

PRIVATE SECTOR RESPONSIBILITIES FOR CLIMATE CHANGE  
IMPACTS ON HUMAN RIGHTS

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İSTANBUL BİLGİ ÜNİVERSİTESİ  
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İKLİM DEĞİŞİKLİĞİNİN İNSAN HAKLARINA ETKİSİ KONUSUNDA  
ÖZEL SEKTÖRÜN SORUMLULUĞU

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## ÖZET

İklim değışikliđi, günümüzde dünyanın karşı karşıya bulunduđu en ciddi çevre sorunlardan biri ve yaşam hakkı, sađlı hakkı ve gıda hakkı ve suya erişim gibi birçok haktan faydalanılmasını etkileyebilir. İklim değışikliđinin insan hakları üzerindeki belirgin etkisine rağmen, iklim rejimi konuya karbon azalımı ve adaptasyonu açısından yaklaşarak konunun insani boyutu ihmal etmektedir. Oysa ki, iklim değışikliđini insan hakları perspektifinden düşünmek bir zorunluluktur ve etkileri göz önüne alındığında da aciliyettir. Bilimsel kanıtlara göre % 90'a kadar iklim değışikliđinin insan faaliyetleri tarafından ortaya çıktığını kanıtlamıştır. Devletler iklim müzakerelerinin ana aktörleri olabilirler, ancak tek katkıda bulunan değildirler. Sorumlu tarafları belirleme konusunda ki zorluk bir yana, özel sektörün ve özellikle uluslararası firmaların gözden kaçırılmayacağı rolü bulunmaktadır. Bu bağlamda, bu çalışma, özel sektör faaliyetlerinin iklim değışikliđi etkilerinin azaltılması ve önlenmesi hususlarında uyumlaştırılması için insan hakları çerçevesinin bir fırsat sunabileceđini savunmaktadır. Bu yaklaşımla, kurumsal raporlama ve dış denetim gibi kurumsal sorumluluk araçlarının potansiyel rolü ve insan hakları perspektifinin devlet yaptırım mekanizmalarını, sivil toplum baskısını, bağlayıcı olmayan hukuk mekanizmalarını ve insan hakları yargı sürecini nasıl harekete geçirebileceđi konuları tamamlayıcı bir yaklaşımla ele alınacaktır.

## ABSTRACT

The climate change is the most serious environmental problem facing the globe and it will affect broad range of rights such as right to life, right to health and right to food and access to water. Despite its obvious implications, climate change regime often approaches the issue from carbon mitigation and adaptation standpoint where human dimension is neglected. Thinking about climate change from a human rights perspective is a necessity and considering the impacts it is also urgency. With the accumulated scientific evidence, it is certain that up to 90% climate change has been driven by human activities. States might be the main actors of the climate negotiations however they are not the sole contributors. Despite the challenge to point out responsible parties, private sector particularly transnational companies have a role that one cannot afford to overlook. In this context, this study argues that human rights framework could propose an opportunity for better alignment of corporate activities with the reduction and prevention of climate impacts. With this approach, the potential role that the corporate responsibility tools such as corporate reporting and external monitoring will be discussed with a complementary approach on how human rights perspective could motive the private sector action by focusing on state enforcement mechanisms, civil society pressure, with soft law measures and human rights judicial process.

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## ABBREVIATIONS

ACHPR	: African Charter on Human and Peoples' Rights
ACHR	: American Convention on Human Rights
Arab CHR	: Arab Charter on Human Rights
CCI	: Caring for Climate Initiative
CDM	: Clean Development Mechanism
CDP	: Carbon Disclosure Project
CIEL	: Center for International Environmental Law
COP	: Conference of Parties
CSR	: Corporate Social Responsibility
ECHR	: European Convention on Human Rights
ECtHR	: European Court of Human Rights
EP	: Equator Principles
ESG	: Economic Social and Governance
EU	: European Union
GHG	: Green House Gasses
GRI	: Global Reporting Initiative
HRC	: United Nations Human Rights Council
IACHR	: Inter-American Court of Human Rights
IBA	: International Bar Association
ICCPR	: International Covenant for Civil and Political Rights
ICESCR	: International Covenant on Economic, Social and Cultural Rights
ICJ	: International Court of Justice
IFC	: International Finance Corporation
ILO	: International Labour Organization
IPCC	: Intergovernmental Panel for Climate Change
ISO	: International Standard Organization
NCP	: National Contact Point
NGO	: Nongovernmental Organizations
OECD	: Organization for Economic Cooperation and Development
OHCHR	: Office of the High Commissioner of the Human Rights
PRI	: Principles of Responsible Investment
REDD	: Reducing Emissions from Deforestation and Forest Degradation
UDHR	: Universal Declaration of Human Rights
UN	: United Nations
UNCTC	: United Nations Commission on Transnational Companies
UNEP	: United Nations Environment Programme
UNFCCC	: United Nations Framework Convention on Climate Change
UNGC	: United Nations Global Compact
UNGP	: United Nations Guiding Principles
TNC	: Transnational Companies
WB	: World Bank
WRI	: World Resources Institute

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## I. Introduction

“This we know, the Earth does not belong to man; man belongs to the Earth. This we know, all things are connected, like the blood, which unites one family. Whatever befalls the Earth befalls the sons of the Earth. Man did not weave the thread of life; he is merely a strand in it. Whatever he does to the web he does to himself.”<sup>1</sup>

“Clearly there is going to be an impact. We have spent our entire existence adapting. We’ll adapt.”  
Rex Tillerson<sup>2</sup>

A healthy environment is a vital precondition for human existence. The natural environment allows human beings to create shelter, to receive food and economic resources. The human dependence on the environment is indisputable, but the relationship between human beings and environment might be one of the most controversial one. Until the end of '60s the strong ambition for development often shadowed the environmental impacts of the human-made pollution. Not all societies have a special relation with the nature as indigenous communities have, who are deeply connected to the land for their survival. The more the population is urbanized, the less the connection with environment becomes visible. As for today, the climate change might be the most serious environment problem facing the globe, although there is a misconception as if it would never threaten human life, exemplified in the common image of a lone polar bear drifting in the Arctic Sea. In this respect, Rex Tillerson might indeed be right; with the qualification some may have the chance and opportunities to adapt but certainly not all.

In fact, as it was constantly repeated during Paris Climate Change negotiations, “We are the first generations to feel the impact of the climate change and last generation that will be able to do anything about it.”<sup>3</sup> The climate change would have global impacts, thus no one would be immune. However, not all of us will be affected in the same way. There is a ‘triple inequality’ in terms of

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<sup>1</sup> Letter from Chief Seattle to President Franklin Pierce (1855) cited by Fatma Zohra Ksentini in UNEP’s New Way Forward: Environmental Law and Sustainable Development, ed. Lin Sun, Lal Kurukulasuriya, Nairobi, 1995, p.96.

<sup>2</sup> Reuters, Exxon Mobil CEO, ‘Exxon CEO calls climate change engineering problem’, 27 June 2012, available at <http://www.reuters.com/article/us-exxon-climate-idUSBRE85Q1C820120627> (accessed 10.12.2016).

<sup>3</sup> Climate Group, ‘We are the first generation to feel the effects of climate change and last that can do anything about it: Rising Seas Summit’, 6 October 2014, available from <https://www.theclimategroup.org/news/were-first-generation-feel-effects-climate-change-and-last-can-do-anything-about-it-rising-seas> (accessed 10.12.2016).

responsibility for creating climate change, the vulnerability to its impacts and higher relative cost faced by developing world for adapting.<sup>4</sup> That is why the term of ‘climate justice’<sup>5</sup> has been introduced to the debate, because the climate change is both an ethical and a political issue, which will eventually be related to the concept of justice. Notwithstanding, the challenge remains to pinpoint one responsible for the crisis. As Naomi Oreskes illustrates,

“Imagine a gigantic banquet. Hundreds of millions of people come to eat. They eat and drink to their hearts’ content—eating food that is better and more abundant than at the finest tables in ancient Athens or Rome, or even in the palaces of medieval Europe. Then, one day, a man arrives, wearing a white dinner jacket. He says he is holding the bill. Not surprisingly, the diners are in shock. Some begin to deny that this is their bill. Others deny that there even is a bill. Still others deny that they partook of the meal. One diner suggests that the man is not really a waiter, but is only trying to get attention for himself or to raise money for his own projects. Finally, the group concludes that if they simply ignore the waiter, he will go away. This is where we stand today on the subject of global warming. For the past 150 years, industrial civilization has been dining on the energy stored in fossil fuels, and the bill has come due. Yet, we have sat around the dinner table denying that it is our bill, and doubting the credibility of the man who delivered it.”<sup>6</sup>

Needlessly to say, the major actors who have contested the bill were also the ones who have contributed the most to climate change. Furthermore, states are not the only contributors to the climate change but there are also transnational companies. Indeed, fossil industry is the major contributor to climate change. That might be one of the reasons why the economic aspect of the issue is always on the top list of negotiations concerning who is going to pay for the adaptation measures, which industries are going to mitigate greenhouse gas (GHG) emissions, how the carbon market will be managed... Thus the climate change has often been considered from a solely economic standpoint with the consequence that the human rights dimension has often been neglected.

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<sup>4</sup> Timmons Roberts, Bradley Parks, *A Climate of Injustice: Global Inequality North-South Politics and Climate Policy*, Cambridge, MIT Press, 2007, cited by Simon Nicholson, Daniel Chong, ‘*Jumping on the human rights bandwagon: How rights-based linkages can refocus climate politics*’, *Global Environmental Politics*, Vol.11: 3, August 2011, p. 128.

<sup>5</sup> There are different definitions for climate justice however majority of them refers to themes; human rights, equality and right of indigenous people. Environmental Justice and Climate Change Initiative define the term as “a vision to dissolve and alleviate the unequal burdens created by climate change”. The term is mostly explained based on John Rawls’ Law of Peoples theory, on the other hand there is still an ongoing debate on utilitarian approach and non-utilitarian approach. While this study will not go in deep analysis of the concept, it will be more in line with Rawls Principles. For further reading; John Rawls, *The Law of People*, Cambridge, Harvard University Press, 1999; Eric Posner, David Weisbach, *Climate Change Justice*, Princeton, Princeton University Press, 2010.

<sup>6</sup> Naomi Oreskes, Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*, New York, Bloomsbury Press, p. 266.

With the accumulated scientific evidences, it might seem simple to connect human rights with climate change; however, in the international arena obtaining recognition of the environment as a precondition to human rights has been a challenging process. For this reason, in the second chapter, I will first analyze the relation between environment and human rights within the interplay between the UN human rights and environment agencies. Following that, I will use this relation as a legal basis in looking at the climate change impacts on human rights. One might question the advantages to be gained from tackling climate change with a human rights perspective. Indeed, the interconnection between climate change and human rights is deep and often complex. Despite the fact that climate change impacts will be more visible in the future, it has already started to affect the enjoyment of a broad range of rights such as the right to life, the right to health, the right of access to water, food and adequate housing. On the other hand, without considering its global nature, climate change efforts are usually evaluated in terms of commitments within national boundaries. With a nation-state oriented approach, we eventually turn a blind eye to global inequalities with regard to climate change impacts. States are not the only contributors to climate change. Furthermore, a small island in Pacific such as Timor Este could still face serious damages, even disappear, even if it were to fulfill all mitigation and adaptation' commitments. In the global context, human rights framework could remind us the necessity for a global action and cooperation. Human rights regime could also be helpful to coordinate diverse efforts and setting up a universally accepted language for the matter, not only for states but also for non-state actors such as transnational companies. As Romina Picolotti points out,

“Thinking about climate change from a human rights perspective is not only a fundamental necessity in terms of guiding our international development policy framework, but also offers us an invaluable opportunity to reappraise the most pressing needs of a highly inequitable global society”<sup>7</sup>

Thus looking at climate change through a human rights lens might allow states to discuss equality beyond their borders, and at least shift the discussion from nation-state limitations and might facilitate the involvement of transnational corporations into the debate. In this study, it is argued that using human rights framework could

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<sup>7</sup> International Council on Human Rights Policy (ICHRP), *Climate Change and Human Rights: A Rough Guide*, 2008, foreword by Romina Picolotti, p. v.

not only promote international cooperation for tackling global nature of the climate change impacts, but also assist in the enforcement of state obligations with respect to recognized human rights –insofar these rights will eventually be affected by climate change—through the existing human rights mechanism.

While, it is impossible to undermine the states' obligation within the framework of human rights and climate change regime, the main focus of this study is not the role of the states but transnational companies. In this study I argue that one of the reasons for the contested inefficiency of the climate regime lies in the lack of commitment from private sector. As it has been already mentioned, not only states but also transnational companies have serious contribution to climate change. Since it is not easy to assign responsibility to corporate world even in the case of human rights violations, the main question could be why and how we would engage with private sector on climate change impacts within the framework of human rights. The first reason to include the private sector in the debate is related to their partial responsibility for climate change. Considering their contribution, transnational companies have a role that one cannot afford to overlook. Secondly, engaging with private sector is a need for at least diminishing the impact of the climate change on humans' lives. Granting that the debate on human rights and climate change could become more complex with the involvement of the private sector, a closer engagement from the business side is still crucially needed. In 2014, the International Bar Association (IBA) published a report where it put an emphasis on the “increasing international recognition of corporate responsibility for human rights harms stemming from climate change” and recommended four solid steps, namely, implementing UN Guiding Principles, reporting, corporate regulation and sector specific initiatives.<sup>8</sup> Even though, there are criticisms due to the philanthropic nature of the corporate social responsibility and lack of enforcement in soft law mechanisms, in this study, I argue that existing soft law mechanism in human rights regime with respect to private sector could also cover climate impacts. They could also provide a complementary approach to state efforts to tackle climate change impacts. Hence, in the third chapter of this study, I will first examine the responsibilities of the transnational companies in the

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<sup>8</sup> IBA, Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption*, London, July, 2014.

framework of human rights regime, and then I will discuss whether these responsibilities could also be applicable for climate change impacts. This approach might be criticized as being over optimistic, considering the fact that soft law mechanisms are legally non-binding instruments for transnational companies. From a legal perspective, these critics might have a valid point, however the main focus of this study is not creating a liability discourse for transnational companies within the framework of human rights. Instead, it aims to discuss the opportunities that a human rights framework could propose for better alignment of corporate activities with the reduction and prevention of climate impacts. With this approach, I will discuss corporate social responsibility tools such as corporate reporting and external monitoring and how these tools could be used to monitor climate related impact. In the final section, I will summarize how human rights approach could motivate private sector action bearing on climate change by focusing on state enforcement mechanism, civil society pressure, with soft law mechanisms and human rights judicial processes.

## II. Human Rights Approach to Climate Change

“If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.”  
Rachel Carson<sup>9</sup>

Climate change is one of the major environmental problems facing the globe and it has drastic impacts on economy, health, safety, food production, security and many other dimensions of human life. Today, while climate change is one of the main causes of natural disasters such as droughts and hurricanes; it could not be defined solely as an environmental phenomenon due to the great scope of its impacts. The major difference between climate change and natural disasters is that, despite the challenges to point out the responsible parties, it is certain that up to 90% of climate change has been driven by human activities.<sup>10</sup> The climate change is seriously threatening the enjoyment of human rights such as the right to life, right to health, right to water and many others. It is however not

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<sup>9</sup> Rachel Carson, *Silent Spring*, 40th Anniversary Edition, Mariner Book, Ed. 2002, p. 12.

<sup>10</sup> IPCC, *Climate Change 2013, Summary for Policymakers*, p. 17, available at <[http://www.climatechange2013.org/images/report/WG1AR5\\_SPM\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf)> (accessed 10.12.2016).

always easy to establish a direct connection between climate change and human rights. The linkage is rather based on the interdependence between human rights and the environment. A healthy environment is a precondition for the enjoyment of most of the human rights. From this perspective, this chapter will firstly discuss the various regional and international attempts to determine status of the environment with respect to its relation with human rights. To this end, I will firstly analyze the efforts to incorporate environment as a distinct human right in the context of the interplay between the UN human rights and environmental agencies. Since regional human rights mechanisms also occupy an influential role in the interpretation of the environment as a vital part of the enjoyment of human rights, the second part will be focusing on regional developments towards the recognition of the right to environment and the related case-law. Here I argue that a rights-based approach could provide the basis to link climate change with human rights through a consideration of environmental impacts. After an analysis of the role of the environment in a human rights framework, the relationship between climate change and human rights will be analyzed in a separate section. It bears noting that, although the linkage seems self-evident, it was only by virtue of the legal and political efforts of the vulnerable populations as well as the civil society organizations that climate change was recognized as a major threat to the enjoyment of human rights in the UN human rights and environmental agencies. Following these analyses I will have a closer look at the impact of the climate change on the recognized human rights, explore the legal basis of the states' responsibility with respect to environmental harm and human rights, and finally try to answer the question whether the human rights obligations of states could be interpreted to cover environmental damage resulting from climate change.

#### **A. Historical and Legal Background of the Relation between Environment and Human Rights**

##### **1. Environmental rights or right to the environment**

Today, the impacts of environmental factors on our ability to enjoy fundamental human rights seem obvious. While this is partly because some of the rights such as the adequate standard of living and/or the right of health depend to a certain extent on environmental quality, it is also because increasing environmental degradation and pollution have become threatening for a wide

range of human rights starting from the 20<sup>th</sup> century. Particularly, between 1950-1960, when aerosol pollution became a widespread problem in many cities, environmental issues such as the greenhouse effect and acid rains were able to find themselves a place in the international agenda. The same period also saw the publication of Rachel Carson's inspirational book titled *Silent Spring* (1962), which was uniquely influential in proving and bringing home the man-made pollution impacts to the nature.<sup>11</sup> Today, publication of this book is widely accepted as a starting point of the environmental movement.<sup>12</sup> Historically speaking, while the human rights were for a long time firmly established as an international concern, environmental protection as well as the impacts of environmental degradation impacts on human rights might be considered as a relatively new item in the international agenda.<sup>13</sup> According to Richard Boyd,

“Human rights trace their roots to specific historical wrongs; society's awareness of the magnitude, pace and adverse consequences of environmental degradation was not sufficiently advanced during the era when these agreements were drafted.”<sup>14</sup>

Human rights had been adopted long before the environmental concerns; therefore international human rights treaties are silent about the environment. For instance, The Universal Declaration of Human Rights (UDHR) that is the origin of the current international human rights treaty regime does not refer to environmental rights even remotely.

It is starting from the '70's that a growing recognition of the necessity of environmental protection in a human rights law context can be observed. Through an examination of this history, one could argue that the legal treatment of the

<sup>11</sup> After the publication of the book, there were series of ecological disasters such as pollution of Lake Erie and Cuyahoga River, see Gina di Tommaso, 'Key environmental issues in 1970', Global Footprint Network: Advancing the Science of Sustainability, available at <[http://www.footprintnetwork.org/es/index.php/newsletter/det/the\\_rise\\_of\\_earth\\_day\\_key\\_environmental\\_issues\\_in\\_1970](http://www.footprintnetwork.org/es/index.php/newsletter/det/the_rise_of_earth_day_key_environmental_issues_in_1970)> (accessed 10.12.2016).

<sup>12</sup> The legacy of Rachel Carson, Silent Spring Institute, available at <<http://www.silentspring.org/legacy-rachel-carson>> (accessed 10.12.2016); Rachel Carson's official web-site, available from <<http://www.rachelcarson.org/SilentSpring.aspx>> (accessed 10.12.2016); Eliza Griswold, 'How Silent Spring ignited the environmental movement', 21 September 2012, New York Times, available at <[http://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html?\\_r=0](http://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html?_r=0)> (accessed 10.12.2016); Mark Stoll, 'Legacy of Rachel Carson's Silent Spring', 2012, Environment and Society Portal, available at <<http://www.environmentandsociety.org/exhibitions/silent-spring/legacy-rachel-carsons-silent-spring>> (accessed 10.12.2016).

<sup>13</sup> Dinah Shelton, 'Whiplash and Backlash-Reflections on a Human Rights Approach to Environmental Protection', Santa Clara Journal of International Law, V.11, 2015, p.12.

<sup>14</sup> Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and Environment*, UBC Press, 2012, p.12.

notion of rights related to environment can be differentiated into three approaches, each bringing into play a different degree of directness:<sup>15</sup> the first approach is essentially anthropocentric and focuses on the quality of the environment as a precondition to the enjoyment of human rights such as the rights of adequate standard of living, health and life. This approach is often defined as the ‘greening of the human rights’ to mark its difference from defining a new sets of rights to environment. The second approach focuses on the procedural aspect of the link between human rights and environment by examining the questions of access to information as well as participation in the decisions on environment and/or environmental protection. In the third approach the right to a quality environment is considered as an independent substantive human right.<sup>16</sup> I will discuss these three approaches and their historical developments as a basis for establishing the connection between human rights and environment, which will in turn allow us to carry the debate into the current climate change context.<sup>17</sup>

a. United Nations perspective

Due to raising concerns about environmental pollution, on 5 June 1972, the United Nations Conference on the Human Environment met in Stockholm to reach

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<sup>15</sup> Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment*, Santa Clara Journal of International Law, 1991-1992, p.105; Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, Fordham Environmental Law Review, Vol. XVIII, 2007, p.472; Rebecca Bratspies, *Do We Need a Human Rights to a Healthy Environment*, Santa Clara Journal of International Law, 2015, p. 36.

<sup>16</sup> In the third approach, right to the environment does not simply defined by its utility to humans but through its unique natural value. In 2008, Ecuadorian Constitution included a chapter for Rights for Nature; which recognizes that nature has the right to exist, persist, maintain and regenerate its vital cycles. See Rights of Nature Articles in Ecuador’s Constitution, available at <<http://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuador-Constitution.pdf>> (accessed 10.12.2016). In 2010, World People’s Conference on Climate Change prepared a Universal Declaration of Rights of Mother Earth in Bolivia, available at, <<http://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf>> (accessed on 10.12.2016). In 2012, New Zealand gave a legal status Whanganui River. See Whanganui Iwi and the Crown, 5 August 2014, available at <<http://nz01.terabyte.co.nz/ots/DocumentLibrary/140805RurukuWhakatupuaTeManaOTelwiOWhanganui.pdf>> (accessed 10.12.2016). This approach has been criticized for being radical; however the supporters claim that it is not different than giving legal status to corporations. For final comment see R. Bratspies, *Do We Need a Human Rights to a Healthy Environment*, p.39.

<sup>17</sup> In terms of environmental laws while scholars like Shelton classify the approaches in three different ways. Special Rapporteur John Knox has categorized them under two approach: “adoption of an explicit new right to an environment and heightened attention to the relationship to the environment of already recognized rights which is often defined as greening the human rights.” Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Preliminary Report*, A/HRC/22/43 (24 December 2012), para.11-17, available at undocs.org/A/HRC/22/43.

a common outlook and seek to establish guidelines for the preservation and enhancement of the human environment.<sup>18</sup> As a result of the Conference, the Stockholm Declaration was adopted and became the first international instrument, which connects the human rights with environment. In its preamble it states that “both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [including] the right to life itself.”<sup>19</sup> Furthermore, the right to a quality environment was declared in the first principle as follows:

“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>20</sup>

Although it formally recognized a quality environment as a precondition for the enjoyment of fundamental rights, the Declaration was not legally binding. The Declaration led to the creation of the United Nations Environment Programme (UNEP), dedicated to tackling environmental problems.<sup>21</sup> After the establishment of the UNEP, a number of issues such as transboundary harm, ozone layer depletion and maritime pollution were approached through environmental law and regulated by international environmental conventions within the framework of UNEP, while the impacts of these issues on human rights were largely managed through national legislations.<sup>22</sup>

<sup>18</sup> UNEP, Declaration of the United Nations Conference on the Human Environment, June 1972 available at <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97>> (accessed 10.12.2016).

<sup>19</sup> UNEP, ‘Stockholm Declaration’, June 1972, available at <<http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>> (accessed 10.12.2016)

<sup>20</sup> Stockholm Declaration, Principle 1.

<sup>21</sup> UNEP, Declaration of the United Nations Conference on the Human Environment, XXV11 Institutional and Financial Arrangements for International Environmental Co-operation, June 1972, available at <<http://www.unep.org/Documents.Multilingual/default.asp?DocumentID=97&ArticleID=1493&l=en>> (accessed 13.12.2016).

<sup>22</sup> *Vienna Convention for the Protection of Ozone Layer*, Vienna, 22 March 1985, United Nations Treaty Series, Vol. 1513, No. 26164, p. 324, available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201513/volume-1513-I-26164-English.pdf>> (accessed 11.12.2016); *Montreal Protocol on Substances that Deplete the Ozone Layer*, Montreal, 16 September 1987, United Nations Treaty Series, Vol. 1522, No. 26369, p. 29, available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf>> (accessed 11.12.2016); *Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal*, Basel, 22 March 1989, United Nations Treaty Series, Vol. 1673, p. 57, available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXVII3&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII3&chapter=27&clang=en)> (accessed 11.12.2016). Following Stockholm Declaration, a number of regional human rights conventions and national constitutions also included the right to

After the Stockholm Declaration, despite the evidence of overlapping issues between environment and human rights, the dialog between human rights and environmental bodies was limited until the beginning of the '90's. The efforts to come to grips with environmental issues were undertaken separately.<sup>23</sup> Special bodies were established to conduct scientific studies on the effects of human pollution on the atmosphere. Correlatively, the environmental problems were exclusively considered from the standpoint of pollution.<sup>24</sup>

As to the involvement of human rights bodies, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Fatma Zohra Ksentini to prepare a report on the environment and its relation with human rights in 1989.<sup>25</sup> Between 1990-1992, Ksentini submitted a preliminary and a progress report which focused on the universal awareness of the scale and complexity of environmental problems along with the effects of environmental deterioration on the enjoyment of human rights.<sup>26</sup> In 1994, Fatma Zohra Ksentini presented her final report.<sup>27</sup> The report was an extensive study on the specific relationship between human rights and environment and it was composed of six chapters devoted to the legal foundations of the right to the environment, the right to development and environment, the impacts of the environment on vulnerable

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healthy/quality environment into their legislation however this development will be further discussed under regional perspective section.

