

CLIMATE CHANGE AND HUMAN RIGHTS: AN INTRODUCTION TO LEGAL ISSUES

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I. INTRODUCTION

The varied consequences of rapidly increasing climate change are already having a dramatic effect on poor and marginalized people all over the world, reinforcing existing vulnerabilities and deepening inequalities.¹ The fact that those who are already vulnerable will be impacted disproportionately enhances the human urgency of the problem; the fact that those likely to suffer most from the impacts of climate change are those who have contributed least to the problem adds what can be described as an equity challenge. International human rights law is potentially well placed to address that challenge and highlight some of the human and equity dimensions of climate change.

This short Paper lays out some of the legal questions that are implicated in the emerging debate on climate change and human rights and suggests ways in which international human rights law could be approached in order to promote clarity in the discourse of human rights and climate change. In Part II, it outlines some of the context that defines the intersection of human rights and climate change; in Part III, it delineates the different types of questions raised by the interface; and, in Part IV, it offers potential conceptualizations of the relationship between human rights and climate change.

II. CONTEXT OF THE LINKS BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS

The current discussion of human rights obligations in the context of climate change can be traced to the well-established body of literature connecting human rights and the environment,² and efforts to establish a free-

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¹ See, e.g., WORLD BANK, WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT IN A CHANGING CLIMATE: CONCEPT NOTE (2008), available at http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1226014527953/5555566-1226014549177/WDR2010_CN_oct14v3.pdf (discussing World Bank report forthcoming in October 2009).

² See, e.g., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996); LINKING HUMAN RIGHTS AND THE ENVIRONMENT (Romina Picolotti & Jorge Daniel Taillant eds., 2003); Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INT'L & COMP. L.Q. 796 (1996).

standing right to a clean and healthy environment.³ More recently, it can be identified in efforts specifically aimed at highlighting the human dimension of climate change.⁴ That discourse has seen a sharpening of focus around human rights and climate change, with a number of important initiatives underscoring this specific link.

In particular, efforts surrounding the 2007 Bali Conference of the Parties, such as the address of the U.N. Deputy High Commissioner for Human Rights⁵ and the statement of the U.N. Office of the High Commissioner for Human Rights (“OHCHR”), highlight the connection.⁶ Each of these is notable for the way it frames the challenge of climate change as a social and human problem, going beyond environmental or technical analysis. In addition, each is unequivocal in connecting human rights and climate change explicitly, thereby introducing a normative and moral, if not a clearly established legal, dimension. Also relevant was the 2008 U.N. Human Rights Council Resolution 7/23 on Human Rights and Climate Change, which called for a study to be undertaken by the OHCHR.⁷ The ensuing OHCHR study,⁸ along with other recent scholarship⁹ devoted specifically to the question of human rights and climate change, has helped advance the conceptual understanding and legal underpinnings of this area. In March 2009, the Human Rights Council adopted Resolution 10/4,¹⁰ which noted the effects of climate change on the enjoyment of human rights, and reaffirmed the potential of human rights obligations and commitments to inform and strengthen

³ Convention on the Rights of the Child art. 24, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed but not yet ratified by United States); Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 4, 7, 15, June 27, 1989, 28 I.L.M. 1382; African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 21 I.L.M. 58; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) art. 11, *done* Nov. 17, 1988, 28 I.L.M. 156; *see also* John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000).

⁴ Male’ Declaration on the Human Dimension of Global Climate Change, *adopted* Nov. 14, 2007, *available at* http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

⁵ Kyung-wha Kang, Deputy High Comm’r for Human Rights, Office of the U.N. High Comm’r for Human Rights, Address at the Conference of the Parties to the U.N. Framework Convention on Climate Change and its Kyoto Protocol (Dec. 14, 2007), *available at* <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/013DC0FAA475EC87C12573B10074796A?opendocument>.

⁶ U.N. Joint Press Kit for Bali Climate Change Conference, OHCHR, The Human Rights Impact of Climate Change, U.N. Doc. DPI/2483 (Nov. 2007), *available at* <http://www.un.org/climatechange/pdfs/bali/ohchr-bali07-19.pdf>.

⁷ U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, *Report of the Human Rights Council on Its Seventh Session* 65-66 ¶ 1, U.N. Doc. A/HRC/7/78 (July 14, 2008).

⁸ OHCHR, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

⁹ INT’L COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008), *available at* http://www.ichrp.org/files/reports/36/136_report.pdf.

