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International law and the sustainable governance of shared natural resources: A principled approach

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Citation

Sánchez Castillo, N. N. A. (2020, October 1). *International law and the sustainable governance of shared natural resources: A principled approach*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/136858>

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Title: International law and the sustainable governance of shared natural resources: A principled approach

Issue date: 2020-10-01

4 | Observer Participation in International Climate Change Decision Making: A Complementary Role for Human Rights?

ABSTRACT

Parties to the United Nations Framework Convention on Climate Change (UNFCCC) have acknowledged the need to further enhance the effective engagement of observer organizations as the UNFCCC process moves towards implementation of the Paris Agreement. This chapter explores whether and how international human rights law could complement climate law to enhance observer participation in the international UNFCCC decision-making processes. Its main proposition is that the human right to participate in public affairs could contribute to enhancing observer participation in processes reviewing the implementation of parties' commitments and in intergovernmental negotiations more generally. This proposition is based on the following argument. First, the right to participate in public affairs requires states to adopt measures that ensure effective participation in public interest decision making. Second, the right to participate in public affairs encompasses international decision-making processes. Third, although neither the UNFCCC nor the Paris Agreement expressly refer to ensuring effective observer participation, for UNFCCC parties that are also signatories to relevant human rights treaties, these treaties carry the obligation to ensure effective public participation. This obligation is reinforced by parties' acknowledgement in the Paris Agreement that they should honor their existing human rights obligations when taking action to address climate change. Consequently, the human right to participate in public affairs creates obligations for UNFCCC parties that are also signatories to relevant treaties, which could complement climate provisions and thus contribute to enhancing observer participation in international UNFCCC decision-making processes. This chapter concludes by exploring possible complementarities.

* This chapter was originally published in 31 *Colorado Natural Resources, Energy, & Environmental Law Review* 2 (2020) 315-378. I am grateful to Professors Nico Schrijver and Eric de Brabandere for their helpful comments on earlier versions and to Dr Marta Alfaro and Dr Marcos Orellana for their insights into review procedures under the UNFCCC process. I am also grateful to the Chilean Ministry of Foreign Affairs for the opportunity to observe negotiations during COP 22 in Marrakech, in particular to Ambassadors Maria Teresa Infante and Waldemar Coutts and Mr Julio Cordano. The views expressed are strictly my own, as are any errors.

1 INTRODUCTION

Public participation in international environmental governance has led to increased transparency, accountability, effectiveness, and legitimacy of decision-making processes.¹ Although objections have been raised,² global instruments and regional treaties show that the international community regards public participation to be fundamental to sustainable development. For instance, Principle 10 of the Rio Declaration proclaims “environmental issues are best handled with participation of all concerned citizens.”³ In addition, both Agenda 21 and *The Future We Want* affirm that broad public participation in decision-making is essential to achieving sustainable development.⁴ The 2030 Agenda for Sustainable Development promotes a system of environmental governance in which public participation is integral to the governing process and necessary to ensure institutional transparency, accountability, and effectiveness.⁵ Regional treaties on access to information, public participation in de-

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- 1 See, e.g., J. Ebbesson, ‘Principle 10: Public Participation’ in Jorge E. Viñuales (ed) *The Rio Declaration on Environment and Development* (OUP 2015); T. Kramarz and S. Park, ‘Accountability in Global Environmental Governance: A Meaningful Tool for Action?’ (2016) *Global Environmental Politics* 16(1), 6; T. Bernauer and R. Gampfer, ‘Effects of Civil Society Involvement on Popular Legitimacy of Global Environmental Governance’ (2013) *Global Environmental Change* 23, 439.
 - 2 See, e.g., C. Pahl-Wostl, ‘A Conceptual Framework for Analysing Adaptive Capacity and Multi-level Learning Processes in Resource Governance Regimes’ (2009) *Global Environmental Change* 19, 354, 357. See also Gemma Carr, Günter Blöschl and Daniel Peter Loucks, ‘Evaluating Participation in Water Resource Management: A Review’ (2012) *Water Resources Research* 48, W11401, 2, stating that it has been objected that public participation may decrease efficiency for being resource consuming in terms of time and money; N.P. Spyke, ‘Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence’ (1999) *Boston College Environmental Affairs Law Review* 26(263), 273, affirming that public participation may result in “lowest-common-denominator solutions if decision-makers strive to accommodate as many views as possible”.
 - 3 United Nations Conference on Environment and Development (UNCED), ‘Rio Declaration on Environment and Development’, Principle 10. Rio Principle 10 has been subsequently developed into international law by the Aarhus Convention and the Escazú Agreement.
 - 4 UNCED ‘Agenda 21: Programme of Action for Sustainable Development’, UN Doc A/CONF.151/26 (Vol. I) (14 June 1992) Chapter 23, para. 2. The Rio Declaration and Agenda 21 were not the first international instruments to address public participation in environmental matters; however, they were the first to have significant impact on international law and policy likely because of their timing. See Ebbesson (n 1) at 288-289. UNGA ‘The Future We Want’, UN Doc A/RES/66/288 (11 September 2012) para. 43.
 - 5 See Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1, 21 October 2015 (‘2030 Agenda’), SDG 16. I discuss this at length in N. Sánchez Castillo-Winckels, ‘How the Sustainable Development Goals Promote a New Conception of Ocean Commons Governance’ in D. French and L. Kotzé (eds.) *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar 2018). See also M. Orellana, ‘Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration’ (2016) 25 *RECIEL* 50, 51 – 52, for an account of how the sustainable development discourse has affirmed the centrality of access rights in governance.

cision making, and access to justice in environmental matters (“access rights”) also highlight the importance of public participation. As stated in the Aarhus Convention, public participation enhances the quality and the implementation of decisions, promotes public awareness of environmental issues, empowers the public to express its concerns and the authorities to consider those concerns, furthers accountability and transparency in decision making, and strengthens public support for environmental decisions.⁶ Parties to the Aarhus Convention must promote the application of the Aarhus principles in international environmental decision making processes.⁷ The Escazú Agreement states that access rights contribute to the strengthening of democracy, sustainable development, and human rights.⁸ Parties to the Escazú Agreement may educate the public about the Agreement’s environmental provisions in international forums.⁹ According to both the Aarhus Convention and the Escazú Agreement, access rights are instrumental in protecting the right to live in a healthy environment.¹⁰

Public participation in international decision-making processes under the United Nations Framework Convention on Climate Change (“UNFCCC”)¹¹ adopts different forms. Non-state actors have been involved in various ways ranging from organizing activities in parallel to international negotiations, including arranging side-events, organizing exhibitions and protests to influence the climate agenda, submitting information and views on items under negotiation, and observing negotiations.¹² This chapter focuses on the participation of observer organizations in international UNFCCC decision-making processes. The term “international UNFCCC decision-making processes” refers to intergovernmental negotiations during sessions of the Conference of the Parties (“COP”) and subsidiary bodies and open-ended contact groups (i.e., intergovernmental negotiations). The term also includes the process of reviewing the implementation of parties’ commitments, namely those of the measure-

6 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted in Aarhus, Denmark, 25 June 1998, entered into force 30 October 2001) 2161 U.N.T.S. 447 (Aarhus Convention) Preamble, paras. 9 and 10.

