Indigenous Peoples' Rights and Climate Change Policies

Jean-Marie Rogue*

«It is a matter of human rights»

Joint Statement of the Special Procedure Mandate Holders of the Human Rights Council on the UN Climate Change Conference (Copenhagen, 7-18 December 2009), Geneva, 7 December 2009[1]

The Fifteenth Conference of the Parties of the UN Framework Convention on Climate Change (UNFCCC) concluded on 18 December 2009 in Copenhagen on a – at best provisional – failure. The final document, which was not approved by a number of states present, is not binding and does not indicate CO2 emission reduction commitments to replace the ones set up by the Kyoto Protocol, which runs until 2012. Worse, it is the unanimity-based UN process itself that has been discredited, with the risk that future climate change policies be designed on a flexible/non-binding/non-universal-reach basis outside the UN framework. While some put forward that this would allow more flexibility and efficiency, this article argues that bypassing the UN framework – and more generally marginalising the human (rights) dimension in the debates over climate – will entail a risk of reinforcing climate change-related and climate policies-related human rights violations. In the climate governance model shaped in Rio and Kyoto, the design of climate policies has been monopolised by states while the implementation of concrete projects has been dominated by a largely unregulated private sector. The failure of the Copenhagen Summit to maintain post-2012 climate policies in an internationally binding framework means that states will be even less controlled than before in the way they conduct their climate policies. Unrepresented peoples and marginalised groups, who suffer the more from the impossibility to participate in and influence climate policies at national,

* *European Master in Human Rights and Democratisation, academic year 2008-2009.*

[1] UNHCHR, *«An Ambitious Climate Change Agreement Must Protect Human Rights of All», Warn UN Experts*, Geneva, 7 December 2009, Joint Statement of the Special Procedure Mandate Holders of the Human Rights Council on the UN Climate Change Conference, (Copenhagen, 7-18 December 2009), at http://www.unhchr.ch/huricane/huricane.nsf/view01/211098584F07FF2FC1257685002E1DE0?opendocument (consulted on 8 December 2009).

international and project level, will have little or no say in the design of these policies that will affect them and will probably benefit from few human rights guarantee to protect them from abuses.

Indigenous peoples have been among the biggest advocates of a binding document in the framework of the UN and will continue to push for this at the next UNFCCC meetings in Bonn (June 2010) and Mexico (December 2010). Their decade-long climate campaign can be placed on the intersection of two emerging phenomena in international law. One is the active participation of indigenous peoples, as re-emerging subjects of international law, in the making of international law and policies, i.e. in global governance (in this case regarding climate change). The other one is the progress towards rapprochement between regimes that have previously been very distinct: the International Human Rights Law regime (including indigenous peoples' rights) and the International Environmental Law regime (including climate change). This article focuses on the human rights/climate campaign led by indigenous peoples and will seek to show that it is admittedly difficult but not impossible to establish legal and political responsibilities in climate-related indigenous peoples' rights violations (1); that obtaining legal redress is also complicated (2); but that the real interest resides in avoiding violations, which passes through adequate participation and consultation at global level (3) and adequate governance at national and scheme levels like REDD[2] (4).

1. Establishing Responsibilities for Climate-related Indigenous Peoples' Rights Violations

There is no fatality in climate change. While the symptoms of global warming take the form of «natural» phenomena – draughts, rise of the sea level, ice melting, etc. – both the causes and the consequences of this changing of climate are human... and translatable in terms of violations of the human rights to life, to health, to water and food, to housing, to culture, to self-determination, and of course to a sane environment. The first victims of those violations are groups (so-called «vulnerable» groups) who contributed the less to

[2] REDD stands for the «Reduction of Emissions from Deforestation and forest Degradation».

global warming: poor and marginalised groups, developing countries peasants, low island nations, and indigenous peoples, who live in sensitive ecosystems (notably polar, dry, forest, high altitude and coastal ecosystems). Although the environmental responsibilities for those violations are known (GHG emissions, primarily from the North), establishing them at a purely legal level to allow those affected to seek redress is nearly as complicated as making the responsible countries take on their responsibilities at the political level (as shown in Copenhagen).

Before further development, it is important to specify what International Human Rights Law designates by «indigenous peoples». Indigenous peoples – an estimated 370 million individuals constituting more than 5,000 peoples in some 70 countries – have refused a closed definition, but a synthesis of the main working definitions (United Nations «Working Group on Indigenous Populations», ILO Convention 169, World Bank Operational Directive 4.20) is useful. It indicates that an «indigenous people» is a cultural group that has inhabited a region which has been either colonised, annexed, incorporated into a nation-state formation or has remained largely isolated from the influence of the claimed governance by a nation-state. The group has remained differentiated from the surrounding populations and the dominant culture of the nation-state by maintaining distinct linguistic, cultural and social/organisational characteristics. Decisively, there is an additional subjective criteria: the group must identify itself as an «indigenous people». It is important to note that only the term «indigenous peopleS» (with an «s») refers to the right-holders who benefit individually *and* collectively from the protection of their rights as defined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169. The term «indigenous people» (without an «s») on the other hand only refers to individuals and is not attached to the protection of specific rights under international law. Until recently, ILO Convention C 169 «concerning Indigenous and Tribal Peoples in Independent Countries» (1989) – binding only on the twenty states that have ratified it – was the international document of reference for the rights of indigenous peoples. The historic adoption the UN Declaration in 2007 marked a decisive step in the re-

emergence of indigenous peoples as rights-holders, although it is not binding.

1.1. Indigenous Peoples' Rights Violated by Climate Change (Policies)

As the impacts of climate change become more obvious each day, indigenous peoples see the process of recovery of their rights started with the 2007 adoption of the UNDRIP threatened by new dangers. Just at the point when the UNDRIP has proclaimed their right to life and health, the warming of the atmosphere is fostering the development of vector-borne and water-borne diseases like cholera and malaria. Just as their rights to traditional activities, to conservation of their environment and to enjoyment of their own means of subsistence are enshrined in the historical Declaration, the planet is encountering problems including drought, desertification, excessive rainfall, reduced population of animal species, and a proliferation of alien insects destroying vegetation. The Declaration confirms and proclaims one of their most fundamental rights, the right to land, territory and resources, but the coasts are being heavily eroded, the ice is melting and the sea is rising[3], destroying the traditional land at the same time as the concrete possibility to enjoy self-determination and self-government.

The shocking aspect of the question of indigenous peoples' climate-related rights violations is that it is not only climate change as such that threatens to reject indigenous peoples in a new state of vulnerability they obviously refuse. In many instances, indigenous peoples do not only suffer from the direct consequences of climate change, but more perversely, from the mitigating measures that are meant to address it, and that many times take place on their traditional land. The examples are numerous: the Benet people of Uganda violently evicted from their land to allow the planting of 25,000 ha of eucalyptus trees to offset the carbon emitted by energy utility companies in the Netherlands; Ngöbe communities in Panama relocated by force, including with the destruction of their houses and armed repression to allow for the construction of the Chanquinola Dam; Pygmy people losing their territory, sacred sites and source of livelihood in the Democratic

3 See Tebtebba, *Guide on Climate Change and Indigenous Peoples*, Baigo City, Tebtebba Foundation, 2008; Indigenous Environmental Network et alii, *Indigenous Peoples' Guide - False Solutions to Climate Change*, 2009, at http://www.earthpeoples.org/CLIMATE_CHANGE/Indigenous_Peoples_Guide-E.pdf (consulted on 6 July 2009); International Indian Treaty Council (A. Carmen), *Climate Change, Human Rights and Indigenous Peoples*, 26 December 2008, at http://www.treatycouncil.org/PDFs/HR%20IPS%20and%20Climate%20Change%20corrfinal122708OHCHRa.pdf (consulted on 3 June 2009); V. Tauli-Corpuz, A. Lynge, «*Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*». *Report to the UNPFII Seventh Session 21 April-2 May 2008*, E/C.19/2008/10, 20 March 2008, at http://daccess-ods.un.org/access.nsf/Get?Open&DS=%20E/C.19/2008/10&Lang=E (consulted on 28 June 2009).

Republic of Congo as the savannah is getting replaced by tree plantations[4], etc. Here a question arises: whereas establishing legal responsibilities for the whole climate change is admittedly difficult, the establishment of responsibilities for human rights violations resulting from concrete mitigation projects, with clearly identified donor states, recipient countries and entrepreneurs should be easier. Then why are those violations not prevented? We shall argue in the rest of the article that this results from poor governance at the macro-level (UNFCCC) and the micro-level of states and climate mitigation schemes.

1.2. Indigenous Peoples Excluded from Climate Governance

While the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, recognising the right to a healthy environment, marked the symbolic beginning of International Environmental Law (IEL), the global response to climate change can be dated back to the 1979 World Climate Conference which highlighted for the first time the possible human origins of climate change. But it is not before the end of the 1980s, with notably the work of the 1987 Brundtland Commission (which coined the concept of «sustainable development»), the establishing in 1988 of the International Panel on Climate Change and the 1989 Ministerial Conference on Atmospheric Pollution and Climate Change that serious action was envisaged. The 1992 United Nations Conference on Environment and Development (UNCED, the «Earth Summit») held in Rio de Janeiro was a landmark in the development of IEL, with the adoption of five fundamental documents: the Rio Declaration on Environment and Development, the Convention on Biological Diversity, the Agenda 21 on sustainable development, the Forest Principles and the UNFCCC.

