

A WORLD BANK STUDY



# Human Rights and Climate Change

A REVIEW OF THE INTERNATIONAL LEGAL  
DIMENSIONS

Siobhán McNerney-Lankford

Mac Darrow

Lavanya Rajamani

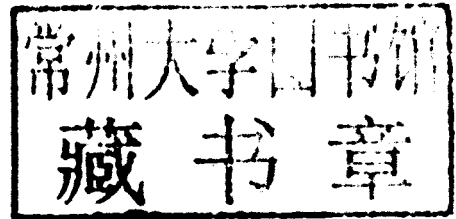


THE WORLD BANK

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## *A Review of the International Legal Dimensions*

*Siobhan McNerney-Lankford, Mac Darrow, and Lavanya Rajamani*



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# Foreword

The World Bank Study *Human Rights and Climate Change: A Review of the International Law Issues* provides a comprehensive and current review of the legal and policy frameworks governing the interface of human rights and climate change. The Study includes a conceptual overview of the link between climate impacts and human rights, focused on the relevant legal obligations underpinning the international law frameworks governing both human rights and climate change. As such it makes a significant contribution to the global debate on climate change and human rights by offering a comprehensive analysis of the international legal dimensions of this intersection. The Study helps advance an understanding of what is meant, in legal and policy terms, by the human rights impacts of climate change through examples of specific substantive rights. It gives a legal and theoretic perspective on the connection between human rights and climate change along three dimensions: first, human rights may affect the enjoyment of human rights. Second, measures to address human rights may impact the realization of rights and third, that human rights have potential relevance to policy and operational responses to climate change, and may promote resilience to climate change, including in developing countries in a way that may help sustainable development. Beyond a rigorous legal review and analysis however, the Study also contributes insights on the potential operational implications of the links between human rights and climate change in a diverse range of areas including policy measures, legal accountability, technology transfer and the potential role of the private sector.

The Study represents a timely and substantive contribution to an area that has been the subject of sustained attention in recent years, particularly in developing countries. This Study effectively consolidates knowledge from the fields of international human rights law, international law governing climate change and international environmental law, building on the existing work of the UN Office of the High Commissioner on Human Rights, the UN Human Rights Council and the International Council on Human Rights Policy. Although it maintains a legal focus, the Study has benefited from the input of a host of international experts from other disciplines as well.

The Trust Fund on Environmentally and Socially Sustainable Development (TFESSD) provided financial support for the publication of this Study and the research upon which it is based: this Study is part of an ongoing Trust Fund activity on the *Use of International Law to Address Social Impacts of Climate Change*. This publication has been reviewed and recommended for publication by the Legal Vice Presidency Research and Editorial Board and the Legal Vice Presidency is pleased to support its publication on an area of its broader initiative on knowledge and research. Moreover, since 2010 the management of the Trust Fund activity on the *Use of International Law to Address Social Impacts of Climate Change* has been integrated into the Nordic Trust Fund on Human Rights managed out of Operations Policy and Country Services Vice Presidency (OPCS). As such, OPCS is pleased to join in support of the publication of this Study as part of the Bank's knowledge and learning activities on human rights.

**Hassane Cisse,**  
Deputy General Counsel  
Knowledge and Research  
Legal Vice Presidency  
The World Bank

**R. Kyle Peters,**  
Director  
Strategy and Country Services  
Operations Policy & Country Services  
The World Bank

# Abstract

This Study explores arguments about the impact of climate change on human rights, examining the international legal frameworks governing human rights and climate change and identifying the relevant synergies and tensions between them. It considers arguments about (i) the human rights impacts of climate change at a macro level and how these impacts are spread disparately across countries; (ii) how climate change impacts human rights enjoyment within states and the equity and discrimination dimensions of those disparate impacts; and (iii) the role of international legal frameworks and mechanisms, including human rights instruments, particularly in the context of supporting developing countries' adaptation efforts.

The Study surveys the interface of human rights and climate change from the perspective of public international law. It builds upon the work that has been carried out on this interface by reviewing the legal issues it raises and complementing existing analyses by providing a comprehensive legal overview of the area and a focus on obligations upon States and other actors connected with climate change. The objective has therefore been to contribute to the global debate on climate change and human rights by offering a review of the legal dimensions of this interface as well as a survey of the sources of public international law potentially relevant to climate change and human rights in order to facilitate an understanding of what is meant, in legal terms, by "human rights impacts of climate change" and help identify ways in which international law can respond to this interaction. This is a complex and dynamically evolving legal and policy landscape and this study aims to capture its most salient features insofar as they appear at present.

