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Climate Change and the Human Rights Responsibilities of Business Enterprises

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Changing perspectives on human rights

Climate Change, Justice and Human Rights

*Edited by David Ismangil, Karen van der Schaaf
& Lars van Troost*



Strategic Studies ————— *initiated by Amnesty International Netherlands*

Climate Change, Justice and Human Rights

Edited by David Ismangil, Karen van der Schaaf

& Lars van Troost

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Introduction

Over the past decade there has been increasing recognition at the multilateral level of the human rights implications of climate change. The Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Human Rights Council (UNHRC) have addressed the relationship between human rights and climate change and have called for a human rights-based approach to guide measures addressing climate change (see e.g. UNHRC 2009; OHCHR 2009; OHCHR 2010; OHCHR 2015). In its Fifth Assessment Report in 2014, the Intergovernmental Panel on Climate Change (IPCC), building on previous reports, clearly linked climate change to human activities and detailed the various ways climate change adversely affects human well-being. In 2016 the Paris Agreement entered into force, and within a year counted 195 signatories, signifying their commitment to combating climate change. However, only three years later, the United States announced its intention to withdraw from the Agreement.

The intervening years were beholden to growing climate crisis protests, new climate justice movements, and civil disobedience in protest against governmental actions on climate change that allegedly were too little, too late. Others demonstrated against the alleged unjust distribution of the costs of climate change measures. The effects of climate change and the efforts to prevent or adapt to its effects are strongly contested, with specific efforts to combat climate change being denounced by one side or another, including authoritarian leaders.

The human rights framework is increasingly brought

forward as an instrument to combat the climate crisis. Environmental and climate organizations have taken up the discourse and tools of human rights to address climate change issues, using human rights arguments in court cases and public campaigns. In December 2019 the Dutch Supreme Court rejected the government's cassation appeal against a 2015 landmark decision of the Hague District Court, ordering the state, as requested by the Urgenda Foundation, to reduce greenhouse gas emissions by at least 25 per cent (compared to 1990) by the end of 2020. The Supreme Court's decision was based on the Paris Agreement and on the Dutch state's obligations to protect the life and well-being of its citizens, particularly under Article 2 (the right to life) and Article 8 (the right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). These state obligations include taking suitable measures if a known real and immediate risk to people's lives or welfare exists. Furthermore, the Supreme Court noted that the ECHR in its Article 13 provides that national law must offer an effective legal remedy against (imminent) violations of the Convention and that therefore national courts must be able to provide effective legal protection. In other words, the courts had not inappropriately entered the political domain – as the state had argued –, they just properly circumscribed it.

Human rights organizations, meanwhile, are turning their attention to the climate crisis. There is now a widespread consensus that the enjoyment of human rights will be both directly and indirectly affected by climate

change. Common examples are sea level rise, temperature increases, and extreme weather events affecting the rights to health, food, water and life amongst others. These effects will not be felt equally: the more vulnerable segments of the global population will be hit hardest. Indeed, UN Special Rapporteur Philip Alston, in a report on climate change and poverty (UNHRC 2019), highlighted an “increasing risk of climate apartheid”. Alston linked the growing threat of climate change to risks to civil and political rights, and even to democracy and the rule of law. As the effects of climate change worsen, community discontent, inequality, and deprivation increase.

With the worlds of climate crisis activism and human rights protection becoming increasingly intertwined, their value for and impact upon one another deserve closer inspection. The language, policies and (campaigning) strategies around climate change and human rights are still in development. As the need for action becomes more urgent and climate change issues become more dire, it is important to critically examine the role of human rights in climate change policies and activism.

A prominent question arising from the alleged convergence of these policy areas is whether human rights activists should take a proactive or a reactive approach to climate change and related issues. Some see the dangers of a climate crisis as an all-embracing threat necessitating an all-hands-on-deck approach and close cooperation of civil society to secure the protection of justice and human rights, including those of future generations. Others advocate a more traditional, reactive approach, arguing that the human rights framework is better suited to protect against actual or imminent violations in specific situations.

These approaches do not exclude each other but do play a central role in current debates for human rights organizations and activists around the world. What is clear is that regardless of one’s position, the worlds of human rights and climate change are increasingly engaging with each other, leading to new insights, (re)definitions, and new challenges for human rights and environmental activists.

The first two essays examine the opportunities, threats, and difficulties at the nexus of human rights and climate change. The authors discuss the applicability of the human rights framework to the problems that arise with climate change. Several environmental organizations have taken up the language and framework of human rights to further their goal. While many have welcomed this development, it invites scrutiny as well.

Ashfaq Khalfan and Chiara Liguori set out how climate change impacts human rights, from vulnerable populations to intergenerational inequity, and make a case for action from the human rights movement. “The climate crisis threatens a huge range of human rights. It exacerbates inequalities and its effects are disproportionately felt by those who are more vulnerable, marginalized and/or subject to discrimination.” The benefits of a human rights lens, they argue, are threefold. First of all, it strengthens the climate justice movement. Second, they argue that international human rights law provides more extensive legally binding obligations than environmental law, which will help states design ambitious and effective policies. It also keeps the focus on states and corporations, rather than individuals. The third benefit is the range of human rights tools of both pursuing action, and monitoring outcomes. The accountability and remedy mechanisms of human rights law are stronger than those of environmental law and will be more effective in obtaining results.

Providing a counterpoint, **Eric Posner’s** essay warns that rather than providing an extra stimulus to combat climate change, the human rights framework brings its own problems. He points out that the current approach to climate policy, given the unique nature of the problem, is through the framework of international agreements. Introducing the human rights framework might negatively affect existing efforts of combating climate change. The lawful basis for a human rights approach is missing, and applying the human rights framework is “more likely to distract from the effort to combat climate change than advance it.” It might even damage existing efforts, as major polluting countries, such as China, might find grievances with a more human rights-based approach:

“These countries, and others like them, will not only resist the use of human rights language, but, more practically, they will worry that if a climate treaty is seen as a vindication of human rights, or an implementation of human rights commitments, then claims based on those underlying human rights will be more difficult to resist.” Posner furthermore points out that the instruments used by human rights organizations are ill-equipped to combat climate change. There is a role for human rights however: Posner suggests focussing on the human rights abuses that are the result of states responding to the challenges of climate change.

Where the first two essays focus on whether climate change is and should be a human rights concern, the following four examine recent human rights approaches to climate change issues in specific policy areas: displacement and migration, subnational entities, companies, and (strategic) litigation.

Jane McAdam and Sanjula Weerasinghe illustrate some of the difficulties around the interactions between climate change and human movement (used here as an umbrella term for displacement, migration, and relocation), and critically examine concepts such as the term ‘climate refugee’. Their essay charts the normative developments regarding climate change and human movement, and the duties of states when movement occurs within and across borders. The accumulation of knowledge and awareness has led to two instruments adopted by the UN in 2018: the Migration Compact and the Refugee Compact. McAdam and Weerasinghe conclude that there are existing frameworks and tools that can prevent movement where possible and manage it where unavoidable. The standards offered by the human rights framework can assist in assessing risk and policy responses related to climate change.

Barbara Oomen suggests that subnational entities, especially cities, are important stakeholders and should be targeted by human rights actors. Charting the growth and importance of subnational authorities for the global problem of climate change, she notes that: “it is clear that all types of subnational authorities are

often prepared to go much further than the nation state in combating climate change”. Particularly, the impact cities could have on effectiveness, legitimacy, and appropriateness of climate action are noted. However, as Oomen points out, local and regional human rights responsibilities are usually not addressed in international law. This might be changing as “today’s world abounds with ‘frontier cities’ seeking to explicitly assert responsibility for international human rights law”. Oomen divides the subnational authorities in the ‘more-than-willing, the willing and the less-than-willing’ to combat climate change. The more-than-willing are showcases for what is possible, providing avenues that might strengthen human rights law in relation, but not exclusive, to climate change. The willing cities are targets, where large gains could be made through networks and alliances. For the less-than-willing entities, Oomen argues that explicating the responsibilities of subnational authorities by human rights and climate change activists is especially important to ensure compliance and timely action.

Sara Seck’s essay discusses the role of multinational business enterprises by charting the evolution of the responsibilities of businesses regarding climate and human rights. Starting with the 2007 Caring for Climate initiative, guidance for businesses on human rights and climate change is emerging and will continue to develop, regardless of the involvement of human rights actors. Noting that “it is crucial that human rights NGOs not ignore the emergence of business guidance tools in the climate context”, engagement to further develop these tools by human rights actors might determine the strength of social norms and in turn, inform legal responsibilities. Seck draws attention to the fact that the human rights community “has for the most part utterly failed to meaningfully engage in efforts to develop useful tools”, due to their scepticism over non-binding guidance tools.

In her essay on climate change litigation and its limitations, **Annalisa Savaresi** discusses the accelerating trend of using human rights in strategic climate litigation. Human rights are turned to as “a gap-filler to provide remedies where other areas of the law do not”. So far, the focus of these cases is on states, with only a few cases

targeting non-state actors only. Savaresi notes that in recent years “human rights arguments have been increasingly used to prop up those based on private or public law”. In some cases, the emphasis has been placed on a failure to act resulting in human rights violations. Analyzing some key cases, Savaresi states that “far from treating climate change as a series of individual transboundary harms, therefore, applicants (...) are arguing that climate change should be averted because it systematically threatens the enjoyment of human rights”. Although human rights are used as an avenue of exploration in the courts, Savaresi notes several limitations. While several court cases have been won, this has not always led to tangible results on the ground. Human rights law is “no replacement for effective legislation concerning climate change mitigation, and human rights remedies are no replacement for tort-like liability for climate change impacts”.

A central theme coming out of the discussions on climate change and human rights is the concept of climate justice. How should it be defined, and what is its relation to human rights? The final four essays center on justice, focusing on social justice and climate change, the potential for new justice movements, and the emerging concept of intergenerational justice.

In his essay on justice delayed **Stephen Humphreys** considers how climate change is changing the landscape of time, justice, and the experience of living in a world of uncertainty. Indeed, it is the delay between cause and effect, between our actions and their outcomes, and between harms and redress, that has formed the obstacle to the achievement of justice and redress with regard to climate change. So where do we find climate justice? Humphreys looks at the notion of equity and its history, arguing that “[t]he emerging law of climate equity cannot and will not by itself bridge the expansive sea between climate justice, however we conceive it, and a law that remains fundamentally supportive of the pollutive and distributive effects of climate change”. It is here that human rights might supplement equity, since we have reached the point where once speculative harms are now palpable, with a growing number of actors standing up

to claim their rights and seeking redress in the face of massive injustice.

Elizabeth Dirth’s essay examines the interlinkages between the impact of climate change, social justice, and human rights. Noting the tension between these concepts, Dirth highlights three examples, arguing that “in the face of these new and diverse challenges resulting from climate change and how we deal with it, perhaps utilizing a human rights framework does not go far enough to understand the injustices caused or exacerbated by climate change”. So how can socially just solutions be found? Dirth suggests that two fundamental challenges have to be overcome. First is the necessity to fully understand what climate change problems and solutions entail, and to acknowledge the complex on-the-ground realities behind abstract solutions. The second challenge is that in order to incorporate justice into climate policies and programmes, they need to be locally relevant and context-sensitive. Indeed, Dirth states that “the fact that justice is a word with fluid and dynamic meanings, means that it has come to incorporate environmental needs, struggles and climate injustice in a way that human rights narratives and groups have struggled with”.

Anna Schoemakers points out that the notion of ‘climate justice’ is expanding and is now being used by young people around the world to fight for a secure future. In her essay, Schoemakers discusses how the term climate justice is being coopted and redefined by a young climate movement: “Climate justice matters because today’s generation is the last generation that can take steps to avoid the worst impacts of climate change.” Schoemakers further makes the case that the burgeoning movements for social and climate justice might be game changers, as the reasons for their existence will only grow as climate change effects become more visible and have higher impacts. So how can human rights actors support these new movements? Schoemakers suggests it is best to facilitate the movements, sharing experience and resources where possible. Organizations such as Amnesty International and Greenpeace can operate from their own strengths and provide space and expertise for the activists where possible.

In the final essay **Bridget Lewis** examines the turn from intra-generational justice towards intergenerational justice: “Given that future generations have not contributed to greenhouse gas emissions and have no say in how we choose to combat global warming, limiting their ability to enjoy their human rights and forcing them to deal with the consequences of our actions represents intergenerational injustice.” But is the human rights framework a fitting instrument for this? Theoretically, argues Lewis, there are duties that correspond with the consequences of our past and current actions that could be expanded towards future generations. However, these rights and duties of future generations are currently not enshrined in international or domestic (human rights) law. Furthermore, one of the more important tools of the human rights framework – its claims-based approach – does not fit the intergenerational nature of climate change: “The cumulative, transnational and long-term impacts of greenhouse gas emissions create challenges for proving that a particular state’s conduct has caused a given interference with human rights.” While the existing human rights framework will struggle with these claims, Lewis outlines possible ways forward. Through expanding the scope of states’ duties for example, or through expanding rules of legal standing on behalf of future persons. A notable development is that human rights language and principles are already being employed, particularly by young people. As with Schoemakers’ showcase of burgeoning movements, these are developments that have been set in motion and will continue to progress, requiring adaptation by human rights actors.

The essays in this volume were written in 2019, before the Dutch Supreme Court announced its judgement in the matter between The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) and the Stichting Urgenda (Urgenda Foundation).

The views expressed in the contributions that follow are those of the authors and do not necessarily reflect the positions of Amnesty International, its Dutch section or the Strategic Studies Team. The editors wish to thank Jeroen Teitler for his editorial assistance.

Amnesty's approach to climate change and human rights

The climate crisis is one of the most critical threats to human rights faced by humanity. The human rights movement, including Amnesty, has a significant contribution to make to the wider climate justice movement.

Introduction

It is a truth not yet universally acknowledged that climate change poses a severe threat to human rights. This is something Amnesty, and our partners in the human rights movement, need to change. Not only that, but we need to bring our perspectives, our constituencies and our tools to the struggle to protect humanity from the climate crisis, to ensure that we come out of this crisis with a world in which all parts of humanity can not only survive, but also thrive.

The climate crisis threatens a huge range of human rights. It exacerbates inequalities and its effects are disproportionately felt by those who are more vulnerable, marginalized and/or subject to discrimination. While it is mostly caused by the emission of greenhouse gases by

developed countries since the industrial revolution, its harshest effects are and will be felt mainly by people in developing countries.

In this essay, we will describe the extent of the threat the climate crisis poses to human rights. We will then discuss key features of states' obligations under human rights law to prevent the situation from getting worse, to help those affected and to provide remedy. We will address the corporate human rights responsibilities in the context of the climate crisis. We will then move from a legal analysis to one of strategy. Why should we take a human rights lens to climate change? Why should Amnesty itself get involved, and if so: how?

Climate change's human rights impact

Climate change has made extreme weather events such as heatwaves, storms and drought much more likely (Carbon brief 2019). It also causes, or contributes to, environmental changes that occur gradually over the course of a prolonged period of months to years, such as desertification, sea level rise, glacial melt and ocean acidification (UNFCCC 2012). These effects undermine human rights such as the rights to water, food, housing, health, adequate standard of living, and life. In 2019, cyclones in Mozambique, Malawi and Zimbabwe killed more than a thousand people, and almost 4 million were affected, being displaced and losing access to schools, hospitals and sanitation (see Chagutah 2019; OCHA 2019a). If unchecked, climate change will continue to blight the lives of hundreds of millions of people.

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The World Health Organization (WHO) projects that climate-caused undernourishment is expected to lead to 7.5 million children suffering from stunted growth by 2030, rising to 10 million by 2050 (WHO 2014: 80). The World Food Programme expects that climate change could lead to a 20 per cent increase in global hunger and malnutrition by 2050 (WFP 2016: 1).

A 2°C rise in global temperature would lead to more than 1 billion people suffering from a severe reduction in water resources (IPCC 2014). A temperature rise to 1.5°C – which is currently the ‘least worst case’ scenario – would reduce this number by half but still leave hundreds of millions affected (IPCC 2018a: 179). The WHO predicts that climate change is expected to cause 250,000 additional deaths per year between 2030 and 2050 due to malaria, malnutrition, diarrhoea and heat stress (WHO 2014).

Climate change disproportionately affects those already subject to discrimination including, for example, on the basis of gender, class, ethnicity, age, and disability (IPCC 2014). Women are on average fourteen times more likely than men to die or be injured due to a natural disaster – although this discrepancy is lower in situations where women face lower levels of gender inequalities (UN Women 2014). Children bear a disproportionate burden of climate-related impacts, for example with 88 per cent of the diseases attributable to climate change affecting children under the age of five (WHO 2009: 46). Because Indigenous peoples heavily rely on the natural environment for their livelihoods, housing, medicines and cultural identity, and because they often live in areas prone to climate-related disasters due to a history of expropriation and forced evictions, they are among the groups suffering the most from climate impacts (UNHRC 2017). People with disabilities have a heightened vulnerability to climate disasters compared to people without disabilities and their needs and voices are generally neglected in disaster risk reduction strategies. For example, a recent survey found that almost 80 per cent of people with disabilities wouldn't be able to evacuate immediately without difficulty following a disaster (UN 2018: 15).

Climate change will have clear intergenerational inequi-

ties. Current generations of children and youth, as well as future generations will live in a world that is more precarious for their rights, and they will bear the costs of coping with the damage.

Climate change will perpetuate the effects of colonialism. In spite of decolonization, the empires (and their offshoots) struck back; effectively colonizing much of the atmosphere. The USA, UK and Germany have per capita greenhouse gas emissions, between 1751 and 2018, that are six times or more the global average. Russia, Canada and Australia have 4-5 times the global average (Hansen & Sato 2016).

As a result of climate change, the economic output of the warmest countries has significantly reduced: India's by 31 per cent compared to what would have been the likely case without climate change. At the same time, some of the coldest countries have benefitted, for example Norway by a 34 per cent increase in economic output, while the figure for the Netherlands is 7.9 per cent (Diffenbaugh & Burke 2019).

The above projections of the impacts on human rights are based on an increase of up to 2°C over pre-industrial temperatures. It is not the worst-case scenario, nor is it even the most likely outcome based on current projections. Unless there is a rapid phase-out of fossil fuels and other sources of greenhouse gas emissions, current projected national plans (officially termed ‘Nationally Determined Contributions’ under the Paris Agreement), even if fully implemented, would put us on a course to reach a 2.9 to 3.4°C increase by 2100, and continue to rise (WMO 2019). Given that governments often cannot be trusted to implement their plans, we may be looking at apocalyptic consequences. A world that, for example, reaches 4°C warming may make large parts of the world uninhabitable, such as the tropics, southern Europe, low-lying islands and coastal regions.¹ In such a

¹ See e.g. Vince (2019). It must be emphasized that given the uncertainties involved, including around potential feedback loops, this particular example can only be treated as a possible outcome, rather than an accurate prediction. The situation may well be better, or much worse.

situation, humanity would somehow have to completely revise its political, social and economic structures and accommodate itself primarily in densely populated cities in the relatively small number of countries in temperate zones that could sustain life. If it could not, billions of people would be facing unbearable conditions, often incompatible with life.²

State obligations

States have three levels of duties relating to climate change. First, under international human rights law, states have obligations to protect people from harm caused by conduct or omissions within their territory or jurisdiction, whether committed by state or non-state actors, including businesses. The foreseeable adverse effects of climate change on the enjoyment of human rights give rise to states' duties to take all reasonable steps to the full extent of their abilities to prevent this harm (UNHRC 2016). This means that states need to reduce greenhouse gas emissions within the shortest possible time frame both nationally and through international cooperation and assistance (CESCR 2018a; OHCHR 2019a). A failure to do so represents a violation of states' human rights obligations.

The IPCC has shown that it is feasible for states to collectively reduce greenhouse gases within thirty years to a level that would keep the global temperature to no more than 1.5°C above pre-industrial levels (IPCC 2018b). This requires that greenhouse gas emissions are reduced by 45 per cent globally from 2010 levels by 2030, and to net zero by 2050. It would be unreasonable to demand that developing countries make this transition at the same pace as developed countries. Thus, developed countries, which currently emit approximately one third of global emissions and that have greater resources and

technological capacity,³ should therefore move to zero carbon emissions by 2030 or as soon as possible after that. This still requires developing countries to reduce their emissions by at least one third below 2010 levels by 2030, and moving to net zero by 2050 – a deeply difficult task, for which many will require significant financial assistance and technical cooperation. Wealthier countries are required under their obligations of international cooperation (as per Article 2.1 of the ICESCR) to respond to developing countries' requests for assistance to meet their own transition targets.⁴

Second, all states must also adopt all necessary measures to assist affected people in adapting to the unavoidable effects of climate change, thus minimizing the negative impact on their human rights, as well as ensuring remedy for the harms caused. Three distinct but overlapping duties apply here: i) states that have a greater responsibility for the climate crisis – due to their higher than average per capita current and past emissions – are jointly responsible for ensuring remedy to affected people based on the extent of their contribution to this harm;⁵ ii) wealthier states are also responsible for providing assistance to people at risk or already affected by climate impacts on the basis of obligations of international assistance and cooperation; and iii) all states are responsible for the realization of rights of those living within their jurisdiction, and thus need to take steps to safeguard the rights of affected people, request the necessary assistance from other states and demand remedy from those most responsible.

Third, respect for and protection and fulfilment of human rights must be central in the design and implementa-

² Vince (2019) quotes Johan Rockström, director of the Potsdam Institute for Climate Impact Research as saying: "It's difficult to see how we could accommodate eight billion people or maybe even half of that. There will be a rich minority of people who survive with modern lifestyles, no doubt, but it will be a turbulent, conflict-ridden world."

³ Center for Global Development (2015)

⁴ For an elaboration of the legal basis for such obligations, see de Schutter et al. (2012).

⁵ The International Law Commission Articles on State Responsibility state that where several states separately carry out internationally wrongful conduct that contributes to causing the same damage – such as where several states contribute to polluting a river by the separate discharge of pollutants – "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations" (ILC 2001: 125).

tion of all policies and measures aimed at addressing climate change. In particular, states must ensure that measures intended to protect people from the effects of climate change do not result in the violation of other human rights. They must avoid using the response to climate change to justify violations of human rights. And they must also ensure that the transition towards more resilient and zero-carbon societies safeguards the rights of affected workers and communities and is an opportunity to correct existing imbalances in terms of enjoyment of and access to rights. For example, forest conservation projects must contribute to strengthening the rights of Indigenous peoples, not result in the eviction of forest dwellers from their ancestral land (Amnesty International 2018). Carbon taxes must reduce inequalities rather than deepen them, thus putting the burden primarily on fossil fuel corporations and wealthier consumers whilst protecting the access of low-income groups to affordable energy (Naidoo 2018; Amnesty International Canada 2019).

These examples also illustrate the importance for states to respect and facilitate the rights to information and participation in decision-making of all affected people, as well as their right to access effective remedies for human rights abuses. Ensuring that climate decisions are taken with the full and meaningful participation of all concerned people, and particularly those most affected by climate impacts or by proposed climate mitigation measures, will lead to more effective and ambitious action that responds directly to the needs and demands of those affected.

Corporate responsibilities

States have an obligation to protect all persons against human rights harms caused by third parties, including businesses. States must adopt and enforce regulations on companies, do so without undue interference from corporate actors and ensure that corporations respect them. Alongside that, businesses themselves are also duty-bearers with a responsibility to respect human rights. These include extensive responsibilities to assess the impact of their activities on human rights, to put measures in place to prevent negative impacts, to make

such information and efforts public and to remedy human rights infringements and abuses.⁶ Such responsibilities extend to human rights harms resulting from climate change. One implication is that businesses are required to reduce their greenhouse gas emissions to the greatest extent feasible. In particular energy producers and providers must expeditiously phase out the use of fossil fuels in favour of clean energy produced in a manner consistent with human rights. Financial institutions should phase out investment in fossil fuel activities. Companies must also refrain from other human rights abuses linked to their operations, such as the use of child labour in supply chains for materials required for the production of rechargeable batteries needed for electric vehicles or energy storage (Amnesty International 2016).

Why should we take a human rights lens?

A not entirely unreasonable question is what is the practical utility of taking a human rights lens to climate? Should we not just push for full implementation of international climate and environmental law, which more explicitly addresses climate issues than human rights law? Given the fact that many states already pay no more than lip service to their human rights obligations, is it really effective to link these with climate action?

We argue that there are at least three broad benefits of adopting a human rights lens. The first is to add numbers and pressure to the existing climate justice movement. Solving the climate crisis requires radical state action in a two- to five-year timeframe whilst overcoming one of the most deep-pocketed and powerful lobbies – the fossil fuel industry. It needs the world's most powerful and diverse people's mass movement ever assembled. Many people are deeply committed to values such as dignity, equality and justice for all, and a subset of such people specifically identify with human rights as the value system and vocabulary for such values. The climate crisis threatens these values, and indeed threatens to reverse many of the human rights gains of the last century. It makes a differ-

⁶ United Nations Guiding Principles on Business and Human Rights, Principles 22 and 31.

ence to some that government failures are characterized as human rights violations rather than simply bad policy or poor environmental stewardship, and it helps show who the villains and victims are. Therefore, to advocate on the basis of human rights – as opposed to environmental protection – and emphasizing the impact on people itself helps humanize the problem and motivate a segment of society to engage more deeply in climate activism. This may motivate some decision-makers to adopt decisions in favour of human rights consistent climate action, either due to the intrinsic argument we are making, or by showing that climate action has broad support in society, not just among environmentalists.

