


2015

Climate Change and Human Rights: How? Where? When?

Basil E. Ugochukwu

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Ugochukwu, Basil. "Climate Change and Human Rights: How? Where? When?" *Osgoode Legal Studies Research Paper Series*, vol.12, no. 9, 2015.

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Research Paper No. 45

Volume 12, Issue 9, 2016

Climate Change and Human Rights: How? Where? When?

CIGI Papers, No. 82, 2015.

Basil E. Ugochukwu

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Osgoode Legal Studies Research Paper No. 45
Vol. 12/ Issue. 9/ (2016)

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Abstract:

Climate change poses a threat to several internationally recognized human rights, including the rights to food, a livelihood, health, a healthy environment, access to water and the rights to work and to cultural life. Actions taken to mitigate and adapt to the adverse impacts of climate change have to be centred on human rights. In negotiations for a binding international climate change instrument, nation states have been called upon to fully respect human rights in all climate-related actions. As important as this demand is, there is also the need to describe and plan how human rights can be integrated into international, national, subnational and corporate climate change strategies. This paper analyzes a few examples of national, subnational and corporate climate change policies to show how they have either enshrined human rights principles, or failed to do so.

Keywords:

Climate Change, Human Rights, Language, States, Corporations, Policies

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CIGI PAPERS

NO. 82 — NOVEMBER 2015

CLIMATE CHANGE AND HUMAN RIGHTS **HOW? WHERE? WHEN?**

BASIL UGOCHUKWU



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ABOUT THE ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law.

ABOUT THE AUTHOR



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EXECUTIVE SUMMARY

Climate change poses a threat to several internationally recognized human rights, including the rights to food, a livelihood, health, a healthy environment, access to water and the rights to work and to cultural life. Actions taken to mitigate and adapt to the adverse impacts of climate change have to be centred on human rights. In negotiations for a binding international climate change instrument, nation states have been called upon to fully respect human rights in all climate-related actions. As important as this demand is, there is also the need to describe and plan how human rights can be integrated into international, national, subnational and corporate climate change strategies. This paper analyzes a few examples of national, subnational and corporate climate change policies to show how they have either enshrined human rights principles, or failed to do so.

It is argued that existing national, subnational and corporate climate change policies make little direct reference to human rights norms. This paper examines the question that naturally arises: how are human rights concerns being integrated into those policies? This paper also examines the challenge of integrating human rights principles in climate change actions. It first looks at climate change in the context of larger environmental issues that have considerable human rights consequences. Then it highlights the challenges of bridging the normative gap in international law — in other words, the inadequate legal provision for protection of human rights with regard to environmental rights in general, and climate change more specifically, and how this might guide domestic climate change action. The paper concludes that climate change policies, if they are to respect all human rights, must actually use human rights language to articulate adaptation or mitigation measures.

INTRODUCTION

In the 2010 Cancun Agreement to the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC), it was provided that “Parties should, in all climate-related actions, fully respect human rights” (UNFCCC 2011). The same document also affirmed the rights-based safeguards to be applied when financing and undertaking activities under the Reducing Emissions from Deforestation and Forest Degradation (REDD+) framework. These safeguards, it must be noted, were informed by the experiences of local and indigenous peoples under UN-REDD, which became REDD+ as a result of the bottom-up efforts to catalyze human rights protection for the most vulnerable, whose interests were apparently being ignored up to that time in the UNFCCC process (Kant, Chaliha and Shuirong 2011; Doolittle 2010).

On October 17, 2014, mandate holders under the special procedures of the United Nations Human Rights Council

jointly addressed an open letter to the UNFCCC parties, calling upon them “to include language in the 2015 climate agreement that provides that the parties shall, in all climate change-related actions, respect, protect, promote, and fulfill human rights for all” (Mandate-Holders of the Human Rights Council 2014). This call departed noticeably from the language of “respect” in the Cancun Agreements mentioned above, as well as from the COP 21 negotiating text identified below, to prescribe additional substantive state responsibilities (“protect,” “promote” and “fulfill”) in designing an international climate agreement.

As well, in the Streamlined and Consolidated Text the preamble noted that, “Parties should ensure in all climate change related actions full respect of all human rights” (UNFCCC 2015). The text further recognized that, “all actions on climate change shall significantly contribute to the post-2015 development agenda of the United Nations with a particular focus on human rights, good governance, gender equality and the needs of particularly vulnerable groups” (ibid.).

As the COP21 Paris meeting draws closer, there are indications that a binding agreement may not be achieved, and the language of human rights may be excluded altogether from whatever agreement is reached. Rather than the streamlined text mentioned above, a set of three tools have been issued by the co-chairs of COP21, anticipating the most likely scenario for the final negotiations. The first is a draft of issues that could form an agreement in Paris. This draft is full of the language of “vulnerabilities.” Not even once does it mention “human rights.” The second tool is a draft of issues that could form part of the decisions, with one extended preambular paragraph that emphasizes “the importance of respecting and taking into account human rights, gender equality, the rights of indigenous peoples, intergenerational concerns, and the needs of particularly vulnerable groups, including women, children and persons with disabilities, when taking action to address climate change....” The last tool deals with provisions whose placement requires additional explanation among the parties. This tool includes a paragraph that, while it emphasizes “full respect for all human rights,” singles out gender responsiveness/equality, the right to development and the rights of indigenous peoples for specific recognition.

