

## SYMPOSIUM FOREWORD

Symposium on ‘A Rights-Based Approach to Climate Change’, held at Queensland University of Technology (QUT) Law School, Brisbane, Qld (Australia), 18–19 February 2016

### *Rights-Based Approaches to Climate Change*

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The severe impacts of climate change on human rights are increasingly evident as climate-related harms such as tropical storms, forest fires, and desertification intensify. As understanding of the causes and effects of climate change has improved, so too has recognition of the injustices inherent in anthropogenic global warming. Climate injustices are compounded by the fact that those individuals and groups most vulnerable to climatic harm are most likely to have fewest financial resources and lowest adaptive capacities, and are least responsible for the greenhouse gas (GHG) emissions that have caused the problem. Campaigners and litigants are increasingly looking to human rights principles and law to protect victims – both current and future – against the negative impacts of climate change and to promote climate justice.<sup>1</sup>

Anthropogenic climate change threatens all human rights to a greater or lesser extent. The Intergovernmental Panel on Climate Change (IPCC) warns that its impacts will be ‘severe, pervasive and irreversible’.<sup>2</sup> The right to life is threatened by systemic risks arising from extreme weather events that undermine infrastructure and critical services such as electricity, water supply, and health services. The right to health will be undermined by increased risks from food-, water- and vector-borne diseases. Injuries, diseases and deaths will increase as a result of more intense storms, heatwaves and forest fires, and malnutrition from diminished food production is likely to increase in poor regions.

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<sup>1</sup> See, e.g., S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016); D. Bodansky, ‘Climate Change and Human Rights: Unpacking the Issues’ (2010) 38(3) *Georgia Journal of International and Comparative Law*, pp. 511–25; S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010); J. Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33(2) *Harvard Environmental Law Review*, pp. 477–98; S. Adelman, ‘Human Rights and Climate Change’, in G. Digiacomio (ed.), *Human Rights: Current Issues and Controversies* (University of Toronto Press, 2016), pp. 411–35; M. Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action’ (2009) 33(2) *Harvard Environmental Law Review*, pp. 439–76.

<sup>2</sup> IPCC, *Climate Change 2014: Synthesis Report* (IPCC, 2014), p. 8, available at: [http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf). Unless otherwise indicated, the facts in this section are derived from this report.

Increased warming puts ecosystems such as coral reefs at risk of abrupt and irreversible changes that will slow economic growth and poverty reduction, erode food security, and trigger new poverty traps. The IPCC predicts that hundreds of millions of people will be displaced by land loss from coastal and inland flooding, which in turn increases the risks of death, injury, severe ill-health, and disrupted livelihoods in low-lying coastal zones and small island developing states (SIDS) as a result of storm surges and rising sea levels. Climate migration is likely to compromise the right to peace and security through increased risks of violent conflict and civil war, as we have seen in Darfur and Syria.

The right to food is threatened by the breakdown of food systems caused by warming, drought, flooding, and desertification. Rural livelihoods and income are undermined by insufficient access to drinking and irrigation water, and reduced agricultural productivity, especially for farmers and pastoralists with minimal capital in semi-arid regions. In Africa ‘between 75 million and 250 million people are projected to be exposed to increased water stress’ by 2020.<sup>3</sup>

These are just a few of the threatened rights which are guaranteed to all persons in the International Bill of Rights,<sup>4</sup> which came into existence before the work of the IPCC made clear the dangers of anthropogenic climate change. Few subsequent human rights instruments or multilateral environmental agreements (MEAs) contain provisions that protect human rights in the context of environmental or climatic changes.