¹⁰ U.N. Human Rights Council Res. 10/4, in U.N. Human Rights Council, *Draft Report of the Human Rights Council on its Tenth Session* 13, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2009).

international and national policy making. In that resolution, the Council announced its decision to hold a panel discussion on the relationship between climate change and human rights, welcomed the exchange of information between the OHCHR and the U.N. Framework Convention on Climate Change (“UNFCCC”) Secretariat, and encouraged the High Commissioner to participate in the fifteenth UNFCCC Conference of the Parties.¹¹

III. TYPES OF CONSIDERATIONS ON THE LINK BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

In pursuing an inquiry into the nexus between human rights and climate change, it is important to disaggregate the different types of questions and considerations in play, since both areas have evolved separately over time with different assumptions and premises, analytic approaches, and methodologies.

A. *Conceptual Questions*

Despite the momentum surrounding the human rights-climate change discourse, conceptual and analytic questions persist about how to link the two issues in a coherent manner. At this level, the challenge remains how to link the pervasive phenomenon of climate change, with its aggregated causes and dispersed effects, to the legal and normative constructs of correlative right and duty under the international human rights framework.¹² How does one connect the physical manifestations of climate change with peoples’ entitlements to certain rights and freedoms and the responsibilities of states, including to persons residing outside their jurisdictions in light of the resistance of many states to the very notion of extra-territorial obligation?¹³ Connected with the contested boundaries of human rights duties are the complex questions of causation in relation to climate change, which compound the difficulty of questions related to attribution and responsibility.

Other conceptual issues include the need to specify the sources of the rights and duties under consideration. Invoking the notion of human rights entails both rights and duties, and in each case, for human rights to have meaning, one must identify a right-holder and a duty-bearer so as to permit an actionable claim. Ideally, each should be identified in corresponding legal terms according to one of the traditional sources of public international

¹¹ *Id.* ¶¶ 1, 4, 5.

¹² See Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 9, 9 (Asbjørn Eide et al. eds., 2d rev. ed. 2001); Bernard Mayo, *What Are Human Rights?*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 68, 72 (D.D. Raphael ed., 1967) (discussing “correlativity of rights and duties”).

¹³ SIGRUN SKOGLY, *BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION* 57–72 (2006).

law as specified under article 38 of the Statute of the International Court of Justice,¹⁴ or at least some relevant provision of domestic law.

Finally, there is a need for some cogent articulation of what is distinct about addressing climate change through a human rights lens and what distinguishes a human rights approach from one that simply addresses the social or human impacts of climate change. Is there a meaningful difference between the human impacts of climate change and the human rights impacts of climate change? If so, how is it best understood? There is therefore a need to explain what a human rights perspective brings to the problem of climate change, including what it offers in legal terms. Precisely how can an approach predicated on human rights improve the understanding of climate change and make measures to address it more effective? An answer is still needed to the question of the “value-added” of human rights for an international legal and policy dialogue that is already complex and fraught with political sensitivities.

B. Legal and Policy Questions Pertaining to the Relevant International Law Frameworks

At a more applied level, climate change and human rights are governed by international regimes that have evolved separately, with different premises underlying the legal frameworks of multilateral environmental agreements (like the UNFCCC)¹⁵ and human rights treaties (such as the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)).¹⁶ For instance, one may contrast the relatively clear “vertical” application of human rights treaty provisions between a State Party and its citizens or persons within its jurisdiction, with the more “horizontal” operation of environmental agreements like the UNFCCC governing state-to-state relations and burden sharing between countries in relation to emissions.¹⁷ In each case, the application of rights and duties under the various instruments reflects different iterations of state-centricity. Other contrasting premises and principles include the concept of violations in relation to human rights and an outlook that is more oriented toward past harms than future harms, as is the case with respect to climate change. Such contrasts should not occlude the potential complementarities and points of convergence that may be identified between the two frameworks and that may be

¹⁴ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 (naming as sources of law “international conventions, . . . international custom, as evidence of a general practice accepted as law, . . . and the general principles of law recognized by civilized nations”).

¹⁵ UNFCCC, *opened for signature* May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107, *as amended by* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, 2303 U.N.T.S. 148 (*entered into force* Feb. 16, 2005).

¹⁶ ICESCR, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).

¹⁷ *E.g.*, UNFCCC, *supra* note 15, art. 3(1).

relevant to an understanding of States Parties' obligations. There may be compatibility in terms of a focus on treaty obligations, which is particularly relevant for States Parties to Treaties under both regimes. Moreover, there may be complementarity identifiable in principles, which can be identified in both the UNFCCC and the ICESCR, such as the duty of cooperation,¹⁸ "do no harm,"¹⁹ or equity.²⁰

C. *Political and Institutional Questions*

A different type of consideration emerges in relation to the political and institutional realities of promoting the connection between climate change and human rights. Considering the complexity and sharp contrasts between states' positions in relation to climate change negotiations, and taking into account similar cleavages surrounding certain human rights debates, there is much to suggest that divergences might be replicated, if not reinforced, where the two intersect. This is particularly true of approaches that seek to link climate change impacts in one country to the enforceable human rights obligations of another, or strategies that aim to connect human rights obligations with the rendering of financial assistance (e.g., for adaptation). Practical questions also exist about the capacity of institutions seized with the issues of climate change and human rights to engage more fully with one another and create space for mutual reinforcement within their respective institutional frameworks and processes. Finally, how can international actors like the World Bank or U.N. Environment Programme, working on climate change but operating somewhat outside the traditional international human rights processes, be engaged by an approach predicated upon human rights?

