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The human rights context of climate change¹

The interrelationship between environmental quality and the enjoyment of human rights has been extensively analysed by legal scholars over the past few decades and confirmed by numerous decisions and opinions of international and national courts and other human rights bodies. Most attention has so far focused on cases where there is a direct and demonstrable causal link between environmental degradation attributable to a particular person (typically, although not exclusively, the operator of an industrial activity emitting excessive amounts of pollutants or using excessive amounts of resources) and the limited ability of the rights-holder (in the case of individual rights) or holders (in the case of collective rights, particularly indigenous peoples) to fully exercise or benefit from those rights.

Nevertheless, the relationship between climate change and human rights is different, more complex and less straightforward. While it is clear that climate change has a major negative impact on the possibility of realization of human rights – an impact that will intensify as the global average temperature will rise – the role of natural factors makes it very difficult to identify, in individual cases, the responsible person and to prove the causal link. Despite these difficulties, the human rights-based approach can make an important contribution to achieving the goals of international climate law, both in the area of mitigation and adaptation.

Human rights impacts of climate change

“Climate change threatens our ability to achieve sustainable development, and in some cases, our very survival. It could fuel famine, political upheaval and conflicts over resources.”

Source: United Nations. *Secretary-General’s [Ban Ki-moon] video message for Human Rights Council meeting on Climate Change*. United Nations, Secretary General. 6 March 2015.

<https://www.un.org/sg/en/content/sg/statement/2015-03-06/secretary-generals-video-message-human-rights-council-meeting> [accessed 1st December 2021]

There are a number of human rights the realisation of which may be threatened by climate change and its manifestations. In this context, measures in the field of both

¹ This is a draft chapter from the textbook for the course International Climate Law in the Human Rights Context. For use only by students of this course in the academic year 2021/2022. Please do not distribute.

mitigation (limiting the extent of climate change itself) and adaptation (adapting to changing natural conditions) are important to ensure the full enjoyment of human rights.

Discussion

Discuss the following examples of threats to the realization of human rights due to climate change. Identify, in general terms, the options for ensuring the protection of the rights-bearers as well as the obstacles to applying a rights-based approach in these cases.

Example No. 1

Carteret Islands: threatened by rising sea level

The Carteret Islands are a group of seven small islets on a coral atoll in the South Pacific, about 90 km north-east of Bougainville. They are part of the territory of Papua New Guinea, inhabited by about 1 800 people. Their highest point is of just 1,5 m above the sea level which makes them extremely vulnerable to even a slight sea level rise. Climate change is not (yet?) threatening the lives of islanders, but it is further complicating their already difficult livelihoods.

Suggested reading: Connell, John. *Nothing There Atoll? "Farewell to the Carteret Islands"*. In Crook, Tony and Peter Rudiak-Gould (eds.). *Pacific Climate Cultures. Living Climate Change in Oceania*. De Gruyter Open Poland, 2018, pp. 73-87. Available from: <https://www.degruyter.com/document/doi/10.2478/9783110591415/html> [accessed 1st December 2021]

Example No. 2

The Inuit: threatened by sea ice and permafrost thawing

The Inuit are a group of culturally close indigenous peoples inhabiting the Arctic and subarctic regions of Greenland, Canada and Alaska (United States). The Inuit culture is closely linked and adapted to the Arctic environment, being characterized, among others, by dependence on subsistence harvesting in both the terrestrial and marine environments. The traditional Inuit culture is being threatened by impacts of climate change that are particularly severe in the Arctic, including changes in the quantity and timing of the snowfall, thinning and less extent of the sea ice and thawing of the permafrost.

Suggested reading: *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*. 7 December 2005. Available from: <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/> [accessed 1st December 2021]

Example No. 3

People's Climate Case: livelihood and well-being of people working in agriculture and tourism threatened by extreme weather events

One of the typical manifestations of climate change are hydrometeorological extremes such as heat waves, droughts or floods. In many parts of the world, climate change is disrupting seasons and precipitation patterns. These changes fundamentally affect the quality of life of many people, as well as their ability to earn a living in a way to which they were accustomed and in which they had invested time, energy and resources. Among the most affected sectors are agriculture, forestry and tourism.

Suggested reading: *People's Climate Case* [online]. 2018. <https://peoplesclimatecase.caneurope.org/> [accessed 1st December 2021].

Can you think of other examples of threats to the enjoyment of human rights as a result of climate change?

