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Climate justice and the use of human rights law in reducing greenhouse gas emissions

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QUNO's Mission

QUNO staff work with people in the UN, multilateral organisations, government delegations, and non-governmental organisations, to achieve changes in international standards and practice. Quakers are known for speaking out against injustice and war - issues that are incompatible with our vision of a world in which peace and justice prevail.

Our work is rooted in the Quaker testimonies of peace, truth, justice, equality, and simplicity. We understand peace as more than the absence of war and violence, recognizing the need to look for what seeds of war there may be in all our social, political, and economic relationships.

Human Impacts of Climate Change

QUNO is concerned about the impacts of climate change on people's lives, and works to ensure that the rights and dignity of all are upheld while emphasising the need for urgent action.

We contribute towards this by emphasizing the human impact of decisions made at the international climate negotiations, collaborating with civil society and engaging with the latest climate science, and exploring linkages between climate change and our other areas of expertise, such as human rights, food policy and peacebuilding.

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Overview

This report looks at how human rights obligations can help support policies which lead to more successful and just efforts to decrease greenhouse gas (GHG) emissions due to human activities.

The report examines the relationship between human rights and climate change as conceptualized at the United Nations, and explores how human rights can be used to secure greater emissions reductions while also achieving climate justice.

I. Climate change as a justice concern

Climate change caused by human activity is part of a broader, fundamental challenge of how to live sustainably and justly on earth. The choices we make now - either to transform our behaviour and practices or not to - are determining whether all living species will experience, in this century, rates of global temperature increases unprecedented in human history. We know which human activities are the root causes of intensified GHG emissions, what choices should be made to transform these activities, and how limited our time is to avoid catastrophic climate change. The consequences of our choices now, both on an individual and collective level, make climate change a justice concern.

The latest climate science

There is solid scientific consensus on the drivers of current climate change. The Intergovernmental Panel on Climate Change (IPCC) produces the world's most authoritative synthesis of recent climate science findings. Its Fifth Assessment Report (AR5) stated, "it is *extremely likely* that human influence has been the dominant cause of the observed warming since the 20th century" (IPCC, 2013; emphasis

in original). For this reason, climate change as it is discussed in this paper refers to "anthropogenic": it is caused by human activity.

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"Climate change caused by human activity is part of a broader, fundamental challenge of how to live sustainably and justly on earth."
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In the Paris Climate Change Agreement of 2015, countries agreed to "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". The Agreement creates an ambitious framework for action, including a strong reporting mechanism and periodic global stocktake. With its near universal support, it is a remarkable multilateral achievement.

Yet, the agreement is based on a bottom up, voluntary approach defined through "nationally determined contributions" (NDCs) which lack legally binding targets on either GHG emission reductions (mitigation) or climate finance. Sufficient and fair mitigation is thus dependent on political will; there are no "enforceable means to

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require countries to reduce emissions by specific amounts (Estrin, 2016)”.

The challenges are therefore many. Under the current anthropogenic GHG emission rate, the global mean surface temperature could rise + 4.8°C above pre-industrial levels by 2100 (IPCC, 2014b). Consequences of this rate of temperature rise would include the melting of glaciers and permafrost, rising sea levels and coastal erosion, disruption of terrestrial, freshwater and marine ecosystems, reduction of crop yields, widespread drought and floods. Ecosystem collapse would also have an array of consequent impacts on human health and livelihoods (IPCC, 2014a). In sum, the current ‘business as usual’ rate of GHG emissions is threatening the future of most

species, including our own.

The first round of NDC country pledges would only limit warming to 2.7C to 3C by 2100, increases which would still have very severe consequences. In addition, the NDCs remain pledges; many developing country pledges are heavily dependent on significant climate finance which has not yet materialized from wealthier countries. Meanwhile, under “business as usual” emission rate, global warming would exceed the Paris Agreement target of 1.5C in some 5 years (IPCC, 2014c).

With urgent, fair and sufficient action, there is time to avoid catastrophic climate change, but not much time.

What is Climate Justice?

In most countries, mainstream political debate has moved on from questioning the existence of climate change to choosing appropriate policy responses. Crafting an effective and just policy includes consideration of how the benefits of a given policy may outweigh the harm it causes. However, this is about more than just balance: if the benefits of a policy accrue to the powerful, while the harm is felt by the vulnerable, it would not reasonably be considered 'just' (Broome, 2009). The questions asked under a climate justice framework would include: who should bear what costs? How should benefits be adequately distributed? What level of harm, or responsibility to act, are we as a global community willing to accept? And who gets a voice in asking these questions and setting these priorities? The movement towards just policy responses to climate change has been labelled 'climate justice'.