The Study employs the following three-part conceptual understanding of the links between human rights and climate change. First, climate change may affect the enjoyment of human rights: this is explored in Chapter II and draws from the existing work of the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), the UN Human Rights Council and the International Council on Human Rights Policy. Second, measures to address climate change may impact the realization of human rights. This is a subset of the discussion of "impacts" targeting "secondary" human rights impacts of measures aimed at addressing climate change. Third, human rights have relevance to policy and operational responses to climate change, such that human rights obligations (both substantive and procedural) may be relevant to the design and implementation of effective responses to climate change, particularly in relation to adaptation and to some extent also to mitigation. Human rights may also have a role in promoting resilience to climate change and may reinforce sustainable development goals.

The Study includes a number of approaches from connecting climate change to specific human rights impacts under international human rights law, to tracing the applicable sources of law and surveying identifiable obligations under international human rights law and international environmental law. The Study reviews how human rights law addresses environmental protection in substantive and procedural terms focusing in particular on the advances made in the latter through the jurisprudence of regional human rights bodies for example. The Study considers also how environmental protection has been extended to regulate private as well as public action. Following from this

is a discussion of the application of human rights to climate change, including an outline of the various ways in which human rights can be seen to “add value” to the discourse, including the use of human rights legal framework as a tool for helping analyse climate impacts and determining appropriate policy responses. The Study includes a summary analysis of principles and precepts of international human rights law and multilateral environmental agreements (MEA) to consider their compatibility in conceptual terms. It concludes with a short review of potential operational implications and areas for further research. Among these new issues in human rights and climate change is the role of the private sector in addressing the challenges identified and complementing the efforts of governments: this is particularly apt in light of the increased recognition of the emerging roles of both public and private sector actors in relation to human rights.

# Acknowledgments

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The findings, interpretations, and conclusions expressed in this Study are those of the authors and do not necessarily reflect the views of the Executive Directors of the World Bank or the governments they represent. This Study should not be understood to be linked to any World Bank policies, operations or positions related to the subject areas it covers. The last revision of this Study was completed in September 2010.

\*Hassane Cisse, Editor-in-Chief, Kenneth Mwenda, Alberto Ninio (Chairs); Christina Biebesheimer, Charles Di Leva, Laurence Laulio, Siobhán McInerney-Lankford, Vikram Raghavan, Kishor Uprety and Vijay Tata, Members.

# Acronyms and Abbreviations

ABA	American Bar Association
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment
CBDR	Common But Differentiated Responsibilities
CDM	Clean Development Mechanism
CESCR	Committee on Economic, Social and Cultural Rights
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CER	Certified Emissions Reductions
COP	Conference of Parties
CRC	Convention on the Rights of the Child
CRC-AC	Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflicts
CRC-SC	Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRPD	Convention on the Rights of Persons with Disabilities
DFID	Department for International Development
DIHR	Danish Institute for Human Rights
EC	European Commission
ECtHR	European Court on Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
EGTT	Expert Group on Technology Transfer
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GHG	Greenhouse Gas
IACHR	Inter-American Commission on Human Rights
IBLF	International Business Leaders Forum
IBRD	International Bank for Reconstruction and Development
ICC	Inuit Circumpolar Conference
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination on All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IDA	International Development Association
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
KILM	Key Indicators of the Labour Market
KJAS	Kenya Joint Assistance Strategy
LDCs	Least Developed Countries
MDGs	Millennium Development Goals
MEA	Multilateral Environmental Agreement
MWC	Migrant Workers Convention
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
PRS	Poverty Reduction Strategies
REDD	Reduced Emissions from Deforestation and Degradation
RBAs	Rights-Based Approaches
SSA	Sub-Saharan Africa
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SRSG	Special Representative of the UN Secretary General on Business and Human Rights
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGC	United Nations Global Compact
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
US	United States
WDR	World Development Report
WHO	World Health Organization
WTO	World Trade Organization