Rights-holders, duty-bearers and extraterritorial application of human-rights

The concept of human rights is generally understood, although their definitions may vary: they are the basis standards which are necessary for a life of dignity², “*norms that aspire to protect all people everywhere from severe political, legal, and social abuses*”³. They are considered inalienable, indivisible, interdependent and interrelated, and – last, but not least – universal, it means applying to all people in the worlds regardless of their ethnic background, nationality, language, sex, religion, social origin, political opinion, disability or any other characteristic.

As regards their legal nature, recognised human rights are generally **mandatory claim rights**, it means they entail duties (obligations) on other parties (the duty-bearers).

² For a general introduction to human rights see, for example: COUNCIL OF EUROPE. *Compass. Manual for Human Rights Education with Young People*. 2nd edition, 2020, p. 383 et seq. Available from: <https://rm.coe.int/compass-eng-rev-2020-web/1680a08e40> [accessed 1st December 2021].

³ NICKEL, James. *Human rights* [online]. Stanford Encyclopedia of Philosophy, 2019. <https://plato.stanford.edu/entries/rights-human/> [accessed 1st December 2021].

Traditionally, **individuals, i.e. every human being, are the bearers of human rights** and **States are the bearers of corresponding duties** to respect, protect and fulfil them.

Discussion

1. Is the concept of human rights dependent on citizenship? In other words, do States have human rights obligations only in relation to their citizens?
2. How does the responsibility of States, as primary duty-bearers of human rights obligations, manifest itself in the area of climate change?

The universality of human rights does not preclude that only persons fulfilling a certain characteristic may be holders of some of them. These are people who, because of this characteristic, are more vulnerable in certain situations and therefore require special protection. Examples include women, children or members of ethnic and national minorities. Even in these cases, however, it is individuals who are the holders of rights, not groups sharing the characteristic as such. However, the situation is different for two specific groups of rights holders that are becoming increasingly important in the context of climate change: **indigenous peoples** and **future generations**.

Indigenous peoples as rights-holders

There are more than 5 000 indigenous peoples living in more than 90 countries in the world encompassing more than 370 million people. The environment – or nature more precisely (land, water, fauna and flora) – often plays a crucial role in the traditional culture and way of life of indigenous peoples. Although the environmental changes that threaten the long-term survival of indigenous peoples currently stem primarily from direct impacts on the lands they use (territorial development or natural resource use), climate change-induced environmental changes are also gaining importance.

Discussion

Discuss the possible impacts of climate change on indigenous peoples' lives and livelihoods. Which indigenous peoples are most at risk?

There has been a debate at the international level for many decades as to whether indigenous peoples as such are rights-holders or, more precisely, **whether indigenous communities are peoples** in the sense of international law. This concept was opposed primarily by modern states with strong indigenous populations, who feared that these

populations would exercise the right to self-determination guaranteed to nations by international law. However, these fears were gradually overcome and indigenous communities were granted the status of peoples as separate entities and rights holders, with the understanding that their right to self-determination included only internal self-determination, meaning the right to freely determine their political status and pursue their economic, social and cultural development, but without the possibility to demand territorial separation from "their" state.

At the international level, there are **two major universal texts on the rights of indigenous peoples**: the **Indigenous and Tribal Peoples Convention** adopted in 1989 within the International Labour Organization as convention No. 169⁴ and the **United Nations Declaration on the Rights of Indigenous Peoples** adopted in the form of a UN General Assembly resolution in 2007⁵.

Discussion

Study both documents and reflect on the following questions:

- a) Are indigenous peoples holders of rights related to the environment?
- b) Could the exercise of some indigenous peoples' rights be threatened by the impacts of climate change? If so, which ones?
- c) What are the obstacles to the exercise of the rights granted to indigenous peoples and the enforcement of the corresponding obligations?

Future generations as rights-holders

The concept of the rights of future generations is considerably less clear than the one of the rights of indigenous peoples. References to future generations, their needs and/or benefits, appear in a number of international documents of both soft and hard law character, such as the 1992 Rio Declaration on Environment and Development ⁶ or the UNFCCC⁷. The idea of the needs of future generations is also embodied in the principle of

⁴ For more information about the topic, see: INTERNATIONAL LABOUR ORGANIZATION. *Indigenous and tribal peoples* [online]. ILO, 1996-2021. <https://www.ilo.org/global/topics/indigenous-tribal/lang-en/index.htm> [accessed 1st December 2021].