In reality climate justice means different things to different individuals and groups. Box 1 (on page 5) provides a variety of philosophical, religious and political perspectives on the issue. Linking these perspectives is a shared

recognition that those most vulnerable to anthropogenic climate change have contributed the least to the current crisis. Consequently, those who have contributed the most have a responsibility to protect them.

A climate justice approach can have a positive influence in the pursuit of greater mitigation efforts, from inspiring individuals who choose sustainable lifestyles to protect the next generations, to States which have benefited from past industrialization supporting the mitigation and adaptation needs of less developed countries. A climate justice approach to climate policy action encourages both individual and collective responsibility.

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Taking responsibility

The following section examines how the disparity between most vulnerable and most responsible is felt between states, between individuals and between generations.

Box 1: What is climate justice? Perspectives from around the world

“[Climate change is] an issue so vast and threatening to peace, prosperity, social justice and indeed life itself that it demands we seek solutions together, or face irreparable damage to humanity. Climate change is a threat multiplier, a force that intensifies the likelihood of poverty and deprivation of all kinds; conflict; and the precarious migration of people.” *UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein (2015)*

“We have to realize that a true ecological approach always becomes a social approach; it must integrate questions of justice in debates on the environment, so as to hear both the cry of the earth and the cry of the poor.” *Laudato Si of the Holy Father Francis on Care for our Common Home (2015)*

“We particularly call on the well-off nations and oil-producing states to... recognize the moral obligation to reduce consumption so that the poor benefit from what is left of the earth's non-renewable resources...What will future generations say of us, who leave them a degraded planet as our legacy? How will we face our Lord and Creator?” *Islamic Declaration on Climate Change (2015)*

“Climate Justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable and sharing the burdens and benefits of climate change and its resolution equitably and fairly.” *Mary Robinson Foundation - Climate Justice (N.D.)*

“Communities in the Global South as well as low-income communities in the industrialized North have borne the toxic burden of this fossil fuel extraction, transportation and production. Now these communities are facing the worst impacts of climate change - from food shortages to the inundation of whole island nations.” *Climate Justice Now! (2013)*

“We recognize the connections between climate change and global economic injustice as well as unprecedented levels of consumption... We recognize a personal and collective responsibility to ensure that the poorest and most vulnerable peoples now, and all our future generations, do not suffer as a consequence of our actions. We see this as a call to conscience... *Facing the Challenge of Climate Change: A shared statement by Quaker Groups (2014).*

States

Climate justice is felt between countries. Those countries now considered ‘developed’ emitted the greatest amount of anthropogenic GHG emissions – the United States and the European Union are responsible for over half of cumulative or ‘historical’ global CO₂ emissions between 1850 and 2011 (Friedrich and Damassa, 2014). In the last quarter of the 20th century, major new emitters such as China emerged, though emissions per capita continue to remain highest within developed countries and there exists a subset of nations, including Small Island Developing States (SIDS) and States in sub-Saharan Africa, whose contribution to historic and current emissions is negligible (Friedrich and Damassa, 2014). Still, the total annual GHG emissions of developing nations surpassed those of the industrialized nations in the early 21st century (UNEP, 2013), and sufficient action to avoid catastrophic global climate change requires a global effort.

In addition, while many developing nations are located within climatic systems that are particularly vulnerable to disruption, the IPCC reports that differences also arise from “non-climatic factors and from multidimensional inequalities often

produced by uneven development processes [and] these differences shape differential risks from climate change” (IPCC, 2014a). The least developed countries often lack the human, technological and financial resources required to adapt to climate change effectively. Many States in the global South hold that this disparity undermines their longstanding development and poverty reduction goals - which they may in turn consider incompatible with substantial GHG emissions reductions.

.....

“Adults worldwide have a responsibility to act urgently to protect the environment upon which future generations depend.”

.....

Individuals

Climate justice is also about recognizing the vulnerable and the marginalized within all States. Climate change affects more destructively the lives and livelihoods of those who are already negatively affected by other forms of structural inequality within their own countries. The poor and Indigenous peoples are often the most vulnerable; impacts are felt more severely depending on a person’s gen-

der, class, ethnicity, age and disability (IPCC, 2014a). Women in these groups are particularly at risk because of limited access to resources, weak legal enforcement of their rights, and less meaningful participation in decision-making (UNDP, 2007). Attempts to reduce GHG emissions, through biogas or hydroelectric projects for example, can also negatively affect the lives of vulnerable people (see Carbon Market Watch, N.D.).

