigation is perhaps not the strongest remedy for the human effects of climate change. Indeed, many commentators state that litigation is second best to establishing more suitable treaty regimes.⁶² Although litigation can provide direct relief to individuals and promote 'environmentally-friendly' behaviour by states, it is extremely difficult to overcome the burden of proof. It is also difficult to raise a case in the first place. It is problematic to identify a clear offender and to prove the necessary proximity to the damage. In climate change there are extremely complex ecological systems involved and they exist across national boundaries and territorial sovereignty. Moreover, satisfying the procedural requirements concerning standing before a court is also a substantial obstacle. In the Inuit Petition, NGOs were permitted to submit petitions to the Inter-American Court, allowing the Centre for International Environmental Law and Earthjustice to support the claim.⁶³ However, not all courts give standing to NGOs. This could be a significant barrier to ensuring that the poorest and most vulnerable communities have access to legal remedies.

A further problem is that litigation is usually reactive, as it is often invoked once damage has already occurred. It does not therefore prevent irreversible damage. Also, on a more abstract level it is noted that human rights regimes, as well as environmental regimes, have demonstrated a preference for cooperative instead of adversarial mechanisms of implementation and enforcement.⁶⁴ This indicates that states do not consider adversarial mechanisms such as litigation to be as valuable. Indeed, it is also widely accepted that in many or most cases of non-compliance with the regime, it is not the lack of will which leads to deviance, but the lack of capacity.⁶⁵

59 See *supra* note 47.

60 M. Wagner *et al.*, *An Inuit Petition to the Inter-American Commission for Dangerous Impacts of Climate Change*. Presented at the 10th Conference of the Parties to the Framework Convention on Climate Change, December 15 2004, Buenos Aires, http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf (accessed 26 November 2008).

61 Inuit Petition, *supra* note 47, pp. 83-96.

62 See E. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal', 2007 *University of Pennsylvania Law Review*, pp. 1925-1945.

63 S. Aminzadeh, *supra* note 9, p. 240.

64 Although the ICCPR does provide a mechanism for state complaint, it has never been used, and it is clearly not an effective implementation mechanism for that regime. See Hanschel, *supra* note 44 p. 29.

65 U. Beyerlin *et al.*, *Law-Making and Law-Enforcement in International Environmental Law after the 1992 Rio Conference*, 1997, p. 117.

However, despite these criticisms, litigation is very successful in raising awareness of climate change and human rights issues. The Inuit Petition was widely reported in the media⁶⁶ as were the threats by the small South Pacific island of Tuvalu to sue Australia and the United States for pollution contributing to climate change.⁶⁷

4.2. A right to the environment

Unsatisfactory human rights case law has prompted debate on whether there should be a 'right to the environment'. Authors point to the merits of such a right as a higher legal status being accorded to the environment and incorporating justice and values.⁶⁸ This would have a strong symbolic value as opposed to an approach based on a civil or tort claim. Perhaps one of the strongest arguments is that human rights trump ordinary law. However, the right to the environment would then conflict with the right to development. Rights only have a stronger status in relation to other law when there are two rights, such as the right to the environment and the right to development, which are on a par with each other.⁶⁹ Kiss and Shelton⁷⁰ envisage the right to an environment being given a meaningful context by being part of a more holistic rights-based approach encompassing procedures such as Environmental Impact Assessments, access to information and access to justice. This would then be a 'blueprint for incorporating environmental protection, economic development and human rights protection.'⁷¹ Indeed, the arguments for a right to the environment are compelling. However, it is not clear if a right to the environment will truly integrate human values.

In the case law on human rights and the environment, often an explicit 'right to the environment' would not have greatly contributed to the case. For example, in the *Ogoniland* case, Nigeria was found to have violated seven articles of the African Charter, including the right to a general satisfactory environment. There would have been a finding of severe human rights violations irrespective of the specific right to the environment.

Merrills helpfully draws attention to the distinction between morals and rights. While the protection of the environment may be morally the right thing to do, this does not establish the necessity of creating a right to the protection of the environment. He argues that environmental problems will not be resolved if everyone stands defensively by a right. It would seem that a 'right to the environment' is too unspecific, with unclear duties and unclear boundaries, such as whether it gives rise to individual or collective claims.