Second, human rights perspectives can provide additional arguments to strengthen the climate justice struggle.⁷ International human rights law provides more extensive legally binding obligations than environmental law, obligations that can be used to demand effective climate change policies and measures. For example, international environmental law does not oblige states to take any particular steps to substantively reduce emissions. Under the Paris Agreement, states determine themselves the extent of their commitment to reduce climate change by a particular amount. In contrast, as discussed under 'State obligations' above, under human rights law, states are required to take all feasible steps within their available capacity to reduce emissions, help people to adapt to climate change and ensure remedy for violations. International human rights law thus, properly interpreted and applied, places reasonable boundaries on the margin that states have for discretion on issues ranging from emissions reductions to paying for the losses and damages that people and countries suffer due to climate-related impacts.⁸ In other words, while states, and their voters (if they listen to them) can broadly determine how they

address climate change, and have a wide range of options for doing so, human rights law helps in shaping ambitious and effective policies by setting certain boundaries and minimum floors for these actions.

Human rights law also helps to keep the main focus on governments and corporations, rather than on individual consumers. This, we argue, is beneficial. While individuals obviously have moral and personal responsibilities to reduce their carbon footprint, it would be naïve and inequitable to put the burden mainly on them. Rather, those who have the power to design the systems we live in, to allocate public resources and to design regulations, should be held to account for their conduct, rather than individuals who often have limited control over how they can live their lives in a way that does not harm others, particularly if they are disadvantaged.

The most important human rights perspective in this context is to help shape the content of climate action. As noted above under 'State obligations', climate action without attention to human rights has the potential to cause significant harm. By taking into account human rights values such as public participation, accountability, equality and non-discrimination, climate action is more likely to get buy in from the public and be effective, than if it takes a purely emissions-reduction focused approach. Human rights will also become increasingly important as a counterpoint to policy approaches and political narratives that use the threat of climate change as a justification to violate civil and political rights, such as freedom of expression and association, or adopt even more restrictive policies against particularly vulnerable groups such as refugees, migrants and asylum-seekers.

As the window of opportunity to limit even more catastrophic levels of global heating narrows with every passing day, it is possible that states will resort to desperate measures that could result in violations of human rights (UNHRC 2019: 65-66). In so doing, they could adopt the view that violating some people's rights, for example those of Indigenous peoples to clear land for carbon removal projects, is a lesser evil that is justified for the greater good and grounded in the need for

⁷ The Climate Justice Syllabus, a project endorsed by the Global Campaign to Demand Climate Justice, defines climate justice as the recognition that climate change is not only a question of emissions reductions and our physical environment, but also a political issue, an ethical issue, and a social issue (see <https://demandclimatejustice.org/>).

⁸ For further information on loss and damage from a human rights perspective, see Amnesty International (2019a).

fast action. However, Amnesty opposes such utilitarian approaches based on the clear international law position that reducing emissions can and must happen in full compliance with human rights standards. While rapid emissions reductions will certainly require restrictions in some lifestyle areas and consumption, significant inconvenience and major policy shifts, such steps can be implemented in ways that impose burdens primarily on corporations and higher-income groups whilst restricting activities that are not essential for the realization of human rights. Similarly, governments can and must carry out emissions reductions in a way that ensures everyone has access to a reliable and sufficient supply of energy to realize their human rights.

It should be recognized that many states, despite having become party to the relevant human rights treaties, will contest that these legal obligations apply to the climate crisis, or even in some cases exist at all. In these cases simply citing these obligations will not be sufficient. Sustained, patient pressure and coalition-building will be required. However, the fact that there is a strong legal basis for these demands is useful for advocacy purposes. It helps civil society groups align their advocacy across coalitions and indeed is a tool to ensure that we are consistent and principled in our advocacy, and therefore more credible and persuasive. A critical example is the Declaration of the Peoples' Summit on Climate, Rights and Human Survival, which was signed by over 400 organisations around the world representing diverse environmental, women's rights, Indigenous, trade union, social justice and other human rights causes.⁹

Clearly, asserting legal claims alone would be foolhardy – much of the battle will be in the court of public opinion. But the moral underpinnings of these legal standards can be of great help in winning this battle. It is an intuitive argument to say that states should not harm people, both within and outside their borders. Nor should they allow companies under their regulation to do the same. Similarly, it is a compelling argument that wealthy industrial-

ized countries that have benefitted economically for over a century from growing emissions – while suffering far less from its ill-effects – should not be content to be global freeloaders, with the costs borne by people in poorer countries. Rather, people living in such countries should insist that their governments act with decency and honour in doing the right thing for people elsewhere (Amnesty International 2019b).

The third benefit of adopting a human rights lens is the range of human rights tools at our disposal, including litigation, supranational and domestic scrutiny by human rights bodies and monitoring through the use of rights-compliant indicators and benchmarks. Human rights accountability and remedy mechanisms are stronger than those available under environmental law, both with regard to procedural and substantive rights. For example, global and regional human rights mechanisms provide for assessment of individual and/or group complaints and regular periodic review by independent treaty monitoring bodies, whereas most environmental treaty bodies do not. Human rights bodies have increasingly been addressing climate change as a human rights issue.¹⁰ Relatedly, the human rights movement, often working with other disciplines such as scientists and economists, excels at determining whether state actors are responsible for particular forms of misconduct and what they need to do to make amends.

What is the relative weight of these three contributions? We posed this question in an audience survey at the Peoples' Summit on Climate, Rights and Human Survival in September 2019, which brought together over 200 activists from a range of regions and backgrounds. 23 per cent of those responding selected 'Numbers and pressure', 47 per cent selected 'Human rights perspectives' and 30 per cent selected 'Human rights tools'. Time will tell as to who was right, but strategies that employ aspects of all three are likely to be more successful. Amnesty's experience of working on human rights for nearly six decades has demonstrated that strong research

⁹ For more information on the Declaration see <https://www.climatehumanrights4all.com/>

¹⁰ For an overview of UN human rights treaty body statements on climate change, see CIEL & GI-ESCR (2019).

grounded in solid legal arguments and linked to effective campaigning, mobilization, litigation and advocacy can make a real difference.

Why is Amnesty getting involved and how so?

In September 2019, the UN High Commissioner for Human Rights Michelle Bachelet warned the UN Human Rights Council that climate change is the greatest ever threat to human rights. Earlier in the year, the UN Special Rapporteur on human rights and extreme poverty had challenged the human rights community, including NGOs, to take much more bold and innovative steps to face the extraordinary challenge of the climate crisis (UNHRC 2019).

Amnesty International, as the largest global human rights organization, with a supporter base of 8 million people and a presence in over 70 countries, including increasingly in the Global South, must respond to this challenge. Since 2015 Amnesty has been escalating its level of engagement to work on the climate crisis, and it is now ready to fully throw its weight in support of the climate justice movement.

Amnesty's strategy on climate change and environmental degradation, requested by the organization's main decision-making forum in 2017 and adopted in April 2019, is based on a theory of change that focuses on national strategies to pressure governments to uphold their obligations, weaken the power of the fossil fuel industry, defend the right to peaceful protest and participation, and support a just transition to a new energy economy that protects human rights and leaves no one behind.

As a result, Amnesty is working to achieve four main objectives. First, it has commenced work to pressure national governments, through research, campaigning, litigation and advocacy, to reduce emissions in a fast and fair (i.e. human rights consistent) way. In particular, Amnesty is planning to escalate the pressure on wealthy industrialized countries which bear most responsibility for the climate crisis and have the most available resources to address it. In some of these countries and in partnership with other groups, Amnesty will identify and demand

one or more key policy changes related to climate mitigation together with a just and human rights-consistent transition. In so doing, our decision-making will be guided by an assessment of the most critical relevant issues in the country, and of where Amnesty is best placed to make a contribution as part of the wider climate movement. Such policy changes should be on issues where it is clear that lack of political will (rather than scientific or technical uncertainty) is the issue. Advocacy in developing countries will include demands on emissions reductions and just transition but will also focus on pushing the leaders to demand more concrete action and support from wealthy industrialized countries for mitigation, adaptation and address loss and damage. Amnesty has also engaged in international standard setting, for example through engaging in advocacy with others for the inclusion of human rights language into the Paris Agreement and for stronger human rights standards. It continues to advocate for urgent, effective and human rights-consistent climate action at international decision-making forums on climate.

Second, Amnesty will expose corporations which are fuelling the climate crisis, mobilize action to stop them and call on them to phase out fossil fuels. Amnesty will also continue to call for companies to ensure that the transition to clean energy is undertaken in a just fashion. In March 2019 Amnesty launched an Ethical Battery Campaign (Amnesty International 2019c). This campaign challenges industry leaders to ensure that the shift to green energy – which relies on batteries – does not cause or contribute to human rights abuses or environmental harm.¹¹ The campaign aims for governments to legally require electric vehicle companies and battery manufacturers to produce an ethical battery by 2024, which does not harm human rights or the environment.

Third, Amnesty has started to mobilize its own supporters and people interested in human rights and sharing

¹¹ For example, companies must phase out any use of fossil fuels to produce batteries and must refrain from the use of child labour in the supply chain for materials required for the production of batteries. See Amnesty International (2016).

similar values, and encouraged human rights groups that have not engaged in-depth in climate change to join the struggle for climate justice. It has mobilized its members to participate in key global moments for action, such as during the youth strikes or climate protests around major international events. It is also mobilizing, campaigning, producing human rights-focused outputs, as well as human rights education tools, to illustrate the link between the climate crisis and human rights to a wider public. These will amplify the stories of individuals and communities affected by the climate crisis and who are driving the battle for climate justice.

Finally, Amnesty will continue to support human rights defenders and communities to campaign for a safe climate and participate in relevant decision-making processes. Building on its work on human rights defenders in general, and environmental human rights defenders in particular, Amnesty will enhance its work in support of all those taking non-violent direct action, including civil disobedience, against the climate crisis. These include community and grassroots groups, young people, Indigenous peoples, minority communities and communities discriminated on the basis of work and descent. Amnesty will actively stand with them in national and international level initiatives, and support them when they are criminalized, attacked and publicly smeared.

There is certainly an open question as to what tactics to use – are our traditional forms of research, advocacy and campaigning sufficient? At the Peoples Summit referred to above, an audience survey of participants asked what the most important tactics on climate ambition were. These were the results from the options provided: 1). Changing public opinion (25%); 2). Civil disobedience (19%); 3). Litigation (17%); 4). Divestment (14%); 5). Mass demonstrations (9%); 6) Consumer boycotts (9%); or 7) something else (7%). The first, third and fifth are established methods for Amnesty, whereas the second is much rarer, and the sixth not something Amnesty has ever done. We will have to discuss whether our existing methods are sufficient, and maybe to deepen them, or whether we are well placed to consider new tactics to have more impact.

Conclusions

The climate crisis is one of the most critical threats to human rights faced by humanity. The human rights movement, including Amnesty, has a significant contribution to make to the wider climate justice movement. Simply framing the crisis as a human rights crisis will by itself make only a modest difference. However, with determination, sound strategy and humility we can use our strengths to support and be guided by those who are at the front line of the climate crisis, and who have been leading the struggle for climate justice for a long time. We can add numbers and pressure for action, use additional tools and share important perspectives that can help build the case for fast but fair action to reduce emissions in a manner to that protects the human rights of all.

Climate change and human rights

The climate change problem has in recent years been described as a 'human rights' problem rather than simply an environmental disaster that threatens humanity. However, the human rights perspective contributes little to the challenge of combatting climate change, and is more likely to cause harm by complicating negotiations and provoking a backlash from states that are sensitive about human rights claims.

Introduction

Climate change is one of the most difficult challenges ever faced by humanity. Yet the world has converged on an approach to tackling this problem, and the only question is one of mustering the political will. The approach is, by now, well known: it involves countries committing to reduce their greenhouse gas emissions through international agreements, based on scientific and economic estimates of the likely costs of mitigation and the benefits from slowing the climatic changes that have already begun to plague us. The approach has not, so far, relied on human rights law or norms, at least not in any recognizable sense. But in recent years, some people have argued that climate change is a human rights problem, and that any solution must be based on human rights principles. Unfortunately, a 'human rights approach' to climate change, while well-intentioned, is not grounded in the law, and is more likely to distract from the effort to combat climate change than advance it. Ironically, while human rights advocates insist that human rights are universally recognized and provide a bedrock normative commitment that demands action to mitigate climate

change, in fact human rights are more hotly contested than climate policy is, and so a human rights approach could very well undermine the delicate near-consensus on climate policy that it has taken decades to cobble together.

The current approach to climate policy

What is that near-consensus on climate policy? The current approach to climate change follows a pattern that states have used before to negotiate international treaties that address environmental challenges. The approach can be broken into two stages. In the first stage, states learn that an activity that takes place on the territory of multiple states (or sometimes in other areas, such as on the high seas) causes cross-border harms that cannot be fully addressed through national policy. Those harms include harms to life, health, and property, and often to wildernesses and other natural resources. While a state may be able to pass laws that limit the harms caused by the activity – pollution, for example – they are reluctant to do so because unilateral state regulation imposes costs on citizens, while producing benefits that are partly enjoyed by foreigners in other countries. In the second stage, states negotiate a treaty with other states. The treaty imposes obligations on all the states, requiring each state to absorb a share of the costs of resolving the environmental problem in a mutually acceptable way. The most successful example is the Montreal Protocol of 1987, an international agreement that led to the reduction of emissions that damaged the ozone layer.

Two points can be made about this model for addressing international environmental harms. First, the international effort to reach a treaty is rooted in a prior understanding among states that it is in their national interest to mitigate the environmental harms. States understand their national interests in different ways, but, as a very rough approximation, most governments perform either a formal or rough cost-benefit analysis, in which they compare the benefits from, and costs of, reducing the harm. In the case of the Montreal Protocol, states realized that as the ozone layer dissipated, the incidence of skin cancer and other harms would rise. Yet many industrial and other activities emitted ozone-depleting substances, and the cost of replacing them would be high. Weighing the costs and benefits, countries – initially, and primarily, the United States – realized that their citizens would be better off if measures were taken to preserve the ozone layer. This type of cost-benefit analysis, sometimes called ‘policy analysis’, takes seriously the well-being of citizens, including their interests in environmental quality, health, and the goods supplied by the economy.

Second, the treaty itself is the product of bargaining. States enter treaty negotiations with a mutual interest in mitigating the environmental harm, but a desire to shift as much of the burden as possible on other countries. The outcome of bargaining will normally reflect the bargaining power of states, which may mean that the distribution of the ‘surplus’ generated by the treaty (the benefits minus the costs) will not necessarily satisfy general notions of fairness. The states with the most bargaining power are typically (though not always) the wealthiest and most powerful states – those on which other states rely. Thus, the treaty may not require wealthy states, and even states that are responsible for the problem in the first place, to comply with ideals of redistributive or corrective justice. To be sure, not all treaties are unfair. These ideals might play a role in negotiations, and sometimes poor states will receive transfers or technical assistance because they lack the capacity to comply with the treaty on their own. But there is clearly a tension between those ideals, which are also reflected in human rights norms, and the outcomes that can be expected from great-power bargaining.

For all the complexities, climate change and the international efforts to address it have fit this pattern. National-level regulation alone will not suffice because of a free-rider problem: the country that issues climate regulations bears all the costs of the regulation and shares the benefits with the rest of the world. And such regulations may simply shift carbon-emitting industries to foreign countries, with the result that global carbon emissions remain unaffected. Thus, it was recognized early on that international cooperation was necessary, and a series of international agreements, culminating in the Paris Agreement, moved the world incrementally in that direction.

The unusual level of difficulty in reaching international agreements reflects the special features of the climate change problem, including the high level of uncertainty about the amount of harm that climate change will cause; the variation in the level of likely harm across countries, and hence in the strength of the interests of different countries in addressing the problem; the very long time horizon; and the high cost of climate mitigation efforts because of the ubiquitous role that fossil fuels play in the economy of every country. Nonetheless, the international consensus seems to be that a framework successfully used for the ozone problem – in other words, policy analysis and international bargaining – should be used for climate change as well.

Climate policy and human rights

Against this backdrop, what exactly does the human rights perspective add? A survey of recent publications – by organizations, commentators, and advocates – provides little clarity.¹ Below I describe some of the claims, suggestions, or implications that I have gleaned from this literature. I conclude that the human rights perspective contributes little to the challenge of combating climate change, and is more likely to cause harm by complicating negotiations and provoking a backlash from states that are sensitive about human rights claims.

¹ See, e.g., Amnesty International (2019d); OHCHR (2015); UNEP (2015); Knox (2009a).

First, one might think of the human rights approach as no more than a redescription of the existing approach to the climate change problem. The policy analysis or cost-benefit approach overlaps with the human rights perspective in several respects, and so one might see the human rights perspective as one that simply recasts policy analysis in more vivid or normatively appealing terms. In policy analysis, especially as used in international relations, human beings are given equal moral weight regardless of nationality, status, and wealth. These are the core elements of the traditional human rights approach as well. Thus, to the extent of this overlap, we might understand human rights advocates as pointing out that if states cannot agree on an international programme of climate mitigation, they have betrayed their commitments to human rights as well as to the 'national interest', understood as a more generic commitment to the well-being of their citizens. On this view, the advantage of the human rights approach is that it addresses people who care about human rights and directs their attention to climate change, enabling human rights organizations to mobilize their members to bring pressure on government bodies.

Second, one might see the human rights perspective as a way to assert the claims of poorer, more vulnerable, or powerless populations. This assertion is the major thrust of a document issued by the Office of the High Commissioner of Human Rights (OHCHR), which recommends: "Mitigation and adaptation efforts that place people at the centre, are gender sensitive, and ensure the rights of persons, groups and peoples in vulnerable situations, including women, children, indigenous peoples and the poor" (OHCHR 2015: 23). Elsewhere, it argues that: "Equity in climate action requires that efforts to mitigate and adapt to the impacts of climate change should benefit people in developing countries, indigenous peoples, people in vulnerable situations, and future generations" (OHCHR 2015: 3-4). The OHCHR's approach thus departs from standard policy analysis in two respects. It advocates redistribution of wealth from rich to poor and to other vulnerable groups – which is normally left out of policy analysis – and from developed countries to developing countries. The OHCHR and other human rights organizations have also insisted that

international cooperation on climate mitigation respect democratic norms of consultation among all 'stakeholders' – another human rights norm that policy analysis, which is resolutely technocratic, usually disregards.

Third, human rights could be a vehicle for legal change. Most countries have ratified most of the human rights treaties, and many countries have submitted to the jurisdiction of international legal institutions that monitor or enforce their compliance with those treaties. National courts and other national institutions also may implement international human rights commitments. If the failure to mitigate climate change violates human rights, then victims of climate change may appeal to these legal bodies, which in turn may compel governments to take action.

Problems with the human rights approach to climate policy

There are problems that are specific to each of these approaches, and there are problems common to all of them. Let me start with the first. While it may seem harmless to redescribe the climate change problem so that it is a 'human rights' problem rather than simply an environmental disaster that threatens humanity, the truth is the opposite. Once the scientific uncertainties are surmounted, everyone understands that rising sea levels, the spread of pests, melting glaciers, and all the other environmental harms caused by climate change spell significant trouble and call for international cooperation toward a remedy. By contrast, the moment that the term 'human rights' is invoked, a large number of countries are immediately put on guard against threats to their sovereignty. Above all, the two countries with the biggest economies in the world – the United States and China – have made no secret of their opposition to human rights obligations that might compel them to act against their perceived interests. Without the participation of these two countries, an adequate response to climate change is not possible.

These countries, and others like them, will not only resist the use of human rights language, but, more practically, they will worry that if a climate treaty is seen as a vindication of human rights, or an implementation of human

rights commitments, then claims based on those underlying human rights will be more difficult to resist. China will not make concessions to human rights claims that threaten the authoritarian structure of the government, the suppression of political and religious freedom, and the massive repression of Muslim and ethnic minorities. For the United States, there is a deep and apparently unshakable hostility to human rights commitments that are seen as threats to the country's political autonomy. Contrary to the claims of human rights advocates, the nature and content of human rights are controversial – indeed, more controversial, it seems to me, than the argument that the world should cooperate to mitigate climate change, putting aside the declining minority of people who deny that climate change has occurred.²

If all this is true, then the OHCHR's attempt to leverage human rights on behalf of developing countries and vulnerable populations threatens the success of climate mitigation efforts. The argument that rich countries have a moral obligation to help poor countries has been made before, and it has never gained traction. The argument that rich countries have a moral obligation to carry a greater climate mitigation burden relies on numerous contestable philosophical premises that are unlikely to sway the voters who will need to be convinced.³ The OHCHR's approach effectively takes the difficult but manageable problem of international cooperation toward climate mitigation and converts it into an impossible, never-before-tried programme of redistributing wealth across the globe and across generations, all at the expense of the countries whose participation is most essential, and who have never shown themselves to be notably generous. It is hard to imagine a more certain way to bring climate cooperation to a halt.

The same point can be made about the OHCHR's insistence that international cooperation on climate litigation respect norms of consultation, which can be derived,

more or less, from the political rights recognized in human rights treaties. However, the Chinese government is not going to consult the Uighurs who it has placed in concentration camps, nor any of its other citizens, for that matter, outside the party elite. Nor are other authoritarian countries, or the many imperfect democracies that are actually controlled by an oligarchic elite. On the other side of the problem, human rights organizations need to figure out how to reconcile the demand for consultation with the fact that many ordinary people do not believe that anthropogenic climate change is happening, or is a problem, or is best addressed through the elimination of fossil fuels; or are hostile to international cooperation on principle, or do not trust foreigners.⁴ Here again, the human rights organizations may need to make a choice, or at least recognize that there is a choice – about whether we should give priority to climate mitigation or human rights – rather than pretend that the different areas of international cooperation are actually the same.

These tensions create challenges for the 'name-and-shame' approach made famous by Amnesty International, which, like the OHCHR, argues that states violate human rights both by failing to address climate change and by addressing climate change in the wrong way. Amnesty International is no doubt correct when it argues that "conservation areas or renewable energy projects must not be created on the lands of Indigenous peoples without consulting them and getting their consent" (Amnesty International 2019d). But then Amnesty International needs to decide who to shame – the government that does nothing about climate change or the government that, in its eagerness to address climate change, runs roughshod over the rights of indigenous peoples. Of course, it could try to do both but there seems to be a practical limit on how much naming-and-shaming can be done before it loses its effectiveness.

² For an interesting effort to put climate change in terms of "human security" rather than human rights for just this reason, see Adger et al. (2014).

³ For a discussion, see Posner & Weisbach (2010).

⁴ While this problem might seem specific to the United States, public opinion polls suggest a great deal of climate change scepticism around the world – suggesting that democracy might be more of a problem for climate mitigation than we would like to think. For data on global attitudes on climate change, see Lee et al. (2015).

One might argue, at least, that human rights *law* could help push forward climate change mitigation. If states are obligated to comply with human rights law, and the failure to mitigate climate change results in human rights violations, then it seems that we could advance climate change mitigation by reminding states of their human rights obligations or compelling them to comply with them. Individuals and organizations may also be able to file complaints with domestic and international courts, regulatory bodies, and other forums – and even if they do not obtain remedies, these activities will further bring attention to climate change and mobilize political support for climate change mitigation.

There are several problems with this argument. First, the connection between human rights law and the climate problem is far from obvious. There is no recognized human right to an atmosphere free of carbon emissions, thus the human rights argument must be that carbon emissions result in human rights violations – for example, by resulting in avoidable deaths and other harms. Even more creative arguments are possible:

“According to the Universal Declaration of Human Rights, ‘everyone has the right to education.’ Article 13 of the ICESCR elaborates upon this right, guaranteeing to all persons, free, compulsory primary education and calling on States to progressively realize free secondary education for all. However, the impacts of climate change and the exigencies which it creates threaten the ability of States to expend maximum available resources for the progressive realization of the right to education and can press children into the labour pool prematurely.” (OHCHR 2015: 19)

But no court, government, or other legal authority would accept such an argument, as it implies that all government resource decisions – all decisions to spend money on X rather than Y – are limited by international treaties, since spending money on X could always mean failure to spend money on education, health care, old-age pensions, and all the other rights guaranteed by the treaties. If the failure of governments to curb carbon emissions violate human rights in this way, then so do all failures to curb all forms of serious pollution. Human rights thinking, on

this approach, does no more than restate the premise of policy analysis while getting us no closer to a solution.

Second, the legal institutions responsive to human rights arguments are too weak to provide any traction against climate change. Even at the best of times, international legal institutions are unable to coerce, shame, or in any other way influence the behavior of countries, except at the margins. And, with a new populist-nationalist fervour raging across the world, now is hardly the best of times. The International Court of Justice rarely has mustered the courage to pressure countries to comply with human rights; but in any event, most great powers refuse to submit to its jurisdiction. The various human rights committees, offices, and organizations established by the treaty regime are also frequently ineffective. Further, having no authority, relevant expertise, or legitimacy for directing climate policy, these organizations would be unable to influence governments if they tried to.

In many countries, domestic courts also sometimes enforce international human rights law (or regional or domestic law that overlaps with it). But their record is spotty, and in any event, it is hard to see what could be accomplished if courts were persuaded that climate change is a problem for human rights. Domestic courts rarely dictate policy outcomes, and in the handful of cases where courts have recognized positive rights, they have mostly urged the government to take action rather than issuing compulsory orders requiring the government to change its policies. National institutions in most countries already recognize that climate change is a challenge that should be addressed through international cooperation and domestic policy. The problem is one of achieving international cooperation, which domestic courts are in a poor position to solve.