The young and future generations

At heart, climate change due to past and current human behavior is an intergenerational injustice. No young or unborn child is responsible for climate change, and yet their ability to cope with the effects of rising temperatures is dependent on the action we take now to curb GHG emissions. And while the circumstances into which children are born, such as poverty and region, intensify the human impact of climate change, the lives of all youth and future generations would be profoundly affected by the current rate of temperature increase.

Climate justice for our youth and future generations is often referred to as intergenerational equity – the sharing of benefits and burdens of social cooperation across generations, and

is another dimension of “distributive justice” (Frischmann, 2005). The United Nations Framework Convention on Climate Change (UNFCCC), in Article 3, identifies action to protect the climate system as “for the benefit of present and future generations of humankind”. Intergenerational equity, though technical in wording, reflects the primary connection between human beings worldwide to inspire urgent action. Climate change is about all of our children. As adults, we have a responsibility to act urgently now to protect the environment on which the lives of our future generations depend.

2. Human rights and rights-based approach

Human rights language powerfully articulates the impacts of climate change on even our most fundamental of human rights, including the right to life, health, food, water, adequate housing and self-determination. In recent years, one expression of the call for climate justice has been the movement to reconcile climate policymaking with international human rights law.

The process by which climate change has come to be recognized within the United Nations as a legitimate human rights concern is strengthen-

ing, though still incomplete. There is a growing consensus on the human rights impacts of climate change itself, and some multilateral bodies have started to recognize that States have human rights obligations to prevent these harms from being realized.

The value of a rights-based approach to strengthen climate action

With climate change increasingly identified as a human rights concern, an essential question is how to meaningfully incorporate human rights into climate policies and action. This is often referred to as a ‘rights-based approach’, and its integration in climate change policy is a direct channel for strengthening public support for climate action. Local, national and international policies that include a ‘rights-based approach’ promote policy coherence, legitimacy and sustainable outcomes (Knox, 2016) in reducing our emissions. This is because citizens whose lives affected by climate change policy are more likely to support climate action when rights are promoted, respected and protected. This approach can create a virtuous cycle for more effective efforts to reduce GHG emissions.

A rights-based approach entails strengthening the capacity of duty-

bearers (States) to meet their obligations and empowering rights-holders (individuals) to claim their rights (UN HRBA Portal, 2003). As this can result in more sustainable and just climate policies, it can increase the effectiveness of those policies in protecting human beings from dangerous global temperature rises.

Anchoring climate decision-making in a recognized body of international law such as human rights leads to climate policies that are collaborative, responsive and thus sustainable, and provides a reference point for the coordination of international efforts (OHCHR, 2015). A rights-based approach can also help to ensure equity and protect citizens from harms caused by the activities of non-state actors such as businesses (OHCHR 2015).

Under international human rights law, states also have a number of process (or ‘procedural’) obligations in the context of environmental decisions, which would promote the equity and efficacy of climate policies. States’ procedural obligations include duties to (a) assess environmental impacts and make environmental information public; (b) facilitate public participation in environmental decision-making, including by protecting the rights

of expression and association; and (c) provide access to remedies for harm (Knox, 2016). Fulfilment of procedural rights, including effective participation in decision-making, contributes to more transparent, better-informed and more responsive environment policy (Knox, 2012). Enabling communities to participate without discrimination in the design and implementation of these projects can pre-empt violations which could otherwise delay implementation and frustrate long-term success.

Human rights can complement other forms of legal empowerment and protection in supporting individuals and communities to contribute to national and global mitigation targets. For example, many local communities and Indigenous peoples are involved in renewable energy projects or the conservation of carbon sinks such as forests (see United Nations University, 2012). International law does not, for example, tend to provide the legal certainty necessary for forward planning in renewable energy projects. However, rights as guaranteed under national legal frameworks are, if adequately supported, a powerful tool. Legal recognition of community-managed forests is associated with low rates of deforestation and, consequently, the benefits of CO₂ reduction, when accompanied by

proactive government enforcement of these rights (WRI, 2014b) and national and international civil society support (Green, 2015). The International Institute for Environment and Development has developed a program of work on Legal Tools for Citizen Empowerment, whose initiatives include training local citizens to be paralegals who can represent their communities in environmental disputes (IIED, nd. Polack, 2014).