In the present authors' opinion, the arguments for the symbolic trumping nature of a right to the environment are strong. However, creating a right may not be the best way to ensure environmental protection, and for climate change and it will not be best way to bring about the lifestyle change that is required to combat it. A right is a defensive mechanism; it does not encourage or facilitate cooperation for emission reduction. Also, a rights-based regime is strongest in a system with a superior entity, such as the Government in the national legal system, which can guarantee the formal acceptance and realisation of these rights. On the international level, a duty-based approach might be the only feasible possibility. It can be concluded that a

66 See for example A. Revkin, 'Inuit Climate Change Petition Rejected', *New York Times*, 16 December 2006, <http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html> (accessed 25 November 2008).

67 'Tiny Pacific Nation takes on Australia', BBC News, 4 March 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1854118.stm> (accessed 25 November 2008).

68 D. Hunter *et al.*, *International Environmental Law and Policy*, 2002, p. 1285.

69 J.G. Merrills, 'Environmental Rights', in: D. Bodansky *et al.* (eds.), *Oxford Handbook of International Environmental Law*, 2007, pp. 663-680.

70 A.C. Kiss *et al.*, *International Environmental Law*, 2004, p. 716.

71 *Ibid.*

right to the environment has significant drawbacks to ensuring the protection of the environment and for climate change. We therefore turn to examine human rights on a more general level.

4.3. Human rights and human values

In this article the human rights regime is treated as an exemplary regime of implementing human values. The concept of human rights is an inherently ethical one, as its roots in the ideologies of naturalism or the enlightenment indicate. Positive human rights, as laid down in human rights treaties, are consequently the way in which the law conveys these social and human considerations and commonly agreed values. One could venture that it was because of this broad and strong moral basis that human rights were able to unfold the influence they have, even though their positive legal grounding is rather weak.⁷² Legal rules acquire relevance not only through their legal status, but also through their immediate moral appeal. Human rights are often evoked not only as grounds for litigation, but also in more political settings because of this.⁷³

The procedures of the human rights regimes can inspire thinking on the inclusion of human values. They are tools for the implementation of human values and norms and are sensitive to the ethical and social context in which the provisions function. Their flexibility and receptiveness to human values and their context makes them interesting for the present undertaking.

5. How procedures influence a regime

An underlying assumption of this article is that using human rights instruments will carry human values into the climate regime. By self-reflection, capacity building, and steering a process that requires consideration of the human implications of climate change, ethical considerations are taken to be naturally integrated. While no automatism is involved, this is seen as the most effective and most flexible way to respond to the increasing necessity of more social considerations throughout the regime. Using value-sensitive instruments in the climate regime will change the whole character of the regime, or at the very least make human values more prominent. This is evident from considering the definition of a regime.

In legal terms, regimes are often defined as a system of treaties. However, there is also a broader definition which incorporates the legal regime. The so-called ‘consensus definition’ of an international regime is given as ‘implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.’⁷⁴ This definition illustrates how decision-making procedures form a unity with a regime’s principles and values. While it is an abstract possibility that the other elements of a regime remain unaffected if one element changes, this seems to be a highly unlikely development. It is rather to be expected that a change to one element will affect the whole regime, including every singly other element.⁷⁵

A traditional approach to including human values in the climate regime may be the actual recognition or otherwise inclusion of human rights in climate treaties. However, it should be noted that the establishment of rights alone might have little effect. There must be procedures

72 So also B. De Gaay Fortman, ‘Adventurous Judgements. A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development’, 2006 *Utrecht Law Review*, no. 2, pp. 25 *et seq.*

73 *Ibid.*, p. 24.

74 S. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in: S. Krasner (ed.), *International Regimes*, 1983, p. 2.

75 Similarly it can be argued that principles will also shape a regime. Indeed it seems that procedures and principles are complementary. See H. van Rijswijk, *Moving Water and the Law*, 2008, pp. 7 *et seq.*

which effectively implement values. It is for this reason that in this article the more procedural route is taken. In order to diffuse human values, the relevance of which is already recognised and which are already protected in human rights treaties, the organisational structure must be changed so as to accommodate and strengthen human values.⁷⁶

This focus on procedure to determine outcomes mirrors reflexive tendencies in law.⁷⁷ Including these human rights procedures in the climate regime will make the regime more reflexive in that it will not rely on the human rights mechanisms to point out the human and social concerns with regard to climate change. The proposed procedures would encourage the climate regime to develop a learning process concerning the human dimension of climate change and adaptation efforts.

