

Introduction: human rights and climate change

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Two starting points inform this collection of articles on human rights and climate change. The first is that, as a matter of simple observation, climate change will undermine – indeed, is already undermining – the realisation of a broad range of internationally protected human rights: rights to health and even life; rights to food, water, shelter and property; rights associated with livelihood and culture; with migration and resettlement; and with personal security in the event of conflict.¹ Few dispute that this is the case.

Moreover, the interlinkages are deep and complex. The worst effects of climate change are likely to be felt by those individuals and groups whose rights protections are already precarious.² This is partly coincidence. As it happens, the most dramatic impacts of climate change are expected to occur (and are already being experienced) in the world's poorest countries, where rights protections are too often weak for a variety of reasons. But the effect is also causal and mutually reinforcing. Populations whose rights are poorly protected are likely to be less well-equipped to understand or prepare for the effects of climate change, less able to lobby effectively for government or international action and more likely to lack the resources needed to adapt to expected alterations

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¹ On the rights of indigenous peoples under conditions of climate change, see IUCN (2008). On migration, see IOM (2008). On gender, see IUCN (2007). On conflict, see German Advisory Council on Global Change (2008); European Council Doc. 7249/08 Annex, *Climate Change and International Security*, Paper from the High Representative and the European Commission to the European Council (March 2008).

² The literature on climate change vulnerability is vast and raises significant human rights concerns. See, for example, Brooks *et al.* (2005); Guèye *et al.* (2007); Ribot (1995).

in their environmental and economic situation. A vicious circle links precarious access to natural resources, poor physical infrastructure, weak rights protections and vulnerability to climate change-related harms.

At another level, the close relation between climate change and human rights vulnerability has a common economic root. Rights protections are inevitably weakest in resource-poor contexts. But resource shortages also limit the capacity (of governments as well as individuals) to respond and adapt to climate change. Worse, where governments are poorly resourced, climate change harms will tend to impact populations unevenly and unequally, in ways that are *de facto* discriminatory because the private capacity of individuals to resist it and adapt to it differs greatly.

The construction of an international climate change regime, too, has rights implications. Mitigation policies have clear human rights dimensions. On the one hand, any strategy (or mix of strategies) that is successful at a global level will tend to determine the long-term access that many millions of people will have to basic public goods. On the other hand, choices made in the shorter term – such as whether and where to cultivate biofuels or preserve forests – will affect food, water and health security and, by extension, the cultures and livelihoods of particular persons in particular places.

Adaptation policies raise comparable human rights concerns. International funding for adaptation may be thought of as a compensatory or corrective response to potential or actual climate change-related human rights violations. Adaptive interventions before or during climate change impacts reduce the likelihood that rights infringements might result from those impacts; adaptation actions after the fact may provide redress where rights protection has already suffered. Indeed, discussions of adaptation at international and government level (as opposed to autonomous local measures) already assume a rights basis for policy construction, even if it is rarely articulated in those terms. At the same time, adaptation actions can themselves affect human rights; for example, if communities or individuals are forcibly removed from disaster or flood-prone areas, or, less forcibly, expected to conform to new economic policy imperatives (by adopting different cash crops or energy sources, for instance).

A second starting point is the observation that, despite the obvious overlaps outlined above, the mainstream climate change literature and debate has, until very recently, given little or no attention to human

rights concerns.³ This has been so even though the reports of the Intergovernmental Panel on Climate Change (IPCC) have examined the human impacts of climate change – in particular, on food, water and health – and have progressively expanded their sphere of reference to include the social as well as the physical sciences. Moreover, perhaps unavoidably, climate change analyses generally remain aggregated at continental or sub-regional level: the available information is still not sufficiently nuanced to cover the situation of individuals and communities who experience climate impacts directly as rights infringements. This, too, reflects the resource asymmetries that everywhere inform climate change discussion and research. Information is far more detailed for those areas likely to experience lesser impacts than for those where the consequences will be most devastating.