The inconsistent back-and-forth treatment of human rights concerns in the pre-COP21 documents might seem to suggest that the issue has not been considered with a great deal of seriousness, at least not from the perspective of the negotiating parties. This may well be the case, or it may be an unintentional oversight. Regardless, any potential for a lack of attention to and absence of the human rights component in the COP21 deliberations has to be carefully followed to ensure negotiators do not drop the ball on the matter and thus negatively affect the outcome. Whether described in the language of vulnerabilities or articulated

in more explicit human rights terms, a combined reading of all the pre-Paris documents indicates a concern for human rights principles in climate change strategies. Those principles should not be ignored in any outcome or agreement, even if they are only general declarations of goals. Making them essential, operational elements of the agreement would require further articulation of specific norms and the identification of actionable activities.

CONNECTING CLIMATE CHANGE AND HUMAN RIGHTS

Climate change puts humanity at risk and has “clear and immediate implications for the full enjoyment of human rights” (Kravchenko 2010; Atapattu 2002; Humphreys 2010). Combatting climate change therefore requires actions that are focused on its impacts on human rights. Equally as important as this expectation of integrating human rights principles into climate change action is the need to spell out explicit ways this expectation can be met in international, national, subnational and corporate climate change strategies.

According to 2014 research undertaken by the Mary Robinson Foundation, only 12 countries (mainly from Central America, Europe and Asia) mentioned the link between climate change and human rights in reports transmitted to the UNFCCC and the Human Rights Council (HRC). In specific terms, however, the report showed that in information presented before the HRC under the Universal Periodic Review, 45 countries (in Central America, Africa, Europe and Asia) referred explicitly to the human rights impacts of climate change. At the UNFCCC, 49 countries (in Africa, Central and South America, Europe and Asia) clearly mentioned human rights in their submissions to that body (Mary Robinson Foundation 2014). Neither the United States nor Canada figured in any of these reports. It is unclear if this is because the statistics do not cover the two countries’ reporting period or their reports did not actually make reference to human rights.

These figures show that even though human rights implications are central concerns of at least some countries in their climate change action plans, the number of countries showing such human rights sensitivity is still too low to warrant optimism. Given that 193 member states of the United Nations and 195 countries have ratified the UNFCCC, the low numbers from the Mary Robinson Foundation reveal that the situation leaves a lot to be desired. The language of the reports themselves is equally important to understanding the challenges. Referring to the human rights impacts of climate change in general terms is clearly not the same as stating explicitly how the human rights framework can be incorporated in climate change mitigation and adaptation measures. There is, therefore, the challenge to move from broad plans to the specifics of how these goals can be achieved.

As a practical strategy in this regard, the International Bar Association Climate Change Justice and Human Rights Task Force (2014) has suggested the “greening” of existing human rights by “urging human rights bodies to recognize that climate change impedes the full enjoyment of at least some, if not all, human rights.” Yet questions remain as to how specific human rights targets can be achieved under the climate change regime. What would such general statements about “respecting” or “greening” human rights amount to when broken down to fine details? What does it mean to respect all human rights in this context? What human rights are to be respected? And is there a distinct language with which to express respect for human rights in climate change action?

The possibility of addressing climate change through international human rights law has come under intense scrutiny in recent years (Shue 2014; Roht-Arriaza 2010). There is increasing consensus that under a general theme of “climate justice,” existing international human rights norms could be deployed in the fight against climate change — to the extent that the impact of climate change violates any of those norms (Caney 2010). Applying those norms should not depend on an international agreement specifically linking climate change and human rights. Instead, the link could be made by assessing the ways that climate change affects particular human rights norms already recognized under international human rights law. As has been rightly argued, “linking the climate change negotiations and structures to existing human rights norms enables States to use indicators and mechanisms anchored in the well-established human rights system to address the challenges posed by the changing climate” (Center for International Environmental Law 2011). Establishing this link is by no means an easy task (Doolittle 2010). The next section explores this challenge.

ENVIRONMENTAL RIGHTS AND CLIMATE CHANGE CLAIMS

Within the existing literature, the right to a clean environment is sometimes differentiated from the human right to remedies accruing from the consequences of climate change. John Knox, the UN Special Rapporteur on Human Rights and the Environment, is among the scholars who have made this distinction. In a recent essay, he divided his discussion on the international regime for the protection of the environment within the human rights framework into two parts. In the first part, he examined the relationship between human rights law and environmental protection in a general sense. In the second, he focused specifically on the human rights implications of climate change (Knox 2015). This distinction must be understood if the contours of human rights claims based on climate change are to be effectively traced.