7 *ibid.* art 3(7).

8 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, open for signature on 27 September 2018, not in force) available at <https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>, Preamble.

9 *ibid.* art 4(10).

10 Aarhus Convention (n 6) art. 1.

11 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

12 See, e.g. Harro van Asselt, ‘The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement’, 6 *Climate Law* (2016) 91, 94-6; JW Kuyper, B Linnér and H Schroeder ‘Non-state actors in hybrid global climate governance: justice, legitimacy, and effectiveness in a post-Paris era’ (2018) 9 *WIREs Climate Change* 1, 2-4.

ment, reporting, and verification framework (“MRV system”), which will eventually be superseded by the enhanced transparency framework (“ETF”) established by the Paris Agreement.¹³ Observer participation has increased and diversified over the years.¹⁴ UNFCCC parties have repeatedly acknowledged the value of observer participation in the intergovernmental negotiation process, and of observer contributions to deliberations on substantive issues.¹⁵ Parties have also acknowledged the need to further enhance the effective engagement of observer organizations as the UNFCCC process moves towards implementation and operationalization of the Paris Agreement.¹⁶ This chapter explores whether and how international human rights law (“IHRL”) could complement climate law to enhance observer participation in international UNFCCC decision-making processes.

This chapter’s main proposition is that the human right to participate in public affairs, and the obligation to ensure effective participation arising from it, could enhance observer participation in MRV processes and intergovernmental negotiations. This proposition is based on the following argument. First, the right to public participation requires states to adopt legislative and other measures necessary to ensure effective participation in public interest decision making. Second, the right to participate in public affairs encompasses international decision-making processes. Third, although neither the UNFCCC nor the Paris Agreement expressly refer to ensuring effective observer participation, UNFCCC parties that are also signatories to relevant human rights treaties have the obligation to ensure effective participation, including at the international level. Parties reinforce this obligation by acknowledging in the Paris Agreement that they should honor their existing human rights obligations when taking action to address climate change. Consequently, the human right to participate in public affairs creates obligations for UNFCCC parties that are also signatories to relevant treaties, which could complement climate provisions and thus

13 Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. 54113 (Paris Agreement) art 13; UNFCCC ‘Decision 1/CP.21, Adoption of the Paris Agreement’ UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) para 98. See also ‘Decision 1/CP.24, Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement’ UN Doc FCCC/CP/2018/10/Add.1, preamble and para 39.

14 UNFCCC Secretariat ‘Observer organizations in the intergovernmental process’ (period 2014-2015) included in SBI ‘Arrangements for Intergovernmental Meetings’ UN Doc FCCC/SBI/2016/2 (14 March 2016) paras 36-45; UNFCCC Secretariat ‘Engagement of observer organizations and non-Party stakeholders in the intergovernmental process’ (period 2016-2017) included in SBI ‘Arrangements for Intergovernmental Meetings’ UN Doc FCCC/SBI/2018/7 (22 March 2018) paras 37-41.

15 SBI ‘Report of the Subsidiary Body for Implementation on its forty-fourth session, held in Bonn from 16 to 26 May 2016’ UN Doc FCCC/SBI/2016/8 (26 August 2016) paras 161-2. See also SBI, UN Doc FCCC/SBI/2016/2, *ibid* para 40; SBI, UN Doc FCCC/SBI/2018/7, *ibid* para 40.

16 SBI, UN Doc FCCC/SBI/2016/8 (n 15) para 162.

contribute to enhancing observer participation in international UNFCCC decision-making processes. This chapter concludes by exploring possible options for participation in discussions on climate change.

This chapter begins by looking into the obligation to ensure effective participation and by discussing the premise that the right to participate in public affairs encompasses international decision-making processes. This chapter subsequently examine observer participation in international UNFCCC decision-making processes and the significance of the parties' acknowledgment that they should respect human rights in the Paris Agreement. Finally, this chapter discusses how the right to participate in public affairs, and the obligation to ensure effective participation, could complement climate provisions on observer participation.

2 THE HUMAN RIGHTS OBLIGATION TO ENSURE EFFECTIVE PARTICIPATION

This section draws on a survey I conducted of universal and regional human rights agreements. The purpose was to identify the obligations derived from the right to participate in public affairs.¹⁷ I focused on the relevant provisions of two agreements: the International Covenant on Civil and Political Rights ("ICCPR") and the American Convention on Human Rights ("ACHR"), including subsequent interpretations by the institutions that oversee their implementation. I excluded from this discussion other surveyed agreements because they focus on the rights to vote and be elected.¹⁸ These rights do not apply to inter-

17 I surveyed the following human rights agreements: International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Convention on the Rights of Persons with Disabilities, American Convention on Human Rights, African Charter of Human and People's Rights, and Protocol No. 1 to the European Convention on Human Rights.

18 Art 13(1) of the African Charter of Human and People's Rights provides: 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'. The phrase 'in the government of his country' found neither in the ICCPR nor in the ACHR, *prima facie* excludes participation in public affairs other than those related to the government of the respective state. Decisions of the African Court on Human and People's Rights (ACHPR) on cases alleging violations of Article 13 focus primarily on the right to vote and be elected in national elections and, consequently, do not shed light on whether states must ensure the right to participate in public affairs in decision-making processes occurring outside their territory. See *e.g. Actions Pour la Protection des Droits del L'Homme (APDH) v. The Republic of Cote D'Ivoire* (Merits) (ACHRP, 18 November 2016) App. No. 001/2014; *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania* (Merits) (ACHRP, 14 June 2013) App. Nos. 009&011/2011. In addition, as provided by Article 3 of Protocol No. 1 to the European Convention on Human Rights, parties 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people

national decision-making processes and for this reason neither support nor contradict the premise that states should ensure effective participation in said processes.

2.1 The obligation to adopt measures that ensure effective opportunities to participate

As stipulated in Article 25(a) of the ICCPR, “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.”¹⁹ According to the General Comment No. 25 adopted by the Human Rights Committee (“HRC”), “the [ICCPR] requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.”²⁰ Measures adopted in compliance with this obligation should not make any discriminatory distinctions.²¹ In addition, any conditions applied to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria.²² General Comment No. 25 also clarified that the right to participate in public affairs is not limited to certain forms of participation – such as voting in electoral processes or acting as members of legislative or executive bodies. The Comment states: “Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”²³ This is the form of participation that takes place in UNFCCC processes.

The HRC has developed its interpretation in several decisions specifically concerning violations of the right to participate in public affairs. For instance, as stated in *Sudalenko v. Belarus*: “the exercise of the rights protected by article 25 may not be suspended or excluded except on grounds which are established

in the choice of legislature’. The right to participate in public affairs is in fact a right to free elections. Similarly to the jurisprudence of the African Court, that of the European Court of Human Rights focuses on the rights to vote and to stand for election, see European Court of Human Rights, Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to Free Elections (updated on 31 August 2018) <https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf>.

19 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25(a).

20 HRC ‘General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights’ UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) para 1.