<sup>23</sup> The first attempt to deal with environmental and human rights link starts with the appointment of Fatma Ksentini however Sub-Commission has already dealt with movement and dumping of toxic wastes in Resolution 1988/26, September 1988.

<sup>24</sup> For instance, in 1988, World Meteorological Organization and the UNEP founded International Panel on Climate Change (IPCC) to provide regular assessments of the scientific basis of the climate change. The initial task was "to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economical information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation." In 1990, the first assessment of IPCC brought up serious evidence on the threats of the climate change and underlined the need for an international cooperation. UN General Assembly Resolution 43/53, '*Protection of global climate for present and future generations of mankind*', A/RES/43/53(6 December 1988), available at <http://undocs.org/A/RES/43/53>.

<sup>25</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Decision 1989/108, E/CN.4/1989/86 (10 March 1989).

<sup>26</sup> Economic and Social Council, Review of Further Developments in Fields with which the Sub-Commission has been concerned Human Rights and the Environment, Preliminary Report by Mrs. Fatma Zohra Ksentini, E/CN.4/Sub.2/1991/8 (1991) available at <http://undocs.org/E/CN.4/SUB.2/1991/8>; Second Progress Report, E/CN.4/Sub.2/1992/7 (02 July 1992) available at <http://undocs.org/E/CN.4/SUB.2/1992/7>.

<sup>27</sup> Economic and Social Council, Review of Further Developments in Fields with which the Sub-Commission has been concerned Human Rights and the Environment: Final Report prepared by Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9 (06 July 1994) available at <http://undocs.org/E/CN.4/SUB.2/1994/9>.

groups and finally recommendations.<sup>28</sup> A considerable part of the study was dedicated to indigenous and vulnerable groups. Furthermore, climate change impacts were also discussed under a separate heading.<sup>29</sup> It is important to note that since the Stockholm Declaration, none of the policy documents had approached the environment from a direct human rights standpoint. The environment was never defined as a precondition to the enjoyment of human rights and recognized as a distinctive right. In this regard, the Report was exceptional in using the term ‘right to a satisfactory environment’:

“In order to give practical expression to the right to a satisfactory environment, there is a need for development strategies that are directed towards the implementation of a substantive part of that right (the right to development, to life, to health, to work, etc.). These must go hand in hand with the promotion of the related procedural aspects (due process, right of association and of assembly, freedom of expression, right of recourse, etc.)”<sup>30</sup>

The Report also includes draft principles for human rights and environment, defining “the right to a secure, healthy and ecologically sound environment as universal, interdependent and indivisible right”.<sup>31</sup> The reluctance of the international community to accept ‘right to a quality environment’ as an indispensable and substantial right becomes obvious after the Economic and Social Council’ decision to not to adopt draft norms. Apparently, states stepped away from such a commitment.

On this score, the Ksentini Report represents both a succession and advance after the Stockholm Declaration. In the Stockholm Declaration, human rights and environment are considered interdependent and the environment is a precondition to the enjoyment of human rights. However, this approach is not supported by a binding agreement. It is important to note that from 1972 to 1992 none of the environmental agreements used an explicit human rights language or human rights framework for examining and managing environmental impacts. In fact, since the establishment of the UNEP, environmental issues were largely approached through the perspective of environmental law without the accompaniment of a human rights dimension. Furthermore, human rights bodies also paid attention to the issue separately, as it could be observed with Ksentini

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<sup>28</sup> E/CN.4/Sub.2/1994/9, p.1-2.

<sup>29</sup> E/CN.4/Sub.2/1994/9, parag. 118.

<sup>30</sup> E/CN.4/Sub.2/1994/9, parag. 253.

<sup>31</sup> E/CN.4/Sub.2/1994/9, p.75.

Report.

As far as environmental arena concerns, in 1992, in the light of the Intergovernmental Panel on Climate Change' (IPCC) assessments which provided serious evidence on the impacts of climate change, the United Nations Conference on Environment and Development (also known as Earth Summit) was held in Rio de Janeiro.<sup>32</sup> As a result of the Summit, the United Nations Framework Convention on Climate Change (UNFCCC) was created as a foundational treaty body concerned with the mitigation and adaptation procedures bearing on the climate change.<sup>33</sup> However, neither human rights nor climate change impacts on enjoyment of human rights are mentioned by the treaty body of the UNFCCC and in the Rio Declaration. The Rio Declaration's main focus was on sustainable development. The Principle 1 states that: "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."<sup>34</sup> As compared to the Stockholm Declaration, which underlines the 'fundamental right to quality environment', the Rio Declaration emphasized 'the right to development' that requires to be fulfilled equitably in order to meet the developmental and environmental needs of present and future generations.<sup>35</sup> Furthermore, the Rio Declaration highlights the importance of citizen participation in decision-making processes pertaining to environmental decisions as well as access to remedy and redress.<sup>36</sup> Briefly, the Declaration adopted a procedural approach to environment rights in human rights context. Human rights such as access to information, remedy and participation in decision-making processes are considered as pressing requirements to fulfill the right to an adequate environment.

In 1992, the Rio Declaration's main focus was on sustainable

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<sup>32</sup> Mrs. Ksentini was participated as an observer.

<sup>33</sup> *United Nations Framework Convention on Climate Change*, New York, 9 May 1992, United Nations Treaty Series, Vol. 1771, p. 107, available at <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg\\_no=XXVII7&chapter=27&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII7&chapter=27&Temp=mtdsg3&clang=en)> (accessed 11.12.2016).

<sup>34</sup> UNEP, 'Rio Declaration on Environment and Development', June 1992, Principle 1, available at <<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>> (accessed 11.12.2016)

<sup>35</sup> Rio Declaration on Environment and Development, Principle 3.

<sup>36</sup> Rio Declaration on Environment and Development, Principles 10,11,13.

development<sup>37</sup> as a clear turnout from Stockholm Principles. In addition the Sub-Commission on Prevention of Discrimination and Protection of Minorities did not adopt draft norms for environmental rights, which were presented in Ksentini Report. Hence in the contexts of both environmental and human rights, the idea of the environment as a distinct human right was practically abandoned. The procedural approach to the right to environment, which was embedded in Rio Declaration, has become a binding structure with Aarhus Convention in 1998. The Aarhus Convention recognizes ‘the right to live in an adequate environment’; however, the Convention’s content remains limited to procedural aspects, such as enabling participation in environmental decision-making, access to justice and information.<sup>38</sup>

Until 2005, within the UN human rights mechanisms, the environmental rights were not discussed outside the limits of the thematic mandates of the special rapporteurs.<sup>39</sup> However, along the way considerable amount of national and regional legislation started to recognize the limits of the environmental rights.<sup>40</sup> The case law also developed on the basis of a growing acknowledgment of the impact of the environment on recognized human rights. In this respect, a regional case involving Inuits became a landmark for the discussion on human rights and climate change.<sup>41</sup> Concurrently, both developments will be discussed in the

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<sup>37</sup> General Assembly Resolution 45/94 recognized the healthy environment as a stand-alone rights by claiming "all individuals are entitled to live in an environment adequate for their health and well-being." General Assembly, Resolution 45/94, ‘*Need to ensure a healthy environment for the well being of individuals*’, A/RES/45/94 (14 December 1990) available at <http://undocs.org/A/RES/45/94>. This approach has changed until the Rio meeting.

<sup>38</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, 25 June 1998, United Nations Treaty Series, Vol. 2161, p. 447 available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=en)> (accessed 11.12.2016).

<sup>39</sup> Related Special Rapporteurs’ approaches will be examined in the second part of this section titled climate change impacts on human rights.

<sup>40</sup> Regional human rights mechanism in America, Africa and Arab cover right to healthy environment. Mentioned mechanisms were established after ‘70ies where man-made pollution became more visible. Correlatively, when Special Rapporteur Ksentini presented her first report on the relationship between environment and human rights, already 60 countries included environmental rights into their constitution. Today, more than 100 constitutions recognize environmental rights. Report of the Independent Expert on the issue of human rights obligations concerning the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ‘*Compilation of good practices*’, A/HRC/28/61 (3 February 2015), parag.73, available at <http://undocs.org/A/HRC/28/61>.

<sup>41</sup> Earthjustice, 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, submitted by Sheila Watt Clouter, with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Region of the United States and Canada, 7 December 2005, available at

regional perspective section.

b. Regional perspective

Regional human rights protection mechanisms have an important role in the promotion and protection of human rights. In this section of the study, the three main regional human rights mechanisms will be analyzed in terms of their different approaches to environment and human rights.<sup>42</sup> In America, Europe and Africa, comprehensive regional human rights mechanisms have been established over the years. These bodies had played a crucial role in the gradual recognition of environmental rights in particular and the establishment of a stronger association between environment and human rights in general.

The right to a satisfactory environment is formulated differently in various regional human rights treaties. The African Charter on Human and Peoples' Rights (ACHPR) was the first international human rights treaty recognizing the right to a satisfactory environment in 1981 by proclaiming, "all people have the right to a general satisfactory environment favorable to their development".<sup>43</sup> The American Convention on Human Rights (ACHR) affirms, "Everyone shall have the right to live in a healthy environment".<sup>44</sup> Arab Charter on Human Rights (Arab CHR) recognizes also a right to a healthy environment under the right to an adequate standard of living.<sup>45</sup> However, not all regional human rights treaties recognize the right to an healthy environment. For instance, European Convention on Human Rights (ECHR) aim to protect civil and political rights therefore does not

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<[http://earthjustice.org/sites/default/files/library/legal\\_docs/petition-to-the-interamerican-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-interamerican-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf)> (accessed 11.12.2016).

<sup>42</sup> As far as regional human rights mechanisms concerns, there are five regional human rights distinguished varying significantly from a very advanced system to emerging ones. In Europe and America it is observed that an effective regional human rights system is in place with human rights treaties, procedures for ensuring implementation and effective monitoring supported by judicial procedure. In Africa, human rights mechanisms consist of treaties, procedures and monitoring mechanism however system has some constraints due to financial reasons. In Arab human rights system, Arab Charter was adopted and Arab Committee of Human Rights was established, however, the system does not possess independent monitoring mechanism.

<sup>43</sup> African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights (ACHPR) Article 24, June 1981.

<sup>44</sup> Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" (ACHR), Article 11, 22 November 1969.

<sup>45</sup> Arab Charter on Human Rights (Arab CHR), Article 38, 15 September 1994.

guarantee a specific right to a healthy environment.<sup>46</sup>

As a matter of fact, an increasing number of national legislations had developed a framework for environmental protection and the right to a satisfactory environment after the Stockholm Declaration. Even before the recognition of right to an adequate environment by regional human rights mechanisms, in 1994, at the time Ksentini presented her final report, over 60 constitutions had already made specific references to environmental protection, explicitly recognizing the right to a satisfactory environment.<sup>47</sup> Today, more than 100 constitutions recognize environmental rights.<sup>48</sup> Thus, one can claim that while the recognition of the right to a satisfactory environment was in limbo at the international level, the regional human rights mechanisms and national legislations were there to fill the gap. Starting from the '90s regional and national legal systems started to develop a practice whereby the procedural basis for enforcing the right to a satisfactory environment has been established. Complaints with regard to human rights violations based on ecological considerations are now generally recognized; and the case law concerning human rights and environment has also been developing considerably.<sup>49</sup>

The regional human rights mechanisms might have their own challenges in terms of providing protection and remedy and can be criticized due to limited enforcement mechanisms. Nonetheless each system has a mechanism in place, by which individuals can raise their voices through their complaints against states, advocate their rights and pressure national governments to take action.<sup>50</sup> That is the reason why regional human rights regimes occupy a crucial role in relation to the human rights and the environment. While the recognition of the right to a quality environment might still be considered as limited within the UN framework,

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<sup>46</sup> In the context of European Union, the European Social Charter only recognizes the right to a safe working environment. European Charter for Fundamental Rights of the European Union urges the protection of the environment under Article 37 by stating “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.” *Charter of Fundamental Rights of the European Union*, Art.37, 2012/C/326/02 (26 December 2012), available at <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012P%2FTXT>> (accessed 11.12.2016)

<sup>47</sup> E/CN.4/Sub.2/1994/9, parag. 241.

<sup>48</sup> A/HRC/28/61, parag. 73.

<sup>49</sup> E/CN.4/Sub.2/1994/9, parag. 242.

<sup>50</sup> Megan S. Chapman, ‘*Climate Change and the Regional Human Rights Systems*’, Sustainable Development Law and Policy, Winter 2010, pp. 37-38.

there is an extensive jurisprudence on recognized human rights where regional human rights mechanisms interpret environmental protection as a necessity.<sup>51</sup> One example of this approach is the ‘*Oganiland Case*’ that was brought by the Social and Economic Rights Action Center and the Center for Economic and Social Rights against Nigeria to the African Commission on Human and People’s Rights.<sup>52</sup> In May 2002, the African Commission found that the military government of Nigeria was in violation of the right to freedom from discrimination, right to life, right to property, right to health, right to protection of family and vulnerable groups, right to free disposal of wealth and natural resources, and the right to a general satisfactory environment, all of which were under the protection of African Charter on Human and Peoples’ Rights.<sup>53</sup> In the decision, the Commission states that:

“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instrument.”<sup>54</sup>

The decision has a great significance, as it refers to both negative and positive obligations of the states under Article 16 (right to health), 24 (right to satisfactory environment) and 21 (right to free disposal of wealth and natural resources) of the African Charter.<sup>55</sup> As far as state duties with respect to private parties’ activities are concerned, the decision has a particular importance for the clarity of its emphasis on the duty of the state to protect its citizens from damaging acts of private parties:

<sup>51</sup> Some of the examples on environmental cases can be listed as: *Lopez Ostra v. Spain* (dec.), no. 16798, ECtHR 1990; *Öneryıldız v. Turkey* (dec.) no.48939/99, ECtHR 2004; *Taskin and Others v. Turkey* (dec.), no. 46117/99, ECtHR 2005; *Mangouras v. Spain* (dec.), no. 12050/04, ECtHR 2010; *Dubetska and Others v. Ukraine* (dec.) no. 30499/03, ECtHR 2011; *Cordella and Others v. Italy* no. 54264/15, ECtHR 2016; *Front for the Liberation of the State of Cabinda v. Republic of Angola*, no. 328/06, ACHPR, 2013.

<sup>52</sup> Royal Dutch Shell started oil production in Niger Delta Region in 1958. Ogoni is the name of the region in the Niger Delta in Nigeria. Oil drilling activities had devastating impacts on Ogoniland. Any intervention faced obstacles in the fact that Shell had close relations with Nigerian government and Nigerian soldiers who were financed by Shell suppressed movement of Ogoni people. In 1990 Movement of the Survival of the Ogoni People (MOSOP) brought worldwide attention the situation in Ogoni although massive violence continued for movement members by government and Shell. For the chronology of events see: Center for Constitutional Rights, Factsheet: The Case Against Shell, March 2009, available at <<http://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-case-against-shell>> (accessed 11.12.2016).

<sup>53</sup> African Commission on Human & Peoples’ Rights, ACHPR/COMM/A44/1 (27 May 2002), available at <<https://www.escri-net.org/sites/default/files/serac.pdf>> (accessed 12.12.2016).

<sup>54</sup> ACHPR/COMM/A44/1, parag. 57.

<sup>55</sup> ACHPR/COMM/A44/1, parag. 44-62

“The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights, to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favorable to development Article 16(3) already noted obligate governments to desist from directly threatening the health and environment of its citizens. The State is under the obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.”<sup>56</sup>

The European Convention of Human Rights does not recognize the right to a satisfactory environment; however the European Court of Human Rights (ECtHR) interprets a quality environment as a requirement to meet with protected rights in the Convention through its case law.<sup>57</sup> Major relevant judgments refer to the right to private life, the right to life and right to a fair trial in procedural contexts. The Court points out that the environmental pollution has impacts on personal well-being and that it might breach the right to private life and home. As an illustrative example, in 1990, G. Lopez Ostra alleged that the waste treatment plant which was located a few meters from her home was violating her rights to physical integrity and respect for the home and private life because of the smell, smoke and noise it was emitting.<sup>58</sup> The Court found that the Spanish State failed to protect the applicant's private and family life in *Lopez Ostra v. Spain* case:

“Despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.”<sup>59</sup>

*Lopez Ostra v. Spain* case became a landmark. The judgment was referred frequently in environmental cases where states needed to balance the economic well-being with individual interests. In a similar situation, *Taşkın v. Turkey* case the applicant alleged that they suffered from environmental damage because of the gold mine operating activities in Izmir. The Court points out that the situation needs to be examined in two aspects, namely the substantive aspect of the

<sup>56</sup> ACHPR/COMM/A44/1, parag. 52.

<sup>57</sup> Shelton, ‘Whiplash and Backlash’, p.24.

<sup>58</sup> *Lopez Ostra v. Spain* (dec.), no. 16798, ECtHR 1990.

<sup>59</sup> *Lopez Ostra v. Spain* (dec.), no. 16798, ECtHR 1990, parag. 58.

compatibility with the Article 8 as well as the procedural one of the decision making process that ensures the interest of the individual. With regard to Article 8, the Court refers to *Lopez Ostra v. Spain* and states that:

“Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, § 51). The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 would be set at naught.”<sup>60</sup>

The Court also referred to the procedural rights within the framework of the Rio Declaration and Aarhus Convention. However, in deciding on the applicability of the Article 6, the right to fair trial; the Court's reference was mainly to the national legislation since the Turkish Law protects the right to environment:

“The Court notes, firstly, that the application of 8 November 1994 shows that the applicants opposed the Ministry of the Environment's decision to issue a permit on grounds of the risks which, according to the impact report, the Ovacık gold mine posed for the environment and for the life and health of the neighbouring population, of which they were part (see paragraph 23 above). The right relied on in substance before the administrative courts by the applicants was the right to obtain adequate protection of their physical integrity against the risks entailed by production at the Ovacık gold mine.”<sup>61</sup>

“The Court considers that such a right is recognised in Turkish law, as is clear, in particular, from the right to live in a healthy and balanced environment (Constitution, Article 56 – see paragraph 90 above) to which the Supreme Administrative Court specifically referred (see paragraph 26 above). Accordingly, the applicants could arguably maintain that they were entitled under Turkish law to protection against damage to the environment caused by the activities of the mine in question. Without any doubt, there existed a genuine and serious ‘dispute’.”<sup>62</sup>

In the following Court judgments in *Tatar v. Romania*<sup>63</sup>, *Fadeyeva v. Russia*<sup>64</sup>, *Giacomelli v. Italy*<sup>65</sup>, States were found responsible for the harm caused by environmental pollution, whether it was directly caused by the state or the state's failure to regulate private sector activities. In 2006, Council of Europe published a manual to improve the understanding of the relationship between the protection of human rights under the European Convention on Human Rights and the protection

<sup>60</sup> *Taskin and Others v. Turkey* (dec.), no. 46117/99, ECtHR 2005, parag.113.

<sup>61</sup> *Taskin and Others v. Turkey* (dec.), no. 46117/99, ECtHR 2005, parag.131.

<sup>62</sup> *Taskin and Others v. Turkey* (dec.), no. 46117/99, ECtHR 2005, parag.132.

<sup>63</sup> *Tatar v. Romania* (dec.), no. 67021/01, ECtHR 2009.

<sup>64</sup> *Fadeyeva v. Russia* (dec.), no. 55723/00, ECtHR 2005.

<sup>65</sup> *Giocomelli v. Italy* (dec.), no. 59909/00, ECtHR 2007.

of the environment based on the Court's case law in last years.<sup>66</sup>

In environmental issues, the Inter-American Court of Human Rights (IACHR) has a different approach from other international treaty bodies, compared in terms of their stances regarding the link between environmental issues and rights to family/private life or property. In 2002, when a community of San Mateo de Huanchor in Peru alleged that the pollution caused by toxic waste was violating their rights to life, family and right to protection of dignity, the IACHR found the claims inadmissible for the right of family.<sup>67</sup> Instead, in the majority of the cases concerning indigenous communities, the Inter-American Court has the tendency to connect the environmental protection with the protection of indigeneity.<sup>68</sup>

It is important to note the jurisdiction limits of the regional human rights mechanisms in general and regional courts in particular with regard to admissibility criteria. For instance, the IACHR has the authority to receive, analyze and investigate applications with respect to both the member states that ratified the American Convention on Human Rights and those Member States that have not ratified it. Different rules and procedures apply depending on the status of the member states.<sup>69</sup> Moreover, the courts' jurisdiction is limited to recognized rights under the relevant conventions. For instance, existing case law where environmental harm is interpreted as a threat to recognized rights under the ECHR is promising, although it remains the duty of the applicants to establish the link between recognized right and environment. For the cases where there are no direct connections, establishing a clear link might not always be possible.

Furthermore, one might argue that there is a consensus on the states' responsibility regarding environmental protection as it has been demonstrated by

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<sup>66</sup> The second edition of the manual was published in 2012, Council of Europe (COE), *Manual on Human Rights and Environment*, 2012, available at <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other\\_issues/Environment/Environment\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_issues/Environment/Environment_en.asp)> (accessed 11.12.2016).

<sup>67</sup> Inter-American Commission on Human Rights, Report n.69/04, Petition 504/03, Admissibility Community of San Mateo de Huanchor and Its Members Peru, 15 October 2004, parag.16, available at <<http://cidh.org/annualrep/2004eng/Peru.504.03eng.htm>> (accessed 11.12.2016).

<sup>68</sup> Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', *The European Journal of International Law*, Vol.21, no.3, 2010, p. 595.

<sup>69</sup> IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 30, available at <<http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>> (accessed 11.12.2016).

the case-law of the regional courts and previous decisions by regional human rights mechanisms. Notwithstanding the limits on the enforcement mechanisms as illustrated by the African Commission decision on Oganiland case which took more than 10 years to end Shell's activities.<sup>70</sup> However, regional protection mechanisms certainly allow victims to put international pressure on governments. In this context, while regional human rights case-law might have stronger impacts on national legislations, an application to universal human rights monitoring mechanisms might also give start to a conversation and draw attention to neglected issues, as seen in the 2005 Inuit application.

Inuit Circumpolar Conference filed an application before the Inter-American Commission on Human Rights claiming that their rights to “benefit of culture, property, to the preservation of health, life, physical integrity, security and to residence and movement” are being violated by the United States which is one of the biggest greenhouse emitters in the world.<sup>71</sup> However, applicants faced challenges in terms of proving sufficient causality between environmental harm and United States' omissions. Even though the Inter-American Commission dismissed the petition in 2006, it invited petitioners and the Center for International Environmental Law (CIEL) and Earthjustice to a thematic hearing on climate change and human rights in Americas in 2007.<sup>72</sup> The application was exceptional in several aspects. Firstly, “it has not only confronted an international tribunal with the serious human rights consequences but joined up the dots between acts and omissions”<sup>73</sup>. Therefore it is often considered as a landmark for the climate change debate since it was the first time that a legal claim against a state was based directly on climate change impacts. But importantly the application also demonstrated the challenges ahead for future cases in terms of proving causality. Despite the fact that application was dismissed, it had opened up a new path for the intervention of human rights bodies on climate change.

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<sup>70</sup> Center for Constitutional Rights, Factsheet: The Case Against Shell.

<sup>71</sup> Earthjustice, 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.

<sup>72</sup> Earthjustice, Thematic hearing Sheila Watt-Cloutier, March 2007, available at <[http://earthjustice.org/sites/default/files/library/legal\\_docs/testimony-before-iachr-onglobal-warming-human-rights-by-sheila-watt-cloutier.pdf](http://earthjustice.org/sites/default/files/library/legal_docs/testimony-before-iachr-onglobal-warming-human-rights-by-sheila-watt-cloutier.pdf)> (accessed 11.12.2016).

<sup>73</sup> ICHRP, Climate Change and Human Rights: A Rough Guide, p. 42.

## 2. Linking human rights with climate change

While the connection might seem self-evident, particularly after the scientific studies of the IPCC, the climate change and human rights were rarely used in the same legal document until the Inuit application. In 1992, when UNFCCC was adopted as the main treaty for climate negotiations, there was predictably no reference to environmental rights or impact of climate change on human rights, since the environmental bodies approached the subject from a limitedly environmental standpoint.