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# Introduction

### **Climate Change: A Defining Human Development Challenge for the 21st Century<sup>1</sup>**

**T**he issue of climate change has captured global attention like few other causes. From relative obscurity in the late 1980s when it was first discussed in the UN General Assembly,<sup>2</sup> it has come to be characterized as “the defining human development challenge for the 21st century.”<sup>3</sup>

The Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), released in 2007, warned that the warming of the climate system is unequivocal and accelerating.<sup>4</sup> The global average temperature has increased by 0.74 degrees centigrade in the last century constituting the largest and fastest warming trend in the history of the Earth.<sup>5</sup> It is predicted to increase by 1.8 to 6.4 degrees centigrade.<sup>6</sup> Climate change will, among other impacts, increase the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, the incidence of malaria and heat-related mortality, and decrease crop yield and food security.<sup>7</sup> There is also increasing certainty that, as the climate system warms, poorer nations, and the poorest within them, will be the worst affected.<sup>8</sup> Of some concern is the fact that, in the short span of time since release of the IPCC report, there is growing evidence that its conclusions underestimated both the scale and pace of global warming.<sup>9</sup>

Climate change is expected to have profound impacts on human development.<sup>10</sup> The Human Development Report notes that climate change is hampering efforts to deliver the MDG promise, and that failure to address the climate change problem will consign the poorest 40% of the world’s population – 2.6 billion people – “to a future of diminished opportunity.”<sup>11</sup> Two degrees centigrade represents the threshold at which rapid reversals in human development become difficult to avoid.<sup>12</sup> The Stern Review provides authoritative guidance on the likely impacts of climate change on development in developing countries.<sup>13</sup> It records, for instance, that the cost of climate change in India and South East Asia could be as high as 9-13% loss in gross domestic product (GDP) by 2100 as compared to what could have been achieved in a world without climate change.<sup>14</sup> In an updated analysis in 2009, Stern remarked that “[t]he magnitude of risks involved in climate change is vastly greater than, for instance, the disruption that would be caused to people were the Western financial system to collapse.”<sup>15</sup> The adverse impacts are likely to be compounded for those countries worst hit by the global economic and financial crises, putting vulnerable communities under additional stress and limiting the resources for mitigation, adaptation and clean technology transfer.<sup>16</sup>

It seems likely that the climate impacts documented by the IPCC and the Stern Review will undermine the realization of a range of internationally recognised human rights, and indeed in many parts of the world the damage is already evident. Yet it is only recently that human rights have entered the discourse on the climate change problem.<sup>17</sup> As will be discussed in more depth below, an explicit concern for human rights within this context could bring value in a number of ways, such as placing the individual at the centre of inquiry, drawing attention to the impacts that climate change have (actually and prospectively) on the realization of a range of human rights that are protected by law, buttressing vulnerable communities' and countries' claims for international assistance, and helping to empower the most marginalised groups and strengthening accountability for delivery on adaptation measures through a focus on obligations. The reluctance to consider the human rights dimensions of climate change thus far can, to some extent, as some scholars have suggested, be traced to disciplinary path-dependence.<sup>18</sup> That is, climate discourse has originated and remained the purview of physical scientists and has only recently entered the social science discourse. As such, the climate negotiations have adopted consensus-driven, welfare-based solutions with an economic orientation, and largely ignored parallel developments in the human rights arena.<sup>19</sup> The practice of human rights has, for its part, been historically dominated by lawyers, and only relatively recently gained the attention of economists and other social scientists.

Against this backdrop, this paper seeks, in a schematic way, to explore:

- The key tenets, principles and premises of the conceptual and legal frameworks relating to human rights and multilateral environmental agreements (MEAs),<sup>20</sup> and their relevance in the context of climate change discourse, regulation and action;
- The human rights impacts of climate change, including the human rights impacts of action to combat climate change;
- The relevant sources of public international law relevant to climate change and human rights, and in that connection, the typologies, content and boundaries of legal obligations under each regime;
- Key features of the human rights legal and institutional framework at regional and national levels, in addition to the global level, relevant to how the challenge of climate change is framed and to how mitigation and adaptation measures might be pursued;
- The compatibility of action to protect human rights and address climate change; and
- The distinctiveness and so-called "value-added" of an approach to climate change based upon human rights, entailing, among other things, using the human rights legal framework as a tool for helping analyse climate impacts and determining appropriate policy responses.