Third, it is not even clear that a human rights approach, grounded in existing legal instruments, would require states to make climate mitigation a priority. As the OHCHR acknowledges, “The rights of children are protected by the CRC [Convention on the Rights of the Child] but the rights of future generations (in the sense of generations yet unborn) are not formally recognised in this or other

major human rights instruments” (OHCHR 2015: 24). Never mind; the OHCHR insists that a climate treaty is required by ‘intergenerational equity’ without explaining what intergenerational equity requires or how it can be derived from human rights law. Under existing law, there is no basis for criticizing a country that says it will refuse to take climate mitigation efforts because, inspired by the CRC, it needs to spend money to save the lives of existing children instead of the non-lives of not-yet existing children.

A way forward

But this last point does suggest a way that human rights law could be of use in the coming battle with climate change. From time to time, a government might be tempted to engage in human rights abuses in the course of responding to the challenges posed by climate change. The most obvious danger on the horizon is the coerced transfer of populations from low-lying areas to higher ground, or to make way for massive new green-energy projects or untried geoengineering schemes. China’s Three Gorges Dam provides a cautionary tale. While not motivated by climate mitigation, the dam is the type of project that a world bent on eliminating reliance on fossil fuels might undertake in increasing numbers. The dam project displaced more than a million people and caused significant harm to the environment – raising protests from human rights organizations (Human Rights Watch 1995). Amnesty International might have had this concern in mind when it invoked the rights of indigenous peoples: once states commit to climate mitigation, the natural constituency of the human rights organizations will comprise vulnerable individuals whose rights may be steamrolled by a panicking or over-aggressive government rather than the vast majority for whose benefit the climate mitigation projects are undertaken. As an early warning system for drawing the world’s attention to climate mitigation projects that go too far, human rights might play a role. That is not the role that its advocates have called for, but it seems like a role that the human rights regime might be able to play.

Climate change and human movement

This essay discusses the evidence and available tools to address human movement linked to the adverse effects of climate change. In doing so, it offers insights into associated human rights implications. While human rights actors have recognized the immediate and longer-term implications of climate change on the enjoyment of human rights as a key challenge, including in the context of human movement, there is scope for a deeper engagement in order to foster rights-based policies and practical solutions.

Introduction

In public discourse and narratives on climate change and human movement, misconceptions abound. Correcting these is essential if suitable legal and policy frameworks are to be developed. At the outset, the following baselines need to be appreciated. First, climate change does not on its own cause the movement of people, but rather interacts with (and exacerbates) existing triggers. In particular, climate change impacts on the frequency and/or severity of certain disasters, such as extreme weather events. Secondly, most movement associated with climate change occurs within countries, not across international borders. When cross-border movement does occur, people will generally remain within their own region. Thirdly, the term 'climate refugee' is legally flawed, although refugee law may have some relevance when people are displaced. Fourthly, long before island nations are inundated by rising seas, depleted water resources will render them uninhabitable. Finally, many people may need assistance to move, and some may not move at all – whether by choice or inability.

These corrective statements highlight the complexity of movement linked to climate change, and why evidence-based research is critical. This essay discusses the evidence and available tools to address human movement related to the adverse effects of climate change. In doing so, it offers insights into associated human rights implications. While human rights actors have recognized the immediate and longer-term implications of climate change on the enjoyment of human rights as a key challenge, including in the context of human movement, there is scope for a deeper engagement in order to foster rights-based policies and practical solutions.

Types and magnitude of human movement

The adverse effects of climate change are already influencing people's options and decisions on movement. They may contribute to *displacement* (forced movement), *migration* (voluntary movement) and decisions to *relocate* as households or communities (which can be forced or voluntary, depending on the circumstances).¹

* The authors would like to thank the Research Council of Norway (Project No 235638) for supporting this work.

1 'Relocation' here refers to a planned process in which people voluntarily move, or are forced to move, away from their homes or places of temporary residence, are settled in a new location within their own or another state, and are provided with the conditions for rebuilding their lives. Planned relocation is carried out under the authority of the state, and is undertaken to protect persons from risks and impacts related to disasters and environmental change in the context of sea level rise. This has been adapted from Brookings Institution et al. (2015).

The full magnitude of movement associated with climate change is unknown, although the evidence base is much richer than it was just a decade ago. Since 2008, the Internal Displacement Monitoring Centre (IDMC) has compiled data on internal displacement linked to sudden-onset disasters (such as storms, cyclones, floods, wildfires, extreme temperatures and landslides). In 2018, of 17.2 million new disaster-related displacements, 16.1 million were associated with weather-related disasters (IDMC 2019a: 7). Over the past eleven years, disasters triggered 265 million internal displacements, which was an average of 24 million new displacements per year – and three times the figure for conflict and violence (IDMC 2019b: 5-6).² These figures are, however, an underestimate since they fail to capture displacement linked to slower-onset disasters (such as droughts, sea level rise, and desertification) (IDMC 2019a: v).³

Attribution and causality

To fully appreciate the evidence, it is crucial to recognize that weather-related natural hazards that trigger disasters cannot easily be attributed solely to climate change.⁴ What is known is that in 2018, the Intergovernmental Panel on Climate Change (IPCC) reinforced its earlier findings on the intensity and frequency of climate and weather extremes, which have increased in the past and are predicted to continue.⁵ This means the magnitude of adversity arising from storms, floods, droughts and heat-waves will rise as climate change continues. The same is true for sea level rise.⁶

There is also a tendency to view sudden- and slow-onset disasters in isolation. Yet, between 2004 and 2014, roughly 34 per cent of disaster-affected people and 58 per cent of

disaster-related deaths occurred in the top 30 countries listed in the Fragile States Index (Peters & Budimir 2016). IDMC's 2018 data also explain an overlap of conflict and disasters which displaced people in a number of countries such as Afghanistan, Nigeria and Somalia (IDMC 2019a). These dynamics underline another important factor: displacement, migration or relocation associated with climate change is multi-causal. Stressors such as weak governance, resource scarcity, environmental sensitivity and demographic changes; individual vulnerabilities associated with age, gender, civil and political status and socio-economic well-being; and other root causes such as conflict and violence, impact on people's resilience, affecting whether they remain in situ (and in what condition), are displaced, or can migrate elsewhere.

This is why climate change is sometimes described in narratives and public discourse as a 'threat multiplier', and why the scale of climate change-related movement is difficult to measure. It also partly accounts for why policy development in this area has been incremental. However, with expanding knowledge and a growing pool of actors willing to engage with the phenomenon, there is now a clearer normative framework and more robust tools in place for averting, minimizing and addressing climate change-related mobility.

Normative developments

The IPCC first identified the potential impacts of climate change on human movement in 1990 (IPCC 1990; IPCC 1997). Following its 2007 assessment report, which reinforced its impacts on mobility, empirical research on the connection between climate change and human movement expanded (Hegerl et al. 2007; IPCC 2007). The adoption of paragraph 14(f) of the Cancun Adaptation Framework in 2010, whereby states parties to the United Nations Framework Convention on Climate Change (UNFCCC) recognized "climate change induced displacement, migration and planned relocation" as elements to be addressed within the framework of climate change adaptation, was pivotal (UNFCCC 2011). It explicitly acknowledged the impacts of climate change on human mobility and became a catalyst for action (see McAdam 2014).

² In 2018, 61 per cent of new internal displacement was caused by disasters compared to 39 per cent by conflict (IDMC 2019a: 6).

³ Note, however, that some drought-related displacement is captured in the 2018 global figures.

⁴ See National Academies of Sciences, Engineering, and Medicine (2016) and Otto et al. (2014).

⁵ See e.g. IPCC (2018b) and Hoegh-Guldberg et al. (2018).

⁶ On human rights impacts of sea level rise see e.g. McAdam et al. (2016). See also OHCHR (2018).

Even so, it was the Nansen Initiative and its Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change (Protection Agenda) that paved the way for a clear and comprehensive plan to address human movement (The Nansen Initiative 2015). Prior to the Nansen Initiative's establishment in 2012, scholars, practitioners and policymakers had identified normative gaps but concerted efforts to address them had faltered (see McAdam 2014). The Protection Agenda sets out a toolkit for responding coherently to climate change-related mobility, underpinned by the recognition that multi-disciplinary and multi-sectoral actions are needed at the local, national, regional and international levels.

The Protection Agenda was developed through political, strategic and technical efforts that engaged states and other stakeholders across regions, and it was endorsed by 109 state delegations in October 2015. It encompasses humanitarian dimensions, but also disaster risk reduction (DRR), climate change adaptation (CCA) and sustainable development, in efforts to avert and minimize unsafe and involuntary movements and to respond to displacement within and across international borders when it does occur. Three key priorities are to: (1) collect data and enhance knowledge (particularly on cross-border disaster displacement); (2) enhance the use of humanitarian protection measures for cross-border disaster displaced persons; and (3) strengthen the management of disaster displacement risk in countries of origin.

The centrality of proactive efforts in countries of origin, and not simply remedial measures in destination countries, is reflected in the Protection Agenda's priorities. In this respect, the third priority encompasses four interventions: (1) integrating human mobility within DRR, CCA and relevant development processes; (2) facilitating migration with dignity; (3) improving the use of planned relocation; and (4) ensuring that the needs of internally displaced persons (IDPs) are effectively addressed in domestic laws and policies. This envisages that human rights consequences could potentially be minimized if involuntary and unsafe movements are averted. Displacement also undermines development gains and frustrates the sustainable development agenda.

The Task Force on Displacement (TFD), established in 2015 under the UNFCCC, was accordingly tasked with developing recommendations to avert and minimize, as well as address, displacement related to the adverse impacts of climate change. Similarly, the International Law Commission's 2016 Draft articles on the protection of persons in the event of disasters, which explicitly address human mobility, detail the scope and content of states' duties in the context of sudden and slow-onset disasters with respect to preventive and remedial actions.

Since the adoption of the Protection Agenda, coordinated efforts (including through the Platform on Disaster Displacement (PDD), the Nansen Initiative's successor) have been undertaken to frame and secure acknowledgment of the diverse dimensions of climate change-related mobility in pivotal global processes and instruments.⁷ Concerted efforts to ensure states and other stakeholders have the requisite tools to implement recommendations has been another central focus.

One example is the UN General Assembly-endorsed Sendai Framework for Disaster Risk Reduction 2015-2030, which contains language on human mobility and measures related to displacement, evacuation and relocation in the context of strengthening disaster risk governance, investing in resilience and enhancing preparedness. The Framework recognizes displacement as one common, devastating consequence of disasters and notes that managing disaster risk aims to protect people, their property, health, livelihoods and assets, while promoting and protecting all human rights. In May 2019, the UN Office for Disaster Risk Reduction (UNDRR) published a Words into Action guide, which offers practical guidance to governments on integrating human mobility into DRR strategies.

Movement within countries

Moving people away from harm is an important measure

⁷ For details, see McAdam (2016); Global Compact on Refugees, UN Doc: A/73/12 (2 August 2018); Global Compact for Safe, Orderly and Regular Migration, UN Doc: A/RES/73/195 (19 December 2018).

to reduce mortality and injury in the face of imminent risk and when other DRR and CCA actions to reduce exposure and vulnerability are inadequate. Indeed, international human rights law imposes duties on states to undertake certain actions to protect the right to life (inter alia) from risks emanating from natural hazards. Substantive and procedural duties are engaged, such as the obligation to take regulatory measures and to provide sufficient information. In essence, the duty is one of conduct to “take appropriate steps to safeguard the lives of those within their jurisdiction”, not one of result (ECtHR 2008: para 128).⁸

In practice, this may mean providing people with warnings, options to leave, safe areas to move to, and assistance and protection while displaced. This strategy proved vital in May 2019 when the Indian government evacuated over 1.2 million people in less than 48 hours from the worst cyclones to hit India in over twenty years. While storm surges, powerful winds and flooding ravaged infrastructure, loss of life was minimized (see e.g. Dora & Padhee 2019).

The international community has conceded that preventative or remedial relocation (that is, in the aftermath of displacement) may be necessary from places that present risks from landslides, flooding, storm surges and the like, or which are likely to become inhabitable due to water, ecosystem or livelihood depletion or inundation from sea level rise (Republic of Fiji 2018).⁹ Increasingly, communities are themselves making decisions to relocate to avoid the adverse effects of climate change and environmental degradation.

When an evacuation or relocation occurs, a range of human rights are implicated in the actions and choices of states and other actors. Past experiences demonstrate that relocation can entail disruptions to livelihoods, income, socio-economic networks and cultural heritage, which is

why it is often considered an option of last resort. Due regard must be had to procedural safeguards (including access to information, in-depth consultation and participation), financing and planning, and expert guidance has been developed to try to ensure these and human rights protections are safeguarded.¹⁰

Through the state-led Migrants in Countries in Crisis (MICIC) Initiative, states, intergovernmental organizations, private sector actors and civil society have developed guidance, practices and tools to address the protection needs of migrants displaced in a range of contexts, including by disasters. They cover needs from the period prior to departure, through to the emergency response phase and finally to return.¹¹

In all of these situations, the Guiding Principles on Internal Displacement remain the most authoritative and overarching normative framework on the protection of IDPs, including those displaced by the impacts of disasters. They reflect international human rights and humanitarian law and cover all stages of flight.

Movement across international borders

Cross-border movements have been the subject of extensive policy and scholarly debate, partly due to recognition of a normative gap for addressing admission, status and rights.¹² Concerns about the legal lacunae for so-called ‘climate refugees’ stimulated calls to expand the 1951 Refugee Convention relating to the Status of Refugees, adopt a new protocol to it, or create a whole new treaty. However, states are reticent to develop new international legal standards and many legal experts believe such efforts are premature. In this context, one of the Protection Agenda’s three priorities recommended enhanced use of ‘humanitarian protection measures’, exceptional migration categories or other special protection measures to assist people displaced in the context of climate change.

⁸ See also Burson et al. (2018).

⁹ See also International Law Association (2018) Resolution 6/2018 and accompanying Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise. Available at: https://environmentalmigration.iom.int/sites/default/files/ILAResolution_6_2018_SeaLevelRise_SydneyDeclaration.pdf.

¹⁰ See Brookings Institution et al. (2015); UNHCR et al. (2017); CCCM Cluster (2014).

¹¹ For more on the initiative, its guidance and tools see <https://micinitiative.iom.int/>.

¹² For further elaboration of these points, see McAdam (2012).

To be recognized as a refugee under the Refugee Convention, a person must demonstrate a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (Convention relating to the Status of Refugees 1951: art 1). Scholars and decision-makers have recognized that in limited circumstances, this definition may be applicable to claims from people fleeing disasters or other adverse effects linked to climate change. For instance, if, in the aftermath of a disaster, a government withheld humanitarian aid due to a person’s political opinion or ethnicity, this could amount to Convention-based persecution. In general, however, the Refugee Convention has been considered an inappropriate normative framework on account of:

- difficulties in demonstrating discriminatory human agency and in identifying the so-called ‘agent of persecution’;
- difficulties in demonstrating the requisite nexus to a Convention ground;
- arguments that governments may be willing and/or able to provide protection;
- inaccurate conceptions of disasters as ‘natural’ events arising from forces of nature, and conceptions of disasters and adverse effects of climate change as inflicting indiscriminate harm.

Recent jurisprudence from New Zealand has offered some insights into where and how refugee law might apply.¹³ Some scholars have also put forward salient arguments for a deeper examination of the Refugee Convention’s potential,¹⁴ seeking to dispel the common perception of disasters as purely ‘natural’ phenomena. Disasters are also social phenomena which can exacerbate existing patterns of discrimination and marginalization. This lens provides new insights into differential experiences and risks of harm that may be based on ethnicity, gender or other grounds.

13 *AF (Kiribati)* [2013] NZIPT 800413; *AC (Tuvalu)* [2014] NZIPT 800517-520.

14 See e.g. Scott (2016); note also UNHCR (2018).

In situations where disasters combined with conflict or violence, states in Africa and Latin America have recognized refugee status on the basis of broader criteria explicit in definitions in regional instruments. For instance, neighbouring states granted refugee status to Somalis who fled in the context of drought, conflict and famine in 2011 (see e.g. UNHCR 2018). As noted earlier, there is a tendency to view disasters in isolation. Yet, in many countries and regions, disasters overlap with conflict and/or violence, such as in Nigeria, South Sudan, Afghanistan, Iraq and parts of Central America.

At present, international human rights law also offers limited opportunities. It prevents states from sending people to places where they face a real risk of being arbitrarily deprived of their lives or being subjected to inhuman or degrading treatment. Certainly, at some point, on the basis of cumulative impacts (such as where fresh drinking water is unavailable, crops cannot grow, and people are at risk of repeated displacement), the harm could amount to inhuman or degrading treatment. However, timing will be relevant, including the potential for mitigating factors to intervene to limit exposure and severity of harm.¹⁵

In this context, states have often used discretionary measures to permit people to remain, or to be admitted, in the aftermath of disasters. Underpinned by humanitarian considerations, some states have issued special humanitarian visas, generally for temporary stays, with options for disaster-affected individuals to apply before departure or upon arrival. For instance, Brazil granted humanitarian visas to Haitians following the 2010 earthquake. Other states have permitted non-citizens present on their territory to stay after a disaster has struck. For instance, New Zealand offered temporary visas to Nepalis who could not return after the 2015 earthquake. Occasionally, states have also evacuated people across international borders, but mostly for medical reasons. While most of the measures described above have been wholly discretionary, some have had a legislative basis (such as Temporary

15 See Anderson et al. (2019) and *Teitiota v New Zealand*, UN doc: CCPR/C/127/D/2728/2016 (24 October 2019).

Protected Status in the United States). Some countries in Central and South America have sought to create more systematic responses by producing non-binding regional guidelines, identifying effective practices.¹⁶

States have also used regular migration law categories (such as labour, family, education or tourism) to support entry and stay. Authorities have expedited processes, waived or relaxed substantive requirements, and used their discretion to grant visas to disaster-affected people who apply through these more general migration channels. Such measures can offer a more predictable legal status and, potentially, a path to a permanent solution.

These types of migration law and policy-based measures are a vital component of efforts to develop sustainable approaches. As Anote Tong, former President of Kiribati, stated: “If we train our people and they become skilled, then they would migrate with dignity and on merit, they would not be people running away from something. They would be migrating, relocating as people with skills as members of communities they go into, even leaders, I hope” (Walsh 2017).

Temporary labour migration schemes, which can support livelihood diversification, have also been used to support people living in precarious conditions. For instance, Australia and New Zealand have seasonal employment schemes targeting Pacific island countries significantly affected by climate change (although that is not the stated rationale for the programmes). Regional or bilateral free movement agreements can also enable disaster-affected people to travel safely across borders, and in that sense can be a form of ‘migration as adaptation’.

Global compacts on migration and refugees

The knowledge and awareness amassed over the past decade on climate change-related movement is evident in two instruments adopted by the UN General Assembly in 2018: the Global Compact for Safe, Orderly and Regular

Migration (Migration Compact) and the Global Compact on Refugees (Refugee Compact).¹⁷ Although not legally binding, they reflect political commitments by states to which they will be held to account in regular high-level reviews.

The Migration Compact reflects an express commitment by states to address the challenges of climate change-related mobility. The text underscores the three priorities identified in the Protection Agenda and addresses displacement, migration and relocation within and across borders. Notably, it recognizes the significance of regular migration pathways (such as those discussed above) for offering safe options for affected people, including as a way to adapt to the adverse effects of climate change.

Unlike the Migration Compact, the Refugee Compact does not contain specific commitments on climate change-related movement. However, it does acknowledge displacement in the context of disasters, environmental degradation and the adverse effects of climate change, including the importance of preparedness and DRR, the need for coordinated operational responses, and the role of multiple protection options. In particular, paragraph 61 notes that states must determine the status of those on their territory “in accordance with their applicable international and regional obligations, in a way which avoids protection gaps”.

Conclusion

Human movement linked to the adverse impacts of climate change is likely to increase, but frameworks and tools exist to prevent some movement where possible, and to manage it where not. Concerted efforts are needed to ensure these interrelated approaches are implemented robustly to avert, minimize and address displacement linked to climate change. Most people do not want to

¹⁶ See e.g. The Nansen Initiative (2016) and CSM & International Organization for Migration (2018).

¹⁷ Global Compact on Refugees, UN Doc: A/73/12 (2018); Global Compact for Safe, Orderly and Regular Migration, UN Doc: A/RES/73/195. For analysis, see the special issue: ‘The 2018 Global Compacts on Refugees and Migration’ (2018) *International Journal of Refugee Law* 30(4), particularly the article by Walter Kälin.

leave their homes, and most want to return as soon as possible if they are uprooted. Yet, some are also coming to the realization that moving away from their homes may become inevitable for their long-term security. To safeguard these choices and provide dignified options, the multi-pronged preventative and remedial approaches discussed in this essay must become part of preparatory processes at all levels of governance.

In his June 2019 report to the Human Rights Council, the Special Rapporteur on Extreme Poverty and Human Rights urged the human rights community to engage robustly and systematically to help create transformative responses to climate change (UNHRC 2019). The human rights framework offers an established set of standards against which to assess both risk and proposed policy responses. In this context, a central role for human rights actors is to determine how to “translate States’ obligations in a way that more clearly engages with [the available] policymaking choices” (UNHRC 2019: para 71) so as to foster sustainable and rights-attuned solutions.

Subnational authorities and climate change

Today's world abounds with 'frontier cities' seeking to explicitly assert responsibility for international human rights law, even – and especially – where the state parties concerned do not take their international obligations as seriously. They can add to the effectiveness, but also to the legitimacy and the appropriateness of climate action. International (human rights) law has a key role to play in supporting their efforts. There are, however, risks involved in a focus upon local action.

Introduction

In May 2019 Heidelberg declared a 'climate emergency', as did hundreds of other local authorities in dozens of countries – including New York, Vancouver and Naples. In the German town, this led to, amongst others, a focus on electrical buses, reconsidering building projects and supporting food saving projects. Heidelberg forms but one example of how local and regional authorities are taking the lead in climate change mitigation and adaptation. Small wonder that such subnational authorities show up in addressing the causes and consequences of climate change: they do not only have a lot to lose with global warming, but also a great deal to contribute. If addressing climate change and its human rights implications is about having 'all hands on deck', subnational authorities are powerful partners to have on board. They can add to the effectiveness, but also to the legitimacy and the appropriateness of climate action. In this essay, I will argue that international (human rights) law has a key role to play in supporting their efforts, and that human rights organizations should support this. In setting out this role, it

is important to distinguish between subnational authorities that are more-than-willing, those that are willing and those that are less-than-willing to meet the global goals in this field. In each of these cases, international law has a specific role to play. Before turning to this, however, it is important to take a closer look at how subnational authorities have come to play an ever-larger role in combating climate change and thus protecting human rights.

Global challenges, local action

Tiny hamlets amongst wide stretches of agricultural land, global cities with monorails amongst skyscrapers, tribal areas in which people live close to nature, regions and states that encompass both and everything in between – the term subnational authorities encompasses a wide range of actors like cities, local governments, municipalities and regions (Bäckstrand et al. 2017). The common denominator is that these are authorities other than the nation state, that hold public power within a certain territory. They do not hold functional authority, as is the case with for instance water boards or transport authorities. Neither are they non-state actors, such as businesses or civil society. This, however, is where the commonality ends. The public power concerned can be allocated via decentralization or devolution, or exist simply because it concerns a federal state. It can also range from seemingly mundane features, such as garbage collection and zoning, to far-fetching constitutional and fiscal powers which all impact differently the ability to respect, protect and fulfill human rights in times of climate change. In addition, resources and needs in this area differ vastly.

Amongst this collection of highly diverse actors, cities hold a special role (Aust 2015). They are home to more than half of the world's population, but are also often threatened directly. Seaside cities like Ghuangzou, New Orleans, Mumbai and Osaka, for instance, all run the risk of being flooded by 2100 if emissions are not reduced (Cassidy 2018). It is not surprising that New York, after hurricane Sandy demonstrated the city's vulnerability in 2012, passed a far-reaching Climate Mobilization Act in 2019 (Kaufman 2019). Coastal towns aside, cities in general account for 60 to 80 per cent of both energy consumption and global CO₂ emissions, and as such are as much part of the problem as they can be part of the solution.

Such urban solutions come in a wide variety of forms. The C40 climate network lists 14.000 examples of city climate action (C40 2018). Among them is San Francisco's move towards zero waste via recycling and composting. Addis Ababa's focus on low carbon building designs. Sydney's investment in green links connecting all city parks. London limiting access to its central business district. Buenos Aires offering free led lights. Milan and Shenzhen changing all their municipal transport to zero emission buses. Accra closing down illegal waste dump sites and Dubai participating in the adaptation academy. And so on, and so forth.

The fact that all these examples are shared within a city network is not coincidental. If cities are taking the lead in addressing climate change, they are doing so together (Kern & Bulkeley 2009). The Global Covenant of Mayors for Climate and Energy, for instance, brings together nearly 10.000 signatories in 59 countries which commit to reducing greenhouse gas emissions to 40 per cent by 2030, and to drawing up a sustainable action and energy plan. The C40 network unites some of the largest cities in the world, with the Paris Agreement as its normative basis. ICLEI, local governments for sustainability, is another mayor network, that helps over 1750 local and regional governments in developing pathways to lowering emissions, enhancing biodiversity and strengthening circularity and resilience in an equitable manner. These are only three of the hundreds of Transnational Municipal Networks (TMNs) at play in climate governance, often with

overlapping membership and partnerships with international organizations and businesses (Acuto 2013).