In fact, Ksentini had established the first connections between these two concepts in her final report in 1994. In the report, there was a particular subsection for the impacts of climate change on human rights. She stated,

“Apart from the fact that the varying effects of climate on socio-economic systems have always imposed substantial constraints on development, the climate changes expected from the greenhouse effects may render those constraints utterly unbearable.”<sup>74</sup>

Based on Ksentini's statement, one might observe that, starting from the '90's, the elephant was already in the room. However, none of the states would bring the debate on climate change within the human rights framework. There could be several reasons behind this reluctance. Firstly, the international community could be considered to not have been ready and willing enough to recognize the right to a quality environment. Secondly due to its impacts on the economy and development, the climate change might have seemed too complex to handle from a human rights perspective. Introduction of a human rights approach might have promised to solve few problems while seeming to create new ones. The complexity and politicization that would be brought into the climate change negotiations would only slow down the process, which was already very slow to begin with. These concerns might be some of the reasons why climate change negotiations almost never made reference to human rights. Hence until the landmark case of Inuits dated 2005, the situation remained the same by neglecting the human rights dimension of climate impact. However, when the elephant in the room started to disturb or further threaten some, it became inevitable to deal with the human rights dimension of the issue.

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<sup>74</sup> E/CN.4/Sub.2/1994/9, parag.118.

For some states which are particularly more vulnerable to climate impacts but have less contribution to greenhouse gas, handling the climate change issue from human rights perspective was a last resort to change pace in climate talks, particularly when negotiations already tended to drag or sometimes came to a halt entirely. Considering the high interest in terms of economic development, states did not negotiate or agree on binding commitments for a long time within the climate change framework. Given that the human rights treaties were already binding for states parties, approaching the issue through a human rights lens may have reminded these states of their responsibility to protect human rights that might be affected by climate change and provide remedy for the climate change impacts on these rights as well. In the climate change negotiations, the main focus is on the mitigation of the greenhouse gases. Hence the issue is being tackled on the carbon reduction standpoint, however there are serious concerns on how climate change can affect the livelihoods. In this regard, complying with their commitment bearing on greenhouse gases constitutes one part of their duty to prevent human rights from the disastrous effects of climate change.

Small Island States' residents like Inuits are very vulnerable to climate change impacts and have been raising their concerns on the rising sea levels since 1987.<sup>75</sup> In November 2007, Small Island States representatives met in Male to discuss the effects of climate change.<sup>76</sup> As a result of the meeting, the Small Island States expressed their concerns about the climate change impacts on the enjoyment of human rights and requested in Male Declaration

“The Conference of Parties of the UNFCCC to seek cooperation of the Office of the High Commissioner of the Human Rights (OHCHR) and UN Human Rights Council in assessing the human rights implications of climate change and OHCHR to conduct a

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<sup>75</sup> Nobel Lecture by R.K. Pachauri, Chairman of the Intergovernmental Panel on Climate Change (IPCC): “It would be relevant to recall the words of President Gayoom of the Maldives at the Forty Second Session of the UN General Assembly on the 19 October 1987: “As for my own country, the Maldives, a mean sea level rise of 2 meters would suffice to virtually submerge the entire country of 1,190 small islands, most of which barely rise 2 meters above mean sea level. That would be the death of a nation. With a mere 1 meter rise also, a storm surge would be catastrophic, and possibly fatal to the nation.” Oslo, 10 December 2007, available at < [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2007/ipcc-lecture\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2007/ipcc-lecture_en.html)> (accessed 11.12.2016).

<sup>76</sup> The states have formed the Association of Small Island States (AOSIS) in order to lobby for greenhouse emission negotiations in 1989 (more information can be available at < <http://aosis.org/about/>> accessed 11.12.2016). However after the Inuit petition, the Maldives also started to lobby in the human rights platform for pushing climate change negotiations.

detailed study into the effects of climate change on the full enjoyment of human rights”<sup>77</sup>

By doing so, Small Island States preferred to link the climate change with human rights in a more political process than pursuing a judicial one.<sup>78</sup> States have clear duties under human rights law thus if the relationship between human rights and climate change would be recognized by the UN human right bodies, the states duties to protect human rights from climate change will become more clear. Thus, human rights could indirectly create a political pressure particularly on greenhouse emitter states to mitigate their emission not to violate the human rights.

In Resolution 7/23 in 2008, Human Rights Council (HRC) asked the Office of the High Commissioner of the Human Rights to prepare a report on the relationship between climate change and human rights.<sup>79</sup> The report, which was published in 2009, examined the relationship between human rights and climate change based on its impact on the enjoyment of recognized rights.<sup>80</sup> In this regard, the Report stated at the beginning that

“While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights such as the right to life, to health, to food, to water, and to housing.”<sup>81</sup>

With this statement, the OHCHR merely signaled its approach to the environment as a precondition for enjoyment of human rights. The Report describes how climate change impacts are threatening the enjoyment of human rights, and concludes by the following statement:

“While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.”<sup>82</sup>

<sup>77</sup> CIEL, ‘Male’ Declaration on the Human Rights Dimension of Global Climate Change’, 14 November 2007, available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf) (accessed 11.12.2016).

<sup>78</sup> “In states involved later formed the Association of Small Island States, which was lobbied in the United Nations and the climate negotiations for stricter restrictions on greenhouse gases. Only in recent years, however Maldives begun to place its argument in the framework of international human rights law. In doing so the Maldives has not followed the essentially judicial path taken by the Inuit in their December 2005 petition to the IACHR.” John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, Harvard Environmental Law Review, Vol.33, 2009, p.482.

<sup>79</sup> Human Rights Council, Resolution 7/23, ‘Human Rights and Climate Change’, A/RES/7/23 (28 March 2008) available at <http://undocs.org/A/RES/7/23>.

<sup>80</sup> Human Rights Council, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’, A/HRC/10/61 (15 January 2009), available at <http://undocs.org/A/HRC/10/61>.

<sup>81</sup> A/HRC/10/61, parag.18.

<sup>82</sup> A/HRC/10/61, parag.70.

The Report demonstrates the hardship concerning the establishment of a causal link between the states' emissions of greenhouse gases and the effects of climate change and thus the attendant difficulty of assigning responsibility to a specific state.<sup>83</sup> Since the largest emitters are the most powerful states in the world, one might argue that the OHCHR might have also faced political difficulties in defining the contribution to climate change as an explicit way of violating human rights.<sup>84</sup>

The Human Rights Council adopted the second resolution (10/4) on climate change and human rights on March 2009 and requested to hold a panel discussion on the interconnection between them.<sup>85</sup> The Office of the High Commissioner for Human Rights organized the panel with the participation of the UNFCCC Secretariat and other stakeholders.<sup>86</sup> The panel was intended to discuss the relationship between climate change and human rights in order to (a) improve understanding of the implications of climate change-related effects and of climate change response measures for the full enjoyment of human rights, (b) discuss the implications of this understanding for climate change policy making, and (c) better understand the implications of climate change for human rights law and mechanisms.<sup>87</sup> The debate allowed states, the international organizations and NGOs to hold an in depth discussion on climate change and raise their concerns. The Panel has also given a start to the exchange of information between human rights bodies and UNFCCC. Furthermore, the resolution (10/4) also encouraged deeper involvement of the relevant Special Rapporteurs (particularly around the right to adequate standard of living) in the debate, as they were invited to present a thematic report on climate change impacts within the limit of their mandates.<sup>88</sup> In

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<sup>83</sup> A/HRC/10/61, parag.70.

<sup>84</sup> Knox, *Linking Human Rights and Climate Change at the United Nations*, pp. 485-486.

<sup>85</sup> Human Rights Council, Resolution 10/4, *Human Rights and Climate Change*, A/RES/10/4 (25 March 2009), available at <http://undocs.org/A/RES/10/4>.

<sup>86</sup> "Panel discussion on the relationship between climate change and human rights", (Summary of the panel discussion of the Human Rights Council, Geneva, 15 June 2009) available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Panel.aspx> (accessed 11.12.2016).

<sup>87</sup> Panel discussion on the relationship between climate change and human rights, p.2.

<sup>88</sup> A/RES/10/4.

fact, some rapporteurs had implicitly examined the issue earlier.<sup>89</sup> In 2008, the Special Rapporteur Jean Ziegler had emphasized the relationship between climate change, poverty and conflicts over resources as follows:

“It is estimated that 50 per cent of the world’s 854 million hungry people live in marginal, dry and degraded lands. Half of the world’s hungry people therefore depend for their survival on lands which are inherently poor and which may be becoming less fertile and less productive as a result of the impacts of repeated droughts, climate change and unsustainable land use. In Niger for example, close to 95 per cent of productive land is dry land; the population is predominantly rural, chronically poor and subject to repeated food crises. In Zimbabwe, the overwhelming majority of the poor live in rural areas and poverty is deepest in the low rainfall areas of Matabeleland South, Masvingo and Matabeleland North provinces. Land degradation also causes migration and intensifies conflict over resources, particularly between pastoral and farming communities, as the Special Rapporteur witnessed in Niger and in Ethiopia. Many conflicts in Africa, including the one in the Darfur region, are linked to worsening droughts, desertification and related fights over resources.”<sup>90</sup>

After the Resolution (10/4), climate change impacts have been examined by different Special Rapporteurs within the scope of their mandates (adequate living standards, safe drinking water and sanitation, right to food and right of indigenous people) with an emphasis on the vulnerability of certain states documented by country visits.<sup>91</sup> The inclusion of the human rights special procedures in the debate also allowed their introduction into the process of climate negotiations. In Copenhagen COP-15 meeting UN Special Rapporteurs issued a joint statement entitled “An ambitious climate change agreement must protect human rights of all”.<sup>92</sup>

In one of the first instances after the Stockholm Declaration, the term human right has been used by COP-16 in Cancun COP which stated “that Parties should, in all climate change related actions fully respect human rights” in 2010.<sup>93</sup>

<sup>89</sup> General Assembly, Resolution 62/21, ‘Rights of everyone to the enjoyment of the highest attainable standard of physical and mental health’, A/RES/62/21 (8 August 2007), available from <http://undocs.org/A/RES/62/21>; Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people’, Rodolfo Stavenhagen, A/HRC/4/32 (26 February 2007) available at <http://undocs.org/A/HRC/4/32>.

<sup>90</sup> Report of Special Rapporteur on the right to food, ‘Promotion and protection of all human rights civil, political, economic, social and cultural rights including the right to development’, Jean Ziegler, A/HRC/5/5 (10 January 2008), p.19, available at <http://undocs.org/A/HRC/5/5>.

<sup>91</sup> The details of these reports will be further discussed in the next section in which climate change impacts on enjoyment of human rights will be discussed.

<sup>92</sup> “Joint Statement of the Special Procedure Mandate Holders of the Human Rights Council on UN Climate Change Conference”, (Copenhagen, 7-18 December 2009) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9667&LangID=E> (accessed 11.12.2016)

<sup>93</sup> UNFCCC, Report of the Conference of the Parties on its sixteenth session, (Cancun, 29 November to 10 December 2010), available at <http://undocs.org/FCCC/CP/2010/7>.

One could argue, the Special Rapporteurs' joint statement could have an effect in the climate change negotiations to include human rights in the process. Following the Cancun Agreement, the OHCHR presented an analytical study on the relationship between human rights and climate change in 2011.<sup>94</sup> The report analyzes the relationship between environment and human rights with a special focus on the jurisprudence and extraterritorial dimension by recognizing the negative implications of environmental degradation on the enjoyment of human rights. The study also underlines the challenges ahead:

“While much progress has been made in elucidating the complex and multifaceted relationship between human rights and environment, the dialogue between the two fields of law and policy has still left a number of questions open. The theoretical discussions on the relationship between human rights and environment raise salient questions concerning, inter alia, the need for and the potential content of a right to a healthy environment; the role and duties of private actors with respect to human rights and the environment; and the extraterritorial reach of human rights and environment. Similarly, such questions arise regarding the operationalization of international human rights obligations as how to implement a rights-based approach to the negotiation and implementation of multilateral environmental agreements; and how to monitor the implementation of human rights treaties that recognize the right to a healthy environment or interconnected rights.”<sup>95</sup>

By taking the strong impacts of climate change on the environment into account, the Human Rights Council decided to tackle the issue by establishing a mandate on human rights and environment in March 2012.<sup>96</sup> John Knox was assigned as an Independent Expert. Knox issued two reports on human rights obligations to environment and the mapping of good practices in the use of these obligations. The first report, which was issued in 2012, examines briefly the relationship between environment and human rights without any recommendations.<sup>97</sup> The second report is mainly dedicated to human rights obligations relating to environmental protection.<sup>98</sup> Here, John Knox classifies the states' obligations as, substantial and the procedural obligations<sup>99</sup> and also discusses briefly non-state actors' role and the issue of transboundary harm. Finally the Rapporteur concludes the report by underlying the still unclear scope of the extraterritorial obligations:

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<sup>94</sup> Human Rights Council, ‘*Analytical study on the relationship between human rights and the environment*’, A/HRC/19/34 (16 December 2011), available at <http://undocs.org/A/HRC/19/34>.

<sup>95</sup> A/HRC/19/34, p.16.

<sup>96</sup> Human Rights Council, Resolution 19/10, ‘*Human Rights and Climate Change*’, A/RES/19/10 (22 March 2012), available at <http://undocs.org/A/RES/19/10>.

<sup>97</sup> A/HRC/22/43.

<sup>98</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ‘*Mapping Report*’, A/HRC/25/53, (30 December 2013) available at <http://undocs.org/A/HRC/25/53>.

<sup>99</sup> Reports' findings will be examined in the section dedicated to states' responsibility.

“Although it is clear that States have an obligation of international cooperation, which is of obvious relevance to global environmental problems such as climate change, clarification of the content of extraterritorial human rights obligations pertaining to the environment is still needed.”<sup>100</sup>

In his 2014 and 2015 reports John Knox elaborates in detail states’ obligations and also presents a mapping study on good practices. Here again, the Rapporteur raises the lack of clarity regarding extraterritorial obligations as an issue: “the importance of the clarifying human rights obligation with regard to transboundary environmental harm, in particular with regard to global harm caused by climate change.”<sup>101</sup>

Considering the increasing communication between international environmental and human rights bodies through panels and discussions, one might argue that the climate change talks were pressured to include human rights dimension in the process.<sup>102</sup> In 2015, before the COP meeting in Paris, UNEP had published a report on the relationship between climate change and human rights. While highlighting the states’ obligations, the Report also recommends COP to “include the human rights by recognizing the link between climate change and human rights in the preamble of Paris Agreement”.<sup>103</sup> In June, Special Rapporteurs issued a joint statement, which draws on a report entitled “The Effect of Climate Change on the Full Enjoyment of Human Rights” for the Climate Vulnerable Forum.<sup>104</sup> As a result of this long period of lobbying, in December 2015, parties finally reached an agreement in Paris on climate change and the term human rights found itself a place in the Preamble:

“Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and

<sup>100</sup> A/HRC/25/53, parag. 82.

<sup>101</sup> A/HRC/28/61, parag.106.

<sup>102</sup> At the national level, some of the countries had already addressed the link between human rights and climate change in their universal periodic review reports and to reports to UNFCCC. According to Mary Robinson Foundation for Climate Justice research, 40% (%39 in 3014) of national communications and %4 (%3in 2014) of NAPAs made the link between two concepts by 2016. Mary Robinson Foundation Climate Justice, *Incorporating Human Rights into Climate Action, Version 2*, May 2016, available at <<http://www.mrfcj.org/wp-content/uploads/2016/05/Incorporating-Human-Rights-into-Climate-Action-Version-2-May-2016.pdf>> (accessed 11.12.2016).

<sup>103</sup> UNEP (in cooperation with Colombia Law School Sabin Center for Climate Change Law), *Human Rights and Climate Change*, Nairobi, December 2015, p.40.

<sup>104</sup> Special Procedures of the United Nations Human Rights Council, ‘*The effects of climate change on the full enjoyment of human rights*’, 30 April 2015, available at < <http://www.thecvf.org/wp-content/uploads/2015/05/humanrightsSRHRE.pdf> > (accessed 11.12.2016).

people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”<sup>105</sup>

After the Paris Agreement, a remarkable language change in the final report of the Special Rapporteur J. Knox was marked. In the first reports, it is observed that the Rapporteur had put his efforts into defining the states' responsibility in terms of substantial and procedural duties within the framework of human rights that might be affected by environmental degradation. Whether these obligations were also to cover climate change impacts had remained to be answered. Nevertheless, in February 2016, Special Rapporteur stated with respect to states obligations, which left no room for ambiguity:

“As the Special Rapporteur has previously explained, States have obligations to protect the enjoyment of human rights from environmental harm. These obligations encompass climate change.”<sup>106</sup>

Furthermore he challenged the OHCHR comment, which claimed, “It is virtually impossible to disentangle the complex casual relationship between countries emission and climate change.”<sup>107</sup> As Knox argues,

“These conclusions can be challenged. As scientific knowledge improves and the effects of climate change become larger and more immediate, tracing causal connections between particular contributions and resulting harms becomes less difficult. But whether or not climate change legally violates human rights norms is not the dispositive question. As OHCHR emphasized, even in the absence of such a finding, “human rights obligations provide important protection to the individuals whose rights are affected by climate change”<sup>108</sup>

Concomitantly, the Report highlights the importance of the international cooperation besides the questions of causality and responsibility. At this juncture, it can be claimed that once the political will has become more visible with the Paris Agreement, it has also become possible for Special Rapporteur to stress the states' responsibility more assertively in the context of human rights. In fact, in Knox' previous academic article dating back to 2009, the Rapporteur criticized the

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<sup>105</sup> UNFCCC, Adoption of the Paris Agreement, Draft decision CP.21, FCCC/CP/2015/L.9 (12 December 2015); *Paris Agreement*, United Nations Treaty Series, Paris, 12 December 2015, available at <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280458f37>> (accessed 11.12.2016).

<sup>106</sup> Report of Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/31/52 (1 February 2016), parag.33, available at <http://undocs.org/A/HRC/31/52>.

<sup>107</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, ‘*Summary*’, A/HRC/10/61 (15 January 2009), parag. 70, available at <http://undocs.org/A/HRC/10/61>.

<sup>108</sup> A/HRC/31/52, parag. 36.

OHCHR Report perspective and indicated that the Report failed to emphasize states' responsibility in terms of climate change impacts as an academic. However Knox did not raise any objections in its mandate between 2012-2015 and was solely analyzing the legal framework for states' responsibility.<sup>109</sup> The Rapporteurs' approach to relationship between climate change and human rights in the framework of state duties also give a momentum to Human Rights Council approach to the issue. After the February report, the Council welcomed the adoption of Paris Agreement in its resolution dated April 2016.<sup>110</sup>

### **B. Climate Change Impacts and Scope of States' Responsibilities**

The first section of this chapter aimed to explain the historical background of the recognition of the rights to environment. At the same time, how the linkages were established between already recognized human rights and environment have been briefly outlined through regional and international human rights protection mechanisms including but not limited to OHCHR position papers and special rapporteurs' reports. This section aims to analyze more thoroughly the relationship between recognized rights and climate change impacts.

Classifying rights and obligations regarding environmental degradation and climate change is challenging due to the linkage between substantive rights and procedural duties. As Special Rapporteur John Knox pointed it out, there are rights that are most likely to suffer from environmental harm (largely substantive), and rights (largely procedural) whose implementation helps to ensure environmental protection.<sup>111</sup> Hence it is implied that the obligation to respect and protect procedural rights would eventually safeguard the environment and constitute a measure against the violation of substantive rights from environmental harm. However, in the current climate change context, this might not always be the case.

Climate change has some complicating factors such as the transboundary nature of the damage, which poses a great difficulty to pinpoint duty bearers. Moreover, there might be more than one state or/and non-state actors, which have

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<sup>109</sup> By 2016, he shared his critique by referencing his article dating back to 2009 in A/HRC/31/52, parag. 36.

<sup>110</sup> General Assembly, Resolution 31/8, '*Human rights and environment*', A/RES/31/8 (22 March 2016) available at <http://undocs.org/A/RES/31/8>.

<sup>111</sup> A/HRC/22/43, parag.40.

contributed to the damage. For example, even if a given state takes all preventative measures and act in compliance with the terms of its GHG reduction targets, its population's substantive rights could still be violated by climate change impacts such as droughts, or sea rise. Furthermore, owing to the fact that climate change impacts are often future events and human rights framework comes into the scene mostly when the harm has already occurred. In this respect, the human rights framework might fall short of pushing the states to take preventative measures. In addition, considering the fact that foreseeability of climate change impact is rather questionable despite the existence of more scientific evidence, the application of procedural obligations may not be simply straightforward. Bearing these challenges in mind, in the upcoming section, I will focus on the substantive rights that are directly affected by the impacts of the climate change and the corresponding substantive obligations of the states.

#### 1. Climate change impacts and substantive rights and obligations

According to OHCHR study on the relationship between climate change and human rights <sup>112</sup> and other resources, there is a considerable number of rights that might be affected directly and indirectly by the impacts of the climate change. The substantive rights that might have affected by climate change can be listed as right to life, right to family and privacy, right to self-determination, right to movement, right to property, right to development, right to health, right to adequate standard of living, right to food, right to water and sanitation facilities. There are also procedural rights such as right to access to justice and remedies that have a direct link with climate change. In this section only limited number of various substantive rights will be analyzed, namely those which are considered to be in a more vulnerable position and in direct exposure to climate change impacts.

##### a. The right to life

The International Panel for Climate Change has been publishing scientific reports on the effects of the climate change since its establishment. According to the latest reports AR4 and AR5, IPCC projects “an increase in people suffering from heat waves, floods, storms, fires and droughts”. The IPCC further predicts

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<sup>112</sup> A/HRC/10/61.

that "climate change will exacerbate weather-related disasters, which have already devastating effects on their enjoyment of the right of life" and expects that with the sea level rise, particularly on the coastal side approximately 100.000 people will be affected annually by 2080.<sup>113</sup>

Considering the devastating effects, one of the major implications of the environmental hazards would be for the right to life. As one of the fundamental and widely recognized right, the Article 3 of the Universal Declaration of Human Rights enshrines the right of life.<sup>114</sup> According to Article 6 of the International Covenant for Civil and Political Rights (ICCPR), "Every human being has the inherent right of life"<sup>115</sup> and The Convention of the Rights of Child protects the right to life in the Article 6, which reads, "States Parties recognize that every child has the inherent right to life. State Parties shall ensure to the maximum extent possible to survival and development of the child".<sup>116</sup> The obligation under these provisions, do not solely concern direct actions of the agents of states but also requires states to take positive action to safeguard the right to life even when it is threatened by private agents. Even in the cases where there is no treaty obligation, the right of life is unanimously considered to be a fundamental right at the national legislations and a norm '*erga omnes*' enforceable in respect of all persons.<sup>117</sup>

The particular difficulties in determining the role of the states in relation to climate change and the right to life can be summed up as follows: Firstly, climate change impacts are not directly related to one state's activity and this is one of the complexities of the issue. However, states could still prevent damages and human rights violations through procedural obligations such as environmental impact assessment and protection. Fortunately the scientific research and projections for upcoming years are able to provide full picture of the climate change impacts with

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<sup>113</sup> IPCC, Fourth Assessment Report (AR4), Climate Change 2007: Synthesis Report, 2007, Fifth Assessment Report (AR5), 2008.

<sup>114</sup> General Assembly, Resolution 217A, '*The Universal Declaration of Human Rights*', A/RES/3/217A (10 December 1948) available at <http://undocs.org/A/RES/3/217A>.

<sup>115</sup> *International Covenant on Civil and Political Rights (ICCPR)*, New York, 16 December 1966, Article 6, United Nation Treaty Series Vol. 999, No.14668, available at < <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5> > (accessed 11.12.2016).

<sup>116</sup> *Convention on the Rights of the Child*, New York, 20 November 1989, United Nation Treaty Series Vol. 1577, available at < <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800007fe> > (accessed 11.12.2016).

<sup>117</sup> E/CN.4/Sub.2/1994/9, parag.172.

more than 90% probability, states are eventually in the position to forestall these impacts and obliged to develop preventative measures. In this respect, the human rights bodies that monitor the implementation of the ICCPR and other international treaties interpret that the duty of the states should cover “reducing preventable death including from environmental factor.”<sup>118</sup> Finally the interconnection between the right to life and climate change also allows individuals to make complaints at domestic level in cases of environmental disasters.<sup>119</sup>

It is clear that some countries and peoples are more vulnerable to climate change impacts than others. Rising sea levels will certainly impact the populations living in islands and coastlines more while drought and food security problems will impact most severely the populations who depend on agricultural production. According to the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people:

“The Inuit people have been affected by large-scale thawing in their traditional Arctic territories; this state of affairs was the subject of a recent petition lodged by the Inuit Circumpolar Conference (ICC) with the Inter-American Commission on Human Rights against the United States of America, which it alleges to be mainly responsible for increasing global warming. Some peoples, particularly on the islands of the Pacific, are directly threatened with total or partial disappearance as a result of climate change”<sup>120</sup>

In this regard, it is important to note that the protection of right to life is highly dependent on the fulfillment of other rights - as it is the case for indigenous population- such as the right to food, water, health and protection of the environment in the context of the climate change. Therefore, it is necessary to examine the climate change impacts on these rights as well.