The UNFCCC is the only outcome of the Earth Summit that did not mention indigenous people(s)[5]. This is not to say that the references in the four other texts led to any breakthrough – these references were not framed in terms of «rights» of «indigenous peopleS»[6]. However, the recognition of a role for indigenous people in global environment issues was relatively progressive for that time. Agenda 21 paragraph 26.3 notably recognised that «the lands of indigenous people and their

4 Indigenous Environmental Network et alii, *Indigenous Peoples' Guide…*, cit.

5 United Nations, *United Nation Framework Convention on Climate Change*, 1992.

6 The mention of «rights of indigenous peoples» in the «Forest Principles» are the exception, but the document is not binding. Generally speaking, IEL has taken time before opening to human (rights) issues.

communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate»[7]. Yet, they were totally forgotten in the emerging climate change regime, which has been monopolised by states until now. A direct consequence of the non-participation of indigenous peoples in the design of climate change policies that affect them is that the primacy given to attaining environmental aims through market mechanisms has been at the expense of the human (rights) aspect of the issue.

In theory, indigenous peoples should have felt a benefit from the Kyoto Protocol, as they have been among the first affected by carbon emissions. In reality, the introduction of «Flexible Mechanisms» (the consecration of three market-based mechanisms: Emissions Trading, the Clean Development Mechanism (CDM) and Joint Implementation) as the main way for Northern countries to attain their global reduction objectives has had consequences on indigenous peoples. They have been particularly wary of the CDM, which allows a developed country to reduce its emissions indirectly by investing in a joint reduction project in a developing country[8]. Projects concern the construction or extension of dams, biofuel plantation, reforestation, renewable energy, etc. For example, if Canada, the UK and France finance a wind power farm in Colombia through the CDM that will lead to a reduction of 18,000 metric tons of CO2 per annum[9], they will be able to earn the equivalent amount of Certified Emission Reduction (CER) credits that will count as emission reduction in their climate action balance sheet – even though this reduction did not actually happen on their lands! Although the CDM entails development opportunities, it first and foremost means that indigenous peoples' lands have become the ideal place for the implementation of green projects managed jointly by Northern investors and recipient developing countries that have not always recognised the rights of indigenous peoples or even their existence. Even when a recipient country recognises indigenous peoples, risks exist: in the example we have presented above, members of the Wayuu indigenous people of Colombia – which ratified ILO Convention 169 – have criticised the Jepirachi Wind Power Project for having been started on their sacred land without full respect for their right to free, prior and informed consent and for having lead to serious human rights

7 UNEP, Agenda 21, adopted in Rio de Janeiro, 14 June 1992, at http://www.unep.org/Documents.Multilingual/Default.asp?documentID=52 (consulted on 5 July 2009).

8 See for example: Indigenous Environmental Network, *Indigenous Peoples' Guide...*, cit.

9 This example corresponds to the Jepirachi Wind Power Project. More information at http://cdm.unfccc.int/Projects/DB/SGS-UKL1135244574.04/view (consulted on 25 November 2009).

violations, including the loss of their livelihood, terror and even death caused by paramilitary groups[10].

Reforestation through REDD (Reduction of Emissions from Deforestation and forest Degradation) and biofuel plantation still mostly take place outside the framework of the CDM, but they also represent real risks for indigenous peoples' rights to land, to food (because of loss of livelihood and rising prices) and to a sane environment (because of fertiliser pollution)[11] among others. Indonesia is an interesting case as it is involved in both REDD and biofuel projects, for example in the Kalimatan forest in Borneo. Indonesia has planned to establish massive oil palm plantations in this forest which is the traditional territory of more than one million Dayak indigenous people. The Dayak of Kalimatan have already suffered decades of discriminatory policies from the central government, including the *transmigrasi* policy, which has already displaced millions of people. Violent clashes between indigenous peoples losing control of their territory and new settlers have occurred since the introduction of those policies. Oil palm extension now risks exacerbating the situation. At the same time, the Kalimatan forest is also included in Indonesia's REDD plans, with new potential risks for indigenous peoples' land rights. While REDD and biofuel projects are in contradiction on an environmental level, at a political level, it is quite possible for a country to «protect» its forest through REDD and simultaneously continue to make plans to clear vast tracts of forests for oil palm. Indonesia is thus destroying more forest by promoting oil palm plantation than it is saving through its REDD programmes. In the end, the climate and human rights impact is negative... but the country attracts funds on both sides!

2. How to Address Climate Change-related Human Rights Violations? (Indigenous Peoples as the Spearhead of the Climate Change/Human Rights Regimes Rapprochement)

2.1. The UNDRIP and Climate Change (Mitigation)-related Human Rights Violations

[10] Indigenous Environmental Network et alii, *Indigenous Peoples' Guide...*, cit.

[11] See for example: AMAN, *Oil Palm Plantation in Kalimatan, Indonesia: Violating Indigenous Peoples' Rights*, in «Indigenous Perspectives», vol. 9, no. 1-2, 2007, pp. 70-89; V. Tauli-Corpuz, P. Tamang, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods*, Paper presented at the UNPFII Sixth Session, New York, 14-25 May 2007, E/C.19/2007/CRP.6, at http://www.un.org/esa/socdev/unpfii/documents/6session_crp6.doc (consulted on 19 June 2009); Indigenous Environmental Network et alii, *Indigenous Peoples' Guide...*, cit.

In front of these dangers, a fundamental question is to know in what way does the 2007 UN Declaration on the Rights of Indigenous Peoples offer concrete protection for indigenous peoples who suffer from climate change – and climate change mitigation – related to human rights violations. Contrary to ILO Convention 169 of 1989, the UNDRIP has no legally binding character. But it has elements to be considered customary law: the ICJ jurisprudence has recognised that UN General Assembly Declarations can serve as evidence of existing customary law. Moreover, the UNDRIP can claim a special legitimacy from the fact that it was nearly unanimously approved by states in the General Assembly (143 countries in favour, four against[12] and eleven abstentions) and that its twenty-two years long preparation process benefited from large inputs of the concerned indigenous peoples (through the Working Group on Indigenous Populations), which is without equivalent for any UN Declaration usually prepared by state experts.

This being said, it appears that the reach of the UNDRIP, indigenous peoples' human rights law and the rest of IHRL over the actors of the climate change regime (states, the World Bank and other UN agencies, NGOs, business...) remains limited. The UNFCCC Conference of the Parties (COP) is a political body, whose unanimous decisions result from negotiations between states parties. In theory, all states' agreements should respect international customary law (including the UNDRIP) and work in the spirit of the Vienna Convention on the Law of the Treaties – which provides for systemic integration of international law regimes[13] (this can thus refer to IEL and IHRL). In reality, UNFCCC Executive Secretary Yvo de Boer, clearly stated in June 2009 that the Copenhagen deal would not be bound by the UNDRIP, as it is not considered a binding document[14]. According to UNFCCC rules of procedures, COP decisions are bindingly required only to respect the UNFCCC texts, not IHRL documents[15].

Even if the UNDRIP never leads to a binding International Convention on the Rights of Indigenous Peoples, this does not mean it has no legal impact. The Declaration has already shown that it is a major international standard-setting instrument, fostering some fundamental indigenous peoples' rights and principles in the practice of international law and in

[12] Only Canada, Australia, New Zealand and the USA (the «CANZUS countries») opposed the UN General Assembly resolution. Although a major document, the UNDRIP should not be considered the panacea but rather a step towards a fully binding Convention.

[13] According to the Vienna Convention on the Law of Treaties the interpreter of a treaty should also take into account «any relevant rules of international law applicable in relations between the parties». Article 31 (3)(c). Quoted in R. Cook, E. Tauschinsky, *Accomodating Human Values in the Climate Regime*, in «Utrecht Law Review», vol. 4, no. 3, December 2008, pp. 18-34.

[14] Indigenous Environmental Network, *Reaping Profits from Evictions, Land Grabs, Deforestation and Destruction of Biodiversity*, 2009, at http://www.ienearth.org/REDD/#32 (consulted on 15 December 2009).

[15] UNFCCC rules of procedures are established in United Nations, United Nation Framework Convention on Climate Change, 1992, which does not mention IHRL.

multiple pieces of soft law. The UN Inter-Agency Support Group on Indigenous Issues (IASG), has thus played an essential role in ensuring the cross-fertilisation of the UNDRIP provisions with the work of every body of the UN system, many of which play a role in climate change action (notably the UN-REDD programme)[16]. This horizontal work has then been followed by a more vertical process of incorporation of these provisions in the internal soft law documents of UN agencies and programmes until operational level (c.f. *infra*). The United Nations Development Group (UNDG), of which all UN-REDD agencies are part, notably produced in February 2008 the UN Development Guidelines on Indigenous Peoples Issues, a fundamental document to «mainstream and integrate indigenous peoples' issues in processes for operational activities and programmes at the country level»[17]. In the framework of a human rights-based approach to development, the UNDG guidelines indicate how the UN and its agencies should implement the UNDRIP provisions in line with Articles 41 (UN bodies' contribution to the full realisation of the provisions of the Declaration) and 42 (UN bodies' – including the UNPFII – promotion of respect for and full application of the Declaration's provisions). Article 42 has also been the basis for the UNPFII's wish to expand its mandate towards acting in a way «similar to the human rights treaty bodies»[18] like the Human Rights Committee[19]. Were this development to continue – the road is still very long –, the UNPFII could become a major source of soft law (interpretive statements or general comments[20]) for indigenous peoples confronted with climate change and other human rights challenges. The World Bank and UN agencies participating in the development of climate policies could also have to report before the UNPFII acting as a treaty body... which would certainly be positive.

A problem however stands in the way of the implementation of UNDRIP Article 41 at the level of the World Bank and the other UN agencies: they are – contrary to UN funds and programmes – legally independent international organisations with their own charters[21]. In theory, even the World Bank is part of the «UN family» and has to consider human rights mainstreaming[22]. However, in practice, the World Bank and some other UN agencies have striven to give their own standards privileged status over the most generally recognised

[16] The IASG is composed of 31 UN agencies working closely with the UNPFII to mainstream indigenous peoples' concerns into UN operational activities. It issued a collated paper on indigenous peoples and climate change for the UNPFII Seventh Session in 2008. UN IASG, 7 February 2008.

[17] UNDG, *Development Guidelines on Indigenous Peoples Issues*, February 2008, p. 3, at http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf (consulted on 3 June 2009).