The paucity of rights-specific information is not, of course, merely a *cause* of the negligible analysis of the human rights dimensions of climate change, it is also a *consequence*. Given their salience to the main themes discussed in the IPCC's fourth assessment report (IPCC AR4), for example, it is remarkable that human rights are scarcely signalled in almost 3,000 pages of analysis.⁴ This would appear to indicate a near complete disciplinary disconnect, an impression borne out by a glance at the 10,000-strong participants' list for the thirteenth Conference of the Parties of December 2007, among whom no more than a tiny handful hailed from human rights backgrounds. Scanning for human rights 'language' is, of course, a poor analytical tool. Similar concerns may be addressed using different terms – and this appears to be at least partly true in this instance. Nevertheless, the choice of language and disciplinary lens will determine to some extent the relevance of certain kinds of information, orientation and response. Since the IPCC reports are

³ The situation is now changing. At its seventh session, in March 2008, the United Nations Human Rights Council passed a resolution on human rights and climate change. See UN Doc. A/HRC/7/L.21/Rev.1 (26 March 2008). The Office of the High Commissioner of Human Rights subsequently undertook 'a detailed analytical study of the relationship between climate change and human rights' for consideration by the Council. A series of projects investigating the link have been initiated at universities and non-governmental organisations and elsewhere.

⁴ Human rights are mentioned on a handful of occasions in the fourth assessment report (hereafter IPCC AR4, with each volume named after its relevant working group (WG)). The discussion of legal instruments for mitigation in ch. 13 (IPCC AR4, WGIII, 793–4) notes the existence of human rights litigation, without commentary. Passing references also appear, again without analysis, in IPCC AR4, WGII, ch. 15, 661; ch. 17, 736; and ch. 20, 818.

essentially literature reviews, the paucity of rights references no doubt indicates a mere vacuum rather than any conclusion, bias or failing on the part of the IPCC authors. That vacuum says as much about an absence of interest in climate change among human rights professionals to date as vice versa.

Why the silence on human rights?

What explains this mutual disinterest? The primary cause appears to be a kind of disciplinary path-dependence. The study of climate change began among meteorologists, became firmly entrenched in the physical sciences and has only gradually – if inevitably – reached into the social sciences, where the basic orientation has remained pre-eminently, though not solely, economic. Climate change negotiations have centred on consensus-driven welfare-based solutions, approaches that have historically thrived independently of, and in parallel with, the human rights register. Human rights organisations, for their part, are unlikely, as a matter of professional orientation, to take up issues framed as ‘hypothetical’ or scenario-based, quite aside from the disciplinary boundaries that have long existed between environmental and human rights law. It may be that consideration of new and additional *future* harms simply escapes the ordinary purview of human rights analysis. The confluence has consequently been marginal: on the few occasions that human rights are mentioned in the IPCC reports, it is almost exclusively in connection with harms that have already taken place.⁵

On reflection, scholars and practitioners in either discipline might identify plausible reasons for doubting that a ‘human rights approach’ would assist the formation of effective policies to address climate change. Five such reasons are set out below.⁶

The rights at issue are difficult to enforce. Climate change generally (if not exclusively) affects categories of human rights that have notoriously weak enforcement mechanisms under international law: social and

⁵ The ‘Inuit case’ is the primary example. See 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, Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada (7 December 2005), 70 and the short discussion in IPCC AR4, WGIII, ch. 13.

⁶ These schematic points are not intended as expressions of legal doctrine or political fact.

economic rights; the rights of migrants; rights protections during conflicts.⁷ Even those rights that have strong protections, such as rights to life and to property, are not subject to their normal enforcement procedures, because the harms caused by climate change can be attributed only indirectly. In the absence of strong enforcement institutions, either at national or international level, it is not immediately obvious what human rights can add to a policy discussion that is already notably welfare-conscious, even if focused on the general good rather than on individual complaints.