The first significant attempt to link climatic harm and climate injustices to human rights occurred with the Inuit submission to the Inter-American Commission on Human Rights in 2005.<sup>5</sup> The petition alleged that the acts and omissions of the United States (US) federal government violated the rights of the Inuit people protected by the American Declaration of the Rights and Duties of Man<sup>6</sup> and other international human rights instruments. The Commission declined to assess the merits of the petition on the basis that it did not provide sufficient information, but allowed the petitioners to place their arguments on record in a Hearing of a General Nature.<sup>7</sup> The petition illustrated the problems likely to confront many

<sup>3</sup> IPCC, ‘Summary for Policymakers’, in M.L. Parry et al., *Climate Change 2007: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Fourth Assessment Report of the IPCC* (Cambridge University Press, 2007), pp. 7–22, at 13.

<sup>4</sup> The International Bill of Rights comprises the non-binding 1948 Universal Declaration of Human Rights (Paris (France), 10 Dec. 1948, UNGA Res. 217A (III), UN Doc. A/810, 71), the International Covenant on Civil and Political Rights, with its two Optional Protocols (New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976) and the International Covenant on Economic, Social and Cultural Rights (New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976), available at: <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf>.

<sup>5</sup> Inuit Circumpolar Council Canada, 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 Dec. 2005, available at: <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>.

<sup>6</sup> Bogotá (Colombia), Apr. 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/II.4 Rev. 9 (2003), available at: <http://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm>.

<sup>7</sup> It prompted the emergence of an ever-growing literature in which Humphreys (ed.), n. 1 above, was a significant forerunner.

attempts to use human rights to address anthropogenic warming, such as rules on legal standing and causation. It is a general requirement that complainants must be directly affected by the alleged rights violation to be able to bring a case before a court or tribunal. A similar petition submitted by Greenpeace Southeast Asia, environmentalists and Filipino citizens is being considered by the Philippines Commission on Human Rights.<sup>8</sup> The petition contends that the activities of 50 of the world's largest fossil fuel companies (known collectively as the Carbon Majors<sup>9</sup>) have violated the human rights of Filipinos under domestic and international law.

Litigants in two cases in 2015, in the Netherlands and Pakistan, sought to hold governments accountable for climate policies that undermine human rights.<sup>10</sup> Such developments illustrate growing awareness of the impacts of climate change on a wide range of human rights such as the rights to health, food and water, and the right to life itself.<sup>11</sup> The cases serve not only as a means of establishing accountability and seeking legal redress, but also as a powerful advocacy tool, bringing attention to the plight of those who are most vulnerable to the harmful effects of climate change. The trend of utilizing human rights in climate litigation is likely to intensify in future, with cases based upon various combinations of rights found in international human rights law and national constitutions.

The second significant development that occurred in 2015 was the adoption of the Paris Agreement<sup>12</sup> and the recognition in its Preamble that countries should respect, promote and consider human rights when taking action on climate change. The Paris Agreement is the first multilateral climate change instrument that refers to human rights.

The inclusion of a single reference in the Preamble rather than the operative part of the Agreement is less than human rights advocates had hoped for, but nonetheless constitutes an advance.<sup>13</sup> It is a small step towards a much needed free-standing

<sup>8</sup> Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, available at: <https://perma.cc/2S8RTTKN>. The petition is discussed in J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67.

<sup>9</sup> R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1) *Climatic Change*, pp. 229–41. Heede identifies the Carbon Majors as the world's 90 highest emitting entities, 50 of which are investor-owned companies (p. 231). See also L. Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) *Transnational Environmental Law*, pp. 353–78.

<sup>10</sup> *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396; and *Asghar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at: [https://elaw.org/pk\\_Leghari](https://elaw.org/pk_Leghari). These cases are discussed in the article by Peel & Osofsky, n. 8 above.

<sup>11</sup> See United Nations Environment Programme (UNEP), *Climate Change and Human Rights* (2016), available at: <https://perma.cc/BF65-E7UP>.

<sup>12</sup> Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php).