[18] The UNPFII organised in January 2009 an «International Expert Group Meeting on Article 42 of the UNDRIP» (UNPFII, 14-16 January 2009) that started work on the «growing legal status» of the Declaration, and even prepared a first draft «general comment». C. Smith, *UNPFII Draft General Comment No 1 (2009) on Article 42 of the Declaration on the Rights of Indigenous Peoples*, E/C.19/2009/CRP.12, 5 May 2009, at http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_12.doc (consulted on 4 June 2009).

[19] UNPFII, *Report of the International Expert Group Meeting on the Role of the Permanent Forum on Indigenous Issues in the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples*, E/C.19/2009/2, 4 February 2009, at http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_2_en.pdf (consulted on 3 June 2009), para. 24 and following, p. 6, and recommendations a, b, c, p. 12.

[20] *Ibidem*, para. 23, p. 6.

[21] M. Nowak, *Introduction to the International Human Rights Regime*, Leiden-Boston, Martinus Nijhoff Publishers, 2003, p. 139.

[22] As Manfred Nowak sums it up, «Even if the "Bretton Woods institutions" have been awarded a special role in the overall scenario, they are still part of the "UN family" and have to comply with these requirements [human rights mainstreaming]». *Ibidem*, p. 145.

ones. The Bank has long considered human rights to be «political goals» contradicting its original mandate («Articles of Agreement»)[23]. This began to change, at least theoretically, in the 1990s with the shift towards a «human development» paradigm based on human rights and the development of the Bank's Operational Policy 4.10 on indigenous peoples. But the Bank still privileges its own OP 4.10 over the more constraining UNDRIP.

2.2. Seeking Redress for Climate Change (Mitigation)-related Human Rights Violations

International Public Law provides some basis for holding a state responsible for the impact of its Greenhouse Gases (GHG) emissions. States indeed have the positive obligation to protect their citizens against all human rights violations, including when they result from climate change. In addition, a state's action, including climate change mitigation projects, should not result in human rights violations. The challenge here is that GHGs do not stop at border controls any more than the toxic clouds caused by the Chernobyl disaster. Stockholm Declaration Principle 21 thus indicates that states have the duty «to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction»[24]. However, using this principle within a concrete climate change law suit is close to impossible. Climate change is a highly complicated scientific phenomenon involving a wide range (nearly all) of human activities and a wide geographical and temporal distance between causes and resulting human rights violations. Climate change-induced human rights violations are indirect, diffuse (which means hard to prove, but not benign) and without a clearly identified offender and geographical linkage[25]. Moreover, litigation is reactive, coming after the damage was done, and can only be a palliative to the more substantive inclusion of human rights instruments into the climate change regime. The International Climate Justice Tribunal (Tribunal Internacional de Justicia Climática) held its first session in Cochabamba, Bolivia on 13-14 October 2009[26]. Such a Tribunal could play a decisive role in the international judicialisation of climate-related human rights violations by

[23] *Ibidem*, p. 144.

[24] United Nations, 16 June 1972. This principle is considered as customary law by the International Court of Justice (ICJ).

[25] See D. Hunter, *The Implication of Climate Change Litigation for International Environmental Law-Making*, in «WCL Research Paper», no. 2008-14, 15 July 2007, at http://ssrn.com/abstract=1005345 (consulted on 2 July 2009).

[26] See the webpage of OMAL (Observatorio de Multinacionales en América Latina / Observatory of Transnational Corporations in Latin America) for a presentation of the «Tribunal», at http://www.omal.info/www/article.php3?id_article=2379 (consulted on 2 December 2009).

states and firms... if it were not a mere symbolic and moral tribunal, in the tradition of the Russel Tribunals on international war crimes. The international community has shown it was far from being ready for that. On the medium term, one can hope possibilities for judicialisation of climate-related human rights violations will one day develop within the UNFCCC, or within a more solid «World Environment Organisation» (a fleeting proposal by France at Copenhagen) which would allow sanctions to be taken in case future binding commitments under the UNFCCC were breached by a state. This could serve as a good basis for an extension of sanctions to human rights violations. More generally, an integration of human rights instruments – or at least, provisions – in the climate regime could allow a transfer of the «Environmental Justice» concept at global level. Procedures do indeed influence regimes and the UNFCCC framework, if it were not to be marginalised in the future, could have the capacity to contribute to the protection of human rights while tackling climate change. Procedural possibilities include the authorisation of individual communications to the UNFCCC dispute settlement mechanism; the integration of the principle of progressive realisation/implementation of human rights in climate policies, based on minimum standards; and the authoritative interpretation of the too vague social concerns present in the UNFCCC to refine them to applicable rights[27].

While International Human Rights Law has opened up to concepts of environmental rights[28], the climate regime has remained totally closed to human rights concerns. At the UNFCCC level, states have only committed to the common objective of «stabilisation of greenhouse gas concentrations in the atmosphere»[29] and to binding targets in the Kyoto Protocol – whose survival after 2012 are now compromised after the Copenhagen failure. The respect for the UNFCCC principles of «equity» and «common but differentiated responsibilities» is not in itself a formal commitment to the respect of human rights in the framework of climate policies. Even if this were the case or if international customary law were to be evoked, a complaint at ICJ level or at the UNFCCC Conciliation Commission would only involve states and would therefore not be an available course of action to indigenous peoples or any individual.

27 R. Cook, E. Tauschinsky, *Accomodating Human Values in the Climate Regime*, cit., p. 27.

28 A human right to a sane environment seems to be emerging in Europe. See for example the European Court of Human Rights cases *López Ostra v. Spain* (1994), *Guerra and Others v. Italy*, *Hatton v. UK*, *Öneryildiz v. Turkey*, etc. Indigenous peoples' environmental rights are emerging on other continents. The African Charter on Human and Peoples' Rights (see the *Ogoni* case) and the American Convention on Human Rights (see the *Awas Tingni v. Nicaragua* or the *Yanomami* cases) have recognised the right to live in a healthy environment. Many national constitutions refer to a right to a satisfying environment. ILO Convention 169 and the UNDRIP provide for special protection of the environment of the areas which indigenous peoples occupy or otherwise use. See also the very interesting webpage of the Inter-American Commission on Human Rights devoted to the right to environmental protection of indigenous peoples: http://www.cidh.org/Indigenas/Indigenas.en.01/article.XIII.htm (consulted on 10 July 2009).

29 United Nations, *United Nation Framework Convention on Climate Change*, cit., Article 2.

It also appears difficult to obtain redress in cases of climate-related human rights violations in the realm of International Human Rights Law, before UN or the three (African, American and European) regional human rights mechanisms[30] or at the levels of national Courts[31]. The only example of an extraterritorial claim for climate change-related human rights violations until now is the Inuit case at the Inter-American Commission on Human Rights (IACHR). In December 2005, Sheila Watt-Cloutier filed a petition on behalf of the Inuit Circumpolar Council (ICC) and 62 Inuit individuals, to the IACHR to seek relief from the violation of Inuit human rights resulting from global warming caused by US GHG emissions[32]. The petition asked the Commission to declare the US, as the largest GHG emitter of the continent and the planet, in violation of rights affirmed in the 1948 American Declaration of the Rights and Duties of Man and other instruments of international law. This referred both to the US general commitments as a party to the UNFCCC and specific rights like the Inuit's rights to life, residence and movement, property, inviolability of the home, and enjoyment of culture, health and means of subsistence. Although the petition was rejected, a hearing was organised in February 2007, which allowed the ICC, accompanied by the Centre for International Environmental Law (CIEL) and Earthjustice to testimony on the human rights/climate change relations. Although the pure litigation aspect of the claim failed, the case should be analysed as a «creative lawyering» and public awareness exercise, with the aim of reframing climate change from the classical environmental realm to the human rights one, moreover in a cross-border claim[33].

Whereas legal redress concerning «general» responsibilities in the climate change phenomenon are currently not imaginable, more possibilities exist concerning human rights violations resulting from specific climate mitigation projects. For example, the UN Committee on the Elimination of Racial Discrimination (CERD), alerted by a coalition of Indonesian indigenous organisations, issued an early warning procedure statement in March 2009[34] after Indonesia failed to ensure indigenous peoples' free, prior and informed consent and secure their land rights in the already evoked Kalimantan Oil Palm Project as well as in preparation for REDD under the

30 R. Cook, E. Tauschinsky, *Accomodating Human Values in the Climate Regime*, cit., p. 24.

31 In recent years, several lawsuits for GHG emissions have been filed at national levels but they did not invoke human rights law.

32 S. Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by the Acts and Omissions of the United States*, 7 December 2005, at http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (consulted on 2 July 2009).

33 H. Osofsky, *Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, in «American Indian Law Review», vol. 31, 2007, p. 675, at http://ssrn.com/abstract=979106 (consulted on 2 July 2009).

34 UN CERD, *Early Warning Letter to the Indonesian Ambassador to Geneva*, TS/JF, 13 March 2009, at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf (consulted on 19 June 2009).

World Bank's FPCF[35]. But UN Committees' early warning procedures are not always followed by acts and individual complaints, especially at CERD (which is more in position than the Human Rights Committee to deal with indigenous peoples' individual complaints) are complicated and seldom. The establishment of redress and grievance mechanisms directly at scheme level is therefore essential... and still need to be further developed. In the example of REDD, the World Bank FCPF Charter provisions on disputes, arbitration and remedies[36] concern only donors and REDD countries, not individuals. Indigenous peoples will consequently have to refer a violation by the Bank of its operational policies and procedures to the Inspection Panel. But this can be useful for indigenous peoples only if the World Bank considers its safeguard policies (OP 4.10) apply from the design phase of the project, and not only after the adoption of a Grant Agreement, latter in the process. Concerning the UN-REDD programme, the complaint mechanism foreseen at national level as part of the UN-REDD programme is still to be elaborated. In the meantime, indigenous peoples can only turn towards the UN Residence Coordinator, but no formal procedure exists at present to deal with grievances[37].