There are therefore two lines of inquiry to examine. The first is to determine whether a human right to a healthy and sustainable environment has been acknowledged in international law (Francioni 2010). The second is to discover whether “climate law” is in the process of becoming a new international law regime (Mayer 2013). As will be explained below, there is no doubt that the first question can be answered in the affirmative. This is the case even though the protection of the right to a healthy and sustainable environment has not developed in a straightforward trajectory within the international human rights law-making system. As one scholar asserts, the relationship between international environmental law and international human rights law is a complicated one (Fisher 2013). The concept and understanding of a human right to a healthy environment seems to have developed slowly and tentatively.

In 1972, the Stockholm Declaration on the Human Environment spoke of the fundamental right to freedom, equality and adequate conditions of life “in an environment of a quality that permits a life of dignity and well-being,” asserting that the present generation bears “a solemn responsibility to protect and improve the environment for present and future generations.” This coupling of the “ecological and human rights approaches to environmental protection” saw little progress over the next 20 years (Francioni 2010). By the time of the Rio Earth Summit in 1992, the human rights language had softened considerably, shifting away from a focus on people to “nature” and referring to human beings merely as “the central concern of sustainable development...entitled to a healthy and productive life in harmony with nature” (ibid., 45).

It has been suggested that the main concern of the Rio Declaration was “the conjugation of environmental protection with economic development, not the safeguarding of human rights through enhanced environmental protection,” and that the reconciliation of economic growth with environmental protection remains the focus of environmental diplomacy, even after the world adopted the Kyoto Protocol and subsequent negotiations on global warming (ibid.). While there has been significant international action on the climate change front, the fact that the draft agreement for COP21 talks of a “facilitative, non-punitive, non-adversarial and non-judicial” framework for international climate change governance, detracts substantially from the original goal of agreeing a binding international instrument. Granted, there are some non-binding human rights documents (such as the United Nations Guiding Principles on Business and Human Rights) that could deal with climate change-related concerns. If the UNFCCC process ends up with a similar non-binding document, it could hardly be described as a success because it defeats the stated goal of producing a binding agreement. It bears noting that following more

than two decades of the COP process, and since the 2007 Kyoto Protocol, global emissions of greenhouse gases have increased rather than abated, signifying a more urgent situation.

The next section examines the normative gap in the international legal system, the lack of protection that has fed doubts that climate change will be treated as a human rights concern with claimable, legal and enforceable rights related to its impacts. While some of the gaps in law highlight the lack of a substantive basis for claiming violations on human rights grounds arising from climate change, others show only the procedural limitations of making such claims in specific legal or judicial contexts. It is argued that there is an urgent need to strengthen procedural safeguards where they already exist. The larger, more important challenge is to develop substantive normative standards for the recognition of human rights in climate change policies at the international, national, subnational and corporate levels.

BRIDGING THE NORMATIVE GAP IN THE INTERNATIONAL SYSTEM

Current international human rights law does not recognize the impacts of climate change as the basis for human rights claims, which means that there is a gap in the international normative system. In other words, while it is generally accepted that climate change has negative impacts on a range of human rights, the international legal system has not yet specifically assigned responsibility for the causes of climate change on the basis of human rights norms. For this reason, Eric Posner (2007, 1931) has argued that “There is...no international human right to be free of global warming or pollution per se.” In his view, “the claim that individuals have an international human right of some sort that is violated by the emission of greenhouse gases, and that such a right should be vindicated in human rights litigation, is not normatively attractive.” Even where there are declarations and agreements asserting the importance of the environment, or even the right to live in a healthy environment, such declarations do not create an international human right to a healthy environment (Posner 2007; Atapattu 2002). Proponents of this viewpoint believe this is the very definition of the normative gap. While climate change infringes on human rights, international law does not provide for how this harm can be redressed. A climate change governance mechanism to address this gap is therefore needed.

Equally important, an effective climate change governance strategy requires international collaboration. This is because “although the causes of climate change are located within political borders, their effects clearly transcend them” (Trebilcock 2014, 119). Two separate challenges come from this reality. The first is that there is, as yet, no international agreement on the best possible means of tackling climate

change. While the UNFCCC does exist and serves a specific purpose, it is considered to fall short of what is required to tackle the challenge; hence, the COP meetings that are aimed at achieving a deeper consensus. An alternative framework such as Jutta Brunnee and Stephen Toope's "interactional theory" of the international system could be helpful (Brunnee and Toope 2000), at least to the extent that it breaks down the borders of the traditional understanding of sources/legitimacy of international law. Under this theory, what qualifies as international law in the climate change context depends on whether a wide enough range of actors and participants created it through processes of mutual construction, and not only because it fits traditional boundaries of international legality such as treaties or custom (*ibid.*).

The second challenge is that the lack of international consensus makes it more difficult to frame the harmful impacts of climate change in the language of international human rights. As Knox notes, none of the United Nations human rights treaties enshrines a right to a healthy environment or stipulates an environment of a certain quality to meet a minimum threshold of healthfulness (Knox 2015, 2). This concern could be addressed, as in the first challenge above, by reference to Brunnee and Toope's interactional theory. Yet an awareness of the great efforts being mobilized to ensure that a binding international agreement is reached reveals the limitations of this theory and raises further questions.