21 ICCPR (n 19) art 2 (1); *ibid* para 3.

22 General Comment No. 25 (n 20) para 4.

23 General Comment No. 25 (n 20) para 8.

by law and which are objective and reasonable”,²⁴ a view reiterated in *Paksas v. Lithuania*.²⁵ Providing an example of unreasonable criteria, it stated in *Bwalya v. Zambia* held that “restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.”²⁶ According to the HRC’s interpretation, Article 25(a) creates an obligation for states to adopt the necessary measures, legislative or otherwise, to ensure that right holders have effective opportunities to exercise their right to participate in public affairs without discrimination or unreasonable conditions. As discussed below, this obligation binds the ICCPR’s 172 parties at both the national and the international level.²⁷

In a wording similar to that of ICCPR Article 25(a), Article 23(1)(a) of the ACHR provides “1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives.”²⁸ As the Inter-American Court of Human Rights (“IACtHR” or “the Court”) contended in *Yatama v. Nicaragua*, the state must guarantee the enjoyment of political rights²⁹ in an equal and non-discriminatory manner, which “is not fulfilled merely by issuing laws and regulations that formally recognize these rights, but requires the state to adopt the necessary measures to guarantee their full exercise”.³⁰ In addition, as the Court noted later in *Castañeda Gutman v. Mexico*, the term “opportunities” in the text of Article 23 “implies the obligation to guarantee with positive measures that every person who is formally the titleholder [sic] of political rights has the real opportunity to exercise them.”³¹ In both cases the Court asserted that states need to create optimum conditions and mechanisms to ensure that political rights can be exercised effectively.³² Subsequent juris-

24 *Sudalenko v. Belarus* (HRC, 1 November 2010) Communication No. 1354/2005, CCPR/C/100/D/1354/2005 para 6.4.

25 *Paksas v. Lithuania* (HRC, 29 April 2014) Communication No. 2155/2012, CCPR/C/110/D/2155/2012 para 8.3.

26 *Bwalya v. Zambia* (HRC, 14 July 1993) Communication No. 314/1988, CCPR/C/48/D/314/1988 para 6.6.

27 The ICCPR currently has 172 parties. See UN Office of the High Commissioner for Human Rights <<http://indicators.ohchr.org/>>

28 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 23(1)(a).

29 The rights to participate in public affairs, to vote and be elected, and to equal access to public service – all protected by ACHR Article 23- are collectively referred to in the jurisprudence of the IACtHR as ‘political rights’.

30 *Yatama v. Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 23 June 2005) Series C No. 127, para 201.

31 *Castañeda Gutman v. Mexico* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 6 August 2008) Series C No. 184, para 145.

32 *Yatama v. Nicaragua* (n 30) para 195; *Castañeda Gutman v. Mexico*, *ibid*.

prudence confirms the view of the Court on the matter.³³ In a recent case, *San Miguel Sosa y Otras v. Venezuela*, the Court specifically identified the need for institutions and procedural mechanisms that allow and ensure the effective exercise of the rights protected by Article 23.³⁴ The decisions of the Inter-American Commission on Human Rights concerning violations of political rights are consistent with the Court's jurisprudence.³⁵ According to these judicial interpretations, ACHR Article 23(1)(a) binds its twenty-three parties to adopt the necessary measures to guarantee real opportunities to exercise the right to participate in public affairs.³⁶ This is essentially the same obligation derived from ICCPR Article 25(a).

Several decisions of the IACtHR concerning indigenous communities identify obligations that are complementary to the obligation arising from Article 23(1)(a) when indigenous peoples' rights are involved. As the Court recalled in *Kichwa Indigenous People of Sarayaku v. Ecuador*, there is an obligation to guarantee the rights of indigenous peoples to be consulted on any measure that may affect their rights and to participate in decision-making processes that concern their interests. This obligation entails "the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights."³⁷ In addition, states must guarantee the right to consultation and participation at all stages of the planning and implementation of projects that may affect indigenous peoples' rights so that indigenous peoples "can truly participate in and influence the decision-making process."³⁸ The Court also stated in *Saramaka People v. Suriname* that, in order to guarantee the effective participation of the Saramaka people in development or investment plans within their territory, the state

33 *Luna López v. Honduras* (Merits, Reparations and Costs) (IACtHR, 10 October 2013) Series C No. 269, para 142; *Cepeda Vargas v. Colombia* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 26 May 2010) Series C No. 213, para 172; *Chitay Nech et al. v. Guatemala* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 25 May 2010) Series C No. 212, para 107; *Human Rights Defender et al. v. Guatemala* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 28 August 2014) Series C No. 283, paras 185-6.

34 *San Miguel Sosa et al. v. Venezuela* (Merits, Reparations and Costs) (IACtHR, 8 February 2018) Series C No. 348, para 111.

35 See e.g. *Statehood Solidarity Committee v. United States* (Inter-American Commission on Human Rights (IACHR), 29 December 2003) Report No. 98/03, Annual Report of the IACHR 2003; *Andrés Aylwin Azócar et al. v. Chile* (IACHR, 27 December 1999) Report No. 137/99, Case 11863, Annual Report of the IACHR 1999; *Susana Higuchi Miyagawa v. Peru* (IACHR, 6 October 1999) Report No. 119/99, Case 11428, Annual Report of the IACHR 1999.

36 The ACHR has currently 23 parties. See Organization of American States <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>

37 *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations) (IACtHR, 27 June 2012) Series C No. 245, para 166.

38 *ibid* para 167.

must actively consult them³⁹ and ensure that environmental and social impact assessments are conducted prior to awarding a concession.⁴⁰ In the cases of *Kaliña and Lokono Peoples v. Suriname* and *Kichwa Indigenous People of Sarayaku v. Ecuador*, the IACtHR reiterated the relation between the states' obligation to supervise the execution of prior environmental and social impact assessments and their obligation to guarantee the effective participation of indigenous peoples.⁴¹ Naturally, these decisions have no binding force except between the parties and in respect to those particular cases; however, they could be considered a subsidiary means for determining what the obligation to adopt the necessary measures guaranteeing the right to public participation entails regarding indigenous peoples.⁴²

Other nonbinding yet influential sources could assist law makers in determining what measures to adopt to ensure effective opportunities to participate in public affairs entails. As stipulated in Article 8(1) of the United Nations General Assembly ("UNGA") *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* ("Declaration on Human Rights Defenders"): "Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his of her country and in the conduct of public affairs."⁴³ Article 8(1) is similar to Article 25(a) of the ICCPR and Article 23(1)(a) of the ACHR. Article 8(2), however, provides examples of rights included within the right to participate in public affairs, illustrating how right holders can exercise said right. It reads:

This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.⁴⁴

39 *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) (IACtHR, 28 November 2007) Series C No. 172, para 133.

40 *Saramaka People v. Suriname* (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs) (IACtHR, 12 August 2008) Series C No. 185, para 41.

41 *Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) (IACtHR, 25 November 2015) para 215; *Kichwa Indigenous People of Sarayaku v. Ecuador* (n 37) para 206.

42 Article 38 (1) of the Statute of the International Court of Justice, considered to contain the sources of international law, provides that the Court shall apply judicial decisions as subsidiary means for the determination of rules of law.

43 UNGA 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' UN Doc A/RES/53/144 (8 March 1999) art 8(1).

44 *ibid* art 8(2).