#### b. The right to health

The social and cultural rights are an integral part of international human rights law, however their scope and definitions can be considered as vague

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<sup>118</sup> CCPR General Comment No.36: Article 6 (Right to Life), 16<sup>th</sup> Session, Geneva, 30 April 1982

<sup>119</sup> At the regional level, ECtHR approach to states' responsibility could provide an example for these cases, E.g. *Budayeva and Others v. Russia*, “The court held that there had been a violation of Article 2 of the Convention under its substantial limb, on account of Russian authorities’ failure to protect the life of the residents of Tyrnauz from mudslides which devastated their town in July 2000. There had been indeed no justification for the authorities’ failure to implement land-planning and emergency relief policies in the hazardous area of Tyrnauz concerning the foreseeable risks to the life of its residents.” ECtHR, Factsheet-Environment and the ECHR, June 2016.

<sup>120</sup> A/HRC/4/32, parag.50.

inasmuch as there is no single way for their realization.<sup>121</sup> For instance, The Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of health in the Article 12 by affirming, “the right of everyone to the enjoyment of the highest standard of physical and mental health”.<sup>122</sup> There is no complete definition of highest standard of physical and mental health. Thus, General Comment No14 that interprets the right to health provided a definition,

“as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information including on sexual and reproductive health”.<sup>123</sup>

The Convention on the Rights of the Child refers in Article 24 to the “dangers and risks of environmental pollution” and requires states parties to take appropriate measures for the implementation of the right of the child to the highest attainable standard of health”.<sup>124</sup>

According to IPCC, climate change will affect the health of various populations in three ways: firstly through a direct impact on mortality and morbidity (heat wave, environmental disasters such droughts, flood), secondly through its interference with the patterns of ecosystem changes such as the patterns of diseases or lastly through indirect impacts mediated by societal systems mainly in the form of challenges to adequate nutrition and food insecurity.<sup>125</sup> In 2007, Special Rapporteur on Right to Health stated, “Those living in poverty are disproportionately affected by the adverse effect of global warming”.<sup>126</sup> In June 2015, on the occasion of the World Environment Day, UN Special Procedures published a joint statement in which they emphasized the impact of the increase in

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<sup>121</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) and Maastricht Guidelines on Violation of Economic Social and Cultural Rights (1997) are the legal interpretive tools for economic, social and cultural rights.

<sup>122</sup> *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, New York, 16 December 1966, Article 12, United Nation Treaty Series Vol. 993, No.14531, available at < <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed> > (accessed 11.12.2016).

<sup>123</sup> General Comment No.14, ‘*The Right to the Highest Attainable Standard of Health (Art.12)*’, E/C.12/2000/4 (11 August 2000), parag.9, <http://undocs.org/E/C.12/2000/4>.

<sup>124</sup> *Convention on the Rights of the Child*, Art.24.

<sup>125</sup> IPCC, *Climate Change 2014: Impacts, adaptation and vulnerability*, Chapter 11: Human health: impacts, adaptation and co-benefits, 2014.

<sup>126</sup> General Assembly, ‘Right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, Note by the Secretary General, A/62/214 (8 August 2007), parag.100, available at <http://undocs.org/A/62/214>.

the transmission of infectious diseases with respect to right to health.<sup>127</sup> During the panel discussion on March 2016, the Special Rapporteur underlined the impacts of climate not only on physical health but also on mental conditions:

“Climate change is not only affecting human physical health, it is also impacting on the mental health and well-being of individuals and communities affected. Poor physical health and ailments are associated with poor quality of life and psychological distress. Climate-related disasters, such as floods or hurricanes, leave behind more than physical destruction. People who experience loss of homes or loved ones, or are exposed to life-threatening situations are at higher risk of developing stress and anxiety-related conditions, including post-traumatic stress disorder, or depression. The long-lasting trauma of such experiences, in particular on young children, has a severe impact on the quality of life and well-being of entire communities that should not be underestimated.”<sup>128</sup>

The effects of the changing weather patterns also facilitate the transmission of diseases such as malaria and diarrhea. These are particularly fatal diseases for children. As one of the vulnerable groups, it is argued that the health impacts of climate change would also differ for children considering the extent to their metabolism and physiology, which differ from adult forms.<sup>129</sup> Particularly, their capacity to adapt to heat and other climate change exposures is limited. In its General Comment in 2013, the Committee on the Rights of Child states:

“Environmental interventions should, inter alia, address climate change, as this is one of the biggest threats to children’s health and exacerbates health disparities. States should therefore, put children’s health concerns at center of their climate change adaptation and mitigation strategies.”<sup>130</sup>

#### c. The right to food, the right to water and sanitation and adequate housing

As it is evident, the right to health is highly dependent on access to food, safe water, sanitation and adequate housing. These rights found their basis in the ICESCR. The Article 11 states that:

<sup>127</sup> Joint Statement by UN Special Procedures on the occasion of World Environment Day, ‘Climate Change and Human Rights’, 5 June 2015, available at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>> (accessed 12.12.2016).

<sup>128</sup> Panel discussion on climate change and the right to health, ‘Statement by Dainius Puras, Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health’, 3 March 2016, available at <<http://www.ohchr.org/Documents/Issues/ClimateChange/Impact/DainiusPuras.pdf>> (accessed 12.12.2016).

<sup>129</sup> UNICEF, Climate Change and Children, New York, December 2007, p.7, available at <[http://www.unicef.org/publications/files/Climate\\_Change\\_and\\_Children.pdf](http://www.unicef.org/publications/files/Climate_Change_and_Children.pdf)> (accessed 12.12.2016).

<sup>130</sup> General Comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15 (17 April 2013), available at <http://undocs.org/CRC/C/GC/15>.

“Parties recognize the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living conditions.”<sup>131</sup>

It is scientifically proven that “climate change might affect the future social and environmental determinants of health, including clean water, sufficient food and secure shelter.”<sup>132</sup> The changes in the climate will negatively impact agricultural production and consequently food security will be threatened. The Special Rapporteur on the Right to Food addressed the effects of the climate change on agriculture several times throughout country visits and thematic hearings:

“Climate change, which translates in more frequent and extreme weather events, such as droughts and floods and less predictable rainfall, is already having a severe impact on the ability of certain regions and communities to feed themselves. It is also destabilizing markets. The change in average temperatures is threatening the ability of entire regions, particularly those living from rain-fed agriculture, to maintain actual levels of agricultural production. Less fresh water will be available for agricultural production, and the rise in sea level is already causing the salinization of water in certain coastal areas, making water sources improper for irrigation purposes. By 2080, 600 million additional people could be at risk of hunger, as a direct result of climate change.”<sup>133</sup>

In 2014, during the new mandate period, climate change has become one of priority areas for Special Rapporteur on the Right to Food who stated that:

“Individuals and communities already in vulnerable situations and at risk of discrimination due to geography, poverty, gender, age, indigenous or minority status and disability are often disproportionately affected. Climate change is already having a significant impact on approximately 1 billion of the world’s poor.”<sup>134</sup>

Special Rapporteur on the Right to Water and Sanitation issued a position paper in 2016 where the relationship between climate change and water scarcity was discussed. In the report, the Rapporteur expressed concerns over water scarcity and sanitation issues:

“Climate change presents a serious obstacle to the realization of the rights to water and sanitation. Water is a key medium through which climate change impacts upon human populations and ecosystems, particularly due to predicted changes in water quality and quantity. The impacts of climate change need to be seen in light of its direct effects on water resources as well as its indirect influence on other external drivers of change, in particular increasing population pressures and changing consumption patterns.”<sup>135</sup>

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<sup>131</sup> *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, Art.11.

<sup>132</sup> IPCC, Fifth Assessment Report (AR5), 2008.

<sup>133</sup> Report submitted by the Special Rapporteur on the right to food, Olivier de Schutter, A/HRC/16/49 (17 December 2010), parag. 9, available at <http://undocs.org/A/HRC/16/49>.

<sup>134</sup> Statement by Hilal Enver: Special Rapporteur on the right to food at the 69th session of the General Assembly third committee item 68: human rights, 24 October 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15256&LangID=E> (accessed 12.12.2016).

<sup>135</sup> Climate change and the human rights to water and sanitation position paper, undated, available at [http://www.ohchr.org/Documents/Issues/Water/Climate\\_Change\\_Right\\_Water\\_Sanitation.pdf](http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf), (accessed 12.12.2016).

The impacts of the climate change on natural resources would also become a push factor for livelihoods. Due to the risks and resource scarcity, communities would be obliged to relocate. It is very likely that the rise in sea levels and storms will make life impossible in coastal settlements. All these factors naturally have impact on adequate housing in turn.

As it is illustrated by Special Rapporteurs approach, the climate change has serious impacts on the right to health, water and food. However, as economic, social and cultural rights are rarely enforceable through courts, legal interpretations are limited both in scope and numbers. On the other hand, these rights are interpreted through special rapporteurs and procedures. Especially in the context of climate change, the efforts to demonstrate the climate impacts through different perspectives could be observed particularly by several special rapporteurs' mandates. Since 2007, special rapporteurs in relevant areas have continued to voice their concern on the impacts of climate change in their annual reports and country visits. In 2015, Special Rapporteurs on the right of persons with disabilities, on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, on extreme poverty and human rights, on human rights to safe drinking water and sanitation and independent expert on human rights and international solidarity issued a joint report on the "Effects of Climate Change on the Full Enjoyment of Human Rights" in order to influence the climate talks in Paris, and considering the results of the Paris Agreement, they succeeded.

#### d. Substantive obligations

The system of human rights is based on state responsibility and liability of states for violations of human rights law. By becoming parties to the international human rights treaties, states assume the responsibility to protect, respect and to fulfill these rights including but not limited to the rights that have been examined in previous section. States should take appropriate measures such as legislative, administrative or/and budgetary to ensure the full realization of rights.<sup>136</sup>

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<sup>136</sup> Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities*, Routhledge, New York, 2016, p. 46.

Regarding environmental harms, states have the duty to adopt and implement legislation to protect the enjoyment of human rights, which might be affected by environmental harm whether it is caused by state or private conduct. However the scope of states' obligations might vary with regard to the rights that are directly threatened. In this respect, states could adopt laws to protect environment or recognize the rights for a quality environment. States could also adopt a series of procedures that would allow protecting these rights or/and regulating the activities of private conduct. States are not only required to protect individuals and groups from human rights violations but they also have to refrain from any action that could interfere with the enjoyment of human rights that they have an obligation to respect. Adopting and implementing the legislation to protect the recognized rights is the typical way to guarantee enjoyment of these rights. Additionally, incorporating human rights into environmental laws is another way of ensuring their realization and fulfillment. In this regard, the Human Rights Council urged states in resolution 16/11 “to take human rights into consideration when developing their environmental policies.”<sup>137</sup>

Climate change is a global challenge. Therefore, it requires collective action for minimizing adverse impacts. The protection mechanisms on the individual state level might not be sufficient to tackle or absorb the negative effects. Moreover, the effects of the climate change will not be felt in the same way in all countries. Some of the countries will likely be in more vulnerable positions and they might not have the technical capacity to take adaptation and mitigation measures. The Human Rights Council has underlined several times that “The global nature of climate change calls for the widest possible cooperation by all countries”.<sup>138</sup> In response to this need, international cooperation is promoted both by human rights law and environmental law. In accordance with the Article 55 and 56 of Charter of United Nations, “all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the

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<sup>137</sup> General Assembly, Resolution 16/11, ‘*Human rights and the environment*’, A/RES/16/11 (12 April 2011), available at <http://undocs.org/A/HRC/RES/16/11>.

<sup>138</sup> General Assembly, Resolution 26/27, ‘*Human rights and the environment*’, A/RES/26/27 (14 July 2014), available at <http://undocs.org/A/HRC/RES/26/27>.

purposes set forth in Article 55".<sup>139</sup> In addition, Article 2 of the ICESR requires all parties to take actions "through international assistance and cooperation" for progressive realization of the recognized rights. Although the realization of economic and social rights is based on states' capacity, there is also the obligation to take steps to provide "for the maximum of available resources to implement economic, social and cultural rights where necessary seek international cooperation".<sup>140</sup>

## 2.Procedural rights and obligations

States have certain obligations with regard to foreseeable threats of the climate change within the scope of the human rights law. These obligations do not only cover abstention from violating the rights of individuals under their jurisdiction but also taking preventive measures when there is a threat of human rights violations. In this respect, human rights bodies make clear that the duty to protect is valid for foreseeable environmental damage whether or not environmental harm itself violates human right and even whether or not the states directly cause the harm.<sup>141</sup> In any case, if these measures are not sufficient to prevent harm, states do also have positive duties to provide adequate remedies. However, one can assume that the state discretion has its limits and preventive measures should not be "an impossible or disproportionate burden on authorities".<sup>142</sup> Consequently, obligations and rights arise in terms of prevention and remedy, involving inquiries in several areas. These inquiries may be listed with following questions: Does the state undertake assessment investigations or studies for climate threats? Is there a system for advance warning or disaster management mechanism? Finally whether the authorities share information publicly with citizens within the framework of respect to right to information for climate policies. Both human rights law and environmental law require states to take reasonable measures to prevent environmental harm, so as to eliminate negative impacts on human rights. In this context, states' procedural obligations

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<sup>139</sup> *Charter of United Nations and the Statute of the International Court of Justice*, San Francisco, 1945, United Nations Treaty Series, available at <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> (accessed 12.12.2016).

<sup>140</sup> ICESCR, General Comment No. 3; Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child Article 4, 42 and 44.

<sup>141</sup> A/HRC/31/52, p.10.

<sup>142</sup> A/HRC/31/52, p.10.

can be listed as (a) to assess environmental impacts (b) to facilitate access to information and public participation in environmental decision making, (c) to provide access to remedies in case of harm.<sup>143</sup>

a. Environmental impact assessment

States need to take some measures to collect information on environmental impact of the activities of private entities and also themselves. Although the majority of the environmental assessment laws are adopted at the national level they are promoted through international agreements. According to Principle 17 of Rio Declaration,

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”<sup>144</sup>

As far as climate change is concerned, UNFCCC requires its parties to “employ impact assessments of such measures with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment” in Article 4.<sup>145</sup> Since its establishment, IPCC provides expert assessment and detailed reports on impacts of the climate change. Many countries are conducting studies on the impacts of climate change and their contributions; often take the form of monitoring and disclosing sources of greenhouse gas emissions. However not all states might have the capacity to run researches in this regard and UNEP recommends states parties to cooperate and provide international assistance where necessary for environmental impact assessments.<sup>146</sup>

b. Access to information and public participation

Considering the fact that enjoyment of human rights depends to a great extent on environmental protection and environmental protection is in turn protected mainly by environmental law, an effective mechanism could only be built if local communities and citizens would have access to information on the relevant standards, assessments and environmental conditions. Without access to information on environmental matters, public participation to environmental

<sup>143</sup> A/HRC/25/53, pp. 9-12.

<sup>144</sup> Rio Declaration on Environment and Development, Principle 17.

<sup>145</sup> *United Nations Framework Convention on Climate Change*, Art.4.

<sup>146</sup> UNEP, *Climate Change and Human Rights*, p.34.

decision-making would not be possible. In this regard, the right to information is protected under the right to freedom of expression with Article 19 of UDHR and additionally Article 19 of ICCPR, which states,

“Everyone should have the right to freedom of expression; that right should include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.<sup>147</sup>

The right of public participation widely expressed in Article 21 of the Universal Declaration of Human Rights and Article 25 of ICCPR stipulates that “each citizen have the right to take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>148</sup>

Climate change treaty regime has a flexible structure that is based on states' capacities and common but differentiated responsibilities. Today, there is no doubt that environmental degradation caused by climate change will directly affect everyday life, hence, public participation and access to information become crucial. The effective public participation can be understood as assessment and disclosure of the environmental impacts, effective communication of those impacts and providing opportunity for vulnerable groups to voice their concerns and participate in decision-making.<sup>149</sup> Therefore, the norm ‘public participation’ also receives emphasis in many environmental treaties. To this end, the UNFCCC and Paris Agreement invite its parties to promote and facilitate access to information and cooperate in taking measures. Moreover, the Rio Declaration highlights the importance of public participation of all concerned citizens and access to information in environmental issues.<sup>150</sup> The UN Convention on Biological Diversity and Stockholm Convention on Persistent Organic Pollutants also give priority to the promotion and facilitation of public access to all available information.<sup>151</sup> Last but not least, Aarhus Convention has a comprehensive

<sup>147</sup> *International Covenant on Civil and Political Rights*, Art.19.

<sup>148</sup> *The Universal Declaration of Human Rights*, Art. 21, *International Covenant on Civil and Political Rights*, Art. 25.

<sup>149</sup> UNEP, *Climate Change and Human Rights*, p.18.

<sup>150</sup> *Paris Agreement*, Art. 12; *United Nations Framework Convention on Climate Change*, Art.6, *Rio Declaration*, Principle 10.

<sup>151</sup> *Convention on Biological Diversity*, Rio de Janeiro, 29 December 1993, United Nations Treaty Series Vol.1760, available at <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002934a> (accessed 12.12.2016); *Stockholm Convention on Persistent Organic Pollutants*, Stockholm, 17 May 2004, United Nations Treaty Series, V.2256, available at

approach to the right to information and public participation in environmental matters.<sup>152</sup>

c. Access to justice and remedy

One of the obligations of the states under international human rights law is to provide ‘effective remedy’ where there is a violation of the rights. This principle also applies for violations caused by environmental harm. The ICCPR guarantees victims of human rights violations an effective remedy.<sup>153</sup> The state duties to provide access to justice and effective remedy are also emphasized by the Rio Declaration and the Aarhus Convention.<sup>154</sup> While states are providing access to judicial proceedings for human rights violations claims, they also need to ensure compensation or other type of redress.

The UNFCCC and Paris Agreement do not recognize right to an effective remedy as such; but UNFCCC recommends settlement of disputes between states. On the other hand, Paris Agreement stipulates, “The parties should enhance understanding, action and support with respect to loss and damage from climate change.”<sup>155</sup> Areas of cooperation could be an early warning system, risk management and guaranteeing livelihoods. The human rights dimension has not been embedded into loss and damage system yet. The reason behind might be largely due to complications brought on by climate change (e.g. whether or not contributions causes direct human rights violations). Thus, it might be as yet early to expect from environmental agreements to deal with this subject. There are complications brought by climate change and environmental regime apparently is not ready to provide an answer to this question. The possible outcomes of the climate change are clear. However, if remedy will be in question for victims of the damage, we also need to talk about who is responsible for the damage. At the

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<<https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800536cc>>

(accessed 12.12.2016).

<sup>152</sup> The Convention is rather a regional agreement that covers members of Economic Commission for Europe, and particularly the Articles 4 and 5 of the Convention obligate states to collect and share the information with the public. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Art.4, Art.5.

<sup>153</sup> *International Covenant on Civil and Political Rights*, Art. 2.

<sup>154</sup> Rio Declaration on Environment and Development, Principle 10; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Art. 9.

<sup>155</sup> *Paris Agreement*, Art.8.

current stage of the debate, none of the states are willing to take responsibility. There is a consensus on the fact that developed states need to provide assistance and remedy to vulnerable states, however there is no clear mechanism on how it will be done yet. The Article 8 of Paris Agreement and similar attempts could provide legal basis for further progress.

### III. Engaging Private Sector on Climate Change and Human Rights Debate

“It does not make sense to invest my retirement money in a company whose business plan means that there won’t be an earth to retire on.” Bill Mckibben<sup>156</sup>

In the previous chapter, the relationship between human rights and climate change was mainly discussed on the grounds of the relationship between human rights and the environment, with a particular focus on states duties. States have the duty to protect and respect human rights, which might be affected by environmental damage and/or disasters. However, since the climate change is a complex global threat, the states might fail to fulfill their duties for protecting human rights even when they are fully compliant with climate agreements and GHG targets. Unfortunately, an individual state could not protect its citizens by simply meeting its own target, in terms of diminishing climate change impacts; for an effective preventive stance, all states need to comply with their national commitments. For instance, the United States accounts for approximately one-quarter of all GHGs, and China overtook the United States as the highest emitter of carbon dioxide in 2007.<sup>157</sup> According to a recent study by the World Resources Institute (WRI), the top ten emitters contribute 72% of global GHG emissions.<sup>158</sup> Thus for instance, even if the Maldives were managed to meet the carbon measures, it would not save the Islands from disappearing if the other states did not also act to minimize their carbon emissions. Therefore, the climate issue raises serious questions about justice where ‘global community’ is affected by a common problem for which none of the polluters would like to take responsibility.

<sup>156</sup> Guardian Sustainable Business, ‘Where can investors who worry about climate change put their pension?’, 30 November 2012, available at <<https://www.theguardian.com/sustainable-business/blog/fossil-fuels-pension-divestment>> (accessed 13.12.2016).

<sup>157</sup> GHG emissions come from several sources, namely scope 1 (direct emissions), scope 2 (indirect emissions that arise as a consequence of corporate activities) and scope 3 (other indirect emissions from sources not owned or controlled by corporations but as a result of its activities). David Hunter, *The Implication of Climate Change Litigation*, 2009, cited by Atapattu, p.26.

<sup>158</sup> WRI, *Climate Data Explorer*, available at <<http://cait.wri.org/historical/>> (accessed 13.12.2016).

Moreover, one of the major challenges of the climate change as a global threat is that its contributors are not only states but also non-state actors. States are not only obligated to regulate their activities that might have an impact on climate change, but they also need to control private sector operations. Indeed, states are not the sole emitters and surely not the only ones who neglect their responsibility regarding climate change. Thus states also need to regulate business activities which might impact climate change and press businesses for reaching mitigation targets and where necessary for supporting adaptation measures. A recent study by Thomas Reuters showed that the world's largest fossil fuel producers released 31% of the annual GHG emissions globally; as a matter of fact, gas and oil companies alone have accounted for 13% of the global GHG emissions.<sup>159</sup> Considering the possible consequences of the climate change negotiations for business, private sector has had a huge interest in the process. Therefore, private sector engagement becomes increasingly more noticeable, although the potential role of the involvement is yet undefined.<sup>160</sup>

Although the magnitude of the corporate contribution to the global emissions and their high economic interest in the developments of the climate change regime are obvious, the exact role of the private sector actually play in terms of climate change impacts on human rights is still unclear. Furthermore, the

<sup>159</sup> WRI, 'What do your country's emission look like', June 2015, available at <<http://www.wri.org/blog/2015/06/infographic-what-do-your-countrys-emissions-look>> (accessed 13.12.2016).

<sup>160</sup> As most of the international treaties, the UNFCCC provides a framework negotiated amongst the states and binding for states. Despite the fact that transnational companies have a considerable role in mitigation and are highly affected by the regulation principles, their role might be seen as limited to lobbying at the state level. However, non-states actors actually have an increasingly important role in climate change management and measures otherwise. For instance Lima-Paris Action Agenda seeks to reinforce climate action through having states and non-state actors register their commitments into NAZCA database. (Details are available at <<http://climateaction.unfccc.int>> accessed 13.12.2016). Moreover, non-state actors also join negotiation sessions as observers. According to a recent study, business and industry non-governmental organizations, environmental non-governmental organizations and research and independent non-governmental organizations constituted the largest group that have attended the Lima conference in 2014. Nagmegh Nasiritousi, *'Shapers, brokers and doers: The dynamic roles of non-state actors in global climate change governance'*, Linköping Studies in Arts and Science N.667, p.8. Furthermore, in 2011/2012, UNFCCC's Adaptation Private Sector Initiative (PSI) was launched under the Nairobi Program, which aims to share good practices from private sector and other stakeholders. In this regard, PSI provides a platform in which business could contribute an effective response for adaptation measures. Currently PSI has approximately 150 members including business, research centers and international organizations. UNFCCC, Nairobi Work Program (NWP), available at <[http://unfccc.int/adaptation/workstreams/nairobi\\_work\\_programme/items/4623.php](http://unfccc.int/adaptation/workstreams/nairobi_work_programme/items/4623.php)> (accessed 13.12.2016).

relation between human rights and business is already a contentious subject. Additionally, human rights terms could find a place in the climate change negotiations after a challenging and long process. Moreover, although the states' responsibilities with respect to human rights are very explicit in comparison to the private sector's, there are still some question marks in terms of the scope of states' responsibilities for climate change impacts on human rights. Thus one might ask, why it is necessary to engage with private sector from a human rights perspective when it is already a challenge to connect the dots between human rights and climate change at the state level. For instance, one might wonder whether an approach to business through a human rights perspective in the climate change context would not be doomed to fail considering the economic interests at stake? Finally, it also bears asking whether there is a legal ground to apply human rights responsibilities for private entities at all. As an initial step toward answering these questions, in this chapter, I will first discuss and try to identify the role and responsibilities of the private sector with respect to human rights.

An inherent difficulty of adopting human rights approach to the climate regime is that, “paradoxically, the greater the scale of pollution, the stronger is a given polluter’s claim to shape the regime.”<sup>161</sup> Therefore, major polluters might neglect human rights dimension in the climate regime. In this study, it is argued that climate change is not only a scientific fact but also a justice issue that makes it a necessity to explore the implications for human rights of the private sectors involvement. That is why clarifying the engagement of the private sector is crucial even though it may be challenging. The human rights approach could favorably highlight the state duties with respect to climate change impacts, underline the urgency to put in place necessary prevention measures –particularly those targeting private sector activities- and finally provide remedy by pressing private sector to take action through soft law mechanisms. Hence in this context, firstly state duties with respect to private conduct bearing on environmental damage will be discussed. Secondly, the existing human rights protection and monitoring mechanism regarding transnational companies will be assessed with a brief introduction on the relation between non-state actors and human rights.