The possibilities of judicial redress for climate-related human rights violations seem currently very limited... which does not mean hopes for the future are inexistent if further rapprochement between International Environmental Law and International Human Rights Law operates. However, indigenous peoples would not need to have to seek judicial redress if they could avoid climate-related human rights violations, i.e. if they were genuinely included in the design and implementation of (climate) policies that affect them.

3. How to Avoid Climate Policies-related Human Rights Violations?

3.1. Participation and Consultation of Indigenous Peoples as Key Elements

Decades of international advocacy were necessary for indigenous peoples to obtain in the 2000s the establishment of

35 UN CERD, letter to the Indonesian Ambassador to the UN [no title], 28 September 2009, at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia28092009.pdf (consulted on 5 November 2009).

36 World Bank (IBRD), *Charter Establishing The Forest Carbon Partnership Facility*, 13 June 2008, at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/FCPF_Charter_06-13-08.pdf (consulted on 6 July 2009).

37 UN-REDD Programme, *UN-REDD Programme Operational Guidance: Engagement of Indigenous Peoples and Other Forest Dependant Communities*, 23 March 2009, pp. 10-11, at http://www.un-redd.org/Portals/15/documents/events/20090309Panama/Documents/UN%20REDD%20IP%20Guidelines%2023Mar09.pdf (consulted on 5 June 2009).

three UN mechanisms to protect their rights: the UN Permanent Forum on Indigenous Issues (UNPFII), the «Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people» and the «Expert Mechanism on the Rights of Indigenous Peoples». The climate change/human rights connection has been a particular interest of the UNPFII, which plays an important role as an advisor to ECOSOC, UN agencies, programmes and funds (some of the main actors of climate governance). The Forum organised its Seventh Session on the subject of climate change in 2008[38]. Its overall position is that indigenous peoples' rights – especially land rights and free, prior and informed consent – should be guaranteed as a pre-requisite for any climate mitigation project; that the role of indigenous peoples as stewards of the environment (especially forests) be recognised; and that their participation at every level of climate governance be ensured.

The adoption of the UNDRIP in 2007 marked a decisive step in decades of struggling for the re-emergence of indigenous peoples as rights-holders. The recognition of this status of rights-holder (rather than mere «stakeholder» or even «vulnerable group») is not an end in itself, but rather the possibility finally offered for indigenous peoples to participate in all issues that concern them globally (climate change in general) and locally (mitigation projects on their land), to avoid violations of their human rights. Participation in global decision-making and the general management of a project, and consultation with a view to obtaining consent on a specific project can be presented as two sides of the same coin, or more precisely the upstream and downstream of a same river. If the river is contaminated upstream by bad governance, it cannot be clear downstream, and consultation will then be unable to alter an ill-conceived project.

According to ILO Convention 169 indigenous peoples should be consulted «whenever consideration is being given to legislative or administrative measures which may affect them directly» (Article 6.1 (a))[39]. Consultations «shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures» (Article 6.2), which means that consultations are not required to lead to agreement with indigenous peoples in all instances. The ILO Convention

38 UNPFII Seventh Session, 21 April - 2 May 2008. See the web page at: http://www.un.org/esa/socdev/unpfii/en/session_seventh.html (consulted on 11 July 2009).

39 ILO, *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, at http://www.ilo.org/ilolex/english/convdisp1.htm (consulted on 28 June 2009).

requires «free and informed consent» only in cases of relocation (Article 16.2)[40]. The UNDRIP recognises the necessity for states to lead consultations to obtain «free, prior and informed consent» (FPIC, Articles 10 and 19)[41]. Non-binding UNDRIP provisions have been an important source of soft law for UN agencies. The UNDG Development Guidelines on Indigenous Peoples Issues for example set out clearly that «participation implies going further than mere consultation and should lead to concrete ownership of projects by indigenous peoples»[42]. Consultation and participation are «crucial components of a consent process»[43], but can in no way replace consent. The OHCHR study on «Climate Change and Human Rights»[44] highlights that under the UNFCCC, states parties shall promote and facilitate «public participation in addressing climate change and its effects and developing adequate responses» and refers to the UNDRIP and free, prior and informed consent. The World Bank Operational Policy/Bank Procedures on Indigenous Peoples (OP/BP 4.10) however only rely on the self-coined principle of «free, prior and informed *consultation*» resulting in «broad community support to the project» to be led by the borrower (Article 1)[45]. This means that indigenous peoples have no veto right, i.e. no ability to refuse consent. The OP/BPs are the only rules the Bank officially endorses and its Inspection Panel is the only body able to judge if they have been violated.

The right to participation in decision-making (at global, national and project levels), the other side of the coin or the upstream of the river, is a doubly important right. In addition to being a fundamental right in itself, it is a right that offers the possibility to secure existing rights in the present and acquire new rights in the future. In this sense, it is an essential principle of the indigenous peoples and human rights regimes[46]. ILO C 169 provides that governments shall «establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them» (Article 6.1 (b))[47]. «All levels» means that the provision also applies to the international realm for states parties to the Convention[48]. This is confirmed by UNDRIP Article 18, according to which

40 James Anaya adds an important aspect: «In addition to the procedural safeguards that apply, and whether or not agreement is to be achieved, the consultations should lead to decisions that are consistent with indigenous peoples' substantive rights». J. Anaya, *Indigenous Peoples in International Law*, Oxford, Oxford University Press, 1996, p. 56.

41 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295*, 13 September 2007, at http://www.un.org/esa/socdev/unpfii/en/drip.html (consulted on 3 June 2009).

42 UNDG, *Development Guidelines on Indigenous Peoples Issues*, cit., p. 25.

43 *Ibidem*, p. 28.

44 UN OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61, Human Rights Council, 15 January 2009, at http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement (consulted on 2 July 2009).

45 «Free, prior, and informed consultation with the affected Indigenous Peoples' communities refers to a culturally appropriate and collective decisionmaking process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a veto right for individuals or groups» (note to Article 1). World Bank, *Revised Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10)*, July 2005, at www.worldbank.org/indigenous (consulted on 16 June 2009).

46 Article 25 of the International Covenant on Civil and Political Rights notably implies this right.

47 ILO, *Convention 169...*, cit. See also Article 2.1 of the same Convention.

48 «It is evident that this

«indigenous peoples have the right to participate in decision-making in matters which would affect their rights»[49]. Moreover, Article 41 requires UN bodies and other intergovernmental organisations to contribute to the full realisation of the Declaration. It indicates that «ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established» in this sense[50]. The World Bank OP 4.10 clearly links «free, prior and informed *consultation*» with participation, especially with regards to «benefit from development» (Articles 1 and 22), project implementation, monitoring, and evaluation (Article 11 (d)), and relocation (Article 21)[51].

While consultation aims at achieving consent to a concrete project, effective participation should aim at obtaining the participant's consent to the legitimacy of a decision process. The participant's approval thus concerns the (formal) *legitimacy* of the decision-making process, more than its actual *result* (content). At the same time, legitimacy also implies that one's viewpoint be seriously considered and that there be a *genuine chance* that it be taken into account in adequate procedures/bodies. If participation of an emerging subject of international law like indigenous peoples is only formal (observer status), then it is not effective and not legitimate. In Copenhagen, the voices of indigenous peoples and NGOs in general were totally ignored within the Summit, despite the loud echoes in the «counter-summit» and in the media. This was a flagrant highlight on the «democratic deficit» climate governance suffers. Even playing alone, states were not able to reach a sensible agreement. In spite of all the international law provisions evoked above, indigenous peoples were never consulted on the creation of the UNFCCC or the negotiations of the Kyoto Protocol[52]. In front of this contradiction, indigenous peoples have organised since a decade to be heard as genuine right-holders in the climate negotiation processes. The irony here is that indigenous peoples have to use *political* means (advocacy, etc.) to ensure the inclusion of *legal* principles (UNDRIP) that should in theory automatically be part of the substance of any governance structure as part of international customary law. Indigenous peoples have thus been fighting with political means to obtain the institutional recognition of a legally-recognised right: the right to

requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm». J. Anaya, *Indigenous Peoples in International Law*, cit., p. 53.

49 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples...*, cit.

50 The February 2008 UN Development Group Guidelines on Indigenous Peoples Issues are an illustration of this idea. They state «indigenous peoples must fully participate in the definition and implementation of policies and plans related to climate change impact mitigation». UNDG, *Development Guidelines on Indigenous Peoples Issues*, cit., p. 18.

51 World Bank, *Revised Operational Policy and Bank Procedure on Indigenous Peoples...*, cit.

52 There is nothing extravagant or unfeasible in such an idea. The US Environmental Protection Agency for example consulted indigenous peoples during the treaty process that led to the 2001 Stockholm Convention banning Persistent Organic Pollutants (POPs).

participate in the making of political decisions that will affect their life and possibly violate their rights. This «fighting for the right to fight for one's rights» is thus a fight to make participation effective and global governance more legitimate. It is also an illustration that it is impossible to separate the political and the legal substances of rights.

3.2. A Decade of Advocacy for Participation in Climate Governance

Indigenous peoples have met in *caucus* before attending UNFCCC COPs since 1998[53]. A more specialised International Indigenous Permanent Forum on Climate Change (IIPFCC) was created in 2000 on the model of the International Indigenous Forum on Biodiversity (IIFB). Whereas the IIFB has an institutional counterpart in the form of the CBD «ad hoc open-ended Working Group on Article 8(j)» in which it participates[54], the IIPFCC – as well as the UNPFII – has repeatedly demanded the creation of a Working Group on Indigenous Peoples and Climate Change within the UNFCCC, without success. Since the beginning of the millennium, the message sent out by the IIPFCC has been clear: opposition to the development of the carbon market, condemnation of carbon sinks in the Clean Development Mechanism (CDM), of all climate mitigation projects that are associated with a new form of «(bio)-colonialism»[55], including, after 2007 of REDD.