Extraterritorial responsibility is hard to establish. Under human rights law, a person's government ordinarily has the primary duty to act when rights are violated. In the context of climate change, however, responsibility for impacts in the most vulnerable countries often lies not with the government nearest to hand, but with diffuse actors, both public and private, many of whom are located far away. Human rights law does not easily reach across international borders to impose obligations in matters such as these.⁸

Local accountability is hard to establish. Although countries that lack economic resources and infrastructure are least likely to be major emitters of greenhouse gases, they are most likely to suffer devastating effects of climate change – effects whose human consequences will be worsened by their low capacity to adapt. Resource constraints inevitably impair a state's ability to provide quality public goods to its population. This

⁷ Nevertheless, some human rights bodies, notably the European Court of Human Rights, have found rights violations due to environmental impacts, including of the right to health. See Shelton (2001), 225–31; Robb (2001). In a recent case, *Öneryıldız v. Turkey* (App. No. 48939/99, decision of 30 November 2004), the Court found against Turkey for failing to act on an environmental impact assessment, thereby contributing to deaths caused by a methane explosion at a rubbish tip.

⁸ Existing case law suggests that states have responsibility for: (i) state actions taken in other countries; (ii) human rights protections in countries where they exercise 'effective control'; and (iii) some violations committed abroad by private actors who fall under their jurisdiction. See, for example, *Lopez Burgos v. Uruguay*, HRC Comm. No. R12/52 (1979), Views of 29 July 1981; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004; *Coard et al. v. United States*, IACHR Case No. 10.951, Reports No. 109/99, 29 September 1999; *Banković v. Belgium* (App. No. 52207/99, Decision of 12 December 2001). However, the case law is sparse and its applicability to climate-related harms is unclear. Alternative mechanisms involving 'long-arm' domestic jurisdiction – such as the US Alien Tort Claims Act – may be of limited value. Although state responsibility for extraterritorial violations of social and economic rights has not been widely discussed, the particular harms caused by global warming may generate plausible claims of this kind.

problem, which underpins the inadequate fulfilment of social and economic rights in some countries, has led to the notion of ‘progressive realisation’ of those rights under international law. Under existing circumstances, however, climate change is likely to lead to a *progressive deterioration* of those same rights. If a government cannot be held accountable for failing to fully protect those rights in the ordinary course, it will surely be even harder to hold it responsible for circumstances it did not create.⁹

Emergency conditions limit the application of human rights law. The most severe climate change impacts will be catastrophic – drought, floods, famines, mass migration, wars – and will affect large numbers of people. In such circumstances, a common response is to declare an emergency. International human rights treaties and most national constitutions typically allow for the suspension (‘derogation’) of many human rights in times of emergency.¹⁰ Emergency regimes are habitually critical or dismissive of human rights constraints, tending instead to adopt an ends-oriented and charity-centred language of humanitarian relief. Governments are empowered to act expediently, with less regard to individual rights and interests that might act as a brake on achieving the greater good. Human rights, traditionally conceived as a bulwark against expansive state discretion, become less relevant as *legal* tools at such times (although their rhetorical force may increase). Indeed, some human rights traditionalists might be expected to seek limits on climate action on precisely the grounds that it will empower government, both nationally and internationally, at the expense of individuals.¹¹

*Rights may conflict.*¹² Human rights protect others besides those who are potentially harmed by climate change. Economic actors are also rights-holders and it is foreseeable that some of them will invoke the human right to property or peaceful enjoyment of their possessions to

⁹ Some of these vulnerable countries are themselves becoming significant GHG emitters, notably China and to a lesser extent India and Brazil. In these cases, the relevance of human rights law will depend increasingly on the legal expression and enforcement capacity of human rights norms in the countries in question, which varies dramatically from place to place.

¹⁰ For accounts of the applicability of human rights during emergencies see IASC (2006) and OHCHR (2003), ch. 16.

¹¹ It has become increasingly common to adopt the language of emergency when referring, not only to climate change effects, but to the phenomenon in its entirety. Even if this language is intended to be emotive rather than literal, it tends to remove climate change impacts from the ordinary reach of human rights law, at least rhetorically.