Thus, according to Article 8(2), the right to participate in public affairs includes the right to submit criticism and proposals to entities concerned with public affairs – arguably including intergovernmental bodies such as those part of the UNFCCC process – for improving their functioning and the right to draw attention to any aspect of their work that may hinder human rights protection. Other sources contain a similar interpretation. In her report assessing the situation of human rights defenders in Armenia in light of the Declaration on Human Rights Defenders,⁴⁵ the Special Rapporteur on the situation of human rights defenders recommended that the Government of Armenia “[e]nsure[s] the right to have effective access, on a non-discriminatory basis, to participation in the conduct of public affairs, which includes the right to voice criticism and submit proposals to improve the functioning of governmental bodies, agencies and organizations concerned with public affairs.”⁴⁶ In addition, the Office of the High Commissioner for Human Rights (“OHCHR”) affirmed in its report *Factors that Impede Equal Political Participation and Steps to Overcome those Challenges* (“OHCHR Report”), referring to the Declaration on Human Rights Defenders, that “[e]ffective participation includes the right of civil society actors to have their views incorporated within legislative and policymaking processes and to freely voice criticism or to submit proposals to improve the functioning of public authorities.”⁴⁷

The Declaration on Human Rights Defenders is not legally binding. This does not, however, mean that it lacks the capacity to influence national and international law and policy.⁴⁸ The Declaration is grounded in international human rights treaties, and it reinforces states’ legally binding obligations to protect human rights. Indeed, it refers specifically to the ICCPR as one of the “basic elements of international efforts to promote universal respect for and observance of human rights”⁴⁹ and to the importance of other human rights instruments adopted at the regional level.⁵⁰ If we agree that “contemporary international law is often the product of a complex and evolving interplay of instruments, both binding and non-binding,”⁵¹ then the interplay between the binding human rights treaties discussed above and the non-binding Declaration on Human Rights Defenders can help determine what the right to

45 Human Rights Council ‘Report of the Special Rapporteur on the situation of human rights defenders on her visit to Armenia’ UN Doc A/HRC/16/44/Add.2 (23 December 2010), para 2.

46 para 106.

47 Human Rights Council ‘Factors that impede equal political participation and steps to overcome those challenges: Report of the Office of the United Nations High Commissioner for Human Rights’ UN Doc A/HRC/27/29 (30 June 2014) para 87.

48 I have previously discussed the value of UNGA resolutions in relation to the 2030 Agenda and its accompanying Sustainable Development Goals in N. Sanchez Castillo-Winckels (n 5).

49 Declaration on Human Rights Defenders (n 43) Preamble.

50 *ibid.*

51 A. Boyle and C. Chinkin, *The Making of International Law* (Oxford 2007) 210.

participate in public affairs entails and the states' obligations derived from it.

Finally, the 2018 OHCHR *Draft Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs* ("OHCHR Draft Guidelines") recommend measures to ensure "meaningful participation before, during and after decision-making."⁵² The recommendations are, *inter alia*, that right holders should be able to participate in shaping the agenda of decision-making processes,⁵³ access adequate, accessible, and necessary information as soon as it is known,⁵⁴ participate in the decision-making process from an early stage,⁵⁵ submit any information, analyses, and opinions directly to the relevant public authority,⁵⁶ and access key information to allow effective participation in monitoring and evaluating progress in the implementation of decisions.⁵⁷ The Draft Guidelines were prepared by the OHCHR as requested by the Human Rights Council Resolution 33/22,⁵⁸ which emphasized the "critical importance of equal and effective participation in political and public affairs for democracy, the rule of law, social inclusion, economic development and advancing gender equality, and for the realization of all human rights and fundamental freedoms."⁵⁹ The Council took note of the Draft Guidelines, and presented them as a set of orientations for states and, where appropriate, other relevant stakeholders.⁶⁰

2.2 The right to participate in public affairs encompasses international decision making

As stated by the HRC and the OHCHR, the right to participate in public affairs encompasses participation in international decision-making processes. In the HRC's General Comment No. 25, it clarified that the conduct of public affairs "is a broad concept which relates to the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at *international, national, regional*

52 Human Rights Council 'Draft guidelines for States on the effective implementation of the right to participate in public affairs: Report of the Office of the United Nations High Commissioner for Human Rights' UN Doc A/HRC/39/28 (20 July 2018) para 63.

53 *ibid* para 64.

54 *ibid* para 68.

55 *ibid* para 70.

56 *ibid* para 73.

57 *ibid* para 85.

58 Human Rights Council 'Equal participation in political and public affairs' Un Doc A/HRC/RES/33/22 (6 October 2016) para 8.

59 *ibid* Preamble

60 Human Rights Council 'Equal participation in political and public affairs' UN Doc A/HRC/RES/39/11 (5 October 2018) para 1.

and local levels.”⁶¹ In line with this interpretation, the above-mentioned OHCHR Report states that the right to participate in public affairs includes participation “at all levels, from the local to the international.”⁶² In a subsequent report, the OHCHR further stated that legal frameworks including the right of individuals and groups “to participate in the design, implementation and evaluation of any policy, programme or strategy that affects their rights, *at the local, national and international levels* are most conducive to the full realization of the right to participate in political and public affairs.”⁶³

In strong support of the right to participate in public affairs at the international level, the OHCHR Draft Guidelines advise that participation of civil society actors at all relevant stages of an international decision-making process “should be allowed and proactively encouraged.”⁶⁴ As stated in the Draft Guidelines, “those who participate at the supranational level often bring local and national concerns to the attention of the international community, thus connecting the international and local levels.”⁶⁵ Conversely, international decision-making has an impact on national legislation, policies, and practices, which warrant that decisions “are made in a transparent and accountable manner, with the participation of those who will be affected by those decisions.”⁶⁶ According to General Comment No. 25 and the Draft Guidelines, the right to participate in public affairs covers international decision-making processes including MRV processes and intergovernmental negotiations under the UNFCCC.

It is worthy of mention that the right to participate in public affairs also covers the subjects considered in UNFCCC decision making. The OHCHR Report concluded that the right to participate in public affairs “may now be read as encompassing the rights to be consulted and to be provided with equal and effective opportunities to be involved in decision-making processes *on all matters of public concern*.”⁶⁷ As stated by the UNGA resolution *Protection of Global Climate for Present and Future Generations of Humankind*, climate change is one

61 General Comment No. 25 (n 20) para 5, emphasis added by author.

62 OHCHR Report (n 47) para 89.

63 Human Rights Council ‘Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them: Report of the Office of the United Nations High Commissioner for Human Rights’ UN Doc A/HRC/30/26 (23 July 2015) para 72, emphasis added by author.

64 Human Rights Council ‘Draft guidelines for States on the effective implementation of the right to participate in public affairs: Report of the Office of the United Nations High Commissioner for Human Rights’ UN Doc A/HRC/39/28 (20 July 2018) para 100.

65 *ibid* para 97.

66 *ibid* para 96.

67 OHCHR Report (n 47) para 89. Emphasis added by author.

of the greatest challenges of our time.⁶⁸ Both the UNFCCC and the Paris Agreement acknowledge that climate change is “a common concern of humankind,”⁶⁹ which means that its harmful effects are of such magnitude that they can only be effectively addressed through international cooperation.⁷⁰ Furthermore, the gravity of the matter renders interstate cooperation alone insufficient. Therefore, states have called on non-state actors to actively engage in combatting climate change.⁷¹ If the right to participate in public affairs covers decision making on all matters of public concern, it must cover decision-making on climate change.