This is not to say that the international indigenous peoples' movement position on climate policies has always been coherent. The speeches have not always converged, notably on the question of knowing if CDM and REDD were to be accepted provided they respected indigenous peoples' rights or if they should be rejected altogether by principle. This lack of coherence has to be understood in the context of an implicit competition between two expressions of the indigenous peoples' global movement that can both legitimately claim to speak in its name. While the formal/expertise-based/institutional/political-compromise-oriented/moderate UNPFII and the informal/activist-based/grassroots/confrontation-oriented/harder-line IIPFCC (and indigenous *caucuses*) agree on most subjects, their opposition on some strategies and

53 Indigenous peoples meet in regional and/or global *caucuses* before each meeting of an international organisation in which they participate as observer or more (UNFCCC, CBD, UNPFII, World Intellectual Property Organisation, etc.). *Caucuses* are not public as they aim to reach a common position between all the indigenous representatives who take part in it. The position/statement is then delivered by one of the representatives on behalf of the *caucus*.

54 See Decision V/16 adopted during CBD COP5 in 2000, on «Article 8(j) and related provisions», CBD, para. 11. CBD, «COP 5 Decision V/16, Article 8(j) and related provisions», 2000, at http://www.cbd.int/decision/COP/?id=7158 (consulted on 11 July 2009).

55 IIPFCC, *Declaration of the First International Forum of Indigenous Peoples on Climate Change*, Lyon, France, 4-6 September 2000, at http://www.treatycouncil.org/new_page_5211.htm (consulted on 24 June 2009).

concrete issues blurs the overall message. The so-called «May Revolt» illustrates that. It refers to the heated protest of a significant number of the indigenous representatives present at the Seventh Session against two proposed UNPFII recommendations on climate change. To summarise, a clear gap appeared between the position adopted by American indigenous peoples (no REDD; no World-Bank; no market-based mechanism) and a more flexible approach of the Asian indigenous peoples (inclusion in REDD provided rights are guaranteed; need to redesign REDD due to it being currently not acceptable; FPIC). The Forum experts' finally included the Asian line in the Seventh Session final report and ignored the loud protests of most American indigenous peoples' representatives who demanded the deletion of phrases presenting REDD and CDM as positive developments for indigenous peoples.

Whereas different tendencies within the global indigenous peoples' movement have had differing views on some concrete climate change mitigation policies, the entirety of the movement has shown remarkable continuity in advocating a voice for indigenous peoples and a formal recognition of their rights in the climate change regime. Until the 2008 COP 14 in Poznan, indigenous peoples and their rights were totally ignored in more than five millions words of the UNFCCC corpus. Indigenous peoples had hoped to secure an explicit mention of the link between REDD and their rights (the UNDRIP) in Poznan but states negotiations only led to a poor mention of «full and effective participation of indigenous people» (the phrase without a «s» being devoid of any legal meaning). This truncated mention and the final absence of a mention of «rights» trigged a vivid reaction by the IIPFCC representatives present in Poznan against the usual suspects, namely the «CANZUS countries» (Canada, Australia, New Zealand and the US). In a press conference at Poznan, Canadian Environment Minister Jim Prentice stated that the UNDRIP «ha[d] nothing whatsoever to do with climate change»[56]. In Copenhagen, the mention of indigenous peoples and the UNDRIP finally appeared in the text of the Ad Hoc Working Group on Long-Term Cooperation Action on REDD[57]. But the mention is weak: it evokes the «promot[ion]» or «support» of indigenous peoples' rights in the

56 L. Bailey, *Post-Poznan, What Place for Rights in REDD?*, on the blog of the Independent Civil Society Advisory Group on Forests, Livelihood and Climate Change, 17 December 2008, at http://rightsandclimate.org/2008/12/17/post-poznan-what-place-for-rights-in-redd/ (consulted on 6 June 2009).

57 UNFCCC AWG-LCA, «Draft decision -/CP.15: Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries», FCCC/AWGLCA/2009/L.7/Add.6, 15 December 2009, at http://unfccc.int/resource/docs/2009/awglca8/eng/l07a06.pdf (consulted on 18 December 2009).

REDD process, rather than an obligation for states to respect those rights. Free, prior and informed consent is not even mentioned. In addition, the text – as the more general Copenhagen Accord – is on hold until more advances on a broader agreement, hopefully (but without guarantee) in 2010, whereas indigenous peoples need a binding text to have a legal basis for the safeguard of their rights. The text is weaker than during the whole 2009 negotiation process, once again greatly due to US pressure.

This indicates that the failure of the Copenhagen Summit has to be analysed not only in terms of legal commitment to GHGs reduction, but also in terms of the states' voluntary blindness *vis-à-vis* the process of a rapprochement between the UN human rights and climate regimes, an idea which has recently gained ground at UN top level. This took the form of two Human Rights Council (HRC) resolutions (7/23 of March 2008 and 10/4 of March 2009) on Human Rights and Climate Change, and a study by the Office of the High Commissioner for Human Rights (OHCHR)[58]. The January 2009 OHCHR report did not only highlight the way climate change affects specific rights (to life, to adequate food, to water, to health, to adequate housing, and to self-determination): it also recalled that «the human rights framework draws attention to the importance of aligning climate change policies and measures with overall human rights objectives»[59]. It concluded that «International human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights»[60]. The report also underlined indigenous peoples' rights, especially the UNDRIP and «free, prior and informed consent»[61]. It also indicated that «The application of a human rights approach in preventing and responding to the effects of climate change serves to empower individuals and groups, who should be perceived as active agents of change and not as passive victims»[62]. The report acknowledged indigenous peoples' fears about biofuels and REDD and concluded that «Often the effects of climate change on human rights are determined by non-climatic factors, including discrimination and unequal power

58 All the UN documents quoted in this paragraph (HRC resolutions 7/23 and 10/4, and OHCHR A/HRC/10/61) are available at http://www2.ohchr.org/english/issues/climatechange/index.htm (consulted on 2 July 2009).

59 UN OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, A/HRC/10/61, Human Rights Council, 15 January 2009, para. 80, at http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement (consulted on 2 July 2009).

60 *Ibidem*, para. 99.

61 *Ibidem*, para. 79.

62 *Ibidem*, para. 94.

relationships». This report was greeted positively by a number of indigenous peoples organisations[63]. They urged the OHCHR to recommend that both UN human rights mechanisms and rights-holders like indigenous peoples participate fully in the UNFCCC decision-making process. This question was eluded in Copenhagen, yet the possibilities for indigenous peoples' participation in climate governance are multiple.

3.3. Possible Forms of Participation

Participation at UNFCCC level must be thought beyond voting rights, which are in any case the monopoly of state parties. Most decisions in the COP are made by consensus, which means that influence is ultimately more important than formal voting rights. Yet indigenous peoples clearly deserve more than the 19 indigenous peoples' organisations represented at present, which are lost in the more than a thousand observers to the Convention (mostly NGOs but also 67 intergovernmental agencies and international organisations). What are the possibilities to extend indigenous peoples' representative organisations power within the UNFCCC?

One of the possibilities evoked in the April 2009 «Indigenous Peoples» Global Summit on Climate Change (which met in Anchorage to prepare the indigenous peoples' position for Copenhagen) was to use the model of the «Permanent Participant» status of Arctic indigenous peoples in the «Arctic Council» as a way to gain representation at the UNFCCC COP[64]. The «Arctic Council» was the first intergovernmental organisation to grant the «Permanent Participant» status to indigenous peoples – a status which is different from the observer status given to some states. It allows for active participation by and full consultation with indigenous representatives[65]. Another possibility would be for the UNFCCC to endow itself with an Indigenous Peoples Working Group, on the model of the CBD WG 8(j). Such a body would ensure full and effective participation of indigenous and local communities in meetings held under the Convention. The challenge is that the CBD Working Group is based on a specific provision of the Convention on Biological

63 IWGIA, Tebtebba, Saami Council and RAIPON, *Joint Indigenous Peoples and NGO Statement on the Occasion of the Presentation of the Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Relationship between Climate Change and Human Rights*, 12 March 2008, at http://www.forestpeoples.org/documents/law_hr/un_ohchr_ngo_climate_statement_mar09_eng.pdf (consulted on 28 June 2009).

64 P. Cochran, *Leading the Way on Climate Change: Indigenous Peoples Global Summit on Climate Change* (concept proposal), no date, at http://www.indigenous summit.com/servlet/download?id=45 (consulted on 7 June 2009).

65 See the website of the «Arctic Council», at http://arctic-council.org/section/permanent_participants and the one of the «Arctic Peoples», at http://www.arcticpeoples.org/arctic-council/ (consulted on 25 June 2009).

Diversity that implicitly allows such a body (Article 8(j)), whereas the current UNFCCC and do not offer such a possibility.

Were those possibilities to prove out of reach because of the institutional conservatism of states, it would be in the interests of indigenous people to form an alliance with other Civil Society Organisations (CSOs) to obtain the creation of a Civil Society Advisory Group (CSAG) on the model of the one that was created at UN-REDD level[66]. The «voice» of indigenous peoples could gain visibility if such a body had genuine advisory powers to the UNFCCC COP. But this would present the risk that the gain in visibility by indigenous peoples be diluted by the same visibility being given to some CSOs that do not always adopt positions favourable to indigenous peoples (large conservation NGOs for example). In the end, this is not the best option as indigenous peoples, who are «rights-holders» rather than simple «stakeholders» would lose in relative status what they would gain in visibility.