These TMNs often unite global cities that have the power and the resources to participate in them (Lee 2013). This does not apply to smaller places, where it will often be the region, a province or – in a federal context – the state to undertake climate action. In Canada, for instance, provinces set their own climate plans, which means that British Columbia focuses on introducing a carbon tax and Alberta regulates industrial emissions. In the United States, similarly, California and Hawaii passed State Bills committing to 100 per cent clean energy by 2045, Colorado focused on clean cars, New Jersey passed a Clean Energy Act focusing on wind energy and Illinois vowed to boost solar capacity by 2000 per cent (Zukowski 2018).

Next to all the focus on the activities of cities, transnational municipal networks and regions in combating climate change, there is relatively little scholarly attention for the activities of smaller towns in rural areas. Still, it is clear that all types of subnational authorities are often prepared to go much further than the nation state in combating climate change. Let us briefly consider how this contributes to the process of mitigation and adaptation, and thus also to protection of the rights at stake.

The subnational contribution

When US President Trump pulled out of the Paris Agreement, stating that he represented the citizens of "Pittsburgh, not Paris", the Pittsburgh mayor Peduto replied with a tweet stating that his town would follow the Paris Agreement, "for our people, for our economy & for the future" (Aust 2018). Such local commitment can contribute to reaching global goals as formulated in Paris, in three different ways: by adding to their effectiveness, their legitimacy and their appropriateness. Let's briefly consider each of these contributions.

– *Effectiveness*: subnational authorities can make a key contribution to keeping global warming under 1.5 degree Celsius, if only because cities are responsible for an estimated 75 per cent of global CO₂ emissions. A 2018 report calculated the impact that all pledges 'to go

the extra mile' made by cities could have, including the 9149 cities and municipalities, and 245 regions in 128 countries that made such a pledge, covering one fifth of the world's population. Of course, not all causes of emissions fall under the legislative jurisdiction of these authorities. But if all these places alone would keep their promises in fields that they can influence, this, together with business commitments made, would go one third of the way in meeting the Paris goals (Data Driven Yale et al. 2018). Even if this is not enough, it does provide an important addition.

– *Legitimacy*: combating climate change is not only about technological fixes and regulatory action, but also about public support. Climate leadership by mayors and local politicians can play a key role in overcoming political divides and disengagement. Consider the bipartisan coalition of Climate Mayors in the US. The Democratic mayor Walsh from Boston emphasized that: “We see the impacts of climate change every day in the streets and homes of our cities – the extreme heat, flooding, and increasing health issues. It’s our responsibility to act, and I’m proud to stand among the growing number of Climate Mayors fighting for our residents.” At the time, his Republican colleague mayor Tomás Regalado of Miami put it this way: “We believe that the city of Miami is ground zero for climate change and sea level rise. Now, more than ever, we are undeterred and will vigorously pursue our commitment to this fight. This is not just about ‘the here and now,’ but for generations to come.” Such rhetoric can add to the support for climate action as something that is not imposed from Paris but from Pittsburgh, and does not concern faraway places and concerns, but the lives of all of us here and now.

– *Appropriateness*: one of the key challenges in combating climate change is the complexity of its causes and the vast array of potential ways to address them. The best fit will differ from sunny suburb to monumental town to tribal community. A strong role for subnational authorities allows for a focus on those measures that form an optimal fit with the people, place and purpose.

In all this, subnational authorities differ from other entities (civil society, businesses) because they often hold formal responsibilities, under the national constitution, for

domains that can impact climate change – from garbage collection, housing and zoning to fiscal and foreign policies. What, here, is the role of international law?

The role of international human rights law

Climate change concerns human rights: not only because of the human right to a clean environment but also because the consequences of global warming affect a wide variety of civil, political, social, economic and cultural rights – starting with the right to life. In addition, the above makes clear that subnational authorities, in practice, have a role to play in protecting the rights of those who live on their territories. A question, however, is what the role of the law, and international law in particular, is and should be in assisting subnational authorities in this process.

Here, it is important to recognize how international law, traditionally, does not address the human rights responsibilities of local and regional authorities, leaving the internal allocation of such responsibilities up to the state parties (Oomen & Baumgartel 2018a; Nicola 2012). Take the landmark environmental law case of *Öneryıldız v. Turkey* (ECHR 30/11/2004), in which the European Court of Human Rights recognized how allowing people to build a dwelling on a rubbish tip in Istanbul, resulting in the death of nine people after a methane explosion, violated the positive obligations that comes with the right to life. Even if Istanbul had primary liability here, Turkey was held responsible for the violation of art. 2 of the Convention. Turkey, after all, is party to the European Convention of Human Rights and thus the sole party to be held responsible for its violation – the local government is merely considered part of the state. A consequence of such thinking in terms of a ‘black box of national sovereignty’ is that local authorities seeking to address human rights violations by the nation state have not received standing in front of international and European courts (Oomen & Baumgartel 2018a; Nicola 2012).

Still, today’s world abounds with ‘frontier cities’ seeking to explicitly assert responsibility for international human rights law, even – and especially – where the state

parties concerned do not take their international obligations as seriously (Oomen et al. 2016). They declare themselves to be human rights cities, often committing to one specific set of rights. They also rally around concepts like ‘the right to the city’, recognizing Harvey’s classic concept in local ordinances but also ensuring its inclusion in global agenda’s, like UN Habitat (Cohen 2018). International and regional organizations, in turn, increasingly explicitly focus upon the human rights responsibilities of local authorities, with the UN advocating guidelines in this field (UNHRC 2015).

The specific role that international (human rights) law has to play in supporting local action to combat climate change, very much depends on the type of commitment held by subnational authorities. Here, it is useful to distinguish three types of authorities: the *more than willing*, the *willing* and the *less than willing*. Let us consider each separately.

– The *more than willing* subnational authorities are those that do not only seek to lead the way locally, but also seek to address the system. They are engaged in global and regional agenda and standard setting. At the COP21 conference, for instance, where the Paris Agreement was adopted, there were not only 150 heads of state, but also 400 mayors (Tollin 2015). In addition, they are often involved in climate litigation against companies and against the government. New York, for instance, was one of the American municipalities to start a law suit against fossil fuels companies like BP and Exxon (Setzer & Byrnes 2019). In France, the community of Grande-Synthe lodged a case against the government for “inaction climatique” in response to its feeble action plans (Le Monde 2019). At the European level, Paris, Brussels and Madrid filed a case calling for the annulment of emissions regulation 2016/646, calling it a “license to pollute”. Whereas the American case was rejected, and the French case awaits a decision, the European case was moderately successful: not only were cities granted standing in Luxembourg, but the European Commission was also ordered to amend the legislation (EGC 2018).

This case shows what subnational authorities and the people they seek to protect stand to gain if they can

help develop and invoke international and regional law directly, not only in national cases but also in international and regional courts and in front of treaty monitoring bodies. Offering recourse to such entities, could thus strengthen human rights law, for instance in relation to climate change.

– The *willing* subnational authorities could be considered those that take a less confrontational perspective, but that do seek to enforce existing international human rights law and environmental law. The challenge, here, often lies in deciding what is the best course of action, ensuring stakeholder participation and implementing the proposed changes. Here, membership of transnational municipal networks can play an important role in sharing best practices, deciding on the discourse to employ, setting common standards and ensuring access to funding (Oomen et al. 2018b). The Global Greenhouse Gas Protocol for Cities, for instance, is an emissions measurement standard developed by the C40, ICLEI, and World Resources Institute (WRI) together with the World Bank and UN-Habitat, to which countries sign up voluntarily (Gordon & Johnson 2018). A major challenge here is how to also offer this type of support to smaller places and rural areas, that often do not have the resources to participate in these transnational networks.

– For the *less than willing* subnational authorities, explication of their autonomous international human rights responsibilities could also be important. Take the case of Saskatchewan, in Canada, as a province characterized by inaction. Here, the Canadian government won a case concerning the constitutionality of an Act enabling taxation of greenhouse gases (Court of Appeal for Saskatchewan 2019). The ability to explicitly refer to international legal obligations pertaining to human rights would, arguably, have made the case of the Canadian government even stronger, as it would have been able to argue that even an ‘unwilling’ subnational authority like Saskatchewan is still bound to international treaties such as the Paris Agreement. It is for this reason that international and regional human rights organizations increasingly seek to explicitly set out the human rights responsibilities of local authorities, for instance in discussing the possibility of UN Guidelines (UNHRC 2015).

Conclusion

Cities, regions and other subnational entities can increasingly be found amongst a coalition of the willing in taking bold climate action. This is good news for those who inhabit them, and for the world at large. Cities might often be the main places generating carbon emissions, but can also go a long way in curbing them. Their activities, often devised in the context of transnational municipal networks, are however not only effective. They also add legitimacy to often polarized discussions, and ensure that appropriate measures are taken. Strategically, all who care about international human rights, like human rights NGOs, are wise to support and strengthen these subnational efforts. This can be done, first, by supporting efforts to explicate the human rights responsibilities of local authorities, such as efforts to establish UN guidelines on the role of local government in the promotion and protection of human rights (UNHRC 2015). In addition, human rights NGOs can support the specific global efforts by subnational entities to raise the bar in combating climate change. As set out, such efforts often take place within the context of transnational municipal networks, and human rights NGOs could support efforts to enhance access to such networks for all subnational authorities, not merely the megacities that currently dominate debates. Locally, human rights NGOs could call on willing cities to join such networks, and develop lobbying strategies geared towards subnational entities directly – for instance by offering information on international instruments to organizations that are active locally.

Combined, such strategies can help strengthen the role of subnational entities in combating climate change even more. There are, however, risks involved in a focus upon local action. Most importantly, it can strengthen existing cleavages between *more than willing* and *less than willing* subnational entities, and the rights of those who live there. One way to address this is by means of strategic litigation, and a focus on *less than willing* subnational entities and their obligations. In addition, avoiding inequality means that a focus on localities should never take the place of national and international efforts in this field.

Nevertheless, going local holds great promise. After all, a large part of meeting the largest global challenge of our times, is about both supporting and stimulating local action.

Climate change and the human rights responsibilities of business enterprises

The causes of climate change and solutions to it are inherently tied to non-state actors, including businesses. As multinational business enterprises are at the heart of global emissions, historical and current, it is vital to understand how the attribution of climate change impacts goes beyond the responsibilities of states. The first lawsuits targeting companies have begun. Meanwhile, businesses are increasingly focused on sustainability at different levels of their organizations, including by endorsement of business responsibilities for human rights. What independent responsibilities do business enterprises have when they undertake to respect the human rights of those who are vulnerable to climate harms?

Introduction

The adoption of the Guiding Principles on Business and Human Rights (UNGPs) by the United Nations Human Rights Council (UNHRC) in 2011 has created an opportunity for the international human rights community to clarify how the independent responsibility of business enterprises to respect human rights applies to rights at risk from climate change (UNHRC 2011; Seck 2017). This essay will consider the evolution of international understandings of this responsibility at the UNHRC, as well as in other international initiatives, some of which are multi-stakeholder in nature. A key insight is that whether or not human rights NGOs choose to contribute to the development of guidance for businesses on human rights and climate change, this guidance will continue to emerge and inform accepted social norms for responsible business conduct, which in turn will inform

legal responsibility (Buhmann 2017). The question is whether the guidance that emerges will rigorously embed business responsibilities to respect human rights at risk from climate change, or whether weaker, less effective guidance will be all that is available. The answer to this question depends on the extent to which human rights NGOs choose to actively contribute to these drafting processes.

International scientific consensus is clear that anthropogenic climate emissions, notably those arising from industrial activities including changes in land use, are key contributors to the climate crisis (IPCC 2018a; IPCC 2019). As the science has evolved, the link between fossil fuel emitters and climate change has begun to be clarified, and additional studies of other industry sectors will likely emerge. For example, Richard Heede's 2014 climate attribution study provided a quantification of the historic contributions of 'carbon-majors' to climate change (Heede 2014). Heede initially classified carbon-major producers into investor-owned, state-owned, and nation state producers of oil, natural gas, coal, and cement, concluding that 63 per cent of cumulative worldwide emissions of carbon dioxide and methane from 1854–2010 were attributable to identifiable carbon-majors (Heede 2014: 229). A subsequent study to which Heede contributed distinguishes investor-owned from majority state-owned carbon majors (Ekwurtzel et al. 2017). These studies provide an alternative framework to the exclusive focus on state responsibility found in traditional public international law (Voigt 2008; Wewerinke-Singh 2018). Investigations, inquiries, and litigation

targeting investor-owned carbon majors have begun to proliferate (Greenpeace Southeast Asia & Philippine Rural Reconstruction Movement 2015; The Permanent Peoples' Tribunal 2018; Ganguly et al. 2018), some of which have been inspired at least in part by the Heede research, as well as by the businesses' responsibility to respect human rights (BHR), the second of three pillars in the 2011 UNGPs. In addition, various international initiatives have attempted to clarify the content of the responsibility of businesses to respect human rights in relation to climate change.

2007 Caring for Climate

The idea that businesses should play a role in climate action has been promoted by the United Nations since at least 2007, when the UN Global Compact, together with the UN Framework Convention on Climate Change (UNFCCC) and the UN Environment Programme (UNEP), launched the Caring for Climate initiative in order to mobilize business leaders to climate action. CEO signatories to the Caring for Climate Statement acknowledge that responsible business behaviour includes climate action, by playing a "leading role in deploying low-carbon technologies, increasing energy efficiency, reducing carbon emissions, and [...] assisting society to adapt to those changes in the climate which are now unavoidable" (Caring for Climate 2007). Current participants contribute to the development and sharing of practical solutions in workstreams focused on carbon pricing, science-based targets, climate adaptation, as well as on how to responsibly engage in climate policy. However, the idea that climate change might have human rights dimensions that should inform business responsibilities is not evident in this initiative.

2014 NAZCA

The launching in 2014 of the portal for Global Climate Action prior to the negotiations of the Paris Agreement represents another important moment. An initiative of UN Climate Change together with Peru and France in the lead-up to the Paris Agreement, the NAZCA platform reflects the reality that all sectors of society must take ambitious action to address climate change. Non-party

stakeholders are able to display their climate action commitments on the platform, whether cities, subnational regions, civil society organizations, or companies and investors. Company commitments (of which there are currently over 3500) include carbon pricing and renewable energy use, while investor commitments (currently over 1000) include the issuance of green bonds as part of the move to mobilize finance for development that is both climate-resilient and low in emissions. There is no explicit linkage here between business responsibilities to respect human rights and climate action. Nevertheless, this initiative represents a further acknowledgement that businesses, including the investor community, have a key role to play in global climate action.

2014 IBA Climate Justice Report

The first international initiative of note to consider how the business responsibility to respect rights might apply in the climate change context is the July 2014 report by the International Bar Association (IBA), entitled *Achieving Justice in an era of Climate Disruption* (IBA 2014). The overarching aim of the report is to shift climate change considerations from science and economics to equity and human rights. A section is dedicated to corporate responsibility and climate justice, where it is argued that there is a need for states to agree on consistent standards with which to regulate corporations, while increasing the ability of businesses to self-regulate (IBA 2014: 148; Seck & Slattery 2015). The IBA report recommends that businesses adopt the UNGPs, and also that the OHCHR develop a model for an internal corporate policy on human rights and climate change (IBA 2014: 148-9). This model policy would require a three step commitment and appears loosely modelled on the responsibility to respect in the UNGPs: first, the adoption of a policy stipulating measures to prevent or mitigate climate impacts linked to operations; second, the implementation of a due diligence process to "identify, prevent, mitigate, and account" for "actual climate change impacts" which must then be translated "into active efforts to minimise or reverse" impacts; and, third, implementation of "remediation processes that allow for open communication with stakeholders most affected by the corporation's operations"

(IBA 2014: 148-9). Measures adopted “must include due diligence of corporate projects, including the environmental practices of the company’s affiliates, and as far as is reasonably practicable, its major contractors and suppliers” (IBA 2014: 148). Further guidance is provided on translating awareness into active efforts:

“The corporation should consider measures it can implement to assist in achieving the objective of limiting global warming to no more than a 2°C increase. The corporation’s goal should be to implement the most advanced available technology to minimise its carbon footprint. In situations where negative impact on the environment is unavoidable given current technology or if the cost of such technology is prohibitive, the corporation bears responsibility for corresponding mitigation and remediation” (IBA 2014: 149).

The IBA recommendations could be critiqued as not fully in accordance with Principle 13 of the UNGPs, given that in some circumstances the negative impact of a project on human rights may be so severe that the project simply should not proceed (Seck 2017: 19). Nevertheless, the overall recommendations are a key contribution, although the OHCHR has not yet developed a model policy for BHR and climate change. This is unfortunate, as a BHR and climate change compliant model internal corporate policy could serve to inform legal advice given to business clients who are committed to tackling their contributions to climate change, but are unsure how to proceed. While some business law firms are stepping forward to provide advice (Zampas & Elgie 2019), a model corporate policy developed with active input from human rights NGOs could play an important role in guiding climate responsible corporate practice.

2015 OHCHR Key Messages

In November 2015, the Office of the High Commissioner for Human Rights (OHCHR) developed Key Messages on climate change which also informed a submission to the COP 21 negotiations of the Paris Agreement (OHCHR 2015). Consideration 8 (“To protect human rights from business harms”) endorses the UNGPs, and highlights that “businesses are also duty-bearers” and

that businesses must “be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights”. Yet while the Key Messages claim that the fostering of policy coherence is important for all climate action, only consideration 8 addresses the role of business, while the other nine considerations focus exclusively on the role of states.

Consideration 8 further clarifies that it is critical that businesses comply with their responsibilities when states adopt market-based or private financing approaches to climate change in accordance with international climate law. Yet there is a lack of clarity as to the role of business where a state has chosen not to incorporate private financing or market-based approaches to climate change, or the approaches adopted are clearly inadequate. As the business responsibility is independent of the state duty, the failure of a state or states to take their climate obligations seriously should not be used as an excuse for irresponsible business conduct (UNHRC 2011: Commentary to Principle 11). Moreover, there is no direction as to how, where, and to whom businesses should take responsibility for the remediation of climate harms. While the OHCHR’s endorsement of the UNGPs in the Key Messages is a step in the right direction, it is far less developed than the work of the IBA, and the limited guidance given is not obviously consistent with the UNGPs. The OHCHR should revisit the Key Messages with input from human rights NGOs, and provide more fulsome guidance for businesses that at a minimum aligns with the UNGPs.

2015 Oslo Principles

In the same year as the OHCHR submission, a group of legal experts attempted to grapple in more detail with the responsibilities of businesses and states in relation to climate change, resulting in the “Oslo Principles on Global Obligations to Reduce Climate Change” (EGGCO 2015). The Oslo Principles focus only on climate mitigation, and claim that the primary legal responsibility to urgently respond to climate change rests with states and enterprises; however, ‘enterprises’ is not defined. This legal responsibility is said to arise from a duty of humanity as guardians

of the earth to preserve the biosphere, and reflects the precautionary principle as well as existing human rights obligations to respect, protect, and fulfil the basic dignity of people as well as the integrity of the biosphere.

Oslo Principles 6-8 provide that both states and enterprises have obligations to ensure that global average temperature increases remain below a 2 degree Celsius threshold. However, greenhouse gas (GHG) emissions reduction obligations are qualified by cost, and new excessively emitting activities may be indispensable in some circumstances. Although the Oslo Principles rely on the UNGPs as well as a selection of other international normative instruments, the four principles that most directly articulate obligations of enterprises do not clearly reflect BHR (Seck 2017). Most crucially, they focus on assessment and disclosure of harms to the enterprise itself, or its investors, or perhaps customers, rather than harm to rights-holders as is clearly required under the Principle 17 of the UNGPs.¹ Oslo Principle 29 and 30 do suggest a need to be aware of and reduce the carbon footprint and GHG emissions of a proposed project, yet there is no suggestion that assessments should seek out alternatives with zero emissions, nor is it suggested that the voices of those most vulnerable to climate harms should be sought for decision-making that respects rights. Moreover, there is no mention of the need for businesses to take responsibility to remedy climate harms as would be required under Principle 22 of the UNGPs.² However, as will be seen below, some of the drafters of the Oslo Principles were

1 According to the Commentary to Principle 17: "Principle 17 defines the parameters of human rights due diligence while Principles 18-21 elaborate its essential components. Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22). Human rights due diligence can be included within broader enterprise risk- management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders." (UNHRC 2011)

2 Principle 22: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes" (UNHRC 2011).

not satisfied with this result, and undertook a subsequent drafting initiative.

2016 Climate report

In 2016, the Special Rapporteur on human rights and the environment prepared an important report on climate change and human rights which considers how the obligations of states with regard to environmental human rights should be understood to apply in the climate context. Only brief reference is made to businesses: "corporations themselves have a responsibility to respect human rights" and all "three pillars of the normative framework for business and human rights apply to all environmental human rights abuses, including impairments of human rights in relation to climate change" (UNHRC 2016: 66). This is not surprising given the lack of detail in the OHCHR's 2015 Key Messages with regard to business responsibilities, and reinforces the sense that the OHCHR, perhaps with input from human rights NGOs, should undertake a more in-depth study of this issue.

2018 CESCR Committee

The October 2018 statement on climate change by the Committee on Economic, Social and Cultural Rights (CESCR) specifically identifies the independent responsibility of businesses to comply with human rights, stating that: "*Complying with human rights in the context of climate change is a duty of both State and non-State actors. This requires respecting human rights, by refraining from the adoption of measures that could worsen climate change; protecting human rights, by effectively regulating private actors to ensure that their actions do not worsen climate change; and fulfilling human rights, by the adoption of policies that can channel modes of production and consumption towards a more environmentally sustainable pathway. **Corporate entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice [emphasis added]**".³ (CESCR 2018b)*

3 The statement refers here to the Committee's General comment No. 24 (2017) on State obligations under the

Again, while it is useful to have an acknowledgement of business responsibilities to respect human rights in the climate change context, it is unfortunate that further detail of what this would mean in practice is not elaborated.

2018 Enterprises Principles

As the drafters of the Oslo Principles could not agree on the substance of reduction obligations for enterprises, some members subsequently decided to work together to draft more concrete obligations for both enterprises and investors (EGCOE 2018: 17). The result, released in 2018, is a report of close to 300 pages entitled *Principles on Climate Obligations of Enterprises* (EGCOE 2018). Similar to the Oslo Principles, the Enterprises Principles take as a starting point that the “legal maximum” for global warming is 2 degrees Celsius, even as the authors acknowledge that this “is by no means safe in view of the increasing amount and severity of natural disasters the world is already experiencing today” (EGCOE 2018: 24). Yet, the authors claim that if all countries were to curb emissions such that the 2-degree threshold was avoided, there would be no need to consider the obligations of enterprises (EGCOE 2018: 28). From a human rights perspective this is highly arbitrary and creates confusion when combined with the independent responsibility of businesses to respect human rights.

The definition of enterprise includes a “business, company, firm, venture, organisation, operation, or undertaking that is private” unless it “does not carry on commercial or industrial activities”, as well as “any non-private entity when and to the extent that it carries on commercial or industrial activities” (EGCOE 2018: 1). The Enterprises Principles focus on GHG emissions that can be attributed to an enterprise, while observing that the methodology for doing so is contested (EGCOE 2018: 30-36). Here, “emissions from oil exploration, extraction and refining [are attributed] to the responsible oil company, whereas emissions from combustion in an airplane are attributed to the airline” (EGCOE 2018:

32). The key concern is prevention, and the drafters “do not express a view on damages”, suggesting this aligns with sources of international environmental law (EGCOE 2018: 43), a claim that many would contest (Doelle & Seck 2019). The Enterprises Principles adopt a per capita and carbon budget approach, and so distinguish between countries that are “Below Permissible Quantum (BPQ)” that are “not (yet) under a general *legal* obligation to reduce their GHG-emissions” (EGCOE 2018: 60)⁴ and those that are “Above Permissible Quantum (APQ)” and “must reduce [their] emissions to the permissible quantum ‘within the shortest time feasible’” (EGCOE 2018: 61). The GHG reduction obligations of enterprises are then aligned with those of the country in which they operate (Principle 2.1), although countries are given flexibility to allocate enterprise reduction targets differently (Principles 3.1, 3.2, 4.1, 4.2). This approach aligns with distinctions between developed and developing countries that are fundamental to the climate regime even as they have evolved over time (UNHRC 2016: para. 43, 48). Notably, global enterprises are treated separately under Principle 5 as emerging trends place “special emphasis on the role, responsibilities and obligations of multinational enterprises” and many global enterprises outsource production to BPQ countries. Principle 6 further provides that controlling enterprises must ensure compliance of those under their control.

Enterprises Principles 7-11 focus on mitigation. However, the extent of reduction obligations may be limited by cost, and the purchase of offsets is acceptable, such as in the case of coal-fired power plants. The obligation to reduce applies to activities as well as products or services with excessive GHG emissions, absent offsets, unless these are indispensable in a least developed country context. Principles 12-13 provide that if emissions are not reduced, offsetting is permitted and a grace period may be contemplated. Overall, this appears to be at odds with a human rights approach which should allow no grace period, nor accept that positive contributions could offset violations

International Covenant on Economic, Social and Cultural Rights in the context of business activities (CESCR 2017).