<sup>13</sup> A. Savaresi & J. Hartmann, 'Human Rights in the 2015 Agreement', Legal Response Initiative Briefing Paper 2/15; ISSD Reporting, 'Summary of the Bonn Climate Change Conference' (2015) 12(651)

international right to a clean, safe, healthy and stable environment, although a significant number of countries have constitutionalized some form of an environmental right.<sup>14</sup> The Paris Agreement is likely to play a significant role in climate litigation, such as in a case recently decided in Norway.<sup>15</sup>

Despite the potential of these developments, there is a long way to go before human rights principles and obligations are fully integrated into the climate change regime under the United Nations Framework Convention on Climate Change (UNFCCC)<sup>16</sup> and for the potential for rights-based litigation to be fully realized in domestic courts and tribunals. The articles in the Symposium collection in this issue of *Transnational Environmental Law (TEL)* explore three key aspects of this topic, highlighting both the current limitations and future potential of human rights-based approaches to climate change.

In his article, ‘Human Rights in the Paris Agreement: Too Little, Too Late?’, Sam Adelman provides a critical evaluation of the effectiveness of the Paris Agreement in protecting the rights of especially vulnerable communities.<sup>17</sup> He considers the impacts of climate change on two particularly vulnerable groups – forest dwellers and the inhabitants of SIDS – and argues that the references to human rights in the Paris Agreement are inadequate to provide protection for these vulnerable communities. After outlining the impacts of climate change on the rights of these groups and the limited and inconsistent coverage of environmental and human rights in the Preamble to the Paris Agreement, Adelman considers whether the Agreement nonetheless offers indirect protection for human rights through the inclusion of the stand-alone articles on reducing emissions from deforestation and forest degradation (REDD+) and loss and damage.

He contends that the inclusion of a loss and damage provision in Article 8 of the Paris Agreement is ‘something of a pyrrhic victory for developing countries and does little to directly protect human rights’.<sup>18</sup> In particular, he maintains that the failure to include any reference to displacement as a consequence of climate change or the inevitable need to relocate and resettle the inhabitants of many SIDS constitutes ‘an omission that signifies a significant failure to protect the human rights of the citizens of SIDS’.<sup>19</sup>

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*Earth Negotiations Bulletin*, available at: <http://www.iisd.ca/vol12/enb12651e.html>; Deconstructing Paris, ‘Human Rights in the Paris Agreement’, 10 Dec. 2015, available at: <http://paristext2015.com/2015/12/human-rights-in-the-draft-climate-change-agreement>.

<sup>14</sup> J.R. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015), pp. 67–8. R. O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6(3) *Transnational Environmental Law*, pp. 435–62. 177 countries recognize various formulations of such a right in their constitutions, environmental legislation, jurisprudence, or through ratification of international instruments: UNEP, *The Status of Climate Change Litigation: A Global Review* (UNEP, 2017), pp. 32–3. Art. 1 of the 2017 draft Global Pact for the Environment provides the right to an ecologically sound environment and states that ‘[e]very person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment’. The draft is available at: <http://pactenvironment.org/global-pact-for-the-environment-projet-2>.

<sup>15</sup> *Greenpeace Nordic Association v. Norway Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06, 4 Jan. 2018.

<sup>16</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>17</sup> S. Adelman, ‘Human Rights in the Paris Agreement: Too Little, Too Late?’ (2018) 7(1) *Transnational Environmental Law*, pp. 17–36.

<sup>18</sup> *Ibid.*, p. 28.

<sup>19</sup> *Ibid.*, p. 29.

Turning to the rights of forest dwellers, Adelman highlights the significant risk that the rights of indigenous peoples will be ignored or abused in the promotion of financial incentives designed to prevent deforestation and forest degradation. He argues that the safeguards contained in the REDD+ provision of the Paris Agreement provide inadequate protection against land tenure systems ‘that enable forests to be privatized, commodified and monetized’.<sup>20</sup> To avoid this, the REDD+ mechanism endorsed in Article 5 of the Paris Agreement should have included clear references to the rights of forest dwellers which recognize and protect their cultural ties to land and the forest resources essential for their livelihoods. Such forms of protection, he maintains, are essential for the legitimacy of the REDD+ regime.