## **The International Climate Change Regime**

A problem of this magnitude warrants swift cooperative action from the international community. To date, however, scientific studies show that the emission reduction commitments made by states have been inadequate (in that they are objectively insufficient to effectively address climate change)<sup>21</sup> and inadequately implemented (in that

numerous countries are not on track to meet their commitments).<sup>22</sup> There are significant barriers to effective collective action on climate change. Vast differences exist between countries in terms of contributions to the stock of carbon in the atmosphere, industrial advancement and wealth, nature of emissions use, and climate vulnerabilities. Poverty is increasing in some parts of the world, along with persistent inequalities within and between countries.<sup>23</sup> There is a marked reluctance in many polities and societies to modify existing lifestyles and development pathways, and opinion is divided on the promise of technological solutions to complex climate change problems.

Operating within these constraints, states have over the past two decades established an international legal regime, albeit an evolving one, to address climate change and its impacts. The United Nations Framework Convention on Climate Change (UNFCCC)<sup>24</sup> and its Kyoto Protocol<sup>25</sup> constitute the international community's first significant steps forward to collectively address these concerns. These instruments have attracted near-universal adherence. Their basic purpose is to set in place an international legal framework for common but differentiated responsibility for the reduction of greenhouse gas (GHG) emissions, and support for national adaptation efforts with a particular concern for the special needs of developing<sup>26</sup> and vulnerable countries, including Least Developed Countries (LDCs) and low-lying states.

The UNFCCC's framework divides its member states in two major groups bearing different obligations. The first framework comprises the so-called "Annex-I countries," which are mainly developed, industrialized countries historically responsible for most GHG emissions, which are accordingly subject to emissions reductions targets. "Non-Annex-I" countries constitute the remainder, which include "developing countries" (a broad and undifferentiated category including countries as diverse as China, Singapore, Argentina, India, Mali and Tuvalu) as well as the Least Developed Countries (LDCs) which receive special assistance. The Conference of Parties (COP) is the UNFCCC's chief decision-making body.<sup>27</sup> The Kyoto Protocol, which was adopted in 1997 and entered into force in 2005, sets legally binding obligations on its 187 member states<sup>28</sup> including binding limits on GHG emissions for Annex-I countries during the first commitment period of 2008-2012 (as distinct from the UNFCCC which only "encouraged" mitigation and adaptation measures). States must furnish specific information on emissions and emission reduction measures, and the Kyoto Protocol provides a range of mechanisms to facilitate this, namely a "joint implementation mechanism," an international emissions trading system, and the so-called Clean Development Mechanism (CDM),<sup>29</sup> to be discussed in more depth later.

Unlike the international human rights regime, the UNFCCC and the Kyoto Protocol do not include express provisions for remedial measures for individuals or communities in light of a particular environmental harm. However, subsequent agreements have called for consideration of the social and economic consequences of response measures as well as enhanced international cooperation.<sup>30</sup> Notably, at the Thirteenth Session of the Conference of the Parties to the UNFCCC, the Bali Action Plan was adopted "to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action..."<sup>31</sup> The intention had been to reach an agreed outcome leading to the adoption of a decision at the COP 15 in Copenhagen in December 2009. Instead, the conference produced a non-binding political declaration "the Copenhagen Accord," negotiated by 28 states, which was intended to bridge

the differences among parties while covering the pillars agreed in Bali.<sup>32</sup> A number of international funds have been established to support national adaptation in developing countries.<sup>33</sup> As critical as these and related agreements are, however, the slow pace of international negotiations and continuing political and economic differences between industrialized and developing countries make for, at best, a very cautious assessment of the potential for this legal regime to ward against the more damaging – yet entirely foreseeable – climate harm scenarios.<sup>34</sup>

## The International Human Rights Regime

Human rights are universal legal guarantees protecting individuals and to some extent groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. Human rights law obliges governments (principally) and other duty-bearers to do certain things and prevents them from doing others.<sup>35</sup> There are many different conceptions of human rights, drawing from different political philosophies, ethical principles and normative justifications. Contemporary international articulations of human rights owe much to the liberal traditions of the European Enlightenment, protecting the individual from unwarranted interference by the state, as well as to natural law and dignitarian philosophical influences.<sup>36</sup> The idea, or ideal, of universality<sup>37</sup> and the notion that universally valid rights may be located “beyond law and history,”<sup>38</sup> dependent upon no more than our inherent dignity and common humanity, are central tenets of the international human rights discourse.