To summarize, both the ICCPR and the ACHR require states to adopt measures that ensure effective opportunities to exercise the right to participate in public affairs. In addition, decisions of the IACtHR have identified several additional obligations related to the participation of indigenous peoples. Although only binding between the parties and with respect to those particular cases, these judicial decisions could help determine what the right to participate in public affairs entails with regard to indigenous peoples. Furthermore, as stated in the UNGA Declaration on Human Rights Defenders, the right to participate in public affairs includes the right to submit criticism and proposals to improve the functioning of organizations concerned with public affairs. Although not legally binding, the Declaration on Human Rights Defenders is grounded in international human rights law and may have an effect on the treaties with which it interacts. Also, the OHCHR Draft Guidelines provide guidance concerning, *inter alia*, measures that ensure meaningful participation and advise that states should allow public participation and proactively encourage participation at all stages of international decision-making processes. Finally, the right to participate in public affairs encompasses international

68 UNGA ‘Protection of global climate for present and future generations of humankind’ UN Doc A/RES/67/210 (12 March 2013) para 2. See also UNFCCC Decision 1/CP.16 ‘The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’ UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) (Cancun Agreements) para 1.

69 UNFCCC (n 11) Preamble; Paris Agreement (n 13) Preamble.

70 I have previously discussed this point in N. Sanchez Castillo-Winckels, ‘Why “common concern of humankind” should return to the work of the International Law Commission on the atmosphere’ 29 *Georgetown Environmental Law Review* (2017) 131-151, which is Chapter 3 of this dissertation.

71 The UNGA recognized ‘the need to engage a broad range of stakeholders at the global, regional, national and local levels’ for effective climate action, including national, subnational and local governments, private businesses and civil society, youth and persons with disabilities, women and indigenous peoples (UN Doc A/RES/67/210, n 68, para 12). The Paris Agreement in turn recognizes the importance of public participation with respect to enhancing climate action (n 13 art 12) and Decision 1/CP.21 invites non-party stakeholders to scale up their efforts to combat climate change and support actions to reduce emissions and decrease vulnerability to its adverse effects (n 13 para 134). Decision 1/CP.21 also encourages parties to ‘work closely with non-party stakeholders in order to catalyze efforts to strengthen mitigation and adaptation action’ (n 13 para 118).

decision making as well as decision making on all matters of public concern, such as climate change, and consequently covers international UNFCCC decision-making processes.

3 OBSERVER PARTICIPATION IN INTERNATIONAL UNFCCC PROCESSES

Article 7(6) of the UNFCCC provides:

Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.⁷²

According to the UNFCCC Rules of Procedure, admitted observers “may, upon invitation of the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object.”⁷³ This includes participation in meetings of the COP and its subsidiary bodies,⁷⁴ including the Subsidiary Body for Scientific and Technological Advice (“SBSTA”), the Subsidiary Body for Implementation (“SBI”), and “any body, including committees and working groups, established pursuant to Article 7(2)(i) of the [UNFCCC],”⁷⁵ such as the Ad Hoc Working Group on the Paris Agreement (“APA”).⁷⁶ In addition, upon invitation of the presiding officers, representatives of intergovernmental organizations (“IGO(s)”) and non-governmental organizations (NGOs) may attend as observers any open-ended contact group established under the UNFCCC process, unless at least one-third of the parties present at the respective session object, “and on the understanding that the presiding officers of such contact groups may determine

⁷² UNFCCC (n 11) art 7(6).

⁷³ UNFCCC ‘Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies’ UN Doc FCCC/CP/1996/2 (22 May 1996) rule 7(2).

⁷⁴ *ibid* rule 30.

⁷⁵ *ibid* rule 2(8). Article 7(2) provides that the COP shall keep under regular review the implementation of the UNFCCC and any related legal instruments and make the decisions necessary to promote the effective implementation of the UNFCCC. To this end, the COP shall: ‘(i) Establish such subsidiary bodies as are deemed necessary for the implementation of the [UNFCCC]’.

⁷⁶ Decision 1/CP.21 established the Ad Hoc Working Group on the Paris Agreement (APA) to prepare for the entry into force of the Paris Agreement (n 13) paras 7-8.

at any time during their proceedings that they should be closed to intergovernmental and non-governmental organizations.”⁷⁷

The Paris Agreement affirms in its preamble the importance of public participation at all levels on the matters addressed in the Agreement. In addition, it introduces the notion of mutual assistance in working towards enhanced public participation. Article 12 reads, “[p]arties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement.”⁷⁸ Therefore, parties have the obligation to work jointly in taking measures towards increasing and improving the quality of public participation. Interpreted in the light of the preamble to the Paris Agreement – that participation is important at all levels – this obligation may influence parties regarding public participation in international climate change decision making.

As of November 2017, 2,259 observer organizations had been admitted to the UNFCCC process.⁷⁹ Approximately ninety percent of the admitted observers are members of constituencies,⁸⁰ which are “loose groups of NGOs with diverse but broadly clustered interests or perspectives.”⁸¹ There are nine UNFCCC constituencies mirroring the nine major groups identified as stakeholders in Agenda 21 and reconfirmed in *The Future We Want*.⁸² These are business and industry NGOs (“BINGO(s)”), environmental NGOs (“ENGO(s)”), local governments and municipal authorities (“LGMA(s)”), indigenous peoples’ organizations (“IPO(s)”), research and independent NGOs (“RINGO(s)”), trade union NGOs (“TUNGO(s)”), a women and gender constituency (“WGC”), youth NGOs (“YOUNGO(s)”), and farmers. A recent study on the role of non-state actors in climate governance found that they are perceived as being particularly strong in certain governing activities.⁸³ For instance, BINGOs are regarded as strong in influencing decisions, policy makers, and agenda setting and in taking mitigation action, while ENGOs are perceived as strong in raising awareness and representing public opinion.⁸⁴ RINGOs are considered strong in providing expertise, evaluating consequences, and proposing solutions, and LGMA

77 UNFCCC ‘Decision18/CP.4, Attendance of intergovernmental and non-governmental organizations at contact groups’ UN Doc FCCC/CP/1998/16/Add.1 (25 January 1999) at 66, para 1.

78 Paris Agreement (n 13) art 12.

79 UNFCCC Secretariat, UN Doc FCCC/SBI/2018/7 (n 14) para 39.

80 UNFCCC Secretariat ‘Non-governmental organization constituencies’ <http://unfccc.int/files/parties_and_observers/ngo/application/pdf/constituencies_and_you.pdf>

81 *ibid.*

82 Agenda 21 (n 4) Section III; *The Future We Want* (n 4) para 43.

83 N Nasiritousi, M Hjerpe and B Linnér, ‘The roles of non-state actors in climate change governance: understanding agency through governance profiles’ (2016) 16 *International Environmental Agreements* 109.