As Adelman argues, if we consider these two significant omissions from the Paris Agreement, ‘it is difficult to avoid the conclusion that the legitimacy of the climate regime would have been greatly enhanced by a stronger commitment to human rights’.<sup>21</sup> In their absence, we shall therefore ‘have to rely on innovative, imaginative and insurgent attempts to protect human rights from climate harms’.<sup>22</sup>

The climate lawsuits analyzed by Jacqueline Peel and Hari Osofsky in their article ‘A Rights Turn in Climate Change Litigation?’<sup>23</sup> demonstrate the potential of innovative climate litigation. Peel and Osofsky ask whether landmark cases such as *Urgenda*<sup>24</sup> in the Netherlands and *Leghari*<sup>25</sup> in Pakistan herald the emergence of a trend for petitioners to employ rights-based claims in climate change lawsuits despite the failure of previous claimants to successfully deploy such claims. They provide extended analyses of the two cases, and discuss the progress made by the claimants in the pending *Juliana* litigation in the US.<sup>26</sup> The plaintiffs in this case include former National Aeronautics and Space Administration (NASA) astronaut James Hansen, who is also the grandfather of one of the youths who brought the case against the US federal government. There is a strong possibility that this case will ultimately be decided by the US Supreme Court.

Hansen recently called for a wave of climate litigation against the 100 Carbon Majors responsible for more than 70% of GHG emissions, to force them to pay for the transition to cleaner energy and the protection of tropical forests.<sup>27</sup> He believes that until governments introduce effective carbon taxes, the best way to hold corporations to account is by suing them for climate change-related damage and the resultant harm to present and future generations. Hansen expressly deploys rights-based language in his framing of the issue: ‘Climate change is a human rights issue. We are seeing injustice against the young. The present generation has a responsibility to future generations’.<sup>28</sup>

<sup>20</sup> *Ibid.*, p. 34.

<sup>21</sup> *Ibid.*, p. 36.

<sup>22</sup> *Ibid.*

<sup>23</sup> N. 8 above.

<sup>24</sup> N. 10 above.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Juliana v. United States*, No. 6:15-cv-01517, (D. Or., 10 Nov. 2016) (Aiken, J.), 46 ELR 20175.

<sup>27</sup> J. Watts, ‘“We Should Be on the Offensive”: James Hansen Calls for Wave of Climate Lawsuits’, *The Guardian*, 17 Nov. 2017, available at: <https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits>.

<sup>28</sup> *Ibid.*

Peel and Osofsky argue that the publication in 2009 of a report by the Office of the High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights was an important development in linking the two issues and shaping future work in the area.<sup>29</sup> The study highlighted the obstacles encountered by plaintiffs in rights-based climate litigation, including the difficulty of establishing causation, accurately predicting the extent of future forms of climate harm and attributing them to the actions or omissions of specific actors, and applying rights-based protections extraterritorially.

Despite these challenges, Peel and Osofsky argue that rights-based arguments may offer significant potential for success in climate litigation. They review the ways in which rights have been used as interpretive tools in a case in the Austrian Federal Administrative Court (since overturned on appeal)<sup>30</sup> and another in the South African High Court.<sup>31</sup> The issues addressed in the jurisdictions discussed in their article provide an ‘early indication of the potential power and effectiveness of rights arguments in climate change litigation in an era where human rights–climate linkages are increasingly recognized at both national and international levels’.<sup>32</sup>

Peel and Osofsky conclude that the trend discernible in the limited number of cases litigated so far reveals increased use of rights-based arguments by litigants and a growing receptivity of courts towards such arguments. Creative lawyering, they contend, could further develop these trends and increase the benefits for those affected by climate change. They conclude:

Although alleging rights violations in climate cases may not result in formally successful judgments, they may nevertheless garner media and public attention that elevate political discussions about climate change, highlight the plight of particular communities, bring to light mitigation or adaptation failures, and ultimately illuminate the ‘human face’ of climate disaster.<sup>33</sup>

In the third article in this Symposium collection, Bridget Lewis identifies another specific area in which existing law and current approaches are inadequate to protect the rights of vulnerable groups. In her article, ‘The Rights of Future Generations within the Post-Paris Climate Regime’,<sup>34</sup> Lewis argues that neither the Paris Agreement nor human rights law provide adequate protection of the rights of future generations, and she calls for greater development of the law in this area.

<sup>29</sup> OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 Jan. 2009.

<sup>30</sup> *Vienna International Airport Third Runway* case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017.

<sup>31</sup> *Earthlife Africa Johannesburg v. Minister for Environmental Affairs & Others*, Case No. 65662/16, Judgment of the High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 Mar. 2017, available at: <http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf>.

<sup>32</sup> Peel & Osofsky, n. 8 above, p. 61.

<sup>33</sup> *Ibid.*, p. 67.

<sup>34</sup> B. Lewis, ‘The Rights of Future Generations within the Post-Paris Climate Regime’ (2018) 7(1) *Transnational Environmental Law*, pp. 69–87.

Lewis argues that human rights theory supports state obligations towards future generations, and discusses the ways in which their rights can be conceptualized in human rights discourses. She then examines the extent to which the rights of future generations are protected by current law, noting that the Paris Agreement ‘does not refer explicitly to future generations, but includes language which may be interpreted as bringing the rights of future generations within the scope of states’ obligations’.<sup>35</sup> For instance, intergenerational equity is referred to in the Preamble to the Agreement (although draft texts contained stronger language). Lewis argues that, despite the absence of strong forms of protection for human rights, ‘it may be argued that the Paris Agreement nonetheless makes space for the rights of future generations’.<sup>36</sup> Arguably, future generations are implicitly taken into consideration in the references to sustainable development in the Agreement, and the preambular references to climate justice and a just transition.

Lewis goes on to discuss the tripartite approach of international human rights law (which is ‘generally understood to involve three levels of obligation: the duties to respect, protect, and fulfil human rights’<sup>37</sup>), and considers what securing each tenet would entail for future generations. In sum, Lewis argues that it is necessary to identify the needs of future generations as much as our limited ability to predict their needs and circumstances allows. Prioritizing the obligations to respect and protect rights over the obligation to fulfil them can ensure that a base level protection of rights is established, with more advanced levels of enjoyment to be pursued once minimum protection is put in place. She proposes the establishment of an international institution or officer to advocate on behalf of future generations, such as a High Commissioner or Special Rapporteur appointed by the UN. This should be done as soon as possible because ‘[f]uture generations cannot afford for us to delay any longer’.<sup>38</sup>

The articles in this Symposium reiterate the need for strong forms of human rights protection in the context of climate change to ensure not only that rights are respected by governments when implementing mitigation and adaptation measures, but also that they are protected from the impacts of climate change itself. The articles provide an important critical analysis of existing legal protection, especially in the period since the adoption of the Paris Agreement, and consider the extent to which the current legal framework protects those groups who are most vulnerable to the effects of climate change. Protecting rights may enable vulnerable populations to hold governments accountable, to participate in decisions and policies on adaptation and mitigation, and thereby increase their resilience against the types of climatic harm that threaten a wide range of human rights. As the authors observe, while there are limitations and challenges inherent in enforcing human rights through existing law, emerging and creative avenues can be explored, which may offer the potential for more effective forms of protection and address the inherent injustices of climate change.

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<sup>35</sup> *Ibid.*, p. 72.

<sup>36</sup> *Ibid.*, pp. 75–6.

<sup>37</sup> *Ibid.*, p. 80.

<sup>38</sup> *Ibid.*, p. 87.