

ACCOUNTING FOR THE HUMAN RIGHTS HARMS OF CLIMATE CHANGE

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- *The use of strategic litigation is a key tool in holding governments responsible for inaction on climate change* •

ABSTRACT

This paper discusses the increasing recognition of the grave human rights harms entailed by climate change, and the role that national courts and commissions have played – and are likely to continue to play – in holding governments and corporations accountable for those harms.

KEYWORDS

Climate change | Accountability | Government | Big business

1 • Introduction

In early November 2013, Typhoon Haiyan, the strongest tropical cyclone in recorded history, laid waste to central areas of the Philippines. The typhoon resulted in the deaths of over seven thousand people, displaced more than four million, and created a humanitarian disaster.¹ It has since been determined that climate change, which has caused ocean temperatures to warm and sea levels to rise, contributed to the intensity of the storm.²

Typhoon Haiyan is only one example of the increasingly pervasive consequences of climate change. Fifteen of the sixteen hottest years on record have occurred during the twenty-first century, and 2016 had the highest temperatures of any year ever recorded.³ This paper outlines the increasing recognition of the grave human rights harms entailed by climate change, and the role that national courts and commissions have played – and are likely to continue to play – in holding governments and corporations accountable for those harms.

The human rights implications of climate change are immense. It poses a direct threat to the enjoyment of a wide range of human rights, including the rights to life, food, housing, health, clean water and sanitation, and self-determination and development. Already, climate change is contributing to the degradation of natural resources that millions of people rely on for their food security, livelihood and well-being. This includes declining freshwater resources that are suitable for drinking and supporting agriculture; forest dieback; and the degradation of marine ecosystems including fisheries. These changing conditions are also expected to drive other threats, including an increase in the risk of vector-borne diseases,⁴ and profound levels of stress upon critical physical infrastructure such as public transport and power transmission systems.⁵ Further, there are increasing fears that competition over natural resources caused by climate change will lead to mass displacement, social upheaval, and armed conflict.⁶

The rights of indigenous peoples, women and children are particularly vulnerable in this context, as are individuals and communities who lack the resources to adapt to the impacts of climate change.⁷ Of equal concern are responses to climate change which themselves have the potential to undermine the enjoyment of human rights, often through their impact on access to and use of natural resources.⁸ For example, efforts to reduce or sequester greenhouse gas emissions through the development of hydroelectric dams or the growth of biofuels have led to the acquisition of land that displaces indigenous and small-scale farming communities.⁹

It is therefore imperative that governments and private actors adopt a human rights-based approach to mitigating and adapting to climate change. Civil society and human rights experts have been calling for such an approach for years, whether through the channels of international climate diplomacy; national and community-level advocacy; or innovative, strategic litigation.

The central role that human rights must play in the response to climate change was recently affirmed in the Oslo Principles on Global Climate Change Obligations, a set of legal principles authored by eminent international lawyers, scholars and judges. The Principles

state that international human rights law is one of the sources grounding the obligations of governments and enterprises to “respond urgently and effectively to climate change in a manner that respects, protects and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere.”¹⁰

2 • Shaping a human rights-based response to climate change

Due in large part to the tireless advocacy of the global human rights community, the Paris Agreement – the most recent agreement that governments have reached under the auspices of the United Nations (UN) Framework Convention on Climate Change – includes an important acknowledgement of the link between climate change and the human rights obligations of governments.

The preambular text states that States Parties “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”¹¹ The operative part of the Agreement also “acknowledges” that adaptation and capacity-building should be “gender-responsive”¹² and that the former should also be based on “as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems.”¹³

This language, while far from being a comprehensive statement of the nexus between climate change and human rights, is an important step towards ensuring coherence between governments’ human rights obligations and their obligations to address climate change.

But what does a human rights-based response to climate change look like in practice? Building on a series of resolutions issued by the UN Human Rights Council since 2008,¹⁴ as well as on the statements of UN Special Procedures Mandate-Holders and treaty bodies,¹⁵ the Office of the UN High Commissioner for Human Rights has articulated ten separate considerations that should be reflected in all climate action.¹⁶ This includes mitigating climate change to prevent its negative human rights impacts; ensuring that all persons have the necessary capacity to adapt to climate change; ensuring accountability and effective remedy for human rights harms caused by climate change; protecting human rights from business harms; and ensuring meaningful and informed participation. Several other responsibilities outlined pertain to the international obligations of governments, including in relation to the provision of finance and technology transfer.

States therefore have substantive and procedural obligations in this context. While they enjoy some discretion in deciding how to protect human rights against climate-related effects, as stated by the UN Environment Programme, “there may be some minimum measures that would be required as a matter of international, regional or domestic human rights law.”¹⁷

3 • Ensuring accountability for the human rights harms of climate change

Emboldened by the growing recognition of the human rights implications of climate change, individuals and communities are increasingly turning to national courts and institutions to seek redress and ensure that governments and businesses mitigate increasing global temperatures. This new wave of climate litigation¹⁸ builds on existing efforts by environmental lawyers to ensure that, among other things, the climate change impacts of specific projects are considered when governments and corporations undertake environmental impact assessments.¹⁹ Recent cases – spurred on by the rapidly diminishing window for averting dangerous climate change – have focused on more systemic harms, including human rights harms, posed by government and corporate inaction on climate change. In the last two years alone, climate change cases have been filed in countries including the Netherlands, Belgium, Switzerland, Sweden, New Zealand, the USA, Pakistan, India and the Philippines.