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<sup>161</sup> ICHRP, *Climate Change Human Rights: A Rough Guide*, p. 57.

Since the beginning of the '70s, the international community put significant efforts into coming up with a structure for articulating the binding and non-binding commitments relevant to the regulation of transnational company activities given their increasing impact on human rights. There are various systems in place to regulate transnational companies' activities at the regional and international level with respect to their human rights impacts. The majority of these systems is based on soft law, and highlights the scope of private sectors responsibilities in terms of human rights. Regardless of their inherent shortcomings such as limited enforcement and sanction requirements, these systems frequently require business to provide their commitment to respecting human rights in their operations. On the other hand, the business responsibility towards human rights could also cover the cases of environmental degradation caused by private sector contribution to climate change. In this context, the utility of the existing systems for regulating transnational companies will be discussed. However, beyond the systems in place to ensure private sector accountability from outside, there are also efforts on the part of the companies to regulate their operations internally in the scope of corporate social responsibility. Hence, corporate social responsibility tools will also be analyzed as a complementary approach to external systems. After providing an analysis of the existing mechanisms and their potential adaptation and use for climate related impacts, I will finally discuss the possible human rights approaches that might increase the involvement of the private sector and promote responsibility of the business side. It is important to note that within the scope of this study, the major argument does not depend on an isolated approach to human rights as a sole regulator for private sector activities. The climate change is a multidimensional issue. Hence human rights perspective could be a complementary approach among others in stressing the urgency to take action by underlining state responsibility, exploring the possible use of soft law mechanisms and increasing the pressure on business through corporate responsibility tools and stakeholders.

## A. Private Sector and Human Rights

### 1. State obligations and private conduct within the scope of human rights

Traditionally, while international human rights law provides rights for individuals and groups, obligations are mainly imposed on states, as states are the primary duty bearers. However, this traditional approach is not valid anymore. Indeed, while discussing the issue of responsibility for human rights violations, four main concepts are being used, namely, positive obligations of states, imputability of private actions to state, duties of private entities and horizontal effect of the human rights. Since private entities' responsibilities under human rights law will be further discussed in detail in the upcoming section, presently the analysis of responsibility of states for human rights abuses and violations (related to environment) will be foregrounded in the framework of positive obligation, imputability and horizontal effect.

Under human rights law, states have the obligation to respect, protect and fulfill human rights. Firstly, states have to respect human rights by abstaining from human rights violations. Secondly, states need to protect human rights and guarantee the enjoyment of the human rights for everyone within their jurisdiction. The duty to protect covers the rights that might be affected by both public and private entities' conduct. Indeed, according to the comment of the Human Rights Council for ICCPR:

“The positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”<sup>162</sup>

States' positive obligations are also applicable if private entities' acts and omissions threaten enjoyment of human rights of individuals under states' jurisdiction. Hence, briefly, in case of a human rights violation by a private actor, states would be held accountable for the resultant harm.<sup>163</sup> In this context, there are basically two ways of accounting for the states' responsibility. The first way

<sup>162</sup> ICCPR, General Comment No.31 (80), 'The Nature of General Obligations Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004), parag.8, available at <http://undocs.org/CCPR/C/21/REV.1>.

<sup>163</sup> UNEP, Climate Change and Human Rights, p. 29.

would involve imputing the actions of private actor to the state. As a second option, state obligation to protect could be expanded.<sup>164</sup> However in both cases, states are the main duty bearers.

As far as the relationship between the environment and human rights is concerned, a state's duty to protect individuals under its jurisdiction could also expand to cases of environmental harm that are related to private entities' activities. The Special Rapporteur John Knox states that:

“In principle, the obligations of States to protect human rights from infringement from private actors extend to infringement from environmental harm, as many human rights bodies have explained. However, the specific application of such obligations in the environmental context needs closer examination. In that respect, the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights will be particularly helpful.”<sup>165</sup>

John Knox's statement is supported by regional case law in this regard.<sup>166</sup> The states are obliged to regulate the conduct of private actors that are registered under their law and/or located in their territory and doing business under states' jurisdiction according to the principle of ‘effective control’.<sup>167</sup> However, the scope of states' responsibility is far more complex in the contexts of transboundary harm and extraterritorial application. At the current stage of globalization, transnational companies operate in various countries with different legal entities, belonging to different shareholders, who are based in different countries and with the nationality of different states. It has been noted by the Special Rapporteur John Knox “more than 300 alleged corporate related human rights abuses, nearly one third alleged environmental harms that have corresponding impacts on human

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<sup>164</sup> On the regional level, there are cases where states were found responsible for private party and public acts starting from 1980's. As an example in the case of *Velasquez Rodriguez v Honduras*, according to the judgment of Inter-American Court of Human Rights, “Thus in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by person who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a state is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.” Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, July 29, 1988, parag. 172.

<sup>165</sup> A/HRC/22/43, parag.50.

<sup>166</sup> *Lopez Ostra v. Spain* (dec.), no. 16798, ECtHR 1990; *Tatar v. Romania* (dec.), no. 67021/01, ECtHR 2009.

<sup>167</sup> Olivier de Schutter, ‘*Towards a Legally Binding Instrument on Business and Human Rights*’, Université Catholique de Louvain, Institute for Interdisciplinary Research in Legal Sciences, Working Paper 2015/2, p.19.

rights”.<sup>168</sup> Within this context, while it is crucial to determine the origin of the company, it is also very challenging.

In the context of extraterritoriality, Committee on Economic and Social Rights in its General Comment No.15 indicated that the state parties have the responsibility “to prevent their own citizens and companies from violating the rights to water of individuals and communities in other countries”, further noting that,

“Where state parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with Charter of the United Nations and applicable international law.”<sup>169</sup>

While the Comment is on the right to water, it could be also applicable for other cases related to environment. Indeed, there are country based new instruments which oblige parent corporations that domiciled in a state to comply with human rights obligations of the residing state as well as the places they operate.<sup>170</sup> However, despite growing practice, there is no legally binding international instrument that would clarify a state’s duty to offer protections from the extraterritorial extent of the activities of transnational companies yet.<sup>171</sup>

## 2. Transnational companies and human rights: With power should come responsibility

The international human rights system is based upon the states as the primary duty bearers and the main actors. The ability of international human rights and international law to address directly non-state actors is limited and was even non-existent a few decades ago. This is because the world was a more state-centric place during the 1940s and the ‘state is dead’ thesis was barely foreseen. All the other new actors such as non-governmental organizations, transnational companies, banks, and terrorist groups... which entered the scene only recently – thus allowing us to question the state’s monopoly of power-- can only be defined

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<sup>168</sup> A/HRC/31/52, parag.33.

<sup>169</sup> Economic and Social Council, ‘Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights’, E/C.12/2002/11 (20 January 2003), parag.33, available at <http://undocs.org/E/C.12/2002>.

<sup>170</sup> Schutter, ‘*Towards a Legally Binding Instrument on Business and Human Rights*’, pp. 18-19.

<sup>171</sup> The due diligence approach which was developed by the Guiding Principles attempts to fill this gap. In the due diligence approach, the acts of the non-state actors are not attributed to states although the potential harm is still considered as the states’ failure resulting from a lack of prevention and/or protection measures for regulating third party conducts and exercising the necessary due diligence. This will be further discussed in UN Guiding Principles section.

in terms of their relationship to the state, as it is called the ‘not a cat syndrome’ by Philip Alston.<sup>172</sup> In the international legal discourse, despite their various characteristics, all of these different actors are conceptualized as “non-state actors”, based on their common denominator.<sup>173</sup>

There is not one globally accepted definition of non-state actors. As a result of the recent developments, their roles are expanding in national and international arena. The continuous creation of new actors in the international arena is making even more difficult to create a global definition, which would cover all the relevant organizations under the umbrella of a non-state actor. There are several key factors, which characterize the emergence and the increasing importance of the non-state actors within the international human rights regime. These factors can be listed as privatization, capital mobilization and private investment flows, trade liberalization and its employment consequences, the expanding horizons of multilateral institutions, the unleashing of civil society, the privatization of security provisions and changing nature of the conflicts in general.<sup>174</sup> However, while the role of non-state actors becomes undeniable, it is still challenging to define the scope of the responsibilities within the existing system, which is still built upon the two categories, ‘states and the rest’.

At this juncture, the Universal Declaration of Human Rights remains an important instrument for the possibility to expand the category of subjects of international law regime in general and human rights in particular. From a broader perspective, the UDHR calls on “every individual and every organ of society to protect and respect to human rights”.<sup>175</sup> In addition, in 1949, International Court of Justice (ICJ) stated “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community”.<sup>176</sup> In parallel with this opinion, Nuremberg

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<sup>172</sup> Philip Alston, ‘*The “Not-a-Cat” Syndrome: Can the international human rights regime accommodate non-state actors?*’ in *Non-State Actors and Human Rights*, ed. Philip Alston, Oxford University Press, Oxford, 2005, p.3.

<sup>173</sup> Alston, *Not-a-Cat Syndrome*, p.4.

<sup>174</sup> Alston, *Not-a-Cat Syndrome*, pp. 17-19.

<sup>175</sup> *The Universal Declaration of Human Rights*, Preamble.

<sup>176</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949, available at <<http://www.icj-cij.org/docket/files/4/1837.pdf>> (accessed 13.12.2016).

tribunals introduced the principle of individual (non-state actors') responsibility for international crimes.<sup>177</sup> On the other hand, while there is limited objection to the multiplication of obligations of non-state actors regarding crimes against humanity such as genocide, the idea of extending human rights obligations to non-state actors is confronted with serious objections.<sup>178</sup> Some authors, as Chinkin claimed that applying human rights duties to private actors would undermine the human rights and its historical edifice itself<sup>179</sup>, and on the other hand some argues as Zegveld that it is not legally possible because treaties are binding only for states.<sup>180</sup> Finally, the possibility is acknowledged that legitimizing the non-state actors and providing them human rights obligations might controversially erode freedom and autonomy rather than enhancing them.<sup>181</sup>

Despite the controversy over whether human rights obligations could be applied to non-state actors or not, as far as transnational corporations are concerned, they acquire significant rights in international and bilateral investment agreements which directly or indirectly allow them to affect livelihoods of various populations. This is not to claim that terms such as 'complicity' and 'spheres of influence' frequently employed around this subject are easy to define, nor that they do not need further clarification. However, as Philip Alston cogently recognized by referring to the *Ogani* case, there is no fundamental difference

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<sup>177</sup> *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, International Law Commission of the United Nations, Yearbook of the International Law Commission, Vol.II, 1950, available at <[http://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_1\\_1950.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf)> (accessed 13.12.2016).

<sup>178</sup> Andrew Clapman, *Human Rights Obligations of Non-State Actors*, Academy of European Law European University Institute, Oxford University Press, New York, 2006, p. 41.

<sup>179</sup> Christine Chinkin states, "There is apprehension that to transform the vision of human rights to include acts by private individuals would disturb and undermine the entire edifice of human rights." Christine Chinkin, *International Law and Human Rights*, in *Human Rights Fifty Years On: A Reappraisal*, ed. Tony Evans, Manchester University Press, New York, 1998, p. 115.

<sup>180</sup> Liesbeth Zegveld, "human rights law purports to govern the relations between the government representing the state and the governed", *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 54 cited in Clapman, *Human Rights Obligations of Non-State Actors*, p. 45.

<sup>181</sup> Philip Alston summarizes this critic as follows: "It has often been said that the international human rights system makes an important contribution to the legitimacy of states, both by enabling them to claim the moral high ground and by giving them the opportunity to take on an obligation which, in effect, legitimizes a more activist or interventionist role for the government within the society. Therefore if giving human rights obligation would legitimize other actors' movement, it would eventually erode human freedom and autonomy." Philip Alston, 'Downsizing the State in Human Rights Discourse' in *Democracy and the Rule of Law*, ed. N. Dolden and P.Gifford, Congressional Quarterly Press, Washington, 2001, p. 359.

between states obligations and corporate obligations, particularly in the contexts where private actors' activities have a considerable impact on livelihoods.<sup>182</sup>

Considering the increasing power and impact of transnational companies, the efforts of the international governance to align corporations' activities with international order are growing since the '70s.<sup>183</sup> During these years, the involvement of ITT Corporation in the Pinochet Coup in Chile, allowed developing countries to raise their concerns about the activities of transnational companies.<sup>184</sup> In 1973, UN Economic and Social Council appointed a group of eminent persons to study the impacts of the transnational companies (TNC) on economic development and international relations.<sup>185</sup> In 1974, the United Nations Commission on TNCs (UNCTC) was established in New York. One of the major tasks of the UNCTC is to draft a code for TNCs. However the conflict of perspectives between the developing world which insisted on voluntary principles and the socialist bloc which demanded a legally binding instrument did not allow the completion of the code for almost two decades.<sup>186</sup>

During these efforts, the parties had agreed on several issue-specific instruments and treaties such as the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>187</sup>, Set of Multilaterally Agreed Equitable Principles and Rules for

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<sup>182</sup> Philip Alston sheds light on this dilemma by raising the following important questions "Are there any fundamental differences in the nature of the human rights obligations that fall upon governments and those that fall upon corporations? If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their "spheres of influence" as Global Compact puts it how are the latter to be delineated? Does Shell's sphere of influence in Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the right to physical integrity and due process?". Alston, *'The "Not-a-Cat" Syndrome: Can the international human rights regime accommodate non-state actors?'*, p. 15.

<sup>183</sup> John G. Ruggie, *'Business and human rights: The evolving international agenda'*, *The American Journal of International Law*, Vol. 101, p. 819.

<sup>184</sup> In 1972, Jack Anderson, reporter in the United States, asserted that the ITT had plotted with the US CIA in 1970 to block the election of Salvador Allende in Chile. Theodore H. Moran, *'The United Nations and Transnational Corporations: A Review and a Perspective'*, *Transnational Corporations*, Vol. 18, No.2, August 2009, p. 92.

<sup>185</sup> The UN and Transnational Corporations, UN Intellectual History Project, (Briefing Note), N.17, July 2009, available at <<http://www.unhistory.org/briefing/17TNCs.pdf>> (accessed 13.12.2016).

<sup>186</sup> Moran, *'The United Nations and Transnational Corporations: A Review and a Perspective'*, pp. 99-103.

<sup>187</sup> ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, 204<sup>th</sup> Session, Geneva, November 1977. The Declaration was further amended in 2000 and 2006.

the Control of Restrictive Business Practices<sup>188</sup> by UN Conference on Trade and Development. With UNCTC, the main objective was to build up an umbrella structure, which would cover several issues related to TNC activities (such as customer protection, illicit payments, technology transfer) in different chapters. The Commission on Transnational Corporations had presented the draft code in 1983, however despite the long negotiation process, the parties failed to reach an agreement. The negotiations were ended without finalizing the draft by 1993.<sup>189</sup>

The Code for Transnational Corporations was not adopted and as a result the OECD Guidelines, ILO Tripartite Declaration had become the major platforms for specific issues with regard to transnational companies. The existing system is built upon soft law and voluntary principles with limited enforcement and monitoring mechanisms. However, as Ralph Steinhardt has pointed it out, despite voluntary systems' weaknesses, the new *lex mercatoria* would potentially govern the conduct of companies through emerging regulatory structures.<sup>190</sup> In support of this possibility, there are already various international and regional structures, which have been established to regulate TNCs activities. These mechanisms will be analyzed in the upcoming section with particular focus on the relation between company practices, environment and human rights.

- a. United Nations mechanisms for regulating TNCs activities in accordance with human rights
  - a.a United Nations Global Compact (UNGC)

As it has been mentioned in previous section, there have been some efforts to develop norms that are applicable to business activities with respect to responsibility towards human rights since the '70s. However, these efforts did not reach a binding agreement. By 2000, it already became an urgency to obtain a policy commitment from the business side. As a result, the United Nations Global Compact (UNGC) was launched as a global corporate responsibility initiative that

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<sup>188</sup> General Assembly, Resolution 35/63, 'The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices', A/RES/35/63 (5 December 1980), available at <http://undocs.org/A/RES/35/63>.

<sup>189</sup> Karl P. Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations', *The Journal of World Investment & Trade*, 2015, p. 55.

<sup>190</sup> Ralph G. Steinhardt, 'Corporate Responsibility and the International Law of Human Rights', in *Non-State Actors and Human Rights* edited by Philip Alston, Oxford University Press, Oxford, 2005, pp. 177-179.

consisted of ten principles highlighting business responsibilities in terms of human rights, anti-corruption and environment in 2000.<sup>191</sup> The ten core principles need to be supported and adopted once companies become a signatory. Furthermore, UNGC is a soft law mechanism for which the signatories are obliged to provide a yearly report explaining how they support the UNGC principles through their actions.<sup>192</sup> It is neither a binding set of regulations nor a code of conduct for companies but “rather a basis for a dialog forum in which mutual learning among companies is to be promoted with examples of best practices”.<sup>193</sup> The Global Compact is a voluntary initiative that also allows local network creation and supports a particular focus on policy commitment with respect to principles.

As far as the UNGC approach to human rights is concerned, it is largely based on the human rights principles deriving from the UDHR, which proclaims the fundamental values, shared by the international community.<sup>194</sup> Hence, the approach of the UNGC could be considered as based on moral criteria rather than legal ones for human rights since there is no reference in the Global Compact to core human rights treaties. The Principle 1 is the baseline expectation of all companies to meet their responsibility to respect human rights wherever they operate; it states that “Business should support and respect the protection of internationally proclaimed human rights” and Principle 2 requires that they “make sure that they are not complicit in human rights abuses.”<sup>195</sup> Within the scope of the UNGC, a company’s commitment to these principles extends in proportion to its sphere of influence although neither sphere of influence nor complicity has been

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<sup>191</sup> United Nations Global Compact, available at < <https://www.unglobalcompact.org/what-is-gc/our-work/> > (accessed 13.12.2016).

<sup>192</sup> Under the UNGC schema, each signatory is allowed to select the particular issue for improvement, design metrics for measurement of the progress in this area, measure movements against the metrics and write the report. UNGC, Participation Report, available at < <https://www.unglobalcompact.org/participation/report> > (accessed 13.12.2016).

<sup>193</sup> U. Kerkow, J. Martens, T. Schmitt, ‘*The limits of voluntarism, corporate self-regulation, multi-stakeholder initiatives and role of civil society initiatives*’, World Economy, Ecology and Development Association, 2003 cited by Dilek Cetindamar, Kristoffer Hussoy, ‘*Corporate social responsibility practices and environmentally responsible behavior: The case of the United Nations Global Compact*’, Journal of Business Ethics, 2007, p. 167.

<sup>194</sup> Embedding Human Rights into Business Practice I, Joint publication of UNGC & OCHCR, The Global Compact Leaders Summit, 2004, p. 18, available at < [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/embedding.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf) > (accessed 13.12.2016).

<sup>195</sup> UNGC, available at < <https://www.unglobalcompact.org/what-is-gc/our-work/> > (accessed 13.12.2016).

clearly defined.<sup>196</sup> UNGC focus is on inspiring practical action rather than establishing legal definitions.<sup>197</sup>

With respect to environment, Principles 7, 8 and 9 explain UNGC's understanding of the environmental dimension and approach the issue in terms of prevention, promotion of greater environmental responsibility and development of environment friendly technologies. UNGC signatories commit to take measures to support these principles. The environmental principles refer solely to Rio Declaration. However, the responsibility of the companies towards environmental protection is articulated mainly through reference to economic consequences such as how the prevention mechanism could help companies to avoid paying remedies and how greater responsibility for the environment could increase efficiency and costs.<sup>198</sup>

The UNGC is often criticized for its soft mechanism and business oriented board and management structure.<sup>199</sup> On the other hand, it is a transparent structure, company reports are accessible online, therefore if signatories do not realize the yearly reporting requirements, UNGC reserves the right to de-list the company publicly. Currently UNGC is one of the biggest voluntary platforms of corporate responsibility with more than 12.000 members.<sup>200</sup> Number of participants is indeed not a sufficient measure for its impact. The reason behind its success in terms of scope is based on its voluntary structure. Hence, the UNGC was never meant to be a legal binding structure for company actions. The effort for a more binding and clear structure continues with developments of norms and UN Guiding Principles. As it has been pointed out earlier, "The UN Guiding Principles provide further

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<sup>196</sup> In acknowledgment of the lack of definition, after the UNGC, there have been attempts to establish more precise norms, which would determine the boundaries between states' responsibility and corporate responsibility, as it was underlined in previous section on non-state actors. Alston, 'The "Not-a-Cat" Syndrome: Can the international human rights regime accommodate non-state actors?', p.15.

<sup>197</sup> Embedding Human Rights into Business Practice I, pp. 18-19.

<sup>198</sup> UNGC, Principle 7, available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7>> (accessed 13.12.2016); Principle 8, available at, <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-8>> (accessed 13.12.2016); Principle 9, available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-9>> (accessed 13.12.2016).

<sup>199</sup> Oliver F. Williams, 'The United Nations Global Compact: What did it promise?', Journal of Business Ethics, 2014; S. Prakash Sethi, Donald H. Schepers, 'United Nations Global Compact: The promise-performance gap', Journal of Business Ethics, 2014.

<sup>200</sup> UNGC, Members, available at <<https://www.unglobalcompact.org/what-is-gc/participants>> (accessed 13.12.2016).

conceptual and operational clarity for the two human rights principles championed by the Global Compact.<sup>201</sup>

#### b.b. United Nations Guiding Principles

Starting from late '90's, corporate human rights abuses became more visible and the launching of the UNGC with its voluntary structure did not provide the binding platform that developing world and international NGOs were demanding. In 1998, UN Sub-Commission on the Promotion and Protection of Human Rights established a working group on business and human rights.<sup>202</sup> The working group presented Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in 2003.<sup>203</sup> Compared to Global Compact, the Norms aimed to create a binding structure where transnational companies have the duty to protect and respect human rights:

“Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.”<sup>204</sup>

The Draft Norms do not only differentiate themselves from UNGC by their legally binding structure but also with a third party control mechanism. The draft document proposes a periodic review and monitoring mechanism by observer groups. Additionally, situations are recognized in which companies could become liable for breaches of the principles. On the other hand, one of the main problems with the Norms is that the document does not make a clear distinction between states' duties and corporation duties. As may be expected, states remain reluctant with regard to an approach where they would be under the same status and

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<sup>201</sup> The two concepts are complicity and sphere of influence. UNGC & OHCHR, *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments*, July 2011 (updated June 2014).

<sup>202</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities was renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights. General Assembly, 'Report of the Sub-Commission on the Promotion and Protection of Human Rights: Final Report of the 58<sup>th</sup> Session', A/HRC/2/2, A/HRC/Sub.1/58/36 (11 September 2006), available at <http://undocs.org/A/HRC/2/2>.

<sup>203</sup> Economic and Social Council, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12/Rev.2 (24 August 2003), available at <http://undocs.org/E/CN.4/Sub.2/2003/12>.

<sup>204</sup> E/CN.4/Sub.2/2003/12/Rev.2, Principle 12, p.5.

obligations for human rights with corporations.<sup>205</sup> Consequently the Norms were not adopted.

Following these efforts, in 2005, UN Human Rights Council appointed John Ruggie as Special Representative to the issue of Human Rights and Transnational Companies.<sup>206</sup> According to John Ruggie, the major difficulty in securing the connection between human rights and business lies in the governance gap created by globalization. The weak governance zone in terms of human rights protection provide occasion for wrongful acts of the corporations. Therefore, instead of focusing on corporations' sphere of influence and 'limited list of rights linked to corporate abuses' John Ruggie conducted preliminary research on states' duty to protect and due diligence concepts.<sup>207</sup> He argued that with a due diligence process "whereby companies not only ensure compliance with national laws but also manage the risks of human rights harms with a view to avoiding it", companies could provide confidence that they realize their responsibility to respect human rights.<sup>208</sup> Moreover, the Special Representative proposed that the limits of the human rights due diligence would be determined "by the context in which a company is operating, its activities and the relationship associated with those activities."<sup>209</sup>

In 2008, the Guiding Principles were proposed as a three-pillar policy framework consisting of state duty to protect human rights, corporate responsibility to respect human rights and the need for greater access to remedy for victims of business related abuses. The framework was adopted in 2011.<sup>210</sup> The duty of state to protect human rights is the core element of the framework because as the Special Representative has underlined it, current problem lies in the governance gap:

<sup>205</sup> Denise G. Arnold, 'Transnational corporations and duty to respect basic human rights', *Business Ethics Quarterly*, July 2010, p. 374.

<sup>206</sup> Commission on Human Rights, Resolution 2005/69, 'Human rights transnational corporations and other businesses', E/CN.4/RES/2005/69 (20 April 2005), available at <http://undocs.org/E/CN.4/RES/2005/69>.

<sup>207</sup> "Sphere of the influence defined with two meanings: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm." John Ruggie, 'Protect, respect and remedy: A framework for business and human rights', *Innovations/Spring*, 2008, pp. 189, 202.