One such question is, what is the impact of the lack of international agreement for international climate change governance? Treaties are generally considered effective in building international law on the environment and other subject matters. By no means are treaties the only source of international law, however. According to article 38 of the Statute of the International Court of Justice (annexed to the Charter of the United Nations), international law can arise from customary international law, meaning "general and consistent practice of states followed by them from a sense of legal obligation" (Goldsmith and Posner 1999). Additional sources of international law include general principles of law and judicial decisions and teachings of legal scholars.

Does the absence of an international environmental and climate change treaty mean a diminished role for other sources, such as customary international law (Bodansky 1995)? Not necessarily. Climate change governance is an area in which the suggestion that treaties take priority over other sources of international law cannot plausibly be supported. This is especially true given that the existence of a treaty is not always an effective guarantee that states will comply with its provisions.

The simple answer to this question is that climate change as a global problem is multidimensional in nature and therefore requires a diversity of normative mechanisms

to fight it. While those mechanisms may be treaty based, other sources of international law, such as custom and state practice, should not be discounted. In addition, and on the basis of the interactional theory mentioned above, attention has to shift further to alternative understandings of international legal legitimacy incorporating the activities of a diverse range of actors generating norms based in large measure on rhetorical processes of discussion and dialogue (Brunnee and Toope 2000).

There is, for example, a growing incidence of climate change litigation in various domestic legal jurisdictions. This can provide evidence of customary international law through state practice. In these cases, combinations of human rights and non-human-rights norms, such as remedies under tort law, have been deployed (Cox 2014; Schatz 2009; Newell 2008). Those parties that turn to domestic litigation, often under human rights norms that may not be explicit or clear, are acting partly in response to weaknesses in the international regime (Hunter 2009). Such litigations are significant in that they create a strategic rhetorical process to deal with human rights and climate change in the domestic context.

In addition, there are many international statements and declarations that, while not directly addressing climate change as a human rights issue, could be employed interpretively to achieve that goal. Examples are the 1986 United Nations Declaration on the Right to Development and the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The Declaration on the Right to Development, for instance, recognizes the right to self-determination (article 1), which could be compromised by loss of land arising from flooding or erosion. It also enshrines the right of access to basic resources, education, health services, food and housing (article 8), all of which may be placed at risk by changes in traditional livelihood arising from climatic factors such as change in disease vectors and high-intensity storms (Center for International Environmental Law 2015). Similarly, the Declaration on the Rights of Indigenous Peoples contains several provisions under which climate change impacts could become human rights questions. That declaration focuses on the right to self-determination and adds the rights of indigenous populations to autonomy and self-government (article 4), these rights also oblige states to obtain the free, prior and informed consent of indigenous peoples before adopting measures that may affect them (article 19). Yet these rights and obligations are often disregarded in the climate change context.

Because litigators may have already accepted Posner's assertion that current international human rights norms do not directly recognize claims arising from the impact of climate change, it may be tempting to concentrate on norms implied or derived from other sources rather than on explicit human rights norms. That could be a mistake, however, because the right to a remedy based

on such claims has been implied from other normative sources. The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have in some instances been expanded to support these claims. It has been argued, for example, that while there is nothing in the human right to life and to own property that directly refers to the environment, “the existence of rights such as these has justified in certain circumstances the need to protect the environment” (Fisher 2013). The major regional human rights instruments also directly or implicitly enshrine the right to a healthy environment (Shelton 2009; Osofsky 2010). The relationship between the harms resulting from climate change and the definition of a healthy environment is one more issue open for debate.

Much as some regional human rights instruments recognize environmental rights in their provisions (Kravchenko and Bonine 2008; Shelton 2009), some national constitutions have incorporated these rights as well. As of 2012, 177 of the 193 member states of the United Nations recognized the right to a healthy environment in one form or another (Boyd 2012). This is true of African countries (Bosek 2014; Madebwe 2015; Van der Bank and Van der Bank 2014) and European countries (Falletti 2015). Not only do some Latin American constitutions incorporate environmental rights, they further provide that addressing climate change is a responsibility of the state (Aguilar and Recio 2013).

In those countries whose constitutions enshrine the right to a healthy environment, this is done either in explicit terms, as in Portugal, Zimbabwe, Spain, among others (Boyd 2012, 5) or through objectives and principles, as in the Fundamental Objectives and Directive Principles of State Policy of Nigeria (Amechi 2010; Ijaiya and Joseph 2014; Temitope 2010; Musa and Bappah 2014). Under the latter process of enshrinement, the right to a healthy environment is only a policy vehicle. It cannot be legally enforced in the way that civil and political rights can. Despite the global push for recognition of the right to a healthy environment, there are still exceptions — those countries Boyd refers to as “laggards” — whose domestic constitutions have ignored the right altogether (Boyd 2012, 4). Holdouts include Australia, Canada, China, Japan, New Zealand and the United States.