84 *ibid.* at 119.

in taking action, particularly in the field of climate adaptation. TUNGOs and IPOs are considered strongest in representing marginalized voices.⁸⁵ Although a large number of observers have significant resource implications for the UNFCCC secretariat,⁸⁶ and although several issues concerning non-state actor participation in UNFCCC processes have been raised, including representation,⁸⁷ legitimacy,⁸⁸ and conflict of interests,⁸⁹ parties nevertheless agree on the importance of further enhancing observer engagement as the UNFCCC process moves towards implementing the Paris Agreement.⁹⁰

Still, UNFCCC parties close intergovernmental meetings to observers, for instance, towards the end of each negotiation period. Many criticized restricted access for observers and civil society during the last two days of COP 15 in Copenhagen as a practice that “undercut the role of civil society, legitimacy and democratic process of negotiations. It violated Article 6 of the UNFCCC and Rule 7 of the Rules of Procedure. It also failed to comply with the principles of access to information and public participation embodied in the Aarhus Convention.”⁹¹ Closing negotiating sessions to observers during COP 21 in Paris much earlier in the process than usual resulted in unnecessary speculation about a range of issues and made it more difficult for civil society “to play its role of holding obstructive delegations to account for their role in the negotiations.”⁹² A common explanation found in the literature on global environmental politics is the “functional efficiency hypothesis” that states hold meetings open to observers when it is convenient for their interests, particularly during the agenda-setting stage, and close meetings during the more sensitive decision-making stages.⁹³ However, a study examining why certain UNFCCC negotiations are open to observers while others are closed found that besides

85 *ibid.* at 120.

86 UNFCCC Secretariat, UN Doc FCCC/SBI/2018/7 (n 14) para 39.

87 See *e.g.* Kuyper et al (n 12) at 10-11.

88 See *e.g.* K Bäckstrand et al ‘Non-state actors in global climate governance: from Copenhagen to Paris and beyond’ (2017) 26 *Environmental Politics* 561, 570-572.

89 SBI ‘Views on opportunities to further enhance the effective engagement of non-Party stakeholders with a view to strengthening the implementation of the provisions of decision 1/CP.21’ UN Doc FCCC/SBI/2017/INF.3 (28 April 2017) paras 38-9; SBI ‘In-session workshop on opportunities to further enhance the effective engagement of non-Party stakeholders with a view to strengthening the implementation of the provisions of decision 1/CP.21: Report by the secretariat’ UN Doc FCCC/SBI/2017/INF.7 (12 May 2017) paras 16, 25, 29, 33 and 36.

90 UN Doc FCCC/SBI/2016/8 (n 15) para. 162.

91 S Kravchenko, ‘Procedural Rights as a Crucial Tool to Combat Climate Change’ (2010) *Georgia Journal of International and Comparative Law* 613, 643-4, referring to restricted access to observers and civil society during the last two-days of COP 15 in Copenhagen. See also DR Fisher, ‘COP-15 in Copenhagen: How the Merging of Movements Left Civil Society Out in the Cold’ (2010) 10 *Global Environmental Politics* 11, 14-15.

92 M Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’ (2016) 6 *Climate Law* 1, 7.

93 Kuyper et al (n 12) at 3.

functional efficiency, “decisions on open/closed negotiations are also influenced by standard operating practices, habits, and routines.”⁹⁴ For example, informal consultations are rarely open to observers as standard procedure and not necessarily because of high political stakes.⁹⁵ The study concluded that a large number of closed meetings could lead to unequal participation opportunities for non-state actors, depending on their available resources, and to the further disenfranchisement of particular non-state actors.⁹⁶

After COP 15 in Copenhagen, the SBI identified the need to enhance the role and contributions of observer organizations and adopted conclusions on various ways to enhance their engagement in the intergovernmental process, including through inviting presiding officers to “seek opportunities for observer organizations to make interventions”⁹⁷ and to “make greater use of observer inputs in workshops and technical meetings.”⁹⁸ Following the adoption of the Paris Agreement, the SBI acknowledged “the need to further enhance the effective engagement of observer organizations as the UNFCCC process moves forward into the implementation and operationalization of the Paris Agreement.”⁹⁹ In an SBI workshop held in May 2017, parties and non-party stakeholders discussed opportunities to enhance the effective engagement of non-party stakeholders, including ways to expand the scope of their contributions, diversify modes of engagement, and facilitate participation at the intergovernmental level.¹⁰⁰ Proposals to engage non-party stakeholders included creating “new opportunities for non-party stakeholders to make substantive input to the intergovernmental negotiating process and better utilize their expertise.”¹⁰¹ Both the SBI’s recommendation to “make greater use of observer inputs” and the proposal to “better utilize their expertise” suggest a gap between the opportunities to present submissions and the opportunities for those submissions to influence parties’ decision making. They also suggest an intention to bridge said gap.

Observer participation in the MRV system established by the Cancun Agreements and the Durban Outcome consists of two parallel processes: the inter-

94 N Nasiritousi and B Linnér, ‘Open or closed meetings? Explaining nonstate actor involvement in the international climate change negotiations’ (2016) 16 *International Environmental Agreements* 127, 141.

95 *ibid* at 140.

96 *ibid* at 142.

97 SBI ‘Report of the Subsidiary Body for Implementation on its thirty-four session, held in Bonn from 6 to 17 June 2011’ UN Doc FCCC/SBI/2011/7 (12 August 2011) para 178(a)(i).

98 *ibid* para 178(a)(ii).

99 SBI, UN Doc FCCC/SBI/2016/8 (n 15) para 162.

100 SBI, UN Doc FCCC/SBI/2017/INF.7 (n 89).

101 SBI, UN Doc FCCC/SBI/2017/INF.3 (n 89) para 15 (b).

national assessment and review process (“IAR”) for Annex I parties¹⁰² and the international consultation and analysis process (ICA) for non-Annex I parties.¹⁰³ Both the IAR and the ICA follow a three-stage procedure of reporting, review, and multilateral assessment. Annex I parties under IAR submit biennial reports on their progress in achieving emission reductions,¹⁰⁴ which subsequently undergo a technical expert review of information followed by a multilateral assessment of the implementation of emission reduction targets.¹⁰⁵ Non-Annex I parties under ICA submit biennial update reports of national greenhouse gas inventories,¹⁰⁶ which subsequently undergo a technical expert analysis in consultation with the party concerned followed by a facilitative sharing of views.¹⁰⁷ Neither the IAR nor the ICA provides opportunities for active observer participation, and this has been criticized as “fail[ing] to acknowledge the crucial role that civil society can play in the context of this transparency mechanism.”¹⁰⁸

The Paris Agreement established the Enhanced Transparency Framework (“ETF”), which is intended to “build on and enhance the transparency arrangements under the [UNFCCC],”¹⁰⁹ and will eventually supersede the MRV system.¹¹⁰ The ETF does not distinguish between Annex I and non-Annex I parties, but applies a single set of rules to all parties with built-in flexibility for those parties that need it in light of their capacities.¹¹¹ Like the MRV system, the ETF follows a three-stage procedure. The information submitted by each party at the reporting stage must undergo a Technical Expert Review (“TER”), followed by a Facilitative Multilateral Consideration of Progress (“FMCP”).¹¹² In the review stage, a TER is conducted of the mandatory information provided by parties, such as a greenhouse gas inventory, information to track progress on Nationally Determined Contribution (“NDC”) implementation, and information on support provided by developed country parties.¹¹³ The TER must identify areas of improvement for the parties concerned, paying

102 Cancun Agreements (n 68) paras 44; UNFCCC ‘Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’ UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012) (Durban Outcome) paras 23-31 and Annex II Modalities and procedures for international assessment and review.