Critical to making a 'rights-based' approach to climate action effective, is the inclusion of peacebuilding methods¹ to empower disadvantaged groups and help promote inclusive and trust based decision making around natural resource management. Peacebuilding methods will help to ensure that legal solutions are sustainable and do not lead to destructive conflict (Roberts and Finnegan, 2013).

International human rights law provides a conceptual framework of

¹ Peacebuilding approaches such as locally led conflict analysis, creation of dialogue between groups with competing interests, and empowerment of vulnerable groups to articulate their needs, can help stakeholders to understand and deal with resource conflict and underlying tensions exacerbated by the impacts of climate change.

procedural rights that can contribute to the efficacy of climate change decision-making (see Kravchenko et al, 2010).² It can galvanize international support – both political, in the form of pressure on national governments, and financial, in the form of funding from international donor organizations (Dudai, 2009). Finally, a rights-based approach can strengthen mitigation efforts because the climate policies which receive greater public support tend to be more sustainable and thus more effective as well as fair. In other contexts, however, human rights law is taking centre stage - such as the increasing number of cases where citizens are taking their governments to court to ensure adequate emissions reductions.

3. Human rights and climate change: development of legal standards

The foreseeable consequences on human rights, even under a 2°C rise in average global mean surface temperature, would be dramatic (see Knox, 2016; Government of the Maldives, 2008; OHCHR, 2009; IBA, 2014).

2 Procedural rights are recognized in regional instruments such as the Aarhus Convention, which has been signed by 46 States (all in Europe or Central Asia) and the European Union.

While few States deny that individuals can be deprived of their rights due to climate change, for there to be legal redress there must be a responsible party to whom the individual can appeal.

Consensus: State responsibility to respect, protect and fulfil

Human rights exist as moral norms but also as distinct legal rights. Rights gain concrete legal force when they are enshrined in conventions (a form of international legal text that clarifies the content of a given right) through which States agree to be bound. Upon ratifying a text, a State becomes responsible for upholding the right for individuals within its territories, as well as, arguably, those beyond its borders. Thus, although international human rights law is centered on the individual, in that the individual is the ‘rights holder’, the State is seen as the ‘duty bearer’ – States bear the responsibility if an individual cannot secure his or her rights.

Legal challenges to appeal include the situation in which GHG emissions originate in a State, but climate change impacts are felt globally. Climate impacts are ‘transnational’. Climate change does not recognize national borders but, the international human rights system in a sense relies upon them. In addition, climate sys-

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tems are highly complex. It is technically difficult to demonstrate a causal link between a given weather event and anthropogenic climate change. Demonstrating that emissions in a particular country led to the denial of a particular human right has historically required an extremely high burden of proof in political fora (see the Government of the United States of America, N.D.).

For these reasons, despite their clear and widespread recognition of climate change's effects on human rights, international human rights institutions such as the Office of the High Commissioner for Human Rights have tended not to talk of climate change as a human rights *viola-*

tion (see OHCHR, 2009). Such a label would trigger a legally problematic search for a violator. There is not yet global consensus for an internationally recognized right to a healthy environment, though widespread support for its recognition is building among international bodies and States. To date, under international human rights law, environmental harm can only be construed in terms of its impact on other human rights. The UN Human Rights Council's formulation, outlined in a resolution that was passed by consensus in 2015, is that climate change "has adverse effects on the full enjoyment of all human rights", such as the right to food, water and shelter (UNHRC, 2015). However, as noted by the UN Special

Rapporteur on Human Rights and the Environment, not all “adverse effects” on human rights amount to a breach of a legal duty under human rights law (Knox, 2009).

This is a small but meaningful distinction. While abandoning the search for a violator does constrain the ability of human rights institutions to hold States to account for causing climate change, it does not altogether absolve States of any responsibility, nor end the value of these institutions. In particular, regardless of whether or not it is deemed “to be in violation”, a State nevertheless has responsibilities to respect, protect and fulfil the human rights of its citizens. In the context of climate change, this could involve taking action to prevent private parties (non-State actors) from violating human rights,³ or ensuring that citizens have access to adequate food during climate-related extreme weather events. And while it may be difficult to determine that a

3 Under international law, corporations have a responsibility to respect human rights. As noted in the UN’s ‘Guiding Principles on Business and Human Rights’, “the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.” (OHCHR, 2011). See Chapter 3.

given State is responsible for climate change itself, it is nevertheless obliged to uphold human rights in its own responses to climate change. It is also important to note that the impact of climate change on a State’s ability to fulfil its human rights obligations does not itself absolve the State of its legal responsibilities in this regard.