International instruments and domestic constitutions are two different vehicles through which environmental human rights norms can be developed. When those mechanisms contain provisions related to climate change, an expectation is that the principle of “respecting all human rights” will be included and adopted. The major gap in the international system is that there is no specific instrument addressing climate change. It is hoped that such an instrument will emerge from COP 21, and that it will enshrine provisions that are sensitive to the human rights dimensions of climate change. Any such agreement should be codified in unambiguous language, and target

not just procedural guarantees but also the substantive human rights that are affected by climate change. With regard to the rights to life and water, for example, the focus could be on how shifts in climate and precipitation affect access to water.

At the domestic level, it has also been the practice lately of some national, subnational and corporate entities to design policies that deal directly with the challenge posed by climate change. As in international instruments or domestic constitutions, these policies must respect human rights in their provisions. Yet, as climate change is known to affect different states differently, there will be a need for contextual analysis, to determine what the potential human rights implications of climate change are for each state and to frame policies so they address those differing implications. How this is being done in practice is the question addressed in the next section.

EXAMPLES FROM NATIONAL, SUBNATIONAL AND CORPORATE CLIMATE CHANGE POLICIES

This paper is only one part of the overall research that analyzes climate change policies and legislation established by national, subnational and corporate entities for language that meets the imperative of “respecting” all human rights. Although some, like the mandate holders who serve as advisers under the Special Procedures of the UN Human Rights Council, go beyond the language of “respect” to include the need to “protect, promote, and fulfill” the human rights of all, this paper focuses on the COP 21 requirement to “respect.” This is done with an awareness that while “respect” can describe demands made upon corporate entities, it may not sufficiently capture the duties of states required to do more than respect rights in climate change policies and laws. The preliminary conclusion from reading some of these policies and laws is that they avoid the use of direct human rights language. Instead, they tend to employ alternative expressions that may be normatively valuable, but are still not as effective as more explicit human rights terms.

Canada’s Action on Climate Change is one such document. It provides a summary of how the Canadian government has responded to the threat of climate change (Government of Canada 2015). It cannot be described as a plan, policy or strategy. The document speaks to what the government has done, not what it intends to do. It describes what has been done to reduce greenhouse gas emissions and the government’s efforts to facilitate the production of clean energy technologies and green infrastructure. It also states how government action is helping Canadians adapt to climate change, as well as the government’s role in developing an international climate change agreement. The document does not mention human rights, although one might deduce a concern for human rights in the use

of the word “fair” in the claim that “Canada is encouraged by the progress made towards a new, fair and effective international climate change agreement that includes commitments from all major emitters.”

Earlier versions of Canadian climate change plans or air quality plans included the *Climate Change Plan for Canada* (Government of Canada 2002), launched in 2002 under Jean Chretien’s Liberal government. It announced itself as a plan that would “enable Canada to successfully meet its climate change objectives,” which, at the time, included supporting the UNFCCC, ratifying the Kyoto Protocol and fulfilling Canada’s obligations under the protocol’s terms. Yet, in its details, the plan struggled to balance these goals against the pressures of assuring the economic competitiveness of Canadian business and industry.

The plan noted some key principles in which responsiveness to human rights should have been embedded. It never once used the term “human rights” but did mention “vulnerabilities.” It also included a few provisions from which some procedural human rights guarantees could be deduced. There was, for example, a clause aimed at “promoting public participation through education and outreach,” as well as another on the fair and equitable sharing of the benefits and burdens of realizing climate change goals (*ibid.*, 9). Specifically in relation to the Arctic, the plan recognized that the region is particularly sensitive to changes in climate. It noted that the continued decline of Arctic sea ice will not only “affect the global climate system, but [will have] significant impacts on the environment, well-being and lives of the peoples of the circumpolar region, including Canada’s North” (*ibid.*, 51). The plan offered no further specific strategy for incorporating these serious human rights concerns.

Following their victory over the Liberals in 2006, the Conservatives under Prime Minister Stephen Harper abandoned the 2002 plan and replaced it in 2007 with what they described as a *Regulatory Framework for Air Emissions* (Government of Canada 2007). As the title suggests, the agenda was no longer a comprehensive climate change plan but instead a regulatory framework for the narrower subject of air quality. It included “mandatory and enforceable reductions in emissions of greenhouse gases and air pollutants that will deliver tangible benefits to the health of Canadians and their environment” (*ibid.*, iii). In its preface, the framework noted that climate change is a global issue “of major concern to Canadians” (*ibid.*, 1). It stated that the concentration of greenhouse gases due to human activity is producing changes in the climate, including “altered wind and precipitation patterns and the increased incidence of extreme weather events, droughts, and forest fires.” The framework emphasized how climate changes “could imperil the way of life of vulnerable communities around the world and here in Canada.” Further, it stated that:

Air pollution is a significant threat to human health and the Canadian environment. Each year, smog contributes to thousands of deaths [right to life]. Other air pollution problems, such as acid deposition, threaten biodiversity, forests and fresh water ecosystems [rights to food, water, livelihood, health]. In order to address the real concerns of Canadians suffering from the health effects of air pollution [right to health], and to clean up Canada’s environment, the government must act to reduce emissions of air pollutants. (Government of Canada 2007) [Notes in brackets are the author’s.]