⁴ However, if these countries “have accepted reduction obligations under the Paris Agreement or a subsequent amendment thereof, they are bound to honour their pledges”.

of human rights. Furthermore, Principle 16 suggests that where exceptional circumstances such as natural disasters occur, an enterprise may be exempt from reduction targets, yet it is unclear why powerful and well-resourced companies that fail to adequately anticipate a natural disaster should be exempt, particularly if the extent of the disaster is exacerbated by human-induced climate change.

Principle 17 contemplates that enterprises should take into account the GHG emissions of their suppliers where feasible, suggesting that these emissions are not routinely attributed to the enterprise. This may also be out of step with a human rights due diligence approach to responsibility under Principle 19 of the UNGPs.⁵ Guidance on disclosure, including of stranded assets, is provided in Principles 18-23, and goes beyond the Oslo Principles in extending those for whom disclosure is made to include consumers, the public, and employees.

Principles 8 and 24 provide that enterprises must conduct environmental impact assessment of major new facilities or expansions, including an assessment of carbon footprint, upstream and downstream effects and related mitigation opportunities, and potential future climate change effects. However, no explicit direction is given on what to do with this information, or whether the public should be consulted by the enterprise as part of the process (EGCOE 2018: 193-196). Moreover, consideration of the need for the project or alternatives to it that are less carbon intensive does not appear in the text. The Commentary does conclude by noting that human rights impact assessments, following the UNGPs, are “progressing rapidly” as an additional tool (EGCOE 2018: 198).

Principles 25-30 consider investors and financiers, including the obligations of banks engaged in project finance,

⁵ What precisely would be required of human rights due diligence in the climate context is unclear, although supply chain responsibility for GHGs could be viewed as the exercise of leverage across relationships in response to human rights due diligence. However, the authors of the Enterprises Principles did consider the UNGPs and related OECD guidance when developing the scope of this principle and came to a different conclusion.

pension funds, insurers and reinsurers, among others. Consideration is given to the financial implications of failing to adequately consider GHG emissions associated with a project or investment, the need to justify investment in non-complying enterprises, and the need for investors to play an active role in promoting compliance.

While open to critique especially for failing to consider remedy or accountability, the Enterprises Principles adopt a nuanced understanding of the nature of the international actors that include carbon majors. Rather than assuming that all sovereign states and all enterprises based in sovereign states are operating on an equal footing and bear equal responsibility, the Enterprises Principles make a noble effort to grapple with the complexities of common but differentiated responsibilities of states, carbon budget allocations between states, poverty, and development. The result is unfortunately highly complex, with much uncertainty in application, and does not clearly align with the UNGPs. It would be informative to learn the views of human rights NGOs on the Enterprises Principles, and especially their attempt to grapple with the complexity of differentiation. This is particularly pertinent in light of the latest Heede update in which three state-owned enterprises, Saudi Aramco (Saudi Arabia), Gazprom (Russia), and National Iranian Oil Co. (Iran), are placed in the top 5 of global greenhouse gas emitters since 1965 (Heede 2019). From a human rights perspective, should the climate change responsibilities of these state-owned enterprises from countries that are classified by the UN as developing be the same as US-based investor-owned enterprises such as Chevron and ExxonMobil?

2019 Safe Climate report

The Special Rapporteur on Human Rights and Environment, David Boyd, released the Safe Climate report in July 2019 for presentation to the UN General Assembly in October. This report confirms the existing responsibility of business enterprises to respect human rights as they pertain to climate change, specifically stating that businesses “must adopt human rights policies, conduct human rights due diligence, remedy human rights violations for which they are responsible, and work to influence

other actors to respect human rights where relationships of leverage exist” (OHCHR 2019b: para 71). Moreover, the Safe Climate report elaborates that the business responsibility includes the reduction of greenhouse gas emissions from activities, products, and services, while minimizing emissions from suppliers, and ensuring those impacted by business climate harms can access remedies (OHCHR 2019b: para 72). Notably, the Safe Climate report relies on the Enterprises Principles for these insights (OHCHR 2019b: note 90; Seck & Benjamin 2019). Beyond this, the Safe Climate report also provides that businesses should support public policies designed to effectively address climate harms, rather than opposing them (OHCHR 2019b: para 72).

These two paragraphs in the Safe Climate report that elaborate briefly upon the meaning of business responsibilities to respect human rights at risk from climate change, and the need for businesses to support state climate policy, provide the most elaborate OHCHR analysis to date on point. It is notable that the Safe Climate report relies on both the UNGPs and the Enterprises Principles. It is to be hoped that further clarity will emerge from the OHCHR, and from human rights NGOs, so that businesses that seek to address the climate and human rights impacts of their operations have access to meaningful guidance.

Conclusions

The human dimensions of climate change are increasingly in the news, as the world grapples with the ongoing failure of many states to effectively decrease greenhouse gas emissions so as to avoid climate crisis. The independent responsibility of businesses to respect human rights under the UNGPs provides a frequently overlooked and often misunderstood tool that must be called into play to prevent and remedy climate injustice. It is crucial that the independent responsibility of businesses to respect human rights, including those impacted by climate change, be taken seriously. Failure to do so inadvertently propagates the message that business conduct that contributes to the violation of human rights, including those associated with climate crisis, is acceptable in the absence of state regulation. It is not,

and existing tools should be emphasized and leveraged by human rights actors to ratchet up existing responsibilities of businesses to do their part as organs of society to alleviate increasing climate impacts on those who can least afford to bear them. Human rights due diligence guidance tools are being developed for businesses, perhaps most notably by the OECD, yet many fall short of integrating human rights responsibilities for climate change, even as they provide useful guidance for businesses on other related aspects such as stakeholder and rights-holder engagement (Seck 2018). This essay has briefly examined some key examples in the hope of providing ideas to inspire climate action today by both human rights actors and businesses themselves.

A common refrain from human rights NGOs is scepticism over ‘non-binding’ responsible business guidance tools, and a preference to devote resources to ‘binding’ solutions such as the business and human rights treaty. Yet it is crucial that human rights NGOs not ignore the emergence of business guidance tools in the climate context (and others) for many reasons. First, even if a ‘binding’ business and human rights treaty were negotiated that provided the potential for future effective corporate accountability, a treaty is only effective if a sufficient number of key states ratify and then implement it. The record of effective treaty implementation in the international environmental liability context is poor, and a quick glance at the climate regime should give even the most enthusiastic treaty endorsers reason to pause. If it has proven so difficult to reach effective agreement among states as to their own climate commitments, even before ratcheting them up to the necessary level to avoid climate crisis, how likely is it that a business and human rights treaty will ever be able to effectively address climate accountability?

Second, with regard to climate change, the time to enable preventative action is now. An increasing number of businesses are seeking guidance on how to be climate responsible actors, yet the human rights community has for the most part utterly failed to meaningfully engage in efforts to develop useful tools. Particularly at this moment in history, with the United States poised to withdraw from

the Paris Agreement on climate change, it is crucial that non-state actors, perhaps especially powerful transnational businesses, are encouraged and enabled to take meaningful human rights-respecting climate action, rather than wait for state action that may never come. The human rights community must step up, engage, critique, and guide, rather than ignore the potential of climate responsible business conduct as a vital preventative tool that can be mobilized now.

At the time of writing, the Working Group on Business and Human Rights has promised to develop an information note on BHR and climate change, to be released in 2020 (OHCHR 2020). This is a crucially important opportunity to provide clarity on the meaning of human rights respecting business conduct in a time of climate crisis.

The use of human rights arguments in climate change litigation and its limitations

Human rights arguments are increasingly being made, and human rights remedies increasingly being sought, in climate change litigation. While relatively few cases have been argued on human rights grounds so far, the trend is continuing and accelerating, with some striking results. However, human rights remedies offer little, if any, compensatory relief for the impacts of climate change, and few means to deter further harm. So why use them?

The use of human rights arguments in climate change litigation

In recent years, litigants around the world have increasingly tried to push the boundaries of the law by filing test cases to prompt state and corporate actors to reduce greenhouse gas emissions, or to obtain redress for the impacts of climate change on persons, property, or the environment. The use of human rights law as a gap-filler to provide remedies where other areas of the law do not is not new. It is thus hardly a surprise that human rights arguments are increasingly used in climate change litigation. While relatively few climate cases have been argued on human rights grounds so far, the trend is continuing and accelerating, with some striking results.

In August 2019 there were 32 human rights cases listed in climate change litigation databases curated by the

* This piece builds on her contributions to Savaresi & Hartmann (2019); Savaresi & Auz (2019); and Savaresi (2019). The author gratefully acknowledges the research assistance received from Marisa McVey, Chloe Abbott and Urenmisan Afinotan in the preparation of this piece.

Sabin Centre (Columbia University) and the Grantham Institute (London School of Economics). These cases preponderantly involve states (e.g. citizens suing governments), with only three involving non-state actors only (e.g. citizens suing corporations).

This focus on states is to be expected, given that under human rights law the main duty-holder is the state. As discussed elsewhere in this volume, in recent years, human rights bodies have done much work to clarify the content of states' human rights obligations in relation to climate change. This interpretative work has clearly shown that obligations associated with both substantive human rights (e.g. the right to life, adequate housing, food, and the highest attainable standard of health) and procedural human rights (e.g. the right to access to remedies and to take part in the conduct of public affairs) take on a specific character in relation to climate change. Most saliently, states have specific obligations to "enable affordable and timely access to justice and effective remedies for all, to hold states and businesses accountable for fulfilling their climate change obligations" (OHCHR 2019b: para 64).

Even though conventionally greenhouse gas emissions are attributed to states, recent studies suggest that a group of corporations are historically responsible for the lion's share of global emissions (Ekwurzel et al. 2017; Frumhoff, Heede & Oreskes 2015; Heede 2014). After the adoption of the Paris Agreement in 2015, many companies announced voluntary measures to tackle emissions, but there has been a glaring gap between words and action. In fact, evidence suggests that many fossil fuel companies have

continued to lobby against climate change action, to spread disinformation and to support climate deniers (Union of Concerned Scientists 2018). These activities have come under increasing scrutiny in light of recent developments in international,¹ regional² and national³ law, which acknowledge corporate responsibilities for human rights violations, and impose at least some accountability upon corporate actors for these.⁴

Most human rights cases concerning climate change remain ongoing at the time of writing, and a handful have been successful. Yet, this trend is remarkable if one considers that, just ten years ago, a report of the Office of the High Commissioner for Human Rights (OHCHR) noted that “while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense” (OHCHR 2009: para 70). The report cautioned that it would be “virtually impossible to disentangle the complex causal relationships” linking emissions to human rights violations, and that in all events the adverse effects of climate change are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred (OHCHR 2009). These caveats were echoed by the future UN Special Rapporteur on Human Rights and the Environment, John Knox, who warned that, if there was scope to recognize the negative

obligation to refrain from causing harm, this would in all events merely “treat climate change as a series of individual transboundary harms, rather than as a global threat to human rights” (Knox 2009b: 211).

So what has changed? In the last few years human rights arguments have been increasingly used to prop up those based on private or public law, to call for greater state and corporate efforts to reduce greenhouse gas emissions. Furthermore, applicants have tried to use human rights remedies as an avenue to redress personal injury and property damage associated with climate change, which can be framed in terms of human rights violations. The success of human rights arguments depends upon whether a victim can substantiate a claim that a duty-bearer has failed to comply with human rights obligations. Human rights arguments associated with climate change can thus be formulated in two main ways: applicants may complain that failure to act (e.g. a failure to adopt and/or implement climate change legislation) has resulted in human rights violations; or, conversely that certain actions (e.g. permits or licenses to extract fossil fuels or log forests) have led to human rights violations. The sections below look at how these arguments have been used in climate change litigation, starting with cases where applicants have used human rights arguments to challenge governments and corporations for failing to reduce greenhouse gas emissions.

Human rights complaints about failure to reduce emissions

Human rights arguments in climate change litigation have so far largely been used to support complaints over states’ – and, to a more limited extent, corporations’ – failure to reduce greenhouse gas emissions. Courts and human rights bodies around the world have increasingly been asked to consider the human rights implications of states’ action (e.g. licenses for oil extraction) (Oslo District Court 2018) or inaction (e.g. insufficient ambition in targets enshrined in law and policy) (The Hague Court of Appeal 2018). Two landmark decisions taken in 2018 have shown how decisive human rights arguments may be.

1 See UNHRC (2011) and UNHRC (2014).

2 Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Text with EEA relevance) [2014] OJ L330/1. See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (adopted 27 June 2014, not yet entered into force), art 46.

3 See e.g. the UK’s Modern Slavery Act (2015), the French Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (‘Loi du Vigilance’) and Décret n° 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale.

4 See e.g. ICSID (2016) *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No ARB/07/26, Award of 8 December, 2016; The UK Supreme Court (2019) *Vedanta Resources PLC and another v Lungowe and others*, Judgement of 10 April, [2019] UKSC 20.

In the first, a group of Colombian youth successfully challenged the Colombian government for failure to tackle deforestation in the Amazon, thereby breaching several human rights enshrined both in the Colombian Constitution and in international instruments (Supreme Court of Justice of Colombia 2018).⁵ In the second, the Urgenda Foundation and a sizeable group of citizens successfully challenged the Dutch government for not taking sufficiently ambitious action to reduce greenhouse gas emissions (The Hague Court of Appeal 2018). While the Dutch case had in the first instance been decided on the basis of administrative and tort law (The Hague District Court 2015), the Court of Appeal set aside a restrictive interpretation of victimhood and framed the state's duty of care also with reference to rights enshrined in the European Convention on Human Rights – such as the right to life and the right to respect for private and family life. These victories have encouraged litigants and human rights advocates to use similar arguments before national courts – for example against the Canadian Government (Superior Court of Quebec 2019) – and before international human rights bodies – for example against Australia (Client Earth 2019).

These human rights complaints have started to target corporations as well. In 2019 civil society organizations in France (Notre Affaire à Tous 2019) and the Netherlands (Milieudefensie 2019) have asked national courts to declare that fossil fuel corporations' contribution to climate change violates human rights law.

Applicants are also becoming more ambitious. In the so-called *People's climate case*, applicants from Kenya, Fiji, Portugal, Germany, France, Italy, Romania, and the Sami youth association Sáminuorra (CURIA 2018), asked the Court of Justice of the EU (CJEU) to set aside and replace three EU climate law instruments, on the basis of human rights enshrined in the Charter of Fundamental Rights. So far, the applicants have failed to persuade the CJEU to move beyond its restrictive interpretation of the threshold to access judicial review, and the case

was dismissed in 2019 because of lack of standing but is currently under appeal. The *People's climate case* is nevertheless significant, in that it challenges a package of climate legislation, arguing that implementation would lead to human rights breaches, not only of EU citizens, but also of those residing outside the EU.

Far from “treating climate change as a series of individual transboundary harms”, therefore, applicants in the cases above are arguing that climate change should be averted because it systematically threatens the enjoyment of human rights. These developments show not only that human rights arguments are being increasingly deployed, but also that demands associated with the protection of human rights are becoming bolder, and attempt to sanction harm that is predicted to happen in the future – and thus affect future generations – or occurring outside of the bounds of a state's territory. At the same time, a new front in litigation has opened, concerning the impacts of climate change.

Human rights complaints about the impacts of climate change

While so far no court has found that particular emissions relate causally to adverse climate change impacts for the purpose of establishing liability,⁶ litigants are pushing the boundaries of private, public, and administrative law to obtain redress for damage to persons, property and/or the environment associated with climate change (Peel & Osofsky 2018; Setzer & Vanhala 2019).

It is presently difficult to obtain redress for climate change harms. Existing liability schemes scarcely seem fit to address harm associated with the impacts of climate change. As a matter of scale, climate change is predicted to cause unprecedented damage to property, persons and the environment. This damage is predictable, but only to the extent that we know it will happen, not where and when. Thus, extant liability and insurance schemes need to be adapted in order to address the complex restorative

⁵ Hereinafter *Future Generations v. Colombia*.

⁶ See e.g. *Saúl Luciano Lliuya v RWE AG* (2015), Case No. 2 0285/15 of the Essen Regional Court, Germany (pending).

and distributive justice considerations associated with the impacts of climate change. Before this happens, human rights arguments may be used to fill the gap.

Human rights remedies are not designed to specifically redress environmental damage. They have, nevertheless, historically been used as an avenue to address personal and property harm associated with various forms of pollution or environmental degradation, especially where no other remedies are available (Inter-American Commission on Human Rights 2010; Council of Europe 2012). In general, human rights are helpful because they are widely recognized in both international and national law, as a set of basic rights and freedoms that belong to every person. The obligations associated with the protection of human rights may be enforced both nationally and internationally against states and – to some extent – non-state actors, and, in certain circumstances, in an extraterritorial context. The issue is, therefore, to establish when and how they can be used in relation to the impacts of climate change.

As recounted above, in 2009 the OHCHR specifically cautioned that qualifying the effects of climate change as human rights violations poses a series of technical obstacles, concerning the jurisdiction to adjudicate human rights complaints associated with the impacts of climate change; how to attribute responsibility in terms of causality, retrospectivity, and apportionment; and what may be regarded as adequate remedies for human rights violations associated with the impacts of climate change (OHCHR 2009: para 69-70). Yet, recent litigation indicates that these obstacles may not be insurmountable.

The historical contribution of state and non-state actors to greenhouse gas emissions causing climate change is increasingly well documented, and advances in scientific knowledge are making it easier to trace causal connections between particular emissions and the resulting harms (UNHRC 2016: para 36-37). For example, the Athabaskan people have petitioned the Inter-American Commission on Human Rights, arguing that Canada has breached its human rights obligations by causing significant adverse impacts in the Arctic, by failing to regulate emissions of

black carbon, which affect Athabaskan communities within and without Canada's territory (Earth Justice 2013). Similarly, following the widespread loss of life and harm to property and persons associated with increasingly extreme weather events, civil society organizations asked the Philippines Human Rights Commission to investigate the responsibility of the world's largest corporate emitters – so called Carbon Majors – for human rights violations, or threats thereof, resulting from the impacts of climate change (Greenpeace 2015).

These complaints provide an opportunity to see whether the arguments made in 2009 by the OHCHR on the justiciability of human rights violations associated with the impacts of climate change still stand. For example, should the Philippines Human Rights Commission find that the Carbon Majors' are responsible for human rights violations resulting from the impacts of climate change, this would be a primer and could have repercussions on the use of human rights arguments in ongoing climate change litigation against the Carbon Majors elsewhere. As mentioned above, in 2019 Friends of the Earth (Netherlands), six NGOs and around 400 citizens sued Shell for breaches of the duty of care associated with its contribution to climate change and its continued investments in fossil fuels. Similar to *Urgenda*, the applicants have relied, amongst others, on the right to life and the right to respect for private and family life, home and correspondence recognized by the European Convention on Human Rights.

The outcome of the *Carbon Majors inquiry* may therefore resonate well beyond the Philippines. For the time being, the inquiry has already set a significant precedent, by showing that a national human rights institution may look into the responsibility of corporate actors headquartered outside of the territory of state. The inquiry may furthermore establish that corporations may be held responsible for human rights violations associated with the impacts of climate change and even open the way to compensation through subsequent legal action, thus marking another milestone in climate change litigation worldwide.

The limitations of human rights

As the examples above show, human rights law arguments are playing an increasingly prominent role in climate change litigation. For lack of better remedies, human rights arguments are being used to supplement regulatory action and change state and corporate actors' behaviour, and to help address the complex restorative and distributive justice questions associated with climate change.

This is, however, an area where human rights law also presents clear limitations. Human rights law typically provides declaratory relief to name and shame human rights abusers, but this makes little difference if it is not followed by action to prevent further harm and to remedy the harm caused. The *Urgenda* case provides a hopeful example of how litigation may be used to put pressure on the government to take legislative action on climate change. *Future Generations v. Colombia*, however, clearly shows how human rights remedies offer limited means to deter further harm: in spite of their much acclaimed court victory, the applicants have failed to halt forest loss in Colombia, which has reportedly continued unabated (Ardilla Sierra 2019).

In the *Carbon Majors inquiry*, the powers of the Philippines Human Rights Commission rest with the domestic authorities' limited powers to affect the future behaviour of the Carbon Majors. But even the enforcement of court judgements is not to be taken for granted, and the history of human rights law is full of pyrrhic victories, especially in the environmental context (Gilbert 2018). For almost forty years (350.org 2019), coal power plants in the Mugla region of Turkey have continued to severely affect the quality of life for local inhabitants (Climate Action Network 2018), despite the recognition of widespread human rights abuses, including by the European Court of Human Rights (ECtHR 2005). Similarly, victims of severe human rights abuses associated with oil extraction in the Niger Delta are still awaiting for remediation of the harm

caused to their lands, water and livelihood (Friends of the Earth International 2019), in spite of multiple court victories before national, regional and international tribunals.⁷

Human rights law is no replacement for effective legislation concerning climate change, and human rights remedies are no replacement for tort-like liability for climate change impacts. There are dangers too, associated with clashes between human rights claims, that may be relied upon to protect a quality of life that imposes unacceptable climate costs on society (Pedersen 2011). For example, human rights arguments have been used to resist the establishment of wind farms (Peeters & Schomerus 2014; Peeters & Nóbrega 2014), highlighting the potentially complex, layered, conflicting claims when it comes to the protection of different human rights.⁸

Yet, past experience suggests that successful human rights complaints can help to bring about a change in attitude by courts and lawmakers. By highlighting principles of universality and non-discrimination, the rights of future generations and of those living outside a state's territory, human rights arguments in public interest litigation can contribute to engendering a momentum to deal with one of the most intractable challenges yet to face humankind.

The viability of public interest litigation reliant on human rights arguments depends on both legal and social variables (Anderson 1998: 21). It requires that standing rules be interpreted in a way to enable individuals or groups to be heard, and that the judiciary is independent and sympathetic. Under human rights law, victims are

⁷ Such as *Gbemre v. Shell Petroleum Development Company Nig. Ltd. and 2 others* Suit No. FHC/B/CS/53/05; *Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah* (2001) 11 NWLR (Pt.723)168; *Social and Economic Rights Action Centre (SERAC) & Anor v Nigeria* (2001) AHRLR 60, Africa Commission on Human and Peoples' Rights, Communication 155/96; *The Bodo Community v. Shell Petroleum Development Company of Nigeria Ltd* (2015) EWHC HT-2015-000241.

⁸ See *Fägerskiöld v Sweden*, European Court of Human Rights, Application no. 37664/04, Decision as to Admissibility; and, *Vecbaštika and Others v Latvia*, European Court of Human Rights Application no. 52499/11 (pending).

normally saddled with a less stringent burden of proof, when compared, for example, with tort law.⁹ Applicants in *Urgenda* and *Future Generations v. Colombia* have convinced courts to expose governmental inaction, and to order states to do more to tackle climate change. These decisions relied on a novel approach to the interpretation of human rights vis-à-vis climate change law obligations. Using human rights law has also enabled petitioners to formulate complaints, such as those in the *Carbon Majors inquiry*, which would have not been possible by making resort to tort law.

So far, some significant milestones have been achieved and the boundaries of the law have already been shifted. Human rights arguments have been used not only to complain about actual harm, but also about future harms, caused by states, as well as by corporate actors, and even in an extraterritorial context. We have therefore already gone a long way, compared with where we were only ten years ago, when the OHCHR report made its first assessment of the state of play.

The successes achieved thus far are likely to continue to inspire others to use human rights arguments to put pressure on state and corporate actors, both to increase ambition in combating climate change and to redress harm caused by its impacts. The outcome of pending complaints may further embolden applicants or suggest new avenues to test the full potential of human rights arguments. The advantages of taking a human rights approach to the matter of climate change are, eminently, that it translates climate change concerns in terms of obligations owed directly to individuals; and, relatedly, that it provides access to remedies that may not otherwise be available.

Much more could be done going forward. Most saliently, human rights law may provide access to remedies at the domestic and, potentially, at the international level to complain about breaches of human rights associated with climate change. Both at the national and at the

international level, human rights bodies may be systematically used as institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures. Before national courts, human rights arguments may be used to put pressure on state and corporate actors, to increase ambition on climate change and to redress harm caused by climate change.

Ultimately, human rights are no silver bullet and there are limits to their capacity to redress human rights abuses associated with climate change and to address their root causes. Human rights law is nevertheless an important complement to climate change law, as it currently stands. As Humphreys noted already in 2008, human rights continue to “occupy much of the space of justice discourse and therefore represent an ‘essential term of reference’ to address justice and equity questions in the context of climate change” (Humphreys 2009: 45). One just has to be aware of their limitations.

⁹ See e.g. *Tătar v. Romania*, App No 67021/01 (ECtHR 5 July 2007) [107]-[124].

Delayed and denied: climate inequity and human rights

The delay between the causes of climate change and its effects creates a space within which denial and injustice have flourished. Climate law relies on 'equity' to address climate injustice: this may be buttressed by human rights, resurgent in the face of increasingly daily violations.

The bubble of delay

In his recent book, *The Progress of this Storm*, Andreas Malm claims that the felt reality of climate change has reawakened a sense that we are living-in-time. By 'time' he is not referring to daily or seasonal cycles, but to lines of putative historical progress. As the last century ended, it was plausible to consider that history had, in a sense, come to a halt. Market liberalism had apparently won the centuries-long battle of ideas and was installing itself across the globe. Relatedly, perhaps, human rights too (in a trajectory that accelerated with the founding of Amnesty International in 1961) were becoming a dominant language of justice across the world. The relationship between these two forces – human rights and market liberalism – was perhaps not initially very clear: were market 'freedoms' consonant with human rights or did they constitute a threat (Moyn 2014)?