A «better-than-nothing» solution would be the creation of a focal person for indigenous peoples or more generally for human rights at the COP Bureau level. This person could be in charge of ensuring that the decisions made in the UNFCCC framework are consistent with standards on human rights/indigenous peoples' rights. A final possibility would be to include indigenous peoples at the expert rather than the political level. Three «constituted expert groups» already have a mandate to advise specific parties or the subsidiary bodies. This solution would however be preferable as a complement rather than a replacement to a more political representation. Even if – after the Copenhagen undermining – the UNFCCC manages to remain the main forum to devise global climate policies, it will not be the unique place where climate policy decisions are made. Participation of indigenous peoples at global UNFCCC level is thus necessary but will not be sufficient. It must be paralleled with the participation of indigenous peoples in the governance structure of projects and at national level. Genuine consultation and a guarantee of rights (notably land rights) from the design to the implementation phase of a project is also vital. We have chosen to illustrate the difficulties of this challenge by focussing on REDD, the most acute concern for indigenous peoples of the forest.

66 The CSAG to the UN-REDD programme has indeed already envisaged extending its mandate to become an advisory body not only to UN-REDD but also to the World Bank's FCPF and the UNFCCC.

4. The Importance of Consultation and Participation at the Scheme/National Levels - The Example of REDD

The Reduction of Emissions from Deforestation and forest Degradation (REDD) has been conceived as one of the major climate policies to reduce GHG emissions (17% of which come from the loss of forests[67]). In theory, the REDD paradigm is infallible: integrating the world's tropical forests into the carbon market confers a price to the protection of trees – whereas until now only their cutting down represented a monetary value. Rich countries offset their emissions by buying from the South carbon credits from trees that are not cut down (or – and that is one of the problems – planted). After decades of neglect, the new global attention to the plague of deforestation (notably triggered by the 2007 Bali Action Plan[68]) and its role in climate change is certainly a positive step. It has provoked great interest in the political, environmental, and business spheres. «REDD is the new green», green referring here not only to the environment but also to dollars, as REDD schemes will ultimately generate billions of dollars in carbon credits. However, the prospect of the inclusion of forests in «Emission Trading» and the primacy of a market approach over all other types of considerations have led to vivid protests by the estimated 60 million indigenous people living in forests[69], who already feel the pressure of this renewed interest for their lands. UN agencies and the World Bank (WB) have already started supervising the preparation of forest countries for an unprecedented inflow of funds. Given the failure of Copenhagen to enclose REDD projects into a global legal framework where indigenous peoples' rights would be – at least theoretically – guaranteed, indigenous peoples concerned will have to fight for the protection of their rights at scheme and national level.

Until now, examples of reforestation projects have not been as gloriously successful as presented by their managers (e.g. the case of the Benet of Mount Elgon in Uganda already evoked). Whether in connection with climate change or not, global forest governance has until now not been at all favourable to indigenous peoples' rights. A majority of indigenous peoples – especially in America – criticise REDD for not making a difference in the definition of forests between natural forests

67 IPCC, *Working Group III Report: Mitigation of Climate Change*, Cambridge, Cambridge University Press, 2007, p. 105, at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg3_report_mitigation_of_climate_change.htm (consulted on 10 July 2009).

68 UNFCCC, *Bali Action Plan*, Decision 1/CP.13, FCCC/CP/2007/6/Add.1, 14 March 2008, at http://unfccc.int/resource/docs/2007/COP13/eng/06a01.pdf#page=3 (consulted on 5 July 2009).

69 World Bank, *A Revised Forest Strategy for the World Bank Group*, Washington DC, World Bank, 2002. The UNPFII gives the figure as 160 million.

(like the ancestral rainforest) and tree plantations (like new monocultures)[70]. They also reproach REDD projects to be started before rights recognised by the UNDRIP (notably land rights and free, prior and informed consent) are properly implemented at national level. In bad governance countries with a high level of corruption and/or militarisation of the state and no recognition of indigenous peoples' rights and even existence, this represents a concrete threat. Most indigenous peoples also oppose the inclusion of forests (an immemorial territory with which they have had a symbiotic relation mixing religion, livelihood and conservation outside any idea of possession) in a carbon market that will allocate trees a fluctuant price[71].

REDD represents a clear threat to the right to land, territories and resources (UNDRIP Articles 8.2.b, 26 and 27), to life, physical and mental integrity (Article 7), to integrity as distinct peoples (Article 8.2.a), to practice of religious traditions and customs (Article 12), traditional medicine (Article 24), cultural heritage (Article 31), and more generally to full enjoyment as a collective or as an individual of all human rights (Article 1) as recognised by international conventions (e.g. right to health, to adequate food, to housing, etc.). Indigenous peoples reject the looming and yet realistic scenario whereby entrepreneurs (many time reconverting former loggers) would be licensed by the state to «protect» the forest, including through evicting the communities customary living on it and/or cutting down the old forest to plant thousands of new monoculture trees. It is to be noted that not all indigenous peoples reject totally REDD. Some – especially in Asia and Africa – recognise the «right to development» (Article 23) opportunity attached to it if REDD management properly includes the concerned indigenous peoples including on the subject of financial benefits. They insist however that this position is dependent on a clear guarantee of rights, especially land rights and free, prior and informed consent (Articles 10, 19, 32) as a pre-requisite for starting a project.

REDD projects are not (yet?) under the legal umbrella of the UNFCCC. Multiple REDD projects are funded by governments, companies and NGOs, via or outside the framework of the World Bank. The two main structures dealing with «REDD readiness activities» – the supervision of

[70] See for example: Indigenous Environmental Network, *Indigenous Peoples' Guide...*, cit.

[71] A few indigenous peoples' organisations, like the Confederation of Indigenous Organisations of the Brazilian Amazon (COIAB), have for example signed the Forests Now Declaration that advocates using carbon credits to protect tropical forests, contrary to the mainstream approach of the indigenous peoples' movement. UNPFII Chair Victoria Tauli-Corpuz said to «REDD-Monitor»: «At this point I cannot categorically say I am for or against carbon trading», and she insisted this could not be the ultimate solution anyway as Annex 1 countries should operationalise the «common but differentiated responsibilities» principle. C. Lang, *Even at a Conceptual Stage Indigenous Peoples Should Be Involved: Interview with Victoria Tauli-Corpuz*, in «REDD-Monitor», 13 January 2009, at http://www.redd-monitor.org/2009/01/13/even-at-a-conceptual-stage-indigenous-peoples-should-be-involved-interview-with-victoria-tauli-corpuz/ (consulted on 5 July 2009).

the preparation by states of a legal framework to implement REDD – are the UN-REDD programme and the World Bank's Forest Carbon Partnership Facility (FCPF).

4.1. The UN-REDD

UN-REDD (the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) is jointly managed by the FAO, the UNDP and the UNEP[72], with funding provided by Norway. The programme, launched in September 2008, aims notably at contributing to the development of national capacity to implement REDD in nine pilot countries (the Democratic Republic of Congo, Tanzania, and Zambia in Africa; Bolivia, Panama and Paraguay in Latin America; Indonesia, Papua New Guinea and Vietnam in Asia).

The UN-REDD programme has striven – at least conceptually – to develop a truly inclusive approach towards indigenous peoples. UN-REDD organised a global consultation with indigenous peoples in November 2008[73] to allow for the development of informed positions and input into REDD implementation. The «indigenous peoples and local communities global strategy on REDD» that came out of it proposed a number of recommendations which have not yet been followed by facts (e.g. the evaluation of the legal situation of land tenure and recognition of indigenous territories before the implementation of REDD initiatives; the establishment of Indigenous Peoples Working Groups on Climate Change at the national and regional levels; the linking of funding with the observance of indigenous peoples' rights and the Declaration). UN-REDD has however based itself on this consultation to elaborate the overarching principles of the Operational Guidance on the Engagement of Indigenous Peoples and other Forest Dependent Communities[74], a good illustration of the already-evoked integration of UNDRIP principles at UN agency operational level. The guidance is based on three principles:

– a human rights-based approach (especially based on the UNDRIP, the UNDG Guidelines on Indigenous Peoples' Issues and ILO Convention 169);

– free, prior and informed consent;

72 The UN Environment Programme (UNEP), the UN Development Programme (UNDP) and the Food and Agriculture Organisation (FAO).

73 UN-REDD Programme, *Global Indigenous Peoples Consultation on Reducing Emissions from Deforestation and Forest Degradation (REDD)*, Baguio City, Philippines, 2008RRI (2008), 12-14 November 2008, at http://www.tebtebba.org/index.php?option=com_docman&task=doc_view&grid=289&tmpl=component&format=raw&Itemid=27 (consulted on 5 June 2009).

74 UN-REDD Programme, *UN-REDD Programme Operational Guidance…*, cit. These guidelines are to be distributed to UN-REDD Programme and UN Country Team staff, and to national government and civil society counterparts involved in UN-REDD Programme activities.

– broad representation of indigenous peoples at all stages.

Specific guidelines concern UN-REDD activities at national level (representation of indigenous peoples in National REDD Steering Committees; participation in the validation of the draft National Joint Programmes (NJP), etc.)[75]. Fundamentally, the guidelines also provide for responsibility and for the initial outline of a complaint mechanism, to be elaborated more in detail. It should ensure that «activities supported by the UN-REDD Programme do not result in the violation or erosion of the rights of Indigenous Peoples and other forest-dependent communities»[76].

In terms of governance, indigenous peoples have obtained a full member position within the UN-REDD Policy Board, on the same level as UN-REDD Programme countries, donor countries, the three UN-REDD agencies, and a civil-society representative, which can be considered a real breakthrough. In addition, indigenous peoples are represented on the Policy Board by three observers, from Africa, Asia-Pacific and Latin America-Caribbean. Several indigenous peoples' organisations are also represented in the Civil Society Advisory Group (CSAG)[77], a flexible and independent structure which aims to ensure that «climate investments in forest areas are effective and support forest peoples' rights and development»[78], including through the monitoring of international negotiations and funds on forest-related climate change mitigation. The CSAG advises the UN-REDD Policy Board and envisages going beyond, to advice governments and «ideally and eventually the UNFCCC»[79].