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“The impact of climate change on a State’s ability to fulfil its human rights obligations does not itself absolve the State of its legal responsibilities in this regard.”

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This perspective has received a certain amount of institutional recognition. In addition to the 2015 Human Rights Council resolution, the UNFCCC has emphasized in the Cancun Agreements of 2010 that “Parties should, in all climate change related actions, fully respect human rights.” In a move designed to make a connection between the two processes, all seventy-six UN Special Procedures mandate holders signed a letter to the UNFCCC in December 2014 reminding climate negotiators of their States’ human rights obligations before they met in Lima for the Conference of the

Box 2: Examples of rights-based language in the Preamble of the Paris Agreement

“Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty,

“Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

“Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities,

“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,

“Recognizing the importance of the conservation and enhancement, as appropriate, of sinks and reservoirs of the greenhouse gases referred to in the Convention ... Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of “climate justice”, when taking action to address climate change.”

Parties (COP) 20 (OHCHR, 2014). The Office of the High Commissioner of Human Rights produced a similar document in advance of the COP 21 negotiations in Paris in 2015

(OHCHR, 2015); while after much effort the Paris Agreement included human rights, climate justice and the integrity of all ecosystems in its Preamble (see Box 2).

Extraterritorial obligations

There is widespread agreement that, insofar as human rights can be invoked in response to the impacts of climate change, they relate to specific responsibilities held by the State towards individuals within its own territories. However, a growing body of jurisprudence suggests that States have responsibilities beyond their own borders – otherwise known as ‘extraterritorial obligations’ (ETOs).

The kernel of this idea has existed since the beginning of international human rights law. Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two major international human rights instruments adopted in the 1960s, enshrines the principle of international co-operation in order to uphold the rights laid out in the Covenant. Since then, legal scholars have sought to clarify these responsibilities - see for example the Maasticht Principles, a synthesis of existing extraterritorial obligations drawn up by a panel of jurists (MCHR and ICJ, 2011).

The existence of ETOs remains a thorny political issue in the multilateral sphere, and not just in relation to climate change. A variety of ideologi-

cal, political and practical obstacles complicate official state recognition of ETOs. Even when they are accepted in principle, there is little clarity within the UN as to their scope and application (Coomans, 2011). The United Nations bodies set up to monitor the various human rights treaties have issued influential interpretations of the extraerritorial applicability of their respective treaties, but such efforts remain disparate and *ad hoc* (GIESCR, 2015).

Climate change is often considered a litmus test for the concept of ETOs, due to the transnational nature of its impacts. The ETO Consortium, a network of human rights civil society organizations and academics, has suggested that transnational cooperation and coordination in the context of climate change should go beyond the principle of ‘do no harm’, and adopt a more proactive stance in ensuring net positive outcomes for human rights and quality of life (ETO Consortium, 2014). One analyst has claimed that the transnational impacts of anthropogenic climate change mean that it should allow for criminal prosecution of an individual regardless of where the crime was committed, or the perpetrator’s nationality or country of residence (Gracer, 2008). This doctrine of ‘universal jurisdiction’

currently only covers grievous crimes that are understood to threaten the international community as a whole, such as genocide, torture and war crimes.

The Oslo Principles

The Oslo Principles are an attempt to tackle ETOs and climate change by positioning human rights law within the broader framework of public international law, and drawing from other bodies of law such as international environmental law – a “network of intersecting sources.” The Principles, published in 2015 by a body of renowned international jurists, are a synthesis of “the legal obligations of States and enterprises to take the urgent measures necessary to avert climate change and its catastrophic effects” (Expert Group on Global Climate Obligations, 2015).

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The Oslo Principles have helped to influence what a ‘fair’ or ‘just’ approach to reducing GHG emissions looks like and how it is bound up in the issues of past, present and future injustice.

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The Principles were prepared before the Paris Agreement commitment to pursue a 1.5C limit. As a result, the Oslo Principles use the pre-Paris target of 2°C global mean surface temperature rise above pre-industrial levels as the basis for calculating the GHG emissions reductions that, in the opinion of the Expert Group, individual States are legally obliged to bring about. In line with the principle within the UNFCCC Convention of common but differentiated responsibilities (CBDR), the obligations of developing States are relaxed if the State can demonstrate that the mitigation measures would cause undue hardship. As well as providing a legal basis for binding emission reduction targets for States, the Oslo Principles also outline the particular legal obligations States have towards other States. For example, if a State has exhausted all possible means of contributing its share of the mitigation burden, it is legally obliged to provide financial and technical assistance to a country that has contributed its share (Principle 18). Developed States are obliged to assist developing States achieve their targets – developing State obligations are contingent on this support. Principles 25 and 26 describe the procedural obligations of States, namely that they are required to accept the jurisdiction (and assist

in the operation) of independent tribunals or courts at which compliance with their obligations can be assessed and adjudicated. The obligations of enterprises are centered around the need to adequately assess their vulnerability and financial exposure to both climate impacts and continued reliance on fossil fuel extraction and production, while also determining the carbon footprint of their own activities and those of other projects they may be considering financing.