All states have ratified at least one of the nine core international human rights treaties,<sup>39</sup> and most have ratified several, covering rights of all kinds – economic, social, cultural, civil, and political. The two foundational human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)<sup>40</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>41</sup> have 164 and 160 parties respectively. The Convention on the Rights of the Child (CRC)<sup>42</sup> has 191 states parties. The major emitters of GHGs are party to all three of these, with the exceptions of China, which has signed but not ratified the ICCPR, and the United States (U.S.), which has signed but not ratified the ICESCR or CRC.<sup>43</sup> The statements of rights in the human rights treaties are elaborated further by international expert bodies called “treaty bodies,” which review states parties’ periodic reports on their compliance with their substantive treaty obligations, decide individual claims of state non-compliance,<sup>44</sup> carry out investigations (in some cases),<sup>45</sup> and publish General Comments or other interpretive statements clarifying the meaning of various rights in light of evolving law and practice.<sup>46</sup>

Regional and national courts and tribunals occupy an important place in the scheme of human rights protection. Most national constitutions contain lists of human rights protections. General definitions at the global level are thereby translated into specific legal obligations and policy stipulations at the national level. The most significant and well established regional human rights mechanisms are the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.<sup>47</sup> Each of these agreements has at least one body with particular responsibility for interpreting it and reviewing states parties’ compliance: the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court on Human and Peoples’ Rights.<sup>48</sup> The European system is reinforced by the European Union (EU) Charter on Fundamental

Rights, although the legal status of the Charter and the scope of its application beyond the strict boundaries of the implementation of EU law remain unclear.<sup>49</sup>

These regional treaties recognise an extensive range of civil and political rights, including rights to life, liberty, freedom of expression, religion, movement and residence, and respect for privacy, family, and home.<sup>50</sup> In addition, the three regional treaties, but not the ICCPR, recognise a right to property.<sup>51</sup> Socio-economic rights are also protected by these regional systems, although the European and Inter-American systems have separate agreements for this purpose: the European Social Charter<sup>52</sup> and the Protocol of San Salvador to the American Convention.<sup>53</sup> By contrast, the African Charter incorporates socio-economic rights, as well as group rights, directly.<sup>54</sup> These treaties recognize and protect rights to work, to social security, to an adequate standard of living, including adequate food, clothing and housing, to the highest attainable standard of health, to education, to take part in cultural life, and to enjoy the benefits of scientific progress.<sup>55</sup> Uniquely, the Protocol of San Salvador includes a “right to live in a healthy environment” in its list of economic, social, and cultural rights.<sup>56</sup> The EU Charter on Fundamental Rights also reflects environmental protection objectives.<sup>57</sup> However, beyond the caveats expressed above concerning the Charter’s legal status, environmental protection is listed under “Title IV: Solidarity,” rather than Title V on individual rights, and taken in the context of the Charter as a whole can probably be understood as a policy objective of the EU rather than a putative human right.<sup>58</sup>

In contrast to international, African and many national experiences, the European and American regional courts do not have jurisdiction or direct authority to make binding determinations on economic, social, and cultural rights claims.<sup>59</sup> Nevertheless the latter courts are increasingly giving effect to socio-economic rights indirectly, by means of interpretation and enforcement of civil and political rights guarantees. Socio-economic rights are also promoted at the regional level through periodic review of national reports and, in the case of the European Social Charter, an optional complaints procedure.<sup>60</sup>

Human rights treaties impose several kinds of obligations on their parties. The IC-CPR, for instance, requires each of its parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>61</sup> The term “respect” has been interpreted to require the state to avoid violating the rights itself,<sup>62</sup> but the obligation to *ensure* the right requires that the state do more than merely avoid direct violation. It requires affirmative action to secure the right, or make it safe from loss or interference, including from private actors.<sup>63</sup> The Human Rights Committee, the body of independent experts charged with monitoring implementation of the Covenant, has stated:

The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However 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>64</sup>