Concretely however, an important gap still exists between this formal inclusion of indigenous peoples and the reality of the REDD process. During its first meeting in March 2009, the UN-REDD Policy Board indeed approved – after positive recommendation from the Secretariat – the National Joint Programmes of Indonesian and Papua New Guinea, although the Programmes showed clear defects in the consultation of indigenous peoples. Indonesian indigenous peoples were presented as «risks» rather than rights-holders or even stakeholders. The Papua New Guinea Programme clearly did not conform to the UN-REDD Operational Guidance and indigenous peoples have been left out of the National Climate Change Advisory Board[80]. One can hope that UN-REDD is a

75 *Ibidem*.

76 *Ibidem*, pp. 10-11.

77 The establishment of the CSAG responds to «an urgent need to have a similar forum to assist climate deliberations». UN-REDD Programme, *Establishing an Independent Civil Society Advisory Group and Transparent Global Learning on Forest, Livelihoods and Climate Change*, 20 March 2009, p. 2, at http://www.un-redd.org/Portals/15/documents/events/20090309Panama/Documents/UN%20REDD%20IAG%2020Mar09.pdf (consulted on 5 June 2009).

78 *Ibidem*, p. 4.

79 *Ibidem*, p. 7.

80 All NJP submission forms (for DRC, Indonesia, PNG, Tanzania and Vietnam) are available at http://www.un-redd.org/PolicyBoard/1stPolicyBoard/tabid/589/language/fr-FR/Default.aspx (consulted on 22 June 2009).

learning process, that time and the involvement of UN agencies will contribute to greater inclusion of indigenous peoples in the coming months and years. However, one cannot avoid seeing for now a real contradiction between the importance given to the UNDRIP and the consultation of indigenous peoples in the UN-REDD Operational Guidance on the one hand and the ease with which this was considered a minor detail in the actual approval process.

4.2. The World Bank FCPF

The World Bank is a newcomer to climate policies, but it intends to play a leading role in the allocation of the new global funds available for climate work. The Bank's Carbon Finance Unit established the Forest Carbon Partnership Facility (FCPF) in 2007 to act as a catalyst to promote public and private investment in REDD and help developing countries prepare for a REDD National Strategy thanks to the FCPF's Readiness Fund. As said before, the World Bank has always privileged its own standards over the more demanding internationally recognised ones. Its Operational Policy 4.10 for example refers to «free, prior and informed *consultation*», and not to «free, prior and informed *consent*» as recognised in the UNDRIP. It is then a real challenge for indigenous peoples to obtain respect of their rights proclaimed in the UNDRIP in the World Bank management of REDD preparation. However, it is interesting to note that the World Bank has not remained totally impermeable to the influence of the UNDRIP at operational soft law level. An internal FCPF note on consultation and participation of May 2009 thus mentions – although anecdotally – both the UNDRIP and free, prior and informed *consent*[81]. A March 2009 resolution of the FCPF Participants Committee devoted to FCPF/UN-REDD collaboration at country level[82] aims at «harmonized operational guidance on consultation and participation»[83], which represents at least theoretically the possibility for UN consultation standards (requiring consent) to prevail over the World Bank ones (consultation) where both UN-REDD and the FPCF work on a common country.

However, indigenous peoples had to fight to obtain consideration in the World Bank FCPF governance structure.

[81] World Bank FCPF, *Note on Forest Carbon Partnership Facility (FCPF) Readiness Mechanism - National Consultation and Participation for REDD*, Note FMT 2009-2, 6 May 2009, at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/FCPF_FMT_Note_2009-2_Consult_Particip_Guidance_05-06-09_0.pdf (consulted on 4 June 2009).

[82] A *Note on Cooperation between FCPF and UN-REDD Programme on REDD Readiness* had already been produced on 9 October 2008.

[83] World Bank FPCF, *Second Participants Committee Meeting, Gamboa, Panama, Resolution PC/2/2009/3: Collaboration between the FCPF and the UN-REDD Programme*, 11-13 March 2009, at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/7.b_Resolution_3_-_Collaboration_FCPF_UN-REDD.pdf (consulted on 8 June 2009).

The FCPF was launched, rather prematurely – the FCPF Charter still being under draft form – at the UNFCCC COP13 in Bali in December 2007. The event triggered a storm of protests among indigenous peoples, UNPFII Chair included[84], present in the Indonesian capital. The World Bank had indeed left indigenous peoples aside from the consultations it opened in 2006 with a number of states and organisations. Whereas environmental NGOs were included in the «broad range of actors» that were consulted in order to «balance the interests of potential donors and buyers, recipients and sellers and other stakeholders»[85], indigenous peoples – considered as «vulnerable group»[86] rather than rights-holders – were not. They finally managed to be heard in 2008, i.e. very late in the process, during three retroactive regional consultations in collaboration with the UNPFII in Asia, Africa and Latin America[87]. Those consultations were far from bringing about indigenous peoples' support to the FPCF process (indigenous peoples for example walked out of the Latin American consultation). They however obtained their inclusion in two bodies of the FCPF governance structure[88]: the ad hoc Technological Advisory Panels (TAP), and the Participant Committee.

The TAP is composed of experts who review the Readiness Plan (R-Plan) submitted by a REDD eligible countries to ensure that it meets the criteria set out in the FCPF Charter Annex[89] and the Readiness Plan (R-Plan) Template and Guidance[90] – which integrates the concerns of indigenous peoples. However, the presence of an indigenous expert in the TAPs has a limited impact. His/her opinion on the state's plan has anyway to be synthesised – and potentially watered-down – by the lead reviewer. Reviewers' viewpoints anyway weight little in front of the donor/recipient political compromise that takes place in the Participant Committee, the governing body of the Facility which selects REDD Country Participants, approves Readiness Plans and assesses their implementation. The second aspect of indigenous peoples' involvement in the Facility is the new official observer position that was created especially for indigenous peoples and other forest dwellers in the FCPF Participant Committee. But the indigenous peoples' representative is only one observer among others (NGOs, IGOs, the private sector, the UNFCCC and UN-REDD). The

84 UNPFII, *Statement on the Announcement of the World Bank Forest Carbon Partnership Facility*, Bali, Indonesia, 11 December 2007, at http://www.forestpeoples.org/documents/forest_issues/unpfii_statement_fcpf_dec07_eng.pdf (consulted on 15 June 2009).

85 World Bank, *Booklet on the Forest Carbon Partnership Facility*, no date, p. 5.

86 As formulated in the FPCF Charter, which designates indigenous peoples as «a distinct, vulnerable, social and cultural group as defined in the World Bank's Operational Policies and Procedures on Indigenous Peoples». World Bank (IBRD), *Charter Establishing The Forest Carbon Partnership Facility*, cit., p. 5.

87 The reports of the three workshops are available at http://www.forestcarbonpartnership.org/fcp/node/38 (consulted on 14 June 2009). See also: World Bank FCPF, *Summary of Comments from Regional Consultations...*, February-March 2008.

88 World Bank FCPF, *Letter on FCPF Consultation with Forest-dependent Indigenous Peoples and Other Forest-dwellers*, 3 June 2008, at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/FCPF_IP_Letter_English.pdf (consulted on 8 June 2009).

89 According to the FCPF Charter, one of the criteria to select a country for REDD is the «high relevance of forests in the economy of a country including relevance for poverty reduction, the livelihoods of forest-dependent indigenous peoples and other forest dwellers, and clarification of land tenure regimes livelihoods». World Bank (IBRD), *Charter Establishing The Forest Carbon Partnership Facility*, cit.

90 World Bank FCPF, *Readiness Plan (R-Plan) Template and Guidance - Working Version 2*, 16 October 2008, at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/FCPF_R-PLAN_template_and_Guidance_V_2_10_16_08.pdf (consulted on 14 June 2009).

position allows full access to all information available, which is important. But in the end, the indigenous peoples' representative has very little weight as an observer without voting rights compared to the 20 official members of the Participant Committee (10 from donor countries and 10 from REDD Country Participants) and even the Facility Management Team (FMT). His role is limited to expressing his view on issues under discussion.

Thirty-seven developing countries have engaged into the FCPF process, which is composed of five stages towards the agreement of an Emission Reduction Payment Agreement (ERPA). All potential REDD Countries Participants are now either at Phase I (for most of them) or II, which are fundamental for the inclusion of the rights of indigenous peoples and their participation. In theory, Principle 3.1(d) of the FCPF Charter requires that FCPF activities comply not only with the World Bank's Operational Policy and Procedures – including OP/BP 4.10, which subjects the submission of any WB funding to the state carrying out «free, prior, and informed consultation [...] result[ing] in broad community support»[91] – but also with indigenous peoples' rights as recognised at the national and international levels[92]. But once again, there is a gap between theory and reality. In practice, an examination of nine of the 25 first R-PINs clearly shows that the readiness process has been rushed at national level[93]. This seems to confirm the Bank's reluctance to push for the application of its own safeguards before the implementation phase[94]. The FCPF Memorandum specifies that «without a World Bank Grant Agreement [which comes at the very end of the FPCF process], the World's Bank safeguard policies will not apply»[95]. Therefore, none of the nine R-PINs analysed mention human rights or indigenous peoples' rights other than very superficially. Only some of them recognise the need to strengthen indigenous peoples' land tenure in the process (Paraguay, Liberia, Ghana, Nepal, Vietnam). No real strategy to address forest governance problems is proposed. Worse, the DRC readiness note even includes the increase of security for timber concessionaries as an example of «improved governance»[96]! Many of the national REDD concept notes have been written to a large extent by large conservation NGOs like the World Wide Fund for Nature (WWF), the

91 World Bank, *Revised Operational Policy and Bank Procedure on Indigenous Peoples...*, cit., para. 1.

92 «Section 3.1, Operating Principles: The operation of the Facility, including implementation of activities under Grant Agreements and Emission Reductions Programmes, shall: [...] (d) Comply with the World Bank's Operational Policies and Procedures, taking into account the need for effective participation of Forest-Dependent Indigenous Peoples and Forest Dwellers in decisions that may affect them, respecting their rights under national law and applicable international obligations». World Bank (IBRD), *Charter Establishing The Forest Carbon Partnership Facility*, cit., p. 11.