¹² Thanks to Dinah Shelton for much of the substance of this paragraph.

prevent or reduce action on climate change. The right to property has been given a broad interpretation by international tribunals and could be asserted by those who have been licensed to act in ways that harm the environment. Other human rights claims too – such as to culture, or freedom of religion, or family reunion – may bring individuals into conflict with climate change policies. All of these rights, like other rights, may be limited for the public good, and struggles can be expected over exactly where the line should be drawn in such cases. Adversarialism is, of course, part of the ordinary human rights landscape. As climate change policies will necessarily generate choices about the distribution of costs and benefits, the invocation of human rights can be expected to produce struggles, pitting interest groups against one another in a way that is markedly different from the consensus-building and compromise that has traditionally guided climate negotiations.

The above objections are not negligible. Legal scholars in particular will quickly recognise a long-standing dichotomy between formal and substantive justice: the hard rule of law formalism of international human rights law, on the one hand, versus the softer, substantivist, policy orientation of the UN Framework Convention on Climate Change (UNFCCC), on the other hand. The ethical language of ‘equity’ and ‘common but differentiated responsibilities’ (CBDR) of the UNFCCC has a quite different texture from the moral certainty and universalism of statements like the Universal Declaration of Human Rights (UDHR) and the international human rights covenants. Indeed, ‘equity’, as it appears in the UNFCCC, might be thought difficult to reconcile with the formal equality that underpins human rights law, much as the UNFCCC’s distinction between ‘Annex I’ (wealthy or ‘developed’) and ‘non-Annex I’ (‘developing’) countries seemingly runs counter to the universal obligations held by all countries under human rights law. Climate change law and policy have striven to avoid absolute or universalist claims of a kind that pepper human rights law and writing, in favour of a flexible and discretionary ‘framework’ language better suited to guiding compromise and consensus.

Yet these distinctions need not necessitate a sharp divide between the disciplines; indeed, as these two areas of law and practice are forced into contact by circumstance, the distinction between them is likely to narrow. A first response to the concerns outlined above might thus be assertive: human rights law is relevant to climate change for the simple reason that climate change affects and will increasingly impinge upon human rights. A second might be predictive. As harms due to climate

change are felt, it is likely that those affected will turn to the hard language of human rights enforcement mechanisms for protection. Indeed, this is already happening.¹³ At the same time, while neither of these factors comes with a ready-made account of the appropriate posture to take at the interface of the two regimes, the unavoidability of negotiation between them is likely to bring cross-fertilisation. There is plenty of scope for exchange and evolution.

The present book is a first attempt to examine this interface from an interdisciplinary perspective, by picking out some areas where interaction between these two disciplines is to be expected, examining where it is already taking place and forecasting the sort of techniques and strategies it may engender or adopt. Before summarising the book's contributions, this Introduction provides some further background on the extent to which rights language has already featured in the climate change debate and the legal framework within which human rights and climate change must negotiate – before turning to the human rights relevance of the evolving climate change adaptation and mitigation frameworks.

Rights, needs, development and the state

Human rights and climate change draw on quite different vocabularies, each with their own referential history and associations: terms familiar from one register may jar in the other, or mean different things to different audiences. A quick review of the key terms as they appear in this and subsequent articles may, therefore, be useful.

'Human rights', as used here, refer to a specific set of claims about the entitlements of all human beings regardless of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁴ These claims, initially laid out in the 1948 Universal Declaration of Human Rights (UDHR), are understood to carry both a widespread moral authority, on the one hand, and a (somewhat more circumscribed) legal authority, on the other hand. As the UDHR is not legally binding, the primary source texts under international law are the 1966 International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR). The two Covenants are legally binding on all states that have ratified

¹³ See, for example, the Inuit case (footnote 5 above).

¹⁴ Common Article 2(1) of the International Covenant on Civil and Political Rights and the International Covenant on Social, Cultural and Economic Rights.

them – that is, the vast majority of the world’s countries – and are supplemented by further binding treaties that protect the rights of children, migrant workers and people with disabilities, and that prohibit torture as well as racial and gender discrimination. Regional binding human rights treaties also exist within Africa, the Americas and Europe. All these texts are supported by the case law of international, regional and national tribunals, by a body of ‘soft law’ (that is, non-binding resolutions and other texts from international bodies such as the UN General Assembly), and, to a degree, by the doctrinal analyses of international lawyers and scholars.