On Malm's telling, climate change reawakens the category of time precisely because we no longer know what our destination is. Whether we approved of it or not, we appear no longer to be secure in a universal vision of a market machine that metabolizes the world's resources ad infinitum. Even if some, possibly most, contemporary climate narratives cling to the vision of an expanding

global economy capable of conjuring a technological escape from our climate constraints (think of the 'Green New Deal') – and even were such a vision feasible – the spread of a liberal global market has, with contemporary climate realities, lost the sheen of inevitability acquired at the close of the cold war. There are real stakes.

"History," writes Malm (2018:11), "has sprung alive", as the carbon consumption of the past – the immediate past flowing by us, as well as its centuries-long tail – determines the future in ways that are both intractable and unpredictable.

Climate change makes the future both intractable and unpredictable because the cumulation of burned carbon over past centuries builds in an atmospheric effect the extent of which will only be felt and appreciated in future, with the passage of time. There is, in other words, a delay between the cause – the consumption of fossil fuels (primarily) – and the effect – the storms, heatwaves, droughts, floods, rising seas and sinking islands, whose frequency and intensity will, on every account, increase, even as their precise timing and location will remain largely unknowable. There is delay built into climate change, and it is a delay that is, moreover, inhuman – in that it is not subject to human intent, unresponsive to human time-management, and unconcerned with human expectations and human pain. History reawakens as a process of change-in-time where the stakes of change remain up for contest. However, unlike the high modern period with which Malm contrasts the present, in climate change the contest is not (or not obviously – but I will pick this up below) between competing ideas about law,

economy and government; it is rather a contest between competing interpretations of the nature of the delay itself. *What is unfolding? How quickly? Where? With what effect? Can it be stopped?*

The bubble of denial

In this knowledge-contest over the nature of the delay, there are a spectrum of views, some of which are characterizable as denialist. But denialism is not exhausted by the plaintive and, in fact, dwindling claim that climate change is not ‘real’. Rather degrees of denialism run throughout the entire climate experience – if by ‘denial’ we mean an unwillingness to face the truths serially put before us by the practitioners of the ‘best available science’.¹ In conditions of climate change our daily lives involve constant exercises in denial, requiring us to ignore both the myriad small contributions we ourselves make to the problem through our everyday choices and activities and the sheer scale of the mounting pain these choices of ours are building towards. We are in denial both about how much has to be done to check the advancing tide of heat, and about how little is actually being done. We are in denial about the vanishingly tiny likelihood that we can retain our lifestyles and global ‘growth’, just as we are in denial about the huge costs to be borne to avoid the far greater costs climate change will otherwise exact. We are in denial about our personal and collective responsibility, in high-emitting countries, for the havoc wreaked and lives and livelihoods lost in vulnerable countries. We are in denial about our past, which has brought us to this impasse, our present, in which we continue to fail to address it, and our future, which is bleaker than we are ready to imagine. We are in denial about the fact that our laws and governments are not working for us – for the many of us who have and will suffer climate change without having contributed much to it – and we are in denial about our power to make them do better.

All this denial is also, or appears to be, enmeshed in delay. In the bubble of delay, the incontrovertible causal

connection between the wind we are sowing today – the extraordinarily destructive seeds of our everyday lives – and the hurricanes we will certainly reap, feels blurry, loose, deniable. It hasn’t happened yet: it might not happen at all. Or: in the temporal gap between cause and effect, we might figure out how to avert the effects altogether. In its starkest form, this fantasy is the dream of geoengineering – but it can be tracked in every narrative proposing technological fixes to climate change, and these today include all available scenarios in which global warming peaks at 1.5°C above preindustrial temperatures (see Rogelj et al. 2018). The delay, in short, has become our lifeline of denial, allowing us to believe in potential futures which do not and will not exist. Ignorance breeds inaction.

Responses delayed, responsibility denied

At some level, it will have been clear, I am invoking the old adage ‘justice delayed is justice denied’. It is no longer controversial that climate change brings about grave harms and injustices, and that many of these are best understood as human rights violations. People are losing their lives, homes and livelihoods due to storms whose frequency and force would have been vanishingly unlikely were it not for manmade climate change.² Climate change already brings water scarcity and food insecurity for hundreds of thousands of persons; health is threatened, homes are lost, the less well-off everywhere are more vulnerable than the well-heeled.³ Climate change greatly increases the likelihood of conflict and is already triggering mass movements of people from its related impacts. All this is set to get much worse.

2 See the testimony by Myles Allen at the proceedings of the Philippines Commission on Human Rights National Enquiry on Climate Change, hearings held at the London School of Economics, 6-7 November 2018. Available at: <http://www.lse.ac.uk/GranthamInstitute/event/inquiry/>.

3 See the various reports of the UN Office of the High Commissioner for Human Rights, especially those of the Special Procedures on Health, Housing, Children’s Rights, Extreme Poverty, and the Environment. Available at: <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>.

1 The term is from the Paris Agreement, Article 14(a).

The question of delay therefore has to do not only with the space of responsibility within which climate harms take place, but also with the time of redress for the extensive human rights violations to which climate change is now giving rise. The two are presumably related. Does it matter for ‘climate justice’ that climate harms appear in what I have called the ‘bubble of delay’ – that they were not, for example, pre-empted, given that they were predicted far in advance? Does it matter whether ‘redress’ for these harms come later rather than sooner and by how much – or perhaps the question should rather be: is it possible to expedite redress? It is, after all, a simple matter to observe that the longer we put off effective climate action, the worse the human rights consequences are. It is less simple to identify the frame within which climate action is persistently deferred and to relate this to the available frameworks of justice and redress that characterize ‘human rights’ in our usual understanding of the term. Quibbles over ‘responsibility’, as a matter of science, stand to delay redress, as a matter of law. Indeed that is, presumably, the point.

Equity, justice, human rights

For my title I have chosen the term ‘climate inequity’ rather than ‘climate injustice’ (or, indeed, ‘climate justice’) because ‘equity’ is a term of art in climate law (appearing in both the UNFCCC and in the Paris Agreement) whereas ‘justice’ is not. Neither term is transparent, and the particular tradition that joins ‘equity’ to ‘justice’ (deriving from Aristotle’s *Nichomachean Ethics*) does not easily encompass the many strands of thought and political activism that exist today under the banner of ‘climate justice’. Further, in my title, I have linked ‘climate inequity’ to human rights. The consonance of these two terms – equity and human rights – may appear self-evident, but in fact in the vast literature on the legal principle of ‘equity’, very little mention is made of human rights. If the intuition that human rights are relevant to climate equity is correct, it needs to be shown rather than presumed.

So what is equity? Most accounts begin with Aristotle (2012), for whom equity (*epikieia*) is an essential element

in – indeed a superior form of – justice, a vital means to compensate for the flawed generality of law when applied to particular cases, through the exercise of discernment or discretion on the part of an arbitrator or judge. The Greek term *epikieia* translates as ‘decent’ or ‘fitting’ – and Aristotle extols the ‘equitable man’ who exercises equity in daily life – through letting go of legal rights, for example, in the interests of empathy or harmony (Aristotle 1939). The point is equity involves *not insisting on the letter of the law*. As Cicero would later put it, equity is a recognition of the potential for harm in overly literal legal interpretation: *summum ius summa iniuria* – the more law the more harm (Shanske 2005). On its face, this early tradition does not appear promising for a theory or practice of human rights. But it clearly holds within itself a kernel of sympathy for the individual human which will blossom in time.

This kernel finds some fruition in the Roman law tradition, where equity (*aequum; aequitas*) provided a channel for what would gradually become known as natural law principles – notions of fairness and equality that direct lawmakers and adjudicators to ensure basic equalities under law (Schiavone 2012). There are no slaves under natural law, the Roman jurist Ulpian famously wrote around CE 200; slavery is an institution of the positive law of nations (Mommsen et al. 1985). In a powerful tradition running through late Roman law (‘law is the art of the equitable and the good’),⁴ and into medieval scholasticism (‘equity is justice tempered by sweet mercy’),⁵ equity becomes a marker of how law is to be done, presuming an underlying universal equality between the subjects of law, a technique for bridging the positive law to something that would (later again) be termed natural justice. Indeed ‘equity’ tells us what this kind of justice might mean for law: equality, non-discrimination, fairness. Something that is ‘due’ each person regardless of status or wealth – something universal and prior to the social or political. And so by the time it is revived in

4 Ulpian, quoted in Mommsen et al. (1985).

5 The glossarist Hostiensis, in an oft-quoted definition, reworked by Jean Gerson and Christopher St. Germain. See Rueger (1982).

medieval canon law, equity has become a principle of compassion, of regard for the vulnerable, a proximation of God's own justice and mercy, and one carrying real force (Lefebvre 1963).

It is shortly after this point, as the medieval worldview goes into decline as Europe encroaches on the world, that we might begin to associate equity with rights – natural rights, in their nascent early modern articulation. This may be understood in part as a humanist embrace of the principle of equity as a kind of 'natural justice', while reacting against its medieval association with mercy. As Martha Nussbaum points out, people can be treated equitably without invoking mercy (Nussbaum 1993): indeed the whole point of natural or human rights is they do not engage mercy: they provide a floor of basic terms of respect due to all without distinction *as of right*. The line would appear to run from Jean Gerson – the medieval French scholar credited by Richard Tuck with the earliest articulation of the notion of natural individual rights (Tuck 1979) – through the English common lawyer Christopher St. Germain, whose 1530 textbook was for centuries the principal English authority on equity (see Rueger 1982), and into the heady ferment of the English civil war period of the mid-17th century (see Fortier 2005: 159-179). There among the radical activists and pamphleteers exist many rights- and equity-based arguments for root-and-branch law reform, confronting the injustice of an increasingly absolutist monarchy with regular invocations of inter-related principles: equity, reason, justice, conscience, natural law and right. These terms recur in many writers of the time, sewn closely together in many cases, such as the Calvinist John Warr (Hill 1975: 269-276).

For Warr – to choose one example from an extensive group – the gap between the positive law and natural justice was stark and critical.⁶ "At the foundation of governments," he wrote in his *Laws of England*, "justice was in men before it came to be in laws" (Sedley & Kaplan 1992:

91). But over time, "laws, like swords, came to be used against those who made them... Thus the law became anything or nothing at the courtesy of great men and bended by them like a twig" such that "laws upon laws do bridle the people and run counter to their end". Law, which ought to be the guarantor of freedom, has, in 17th century England, succumbed, says Warr, to power: it must be "reduced to its original space which is the protection of the poor against the mighty" (Sedley & Kaplan 1992: 92). Equity plays a starring role in Warr's writings, as "the divine principle", which is the "clear reason and understanding of all things". "Reason," Warr adds, "is the measure of all just laws" and the "proper fountain of good and righteous laws, a spirit of understanding big with freedom, and having a single respect for people's rights". When equity is restored to law, Warr says "we shall all then stand on even ground, in a perfect level, co-ordination and parity (...). This is the fall of worldly interests" (Sedley & Kaplan 1992: 33-4). Warr's work is a reminder that today's delay-and-denial is not merely a question of science, but is also, in fact, one of law and governance: who should the law serve and how?

For its time, this is less eclectic than it may sound today: in the contemporary writings of Francisco Suárez, Hugo Grotius and Thomas Hobbes – the great theorists of natural rights – equity will repeatedly appear, often obliquely, as the ultimate backstop of a natural law, associated with the superarching justice and reason of God. Warr's particular association of equity and rights was shared by his contemporary radicals Gerrard Winstanley and Samuel Rutherford, both of whom find 'equity' as the essential element in a law that underpins 'rights' that were not themselves codified.⁷ This association was in fact the culmination of the centuries-long emergence of natural right principles in medieval legal writing, where 'natural equity' provided the conceptual means to judge the 'rightness' of positive law (Tierney 1997: esp. 131-169).

6 Others invoking this family of terms include Samuel Rutherford, John Harrington, the Levellers William Walwyne and Richard Overton, and the Digger Gerrard Winstanley as well as many anonymous pamphleteers.

7 See Rutherford's *Lex Rex* (1644) and Winstanley's *The Law of Freedom in a Platform* (1652).

But if this story is right, what then happened to the association between equity and right? Around the same time Warr was writing, Thomas Hobbes took a similar set of associations in a very different direction, placing equity above a sovereign who is answerable to God alone. The sovereign, in exercising his right of judgement, may apply mercy grounded in equity, but he is famously not accountable to the people on the use of this power. The English Chancery court was an in-principle locus of the exercise of this sovereign authority – in its origins, the site of the king’s conscience. This view had been recently confirmed in the pivotal 1616 *Earl of Oxford* case, in which it was held – following an argument on these lines put forward by the Stuart King James I himself – that the Court of Equity took precedence over the common law courts (Fortier 1998; Ibbetson 2014). In both James I’s argument and Hobbes’s, equity is associated with natural rights – but these are not necessarily ‘human rights’, rather they comprise or presume the ‘natural’ higher (or retained) right of the sovereign (Cooper 2014; Tuck 1992). For Hobbes, of course, natural individual rights are precisely those which, with the rest of natural law, must be given up in the making of a social contract to preserve peace by vesting power in a (rights-retaining) sovereign.

Hobbes was to win this war of ideas, at least insofar as the radical power of equity was buttoned up behind the veil of sovereignty. In England, equity disappeared into the Chancery. By the early 19th century, equity referred to a collection of relatively random, though rigid, practices in various discrete areas of law, without any clear unifying theme (except perhaps as means to avoid taxes) other than their co-existence within the Chancery’s former jurisdiction, as F.W. Maitland tartly observed (2011). By the late 20th century, through the ever-innovating vehicle of the trust, equity law concepts were driving a global financialization implicated in the financial crash of 2008 (Worthington 2009). The contemporary common law notion of equity has little on its face to offer either climate justice or human rights. By contrast, the much older root tradition which gave rise to it now seems more relevant than ever: equity as a concrete vehicle for righting felt injustice.

The roots of climate justice

Given the richness, longevity and durability of the premodern concept of ‘equity’, perhaps it is unsurprising that the notion it provides of a direct channel to ‘justice’, beyond law, is alive and well, and indeed retains a powerful hold on the collective imagination. This ancient idea certainly lies at the heart of debates about climate equity today. Equity is, for example, the guiding principle behind the Stern Review’s controversial choice of a low discount rate, enabling its famous and influential statement that it would cost less to deal with climate change now than in future (Stern 2006). The point there was to avoid what I called above the bubble of delay – and therefore the associated harms – altogether. Equity reappears in discussions today over the carbon budget and nationally determined contributions under the Paris Agreement, in discussions over the institutional architecture of REDD+, of the CDM, and of carbon markets. In each case, its work is to recognize the differential contribution of different actors and to provide some protection for the most vulnerable: justice tempered by sweet mercy...

And here it is perhaps easy – given the prehistory I have sketched above – to see how this resurgent notion of equity in climate law might latch very easily onto the idea of human rights, itself a curiously natural law phenomenon in a positive-law-oriented world (law, we might say, as the art of the equitable and the good). On most tellings, modern human rights have emerged and imposed themselves on the world as a response to a broad range of felt physical (from Greek *physis*, ‘nature’) inequities over time: slavery, torture, genocide. An appeal to human rights proposes we accept their intuitive appeal to justice and grounds this acceptance in the existence of a broadly accepted list of internationally recognized rights, themselves forged in a visceral response to the horrors of the second world war, and since subjected to significant testing and interpretation.

Across their long histories, then, both equity and human rights share a secret debt to natural law, and a yearning assumption, within that context, of radical universal equality. But however intuitive this connection may

appear, it is rarely made explicitly today. Climate law refers to ‘equity’ but not justice, and the single reference to human rights (in the Preamble to the Paris Agreement) clarifies little. Climate equity has generally been interpreted to refer to the relative distribution of the costs and benefits of climate policy options between ‘developed’ and ‘developing’ countries (Okereke 2010). This interpretation of ‘equity’ is due to the particular context in which the term arose in the original UNFCCC text of 1992 – devised, as is well known, to circumvent entrenched political blockage and achieve climate agreement (Grubb & Paterson 1992). In recent writings on equity we begin to find explicit mention of human rights (Fleurbaey et al. 2014; OHCHR 2015; Allen et al. 2018). But the concepts are closely connected in a much broader literature.

A grounding element of this notion of equity is ‘historical responsibility’. States have ‘differential’ responsibility to address climate change, on a widely held reading, because they have not all contributed equally to the problem in the first place. There are, on one hand, states (and not just states) that are largely responsible for having caused the problem and, on the other, states (and, again, not just states) who are or will be affected by it though they have contributed little to it. The historical delay between long-term emissions from some and future effects for others is, in short, central to the notion of climate equity. And by corollary, equity is conceived as a means of redressing the injustice implicit in that delay – coupled with the broader fact that the world’s poorer postcolonial countries continue to suffer the effects of the trajectory that brought prosperity to the ‘great powers’. Climate injustice, on this reading, arrives on top of, and is intimately connected with, a longer historical delay, the egregious injustices of colonialism and the slow progress in surmounting them (Humphreys 2014).

Unsurprisingly, this entire edifice of remedial equity is itself frequently and repeatedly denied. The existence and relevance of historical responsibility has never been accepted by the United States delegates to the UNFCCC, for example. The notion that developed and developing country blocks have or should have differentiable obligations remains contentious and the idea that one group of

states ‘owes’ compensation for harms in other states has been vigorously refuted. Unlike climate science denialism, this *legal and ethical denialism* is not marginal – it does not struggle for respectability – it is much rather mainstream (though far from universal). The debates nevertheless follow a similar trajectory: what is self-evident to some is hotly contested by others, and those contestations, while pitched as politically or ethically impartial, nevertheless look to be normative or crypto-normative. The blockage in reaching common principles for action results in a blockage on action; the principal beneficiaries of this delay in acting are those who stand to lose most from effective action: the purveyors of fossil capitalism. The result is the entrenchment of delay. Denial reinforcing delay. Delay denying justice.

Tides rising: human rights?

It is here that human rights may appear to supplement equity today. For human rights harms that were once speculative and predicted have now become real and palpable. It is the case, as I write in 2019, that with the surging instances of concrete climate-related human rights violations, courts and quasi-judicial human rights bodies are being petitioned – and hundreds, indeed thousands, of actors are embarking on the long road to seek redress through the courts. These cases are not so far meeting with much success, but someday they might, some of them at least. And courts are not the only locus of surging discontent with the state of our existing law. As the swell of felt injustice grows into a tide, so the delay itself fuels a growing tsunami of ‘justice denied’, and for each cupful of ‘justice’ acknowledged in the courts another ocean of denial rises close behind.⁸

The emerging law of climate equity cannot and will not by itself bridge the expansive sea between climate justice, however we conceive it, and a law that remains fundamentally supportive of the pollutive and distributive effects of climate change. Rather it seems we must await

⁸ On November 6, 2019, for example, two English High Court judges ruled that a blanket police ban on Extinction Rebellion protests was unlawful ([2019] EWHC 2957 (Admin)).

the rise of the drowning tide to trigger the desperate fury of self-proclaimed rights by those of us – humans – in whom they have been invested and are being violated. For this has been the history of human rights. As with the English civil war and the aftermath of the second world war, the sheer scale of felt injustice heads towards a visceral level, triggering a radical response. So when Greta Thunberg calls for equity in climate action, as she did in New York in September 2019 (Milman 2019), she is speaking the language of climate law, but it is through the register of human rights that we must hear her.

What about the people that already live there? Intersections of climate change and social justice

Climate change, both in terms of its impacts and the work we undertake to deal with it, is happening in a world already populated with diverse groups, a world with pre-existing inequalities and challenges to human rights. As such solutions to climate change need a contextualized and nuanced approach, and while mainstreaming considerations of climate change in the context of human rights is an important first step, we need to go one step further and talk about justice.

Introduction

In July 2019 a friend who works in medical research showed me an article about how and where we could increase tree cover globally to help solve climate change. He was pleased at finding something to share with me about my work that offered, what he understood to be, a positive and easy solution to a challenge we often discussed, and he explained the article optimistically. When he finished, I hesitated to respond, unsure whether to share his optimism or my honest reflection... and eventually I asked: and what about the people that already live there? He was stunned. "I've never thought of that before," he reacted. And just like that, his rose-tinted optimistic lens cracked and human reality burst in.

This casual and light-hearted exchange between friends points to the core of the challenge at the intersection of social justice issues and climate change. This simple

question, 'what about the people that already live there?', could be asked about various regions, various peoples with various circumstances and relationships to the climate crisis, to illuminate why climate change is not just an environmental crisis, but a human one. Climate change, both in terms of its impacts and the work we undertake to deal with it, is happening in a world already populated with diverse groups, a world with pre-existing inequalities, with challenges to human rights, with already scarce resources, with tensions, misunderstandings and power struggles. In the same way you would not diagnose a patient without understanding their medical history, solutions to climate change need a contextualized and nuanced approach. There is a risk that new diseases can exacerbate existing conditions, and the same is true for climate change. There is a risk that treatment for one illness can actually worsen another, and the same is true for climate change. However, in the same way that treatment can address multiple problems at once, climate solutions have the possibility to address both climate change and social justice challenges together too.

This essay will explore the tension between climate change and social justice concerns, reflecting specifically on the history of this tension before elaborating on three examples. Narratives around climate change have changed drastically in the last couple of decades, and the problem has been significantly reframed from being narrowly defined as an environmental problem to a broader view incorporating a range of social, economic and political aspects. While this is a step forward in terms of understanding the complexities of the interlinkages

* The author wrote this piece during a Fellowship at the Institute for Advanced Sustainability Studies.

between climate change, social justice, human rights and human development, this also presents new challenges.

Even in the context of an expanding understanding of climate and justice intersections and synergies, many human rights organizations still fail to see the link between climate change and human rights frameworks. Additionally, in this process a new focus on the link between concepts of justice and climate change has also helped to illuminate a core challenge: that there is a huge diversity in how people all over the world understand and experience justice or injustice (Sikor 2013; Dirth et al. 2020). The three examples I highlight demonstrate these complexities by focusing on three important tensions: a story about Malawi will show how impacts of climate-related disasters can exacerbate already existing and historically entrenched injustices; a story about forest management in South America will show how sometimes even seemingly simple solutions may also contribute to local injustices; and a story about the energy transition in Europe will show how injustices resulting from climate change affect not only the Global South but vulnerable people everywhere.

In the face of these new and diverse challenges resulting from climate change and how we deal with them, perhaps utilizing a human rights framework does not go far enough to understand the injustices caused or exacerbated by climate change. While many human rights institutions have already identified ways in which climate change threatens human rights (Commonwealth Forum of National Human Rights Institutions 2015), perhaps the scale of the threat from the climate crisis on human well-being extends beyond our current understanding of human rights. While mainstreaming considerations of climate change in the context of human rights is an important first step, we need to go one step further and talk about justice.

A historical tension

For decades, human and economic development and mitigating climate change were described as being in conflict with one another. This often manifested itself in a

tension between pursuits of human development for poor and vulnerable communities (and what comes with this development, such as access to energy and infrastructure projects) and the imperative of mitigating climate change (Agarwal & Narain 1991). This tension influenced political decisions, such as those made in 1992 within the UN Framework Convention on Climate Change, where countries were divided by their wealth to allow for emissions to increase in order to enable human development in some places, while prescribing that they need to be cut in others. Since the 1990s until very recently, influenced by the creation of different standards for different countries, among many other things, the assumption remained that pursuing human and economic development and dealing with climate change were incompatible and even in conflict with one another. Broadly, the argument went that in order to improve well-being, emissions need to increase first, and we have to have space for this before we can expect action against climate change. In this line of argumentation, discussing limiting emissions inherently also meant limiting human development, which is not only a threat to a number of human rights but also unjust for poor and vulnerable people around the world. While this is the origin of the tension between human development, social justice and climate change, it is now becoming widely recognized that this tension comes from a very narrow understanding of both development and mitigating climate change (Trebeck & Williams 2019).

More recently, our understanding of social justice and climate change has expanded and changed parallel to the expansion of our knowledge about the urgency of climate change and realizations about the imperative of adapting to it. Terms such as 'climate justice' have been introduced to capture new nuances. Pursuing climate justice refers to addressing the injustice that those who have done the least to cause climate change will be the first to experience the impacts, are often the most vulnerable and will experience the worst impacts (Mary Robinson Foundation 2013). While this term has come to encapsulate many aspects of this injustice, there are two central pillars. First, there is the concern about the devastating impacts of climate change on vulnerable communities and the need to consider adaptation, compensation, and losses

and damages which are spread disproportionately to affect the world's poorest and most vulnerable. Second, there is the concern about climate action focusing too much on limiting emissions everywhere and the negative consequences for human development, instead of considering ways in which the fight against climate change can present opportunities for people's well-being.

The term climate justice helped to reframe the conversation about climate change to incorporate concerns about human well-being, rather than to see a conflict between the two. Meanwhile, the human rights community has been slow to participate in these discussions. Why is this?

One possible explanation is that even though the conversation has changed in many places, many still perceive a conflict between realizing social justice and addressing climate change, and they worry that action on climate change means that the pursuit of human rights may suffer. This is a valid concern, as understanding nuanced interlinkages does not mean this has translated to policy-making and implementation. Bad practice still prevails on both sides of this debate: communities are still being forcibly relocated for renewable energy production, like hydropower, and development corporation agencies still fund new coal or fossil fuel-based energy projects.