⁵ For more information about the topic, see: UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS. *United Nations Declaration on the Rights of Indigenous Peoples* [online]. United Nations, 2021. <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [accessed 1st December 2021].

⁶ See Principle 3 of the Declaration: "*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*"

⁷ See art. 3 para. 1 UNFCCC: "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.*"

intergenerational solidarity (or equity), which is closely linked to the principle of sustainable development and is enshrined, for example, in the Paris Agreement.

Paris Agreement

The Parties to this Agreement,

....

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,

However, the explicit granting of rights to future generations does not appear in international legal documents and the concept thus far remains more philosophical (and used in a supportive manner) than legal, at least at the international level.

Discussion

Discuss the concept of the rights of future generations. What are the main obstacles to its wider application? Would future generations in your country have legal standing to bring a lawsuit because of an alleged interference with their rights?⁸

Non-state actors as duty-bearers

As far as duty-bearers are concerned, in the field of human rights it has traditionally been States: the legal relationship arising from human rights is generally between the individual as the holder of the right and the State in whose territory the individual is located as the duty-bearer. Direct accountability of private actors may apply at the national level in the area of civil or criminal law; however, from the perspective of international human rights law, it is States that bear responsibility for human rights violations by non-state actors under their jurisdiction or control.

⁸ For a survey of legal academics' opinions on future generations' rights see MARTINEZ, Eric and WINTER, Christoph. *Protecting future generations. A global survey of legal academics*. LPP Working Paper Series N° 1-2021. 51 p. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3931304 [accessed 1st December 2021].

Discussion

Are human rights linked to nationality (citizenship)? In other words, is the ability to claim protection of human rights linked to the nationality (citizenship) of the State in whose territory a person is located?

However, under the influence of the crucial impact of large (especially multinational) business enterprises on the possibility of exercising human rights - including those related to the environment - the notion of who should be the duty-bearer in this field is slowly beginning to change, albeit so far mostly in theory and soft-law instruments.

The lead agency for the business and human rights agenda within the UN system is the Office of the United Nations High Commissioner for Human Rights.⁹ The most important soft-law instrument created so far under its auspices is the **UN Guiding Principles on Business and Human Rights**, which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, and unanimously endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011. The document comprises a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations.¹⁰

These Guiding Principles are based on **three pillars**:

- a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms.
- b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

⁹ See the relevant web page at: UNITED NATIONS. *OHCHR and business and human rights* [online]. United Nations Human Rights, Office of the High Commissioner. 1996-2021. <https://www.ohchr.org/en/business-and-human-rights> [accessed 1st December 2021].

¹⁰ UNITED NATIONS. *Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations Human Rights, Office of the High Commissioner, 2011. Available from: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [accessed 1st December 2021].

Discussion

Study the UN Guiding Principles on Business and Human Rights and discuss the following questions:

- a) What sub-obligations do states and businesses have under each pillar?
- b) What is the legal nature of the document and its relevance to the protection of human rights?

Related to the question of the rights-holders and the bearers of corresponding obligations is the important question of the territorial scope of human rights, or of the legal relationships that arise on their basis. It is widely acknowledged that States have human rights obligations in relation to individuals (or rights-holders in general) within their territory and/or jurisdiction. But what if an activity carried out under the jurisdiction or control of a State interferes with the human rights of persons (or rights-holders in general) in the territory of another State?

Discussion

Think about the possibility of extraterritorial application of human rights instruments. For example, could the inhabitants of an island State threatened by the rising sea level demand effective climate protection measures from another State – a major GHG emitter – arguing that the lax approach of these States is infringing on their human rights?

Human rights-based climate change litigation

There are a number of bodies at national, EU and international level that deal with human rights violations, including those related to environmental degradation due to climate change. The most important of these are, of course, courts as impartial and independent bodies endowed with the authority to adjudicate legal disputes between parties. Courts at all three levels have seen a significant increase in the number of climate-related cases relying on human rights arguments in recent years, although their share in the total number of climate-related cases remains relatively low. The *Climate Change Litigation Databases*, a recognised database of the U.S. and global climate change litigation, lists (outside the U.S.) 89 human rights-based climate cases out of 562 (the database is updated on a monthly basis, so the numbers change).¹¹

Most human rights-based climate cases take place, for obvious reasons, at the **national level** (a complaint to an international human rights mechanism usually requires exhaustion of domestic legal remedies). As far as access to national courts is concerned, it is, including the rules on standing, governed by the national law of the State concerned. These rules vary from jurisdiction to jurisdiction, which means that arguments and approaches used in one State may be difficult to transfer to another one. The personality and setting of the judge(s) may also play a role, as human rights-based climate litigation is generally less bound by specific legal rules and more open to the application of general principles than disputes in other areas.