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This brief introduction to the range of questions that present themselves makes for a sobering assessment of the potential for initiatives linking human rights and climate change within the framework of international human rights law as it currently stands.

IV. PERSPECTIVES ON THE LINK BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

Beyond identifying the types of questions underpinning the connection between human rights and climate change, it is apposite to disaggregate the various ways in which the connection can be characterized under international law.

¹⁸ UNFCCC, *supra* note 15, art. 3(5); ICESCR, *supra* note 16, art. 2(1).

¹⁹ This was first identified in the *Trail Smelter Case* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Trail Smelter Arb. Trib. 1941), but more recently argued to inhere beyond the realm of environmental harm to human rights-related harm.

²⁰ E.g., UNFCCC, *supra* note 15, art. 3(1); *see also* ICESCR, *supra* note 16, art. 2(2).

A. *Climate Change Affects the Enjoyment of Human Rights*

A strong starting point for conceptualizing the connection between climate change and human rights is to focus on the plethora of rights that will be impacted adversely by climate change. The U.N. Human Rights Council resolution and the OHCHR study emphasize how climate change will negatively impact (and already is negatively impacting) the enjoyment of specific human rights in many countries around the world, with the starkest examples emerging in small island and low-lying states and areas at risk for increased desertification and drought. These include the right to life, food, water, health, housing, and self determination; they may also include rights under threat because of climate change-related conflict or displacement. The impacts will also affect the rights of certain vulnerable groups disproportionately, with factors such as poverty, gender, age, indigenous or minority status, and disability reinforcing the disparate impacts.²¹

B. *Measures to Address Climate Change May Affect the Enjoyment of Human Rights*

A subset of the impacts discussion targets the “secondary” human rights impacts resulting from measures aimed at addressing climate change. That is, certain measures to address climate change may impact the realization of certain fundamental rights or affect the capacity of countries to realize rights. Examples include measures aimed at reducing greenhouse gases through increased reliance on bio-fuels, potentially impacting the right to food, or programs that support of reduced emissions from deforestation and degradation may provide inadequate protection for the rights of certain indigenous peoples reliant on forests.

C. *Human Rights Have Relevance to Responses to Climate Change*

At another level, human rights may be relevant to the design and implementation of responses to climate change, whether in relation to adaptation and mitigation. From a more positive and forward-looking perspective, one may argue that human rights can usefully inform approaches to climate change in policy and legal terms. This dimension may include arguments based on human rights obligations of states under a variety of international law instruments. These range from the integration of human rights into country strategies in terms of priority entitlements to be protected from the impacts of climate change (e.g., right to health, housing, water, or food), or more procedural human rights that are relevant to the design and implementation of policies related to climate change (e.g., right to information, partici-

²¹ OHCHR, *supra* note 8, ¶ 42.

pation, or access to decision making).²² Under this view, human rights obligations may provide a legal baseline for how climate change is tackled and what must be protected from its impacts. From this, it may be possible to identify ways in which addressing climate change can help realize human rights and how realizing rights can help ensure greater capacity to adapt to climate change, underscoring a core compatibility of aims and outcomes between addressing climate change and realizing human rights.

V. CONCLUSIONS

The foregoing discussion highlights a number of significant challenges, but it also points to a number of opportunities. Whether those opportunities can be seized upon and taken forward will depend in part on the clarity and cogence that human rights lawyers can contribute to this discourse through differentiating the types of considerations in play and articulating the specific nature of the connection being argued for between human rights and climate change. Different types of considerations require different approaches, analyses, and strategies, many of them non-legal. Similarly, distinct perspectives on the link between climate change and human rights entail very different approaches to the relevant human rights obligations under international law; each reveals the current limitations on the ability of the law to address the human and social impacts of climate change. However, these observations should not obscure the potential of international law to contribute to this context, nor the ways in which human rights can add value to the ongoing search for solutions to the myriad challenges of climate change and foster change at the three basic levels identified above. It is equally clear that a successful strategy to persuade various constituencies of the link between these two critical issues will require concerted, coordinated action and multi-disciplinary efforts at all three levels. Preventing both further environmental degradation and threats to human rights resulting from climate change will rely on harnessing the moral, political, institutional, and legal potential of human rights discourse.

²² *E.g.*, UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