103 Cancun Agreements, *ibid* para 63; Durban Outcome, *ibid* paras 56-62 and Annex IV Modalities and guidelines for international consultation and analysis.

104 Cancun Agreements para 40(a); Durban Outcome paras 12-22 and Annex I.

105 Durban Outcome para 23 and Annex II.

106 Cancun Agreements para 60(c); Durban Outcome paras 39-44 and Annex III.

107 Durban Outcome para 58 and Annex IV.

108 S Duyck, ‘MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs’ (2014) 3 *Carbon and Climate Law Review* 175, quote from the abstract.

109 Paris Agreement (n 13) art 13(3).

110 Paris Agreement, Decision 1/CP.21 and Decision 1/CP.24 (n 13).

111 Paris Agreement (n 13) art 13(1)(2); Decision 1/CP.21 *ibid* para 89.

112 Paris Agreement, *ibid*, art 13(11).

113 *ibid*.

particular attention to the respective national capabilities and circumstances of developing countries.¹¹⁴ Following the TER, each party must participate in the FMCP, which concerns parties' efforts related to climate finance and toward implementing and achieving their NDCs.¹¹⁵

When the APA¹¹⁶ was developing recommendations for modalities, procedures, and guidelines ("MPG(s)") to implement the Paris Agreement, including MPGs for the ETF, the OHCHR submitted that the ETF should "promote accountability through transparent and participatory processes in line with international norms and standards."¹¹⁷ This accountability includes the ICCPR and "other human rights instruments [which] guarantee all persons the right to free, active, meaningful and informed participation in public affairs."¹¹⁸ In addition, scholars suggested to the SBI that the ETF could strengthen the role of non-party stakeholders in review procedures by allowing them to submit written and/or oral questions and engaging them in the work of the expert review teams.¹¹⁹ The TER procedures established by the MPGs, contained in the Katowice Climate Package (also known as the "Paris Agreement Rulebook"), do not provide opportunities for active public participation.¹²⁰ The procedure for the FMCP, which will consider *inter alia* the TER report,¹²¹ provides that working group sessions "shall be open to observation by registered observers."¹²² The MPGs thus provide for the same degree of observer participation found in the MRV system.

Although neither the UNFCCC nor the Paris Agreement refer expressly to ensuring effective observer participation, UNFCCC parties that also belong to the ICCPR and the ACHR nevertheless have the obligation to adopt measures that ensure effective participation, including at the international level. The

114 *ibid* art 13(12).

115 *ibid* art 13(11).

116 Ad Hoc Working Group on the Paris Agreement (n 76).

117 OHCHR 'Response to the Request of Ad Hoc Working Group on the Paris Agreement (APA) to provide information, views and proposals on any work of the APA before each of its sessions' (6 May 2017) <http://unfccc.int/files/parties_observers/submissions_from_observers/application/pdf/892.pdf> at 4.

118 *ibid* at 3.

119 'Submission by the Stockholm Environment Institute and the University of Oxford to the Subsidiary Body for Implementation on opportunities to further enhance the effective engagement of non-Party stakeholders with a view to strengthening the implementation of the provisions of Decision 1/CP.21' <<https://unfccc.int/sites/default/files/818.pdf>> at 2. See also H van Asselt and T Hale, 'How non-state actors can contribute to more effective review processes under the Paris Agreement' (2016) SEI policy brief, Stockholm Environment Institute <<https://www.sei.org/publications/how-non-state-actors-can-contribute-to-more-effective-review-processes-under-the-paris-agreement>> at 3.

120 'Decision 18/CMA.1, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement' UN Doc FCCC/PA/CMA/2018/3/Add.2, paras 162-163.

121 *ibid* para 190.

122 *ibid* para 193(b).

Paris Agreement's acknowledgement that parties should respect, promote, and consider their respective human rights obligations when taking climate action reinforces the obligation derived from ICCPR Article 25(a) and ACHR Article 23(1)(a), bringing to the forefront the complementary role of human rights.

4 ACKNOWLEDGEMENT THAT PARTIES SHOULD COMPLY WITH HUMAN RIGHTS OBLIGATIONS

The Paris Agreement contains the first explicit reference to human rights in a climate change treaty. The seventh paragraph of its Preamble reads:

Acknowledging that climate change is a common concern of humankind, 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 people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity¹²³

This paragraph is the result of a process which began in 2007 with the Malé Declaration on the Human Dimension of Global Climate Change ("Malé Declaration").¹²⁴ In this Declaration, representatives of the Small Island Developing States expressed concern that "climate change has clear and immediate implications for the full enjoyment of human rights,"¹²⁵ and requested that the COP assess such implications.¹²⁶ Two years later, Human Rights Council Resolution 10/4 noted that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights,"¹²⁷ including the rights to life, health, food, water, adequate housing, and self-determination.¹²⁸ The resolution recognized that these implications affect most acutely those who are already vulnerable due to factors such as geography, gender, age, indigenous or minority status, or disability.¹²⁹ It also took note of an OHCHR report on the relationship between climate change and human rights, according to which the human rights framework "seeks to empower individuals and underlines the critical importance of effective

123 Paris Agreement (n 13) Preamble.

124 'Malé Declaration on the Human Dimension of Global Climate Change' (14 November 2007) <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf>

125 *ibid* Preamble.

126 *ibid* para 3.

127 Human Rights Council 'Human rights and climate change' UN Doc A/HRC/RES/10/4 (25 March 2009) Preamble.

128 *ibid*.

129 *ibid*.

participation of individuals and communities in decision-making processes affecting their lives.”¹³⁰ The Cancun Agreements (2010) from the COP – noting Resolution 10/4 – stated its vision for long-term cooperative action, emphasizing that “Parties should, in all climate change related actions, fully respect human rights.”¹³¹

In 2014, special procedures mandate-holders of the Human Rights Council issued an open letter to the UNFCCC parties calling on them to “include language in the 2015 climate agreement that provides that the Parties shall, in all climate change related actions, respect, protect, promote, and fulfill human rights for all.”¹³² In the run-up to COP 21 in Paris, attention to the relationship between climate change and the enjoyment of human rights progressively increased. At the COP, the OHCHR presented a proposal that stated “climate change is a human rights problem and the human rights framework must be part of the solution.”¹³³ According to the proposal, climate action “should be guided by relevant human rights norms and principles, including the rights to participation and information, transparency, accountability, equity, and non-discrimination.”¹³⁴ Additionally, governments pledged to enable meaningful collaboration between national representatives to the UNFCCC process and to the Human Rights Council in order to “increase [their] understanding of how human rights obligations inform better climate action.”¹³⁵ At the same time, intergovernmental organizations promoted awareness of the issue by publishing reports on climate change and human rights.¹³⁶ Thus, the process initiated with the Malé Declaration culminated in the formal acknowledgement in the Paris Agreement that parties should respect, promote, and consider their respective human rights obligations when taking action to address climate change.

130 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’ UN Doc A/HRC/10/61 (15 January 2009) para 81.