6. The potential for the inclusion of human rights instruments

In this article we examine four human rights mechanisms to reflect on their potential contribution to the climate regime. These are individual communications, progressive realisation, authoritative interpretations and a national mechanism. We consider these to be the most potentially relevant mechanisms, although there are many other important instruments in human rights regimes. While elements of some of these can be found in the climate regime, all of them are significantly stronger in the human rights system.

6.1. Individual communications

A common feature of human rights regimes is that individuals have the opportunity to bring a specific matter before a special court or a special commission of the human rights treaties.⁷⁸ This is the most symbolic of all human rights monitoring mechanisms, as it has the potential for empowering the individual *vis-à-vis* the state and recognising individual, social and human concerns as a matter of international law. As Tardu states: '[t]he irruption of Man into the international sphere as defender of his own rights against the State is today the most revolutionary trend of international law.'⁷⁹

Individual communication procedures⁸⁰ are included, for example, in the International Covenant on Civil and Political Rights,⁸¹ the Convention against Torture,⁸² and other⁸³ human rights conventions under the UN umbrella. The strongest example of this procedure is the European Court of Human Rights, where the rulings are, in contrast to other procedures, binding on the parties to the case. The procedure operates through committees composed of independent experts elected by States parties who can receive individual communications.⁸⁴ This quasi-

76 It is only these procedures which will take care of the actual implementation; substantive obligations are the ones to be implemented. Hanschel, *supra* note 44, p. 3.

77 Teubner, *supra* note 7.

78 For an explication of individual complaint procedures and their value see O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaint Procedures', 1997 *International Journal of Refugee Law*, no. 3, pp. 392-414.

79 M. Tardu, 'International Complaint Procedures for Violations of Human Rights', 1988 *Indian Journal of International Law*, pp. 171-187, p. 171.

80 The procedure differs for each individual treaty, but only marginally. For more information see H.J. Steiner *et al.*, *Human Rights in Context*, 2008, pp.918 *et seq.*

81 First Optional Protocol mechanisms established under the 1966 International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A [xxi], 16.12.1966, UN Doc. A/RES/21/2200.

82 Art. 22 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Resolution 39/46, UN Doc. A/RES/39/46.

83 Tardu, *supra* note 79 gives ten human rights conventions with individual communication mechanisms.

84 UN Fact sheet on Human Rights Treaties, retrieved from <http://www.unhchr.ch/html/menu6/2/fs7.htm#part1> (1 July 2008).

judicial mechanism⁸⁵ is a very powerful and far-reaching tool. It serves to empower minorities or individuals *vis-à-vis* the established Government. While most of the procedures cannot formally effectuate changes to the legislation and substantive national rules, they raise public awareness in the countries in which the case is taking place.⁸⁶

It seems that states, practically rather than formally, must fulfil certain criteria for the individual communication procedures to be effective.⁸⁷ They must have a minimum degree of internal democracy and an effective administration. National remedies against transgressing the law must be available to implement the ‘ruling’ in the case. Furthermore, the administration, as well as the international communication procedures, must be practically accessible to citizens. However, as it is usually the most established democracies and most affluent countries of the world which are the largest emitters of CO₂,⁸⁸ the requirements of individual communication procedures should not pose a problem.

Not all aspects of individual communications are suitable for inclusion in the climate regime. Their quasi-judicial character, and their focus on specific violations of individual rights, would not be implementable in the climate regime as it does not serve as a basis for any individual rights. Instead it is its democratic aspect that is relevant for the current case, and the possibility for individuals to bring their concerns to the attention of the international community. In this way this procedure would have strong similarities to many national parliament petition procedures. The mechanisms should operate as a ‘naming and shaming’ procedure, creating public pressure, thereby preserving the cooperative focus of the climate regime.