Discussion

What are the rules for access to human rights courts in your country? Would an individual - or a group, such as an indigenous people - have standing to sue in the event of an alleged violation of a guaranteed human right as a result of inadequate state (or private) action to prevent climate change or mitigate its consequences? What arguments and legal instruments could the rights-holder rely on in doing so?

Do you know of any national court cases based on human rights arguments in relation to climate protection? Has it been successful?

At the **EU level**, enforcing stricter climate protection measures through the courts using human rights arguments seems difficult, as shown by the famous People's Climate Case launched by 10 families from several (including non-European) countries and the Saami

¹¹ See *Climate Change Litigation Databases* [online]. Sabin Center for Climate Change Law and Arnold & Porter, 2022. <http://climatecasechart.com/climate-change-litigation/> [accessed 26st April 2022].

Youth Association Sáminuorra in 2018 and dismissed first (in 2019) by the General Court and then (on appeal in 2021) by the Court of Justice as inadmissible.¹²

Discussion

Read the decisions of the EU courts in the Peoples' Climate Case – order of the General Court in Case T-330/18 from 8 May 2019 and judgement of the Court of Justice in Case C-565/19P – and explain why the application was dismissed.

Can other climate-related human rights-based applications have a chance of success?

The number of applications/petitions submitted to **international human rights mechanisms** has been relatively low and most of them have not yet been decided (of those that have been already dealt with by the respective mechanisms, none has been successful). The most significant cases include:

- the “Inuit Petition” against the U.S. to the Inter-American Commission on Human Rights filed in 2005 (not dealt with by the Commission substantively)¹³,
- the Climate Change Petition from Greta Thunberg and 15 other children from twelve countries around the world against five respondent States (Argentina, Brazil, Germany, France and Turkey) to the UN Committee on the Rights of the

¹² *Armando Ferrão Carvalho and Others v. The European Parliament and the Council (“The People's Climate Case”)* [online]. Climate Change Litigation Databases, 2021. <http://climatecasechart.com/climate-change-litigation/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/> [accessed 1st December 2021].

¹³ Despite the very detailed nature of the petition and the description of the negative impacts of climate change (global warming) on Inuit life, the Commission concluded that “*the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration*”. See the letter by the Assistant Executive Secretary of the Inter-American Commission on Human Rights to the petitioners from November 16, 2006. Available from: *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States* [online]. Climate Change Litigation Databases, 2021. <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/> [accessed 1st December 2021].

Child presented in September 2019 (declared inadmissible in September 2021 for failure to exhaust domestic remedies)^{14 15},

- complaint by Duarte Agostinho and 5 other Portuguese youth against Portugal and 32 other States to the European Court of Human Rights filed in September 2020, alleging that the respondent States have violated human rights by failing to take sufficient action on climate change and seeking an order requiring them to take more ambitious action (pending)¹⁶.

Discussion

Analyse the decisions of the relevant human rights mechanisms in cases of the Inuit Petition and the children's Climate Change Petition and try to predict the decision of the European Court of Justice in the Duarte Agostinho and others case.

¹⁴ CONVENTION ON THE RIGHTS OF THE CHILD/COMMITTEE ON THE RIGHTS OF THE CHILD. Decisions adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications Nos. 104/2019, 105/2019, 106/2019, 107/2019 and 108/2019. Documents CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019 and CRC/C/88/D/108/2019. Available from: <https://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date> [accessed 1st December 2021].

¹⁵ For a very interesting analysis of the petition, see BAKKER, Christine. 'Baptism of fire?' *The first climate case before the UN Committee on the Rights of the Child* [online]. Questions of International Law, 31 January 2021. <http://www.gil-qdi.org/baptism-of-fire-the-first-climate-case-before-the-un-committee-on-the-rights-of-the-child/> [accessed 1st December 2021].

¹⁶ EUROPEAN COURT OF HUMAN RIGHTS. *Duarte Agostinho and Others v. Portugal and Others*. Case No. 39371/20. HUDOC. Available from: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%7B%2239371/20%22%7D> [accessed 1st December 2021].