93 See the very interesting report: FERN/Forest Peoples Programme, November 2008. The nine R-PINs analysed concern Panama, Guyana, Paraguay, Democratic Republic of Congo, Liberia, Ghana, Lao PDR, Nepal and Vietnam. Some of those countries – which were expected to lead broad and inclusive consultations – only relied on prior general environmental consultations, and others did not establish specific REDD consultation mechanisms at all.

94 See Victoria Tauli-Corpuz interview to «REDD-Monitor»: C. Lang, *Even at a Conceptual Stage Indigenous Peoples Should Be Involved...*, cit.

95 World Bank FCPF, *Forest Carbon Partnership Facility - Information Memorandum*, 13 June 2008, p. 29, at http://wbcarbonfinance.org/docs/FCPF_Info_Memo_06-13-08.pdf (consulted on 14 June 2009).

96 *Ibidem*, p. 11.

Nature Conservancy (TNC) or Conservation International (CI)[97], at the expense of the voice of indigenous peoples.

In spite of this clear marginalisation of indigenous peoples' rights in Phase I, the World Bank has not impeded the first countries – Guyana, Indonesia and Panama – to proceed to the next stage, the preparation of the Readiness Plan (R-Plan). An analysis of the R-Plans shows all the signs of haste, exclusion of indigenous peoples and defective participation measures. The World Bank's OP/BP 4.10, and the FCPF rules on consultation and participation are ignored. Among most important flaws, land rights were ignored in Guyana, and consultation rushed in Panama and Indonesia, where indigenous peoples were not even mentioned as part of the «stakeholder groups» that will be involved in future consultations. Those flows triggered significant debate within the Participant Committee but did not prevent it to approve the three mentioned R-Plans in June 2009.

This haste is not without explanation. Both donor and REDD recipient countries had expressed their wish to show results at the COP15 in Copenhagen last December. In mid-2009, it was argued that if the Participant Committee did not approve the R-Plans, the ability of states to advocate REDD inclusion in the UNFCCC based on the argument of the FCPF's efficiency would be threatened[98]. Thus, both the World Bank and REDD participant countries seem satisfied with maintaining the discontinuity of the FPCF REDD process, a governance gap in which indigenous peoples' right seem to dissolve themselves. On the one hand, the World Bank affirms that «the FCPF will comply with the applicable World Bank safeguard policies, and be inclusive of all the stakeholders and rights-holders in the forest sector»[99]; but on the other hand, the Bank also relies on the principle of sovereignty, according to which «the FCPF will respect sovereign country decisions in terms of the kinds of mechanisms and strategies that will be tested in each country to tackle deforestation and forest degradation»[100]. The next (third) stage in the FCPF process will concern the implementation of the R-Plans. It will be fundamental to include indigenous peoples' rights in the national REDD strategies and genuine representation in the national monitoring systems. But where there is no basis for that in the Readiness Plans, one can be pessimistic that this

97 Forest Peoples Programme (T. Griffith), *Seeing «REDD»? Forest, Climate Change Mitigation and the Rights of Indigenous Peoples - Update for Poznán (UNFCCC COP 14)*, 1 December 2008, p. 10, at http://www.forestpeoples.org/documents//ifi_igo/seeing_redd_update_draft_3dec08_eng.pdf (consulted on 3 June 2009).

98 Bank Information Center, *FCPF Approves R-Plans for Guyana and Panama*, 29 June 2009, at http://www.bicusa.org/en/Article.11278.aspx (consulted on 4 July 2009); A. Belford, *Alarm Raised over Forest Plan to Fight Climate Change*, AFP, 2 June 2009, at http://www.google.com/hostednews/afp/article/ALeqM5gtkRCn01_0CkIHzX1RVGb2BNShZA (consulted on 16 June 2009).

99 World Bank FCPF, *Booklet on the Forest Carbon Partnership Facility*, cit., p. 13. This reflects the FCPF Charter ideas. Note the apparition of the term «rights-holders», although not explicitly associated with indigenous peoples.

100 Rights and Resource Initiative [A. White and J. Hatcher], *Governance, Safeguards and Accountability: How to Ensure that REDD Investments Are Effective in Reducing Emissions from Deforestation and Degradation?*, 15 June 2009, at http://www.rightsandresources.org/documents/files/doc_1120.pdf (consulted on 8 July 2009).

will actually happen. Some indigenous peoples' representatives have expressed their hope that REDD and other climate change mitigation projects be an opportunity to secure the concrete implementation of rights recognised by the UNDRIP. Everything shows on the contrary that poor governance and corrupted states do not make efforts to ensure the respect of indigenous peoples' rights in their obsession of attracting the green projects' godsend. The World Bank and more generally the UN would have an unprecedented leverage to allow for the local implementation of the UNDRIP, if it chose to bind climate project funds with the prerequisite of securing indigenous peoples' rights. This opportunity has been missed until now. If it were still be missed in a final REDD agreement that could potentially be agreed later on in 2010, indigenous peoples' right would be left at the mercy of bad national governance.

Governments have claimed control over the major part of the world's tropical forests, leaving most of the indigenous and other peoples who traditionally live in it without legal recognition of their land rights. It is striking to observe that nearly half of the 38 UN-REDD and FPCF countries are affected by conflicts, the great majority of them (12 out of 16) being directly connected with land tenure[101]. Neither the UN nor the World Bank has required the solving of those conflicts as a pre-condition for entering the REDD scheme. Another fundamental problem is corruption and bad governance. The 38 UN-REDD/FPCF countries' average note on Transparency International's Corruption Perception Index is a poor 2.9/10, and the World Bank itself considers those countries are among the worse to do business[102]. Vested interests, notably from the industry but also private actors (including companies and sometimes large conservation NGOs) weight more than indigenous peoples with weak bargaining power and lack of access to information. This means that the risk is extremely high that the billions of dollars of carbon value allocated to the concerned forests will not only bypass but also play against indigenous and other communities traditionally occupying the forests. The recognition of indigenous peoples' rights is still widely interpreted by governments as a constraints rather than an opportunity. That is when the question of the real objective behind REDD and more generally climate change mitigation

[101] *Ibidem*.
[102] *Ibidem*.

projects resurface. Is the objective really to save the forest and avoid further global warming? Or has the proclaimed means for that (the carbon market) turned into an end in itself? If the real objective is the first one, then legally recognising indigenous peoples' rights has proved to be efficient. In the case of Brazil, indigenous territories in the Amazon are the ones that have resisted deforestation most effectively. While the rate of deforestation is at 1% in indigenous legally recognised territories, the rate is 8% in state level protected areas, and 19% outside the protected areas[103]. Just after the Copenhagen failure, in December 2009, Brazil decreed nine new indigenous reserves over 50,000 km^2, more than the size of Switzerland. The motivation expressed by Lula for this decision was both historical (giving back land to the indigenous peoples traditionally living on it) and ecological (preserving the Amazon rainforest).

Granting land rights to indigenous peoples and adopting a binding convention addressing the root causes of deforestation (demand for wood, agricultural products including cattle, biofuels, activities of the mining and extractive industries) supported by a global fund would certainly be more efficient than trusting the market alone in coping with the interlinked climate and human rights issues of deforestation. The market by its very nature is a system for *relative* valuations and trade-offs, while human rights is about the *absolute* protection of inalienable features of the human being. While the efficiency of the carbon market in reducing global warming is highly debatable, its primacy over law and regulation undermines the «human rights-based approach to climate change» officially advocated at UN level[104]. In the market vision, notably advocated by the World Bank, indigenous peoples are seen primarily as «vulnerable» or forest-«dependent» people. This approach in terms of «vulnerability» creates a clear risk that indigenous peoples be reduced to a status of victim to be protected, at the antipode of their justified demand: playing a positive role in climate change mitigation and governance based on their rights-holder status (and the assets of their traditional ecological knowledge).

[103] Study by Instituto Socioambiental (ISA), Brazil, quoted in «Friends of the Earth International», *Views on Issues Relating to Indigenous Peoples and Local Communities for the Development and Application of Methodologies*, Submission to the UNFCCC, 15 February 2009, p. 3, at http://unfccc.int/resource/docs/2009/smsn/ngo/105.pdf (consulted on 19 June 2009).

[104] UNHCHR, «*An Ambitious Climate Change Agreement Must Protect Human Rights of All», Warn UN Experts*, cit.

Conclusion

This focus on indigenous peoples' rights violations all along the climate governance stream – from denial of global and local participation rights to the violation of multiple rights in the implementation of climate change mitigation projects – shows the outdating of the artificial separation between International Environment Law and International Human Rights Law in front of such an urgent challenge as climate change. By reclaiming the rights that are due to them on their lands and in global governance, but also because to them the environment/human separation is an aberration, indigenous peoples have become the spearhead of this rapprochement. The blow given to the idea of global legal framework and commitments for climate policies in Copenhagen shows that the road is still long. Too many gaps still exist for efficient human rights litigation of climate policies-related human rights violations; the establishing of legal responsibilities for the overall phenomena of global warming remains very difficult; the opening of the climate change regime to human rights concerns is still mostly rhetoric. The continuing absence of human rights procedures in a discredited global climate regime will risk reinforcing the governance gap we have sought to highlight, which would lead to more chances of human rights violations, for indigenous peoples and for others. Climate change, like other challenges that threaten the full enjoyment of rights, is an issue of participation in decision-making, and of enshrining of safeguards in a legally binding framework supported by adequate procedures open to the victims. The primacy of states and business interests over human (rights) concerns in the way climate governance is currently conceived is digging a democratic legitimacy gap – flagrant in Copenhagen – which renders the existential battle for the climate and the human harder to win.