The Oslo Principles are a compilation of existing obligations under international law seen through the lens of climate change. They do not have any legal force in themselves – they are granted meaning through consistent adjudication and enforcement by relevant legal authorities.

The Oslo Principles have helped to influence what a ‘fair’ or ‘just’ approach to reducing GHG emissions looks like and how it is bound up in the issues of past, present and future injustice. Agreeing on a shared way forward has been one of the most difficult issues facing the international negotiations held under the UNFCCC negotiations. Within the UNFCCC negotiation process, *developed* States should continue to increase their climate actions for the

pre-2020 period, and should remain ambitious leaders in the post-2020 universal efforts of *all* States under the Paris Agreement of 2015. These post-2020 actions, defined in the NDCs, include the States’ quantified commitments to reduce GHG emissions. The Paris Agreement recognizes as a general principle the idea that disparities in both historical responsibility and current level of development means that States’ contributions towards meeting their common goal (and the help they receive to do so) will vary.

Citizens may conceive of fairness and level of ambition in emissions reduction differently to their government. Differences in opinion between citizen and state have led to the rise of grassroots movements, many of which seek to persuade their governments to take on a greater share of emissions reductions than they have committed to at the UNFCCC.

4. Recent experiences in climate litigation

Those wishing to hold their governments accountable for their human rights obligations in the face of climate change are often faced with an uncertain legal environment. However, activists and communities have



already started to use human rights law to restore a sense of urgency and ambition to state mitigation targets.

Urgenda Foundation v. The State of the Netherlands

In 2013, Urgenda, an environmental NGO, brought a case in the district court of The Hague against the Dutch government for neglecting its constitutional duty of care towards the Dutch people by making insufficient emissions reductions, thereby infringing both domestic tort law and Articles 2 and 8 of the European Convention on Human Rights (ECHR).⁴

⁴ Articles 2 and 8 of the ECHR refer to, respectively, the right to life and the right to

Urgenda argued that the case law of the European Court of Human Rights provides a precedent for the positive obligations of states to take measures in the event of potential violations as a result of environmental harm, even if a causal link could not be established with absolute certainty (Cox, 2014).⁵ In its ruling, the court did not recognize Urgenda as either a direct or an indirect victim of a rights infringement – Urgenda was an organization, and therefore not a rights

respect for private and family life.

⁵ See *Tătar v. Romania*, App no 67021/01 (European Court of Human Rights, 2009). The case concerned the Romanian State's failure to protect the right to respect for private and family life (Art 8) of the applicants, who lived near a highly polluting gold mine.

holder in the same way an individual would be. However, it did rule that Articles 2 and 8 of the ECHR were still relevant to the question of whether the Dutch government had met its duty of care towards Urgenda. According to the Court, these Articles could be used to derive the:

- i) Extent to which the Dutch state had discretionary power in its climate action; and
- ii) Minimum degree of care the state is expected to observe (Netherlands Judiciary, 2015: para 4.52)

In conclusion, the Court stated “the single circumstance that the Dutch emissions only constitute a minor contribution to global emissions does not alter the State’s obligation to exercise care towards third parties” (ibid: para 4.79).⁶ The court ruled that the government was legally obliged to commit to a 25% GHG emissions reduction, relative to 1990 levels, by 2020, in contrast to the government’s declared reduction pathway of 14-17%. The outcome of the Urgenda case is certainly a step toward improved mitigation

6 Note that while this is the official English translation of the case; only the Dutch original is legally authoritative.

ambition, but given that Dutch GHG emissions amount to just 0.5% of the global total (WRI, 2014a), and that the ruling was made in a Dutch court, the next step is to ask whether the ruling will serve as an effective precedent for similar action in other States and jurisdictions.

A paradigm shift?