Thus, it is evident that this framework had an awareness of the human rights concerns that could arise from climate change, even if that specific language was again lacking. The argument up to this point, however, is that using terms from which human rights may be implied is not as effective as actually indicating that a framework, plan or strategy should be implemented in a way that supports human rights (as well as detailing how it will do that). The 2007 framework was especially lacking in this regard. Because the framework targeted only air pollution, however, it cannot be described or analyzed as a comprehensive climate change plan.

In the absence of a nationwide Canadian climate change strategy, some provincial governments have stepped up to lead local action. Some of the provinces have climate change plans suited to their specific contexts. Of these, the strategies for British Columbia and Quebec have been widely acknowledged. In November 2015, Alberta announced a province-wide carbon tax plan as part of its climate change policy (Giovannetti and Jones 2015). For its part, Ontario spent the early months of 2015 workshopping its *Climate Change Strategy*, which mostly uses, rather than “human rights,” the language of “vulnerabilities” (Ministry of the Environment and Climate Change 2015). While focusing on these vulnerabilities, the plan seeks also to involve those facing climate risks in building appropriate resilience. Like California’s plan (discussed below), the Ontario plan acknowledges the diversity of experience, knowledge and information on the subject. Accordingly, the province intends to take advantage of the traditional knowledge and distinct experiences of its First Nation and Métis communities in crafting the next steps for addressing climate change. In Ontario, as in California, there is more inclination to deliberative, participatory and consultative rights. These are all procedural rights and thus they follow the international pattern, previously discussed, of imagining the human rights dimension of climate change only in procedural terms.

California’s 2009 *Climate Adaptation Strategy* speaks not only in terms of “vulnerability” but also of the “public stakeholder process” of communication and engagement and of “environmental justice.” The California strategy obliged all sectors engaged in its development to

work closely with all stakeholders and to incorporate environmental justice concerns and mainstream them into all actions wherever possible. Further, it claimed that the state's climate adaptation strategies could assure for all Californian residents the opportunity to live, learn and work without regard to race, age, culture, income or geographic location. It specifically noted that interactions with California's "Indian Tribes" were to be respectful and on a "government-to-government basis." The indigenous community's traditional knowledge was highlighted as having a role in combatting climate change (California Natural Resources Agency 2009).

Although there is no nationwide climate change policy in Canada or the United States, that does not seem to be the case in many states in the Global South. Governments in these nations have been actively developing climate change action plans intended for operationalization on a national scale. The plans developed by Rwanda and Nigeria are used as examples in this paper.

Rwanda's *Green Growth and Climate Resilience: National Strategy for Climate Change and Low-Carbon Development* was released in 2011. Produced for a developing country, Rwanda's climate change agenda uses terms such as "poverty and vulnerability," "food and water security," "social protection" and "education and empowerment," but never "human rights" or "housing rights" or "social and economic rights" (Republic of Rwanda 2011). Although human rights principles could be implied from the terms used in the plan, this is still less authoritative than if the language used were more pointed in describing its basis in human rights.

The Nigerian climate change strategy document seems to be on a higher level in terms of its human rights content. It uses the language of vulnerability, local knowledge and experience, social marginalization and poor governance. Each of these descriptions obviously has human rights elements. But the Nigerian plan is also the only one among those discussed here that actually uses the words "human rights" in the text. It states that policies, programs and strategies recommended for climate change adaptation in the country should be guided by the five interrelated principles of the United Nations Development Group, that is, "a human rights-based approach, gender equality, environmental sustainability, result-based management, and capacity building" (Government of Nigeria 2011).

In one area at least, the Nigerian plan further defines what a human rights-centred approach might mean in practice. It not only established well-articulated goals for climate change adaptation for vulnerable groups ("to develop programs that support and assist...to harness opportunities"), but also had clear strategies ("create awareness...provide basic training...adapt government programs...adapt public facilities...intensify immunization...retrain health workers..."

[and] encourage [non-governmental groups] to provide social welfare services"). Furthermore, it makes specific recommendations in terms of policies, programs and other measures by identified actors that can help vulnerable groups adapt to climate change.

In recent times, the corporate sector has also been involved in climate change-related activities, and some companies have developed environmental sustainability plans with climate adaptation and mitigation as critical components. As with the national and subnational plans discussed above, it is important to ask how corporate environmental and climate change plans are integrating human rights concerns. While these corporate plans come under the broad rubric of the "environmental," they could encompass significant climate change elements as well.