<sup>208</sup> Ruggie, 'Protect, respect and remedy: A framework for business and human rights', p. 194.

<sup>209</sup> Ruggie, 'Protect, respect and remedy: A framework for business and human rights', p. 201.

<sup>210</sup> General Assembly, Resolution 17/4, 'Human rights and transnational corporations and other business enterprises', A/HRC/RES/17/4 (6 July 2011), available at <http://undocs.org/A/HRC/RES/17/4>.

“The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”<sup>211</sup>

Within this context, it is important to highlight that the UN Guiding Principles are not a binding structure for business. The point is also illustrated by the language of the document in which the term ‘duty’ is used for states, which invokes moral and legal obligation while ‘responsibility’ is the main word for business activities, highlighting accountability rather than obligation. However, as compared to Global Compact, the Guiding Principles favorably provides explanatory definitions on complicity, sphere of influence and due diligence.<sup>212</sup> Furthermore with operational and foundational principles, it serves as a guideline for companies, which would like to embed human rights into their practice and policies.

However despite the wide acceptance the UN Guiding Principles found in civil society organizations, they apparently did not satisfy a number of developing states. In 2013, just 3 years after the framework was adopted, Ecuador and 80 governments presented a declaration, which made demands for a binding structure, by stating:

“The endorsement by the UN Human Rights Council in June 2011 of the “Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework” was a first step, but without a legally binding instrument it will remain only as a such: a “first step” without further consequence.”<sup>213</sup>

Motivated by these critiques, in 2014 Human Rights Council adopted a resolution for establishment of an Intergovernmental Working Group to elaborate a binding

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<sup>211</sup> Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, ‘ *Guiding Principles on Business and Human Rights: Implementing the United Nations “ Protect, Respect and Remedy” Framework*’, John Ruggie, A/HRC/17/31 (21 March 2011), parag.14, available at <http://undocs.org/A/HRC/17/31>.

<sup>212</sup> A/HRC/17/31

<sup>213</sup> Statement on behalf of a Group of Countries at the 24<sup>th</sup> Session of the Human Rights Council, General Debate-Item 3, Transnational Corporations and Human Rights, Geneva, September 2013, available at <<https://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>> (accessed 13.12.2016).

treaty for business and human rights.<sup>214</sup> The process is expected to be a conflicted one and according to John Ruggie, it might have the risk to fail:

“If present dynamics continue, the process is likely to yield one of two outcomes: no treaty at all, or one that squeaks through to adoption but is ratified by few if any major home countries and thus would be of no help to the victims in whose name the negotiations were launched.”<sup>215</sup>

b. Human rights protection in the domain of projects and investment financing

The growing awareness about the human rights and environmental impacts of the investment and development projects on livelihoods shift the focus on the corporate responsibility to the financial dimension. Organizations such as World Bank (WB) and International Financial Corporation (IFC) are supporting great number of projects by investing approximately 20 billion \$ in financial intermediaries including but not limited to commercial banks, development banks, hedge funds and private equity.<sup>216</sup> In fact, financial sector lending is a major part of the World Bank Group’s portfolio with 62% of the IFC’s total spending.<sup>217</sup> However, by channeling the funds through third parties, these organizations lose control on how it would be spent.<sup>218</sup> In case the projects lack sufficient impact assessment in terms of environmental and social aspects, they might cause serious human rights violations as forced displacement and forced land acquisition, hence it becomes crucial for the lending institutions to establish standards for investment and project funds. The project financing and financial development support have a particular importance for human rights protection despite the fact that they are voluntary measures. While international NGOs,

<sup>214</sup> General Assembly, Resolution 26/9, ‘*Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*’, A/HRC/RES/26/9 (14 July 2014) available at <http://undocs.org/A/HRC/RES/26/9>.

<sup>215</sup> Business and Human Rights Resource Center, ‘*Get real or we’ll get nothing: Reflections on the first session of the Intergovernmental Working Group on a business and human rights treaty*’, available at <<https://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>> (accessed 13.12.2016).

<sup>216</sup> IFC’s FY14 Business Plan & Budget, approved by IFC’s Board of Directors, June 2013.

<sup>217</sup> Office of the Compliance Advisor Ombudsman (CAO) for the IFC, Monitoring of IFC’s Response to: CAO Audit of a Sample of IFC Investment in Third Party Financial Intermediaries, C-I-R9-Y10-F135, 10 October 2014.

<sup>218</sup> There are a couple of projects where IFC efforts and project funds resulted with land loss and forced displacement in Laos, Honduras, India and Guatemala. Oxfam, ‘The Suffering of Others’, Issue Briefing, April 2015, available at <[https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/ib-suffering-of-others-international-financecorporation-020415-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-financecorporation-020415-en.pdf)> (accessed 13.12.2016).

organizations and development banks are implementing projects, human rights violations can be observed especially clearly in developing countries and this issue has been almost out of radar.

In 2003, the Equator Principles (EP) were launched as voluntary benchmarks for assessing and managing social and environmental risks related to project financing.<sup>219</sup> The Equator principles are voluntary standards and applicable to four financial products: project finance, advisory services related to project finance, project related corporate loans and bridge loans.<sup>220</sup> The EPs are composed of 10 principles devoted to a review of environmental and social assessments, applicable environmental and social standards, environmental and social management system, stakeholder engagement, grievance mechanism, and independent review, monitoring, reporting and transparency.<sup>221</sup> The major aim of the Principles is to enhance better management practices for social and environmental risks of the financial projects. They are often criticized for lack of accountability because of the weak enforcement mechanism they involve. For instance, in 2004, NGOs found out more than 120 breaches for the Baku-Tbilisi Ceyhan Pipeline although IFC was confident with the bank assessment reports.<sup>222</sup>

The EPs are based on IFC Performance Standards on social and environmental sustainability<sup>223</sup> and on the World Bank Group Environmental,

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<sup>219</sup> Equator Principles, About Equator Principles (EP III) Update Process and Timeline, available at <<http://www.equator-principles.com/index.php/ep3/process-and-launch>> (accessed 13.12.2016).

<sup>220</sup> The Equator Principles: A Financial industry benchmark for determining, assessing and managing environmental and social risks in projects, June 2013, p.3, available at <[http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)> (accessed 13.12.2016).

<sup>221</sup> The Equator Principles: A Financial industry benchmark for determining, assessing and managing environmental and social risks in projects, pp. 4-10.

<sup>222</sup> 'Third Fact Finding Mission, Azerbaijan-Georgia,-Turkey Pipeline Project', Centre for Civic Initiatives, CEE Bankwatch Network, Green Alternative, Friends of Earth, Les Amis de la Terre, October 2004; CEE Bankwatch Network, 'Georgians demand action to save their homes from oil pipeline', 'Official complaint to IFC reveals shocking BTC negligence', March 2004, available at <<http://bankwatch.org/news-media/for-journalists/press-releases/georgians-demand-action-save-their-homes-oil-pipeline-offi>> (accessed 13.12.2016).

<sup>223</sup> IFC, IFC Performance Standards on Environmental and Social Sustainability, January 2012, available at <[https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES)> (accessed 13.12.2016). It is important to note that prior 2006, the IFC had separate environmental and social policies. In 2006, the first edition was launched and in 2012 the latest version.

Health, and Safety Guidelines; hence they have been revised frequently.<sup>224</sup> The latest version of the EPs was launched in 2013. In fact the human rights terminology was introduced into the framework for the first time in the latest version. The Principle 2, which concerns environmental and social assessment, affirms that “In limited high risk circumstances, it may be appropriate for the client to complement its assessment documentation with specific human rights due diligence.”<sup>225</sup>

In 2006, another initiative was launched on the impact of investment on economic, social and governance (ESG) issues titled The Principles of Responsible Investment (PRI). The PRI encourage investors to take into account environmental, social and human rights issues as part of investment portfolio performance alongside the immediately financial factors. The PRI has six principles which promote incorporation of ESG issues into investment analysis and decision making processes as well as into ownership policies and practices, seeking appropriate disclosures on ESG issues, promoting acceptance and implementation of principles, enhancing their effectiveness and reporting.<sup>226</sup>

c. Regional mechanisms for regulating TNCs activities

The Organization for Economic Cooperation and Development’s Guidelines for Multinational Enterprises (OECD Guidelines) is the only corporate responsibility initiative, which is formally adopted by the governments. While the Guidelines only address enterprises operating in OECD countries, they also encourage the enterprises to extend their good practices toward other countries in which they operate.<sup>227</sup> Despite their geographical limit, the Guidelines have a particular importance for regulating business activities because a great majority of largest corporations from the list of World’s 100, are based in France, Germany,

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<sup>224</sup> World Bank Group Environmental, Health, and Safety Guidelines (EHS Guidelines), April 2007, available at <[http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/our+approach/risk+management/safeguards++pre2006#EHSPPA\\_H](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/safeguards++pre2006#EHSPPA_H)> (accessed 13.12.2016).

<sup>225</sup> The Equator Principles: A Financial industry benchmark for determining, assessing and managing environmental and social risks in projects, p. 4.

<sup>226</sup> Principles of Responsible Investment, the Six Principles, available at <<https://www.unpri.org/about/the-six-principles>> (accessed 13.12.2016).

<sup>227</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, General Policies, parag.13, available at <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> (accessed 13.12.2016).

Japan, UK and USA.<sup>228</sup> However, it is important to note that Guidelines do not solely address multinationals but rather cover “all entities, including parent companies, local subsidiaries, as well as intermediary levels of the organization.”<sup>229</sup>

The OECD Guidelines are composed of 8 chapters and the 4<sup>th</sup> Chapter refers to the fundamental human rights. In this respect, recently revised version makes reference to UN Guiding Principles by stipulating;

“This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises’ respect for human rights. It draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation.”<sup>230</sup>

The responsibility of the private entities to meet the fundamental human rights standards is highlighted under the parag. 38:

“A State failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognized human rights, enterprises should seek ways to honor them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.”<sup>231</sup>

The 6<sup>th</sup> chapter of the Guidelines covers the environmental responsibilities. Here, companies are advised to maintain a system of environmental management.<sup>232</sup> In the context of the Guidelines, “a sound environmental management” is defined in the broadest sense according to which both direct and indirect environment impacts of the activities should be considered in the long term.<sup>233</sup> In this perspective, OECD Guidelines approach the climate change issue from an environmental standpoint and provide extensive information resources regarding climate funding, adaptation and mitigation processes.<sup>234</sup>

As far as the European Union is concerned, the Commission has a pioneering role in promoting corporate social responsibility with the adoption of

<sup>228</sup> Forbes, The World’s Biggest Public Companies, 2016 Ranking, available at < <http://www.forbes.com/global2000/list/#tab:overall> > (accessed 13.12.2016).

<sup>229</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, General Policies, parag.13.

<sup>230</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, (IV) Human Rights, parag. 36.

<sup>231</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, (IV) Human Rights, parag. 38.

<sup>232</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, (VI), Environment, parag. 61.

<sup>233</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, (VI), Environment, parag. 63.

<sup>234</sup> OECD, Climate Change, available from < <http://www.oecd.org/env/cc/> > (accessed 13.12.2016).

Green Paper on establishment of European Multi-stakeholder Forum on Corporate Social Responsibility (CSR).<sup>235</sup> In 2011-2014 Strategy for CSR, the Commission provides a broad new definition for CSR as “the responsibility of enterprises for their impacts on society” and lays emphasis on the multinational nature of the CSR;

“CSR at least covers human rights, labour and employment practices (such as training, diversity, gender equality and employee health and well-being), environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention), and combating bribery and corruption.”<sup>236</sup>

The Commission's approach to CSR is built upon "a smart mix of voluntary policy measures and, where necessary, complementary regulation" which is also applicable for UNGPs.<sup>237</sup> Moreover, with the revision in Accounting Directives, the disclosure of non-financial information became a requirement for large companies and groups.<sup>238</sup> The Commission also made a proposal for Shareholder Directive, which “aims at incentivizing institutional investors and asset managers to take non-financial information into account in investment decisions.”<sup>239</sup>

## **B. Regulating Transnational Companies: Applicability and Validity of Human Rights Approach**

### **1. Applicability of TNC human rights responsibilities’ for climate change impacts**

#### **a. UN Global Compact and UN Guiding Principles**

By covering both human rights and environmental protection, the UN Global Compact might have seemed like a perfect platform for engaging private sector on climate change. However, as it has been underlined in the previous section, the UNGC guidance approaches the environmental issues from an

<sup>235</sup> Commission of the European Communities, Green Paper, Promoting a European framework for Corporate Social Responsibility, DOC/01/9, 18 July 2001.

<sup>236</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’, COM/2011/0681 (25 October 2011), parag.3.3, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>> (accessed 13.12.2016).

<sup>237</sup> European Commission, Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights-State of Play, 14 July 2015, p.7, available at <<http://ec.europa.eu/DocsRoom/documents/11621/attachments/1/translations>> (accessed 13.12.2016).

<sup>238</sup> Accounting Directive, 2013/34/EU (26 June 2013).

<sup>239</sup> European Commission, ‘Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights-State of Play’, p. 10

economic perspective in which non-compliance with the laws and regulations is only confronted with its implication for economic loss. Although it is true that within the Global Compact environmental issues are analyzed on a thematic basis, it is not easy to determine whether the UNGC has a specific roadmap for tackling environmental issues or not. For instance, in 2007, Caring for Climate Initiative (CCI) was launched by UNEP, UNFCCC and UNGC as a collaborative platform for business.<sup>240</sup> In the same year, CEO Water Mandate was also initiated as a public private initiative.<sup>241</sup> Nevertheless, the statement of the Climate Change Initiative is based mostly on sustainable development under the aegis of a univalent environment principle. None of the guidance documents contained under the rubric of Caring for Climate Initiative make any reference to human rights. An exception is that Water Mandate covered both human rights and environmental principles. The CEO Water Mandate guidance clearly defined the company responsibility with respect to water in a framework of human rights.<sup>242</sup>

While the stance of the CEO Water Mandate is clear in terms of human rights, a similar approach was never a question for CCI. Despite the fact that climate change has serious impact on the rights that are protected by the UDHR, the Initiative focuses on carbon mitigation, adaptation and risk management with respect to climate risks without touching upon the human dimension. For instance, in 2015 Progress Report, initiative commitment is explained as follows:

“Continuing to work collaboratively... to set standards and take joint initiatives aimed at reducing climate risks, assisting with adaptation to climate change and enhancing climate-related opportunities.”<sup>243</sup>

The system is established upon economic benefits that depend on climate related actions, adaptation processes that would bring value to supply chain and carbon pricing.

<sup>240</sup> Caring for Climate, available at <<http://caringforclimate.org/about/>> (accessed 13.12.2016).

<sup>241</sup> CEO Water Mandate, Constitution, July 2007, available at <[http://ceowatermandate.org/files/Constitution\\_CEO\\_Water\\_Mandate.pdf](http://ceowatermandate.org/files/Constitution_CEO_Water_Mandate.pdf)> (accessed 13.12.2016).

<sup>242</sup> Companies are recommended to “evaluate the severity of impacts on affected stakeholder and evaluate the likelihood that impacts will occur” and by doing so they were also advised to consider natural climatic factors and climate change. CEO Water Mandate, ‘Bringing a Human Rights Lens to Corporate Water Stewardship’, August 2012, available at <<http://ceowatermandate.org/files/HumanRightsLens2012.pdf>> (accessed 13.12.2016).

<sup>243</sup> Caring for Climate, Progress Report 2015, p. 15, available at <[https://www.unglobalcompact.org/docs/issues\\_doc/Environment/climate/C4CReport2015.pdf](https://www.unglobalcompact.org/docs/issues_doc/Environment/climate/C4CReport2015.pdf)> (accessed 13.12.2016).

On the other hand, both UNGC and CCI are in major part private sector driven platforms, illustrated by the fact that 17 members of the Advisory Board of UNGC belong to business while only 4 are assigned to civil society organizations.<sup>244</sup> Accordingly, the high representation of business is often criticized as bluewashing.

As Ruggie stated, “business dislikes binding regulations until they see the necessity”, and the same could apply to the human rights responsibility aspect.<sup>245</sup> The economic stakes are high for business with respect to climate change. Thus it is not a surprise that a business driven platform such as UNGC is reluctant to approach climate change through a human rights lens, especially when there is very limited initiative in the Board to raise this issue as a necessity.

Needless to say, there are many overlapping areas between the Global Compact principles and climate change. Yet even if the UNGC were to develop a different approach it would still have a limited enforcement in terms of the involvement of business. The ability of the Global Compact is limited in terms of defining the responsibilities of the business in this instance. Nevertheless it is true that business commitments to reduce GHG and CEO Water Mandate thematic approach could still serve as tools to remind businesses of their commitments and responsibilities. For instance, CEO Water Mandate’s draft report on the empowerment of women and climate change could be a sign that the platform might have a particular role on specific issues such as water and indigenous groups’ rights.<sup>246</sup>

As compared to Global Compact, the Guiding Principles lay a clear foundation for business responsibilities with respect to climate change impacts. The Special Rapporteur and Working Group have not issued a separate report on the context of climate change, but some of the principles could be directly interpreted for their implications for climate related impacts. To begin with, the

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<sup>244</sup> UNGC, Global Compact Board, 2016, available at <<https://www.unglobalcompact.org/about/governance/board/members>> (accessed 13.12.2016).

<sup>245</sup> Ruggie, ‘*Protect, respect and remedy: A framework for business and human rights*’, p. 201.

<sup>246</sup> UNGC, ‘Briefing Note: Exploring the Nexus Between Climate Change, Gender and Business, November 2015, available at <[https://www.unglobalcompact.org/docs/issues\\_doc/Environment/climate/ClimateGenderNexus.pdf](https://www.unglobalcompact.org/docs/issues_doc/Environment/climate/ClimateGenderNexus.pdf)> (accessed 13.12.2016).

Guiding Principles have a more comprehensive approach to corporate responsibility, declaring in Principle 11:

“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>247</sup>

Although the verb ‘involve’ might be considered as vague, it has been further defined by Special Rapporteur with the help of the concepts of due diligence and sphere of influence:

“Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context—for example, in their capacity as producers, service providers, employers, and neighbors. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.”<sup>248</sup>

“To begin with, sphere of influence conflates two very different meanings of influence: one is impact, where the company’s activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm.”<sup>249</sup>

In considering the various impacts of climate change on human rights, the Principle 11 could be highly relevant for ensuring the accountability of business activities around problems like lack of sufficient measures for reducing GHG or lack of adaptation measures. In addition, Principle 11 is further reinforced by Principle 13 which requires “business to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship relationships, even they have not contributed to those impacts.”<sup>250</sup> In this regard, the Guiding Principles differentiate between actual and potential impacts and between the cases where there is a cause, contribution or a linkage but no contribution. Since ‘liability’ is hard to prove for climate change impacts, the UNGPs could address this tricky issue of causation through broad interpretation of business impacts.

Significantly, while Guiding Principles are defining the states as the main duty-bearer for human rights protection, they also make provision for weak

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<sup>247</sup> A/HRC/17/31, p. 13.

<sup>248</sup> Ruggie, ‘*Protect, respect and remedy: A framework for business and human rights*’, p. 201.

<sup>249</sup> Ruggie, ‘*Protect, respect and remedy: A framework for business and human rights*’, p. 202.

<sup>250</sup> A/HRC/17/31, p. 14.

governance zones where national law falls below international human rights standards; in effect, urging that a company should respect the higher standard. In this context, Guiding Principles also specify that if national law comes into direct conflict with human rights, company still has the responsibility to demonstrate willingness and make efforts to meet human rights standards. This is particularly important for climate discussion because climate regime depends on the states' efforts in implementing national regulations on mitigation and adaptation strategies. Assuming states fall short to take necessary measures to protect human rights in investment decisions, the responsibility of the company to mitigate the risks and follow up the higher standards still remains as a recourse.

In case enterprises or states have caused or contributed to human rights violations, they also need to play a role to provide timely and effective remedy. Guiding Principle 22 states that,

“Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate process.”<sup>251</sup>

However, providing remedy does not always signify that “all allegations represent real abuses or bona fide complaints.”<sup>252</sup> Therefore both judicial and non-judicial mechanisms could be used. This point is really crucial for climate change because it is possible that the complainants could seek remedy at national level where the harm occurred (which might be often the case for climate change impacts), access to justice might still be limited due to lack of protection for environment and/or human rights. In the circumstance of a case brought to home countries for parent cooperation, the court can dismiss the case on the grounds of ‘*forum non conveniens*’.<sup>253</sup> It should also be noted that companies or multi-stakeholder initiatives might also establish non-judicial grievance mechanisms, albeit only on voluntary basis. State-based non-judicial mechanisms such as human rights institutions accredited under Paris Principles could also be serving as a potential ground for company related grievances.

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<sup>251</sup> A/HRC/17/31, p. 20.

<sup>252</sup> Ruggie, ‘*Protect, respect and remedy: A framework for business and human rights*’, p. 204.

<sup>253</sup> Ruggie, ‘*Protect, respect and remedy: A framework for business and human rights*’, p. 205.

On the other hand as much as the Guiding Principles have a great potential to define business responsibility and enforce states' duty to protect, it is not a legally binding document and still leaves room for an encouragement for further implementation. Moreover, as the International Bar Association report in the context of climate change and human rights argues, there is “uncertainty on what policies or structures and there is no direct explanation in the Principles as to interplay between climate change and human rights.”<sup>254</sup>

For all its shortcomings, Guiding Principles still provide the most extensive and explanatory guidance for business responsibilities, and its broad perspective on adverse impacts, due diligence and sphere of influence have the potential to be favorably interpreted and expanded for climate change impacts on human rights. Nevertheless, the system needs to provide further guidance, as International Bar Association Task Force report recommends:

*“In the short term, corporations should adopt and promote the UN Guiding Principles on Business and Human Rights as they pertain to climate change and justice issues. The Task Force recommends that the OHCHR develop a model internal corporate policy, expanding upon its prior guidance from 2011, which emphasizes the importance of conducting risk analysis before undertaking any major project, tracking performance and remediating any harms, while simultaneously integrating human rights concerns throughout the company.”<sup>255</sup>*

#### b. PRI and Equator Principles

Both PRI and Equator Principles are voluntary platforms that provide guidelines and minimum standards for banks and financial organizations while deciding on project financing. As far as climate change is concerned, there are two ways to analyzing their potential for human rights dimension.

Firstly, there is a direct link between climate change adaptation and mitigation projects and their impact on human rights. Climate change has an economic and scientific aspect, which pressure both states and business to take necessary measures for reducing GHG emissions. In fact the UNFCCC's main objective is briefly to “stabilize greenhouse gas concentrations in the

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<sup>254</sup> IBA, Climate Change Justice and Human Rights Task Force Report, Achieving Justice and Human Rights in an Era of Climate Disruption, p. 148.

<sup>255</sup> IBA, Climate Change Justice and Human Rights Task Force Report, Achieving Justice and Human Rights in an Era of Climate Disruption, p.16.

atmosphere.”<sup>256</sup> For this aim, several initiatives are being initiated such as Clean Development Mechanism (CDM)<sup>257</sup> and Reducing Emissions from Deforestation and Forest Degradation (REDD+)<sup>258</sup>. However, these tools have been proven to be not completely equipped to address the impacts of the projects on the human rights. Consequently, some of the projects activities have caused human rights violations.<sup>259</sup> As noted by the UNFCCC in 2012:

“While a condition of registering each CDM project is the receipt of a letter from the host country government confirming that the project assists it to achieve sustainable development, there are frequently voiced concerns that this stage in the process is a formality, and that national governments frequently issue such letters without proper investigation and/or appropriate regard to concerns raised by stakeholders. In extreme cases, it has been alleged that CDM projects, despite having been issued with such letters, have been the scene of environmental damages or human rights abuses.”<sup>260</sup>

It is important to note that CDM projects could be financed by both private and public organizations and they necessitate significant financial resources. In this context, most of the governments and companies depend on resources and loans. Hence, initiatives such as Equator Principles and PRI that require human rights due diligence and social and environmental risk analysis as precondition to access to loans could play an important role on preventing human rights abuses.

As a second approach to analysis, development projects and investment could also indirectly impact human rights by contributing to GHG emission mitigation. In this regard, funding would be still needed from commercial banks. Therefore due diligence requirements could also prevent human rights abuses in development projects by taking into account projects’ impact on climate change and eventually on human rights. However, this process is not straightforward since there should be a clear link between project activities and climate change as well

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<sup>256</sup> *United Nations Framework Convention on Climate Change*, Art.2.

<sup>257</sup> UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, Montreal (28 November-10 December 2005), FCCC/CP/CMP/2005/8/Add.1, available at <<http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf>> (accessed 13.12.2016).

<sup>258</sup> UNFCCC, Report of the Conference of the Parties on its thirteenth session, Bali (3-15 December 2007), FCCC/CP/2007/6/Add.1, available at <<http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=8>> (accessed 13.12.2016).

<sup>259</sup> In 2014 Durban Conference the UNFCCC launched CDM Policy Dialogue to analyze the concerns and criticism with regard to implementation of CDM projects and their impacts on human rights.