The Urgenda case’s most significant legal achievement lies in its demonstration that a government’s lack of sole responsibility for the cause (i.e. global greenhouse gas emissions) of a given harm does not necessarily negate its duty of care. As noted above, the Dutch government was held responsible for contributing its ‘share’ of global emissions reductions despite the fact that climate change would continue even if Dutch emissions were to fall to zero. This goes some way to bypassing the problem of tracing causality and attributing responsibility raised in Section 2 of this paper and, in turn, could strengthen judicial confidence in climate cases. Legal commentators had previously suggested that the continued absence of prior case law had a self-perpetuating chilling effect, in that judges applying the law in climate change decisions risked being labelled as ‘activists’ in some jurisdictions and would thus

not be inclined to take strong affirmative positions (Kalnins Temple, 2015). *Urgenda v. the Netherlands* goes some way towards filling in this gap.

The Urgenda court judgement is not final; the Dutch State's recent announcement that it would appeal the ruling in the Urgenda case illustrates the fact that governments are rarely powerless in the face of the law (Government of the Netherlands, 2015). However, despite this appeal, the Government is already in the process of implementing the ruling – the court-ordered action in this case could be more important than the ruling itself if it leads to change.

In other countries, citizens have used legal channels to complement political advocacy in their efforts to secure more ambitious greenhouse gas reduction commitments from their governments. A recent example from Washington State, USA, is *Zoe & Stella Foster v. Washington Department of Ecology*. The youth petitioners in this case cited their “inherent and constitutional rights” to natural resources and a healthy environment as the basis for the duty of care in their request that the Department of Ecology recommend to the state legislature that statutory emissions limits be set in line with the latest climate science – a ‘petition for rulemaking’ (Harris 2014). On

this basis, a district judge was able to overturn the Department's rejection of the youth petition and refusal to recommend emissions limits, and in September 2015, the Governor of Washington directed the regulators in the Department to cap emissions and curb them by 50% by 2050. When the Department attempted to withdraw its proposed rulemaking in early 2016 on the basis that it needed more time to consult with stakeholders, the same district judge ordered that an emissions reduction rule be promulgated by the end of the year (Hill, 2015; Our Children's Trust, 2016).

GHG emissions from transnational companies is significant. While international human rights law is not itself currently binding on companies, States have obligations to protect those in its jurisdiction from the actions of the private sector. Transnational corporations (TNCs) have for some time lain largely beyond the reach of human rights law, in part due to the controversy surrounding extraterritorial obligations. However, this issue has recently gained traction within the United Nations: the first session of the intergovernmental working group towards a treaty on TNCs and other business enterprises with respect to human rights was held in

July 2015. Translating international human rights obligations pertaining to climate change into national legislation could both strengthen the hand and widen the scope of courts in litigating against transnational corporations and other third parties (Gage and Byers, 2014).

Litigation works best in States with strong independent judiciaries that are legally empowered to enforce, challenge or call for a review of relevant legislation, and where rights (whether framed as ‘human rights’ or not) are enshrined in national law. The Washington petitioners’ approach was suited to its particular legal and political context in that called on legal rights that not only enjoyed broad-based political support but were also accompanied by strong domestic enforcement mechanisms – notably not, in this case, international human rights law. However, international norms nevertheless played a role – the state legislature referred to IPCC assessment reports and the outcomes of the COP21 in Paris in devising a climate change statute consistent with the climate science (Bach, 2016). Furthermore, in April 2016, a judge ruling on a similar youth petition in the District Court of Oregon explicitly cited the *Urgenda v. the Netherlands* case, the latter of which

was in part premised on international human rights law, when addressing the argument that state-level GHG emissions reductions would be ineffectual in the context of global emissions (Coffin, 2016). The judge did note that the Dutch court had no authority in Oregon, so a precedent could not be called upon, but the very fact of the case’s citation is a significant demonstration of its legal relevance in different jurisdictions.

Litigation is an indirect channel for strengthening public opinion on climate change. When strengthened by international norms, such human rights law, IPCC reports and or NDC pledges, such cases can influence governments of the necessity of urgent action to limit temperature rises. Even when it does not result in court-ordered mitigation actions, recent research has suggested that climate litigation framed as a defense of human rights can be a powerful mechanism for shaping social norms around climate change (Peel and Osofsky, 2015). Yet litigation may erode trust between states and their citizens, removing incentives for state representatives to include human rights guarantees in additional international treaties, or to commit to ambitious mitigation targets to which states can later be held to account.

5. Conclusion

Unless the world's governments make urgent and ambitious emissions reductions, all the human rights safeguards in the world will not be enough to prevent grievous denials of human rights on a staggering scale. What is at stake for many people, especially in sub-Saharan Africa, low-lying areas and many small island developing states, is often their very existence (IPCC, 2014a).