Canada's Bank of Montreal (BMO), for example, has what it calls an Environmental Policy and Action Plan with a particular sensitivity to the "problems posed by climate change," which problems, it says, need prompt and strong action. Only once does this plan mention "human rights," and that is under the summary of the bank's five-program "ECO Strategy," specifically in the section dealing with procurement. There it states, as its overarching objective, the employment of "a rigorous process that will ensure BMO takes into account environmental and social considerations during the procurement process." It then notes that the program "takes a wider view of the concept of sustainability to include social concerns (for example, labour practices and human rights) in addition to environmental issues" (BMO Financial Group 2008).

Power generation and distribution companies are often implicated in the climate change debate because their activities contribute significantly to greenhouse gas emissions. In addition, these companies frequently carry on their business in proximity to indigenous communities whose rights and interests over the land, culture and resources have to be included in corporate accountability measures. It is obvious, therefore, that these companies should conduct their activities in a participatory and pro-rights manner to gain the trust and support of the members of such communities. Specifically, if power companies have designed climate change or other environmental policies, the human rights of the communities affected or likely to be affected by their businesses should be integrated into such policies. To see the extent to which this is being carried out in practice are the following analyses of several Canadian power companies: Imperial Oil and ExxonMobil (operating as a single company), Hydro One and Enbridge.

The environmental policy document of Imperial Oil and ExxonMobil is less explicit than that of BMO. It speaks first to both organizations conducting their business "in a manner that is compatible with the balanced environmental and economic needs of the communities in which they operate." The policy then states the goals of complying

with applicable environmental laws and regulations, preventing incidents and controlling emissions and wastes, as well as communicating with the public on environmental matters and sharing their experience with others to facilitate improvements in performance (Imperial Oil and ExxonMobil n.d.). It would appear that the standard adopted is minimalistic — limited to ensuring compliance with environmental law — and there is little to indicate a commitment to address climate change more holistically.

Hydro One is Ontario's largest power transmission and distribution company. Its terse environmental policy is so general that it does not once mention climate change, let alone human rights. To infer either of these from the very broad terms used in this one-page policy would require imaginative reading between the lines. The policy simply states that the company will manage its operations "in an environmentally responsible manner" and (much like Imperial Oil and ExxonMobil above) "will comply with all applicable environmental legislation and...voluntary commitments." While committing to designing and operating its facilities in a manner that prevents pollution, the company also pledged to "manage any adverse environmental impacts" that may result from those activities. As well, it undertook to "manage significant environmental risks and integrate environmental considerations into [its] decisions" (Hydro One 2015).

Hydro One is particularly concerned about its relationship to the First Nations and Métis peoples, since it owns assets in reserve lands as well as within the traditional territories of these communities. The company states that it is committed to developing and maintaining relationships with First Nations and Métis peoples that demonstrate mutual respect for one another. It also recognizes that First Nations and Métis peoples and their lands are unique to Canada, with distinct legal, historical and cultural significance. It therefore committed itself to working with First Nations and Métis peoples in a spirit of cooperation and shared responsibility (ibid.).

For its part, Enbridge has a climate change policy document that acknowledges that "dealing with climate change is a shared responsibility with implications for citizens, governments and business." The major focus of the policy is on reducing greenhouse gas emissions. However, its most significant prescription in this regard is that government policies should be "tailored to our energy-intensive and energy-based economy [which] must enable us to remain competitive while making meaningful reductions to GHG emissions." Apart from the emissions reduction and pro-economy concentration of this policy, it is only mildly sensitive to the social dimension and makes no mention of human rights at all. Very little, if anything, can be inferred from its statement that "Enbridge is prepared to work with all levels of government and key associations to encourage the energy industry to be a proactive participant

in the development and implementation of climate change solutions" (Enbridge n.d.).

Both the Hydro One and Enbridge policies use very broad and general descriptions, and no direct references to human rights. The Hydro One policy, however, contains words from which some human rights principles could be inferred, if one were to read between the lines. Its promise to conduct its activities in an environmentally responsible manner could convey a range of possible meanings. It could mean that the company would carry out environmental assessments before implementing new projects and also doing those projects in a manner that limits their impacts on the environment. It is conceivable that, when this is the case, a host of procedural and substantive human rights could be protected in the process. The company's concern for the interests of indigenous peoples in affected communities is particularly salient in this regard. Its recognition of the uniqueness and historical significance of First Nations and Métis peoples' lands suggests that the company is also concerned for the protection of indigenous cultural and traditional rights.

The Enbridge policy, by contrast, though it mentions climate change specifically, contains insufficient detail to warrant the inference of a commitment to human rights. The company's pledge to work with governments and associations toward climate change solutions is clearly not enough, although an optimist might see a desire to be consultative and participatory. If this is the case, it could be concluded that at least the company is interested in ensuring that procedural human rights expectations are respected in its strategy.

Most of the goals contained in the corporate policies addressed here could be interpreted to include some human rights expectations. For example, environmental laws could plausibly enshrine human rights norms. Preventing oil spills and controlling emissions would seem to be proactive ways of preventing tragedies that could have human rights implications. Conducting public communications on environmental matters also fits the strategy of using public dialogue to engage communities at risk of environmental disruptions, providing an important procedural means to protect human rights. However, if the exact human rights objectives of these companies in these policies can be discovered only by deducing them from inexact, unspecific language, it means more clarity is needed. This can only be achieved by ensuring that the policies use actual human rights language.