Individual Communications serve as an extra check on states, as they can give an ‘inside view’ of state performance and act as a corrective element for state behaviour⁸⁹ as well as an indication of the cultural context of the human value under consideration.⁹⁰ Individual communications would indicate whether people are benefiting from the climate policy and would point to areas for improvement as far as the international community is concerned. It would be a safeguard against socially or politically insensitive policy, as governments could not use the necessities of their obligations under the climate regime to excuse otherwise contentious policies.

Individual communications could offer a promising instrument for climate problems. The organisational structure would be very similar to that of human rights treaties. A separate committee possessing a mandate to give ‘rulings’ might not be necessary as this mechanism would be advisory rather than quasi-judicial. The Subsidiary Body for Implementation (SBI)⁹¹ or a standing committee thereof might then be well suited to review individual communications.

However, individual communications have their greatest effect where states have taken on substantive obligations as well. This is politically problematic in the climate regime. Possibly the inclusion of a possibility for progressive realisation will encourage states to subscribe to more substantive duties.

85 M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005, pp. 668 *et seq.*

86 S. Hamamoto, ‘An Undemocratic Guardian of Democracy: International Human Rights Complaint Procedures’, 2007 *Victoria University of Wellington Law Review*, pp. 199-216, p. 212.

87 See R. Müllerson, ‘The Efficiency of the Individual Complaint Procedures’, in: A. Bloed *et al.* (eds), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, 1993, pp. 25-43, pp. 32 *et seq.*

88 Only recently China has become the single largest emitter of CO₂, a country which can be argued to be lacking in the formulated requirements. However, China is still far behind the Western Nations in terms of *per capita* emissions.

89 See Müllerson, *supra* note 87.

90 A link to the later discussed mechanisms of authoritative interpretation exists in the fact that the ‘rulings’ in these cases can also be seen as authoritative interpretations of the texts, even though they are first and foremost only applicable to the parties to the case.

91 Established through Art. 10 UNFCCC.

6.2. *Progressive realisation*

The principle of progressive realisation or progressive implementation is now a fundamental part of international human rights law.⁹² The mechanism of progressive realisation leads to the abandonment of a ‘black and white’ view of compliance and introduces a middle ground between the two. This mechanism entails two sides. On the one hand, the duties which a state takes on to be implemented progressively do not have to be fulfilled by the time the treaty has entered into force or at any other specific time. On the other hand, certain minimum standards, which are often procedural in nature, must be observed.⁹³

Progressive realisation is most prominently provided for in the regime for economic, social and cultural rights.⁹⁴ In the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 states that ‘each party (...) undertakes to take steps (...) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights.’ In general, the standard for progressive realisation is then ‘the use of maximum available resources’.⁹⁵ As states are expected to perform to the highest possible standard, the ‘best possible’ is determined by an international body in standardised procedures or through the reporting mechanisms. While a deviation from the obligations laid down is allowed, there is little question that the fulfilment of the obligations taken on must have high priority for a state party. An economically suboptimal situation is not a legitimate excuse to allow human rights to be neglected.⁹⁶

Progressive realisation is suitable for approaching aspiring concepts such as human rights. It can be assumed that a great deal of time will pass before they are fully implemented, if they ever will be. Progressive realisation enables state parties to lay down these aspiring goals in a treaty, while not being measured against full compliance therewith. It has a dynamic element because the standard of ‘maximum available resources’ can be reassessed from time to time. On the other hand, it also carries an element of similarity to common, but differentiated responsibilities. Both can be used to differentiate obligations and thus compliance capabilities.⁹⁷

In the case of combating climate change, which requires profound societal changes, this mechanism seems to be appropriate for the same reasons as in the human rights regime. First, countries need to take on considerably more courageous commitments in order to achieve the goal of the UNFCCC, and progressive realisation might make these obligations sufficiently flexible for countries to actually do so. Second, the inclusion of this mechanism will mean that even if countries have reached their emission goals for one time period, this does not imply that the problem of climate change is actually solved. It will ensure that there is always the need to review state policy in all fields such as, for example, in energy and in transport, in order to see how and where more emission cuts can be implemented. This will ensure that combating climate change is an additional goal for all state actions.