Another possible explanation is that the lack of interaction stems from the fact that there is no mention of environmental conditions in the Universal Declaration of Human Rights. New frameworks and interpretations have been developed which build on this, making connections to environmental rights clearer and stronger (UNHRC 2018). In addition, progress on litigation has also helped, as scores of court cases around the world about environmental harms have been won using clauses about a 'right to life', or environmental rights where they do exist. These cases draw important connections between human rights and basic human needs like water and air. However, much more of this litigation is needed in relation to climate change in order to more deeply ingrain this integral relationship.

But perhaps the fundamental problem is that climate change poses a challenge to the core of the human rights framework: no human right can exist outside of a climate system safely habitable for humans. The deeply existential nature of the climate crisis exposes the assumptions behind a human rights approach which neglects basic human needs.

Fundamental to this whole discussion then is the difference between justice and human rights. While human rights are codified in somewhat universally agreed documents and there are a number of concrete and specific institutions and legal frameworks to enforce them, justice is defined differently everywhere. For some, a just way of dealing with climate change is the average greater good, with acceptance of some inevitable hardship. For some, a socially just way of dealing with climate change is compensation from wealthy countries or regions to those who are experiencing greater devastation and vulnerability. For some, justice also entails justice for their natural surroundings and the non-human as an inherent part of how justice is understood for their community. And for some, justice for future generations is the central idea. The fact that justice is a word with fluid and dynamic meanings, means that it has come to incorporate environmental needs, struggles and climate injustice in a way that human rights narratives and groups have struggled with.

Climate-related disasters and neo-colonialism

One of the most important justice challenges of climate change is that contribution to climate change has happened unevenly across the world and over time. There are immense debates in academic, political, social and economic spheres about who should take responsibility for climate change, the damage it causes to livelihoods and well-being, and how to hold those accountable for past or future damage. This is perhaps the most commonly discussed injustice resulting from climate change, with many recent examples of climate-related disasters all around the world, ranging from cyclones Idai and Kenneth striking the south-eastern coast of Africa, to water

scarcity in Chennai and Zimbabwe, to record-breaking heatwaves in Europe, to enormous wildfires in almost every region of the world. While there is inconclusive science about how many extreme weather events can be directly or solely attributed to climate change, when we consider the human impact, it is less important what percentage of causality we can decisively conclude, than that we know with certainty that as a result of climate change these events will be more frequent, more extreme and more deadly. It is no longer just about tensions between climate mitigation and human development. Climate justice is now also about sustaining life itself.

In early spring 2019 I was in Malawi for a partnership project focused on empowering young people to take action on climate change. While I was there, the country was struck by a series of devastating extreme weather events, which came at the end of their normal, intense, rainy season. While cyclones Kenneth and Idai had a larger impact where they first made landfall, in Mozambique, they also ravaged already vulnerable areas in Malawi. A country where only around 12 per cent of the population has access to electricity and whose carbon footprint ranks 181st globally, lost over sixty lives from these climate-related disasters, with thousands injured; almost 100,000 people were displaced (OCHA 2019b; World Bank 2019). In the region as a whole, over 750 people were killed with over 200,000 displaced. In the week following the storm, the government used its emergency procedure for energy provisions. A country whose electricity is almost entirely generated by hydropower, struggles with consistency of energy supply both during extreme storm events, because of the debris build-up at the hydropower stations, as well as during the dry season from lack of water flowing through the rivers. During these times, the government manages energy use and distributes energy for a few hours per day across the different regions. Most of the time, people don't know when they're going to have power or for how long. It turns on, for a few hours for your region's quota, and then turns off and turns on somewhere else. During the recovery periods from these storms, which lasted several weeks, the electricity available for the entire country of 18 million people - people suffering from a crisis they didn't cause - was the same

amount that twelve people in the United Kingdom use in a year. For me, these events were a clear illustration of social justice and climate change intersections which exacerbate vulnerability and worsen human conditions.

The experience of this vulnerability is something difficult to put into words. There is, first of all, loss. In the most affected areas people were killed, lost their entire livelihood or their loved ones, which is hard to imagine if you haven't experienced it yourself. For the rest of the country, the feeling that your access to water, your ability to cook food, your connectivity to loved ones, your entire life hinges on such a delicate system, is a feeling of vulnerability that is all-encompassing.

Vulnerability also goes beyond physical human needs to impact ability to work, or go to school or university. In a world where many believe that opportunities from digital technology, communication and access to education are levelling the playing field in a globally competitive economy, we forget that these disasters do not strike evenly, and nor are we evenly able to be resilient to them. It is a kind of double inequality that when your school is washed away every couple of years, or three months of the year in the dry season you can't access what many globally consider to be basic technologies for learning or professional communication, climate change is exacerbating structural inequalities in the global economy, and through its uneven impact further entrenches inequality of education and training, new industries and wealth.

This is also psychologically traumatic: this kind of vulnerability comes with a reminder that you exist within a system that you can't control, whether that be climate and weather, or energy, or wealth. All the while, the most expensive hotels kept running normally using generator systems so that international business people or travellers didn't experience this devastation. In the face of this trauma, lucky Malawian families had three to six hours of electricity a day, but visitors could still have reliable wifi and pizza at their hotel. The practices of personal and community resilience that result from this kind of vulnerability are awe-inspiring. Often, research about building resilience as a social response to climate change focuses

on adaptation techniques, either social or technical, and the daily need for psychological resilience as an essential pillar of dealing with human devastation resulting from the climate crisis is overlooked. Psychological resilience in this context requires more than planning ahead, adaptation strategies or disaster relief; at its core it is an acceptance that this injustice is your reality.

The final element in this story is the historical context: Malawi is one of the most vulnerable and least developed countries in the world, and a contributing factor to this is its history under colonialism. Under the rule of the British Empire, Malawi was perceived as not having any useful resources, and so infrastructure development lagged behind other British colonies in the region, such as Kenya and Uganda (Mwakasungura & Miller 2015). Not only was it exploited and oppressed in the past, but it still lacks infrastructure to meet basic human needs, which makes the country incredibly vulnerable to extreme weather events. In some sense, Malawi's experience with climate change can be seen as a continuum of injustice beginning with colonialization by the British Empire up to the UK government's current failure to acknowledge its historic responsibility for climate change, and its failure to take action both in its own mitigation and in its funding contribution to implementation beyond its borders in a way proportionate to the country's contribution to climate change. In this story climate change is an injustice multiplier and its nuances expand beyond human development and disaster vulnerability to encompass long-entrenched wealth hierarchies, colonial legacies and neo-colonialism.

East Africa is one of several regions around the world that is particularly vulnerable to climate impacts because of a number of overlapping socio-economic challenges and historically entrenched injustices. While what is happening there is the very definition of climate injustice, is it also a threat to human rights? Most clearly, extreme events and disasters are a threat to life. They also threaten the right to housing or food. But the injustices related to climate change here don't fit very easily in this framework, as the scope of the injustice goes beyond what looking at this disaster through a human rights framework can convey.

More than 'the lungs of the world'

The world's eyes turned toward the Amazon rainforest in late August and early September 2019. However, the fires which caught the media's attention are just the tip of the iceberg into understanding the complex socio-economic relationship with the forest in many regions in South America. The response of much of the media to say "the lungs of the earth are on fire" only recognizes the value of the forest in producing oxygen and its role in combatting climate change, but not its social, cultural or human value. The Amazon region is first and foremost a home. A technocratic and natural science-based approach to climate change often implies that energy technology, innovation and nature-based solutions, such as tree planting, are 'silver bullets' for the climate crisis. In the case of the Amazon, this perspective is used in adopting an optimistically toned narrative that we can solve climate change simply by planting more trees.

There is and has been a long-standing challenge of deforestation everywhere around the world: there is no region which has not experienced deforestation at some point in its history. Currently, a lot of attention and focus is on the deforestation in South America, even before the fires of 2019 captured the public's attention. Deforestation in this region presents not only a challenge in the context of climate change, but also for essential biodiversity and fragile ecosystem health. There have been many attempts to solve this through programmes which foster international investment in regions suffering deforestation and biodiversity loss; these range from carbon offsetting initiatives that are simply about tree-planting, to initiatives which foster social, economic and environmental outcomes.¹

Often, the basic tenant of such programmes is that

¹ REDD+ and REDD are two of the most well-known examples. (REDD is an earlier version of REDD+.) REDD+ is a mechanism developed by the United Nations Framework Convention on Climate Change to support reducing emissions from deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.

countries (as well as businesses or individuals) that emit a lot of carbon can pay for offsets or compensation in the form of tree-planting or forest and ecosystem management programmes in other regions of the world. The idea is that these programmes have positive impacts by sequestering carbon, combatting deforestation and promoting ecosystem health, as well as boost local economic development by supporting the livelihoods of people living in these regions. This is a very rosy picture, and unfortunately, it fundamentally oversimplifies the challenges faced and neglects the social justice aspects of the locality in which they work.

There is first the problematic relationship that makes up the structural core of the idea: that industrialized countries can compensate for their emissions by paying for tree-planting in more economically vulnerable regions; this is unequal at its core. Many industrialized countries cleared their forests long ago to make space for agriculture, industry and housing. That many now pay others to protect their forests in lieu of industrial development, cuts to the core of the tension between climate change and human development. Agreements that developing countries should have space for their emissions to grow to allow for human development, are at risk of being undermined by the economic incentives which might discourage any change or new socio-economic activities in forested regions. Additionally, many countries contributing financially to programmes such as REDD+ are also home to companies which contribute to deforestation: there is the painful irony that, for example, USAID pays for programmes which combat damage from American companies. In this way, forests and forest communities have become a new battleground for domestic disputes, conflicting ideologies, lack of adequate regulation and lack of policy coherence of other countries. Even with financial resources as part of the transaction, the expectation that a poorer region acts on behalf of a richer seems fundamentally unjust.

A closer look at whether these programmes contribute to the realization of human rights and social justice is helpful for understanding the complexity behind this climate action 'silver bullet'. First, there is the important

question of who benefits and how. Many argue that the injection of financial resources that comes with these programmes enables forest communities to support themselves in socio-economic activity in their home culture and region, which can operate in parallel or even support healthy forests and ecosystems. This also helps shift the narrative from forest communities being victims, to them being empowered and included participants in development of their regions and communities (Schroeder & González 2019). However, interestingly, much of the research on the example of REDD+ actually points to stronger social and economic outcomes than environmental ones (Schroeder & González 2019), indicating that perhaps this work supports the realization of some human rights such as employment and community development. However, there is still a crucial challenge around relationships created and entrenched through these programmes, as they continue to reflect global inequalities and injustices in wealth and power distribution.

There has been significant criticism about the role of gatekeepers, intermediaries, and the power of funding institutions in these processes (Dawson et al. 2018). Whether this criticism is directed at regional or national actors siphoning off funds meant for local communities delivering the projects, or at the power exercised by funders in goal-setting and decision-making, or at the lack of full and meaningful participation of the community, there are certainly injustices in these processes. Crucially, there is often accountability up to international bodies or external funding sources, but a lack of accountability at the local level (Dawson et al. 2018). This dynamic further entrenches global hierarchies, inequality and neo-colonialist attitudes.

The romanticized ideal of replanting the Amazon is often a vision of nature which neglects the human element and the people who live there. In addition, such programmes give the illusion to Western, high-consumption countries and lifestyles that it's possible to adequately compensate for the emissions from a flight or a coal-power station, by planting trees. Many participating in reforestation or forest protection programmes may be wedged in between the burden of compensating for the emissions of wealthy

people and nations, changing local socio-economic developments, neo-imperialist power structures and new forms of hierarchy to adhere to, threats from large-scale business developments and a changing climate. In this example it is not only the impacts of a changing climate that threatens social justice, it is also how we try to solve it with 'silver bullets' without considering the human impact.

A just transition

Finally, I'd like to turn to a different type of example: an example of how climate change mitigation policies and practices can also exacerbate social injustices in industrialized regions in Europe. In many regions across Europe, the production of fossil fuels has been the cornerstone of the local economy for over a century. A number of intersecting and overlapping structural transformations, such as the radical change to a more global economy, resulted in a changing geography of industrial centres and networks. This economic transformation over the past forty years has left many previously industrial regions socially and economically deprived, with none of the tools necessary for pursuing improved human well-being in 21st century Europe, and no opportunity for any form of economic renewal. Regions which once homed, housed, fed, and supported populations through heavy industry, coal mining and the oil and gas industry have, over the past forty years, seen their economic backbone systematically undermined and dismantled. This happened either through trade policy, a private sector policy of profit over people, or as a result of environmental regulation and the shift to a zero carbon economy. It can be seen again and again in regions like Lusatia (Germany), Scotland, South Wales, Appalachia (US) and many more, where the transition out of heavy industry and away from a carbon-based economy into a green economy is not creating opportunities for economic renewal and is ultimately exacerbating social injustices (Sheldon et al. 2018). While we should absolutely be celebrating the closure of coal plants, the decommissioning of oil rigs and the process of divestment from fossil fuels, for the people that have lived in these places for generations, climate change mitigation and the net-zero transition can be an injustice multiplier and a

threat to their well-being and community livelihood. This transition has immense potential to offer new opportunities, economic renewal and improved well-being, but this needs to be an intentional policy of all actors in these regions, local government, national government as well as the private sector, in order for this transition to be a positive one for all.

In addition to this lived experience, the way in which the narrative of experts about these regions in transition has developed, often takes on a condescending and belittling tone. For example, in Germany, the Lusatia region has been coined a 'social experiment', evoking the image of a cage full of lab mice rather than of a broader community struggling with reimagining its cultural identity, and lacking the support to do so. Research on the perspective of coal operators has confirmed what is also clear in their public communications: that fossil fuel intensive industries publicly emphasize human concerns, such as employment, career development, local economies, et cetera, while the green transition emphasizes CO₂, environmental conditions, et cetera (Bosch & Schwarz 2019). A technocratic approach to the energy transition and climate change as a whole may be expected, as climate science developed out of the physical and natural sciences. However, this approach is undermining the success of the renewable energy transition in industrialized regions. In the long run, a technocratic approach to the energy transition could be detrimental to the goal of a net-zero economy because it has the potential to neglect the human element and exacerbate social injustices in doing so.

The concerns of people living in post-industrial areas in Europe are well-grounded in our current understanding of human rights. They justifiably can see that their right to work, their support systems, their right to choose their own development and their community's development are threatened. In addition to being grounded in human rights, the process may also seem unfair and unjust. It has only been very recently that many countries around Europe have begun to prioritize involving communities in decision-making, and especially those who experience pain and turmoil from the transition. The transition is not only consciously perceived as a threat to people's way of

life, but also perhaps both consciously or unconsciously, as a threat to their identity.

A human rights framework without environmental rights could actually be utilized in this example to argue against a sustainability transition. When the human rights framework treats environmental conditions as an externality, the same way industry has treated environmental impact as an externality for decades, it may be time to more fully incorporate environmental rights into human rights.

What would it mean to have socially just solutions to climate change?

Before we can think about what it would mean to have socially just solutions to climate change, it's important to address an important problem underlying all of this: abstraction. One of the reasons why a technocratic approach has been so successful is because it's easy to understand on its surface. However, often implied underneath this approach, whether in climate models or reforestation proposals, is a concept of justice which looks at the average of the human condition, and allows for, and accepts, some amount of devastation, catastrophe and loss. To put it bluntly, many models accept a certain amount of human lives lost. Perhaps one of the reasons this is palatable, is that this loss is often not 'close to home' to those doing this research.

This abstraction has allowed us to skim over communities that are getting exploited or threatened in this process, or look past those that are losing their economic stability and potentially their identity in the post-fossil-fuel transition because we are still pursuing the greater good (Moreno et al. 2015). We don't talk about this assumption very often because it is confrontational, but to really address the social justice challenges of climate change it needs to be explicit: the way we have approached climate science for decades erases and devalues millions of people around the world. On many occasions it allows for some of their stories, their histories, their livelihoods, their well-being to be sacrificed... and often that 'some' is already vulnerable, exploited or threatened by other injustices.

This process of abstraction and aggregation allows us to forget that in addition to being contributed to unevenly, climate change will be experienced unevenly (Raworth 2012). Looking behind the models and projections at what it means to develop a new hydropower plant needed to meet a global emissions target, or a reforestation project, or more generally at the acceptance of a 2 degree target being a global temperature upper limit, we come face to face with the injustice of climate change both in its impacts and in how we deal with it. Under every scenario some will struggle. The first step we have to take to minimizing this struggle is to acknowledge it. We have to be explicit about what climate change, and addressing it, means for individual communities all around the world, and we are only beginning to understand in full detail what this entails.

The second preliminary challenge to addressing climate change and social justice together is that, within the context of human rights and much research and policy on social justice challenges, the current dominant paradigm is often only one side of the story: that of European philosophical traditions. In some sense this normative dominance is also a kind of meta-injustice, because it may mean that even in the pursuit of justice, we place some value systems and cultural norms above others. Which value systems tend to dominate also aligns with which economies and political systems tend to dominate and have dominated throughout history. How can we begin to understand social injustices caused by climate change if we do not understand what is being considered an injustice in a certain context? A human rights framework does not allow for this kind of contextual understanding of climate change and social justice. Ultimately, climate change action guided by a locally relevant, context-sensitive and people-focused approach has the potential to pursue social justice at the same time as securing human well-being in the face of this existential crisis.

While it is an important step in this process to see pursuing justice and tackling climate change as mutually beneficial and not conflicting ideas, this is not enough. We must also design policies and programmes in a way that allows them to be mutually beneficial. Over and over

again, I have heard the argument that “we shouldn’t burden decarbonization policies with concerns for social justice and inequality”. However, policies which consider inequality as a burden for decarbonization will inevitably catalyse a backlash to climate action: the French *gilet jaune* protest movement is the perfect example of this. We often make policies with an inadequate understanding of their impact on different socio-economic groups and the way they might contribute, positively or negatively, to social justice: climate policy is no exception to this trend... yet. There was absolutely an alternative to the tax which caused the *gilet jaune* movement. An alternative where not only the unequal impacts of this policy would be considered, but additional steps could have been taken to address inequalities at the same time. This is not yet the norm, but we have to start working this way. And that means embracing this intersection in policies, research, programmes and implementation and governance processes, rather than criticizing it.

The climate crisis and new justice movements. Supporting a new generation of climate activists

Issues related to the climate crisis are mobilizing people around the world to demand action, justice, and a voice in international responses to the crisis. Recently, youth movements have – largely spontaneously – appeared, organizing school strikes and marches, and demanding political change to secure their future. This essay asserts that almost all human rights are threatened by climate change and therefore argues for a human rights agenda to make sure climate solutions serve people. That is why major global players in the field of climate and human rights – such as Amnesty International and Greenpeace – should work together and engage with the young activists. “By providing this new generation of climate defenders with practical knowledge, skills and support, we can strengthen their worldwide impact.”

Introduction

“Think we should be at school? Today’s climate strike is the biggest lesson of all.” This was the headline above an article in *The Guardian* of 15 March, 2019 (Thunberg et al. 2019). In it, European school students Greta in Sweden, Anna and Holly in the UK, Luisa in Germany, Kyra, Anuna and Adélaïde in Belgium, and Alexandria in the US explained why they intended to continue the school strikes they had started a few months earlier.

On that same day, the largest youth-led protest in history took place: an estimated 1.6 million students in 300 cities worldwide walked out of school to march for climate action. Three school students organized the major Strike for Climate campaign in more than 200 locations in the

United States. Mass protests also took place in Australia, with 150,000 participants spread over fifty locations. Young people in Japan, India, Indonesia, South Korea, Hong Kong and New Zealand also skipped lessons and joined the protests. And it didn’t stop there. The Youth Strikes for Climate movement is not centrally organized, so keeping track of the fast growing number of regular strikes is difficult, but many are registering on [FridaysForFuture.org](https://www.fridaysforfuture.org).

For me, as a climate activist working at Greenpeace Netherlands, the sudden and largely spontaneous rise of young people worldwide who refuse to accept the dire lack of effective action against global heating is without a doubt the most encouraging development of recent years. It inspires us all.

When I saw the photo of the Swedish 16-year-old Greta Thunberg together with acclaimed conservationist Jane Goodall at the World Economic Forum in Davos, it brought tears to my eyes. Goodall is 84, and must be very concerned about the world she is leaving behind. Hopefully, Greta and all these other wonderful youngsters represent a glimmer of hope for her, so that she thinks: you see, a new era is coming.

This is what Greta had to say to the global elite, gathered in Davos: “Some people say that the climate crisis is something that we all have created. But that is not true – because if everyone is guilty, then no one is to blame. And someone is to blame. Some people, some companies, some decision-makers in particular have known exactly what priceless values they have been sacrificing to make

unimaginable amounts of money, and I think many of you here today belong to that group of people” (Germanos 2019). This is not very different from the way we at Greenpeace see it: we think that the historically unfair distribution of rights, power and land is at the basis of the climate crisis. Giving people back their rights and land will reduce the power of major polluters.

Save the Amazon

As much as I enjoy seeing the courage and dedication of all these young people and their refreshing ways of campaigning, I also think of 26-year-old Andre Karipuna.

Like Greta and all the others, Andre is a young leader and climate defender. He lives in the Brazilian Amazon state of Rondônia, together with the 57 other remaining Karipuna. In 1998, 152,000 hectares of unspoiled Amazon forest were transferred to them. But the Brazilian government of the current President Jair Bolsonaro wants to sacrifice the Amazon for quick profits. Looters and logging companies are already penetrating the nature reserve of the Karipuna. Those who resist must fear for their lives. However, the Karipuna are not giving up, and will continue to protect their forest against invaders – for as long as they can. Andre has taken up this battle. Unlike his parents, he and other young Karipuna went to school and speak Portuguese – but they still live in a part of their original territory.

The Amazon is the largest rainforest in the world. It plays a crucial role in our climate. This unique nature area actually stores around 100 billion tons of carbon. That is thirteen times the annual worldwide emissions from fossil fuels. Huge amounts of CO₂ that would otherwise heat our planet. We cannot afford to lose this rainforest, and protection is therefore in the interest of us all.

Like Greta, André Karipuna tries to get as much international attention for his fight as possible. This was his message to the UN in New York and the UN Human Rights Committee in Geneva: “We want to fight to protect nature, but we no longer know what to do against the current serious threats. That’s why I call on the world: help protect my people and stop the companies that steal our

land and destroy the rainforest. Please” (Greenpeace NL 2019).

A few weeks after the first global school strike, in mid-April, indigenous communities from all over Brazil gathered in the capital, Brasilia, to protest against the violation of their rights. For Greenpeace, this was the moment to put the Karipuna in the spotlight and call for international solidarity. Out of solidarity with these protectors of the Amazon forest, we stood in front of Brazilian embassies in eleven countries with the message: Save the Amazon.

People are part of nature, and we cannot create a green and peaceful world if it is not fair and just. We strive to uphold the rights of those most impacted by the effects of climate change and environmental degradation – including indigenous peoples, women, children, people living in poverty, workers and environmental defenders. As a global organization, Greenpeace can offer the Karipuna and other courageous peoples who protect the Amazon the platform they deserve. Because in the end, their fight against loggers is also our fight to end the climate crisis. And it’s essentially not different from the fight of the thousands of school strikers in other parts of the world.

Climate justice

Every person has the right to a safe and healthy environment – as well as the right to life, health, food, and an adequate standard of living. The climate crisis poses a grave threat to these rights. When talking about ‘climate justice’, for the last two decades the debate has concentrated on the protection of poor people in countries most affected by drought, flooding and the disappearance of species. The young climate movement takes a broader view. And they are quite right! They see effects of climate change all around them. Affecting not only the poor, but also the more prosperous. Megacities suffer from extreme temperatures and a lack of clean air and water. Going to school, for example, becomes difficult.

As the window of time available to us to make a difference narrows, we must find ways to ensure lasting global

change. The answer is climate justice, a term which unites a growing global movement based on the belief that people have a right to a stable climate and deserve protection from the dangers of hazardous climate change (see Greenpeace 2019). Climate justice tackles the climate crisis and the violation of human rights simultaneously.

In this broad view, climate change already has an impact on a number of human rights: from the right to school, work, access to clean water and the overall right to a healthy and clean environment. In addition to being protected under international human rights law, they are mostly also recognized by national constitutions and laws, but not guaranteed.

Using the law, a growing number of communities are taking legal action to secure their human rights and hold governments and fossil fuel companies accountable. Climate justice matters because today's generation is the last generation that can take steps to avoid the worst impacts of climate change. Governments and fossil fuel companies are being made to listen and respond, as people from young to old, and from city-dwellers to farmers, are standing up and taking action.

People have rights. States have duties. Companies have responsibilities. That's why we need to raise our voices for climate justice.

Some have already succeeded, as in Colombia, where the Supreme Court of Justice ruled in favour of 25 young people. They argued that the government violated human rights by permitting deforestation in the Amazon, which in turn contributes to the climate crisis (Dejusticia 2018). This was a ground-breaking decision recognizing the Amazon Basin as a subject of rights for the first time.