CONCLUSION

As the parties to the UNFCCC gather in Paris in December 2015 to adopt the final version of the international climate change framework, at the heart of the negotiations should be how human rights principles can guide policies aimed at mitigating the challenges of climate change. It is likely

that the final document will require state parties to ensure all human rights are “respected” in their climate change actions. If that is the case, specific details of how human rights principles can inform climate change strategies will have to be worked into policies at the national, subnational and corporate levels. There is therefore an immediate need to translate the text proposal in ways that integrate human rights into practical actions in specific climate change policies.

As discussed, many countries, especially in the developing world, have developed climate change policy documents to guide their national response actions. There are other states, such as Canada, that do not have documented national policies, but have nevertheless submitted Intended Nationally Determined Contributions aimed at achieving the objectives of the framework convention. Corporations are also showing sensitivity to climate change issues, either as part of their corporate social responsibility strategies or as a risk consideration in investment planning. Either by design or omission, many of these policies do not use the language of human rights. If the international climate change regime is to achieve its objectives of reducing emissions and building resilience, this gap has to be corrected quickly. An international agreement or instrument may not anticipate the entire gamut of ways in which climate change could be a human rights concern. It may therefore be acceptable if such an agreement or instrument makes broad and general provisions. Where this is the case, it is left to domestic policy makers to translate such broad international commitments to actionable domestic strategies. In doing so, domestic policy makers should ensure that the actions chosen for implementation actually address climate change in a manner that is sensitive to human rights. The language of these policies — international, domestic, national, subnational and corporate — should leave no doubt that this is the case by using the language of human rights in their provisions.

Applying this to Canada, for example, would require an understanding of the various ways that climate change could have an impact on human rights throughout Canada. Collective information gathering and sharing could create a platform for meaningful action. If the public education is conducted in a collaborative manner — involving national, subnational and corporate stakeholders, indigenous communities and other relevant stakeholders — each stakeholder could then design their climate change policies in a fashion that recognizes the human rights issues relevant to their sector and the reality of Canada’s domestic context. This approach should apply to all other countries as well.

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ABOUT CIGI

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CIGI Papers No. 79
Roger Cox

In June 2015, The Hague District Court rendered a historic judgment in the climate case of *Urgenda Foundation v The State of the Netherlands*, stating that the Dutch state commits “a tort of negligence” by not adequately regulating and curbing greenhouse gas emissions. Roger Cox, lead counsel for Urgenda, presents his account of the case and the ruling, which marks the first successful climate change action founded in tort law — and a landmark precedent for such cases in other jurisdictions around the globe.



Climate Change Solidarity and Resolve: Post-Paris Strategy, Policy and Law to Translate Ambition into Action

Commentary
Oonagh Fitzgerald

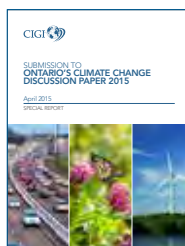
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Global Patent Pledges: A Collaborative Mechanism for Climate Change Technology

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Bassem Awad

Access to and timely diffusion of green technologies required for climate change adaptation and mitigation are among the major challenges faced by the international community. The role of the patent system has become the subject of increased attention in climate change discussions on technology transfer. New mechanisms for collaborative innovation are required to foster the green technology sector.



Submission to Ontario’s Climate Change Discussion Paper 2015

CIGI Special Report
Oonagh Fitzgerald, Bassem Awad, Karima Bawa, David Estrin, Kent Howe, Dean MacDougall, Myra J. Tawfik, and Basil Ugochukwu

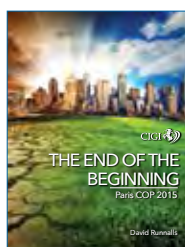
The International Law Research Program (ILRP) of the Centre for International Governance Innovation (CIGI) responds to select questions from *Ontario’s Climate Change Discussion Paper 2015*, as part of a province-wide public consultation process by the Ministry of the Environment and Climate Change.



When CO₂ Goes to Geneva: Taxing Carbon Across Borders — Without Violating WTO Obligations

CIGI Papers No. 83
Maria Panezi

Carbon taxes are relevant to international trade when they are coupled with border tax adjustment (BTA) legislation for imported products. BTAs are intended to level the playing field between domestic and foreign products. Such tax schemes, if not designed properly, however, can be found to violate a country’s international commitments before the World Trade Organization (WTO). This paper argues that environmentally conscious governments can design a WTO-compatible BTA to offset domestic CO₂ legislation.



The End of the Beginning: Paris COP 2015

CIGI Special Report
David Runnalls

The Paris Conference of the Parties 2015 is designed to produce the next round of climate change action. There are reasons to believe that the chances for success at the multilateral level are better now than they were before, but even under the most optimistic scenarios, Paris will not be the end of the negotiations. The Paris summit will be crucial to maintaining the momentum that has been building in the private sector and civil society on the issue of climate change.



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