When including the mechanism of progressive realisation in a regime, it should be taken care, however, that strong checks on and clear standards for state compliance exist which determine compliance with the standards of implementation. Thus, progressive realisation will

92 Apparently there is nowadays little differentiation between political, economic and cultural rights in terms of the need for progressive implementations. See Nowak, *supra* note 85.

93 See the General Comment of the Committee on Economic Social and Cultural Rights 14, § 52, UN Doc. E/C.12/2000/4.

94 E. Brems, *Human Rights: Universality and Diversity*, 2001, p. 352. This mechanism is used in the 1966 International Covenant on Economic, Social and Civil Rights as well as in the 1989 United Nations Convention on the Rights of the Child.

95 See the General Comment of the Committee on Economic, Social and Cultural Rights 3, § 9, UN. Doc. E/C.12/1997/8.

96 Brems, *supra* note 94, pp. 353 *et seq.*

97 Brems, *supra* note 94, pp. 352 *et seq.*

rely on a strong reporting mechanism, for example individual communications, in order to unfold its effect.

6.3. Authoritative interpretation

Authoritative interpretation could be one way to ensure there are clear standards in the climate regime. In the international human rights regime, the ICCPR Human Rights Committee and the Committee on Economic, Social and Cultural Rights often issue general comments on the interpretation of the respective human rights covenants. Although the legal basis for these comments is formally rather weak,⁹⁸ they have subsequently acquired the status of authoritative interpretations of the covenants. While states are still free to have dissenting opinions and to act upon them, they must publicly voice these opinions and offer an alternative interpretation and argumentation, thereby ensuring that it is open for public and scientific scrutiny.

The committee's interpretation exhibits a degree of separation and independence from individual states.⁹⁹ Comments may be concerned with the interpretation of specific rights or with more general ones. They serve to prevent conflicts and evolve with changing times and priorities. Importantly, they provide a clarification of state duties where legal¹⁰⁰ or practical reasons¹⁰¹ present obstacles to acquiring a clarification by a court. They have been crucial in providing a comprehensive understanding of the correct and exact scope of the obligations of states.

The authoritative interpretation of human rights law by an independent committee has strengthened human rights by creating stronger international standards and greater harmonisation. It serves to impact upon state politics and policies because international norms and processes of interpretation influence the national system.¹⁰² In the climate regime an authoritative interpretation could have the same role. It could create more coherent expectations between states, between states and non-state actors and clarify ambiguous language.

There is extensive ambiguous language in the climate regime and questions on the extent of certain duties are an ongoing issue at the Conferences of the Parties. Indeed, one commentator¹⁰³ has stated that the Climate Convention presents an agreement concerning ambiguous language rather than one of substance. During negotiations contentious issues have often been referred to different settings and later times. Thus, a clarifying instrument such as authoritative interpretation would be highly valuable.

In general, it is the vaguest of provisions in the climate regime that have the most relevance to social and human concerns. Emission reduction targets are formulated very clearly and the flexible mechanisms have been fully designed and have evolved into a carbon market which is far greater than ever expected. However, common but differentiated responsibilities, and the articles operationalising this principle, give rise to ongoing and unresolved issues that will only become increasingly contentious. As China and India continue to develop and emit at higher levels compared to many Annex I parties,¹⁰⁴ their status as developing countries will become subject to greater discussion. There is great uncertainty as to the precise rights and duties

98 P. Alston, 'The Historical Origin of the Concept of General Comments', in: H. Steiner *et al.*, *Human Rights in Context*, 2008, p. 873.

99 This is because the ICCPR Committee consists of members who are, by virtue of Art. 28(3) of the 1966 ICCPR, 'elected and shall serve in their personal capacity'. This is taken to mean that the members will act independently of their state government (Steiner *et al.*, *supra* note 80, p. 846).

100 For example, reasons for standing.

101 For example, the cost of litigation.

102 E. Pan, 'Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes', 1997 *Harvard Journal of International Law*, pp. 503-535.

103 See J. Pulvenis, 'The Framework Convention on Climate Change', in: L. Campiglio (ed.), *The Environment after Rio*, 1994, pp. 71-110.

104 Annex I to the UNFCCC, Annex I parties are developed country parties and countries in transition.

stemming from the principle of common but differentiated responsibilities. Authoritative interpretation would be valuable here because it brings about flexibility in dealing with the scope of uncertain concepts. It allows a body to modify the agreement to new circumstances as and when they arise.