The human rights laid out in these documents are generally referred to as ‘civil and political’, on the one hand, and ‘social, economic and cultural’, on the other hand. The former include rights to life, liberty, property, freedom of expression and assembly, political participation, a fair trial, privacy and home life and protection from torture. The latter include rights to work, education, social security, as well as ‘enjoyment of the highest attainable standard of physical and mental health’ and ‘adequate food, clothing and housing, and ... the continuous improvement of living conditions’. Whereas the former rights are typically guaranteed through judicial mechanisms, including at international level, the latter have generally been achieved through domestic welfare mechanisms rather than courts.¹⁵ Social security has typically been more available in wealthy than poorer countries; the latter are exhorted, under the ICESCR to achieve the ‘progressive realization’ of these rights within the bounds of the means available to them.

Human rights, therefore, capture a range of concerns that are evidently relevant to climate change, including many that have elsewhere been framed as ‘basic needs’. For example, the assertion in the first Article of both Covenants that ‘[i]n no case may a people be deprived of its own means of subsistence’ is clearly relevant where a changing climate is having precisely this effect.¹⁶ To speak of basic subsistence needs (water, food, healthcare, shelter and so on) in terms of rights does not merely mean adopting a legal vocabulary in place of a charitable one. In principle at least, it also implies referral to a body of internationally agreed norms that have raised those needs to the level of entitlements for

¹⁵ Social rights have increasing traction in some national and regional judiciaries, however, and a new Optional Protocol to the ICESCR would create an international forum for individual complaints. See footnote 7 above.

¹⁶ My thanks to Kate Raworth for this observation.

all. Nevertheless, these entitlements do not translate unproblematically into corresponding obligations, much less into fulfilled demands. Under human rights treaty law, duties lie with states toward citizens – they are not straightforwardly attributable to other corporate (non-state) actors or to the ‘international community’ at large. Each state that has ratified the ICESCR has a duty to ‘respect, protect and fulfil’ the rights laid down in the treaty for those within their jurisdiction.¹⁷ The obligation to *respect* a right is understood to mean that the state must take no steps that would violate that right; the obligation to *protect* requires that states act to ensure that other actors, including private and international, are not permitted to violate the right; the obligation to *fulfil* requires that states take steps over time to ‘progressively realize’ rights to food, shelter, health, education and so on.¹⁸ The Committee on Social, Economic and Cultural Rights, the UN body that oversees the ICESCR, commonly requests that states demonstrate steady progress in the fulfilment of these rights.

The ICESCR is not entirely silent on the role that wealthier countries might play in securing the social and economic rights of those living in poorer countries, where protection of these rights is often weak. Article 2 of the ICESCR requires states to ‘undertake steps individually and through international assistance and cooperation’ to fulfil these rights and to use ‘the maximum available resources’ to that end. But while the treaty, reinforced by the Committee’s commentaries, thus encourages wealthier states to assist other states to fulfil social and economic rights, the extent to which this exhortation comprises an obligation remains deeply contested. Although social and economic rights are clearly relevant to economic development in ‘developing countries’, the language of rights has been only partially integrated into development discourse. (The Committee provides guidelines on the integration of human rights assessments into development planning.¹⁹) In practice, however, international financial institutions, multilateral development banks and

¹⁷ There are 149 states parties to the ICESCR. The United States is not among them, having signed but not ratified it.

¹⁸ See, for example, UN Docs, E/C.12/1999/5, CESCR General Comment No. 12, The right to adequate food (Article 11) (12 May 1999); E/C.12/2002/11, CESCR General Comment No. 15, the right to water (Articles 11 and 12) (2002); E/C.12/2000/4, CESCR General Comment No. 14, the right to the highest attainable standard of health (Article 12) (11 August 2000).

¹⁹ UN Doc. E/C.12/1991/1, Revised general guidelines regarding the form and contents of reports to be submitted by states parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (17 June 2001).