131 Cancun Agreements (n 68) para 8.

132 ‘A new climate change agreement must include human rights protections for all’, An open letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014 <<https://unfccc.int/resource/docs/2014/smsn/un/176.pdf>>, at 1.

133 OHCHR ‘Understanding Human Rights and Climate Change’ <<http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>> at 6.

134 *ibid.*

135 ‘The Geneva Pledge for Human Rights in Climate Action’ (13 February 2015) <<https://carbonmarketwatch.org/wp-content/uploads/2015/02/The-Geneva-Pledge-13FEB2015.pdf>> at 1.

136 See e.g. UNEP, *Climate Change and Human Rights* (2015) <<https://wedocs.unep.org/handle/20.500.11822/9934>>; UNICEF, *Unless we act now: The impact of climate change on children* (2015) <https://www.unicef.org/publications/index_86337.html>.

Numerous organizations have elaborated on the significance of this acknowledgement. The Human Rights Council affirmed that “human rights obligations ... have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”¹³⁷ In addition, as stated by the Special Rapporteur on human rights and the environment, explicitly acknowledging the relevance of human rights “signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations.”¹³⁸ Scholars have also discussed the meaning of the parties’ acknowledgement and they have emphasized that it draws attention to existing obligations. For instance, Mayer submits that the main added value of the preambular paragraph is “its insertion in a treaty rather than in a COP decision” allowing the interpretation that UNFCCC parties “must recognize an obligation to comply with their respective human-rights obligations when carrying out climate-change-related actions under the Agreement.”¹³⁹ Duyck agrees, stating that referring to human rights in the Paris Agreement “do[es] not define new rights but, rather, simply highlight[s] the relevance of existing obligations.” He adds that such a reference might help ensure that climate change processes do not remain insulated from developments in the field of human rights, and this reference “could potentially play a significant role in guiding the work of the bodies established under the UNFCCC and in framing the implementation of the Paris Agreement.”¹⁴⁰

In essence, parties to the Paris Agreement recognize that they should comply with their incumbent human rights obligations when they take climate action. This recognition shows that the parties have accepted that climate change jeopardizes the full enjoyment of human rights. It also highlights the potential for human rights obligations to inform the implementation of climate laws and policies. Although climate law does not expressly refer to ensuring effective participation, the right to participate in public affairs requires that parties to the relevant human rights treaties adopt measures that ensure effective public participation, including at the international level. The preamble to the Paris Agreement reinforces this obligation. Thus, the human right to participate in public affairs could complement climate provisions on observer participation in international decision-making processes. The following section explores possible options.

¹³⁷Human Rights Council ‘Human rights and climate change’ UN Doc A/HRC/RES/32/33 (18 July 2016) Preamble.

¹³⁸ Human Rights Council ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ UN Doc A/HRC/31/52 (1 February 2016) para 22.

¹³⁹ B Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109, 113–4.

¹⁴⁰ S Duyck, ‘The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate’ (2015) 26 *Yearbook of International Environmental Law* 3, 42 and 44.

5 CONCLUSION: POSSIBLE COMPLEMENTARY ROLE FOR HUMAN RIGHTS

The right to participate in public affairs could complement climate rules on observer participation in the ETF.¹⁴¹ As mentioned above, the recently adopted MPGs for the ETF do not provide opportunities for observer participation during the technical expert review stage. In addition, working group sessions of the FMCP are open to observation only by registered observers. These MPGs will come under review no later than 2028,¹⁴² so it is worth considering what opportunities for public participation they could include in the future. As stated in the Declaration on Human Rights Defenders, the right to participate in public affairs includes the right to submit criticism and proposals to entities concerned with public affairs for improving their functioning. It also includes the right to draw attention to any aspect of their work that may hinder human rights protection.¹⁴³ Grounded in human rights law, and considering that international law is often the result of an interplay between binding and non-binding instruments,¹⁴⁴ the non-binding Declaration on Human Rights Defenders could influence implementation of the right to public participation by providing that the right includes the rights to submit criticism, submit proposals, and draw attention to any aspect that could stand in the way of human rights protection. The phrase “entities concerned with public affairs” should include UNFCCC bodies at the international level because climate change is a common concern of humankind – and therefore a ‘public affair’ – and because the right to participate in public affairs covers international decision-making.

In this light, during the review stage the ETF could allow observers to provide information and views concerning parties’ national reports. Expert review teams could in turn be mandated to incorporate observers’ input in their review reports. In this way, the expert review report would not only address the challenges faced and the progress made by the reporting party towards achieving emission reduction targets, but also take note of how those challenges and progresses affect the interests of specific groups represented by observers. The expert review report could thus provide a more comprehensive consideration of a party’s implementation and achievement of its NDC in order to identify areas for improvement. In addition, the FMCP could allow observers to submit written questions electronically prior to the FMCP session. During the FMCP session, observers could ask oral questions to the party under FMCP or, similarly to the procedure of the Universal Periodic Review of the

141 Parties shall submit their first biennial transparency report in accordance with the MPGs for the ETF at the latest by 31 December 2024. Decision 18/CMA.1 (n 120) para 3.

142 Decision 18/CMA.1, *ibid* para 2.

143 Declaration on Human Rights Defenders (n 43) art 8(2).

144 Boyle and Chinkin (n 51).

Human Rights Council, they could be allowed to make general oral comments.¹⁴⁵ The UNFCCC secretariat could be mandated to include the questions submitted by observers, and the responses in the party's record.

More generally, the human rights obligation to ensure effective participation requires that states take specific action by adopting measures to attain the goal of effective participation. Thus, UNFCCC parties that are also signatories to the relevant treaties should comply with the obligation of observer participation in international UNFCCC decision-making processes. The preamble to the Paris Agreement encourages compliance with this obligation in the context of climate change, stating that parties should respect, promote, and consider their respective human rights obligations when taking climate action. While the UNFCCC does not refer to adopting measures that ensure effective participation, the Paris Agreement does require that parties "cooperate in taking measures, as appropriate, to enhance ... public participation."¹⁴⁶ However, the action required (cooperate in taking measures) and the goal (enhanced public participation), although in alignment with the human rights obligation, are comparatively weaker in content. The phrase "cooperate in taking measures" requires parties to work jointly towards enhanced public participation but fails to oblige them to also work separately towards that end. The obligation to enhance public participation is required from parties acting as a group, not individually. This emphasis on collective action could lead to an understatement of individual state action and thus lessen the effectiveness of parties' efforts to achieve enhanced participation. The obligation to adopt measures that ensure effective participation could correct such an understatement since it obliges states party to the relevant treaties to take individual action as well. In this way, individual states' human rights duty to ensure effective participation could complement UNFCCC parties' collective duty to cooperate in taking measures to enhance public participation.

145 UNGA 'Human Rights Council' UN Doc A/RES/60/251 (3 April 2006) para 5(e); Human Rights Council 'Institution-building of the United Nations Human Rights Council' UN Doc A/HRC/RES/5/1 (18 June 2007) Annex para 31. See also Duyck (n 108) at 185, submitting that the procedures of the Universal Periodic Review (UPR) provide useful lessons for the MRV process with respect to stakeholder participation.

146 Paris Agreement (n 13) art 12.