In the meantime, litigants from all cases are using all tools available, both in the courts of law and in the courts of public opinion. Change is palpable, and mobilization and litigation go hand-in-hand. In recent years a climate justice movement has boomed across the world. Climate change lawsuits have been launched in at least 28

countries around the world, according to a recent report (although three quarters of the recorded cases were filed in the United States) (Setzer & Byrnes 2019). The case of the citizens' platform Urgenda against the government of the Netherlands is among the most prominent ones.¹

In solidarity with the inspiring people and communities of the climate justice movement, and in response to requests to assist in creating people-powered climate cases, Greenpeace Philippines assisted in the creation of the People's Guide. This is a resource on how to hold governments accountable for its climate inaction. Drawing on the efforts of allies, this guide is a non-exhaustive document that provides ideas for community members, NGOs, and public interest lawyers on how to build cases that address the climate crisis from a human rights perspective. It also showcases and celebrates the many phenomenal landmark cases (several of them successful) that are being brought all over the world. Ultimately, the People's Guide shows that communities made vulnerable by the climate crisis can create real environmental, political and social transformations using strategic litigation to demand a better future (see Greenpeace 2018).

Campaigning and political action

Of course, climate litigation is not a perfect catch-all solution. Court cases take time, which is a problem because time is running out. Other forms of activism are needed as urgently as going to court.

Putting the climate crisis at the top of the political agenda is just the first step, argues Sara Blazevic, the co-founder and managing director of the American, youth-led Sunrise Movement (Harkness 2019). This political action organization, founded in 2017, advocates political action on climate change. The group organized a sit-in in the office of Nancy Pelosi, Speaker of the House and the most powerful woman in American politics, which brought Sunrise its first significant press coverage.

¹ For more information on the case, see Urgenda (2019)

Sunrise is building the power of youth to urge the country to take the climate crisis seriously while reclaiming democracy. “We need to transform our entire economy to prevent [the climate crisis] and we also have an incredible opportunity to create millions of good jobs and actually increase equity and justice in this country in the process,” Blazeovic said. “Sunrise is protesting to bring the crisis to the forefront of the minds of every American and bring the urgency of those fires, floods and droughts we hear the plaintiffs talk about from our television screens to our politicians’ scripts.” (Martinez 2019)

Also consider what 29-year-old Representative Alexandria Ocasio-Cortez of New York – who has long aligned herself with the Sunrise Movement – has achieved in just a few months in office. The youngest woman ever elected to the US Congress has moved the terms of the climate debate significantly by pushing a broad set of climate and equality goals.

Under the banner of a Green New Deal, she and her fellow-activists aim to drastically reduce greenhouse gas emissions in order to avoid the worst consequences of climate change (Kurtzleben 2019). They also seek to address problems such as economic inequality and racial injustice by prioritizing historically disenfranchised communities. With her approach, Ocasio-Cortez forced the climate issue to the forefront of the 2020 Democratic primary, pressuring candidates to lay out their own plans to address the effects of rising temperatures. In a sign of grassroots pressure, centrist candidates such as former Vice-President Joe Biden and former Representative Beto O’Rourke both promised not to accept donations from the fossil fuel industry (as they had in the past). O’Rourke singled out youth activists for helping push him on the issue, saying: “Thank you for your advocacy and leadership” (Herndon 2019).

Game changer

In a recent column Rex Weyler, co-founder of Greenpeace International in 1979, reflected on the roots of activism, environmentalism, and Greenpeace’s past, present, and future.

“In the 1970s, in the early years of Greenpeace and other new ecology movements, we thought that ecological change would be simple, that once people understood the threats, they would demand change (...) We probably underestimated the challenge of overcoming our deep, evolutionary bias for short-term thinking. We may have underestimated the status quo – corporate elite, bankers, politicians, and even common citizens dependent upon the economic system – attachment to the old patterns of consumption and growth.” (Weyler 2019)

The new social movements, Weyler argues, are blowing up these social logjams. The timeline of catastrophe has grown too short. People now feel the threat to their own lives and appear willing to make sacrifices for long-term survival.

Is the recent global mobilization by young people on the issues of climate and human rights really the game changer we hope it will be? Will it end up as significant as the anti-war, civil rights and gay rights movements, all social movements in which young people played decisive roles? I think the answer is yes. If every movement needs a constant reason to stand up for their (our) rights, then this movement will stay and have a long-term effect.

How it will develop is, however, hard to predict. Can we expect these movements to harden, to radicalize? Being a peaceful movement is one of the main principles of #FridaysForFuture. But it is difficult to predict what will happen if their protests are ignored, results fail and frustration grows.

Look for example at Extinction Rebellion (XR), which was launched as recently as October 2018 by a group of activists from the campaign group Rising Up! Citing inspiration from grassroots movements such as Occupy, Gandhi’s Satyagraha, the suffragettes, Martin Luther King and others in the civil rights movement, Extinction Rebellion wants to rally support worldwide around a common sense of urgency to tackle climate breakdown. A number of activists in the movement accept arrest and imprisonment, similar to the mass arrest tactics of the

British anti-war group Committee of 100 in 1961. On the eve of international Rebellion Day, 15 April, XR activists occupied part of the International Criminal Court in The Hague as well as the Parliament's Lower House in the UK, forming human chains before being arrested. Similar actions were organized in many cities worldwide.

Andrew Winston, who advises some of the world's leading companies on how they can navigate and profit from environmental and social challenges, argues that we are in the middle of a major realignment of values around climate. "It's now unacceptable to young activists and the millions of people they inspire, to espouse climate denial or play the 'let's go slow' card. They don't appreciate being handed a disaster movie for them to live with for 70 to 80 years." (Winston 2019)

No organization can avoid value shifts, says Winston, the author of bestsellers like *The Big Pivot* and *Green to Gold*. Executives of many companies do increasingly seem to be moving toward action on climate change, he acknowledges, with public pronouncements to cut their own emissions or buy renewable energy becoming the norm in large companies. But that isn't enough. The new generation of customers and employees demands far more. "It may just take the youngest Americans to get companies to take a real and public stand for aggressive global action on climate change; after all, if they don't, they risk getting out of step with an entire generation of employees and customers," Winston says.

The young climate defenders are very clear about the values they stand for. Of course, the majority of them come from Western countries (although the number of participants from non-Western countries is steadily growing). But the movement shows one big wave of solidarity with the most impacted communities worldwide, and demonstrates a willingness to change, to commonly transform our ways of living. The young activists feel a common greater good, which is a future on a safe planet. It really touched me when I saw all the self-made protest signs on the streets: "There's no planet B"; "Less meat, less heat"; "Like the oceans, we rise".

How can 'regular' activists support this new generation?

In a Manifesto published in *The Guardian*, a large group of influential individuals including Naomi Klein, Noam Chomsky, Kumi Naidoo (former Executive Director of Greenpeace International, and the then Secretary-General of Amnesty International), and Jennifer Morgan (International Director of Greenpeace), called for a general strike on 20 September 2019 as the start of the Global Week for Future, "at the request of the young people who have been staging school strikes around the world" (Klein et al. 2019). On that day, they announced, "we're walking out of our workplaces and homes to spend the day demanding action on the climate crisis, the greatest existential threat that all of us face. (...) The clear idea behind this Manifesto is that adults should not be comfortable letting school children carry all the weight here. These kids need our support." It also shows that the protests of this movement resonate with an environmental and a human rights organization.

My expectation is that this new generation gives hope and its members stay strongly connected with each other all over the world. I hope that when they come to choose their higher education or work, they will be given the opportunity to choose to be part of the solution, not part of the problem. At the University of Amsterdam, it is possible to get your degree in Future Planet Studies. The young leaders in the Amazon study law so that they can better protect themselves. Greenpeace, together with other civil society organizations, has put together a curriculum based on their needs, so that they study law, but also learn about sustainability, and how to develop alternative solutions.

This is part of the role Greenpeace International sees for itself. In our recent *Three Year Strategic Plan, 2018-2020*, it is stated as our goal that we will be sought out by allies to help solve problems, build capacity, maintain forward momentum, and share skills and latest practices. Our reputation in the 'movement' will be that of a risk-taking, innovative, effective, collaborative, diverse and inclusive organization. We will be the place where changemakers want to be.

As Greenpeace Netherlands, we support the young Dutch climate activists where we can. After an unexpectedly large number of more than 10,000 students travelled to The Hague to demonstrate and participate in a national school strike in February this year, Prime Minister Mark Rutte invited the leaders to meet him and talk about their demands (although he only agreed to do this outside of school time!). At their request, we helped them to prepare for that meeting.

The new climate activists are in the lead, there can be no doubt about that. Sharing is caring, but let's not take over. Greenpeace facilitates the movement wherever needed, gives time, shares experiences, and amplifies its call to action. During the school strikes, we also handed over our social media channels so that the climate activists were able to let their voices be heard through a channel with a pre-existing larger audience. A more serious task is to publicly support (and therewith protect) young people that speak truth to power, and who directly blame the CEOs of big fossil fuel companies for ruining their future. Criticasters are being unreasonably hard on them, sometimes in a very personal way. Professional activists have a role to stand up and provide fact-based backup.

These new movements of climate defenders see human rights and the environment as inherently connected; for them, there's no distinction. What does this mean for more specialized organizations such as Amnesty International or Greenpeace? Is the dichotomy between human rights and environmental organizations unavoidably shrinking, and could they best merge in the near future? I don't think this is the way to go. The power of organizations such as Greenpeace and Amnesty International is largely based on their substantive expertise. That is too valuable to give up lightly. Progressive organizations and individuals need each other, and we need to support each other's causes. We do this best by fulfilling our own role. But we should listen carefully to new activists, learn from their approach and, where possible, jump over our own shadow.

Conclusion

Amnesty International and Greenpeace are two major global players in the fields of climate and human rights, with national and local offices or departments. We can – and, in my opinion, we must – bring our strengths together, and give all we have. In each hotspot, we can also work together with, and for the benefit of, grassroots organizations and local activists. Providing them with practical knowledge, skills and support and the courage to scale up will be an excellent way of strengthening a worldwide movement of young climate defenders.

And this is my message to them: Keep going strong!
We're proud of you!

Human rights and intergenerational climate justice

Climate change poses an unprecedented threat to human rights and many of those who will suffer most from its effects have contributed least to its causes. This injustice is epitomized in the case of future generations, whose ability to enjoy fundamental human rights is at risk from our past and current actions. How should human rights law respond to this intergenerational climate injustice?

Introduction

The wide-ranging and serious human rights implications of climate change are by now well-understood. We know that increasing temperatures, rising sea levels and severe weather are already impacting on human rights relating to basic needs like food, water and housing, as well as the right to health and even the right to life (HRC 2019; UNHRC 2016; OHCHR 2009). The impacts of climate change on communities, particularly indigenous communities, have serious implications for rights to self-determination, to utilize natural resources and maintain connections to land, and to practice and pass on culture and language. There are also human rights concerns attached to our responses to climate change, pointing to the need to safeguard human rights as we implement adaptation strategies and transition to renewable energy and a green economy (Lewis 2015; Pedersen 2011).

The differential impact of these effects on the Global South is rightly understood as a serious injustice. Those nations and communities that face some of the most serious consequences are frequently among the lowest contributors of greenhouse gas emissions and in many

cases lack adequate financial and other resources to respond adequately to the problem. It was in recognition of this fact that the United Nations Framework Convention on Climate Change (UNFCCC, 1992) adopted the concept of common but differentiated responsibilities (CBDR) into the climate change regime. The concept was explained in the Rio Declaration, adopted at the same meeting of nation states: “The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command” (UNCED 1992: principle 7), and it has become a cornerstone of international efforts to combat climate change (UNFCCC 1992: art 3; Kyoto Protocol 1997: art 10; Paris Agreement 2015: art 2.2).

Despite this legal commitment, the reality of climate injustice persists and has inspired strong advocacy from some states, especially Small Island Developing States in the Pacific, to encourage wealthy nations to deliver on their emissions-reductions commitments. Recently, the Pacific Islands Development Forum (2019: para 1) adopted the Nadi Declaration which, in its opening paragraph, expresses “*deep concern about the lack of comprehension, ambition, or commitment shown by developed nations of the world regarding the impending grave consequences that the current and ongoing Climate Crisis poses for vulnerable Pacific Small Island Developing States (PSIDS), which contribute negligible amounts of greenhouse gases (GHGs) to this human-caused global problem.*”

Until recently, the focus of climate justice campaigns has been more on this dimension of intra-generational justice – the need to seek an equitable distribution of burdens among developed and developing nations and, to a lesser extent, among communities within nations. Attention has started to turn, however, towards the challenges of intergenerational justice, as we gain a better appreciation of the realities of the climate crisis.

Understanding intergenerational climate justice

In simple terms, intergenerational justice can be defined as an equitable distribution of benefits and burdens across generations. It is closely related to the concept of intergenerational equity, famously articulated by Edith Brown Weiss (1989; 2008), who argued that present generations must leave the planet in no worse condition than when they received it, to ensure that future generations have equitable options, quality and access when it comes to natural and cultural resources.

The intergenerational injustice of climate change flows from the fact that the human rights impacts of climate change will continue into the future, affecting generations as yet unborn, and forcing them to deal with the consequences of our current and past emissions. To minimize the most serious future effects of climate change, states need to keep global warming to 1.5°C or below, which is the ambition articulated in the 2015 Paris Agreement (art 2.1(a); IPCC 2018b). On current trajectories, however, we are expected to overshoot the internationally agreed limit of keeping warming to ‘well-below’ 2°C (Paris Agreement 2015: art 2.1a), let alone 1.5°C.

Even if we ceased all greenhouse gas emissions now, future generations would still experience some degree of climate change due to committed warming – that is, the inevitable warming of the planet caused by the lifespan of the CO₂ that has already been emitted and the thermal inertia of the oceans (IPCC 2018b: sec A2; Mauritsen & Pincus 2017). So future generations are already locked into a degree of global warming and the human rights impacts that come along with it, and unless states take

rapid action to significantly reduce emissions, these impacts may be severe, even catastrophic. Furthermore, future generations may find themselves locked into adaptation or mitigation strategies that we choose to implement, for example geoengineering projects or other technologies, but they are obviously unable to participate in the debate around those choices or to grant their consent to any negative side effects.

Given that future generations have not contributed to greenhouse gas emissions and have no say in how we choose to combat global warming, limiting their ability to enjoy their human rights and forcing them to deal with the consequences of our actions represents intergenerational injustice. To some degree, any action which might have long-term environmental, economic or social consequences presents a risk of intergenerational injustice. The magnitude, diversity and complexity of climate change makes it the paramount challenge of our time, however. It demands urgent action to address its intergenerational impacts, while at the same time it exposes the limitations of existing human rights frameworks in protecting future generations’ rights.

Intergenerational justice in the climate regime

The international community has acknowledged the problem of intergenerational injustice in its legal responses to climate change, but only in a limited and arguably ineffectual fashion. The Paris Agreement (2015) refers to intergenerational equity in one of its preambular paragraphs:

“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity” (Preambular paragraph 11).

The next paragraph refers to climate justice more directly, but only to the extent that it notes “the importance for some of the concept of ‘climate justice’” (Paris Agreement 2015: preambular paragraph 12). The Preamble of the Agreement is not considered to be legally binding, and given that intergenerational equity is only mentioned as one among many principles which states ought to consider, these references are hardly likely to demand strong action from states to safeguard the rights of future generations.

Interestingly, earlier drafts of the Paris text had included more explicit references. A draft of article 2, which sets out the purposes of the Agreement, had initially included options for language explaining that states should address climate change “for the benefit of present and future generations” (Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP) 2015a: sec C, art 2.2). At a later negotiation, this text was removed and an alternative proposed that ‘intergenerational equity’ be included as one of the principles which states would be required to consider in implementing their obligations (ADP 2015b).

The reference to intergenerational equity in the operative part of the Agreement was ultimately removed from the final text, however. What remained (in addition to the preambular reference noted above) was a reworded version of article 2.2, which reads: “This agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” This arguably shifted the focus away from intergenerational equity and more towards intra-generational equity and the need to strike a fair balance between members of current generations.

A similar process of watering down occurred with the coverage of human rights in the Paris Agreement. A number of states, including the United States, Norway and Australia, reportedly raised concerns that including explicit references to human rights in the operative text would dilute the purpose of the Agreement or create potential for legal liability (Rajamani 2018: 244-245;

Rowling 2015). Other reports indicated that developed states took a hard line against human rights in retaliation to developing states’ strong demands for a meaningful loss and damage mechanism (Vidal & Vaughan 2015). There had been strong advocacy during the negotiating process for the Agreement to meaningfully recognize the human rights consequences of climate change but, despite more explicit references in some of the early drafts, all that remained in the final text was the wording of preambular paragraph 11 noted above: “Parties should ... respect, promote and consider their respective obligations on human rights.” This presents the question, considered in the next section, of whether (and to what extent) states already owe obligations towards future generations under human rights law which might be captured by the Paris approach.

Can the human rights framework promote intergenerational justice?

Given the reality that future generations will be affected by climate change in ways that will limit their human rights, do human rights laws or principles offer any potential for correcting this intergenerational injustice?

From a theoretical perspective, there is debate within the fields of moral and political philosophy about whether it is appropriate to speak of future generations possessing rights. Some scholars have argued that human rights can only be possessed by actual persons, and not by persons who do not yet exist (e.g. Macklin 1981: 152). This reflects what is sometimes called the ‘right-bearer contemporaneity requirement’ (Gosseries 2008: 456). Derek Parfit (1984: 351ff.) famously argued that we cannot owe obligations towards future generations because our actions today not only determine the conditions in which future generations will live, but also the identities of future persons: were we to act differently, those future generations would not come into existence. This ‘non-identity problem’ suggests that current generations do not possess duties in relation to future generations, and future generations cannot therefore be said to possess rights.

However, these approaches fail to capture the intuitive sense that we should care about the consequences of our actions, particularly when we know that those consequences will be negative, and that we have a moral obligation to act in the interests of future generations. A preferable approach is based on 'interest' theories of human rights, which posit that human rights represent fundamental interests which are important enough to create obligations for others (e.g. Raz 1986; Feinberg 1971, 1981; Caney 2006). Following this approach, we can easily appreciate that future generations have interests, and so it is rational to say that they possess (or at least will possess) human rights. Importantly, such an approach confirms that we owe corresponding duties with respect to future generations' rights. It makes no difference that we cannot know the identities of these future people, because the rights and duties flow from their interest-ownership and "that is all that is necessary to certify the coherence of present talk about their rights" (Feinberg 1971: 147).

So it's theoretically possible to conceive of current duties which correspond to future generations' human rights, but are those rights and duties presently enshrined in human rights law and principles? Unfortunately, future generations are not identified specifically as beneficiaries of human rights under international law or under most domestic applications of that law. Most conventional interpretations of the major human rights treaties suggest that states only owe obligations to their citizens and to persons under their jurisdiction (e.g. ICCPR 1966: art 2; ECHR 1950: art 1), which would seem to exclude persons not yet born. There are some arguments in favour of extending to states an obligation to cooperate internationally for the fulfilment of human rights, especially economic, social and cultural rights (CESCR 2017), but this too would normally be limited to members of current generations.

Another issue is how states' substantive obligations should be defined in relation to future generations. Under international human rights law, states typically owe duties to respect, protect and fulfil human rights (commonly known as the tripartite duties). The *duty to*

respect requires that states refrain from taking actions which impinge upon the enjoyment of human rights. This duty could be interpreted through the lens of intergenerational equity to require that, at a minimum, states do not act to undermine the ability of future generations (at least their own future citizens) to enjoy their rights. With respect to climate change, the duty to respect would demand that action be taken to transition to zero net emissions as quickly as possible, while at the same time minimizing the negative human rights consequences of mitigation and adaptation policies (Lewis 2018). The *duty to protect* would impose similar obligations with respect to regulating the actions of private actors, like corporations. The *duty to fulfil* human rights is somewhat more problematic when applied to future generations, as it's not entirely clear what future generations will require in order to enjoy their human rights, or how far into the future states are expected to provide for. Arguably, however, it obliges states to establish and maintain general conditions which lay the best foundation for the enjoyment of human rights in the future, including reducing greenhouse gas emissions and addressing the causes of vulnerability.

A major challenge in better protecting the rights of future generations in the context of climate change is the question of how to balance the rights of future and present generations. Recognizing the rights of future generations does nothing to supplant states' obligations to present generations, and the need to fulfil human rights in the short term might justify some limitation of rights for future people. Certainly, it might be difficult to prove that a state is in violation of its human rights obligations towards future generations where it acts in the name of fulfilling more urgent needs.

However, we shouldn't assume that the rights of present and future generations necessarily conflict. Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, has recently articulated the links between poverty and climate change, noting that the world's poorest people are the most vulnerable to the human rights impacts of climate change, and that on current trajectories climate change threatens to force

many millions more people into poverty (UNHRC 2019). Further, as Edith Brown Weiss has explained, it's not reasonable to expect that people will care about future generations' interests if their own basic needs are not being met (Brown Weiss 2008: 618). Addressing poverty and development today and ensuring a just transition to a green economy are therefore imperative in protecting human rights in the future.

One of the other major drawbacks of the current human rights framework is its claims-based approach to enforcement. Climate change does not fit the typical model for a human rights violation, which typically requires proof that a government's action or inaction has caused a particular human rights interference for a specific right-bearer (OHCHR 2009; Bodansky 2014; Pedersen 2010; Knox 2009b). The cumulative, transnational and long-term impacts of greenhouse gas emissions create challenges for proving that a particular state's conduct has caused a given interference with human rights. This is a problem where human rights effects are already materializing; it is even more challenging when the consequences are predicted to manifest at some time in the future.

The way forward

For these reasons, the existing human rights architecture will struggle on its own to address the intergenerational injustice of climate change. We need both a rethinking of our obligations towards future generations and creative ways of enforcing those obligations. As noted above, a key area requiring attention is expanding the scope of states' duties beyond conventional notions of territory and jurisdiction. One option is to broaden our understanding of what it means to be under the jurisdiction of a state, so that where the exercise of a state's jurisdiction produces negative human rights effects, human rights duties are activated. This approach has been advocated by the Inter-American Court of Human Rights in a recent Advisory Opinion in relation to extra-territorial obligations (2017), and could potentially be applied to extend states' obligations both geographically and temporally, so that they owe obligations to future generations both within and beyond their territories. A challenge to jurists in this

respect would be defining the extent of future-focused obligations and the point at which future generations' interests are considered too remote to trigger current responsibility. However, it may be possible to develop standards of foreseeability or causal contribution that would help define the obligations with more precision.

Another option is to expand rules of legal standing to enable claims to be brought on behalf of future persons. This could be done through the creation of a dedicated 'guardian' or other institution which can represent future generations in legal actions and advocate for their interests (González-Ricoy & Gosseries 2016). An ambitious proposal along these lines was presented at the Rio +20 conference in 2012 calling for the creation of a High Commissioner for Future Generations within the United Nations framework (Ward 2012). While the proposal ultimately did not proceed, work continues at national and regional levels to create institutions which would work for the benefit of future generations.

Human rights principles have potential to contribute to such proposals, even if they are situated outside the conventional human rights framework. For instance, human rights provide a language for us to articulate the nature of harms facing future generations, encompassing a broad range of impacts from fundamental needs through to economic, social and cultural rights. Thinking of these impacts in terms of human rights also helps to put them on a more even playing field with more immediate concerns, potentially facilitating a better balancing of benefits and burdens across generations. In this way human rights could work as a principled basis for resolving conflicts between current and future interests. The normative and moral force of human rights might also help to combat the causes and effects of 'short-termism' – our tendency to prioritize more immediate outcomes over longer-term interests (Mackenzie 2016) – by encouraging greater consideration of future generations.

Adopting these changes may be challenging, particularly within international human rights law, where modifying existing treaties or creating new ones is dependent on the political will of states. But even without these reforms, we

are starting to see human rights language and principles being employed in litigation which addresses the intergenerational impacts of climate change. For example, in the United States a group of young people are pursuing legal action against the federal government alleging that its failure to tackle climate change represents a violation of their constitutional rights (*Juliana v United States* 2016). Outside the legal system, young people around the world are harnessing the power of human rights language to demand stronger action from governments and highlight the seriousness of intergenerational climate injustice (e.g. 'Fridays for Future'). Just recently, a group of young people, including members of the Fridays for Future movement, have launched a claim under the Convention on the Rights of the Child alleging that five states have violated their human rights by failing to reduce greenhouse gas emissions in accordance with their Paris obligations (*Sacchi & Others v Argentina, Brazil, France, Germany & Turkey* 2019). The case will test the ability of existing human rights infrastructure to deal with climate change-related human rights issues and will be watched closely by those interested in advancing intergenerational climate justice.

In taking this creative and courageous action, younger generations are demanding that we recognize that climate change will have drastic effects within their lifetimes. We cannot only think of climate change as a future problem, however. Around the world we are already seeing grave human rights impacts caused by climate change, as severe storms, droughts, bushfires and floods destroy homes, livelihoods and lives. We must work to address intergenerational climate injustice in parallel with urgent action on current threats, recognizing that the best way to protect the rights of future generations is to take strong action now. Continuing on the same path risks locking future generations into a life of limited rights and opportunities, when it is within our power to leave them a world where the full range of human rights can be enjoyed by everyone.

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The enjoyment of human rights will be both directly and indirectly affected by climate change. Common examples are sea level rise, temperature increases, and extreme weather events affecting the rights to health, food, water and life amongst others. These effects will not be felt equally: the more vulnerable segments of the global population will be hit hardest.

As the worlds of climate crisis activism and human rights protection become increasingly intertwined, their value for and impact upon one another deserve closer inspection. The language, policies and (campaigning) strategies around climate change and human rights are still in development, leading to new insights, (re)definitions, and new challenges for human rights and environmental activists. The essays in this volume discuss the opportunities, threats and difficulties at the nexus of human rights and climate change and examine the concept of climate justice as well as recent human rights approaches to climate change issues in specific policy areas, such as migration, subnational authorities and strategic litigation.

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