<sup>260</sup> Clean Development Mechanism, ‘Input to the high-level panel for the CDM Policy Dialogue, Background paper by the secretariat’, 22 December 2011, parag. 41, available at <[http://www.cdmpolicydialogue.org/background/CDM\\_policy\\_background.pdf](http://www.cdmpolicydialogue.org/background/CDM_policy_background.pdf)> (accessed 13.12.2016).

as between climate change impacts and human rights. Moreover, the project effects can only be observed in the long term, thus environmental and social risk analysis tools could also become necessary to enforce private sector to consider climate change aspect of their activities in long term since their consideration is not limited to short-term impacts. By 2020, with Green Climate Fund, UNFCCC aims to distribute more than \$100 billion for adaptation and mitigation projects<sup>261</sup> while organizations such as World Bank and International Financial Corporation are supporting a great number of projects by investing approximately \$ 20 billion in financial intermediaries.<sup>262</sup> Considering the increasing importance of the project financing, IBA also “encourages similar initiatives that promote addressing climate change issues through the banking and financial sector.”<sup>263</sup> It is certain that existing tools are not yet sufficient to fill the loopholes in project financing for climate change and could still be challenging to implement and monitor. Neither PRI nor Equator Principles are adopted by all financial organizations. Therefore the lack of international standards could still allow companies and public institutions to “pit one financial institution against the other one to negotiate or water down socio-environmental and human rights standards.”<sup>264</sup> There will be also questions about the political will, whether developing countries could meet these standards while trying desperately to attract climate projects.<sup>265</sup> On the other hand, amongst the existing due diligence mechanisms for protecting human rights and ensuring private sector responsibility, financial tools are one of the most functional ones and have a great potential to have an enforcement power, if they could be applied as mandatory.

### c. Regional mechanisms

As compared to other voluntary initiatives, the OECD guidelines have an implementation procedure functioning through National Contact Points (NCP), Investment Committee and Advisory Committee. Since the governments adopt

<sup>261</sup> UNFCCC, ‘Investment and financial flows to address climate change: an update’, FCCC/TP/2008/7 (26 November 2008), available at <<http://unfccc.int/resource/docs/2008/tp/07.pdf>> (accessed 13.12.2016).

<sup>262</sup> IFC’s FY14 Business Plan & Budget, approved by IFC’s Board of Directors, June 2013.

<sup>263</sup> IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 18.

<sup>264</sup> Manuel Wörsdörfer, ‘*Equator Principles: Bridging the gap between economics and ethics*’, *Business and Society Review*, 2015, p. 217.

<sup>265</sup> Damilola S. Olawuyi, ‘*Climate justice and corporate responsibility: taking human rights seriously in climate actions and projects*’, *Journal of Energy & Natural Resources Law*, 34:1, 2016, p. 42.

OECD Guidelines, they are obliged to implement them at the national level. In this context, National Contact Points act as governmental departments, which works for the promotion of the Guidelines at the national level.<sup>266</sup> While each government is free to choose the structure of the NCP, the organization should be visible, accessible, accountable and transparent. Under the Special Instant Procedure<sup>267</sup>, individuals could raise their concerns with respect to OECD guidelines implementation, particularly for human rights violations. In these cases, the NCP make the initial assessment for the complainant and play a mediation role between companies, states and individuals. In this context, the NCPs could be rather defined as dispute resolution mechanisms.

Given that OECD Guidelines cover both environmental impact and human rights, they could be used in the context of climate change related complaints. Moreover, the complaint could be raised either in a country where the company is domiciled (in case the state is a member of OECD) or in the home country of the company. However, it is important to note that the efficiency and structures of NCPs are diversified considerably among member states.<sup>268</sup> Not all NCPs achieve to provide visibility, accessibility, transparency and accountability.

## 2. TNC's Efforts to Regulate Themselves: Corporate Social Responsibility

Beside the international community's efforts to set up standards for regulating transnational company activities, companies are also developing voluntary corporate social responsibility (CSR) initiatives for self-regulation. While the term does not have one widely accepted definition, it marks a consistently evolving area where "business ethics", "corporate sustainability", "corporate citizenship" are commonly used for one another.<sup>269</sup> However, in the majority of the definitions, corporate responsibility "encompasses the economic, legal, ethical, and discretionary or philanthropic expectations that society has of

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<sup>266</sup> OECD Guidelines for Multinational Enterprises: Decision of the Council, June 2000, available at <<http://www.oecd.org/corporate/mne/theoecdguidelinesformultinationalenterprisesdecisionofthecouncil.htm>> (accessed 13.12.2016).

<sup>267</sup> OECD Guidelines for Multinational Enterprises, Procedural Guidance, pp. 72-75.

<sup>268</sup> For instance, Turkey NCP point is TUBITAK, which is an organization specialized in scientific research while the Swedish NCP includes representatives from government, business and labor.

<sup>269</sup> Various definitions can be found in the study of Center for Ethical Business Cultures, 'Corporate Social Responsibility: The Shape of a History', 1945-2004, Working Paper N.1, 2005, available at <[http://www.cebcglobal.org/wpcontent/uploads/2015/02/CSRThe\\_Shape\\_of\\_a\\_History.pdf](http://www.cebcglobal.org/wpcontent/uploads/2015/02/CSRThe_Shape_of_a_History.pdf)> (accessed 13.12.2016).

organization at given point in time".<sup>270</sup> It is important to note that one of the major particularities of CSR is its voluntary nature. Through compliance and voluntarism, companies are expected to go beyond their legal obligations.

There are many reasons behind this voluntary initiative, such as minimizing risks, improving brand image, obtaining financial benefit by attracting socially responsible investors, meeting with consumer expectations, and having support of the public opinion.<sup>271</sup> Due to globalization, transnational companies are domiciled in various countries. Companies need to meet with at least the minimum standards of labor and human rights, as well as environmental protection and anti-corruption. Therefore, the majority of the companies establish code of conduct or codes of ethics where a company publicly states its commitment to ethical, legal and moral codes. By determining company values, responsibilities and obligations, code of conduct also provide guidance for weak-governance zones where there is a protection gap between company code of conduct and country legislation.

Companies are not only accountable to their shareholders, but they also need to get involved with stakeholders such as suppliers, customers, local communities, civil society organizations and public authorities. Companies in many sectors are already using CSR tools such as public reporting, internal and external monitoring and risk mapping to ensure their accountability and to promote stakeholder engagement. These tools allow companies to include stakeholders in decision-making processes and in some circumstances provide information on their business impacts on local communities as well as build up efficient partnerships for sustainable development.

Both human rights and environment are the subjects that are covered under corporate social responsibility depending on the company activities and location. However, largely because their voluntary nature, CSR initiatives are often defined as insufficient particularly for human rights responsibilities. That is why

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<sup>270</sup> UNEP, 'Corporate Social Responsibility and Regional Trade and Investment Agreements', 2011, p.13, available at <[http://unep.ch/etb/publications/CSR%20publication/UNEP\\_Corporate%20Social%20Responsibility.pdf](http://unep.ch/etb/publications/CSR%20publication/UNEP_Corporate%20Social%20Responsibility.pdf)> (accessed 13.12.2016).

<sup>271</sup> Geoffrey Heal, 'When Principles Pay: Corporate Social Responsibility and the Bottom Line', Columbia Business School Publishing, 2008, cited in Bruce Lindsley Rockwood, 'Exploring corporate social responsibility for climate change mitigation with the stabilization wedge-role playing exercise in an MBA Ethics class', International Journal of Case Method Research & Application, 2008, p. 431.

international community has pushed for more binding and clear structures with UNGC and UN Guiding Principles. Nevertheless, CSR could be an effective tool to highlight company responsibilities. In fact, in 2000, governments and leaders called for a greater “corporate environmental and social responsibility and accountability” in Johannesburg Declaration and Plan of Implementation of the 2002 World Summit on Sustainable Development.<sup>272</sup> Moreover, while there is an ongoing debate on the legal responsibility of transnational companies with respect to human rights, exploring the possibility and efficiency of CSR tools as a means to enforce company practices could be a complementary route in the expansion of human rights awareness. In 2016, International Bar Association Climate Change Justice and Human Rights Task Force Report underlined the corporate social responsibility aspect of the issue and recommended

“a multi-faceted approach to corporate responsibility that will increase the ability of corporations to self regulate, including response to increased regulation by states”.<sup>273</sup>

Given the fact that the majority of the companies are already contributing their CSR program on a voluntary basis, in this section, two CSR tools, which are corporate reporting, and external monitoring will be examined with regard to their effectiveness in terms of the climate change and human rights connection.

#### a. Corporate reporting

Due to increasing pressure from governments and civil society organizations, the majority of the companies are providing yearly reports on the impact of their activities on relevant areas such livelihoods, water, human rights and climate change. CSR reporting often refers to the environmental and the social performance of the company along its supply chain and is alternatively described as “triple bottom line” inasmuch as it includes the environmental and social aspects into financial performance.<sup>274</sup> The World Business Council for Sustainable Development defines CSR reports as “public reports by companies to provide internal and external stakeholders with a picture of the corporate position and

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<sup>272</sup> *World Summit on Sustainable Development*, Johannesburg, A/CONF.199/20 (4 September 2002), parag. 29, available at <<http://www.un-documents.net/jburgdec.htm>> (accessed 13.12.2016).

<sup>273</sup> IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 148.

<sup>274</sup> UNEP, *Corporate Social Responsibility and Regional Trade and Investment Agreements*, p. 14.

activities in economic, environmental, and social dimensions”.<sup>275</sup>

Transparency is a key issue in terms of corporate reporting for ensuring the stakeholders' and shareholders' trust. Therefore, although it is voluntary, companies need to provide reports based on internationally recognized standards and guidelines. In this context, particularly bearing on climate change concerns, International Standard Organization (ISO)<sup>276</sup>, Global Reporting Initiative (GRI)<sup>277</sup> and Carbon Disclosure Project (CDP)<sup>278</sup> evaluate environmental influence with regard to climate change. Some of the countries such as USA and UK have binding requirements for reporting the GHG emissions.<sup>279</sup> Moreover, initiatives such as Caring for Climate Initiative allow companies to share their experiences and involvement in the climate policy. However, each company has the freedom to choose their own reporting format and that is why it is a very diversified area.

On the other hand existing reporting frameworks focused on climate change are limited to mitigation and adaptation measures, and there are no clear standards in respect of human rights related environmental harm.<sup>280</sup> While it is true that the majority of the reporting initiatives such ISO and GRI have separate reporting sections for human rights it is still not sufficient to measure how climate policies could also impact enjoyment of human rights. Most of the companies include issues directly linked with climate change under different titles such as water, livelihoods, and food security. Thus approaching the climate change with the sole aspect of carbon management in mind would not sufficiently satisfy the human dimension of the subject. A recommendation by IBA, using the GHG emission reporting as a model, is useful in this regard:

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<sup>275</sup> WBCSD, Richard Holme, Phil Watts, ‘Corporate Social Responsibility: Making Good Business’ Sense, January 2000, p.8, available at <<http://www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf>> (accessed 13.12.2016).

<sup>276</sup> International Standard Organization, available at <<http://www.iso.org/iso/home.html>> (accessed 13.12.2016).

<sup>277</sup> Global Reporting Initiative, available at <<https://www.globalreporting.org/Pages/default.aspx>> (accessed 13.12.2016).

<sup>278</sup> Carbon Disclosure Project, available at <<https://www.cdp.net/en/info/about-us>> (accessed 13.12.2016).

<sup>279</sup> U.S. Clean Air Act, available from <<http://www.epw.senate.gov/envlaws/cleanair.pdf>>; UK Government, Government emission conversion factors for greenhouse gas company reporting, 1 May 2013, available at <<https://www.gov.uk/government/collections/government-conversion-factors-for-company-reporting>> (accessed 13.12.2016).

<sup>280</sup> IBA, Achieving Justice and Human Rights in an Era of Climate Disruption, p. 150.

“Task force encourages states and international organizations, in consultation with corporations to develop and subsequently adopt clear and implementable standards for corporate reporting in respect of human rights pertaining to environment”.<sup>281</sup>

In the context of corporate reporting, this could allow stakeholders to understand the big picture and would also provide NGOs an opportunity to receive information on the company activities and reveal violations.

While the IBA recommendation to include climate change related impacts on human rights into corporate reporting have been found promising by several authors, there are also some criticisms on the score of the possible implementation of the system.<sup>282</sup> For instance, despite the fact that reports are used as a transparency tool, there are cases where companies use fraudulent practices while sharing their actions with the public.<sup>283</sup> Secondly technical structure of the reports fails to provide real information value to stakeholders. Last but not least, in terms of corporate reporting there are no consistent reporting standards.<sup>284</sup> However, it is undeniable that company reports provide an opportunity to engage with private sector in terms of their responsibilities and allow the stakeholders to follow up company activities.

#### b. External monitoring

The term ‘accountability’ which could be defined as the ability of those affected by a corporation to control that corporation’s operation is a crucial part of corporate social responsibility.<sup>285</sup> It is an obligation to account for company activities, accept responsibility for them and disclose their results in a transparent manner; however, while companies notify their stakeholders through corporate reporting, they are only completing one part of their responsibility. In this context,

<sup>281</sup> IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 150.

<sup>282</sup> Olawuyi, ‘*Climate justice and corporate responsibility: taking human rights seriously in climate actions and projects*’; Sharon Mascher, ‘*Climate change justice and corporate responsibility: commentary on the International Bar Association recommendations*’, *Journal of Energy & Natural Resources Law*, 34:1, 2016.

<sup>283</sup> As an example see Volkswagen, which considers shareholder lawsuit to be without merit, March 2016, available at <[http://www.volkswagenag.com/content/vwcorp/info\\_center/en/news/2016/03/Volkswagen.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/news/2016/03/Volkswagen.html)> (accessed 13.12.2016); G. Aras, D. Crowther, ‘*Corporate responsibility reporting: A study in disingenuity?*’, *Journal of Business Ethics*, Vol. 279, 2009.

<sup>284</sup> Olawuyi, ‘*Climate justice and corporate responsibility: taking human rights seriously in climate actions and projects*’, p. 40.

<sup>285</sup> Friends of Earth, ‘*Briefing Corporate Accountability*’, April 2005, p.3, available at <[https://www.foe.co.uk/sites/default/files/downloads/corporate\\_accountability1.pdf](https://www.foe.co.uk/sites/default/files/downloads/corporate_accountability1.pdf)> (accessed 13.12.2016).

institutions have an important role in monitoring corporate activities in order to identify human rights repercussions and environmental impact, as well as in evaluating the consistency of the company reporting initiatives.

The IBA Task Force Reports call for the responsibility of the international organizations to monitor human rights impacts of the climate change projects.<sup>286</sup> According to the Report, international institutions could fill the gap of enforcement by monitoring the multinational companies with respect to their compliance with international human rights and GHG emissions limits within the scope of national and international law.<sup>287</sup> In fact, already several international organizations execute monitoring activities for GHG emissions. For instance, World Bank already quantifies GHG emission.<sup>288</sup> Food and Agriculture Organization reports the GHG emission from an agricultural perspective.<sup>289</sup> While there might be many other organizations to fulfill the task of monitoring, the accountability of the organization or the regime is essential. There should be fair and accurate standards for monitoring, and in order to be effective, the monitoring organization should have the necessary budget and human resources to conduct monitoring visits and be independent.<sup>290</sup> In fact, this is the part where the possibility and efficiency of the implementation of international monitoring systems take on an ambiguity.

Considering the complexity of establishing common standards for monitoring and ensuring truth of the information, the institutional monitoring is hard to achieve beyond a rudimentary level. However in this context, civil society organization and multi-stakeholder initiatives might mobilize their resources more rapidly and play an active role in monitoring processes. As an example, Oxfam identified ten food and beverage products that contribute significantly GHG emissions.<sup>291</sup> Ceres, which is also a non-profit, is also taking steps to identify the

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<sup>286</sup> IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 152.

<sup>287</sup> IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 152.

<sup>288</sup> The World Bank, *Data on CO2 Emissions*, available at <<http://data.worldbank.org/indicator/EN.ATM.CO2E.PC>> (accessed 13.12.2016).

<sup>289</sup> FAOSTAT, available at <[http://faostat3.fao.org/download/G1/\\*E](http://faostat3.fao.org/download/G1/*E)> (accessed 13.12.2016).

<sup>290</sup> Olawuyi, '*Climate justice and corporate responsibility: taking human rights seriously in climate actions and projects*', p.36.

<sup>291</sup> Oxfam, '*Feeding the Climate*', Briefing Paper, June 2016, available at <[https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-feeding-climate-change-270616-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-feeding-climate-change-270616-en.pdf)>; Oxfam, '*Food Commodity Footprints*', available at <<https://policy->

gaps between national requirements and corporate reporting.<sup>292</sup> Both organizations have different focuses; while Oxfam is mostly working in the domain of poverty reduction, Ceres targets sustainable environment practices and investment. Despite this disparity in interests however, their monitoring efforts are still valuable for increasing the accountability of the corporate reporting as well as public awareness.

### 3. When the Challenges Becomes an Opportunity: A Complementary Way to Regulate TNCs Activities with Human Rights Perspective for Climate Change

Thus far, the existing tools and mechanisms have been analyzed in terms of their usage for human rights. The possibility of the adaptation of these tools for climate change impact has also been discussed. The main aim of this section is to deepen the discussion and explore the advantages of these tools. In the light of the previous chapters, I will also try to assess whether existing human rights and corporate social responsibility system could be considered as an opportunity to regulate private conduct.

#### a. Human rights as a tool to highlight state duties for transnational companies

In human rights framework, states have clear procedural duties with respect to environmental protection such as access to information, public participation, freedom of association and expression. While the substantial duties are not as clear as procedural ones, the duty of the states to undertake due diligence to protect human rights against environmental harms is widely accepted at the international level and also supported by regional human rights mechanisms and case-law. Consequently, human rights obligation could be used to pressure states to take action against corporate misconduct.

There are still considerable efforts to establish a binding structure for TNC activities regarding human rights impacts; in the current conjuncture however, states are the main duty bearers before the human rights law, which has binding nature for contracting states. As it has been also underlined by the Guiding Principles, states have the duty to protect and private sector have the responsibility

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[practice.oxfamamerica.org/work/climate-change/food-commodity-footprints/](http://practice.oxfamamerica.org/work/climate-change/food-commodity-footprints/) (accessed 13.12.2016).

<sup>292</sup> CERES, Climate Change, available at < <https://www.ceres.org/issues/climate-change> > (accessed 13.12.2016).

to respect. This distinction between responsibility and duty highlights the fact that there are very few direct obligations on private actors within the framework of human rights. For this reason until the adoption of a binding structure for transnational companies, the best option is to rely on state duties with respect to transnational activities that might directly or indirectly contribute to climate change impacts. As to human rights in its moral aspect, as Special Rapporteur John Knox highlights,

“Whether or not climate change gives rise to legal duties under international human rights law, treating climate change as a threat to human rights in a moral sense has its own value. It establishes that climate change is a moral challenge as well as a technical and environmental one.”<sup>293</sup>

It is important to rather focus on legally binding duties, thus they already exist.<sup>294</sup> Human rights law provides a framework where states’ compliance with their legal obligations is assessed through various mechanisms. As compared to environmental law where dispute resolution systems have their limits, human rights law is fully equipped with tribunals to hear complaints and rapporteurs to investigate particular situations.<sup>295</sup> As it was underlined around the last report by Special Rapporteur John Knox,

“As the Special Rapporteur has previously explained, States have obligations to protect the enjoyment of human rights from environmental harm. These obligations encompass climate change.”<sup>296</sup>

In the light of the Special Rapporteur's argument, the positive duties of the states to protect human rights can be extended to regulate private conduct activities in the climate change context. The interconnection between the various human rights and climate change impacts was comprehensively explained in previous chapter. In this scope, depending on the affected rights, individuals or NGOs could use treaty based and charter-based mechanisms for dealing with corporate related abuses to call for state duties. For instance while states report

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<sup>293</sup> John Knox, ‘*Climate change and human rights law*’, Virginia Journal of International Law, Vol.50, 2009, p. 166.

<sup>294</sup> By many authors it is argued that “human rights law humanizes climate change, something that had been lacking in the climate justice debate until recent years” and that it is desirable to “put focus on those who will suffer from climate change”. Zakary L. Stillings, ‘*Human rights and the new reality of climate change: Adaptations limitations in achieving climate justice*’, Michigan Journal of International Law, Vol.35, 2014, p. 651.

<sup>295</sup> Daniel Bodansky, ‘*Introduction: Climate change and human rights: Unpacking the issue*’, Georgia Journal of International and Comparative Law, Volume 38, N. 3, 2010, p.517.

<sup>296</sup> A/HRC/31/52, parag. 33.

monitoring processes, NGOs could provide shadow reports and information to states and HRC for Universal Periodic Review. The revised 1503 procedure allows individual communication for reliable attested violations of all human rights and fundamental freedoms.<sup>297</sup> Thematic special procedures could be used as a channel to activate and mobilize international community.<sup>298</sup>

As the Special Representative John Ruggie put forward, the root cause of the business and human rights issue lies in the “weak governance zones” where human rights are not completely protected by national legislations, or national legislations do not have the sufficient enforcement mechanisms and lack access to remedy.<sup>299</sup> The governance gap between the international human rights standards and national practice could provide corporations a favorable environment for human rights violations. Thus the possibility exists that promoting existing human rights duties could eventually result in better corporate regulations.

In addition to application of existing human rights framework, the Guiding Principles could also be used as a tool to enforce state duties and business responsibilities. By identifying the state duties in terms of protection and respect for human rights, the UNGPs are providing a valuable guidance for the scope of state duties regarding transnational corporations activities. Despite the UNGP lack a direct explanation with respect to the linkage between climate change and human rights, it is important note that Principles are not firsthand established rules but already find their basis in the existing human rights framework. Therefore, they could still be used as reference and a policy tool to enforce state duties, which are already based on existing human rights regime. Since the endorsement of UN Guiding Principles, the implementation process is diversified in different countries. This goes to show that the national bodies could play an important role, although the precise form of this role is still not defined.

Furthermore, the existing climate regime was able to include human rights solely in the preamble of the Paris Agreement after years of negotiation. The

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<sup>297</sup> OHCHR, HRC Complaint Procedure, available at <<http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>> (accessed 13.12.2016).

<sup>298</sup> FIDH, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanism, 3<sup>rd</sup> edition, May 2016, pp. 21-26.

<sup>299</sup> Ruggie, *Protect, respect and remedy: A framework for business and human rights*, p. 208.

identification of state roles and responsibilities towards transnational corporations (regarding climate change impacts on human rights) in the climate regime might take a considerable length of time even in an optimistic estimation. However, despite their voluntary nature UNGP have been adopted by governments and are increasingly referred to by the private sector. Considering the urgency to take action, commending state duties through effective implementation of UNGPs could possibly be a better tool to enforce company responsibilities with respect to climate change impacts on human rights.

b. Corporate social responsibility and soft law mechanisms

The international community is putting serious efforts into coming up with a binding agreement to determine and make enforceable the transnational corporations' responsibilities with respect to human rights, however it is still in limbo. The existing system is based on voluntary initiatives such as corporate reporting, external monitoring, creation of a code of conducts and active involvement with civil society organizations. That is why they are often criticized as being ineffective and perceived as window dressing.

However, in the scope of this study, it is argued that despite being voluntary, corporate reporting and code of conduct are two important elements of corporate responsibility through which corporates provide a public commitment. Inclusion of human rights language into corporate reporting or code of conducts means the prospect of greater accountability for consumers, shareholders and all relevant stakeholders. This is also supported by the fact that human rights abuses are one of the driving forces behind the adoption of corporate policies, with a dedicated language that is widespread compared to climate change. For instance by being part of the UN Global Compact, currently more than 4000 companies provided public commitment for respecting human rights.<sup>300</sup> On the other hand solely 453 organizations are signatories of the Caring for Climate Initiative.<sup>301</sup> Particularly, oil and gas industries --due to their poorly managed relations with

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<sup>300</sup> United Nations Global Compact, Participants, available at <[https://www.unglobalcompact.org/whatisgc/participants/search?utf8=✓&search%5Bkeywords%5D=&search%5Borganization\\_types%5D%5B%5D=5&search%5Bper\\_page%5D=10&search%5Bsort\\_field%5D=&search%5Bsort\\_direction%5D=asc](https://www.unglobalcompact.org/whatisgc/participants/search?utf8=✓&search%5Bkeywords%5D=&search%5Borganization_types%5D%5B%5D=5&search%5Bper_page%5D=10&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc)> (accessed 13.12.2016).