The treatment of technology transfer in the Climate Change Convention is an example of an area that could benefit from authoritative interpretation. The provisions on technology transfer¹⁰⁵ are rather vague and it is difficult to pin down the precise duties and obligations enshrined therein.¹⁰⁶ Technology transfer is, however, an ongoing issue.¹⁰⁷ Its relevance for the climate regime has not only been recognised in the UNFCCC, it has also been reiterated in the IPCC reports.¹⁰⁸ There have been recurring attempts by the CoP to resolve this issue. Nevertheless, to date no agreement has been possible. The CoP decisions of CoP 4 to 7 provided some hope, although the issue is far from resolved and is now very much a reason for conflicts.¹⁰⁹ This was one of the most contentious issues in Bali¹¹⁰ and clearly when an international body clarifies the content and intent of this article it could serve to advance the discussion.

The importance of an independent body interpreting this convention is constituted by the fact that there is a necessity for an actor which has the goal of fulfilling the convention as its objective, rather than state interests. This would serve to enhance the legitimacy and acceptance of the convention. It should have the expertise to aid clarification and facilitate negotiation on contentious issues. Within the climate regime, the body now most appropriate to fulfil this role is the CoP, which has the status of being the ‘supreme body of the Convention’.¹¹¹ However, the size and overfull agenda of the CoP, as well as its nature of being a political body, might hinder its ability to do so. It is suggested here that the compliance committee could be reformed to fill this role. It could be invested with the power of giving and publishing comments on the interpretation of the whole Convention and its protocols. The necessary characteristics would be that the committee remains of limited size to ensure effectiveness and has the geographic and topical representation to ensure legitimacy, as well as enough independence from nation states so that it is not viewed as political. As authoritative interpretation could be inspired by state reports, this would have great practical relevance.

6.4. Instruments for the national level

The discussion so far has focused on international instruments. However, the national legal system is crucial in implementing human values. It is individual action which will determine the success of combating climate change. This is reflected in the Kyoto Protocol calling for national measures.¹¹² If there is to be an integration of human and social considerations at the international level, this should be mirrored at the national level to give effective implementation and consistency in climate action. This will account for the reality that international mechanisms are

105 Mainly Art. 4(5) and 4(7) UNFCCC.

106 For an attempt see F. Bloch, *Technologietransfer zum Internationalen Umweltschutz: Eine völkerrechtliche Untersuchung unter besonderer Berücksichtigung des Schutzes der Ozonschicht und des Weltklimas*, 2006.

107 Mensah attributes this to its relevance in the North-South dialogue (C. Mensah, ‘The Role of Developing Countries’, in: L. Campiglio *et al.* (eds.), *The Environment after Rio*, 1994, p. 46).

108 S. Trindade *et al.*, ‘Managing Technological Change in Support of the Climate Change Convention: A Framework for Decisionmaking’, in: B. Metz *et al.* (eds), *Methodological and Technological Issues in Technology Transfer: A Special Report of IPCC Working Group III*, 2000, pp. 45-66.

109 See for example, Decision 5/CP.12, FCCC/CP/2006/5 /Add.1.

110 Personal Communication with Rebecca Harms, MEP and a Member of the European Parliament Delegation to CoP 13.

111 Art. 7(2) UNFCCC.

112 Art. 10 UNFCCC.

intrinsically linked to national policies and their effectiveness.¹¹³ Continuing to examine the potential for human rights instruments for the climate regime, a tool at the national level – the UK Human Rights Act (HRA) – provides an interesting example of a possible integration mechanism at the national level.