A number of factors have facilitated the development of such claims. First, the degree of scientific consensus around the causes and current and projected impacts of climate change is increasingly robust. This includes a new level of certainty regarding attribution of particular trends or extreme weather events to climate change. Second, the adoption by governments of the Paris Agreement, which has already been ratified by 144 States, marks a new level of commitment to collective action on climate change, including an ambitious – but necessary – long-term temperature goal of keeping warming to “well below 2°C” compared to pre-industrial levels. This makes it almost impossible for governments to deny in court that they are not aware of the dangers posed by climate change, or to claim that have already done enough to avert those dangers.

The case of *Urgenda Foundation v the Netherlands*²⁰ has arguably been the most successful of the recent climate change cases drawing on human rights standards and other duties. The case was brought on behalf of the Urgenda Foundation, a Dutch sustainability non-governmental organisation (NGO), and 900 individual plaintiffs against the Dutch government. After hearing arguments that the Dutch government was not doing enough to avert dangerous and foreseeable impacts of climate change, the court ordered the government to significantly reduce its level of greenhouse gas emissions by 2020 – specifically, by 25% compared to 1990 levels. It marked the first time that a court has ordered a government to observe an absolute minimum emissions reduction target. While the court was ultimately persuaded by the argument that the government was acting negligently, human rights – as enshrined in the European Convention on Human Rights – played an important part in the court’s construction of the government’s duty of care to the plaintiffs.²¹

Human rights also underpinned a recent successful claim brought by a Pakistani farmer, Ashgar Leghari, alleging that the Pakistani government was not doing enough to address

the local impacts of climate change.²² Leghari argued that the government's inaction on climate change, which threatens the country's food, water and energy security, amounts to a violation of the constitutionally-protected rights to life and dignity. Citing the fundamental rights of Pakistani citizens, as well as the right to intergenerational equity and the precautionary principle, the Lahore High Court's Green Bench ordered the government to implement the National Climate Change Policy and convened a Climate Change Commission to oversee the government's progress.

Several ongoing lawsuits also rely on human rights standards to substantiate their claims that governments and corporations must do more to prevent and remediate the harms caused by climate change. In the US, 21 young people are suing the federal government on the basis that the government's policies endanger the climate and infringe upon their rights to life, liberty and property in violation of their substantive due process rights.²³ Further, they argue that the government has violated its obligation under the public trust doctrine to guarantee the viability of shared atmospheric and oceanic resources for the benefit of future generations. Among the remedies being sought is an order from the court directing the government to develop a plan to reduce carbon emissions. In an intermediate judgment affirming that the claim should proceed to trial, the court stated that there is "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."²⁴

The Philippines Human Rights Commission is also undertaking a landmark investigation into the accountability of 50 fossil fuel companies, including Chevron, ExxonMobil and Rio Tinto, for the human rights implications of climate change and ocean acidification. These include violations or threats of violations of Filipinos' rights to life, food, water, sanitation, adequate housing and self-determination. The vulnerability of these rights to climate change was clearly demonstrated by the devastating impact of Typhoon Haiyan, mentioned above. The Commission's investigation is a response to a Petition filed by fifteen Filipino and international NGOs. The preface to the Petition states:

In the era of climate change, the Petitioners feel that the real value of the statistics and reports of disaster-related casualties has not been given adequate expression. The real life pain and agony of losing loved ones, homes, farms – almost everything – during strong typhoons, droughts, and other weather extremes, as well as the everyday struggle to live, to be safe, and to be able to cope with the adverse, slow onset impacts of climate change, are beyond numbers and words.²⁵

Aside from the impact of extreme weather events caused by climate change, the Petition draws attention to the consequences of ocean acidification, which is a result of increased levels of atmospheric carbon being absorbed by the ocean. As the Petition states, approximately 25 to 30 per cent of the carbon dioxide emitted by human activities

has been absorbed by the oceans, which has brought about fundamental changes to the ocean's chemistry.²⁶ This has significant negative consequences for the viability of marine ecosystems, which is in turn expected to have serious social and economic consequences for communities that depend on fisheries and coastal ecosystems for their livelihoods.²⁷

The Petition builds on recent research confirming that 90 fossil fuel companies are responsible for 63 per cent of cumulative global emissions of carbon dioxide and methane between 1854 and 2010.²⁸ It cites the UN's Guiding Principles on Business and Human Rights as authority for the duties of the companies, including the duty to undertake human rights due diligence, and also relies on core international human rights instruments for further support. Among the remedies that are requested is a recommendation from the Commission that policy-makers adopt effective accountability mechanisms easily accessed by those affected by climate change.

Human rights norms are also integral to climate change actions being brought against the governments of Belgium, Switzerland, Norway, and Sweden, some of which also draw on the right to a clean or healthy environment that exists in domestic legislation.

These climate change cases face considerable, but not insurmountable challenges. In most cases, these include a lack of legal precedent on the issue, as well as the David versus Goliath dynamic involved in individuals and communities taking on governments and fossil fuel companies – some of the most powerful and well-resourced corporate actors in the world. This has not, however, deterred the growing number of climate litigation efforts, many of which recognise the powerful potential of the human rights framework for ensuring accountability for the harmful consequences of climate change.

4 • Conclusion

If governments fail to rapidly reduce carbon emissions, human rights norms will provide an increasingly important bulwark against the exacerbation of social and economic inequalities caused by climate change. It is true that human rights obligations alone do not offer a ready answer to some of the most vexing aspects of climate change inaction, including persuading governments to accept their “fair share” of global responsibility for reducing greenhouse gas emissions.

However, the international human rights framework – which includes obligations of international assistance, cooperation, and broader duties to address extraterritorial or transboundary harm – exhorts governments to enact a just and equitable response. As stated by the Office of the UN's High Commissioner for Human Rights (OHCHR) in the months preceding the adoption of the Paris Agreement, “Simply put, climate change is a human rights problem and the human rights framework must be part of the solution.”²⁹

NOTES

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