<sup>301</sup> Caring for Climate, List of Signatories, available at <<http://caringforclimate.org/about/list-of-signatories/>> (accessed 13.12.2016).

local communities-- , have become part of Voluntary Principles on Security and Human Rights <sup>302</sup> and also developed extensive policies for community involvement and human rights. As an example, Chevron states with its human rights policy that;

“We respect human rights through our contributions to socioeconomic development in the communities where we operate, by fostering ongoing proactive two way communication with communities and knowledgeable stakeholders, through our corporate environment, social and health impact assessment process for all major capital project, as well as for existing operations in sensitive operating environments.”<sup>303</sup>

While the genuineness of the policy can be questionable, it could still be used as a key advantage in documenting the inconsistency of the impact of their climate related activities on human rights. Moreover, once a company publicly declares its commitments to certain values whether by being part of the global initiatives or through their code of conduct, it becomes crucial to provide corporate reporting on activities for the sake of accountability and reputation. The integrated reporting that covers not only financial aspect but also environmental and social aspects of the business aim to respond to the needs of larger groups such as NGOs. Consistency or inconsistency in reporting or CSR initiatives can allow NGOs to access information and run campaigns, which could in turn raise public awareness. In illustration, since 2013, Oxfam assesses the agricultural sourcing policies of the world’s 10 largest food and beverage companies by exclusively focusing on publicly available information which includes but is not limited to corporate policies, sourcing principles and code of conducts.<sup>304</sup>

Furthermore, the corporate reporting is a tool to assess the accountability of the companies. Although they may not approach the climate issue through a human rights perspective, the existence of human rights commitments could still guide them towards better policies for livelihoods. For instance, while the human rights are not one of the thematic areas of the Behind the Brands campaign, “made a commitment to uphold the UN Guiding Principles and Human Rights” is one of

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<sup>302</sup> Companies and the Voluntary Principles on Security and Human Rights, available at <[http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs\\_Companies\\_Fact\\_Sheet\\_-\\_129742\\_v1\\_FHE-DC.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs_Companies_Fact_Sheet_-_129742_v1_FHE-DC.pdf)> (accessed 13.12.2016).

<sup>303</sup> Chevron, Human Right Policy, April 2014, available at <<https://www.chevron.com/-/media/chevron/shared/documents/AboutOurHumanRightsPolicy.pdf>> (accessed 13.12.2016).

<sup>304</sup> Oxfam, Behind the Brands, available at <<http://www.behindthebrands.org/en/about>> (accessed 13.12.2016).

the indicators of the scorecard.<sup>305</sup> Moreover, in the Oxfam index, addressing vulnerability/resilience of communities and reducing agriculture emission are indicators of the climate change awareness section. In this context, listed companies have already begun working on special projects to tackle climate impacts. For instance, World Bank Group and Nespresso became partners to a collaboration project to support coffee farmers in East Africa to combat the effects of the climate change.<sup>306</sup> Briefly, despite being voluntary, private companies' human rights commitment could be a complementary approach for climate policies and allow companies to consider communities and livelihoods.

Secondly, CSR activities such as corporate reporting, institutional monitoring, certification and participation in multi-stakeholder initiatives provide limited means to raise complaints with respect to human rights violations. Despite, the decisions are non-binding, OECD National Contact Points are handling cases of alleged breaches of the Guidelines by companies operating from or in the countries, which adhere to the Guidelines. While their composition and organization might vary the complaints with respect to environment and human rights can also be tackled through NCPs.<sup>307</sup> Although UN Global Compact is not a compliance-based initiative, serious allegations of human rights violations could be brought to the attention of the Global Compact Office, it should be noted however that Global Compact Board insists on the term 'matter' instead of 'complaint'.<sup>308</sup> Finally, Voluntary Principles on Security and Human Rights allow participants to raise their concerns about the other participants' lack of effort to implementing the Voluntary Principles.<sup>309</sup>

Furthermore, soft law might become the hard law. Governments and regional organizations can play a significant role in the promotion of corporate

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<sup>305</sup> Oxfam, The Behind the Brands Scorecard Methodology, August 2014, available at <[http://www.behindthebrands.org/~media/Downloadfiles/BtB%20Methodology%20document\\_final\\_Sept%202014.ashx](http://www.behindthebrands.org/~media/Downloadfiles/BtB%20Methodology%20document_final_Sept%202014.ashx)> (accessed 13.12.2016).

<sup>306</sup> 3BL Media, 'World Bank Group and Nespresso Partner to Help Coffee Farmers in East Africa', 7 October 2016, available at <<http://3blmedia.com/News/World-Bank-Group-and-Nespresso-Partner-Help-Coffee-Farmers-East-Africa>> (accessed 13.12.2016).

<sup>307</sup> OECD Guidelines for Multinational Enterprises, Procedural Guidance, pp.72-75

<sup>308</sup> FIDH, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanism, p.542.

<sup>309</sup> Voluntary Principles, Interaction between company and public security, available at <<http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/#interactions-between-companies-and-public-security>> (accessed 13.12.2016).

reporting and CSR initiatives. For instance, starting from 2016, more than 6000 companies in Europe have the obligation to report their sustainability performance according to the requirements of EU Directive on Non-Financial Information Disclosure.<sup>310</sup> Securities and Exchange Commission has improved environmental reporting requirements for companies due to pressure from Forum for Sustainable and Responsible Investment and Ceres.<sup>311</sup>

Indeed, all CSR initiatives and soft law mechanisms with respect to human rights might have their shortcomings, such as lack of transparency in complaint mechanism, lack of enforcement due to the voluntary nature, and lack of grievance mechanisms.<sup>312</sup> However, at the same time, they also provide opportunities to access company information, connect the dots between their human rights commitments and climate change emission activities, assess inconsistencies in place and mobilize the efforts of the CSO and finally give individuals the means to push TNCs for more responsible actions. In the current context none of the climate initiatives could fully provide these opportunities to engage with the corporate world.

c. Beyond engagement: Strength of the civil society and national human rights institutions

The civil society organizations have an influential role in the business agenda with multi-stakeholder initiatives, projects and ‘naming and shaming’ campaigns. In the UN framework, the majority of the human rights CSOs are involved in the development of a framework for business responsibilities and human rights. For instance, in response to the interim report of Special Representative John Ruggie, Amnesty International along with a considerable number of NGOs communicated their full support for the mandate<sup>313</sup>, moreover,

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<sup>310</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups text with EEA relevance, 22 October 2014, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095>> (accessed 13.12.2016).

<sup>311</sup> CERES, Cool Response: The SEC& Corporate Climate Change Reporting, February 2014.

<sup>312</sup> For instance Voluntary Principles complaint mechanism is not transparent. UNGC is a voluntary platform with no sanction. ISO 26000 does not have a grievance channel because it is not a certification. FIDH, ‘Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanism’, p.557.

<sup>313</sup> Amnesty International, ‘Joint NGO Response to Interim Reports of Special Representatives on Business and Human Rights’, 17 May 2006, available at <

general observations of civil society organization took part in Special Rapporteurs John Ruggies' Reports.<sup>314</sup> In another example, Danish Institute for Human Rights led the establishment of a National Human Rights Institutions Working Group under the International Coordinating Committee of NHRIs in 2008.<sup>315</sup> It is important to note that UN Guiding Principles have been widely recognized by civil society organizations and research institutes. The Principles are being used as the basis for business responsibilities. In this context, International Corporate Accountability Roundtable included Guiding Principles under their program and continuously provides research and information to help their main goals.<sup>316</sup> In 2011 Shift Project was launched for the implementation of Guiding Principles<sup>317</sup>, and the Institute for Human Rights and Business prepared an engagement tool on how to implement Guiding Principles for investment decisions.<sup>318</sup> These are only a few among the many other examples from NGOs and civil society organizations, which embed the Guiding Principles in their work.

Furthermore, human rights organizations are also putting considerable efforts into closing the gap between human rights and climate change. In 2015 before the Paris talks, Amnesty International and Greenpeace communicated a joint statement on why climate change is a human rights issue.<sup>319</sup> Additionally, Human Rights Watch highlighted the importance of human rights in addressing climate change.<sup>320</sup> Moreover, their effort was reinforced by environmental organizations that are not negligent of human perspective of the issue. As an

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<https://www.amnesty.org/en/documents/ior50/003/2006/en/>; Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, January 2011, available at <[https://www.fidh.org/IMG/pdf/Joint\\_CS\\_O\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CS_O_Statement_on_GPs.pdf)> (accessed 13.12.2016).

<sup>314</sup> Report of the Working Group on the issue of human rights and transnational corporations and other enterprises, A/HRC/29/28 (28 April 2015), available at <http://undocs.org/A/HRC/29/28>

<sup>315</sup> The Danish Institute for Human Rights, International Standards, available at <<http://www.humanrights.dk/our-work/business/international-standards>> (accessed 13.12.2016).

<sup>316</sup> ICAR, United Nations Guiding Principles on Business and Human Rights, available at <<http://www.humanrights.dk/our-work/business/international-standards>> (accessed 13.12.2016).

<sup>317</sup> Shift Project, available at <<http://www.shiftproject.org/who-we-are/>> (accessed 13.12.2016).

<sup>318</sup> Institute for Human Rights and Business, Investing the Rights Ways: an Engagement Tool, March 2013, available at <<https://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way-summary.pdf>> (accessed 13.12.2016).

<sup>319</sup> Greenpeace, Amnesty International, Joint Statement: Protection of human rights from climate change requires urgent shift to 100% renewable energy for all, 8 December 2015, available at <<http://www.greenpeace.org/international/Global/international/briefings/climate/COP21/Joint-Statement-GP-Amnesty.pdf>> (accessed 13.12.2016).

<sup>320</sup> Human Rights Watch, UN: Human Rights Crucial in Addressing Climate Change, 3 December 2015, available at <<https://www.hrw.org/news/2015/12/03/un-human-rights-crucial-addressing-climate-change>> (accessed 13.12.2016).

illustration, human rights issue is one of the focus areas of Mary Robinson Foundation for climate justice.<sup>321</sup> Finally, Human Rights and Climate Change Working Group have also been conducting studies with the participation of major human rights and environmental organizations.<sup>322</sup>

While the cooperation and communication between human rights and environmental organizations is promising, they also take action to raise awareness and enforce private sector responsibility in the business context. Although impacts of the naming-shaming campaigns are not financially proven, reputation and accountability are highly important for shareholders and consumers. The Union of Concerned Scientists presented the climate accountability scorecard of eight leading fossil fuel companies, namely BP, Chevron, ConocoPhillips, CONSOL Energy and ExxonMobil.<sup>323</sup> As a reaction to the Report, Business and Human Rights Resource Centre invited these companies to provide response for the allegations and already four of them replied.<sup>324</sup> Another instance of proactive advocacy from NGOs belongs to Greenpeace. In July 2016, Greenpeace gave a petition to Philippine Commission of Human Rights to request investigation of the responsibility of the carbon majors for human rights violations or threats of violations resulting from the impacts of climate change.<sup>325</sup> The Commission invited these companies to provide testimony. While some of the companies declined this invitation, BHP Billiton acknowledged the human rights impact with the following statement:

“We take our human rights obligations very seriously and demonstrate this by committing to operate in accordance with the United Nations (UN) Universal Declaration of Human Rights and aligning our approach with the UN Guiding Principles on Business and Human Rights. BHP Billiton recognizes the multiple dimensions of the challenges posed by

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<sup>321</sup> Mary Robinson Foundation Climate Justice, Human Rights and Climate Change, available at <<http://www.mrfcj.org/our-work/areas-of-work/human-rights-and-climate-change/>> (accessed 13.12.2016).

<sup>322</sup> Human Right and Climate Change Working Group, Partners, available at <<http://climaterights.org/partners/>> (accessed 13.12.2016).

<sup>323</sup> The Union of Concerned Scientists, ‘The Climate Accountability Scorecard’, October 2016, available at <<http://www.ucsusa.org/sites/default/files/attach/2016/10/climate-accountability-scorecard-full-report.pdf>> (accessed 13.12.2016).

<sup>324</sup> Business and Human Rights Resource Center, Company Responses, available at <<https://business-humanrights.org/en/union-of-concerned-scientists-score-8-fossil-fuel-companies-on-their-actions-to-limit-climate-change-company-responses-provided>> (accessed 13.12.2016).

<sup>325</sup> Greenpeace, ‘Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change’, 9 May 2016, available at <[http://www.greenpeace.org/seasia/ph/PageFiles/735232/Climate\\_Changeand\\_Human\\_Rights\\_Petition.pdf](http://www.greenpeace.org/seasia/ph/PageFiles/735232/Climate_Changeand_Human_Rights_Petition.pdf)> (accessed 13.12.2016).

climate change, including the potential direct and indirect impacts of climate change on the realization of human rights.”<sup>326</sup>

It might require some time for businesses to change their attitude and accept responsibilities in terms of human rights impact of climate change. However, BHP Billiton acknowledgement is a sign that this is possible with civil society engagement. There are various ways to increase the pressure on business through action at regional and international level such as EU Corporate Observatory<sup>327</sup>, OECD Watch<sup>328</sup>, and Corporate Watch<sup>329</sup>. If both environmental and human rights organizations continue to work in cooperation and engage with UN bodies by providing feedbacks, joint statements, and raising awareness through campaigns and mobilizing national actors, more companies will stop burying their heads in the sand and start to take responsibility for their actions.

d. Possibility of judicial process against private entities

The human rights protection mechanisms also provide judicial procedures, where victims raise their complaints in case of the violations of their rights. The states also need to provide access to justice and remedy. In the context of climate impacts, the causality is hard prove but not impossibly so. Human rights system might not be completely competent to seek remedy for climate impacts, however evidence suggest that “in the current context, successful litigation will use human rights law as a powerful secondary strategy to tort law”.<sup>330</sup>

The climate case law is an evolving area. In 2015, for the first time, Dutch government was found accountable for not taking the necessary measures to keep its citizens safe from climate change impacts in Urgenda Climate Case.<sup>331</sup> In the

<sup>326</sup> Business and Human Rights Resource Center, BHP Billiton, ‘Commission on Human Rights of the Philippines: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People’, 12 September 2016, available at <<https://business-humanrights.org/sites/default/files/documents/20160908%20Philippines%20CHR%20Petition%20BHP%20Billiton%20ResponseFinal%28002Statement%29.pdf>> (accessed 13.12.2016).

<sup>327</sup> Corporate Europe Observatory, available at <<https://corporateeurope.org>> (accessed 13.12.2016).

<sup>328</sup> OECD Watch, available at <<http://www.oecdwatch.org>> (accessed 13.12.2016).

<sup>329</sup> Corporate Watch, available at <<https://corporatewatch.org>> (accessed 13.12.2016).

<sup>330</sup> Business and Human Rights Resource Centre, Climate Change & International Human Rights Law: The Challenges for Business, Report of the Expert Workshop and Public Meeting, London, 27 May 2015, available at <[https://business-humanrights.org/sites/default/files/documents/Climate%20Justice%20-%20Expert%20Workshop%20Report%20-%20London%20-%202015\\_0.pdf](https://business-humanrights.org/sites/default/files/documents/Climate%20Justice%20-%20Expert%20Workshop%20Report%20-%20London%20-%202015_0.pdf)> (accessed 13.12.2016).

<sup>331</sup> Urgenda, Climate Case, available at <<http://www.urgenda.nl/en/climate-case/>> (accessed 13.12.2016).

mentioned case Urgenda accused the Dutch State for acting unlawfully with the following statement that also included reference to duties with respect to the ECHR:

“As mentioned briefly above, Urgenda accuses the State of several things, such as the State acting unlawfully by, contrary to its constitutional obligation (Article 21 of the Dutch Constitution), mitigating insufficiently as defined further in international agreements and in line with current scientific knowledge. In doing so, the State is damaging the interests it pursues, namely: to prevent the Netherlands from causing (more than proportionate) damage, from its territory, to current and future generations in the Netherlands and abroad. Furthermore, Urgenda argues that under Articles 2 and 8 of the ECHR, the State has the positive obligation to take protective measures. Urgenda also claims that the State is acting unlawfully because, as a consequence of insufficient mitigation, it (more than proportionately) endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care.”<sup>332</sup>

While the Court did not find the claims admissible with respect to Article 2 and 8 of the ECHR, the judgment stipulates the causality link between emission targets and impacts on living as follows:

“From the above considerations, particularly in 4.79, it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change. The court has taken into consideration in this respect as well that the Dutch greenhouse emissions have contributed to climate change and by their nature will also continue to contribute to climate change.”<sup>333</sup>

In the context of climate case law, Dutch Case might be the landmark, however there are promising cases in other countries as well. In 2015, twenty one young people from United States filed a constitutional climate change case against federal government in the U.S. District Court for the District of Oregon, claiming that “the federal government has violated the youngest generation’s constitutional rights to life, liberty, property, as well as failed to protect essential public trust resources.”<sup>334</sup> Regardless of the judgment, both cases attract the attention of public and raise more questions on the impact of climate change on human rights. As the International Council on Human Rights Policy notes, “lawsuits draw attention to

<sup>332</sup> Urgenda, Case Verdict (ENG), parag.4.32, available at <<http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendaVStaat-24.06.2015.pdf>> (accessed 13.12.2016).

<sup>333</sup> Urgenda, Case Verdict (ENG), parag.4.90.

<sup>334</sup> Our Children Trust, Climate Plaintiff, available at <<https://www.ourchildrenstrust.org/us/federal-lawsuit>> accessed 13.12.2016. It is now under the review by US District Court who heard oral arguments on September 2016, available at <<https://static1.squarespace.com/static/571d109b04426270152febe0/t/575ad543cf80a1a925eb20a5/1465570630055/16.04.08.OrderDenyingMTD.pdf>> (accessed 13.12.2016).

harmful effects that might otherwise remain below the radar”.<sup>335</sup> Although some of the cases might not achieve establishing a causality link, they will still have a considerable impact on public opinion. Each case prepares and serves as anticipation for new ones. In a noteworthy example from March 2016, a Peruvian farmer filed a letter of complaint against RWE over the impact of its activities on climate change.<sup>336</sup> More importantly, local legislations also start to take action on climate change impacts with the instigation of these individual cases. Most recently, Kenya passed its 2016 Climate Change Act, which allow citizens to sue private and public entities for lack of efforts to reduce climate change impacts.<sup>337</sup>

Today, the science might have its limits to link some of the gradual changes to climate change and the correlated impacts with human rights. However, as Carroll Muffet, the president of the Center for International Environmental Law argues, climate cases might have similarities with the judicial process against tobacco industry, which achieved dismissing allegations until health data linking cigarettes to addiction were finally proven.<sup>338</sup>

In fact, in the context of sharing research data with public, oil and coal and power companies might have another comparability with tobacco industry. In September 2016, Conservation Law Foundation filed a lawsuit against Exxon for covering up the research held by the company during the '80s on climate change impacts.<sup>339</sup> The Exxon Mobil spokesman reacted to the case as “yet another attempt to use the courts to promote a political agenda”.<sup>340</sup>

Whether these cases are political or legal, they will keep on coming in the upcoming years. The investors in these industries need to recognize the links

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<sup>335</sup> ICHRP, Climate Change and Human Rights: A Rough Guide, p. 41.

<sup>336</sup> Business and Human Rights Resource Centre, RWE Lawsuit, available at < <https://business-humanrights.org/en/rwe-lawsuit-re-climate-change> > (accessed 13.12.2016).

<sup>337</sup> Business and Human Rights Resource Centre, ‘Kenya: Analysts say new law could make companies liable for climate change damage’, 10 October 2016, available at <<https://business-humanrights.org/en/kenya-analysts-say-new-law-could-make-companies-liable-for-climate-change-damage#c143258>> (accessed 13.12.2016).

<sup>338</sup> Quoted in Lisa Friedman, ‘Claim blaming for devastating glacier melt in Peru may set landmark legal precedent’, E&E Publishing, 6 April 2015, available at < <http://www.eenews.net/stories/1060016270> > (accessed 13.12.2016).

<sup>339</sup> Huffington Post, ‘Exxon Mobil sued over climate change cover-up’, 29 September 2016, available at <[http://www.huffingtonpost.com/entry/exxonmobil-lawsuit-conservation-law-foundation-climate-change\\_us\\_57ec1512e4b024a52d2c5ae5](http://www.huffingtonpost.com/entry/exxonmobil-lawsuit-conservation-law-foundation-climate-change_us_57ec1512e4b024a52d2c5ae5)> (accessed 13.12.2016).

<sup>340</sup> Huffington Post, ‘Exxon Mobil sued over climate change cover-up’.

associated with legal claims. Tracing causal connections between one company activity and victims might have significant challenges. However all these cases which do not always find their basis in human rights law, give a human face to the problem, and “put a name and a face to the otherwise abstracted victims”.<sup>341</sup> Furthermore, the strength of the human rights law does not solely depend on its judicial power. Cases opened under its aegis could also have non-judicial side effects for business such as raising public awareness, encouraging companies to behave more responsibly and affecting corporate managers as well as investment decisions.<sup>342</sup> For instance both Chevron and ExxonMobil were introduced to human rights policies after being sued for human rights violations in Indonesia and Nigeria.<sup>343</sup> Hence, judicial mechanism could at least play a role to influence corporate behavior.

#### IV. Conclusion

“We know the truth about the norm of tobacco and the tobacco industry has been prosecuted for its illegal activities. So that’s the good news, right? The truth has come out and people who deserve to be punished have been punished. But the bad news is that it took 50 years. Now if we look at the case climate change, we can imagine eventually people will come to understand the scientific evidence. But the problem is we don’t have 50 years. Climate change is happening, it’s underway, and it’s irreversible.”  
Naomi Oreskes<sup>344</sup>

The urgency of tackling climate change requires efforts beyond what the international community could achieve with UNFCCC processes. Failure to address climate impacts or at least adapt will create costs and losses in a very inequitable way. Those who have contributed the least, will likely to be the ones affected the most. That is why climate change is not only a scientific fact but also a justice issue and human rights impacts need to be discussed and explored with a pressingly new way of thinking.

Climate change is happening a lot faster than the states’ ability to decide on a collective action. It took more than 20 years for parties to reach a consensus on

<sup>341</sup> Bodansky, ‘*Climate Change and Human Rights: Unpacking the Issue*’, p. 517.

<sup>342</sup> Judith Schrempf-Stirling, Florian Wettstein, ‘*Beyond guilty verdict: Human rights litigation and its impact on corporations’ human rights policies*’, *Journal of Business Ethics*, September 2015.

<sup>343</sup> Schrempf-Stirling, Wettstein, ‘*Beyond guilty verdict: Human rights litigation and its impact on corporations’ human rights policies*’.

<sup>344</sup> From the documentary ‘*Mechants of the Doubt*’, 2014.

legally binding global climate agreement. Despite the clear evidences of the climate change on human rights, the human right bodies have become part of the discussion more than ten years after the establishment of UNFCCC. The apathy of the international community and the urgency of the issue, requires us to adopt a better use of the existing system rather than creating new ones.

In the first chapter of this study, the historical approach to environment and human rights was briefly discussed. By using this legal basis, an attempt has been made to establish a link between climate change and human rights. In the framework of human rights law, although the existence of a casual link might still be questioned at the judicial level, the responsibility of the states to take preventative measures and provide access to information and decision-making are widely accepted. In this regard, one of the basic conclusions that could be drawn from this study is that the states' duty to protect the enjoyment of human rights from environmental harm also encompasses climate change impacts. Moreover, this duty to protect also covers the harm that might be caused by private parties.

None of the states has the ability to remain immune to climate change impacts or can afford to tackle this global issue with solely national efforts. Moreover, certain sectors and in some of cases some of the companies are the major the contributors of the climate change. They are operating in various countries with different sub-contractors and parent companies. In an ideal world, there would be a clockwork global system for regulating the private sector activities in terms of carbon emission as well, however this is not the case. The climate regime expect each country to set national targets. In this regard, it is important to note that climate change is a political issue with high economic stakes involving both the carbon market and new technologies. Hence, the efforts to regulate private conduct with climate regime might even end up benefiting corporate interest considering the lobbying power of corporations. However, currently there is no mechanism in place to regulate transnational carbon emissions. Achieving a consensus on creating one might take at least a decade in an optimistic consideration.

Indeed, the exploration of the private sector involvement from the perspective of human rights becomes a necessity not just because of the corporations' considerable emission quantities but also because of the glaring inability of the climate regime to regulate private sector emissions. The way to involve private sector in a human rights framework might seem like straying off the beaten track while there is the well-traveled path of the climate regime. However, considering the economic stakes, this is surely an effective and promising way of balancing the process in favor of climate justice, especially when some transnational companies have more economic power than the most of the states, which also allow them to play an invisible but important role in climate regime. Secondly, human rights law set clear duties for states to take preventative measures for regulating private conduct. Last but not least; despite being in a non-binding form, international community has already determined private sector responsibilities with UN Guiding Principles.

Although there are criticisms on targeting their voluntary nature, the regional and international mechanisms and tools that were analyzed in the scope of this study and regulating transnational corporations, provide a framework for corporate responsibility with respect to human rights. In fact, it is argued that each of the existent mechanisms could provide some opportunity to regulate private conduct although they are neither perfectly adopted nor fully transparent. However, despite their shortcomings, these tools have a greater potential to highlight private sector responsibility, since they already enjoy a track record and therefore could readily bring pressure to bear on the private sector to fulfill its commitments. As Naomi Oreskes states 'we don't have 50 years' to wait for a binding human rights agreement to come and definitively resolve the problem of business responsibility for climate change impacts on human rights. Making private sector responsible for their action is an important part of climate change justice. Within the human rights framework, corporate responsibility, stakeholder and civil society pressure and the enforcement of states duties with respect to private conduct, and finally climate case law, all could help to motivate the private sector to take more responsible actions for climate change. In an issue as complex and global as climate change, it might be too optimistic to believe that human rights framework could fully regulate corporate behavior; however it is definitely

providing efficient tools by drawing attention to the accountability issues, and incentivizing the states to require more climate friendly actions from the corporations.