The ECHR is integrated and given domestic effect in the UK through the Human Rights Act 1998 (HRA). The act is widely recognised as an innovative development in legal thinking, and has been hailed as ‘imaginative and in a sense *revolutionary*.’¹¹⁴ The underlying principle is that human rights are integrated into all United Kingdom law and policy, raising awareness and beginning a new culture in the development of the morals and values reflected in the HRA.¹¹⁵ The act and the mechanisms deriving therefrom have since resulted in greater scrutiny and an enhanced recognition and understanding of human rights.¹¹⁶

The mechanism operates through the courts, ministers and public authorities ensuring that their actions are compatible with convention rights. All courts are under an obligation to interpret legislation and administrative acts in a manner which is compatible with convention rights,¹¹⁷ and where legislation is incompatible, judges are empowered to declare that the legislation is indeed incompatible. Where there is a declaration of incompatibility by a higher court there is a unique fast-track procedure that enables Government ministers to immediately change the law. Courts have an interpretative duty to take account of ECHR jurisprudence,¹¹⁸ ensuring that the UK is consistent with European human rights progress. There are also requirements for legislation. Before enacting a law, all proposals must be analysed for their effects on human rights. Consequently, when a bill is presented before Parliament, the second reading requires the Minister proposing the bill to make a ‘declaration of compatibility’. This adds a structured and systematic process, identifying interactions and potential future conflicts. The cumulative effect of these provisions is to build an infrastructure that incorporates human rights into all law and policy.

An examination of the mechanisms and infrastructure that translate the ECHR into UK law raises an interesting potential for improving the climate regime. The mechanisms for doing so could be largely the same, requiring the compatibility of legislation and administrative acts with national, European or even global climate targets. It illustrates a creative approach for the integration of climate sensitivity into the existing national order, giving effect to internationally agreed principles. The UK Human Rights Act recognises both the importance of interconnections between policy fields and the inclusion of human rights in the system, as well as the importance of the values and morals conveyed in the ECHR. It is crucial that there is integrated comprehensive climate action that recognises the significance of social considerations and human values in every aspect of life.

Two comments may be offered on the relevance of the HRA for the climate regime. First, reflecting morals and values in the climate regime means practically giving climate change a high procedural status. Second, this can be achieved through structural mechanisms that create an institutionalisation and integration in climate policies. By introducing a systematic and structured analytical process that considers climate implications for national legal systems, human considerations will be accounted for. Furthermore, the parallel organisational structure and the wide integration of climate change and human values into all policies will also lead to an

113 M. Faure *et al.*, *Climate Change and the Kyoto Protocol: the role of institutions and instruments to control global change*, 2003, p. 23.

114 D. McGoldrick, *The United Kingdom's Human Rights Act 1998 in Theory and Practice*, 2001, p. 901, (emphasis in original text).

115 Hansard HL Official Report (5th series) vol. 582 col. 1228 (3 Nov 1997), White Paper *Bringing Rights Home*.

116 D. Feldmann, ‘The Impact of Human Rights on the UK Legislative Process’, 2004 *Statute Law Review*, pp. 91-115.

117 Art. 3 Human Rights Act 1998.

118 Art. 2 Human Rights Act 1998.

increased integration of the two fields, leading to a situation in which synergies can more effectively be explored.

7. Conclusion

This article has offered an approach concerning the way forward for the development of the climate regime by way of accommodating human values therein. The instruments and mechanisms discussed will enrich the climate regime, translating human values into institutional terms. This will allow for a more systematic, structured and coherent approach to integrating human values. It will also serve to prevent future tensions and conflicts.

Human rights mechanisms have been criticised and their effectiveness doubted.¹¹⁹ In spite of these criticisms, the human rights regime has fundamentally changed and enhanced the international legal order. Furthermore, any attempt to measure the overall effectiveness of the regime is very difficult and remains rather academic. Thus, while not all climate problems will be solved through incorporating the proposed mechanisms into the regime, a significant improvement can be expected. Furthermore, the presented instruments will be complementary to each other and will thus likely reveal significant synergy effects.

Climate change is the defining issue of this century and requires strategic comprehensive action. This proposal offers an infrastructure to attain this. As the human consequences of climate change become more apparent, proactive approaches such as this will be invaluable. The approach advanced in this article offers an interesting basis for the discussion on the post-Kyoto regime.

The approach is still far from being a fully-fledged proposal. Many more issues have to be debated in terms of determining the details of the approach as well as linking it to other discussions. Further research is required, for example on the interdependencies of principles and procedures, and synergies with the inclusion of administrative procedures should be explored.

¹¹⁹ See for example C. Heyns *et al.*, *The Impact of United Nations Human Rights Treaties on the Domestic Level*, 2002.