Some might believe that the law, as it stands today, cannot guarantee mitigation on a sufficient level to prevent catastrophic climate change. As Rachel Carson wrote in *Silent Spring*, the United States Bill of Rights was ill equipped to tackle harmful pesticide use “only because our forefathers... could conceive of no such problem.” The same might be said of greenhouse gases’ unprecedented capacity to cause harm on a global scale. For some, overcoming this might entail the development of further international human rights instruments in order to compel more ambitious national mitigation commitments. Others may consider that it is more effective to work within the boundaries of existing law – international legal scholars including the Expert Group and the current Special Rap-

porteur on Human Rights and the Environment have strengthened the interpretation of existing human rights obligations in the context of climate change. A pragmatic, case-by-case approach might entail using whichever legal argument (or suite of arguments) is the strongest in a given instance, taking into account strategic and political implications as well as legal viability (see Dudai, 2009).

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“Taken together and applied strategically, these sources challenge the idea that ‘transnational’ climate change is an ungovernable problem.”

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However, what is clear is that international norms and standards are being increasingly called upon for guidance in national courts and legislatures (Bach 2016). International human rights law is one such set of norms; others include international environmental law, outcomes of the UNFCCC process such as the Paris Agreement and the assessment reports of the IPCC. As this paper has shown, judgments reached in one jurisdiction are being cited in others. This is what the “network of intersecting sources” referred to

in the Oslo Principles looks like in practice. Taken together and applied strategically, these sources challenge the idea that ‘transnational’ climate change is an ungovernable problem.

Human rights, as fundamental as the right to life, health, food, water, adequate housing and self-determination, highlight what is at stake for our civilization under rising temperatures. Integrating a rights-based approach in climate policy remains the most direct and fair channel for strengthening public support and promoting successful and fair mitigation efforts to limit temperature rises. Legal action, be it litigation or efforts to uphold rights at the local level, is a more indirect channel and should be used carefully and complemented by decisive commitments from political leaders, responsibility and vision from business and industry, and concerted action by civil society. These elements can provide legal protections for securing climate justice, for the most vulnerable communities now and all future generations.

The time to act is now.

Appendix I: Resources on Human Rights & Climate Change

The basics

[HRC Resolution 29/15 on Human Rights and Climate Change \(2015\)](#) *The United Nations Human Rights Council's recent statement on the issue.*

[The Geneva Pledge for Human Rights in Climate Action \(2015\)](#) *As of June 2016, 33 countries have signed the Costa Rica-led initiative, which was unveiled at a UNFCCC session in February 2015. In addition to pledging to respect and promote human rights in climate change responses, State signatories agree to share good practice and knowledge.*

OHCHR (2015). [Key Messages on Human Rights and Climate Change](#). *This OHCHR brief outlines the essential obligations and responsibilities of States and other duty bearers concerning climate change and its impact on human rights.*

[The International Bar Association \(2014\). Achieving Justice and Human Rights in an Era of Climate Disruption](#) *The IBA produced this exhaustive compendium on the request of Mary Robinson, the Secretary General's Special Envoy on Climate Change and ex-High Commissioner for Human Rights.*

Background

[CARE and Center for International Environmental Law \(2015\). Climate change: Tackling the greatest human rights challenge of our time.](#) *This background paper by CARE and CIEL provides a complete historical overview of international efforts to link climate change and human rights and provides recommendations for further integration of the two issues within both the UN human rights community and the UNFCCC.*

[John Knox \(2009\). Linking Human Rights and Climate Change at the United Nations](#) *John Knox, now UN Special Rapporteur on Human Rights and the Environment, provides a legal and institutional overview of the introduction of climate change to human rights fora at the UN.*

[Report of the OHCHR on the relationship between climate change and human rights \(2009\)](#) *This OHCHR report discusses the implications of climate impacts on human rights. UNHRC Resolution 29/15 (2015) has set in motion the process for this report to be updated.*

[Theodor Rathgeber \(2012\). Climate Justice, Human Rights and the Role of Churches.](#) *The World Council of Churches and United Evangelical Mission published this report in an effort to stimulate discussion among and advocacy by churches on the human rights-climate change link.*

Human rights impacts of climate change responses

[Special issue of Cambridge Review of International Affairs on climate change and human rights \(2014\)](#) *This special issue contains a variety of recent academic perspectives on the links between climate change and human rights, including women's rights and cultural rights, in their political context.*

[Carbon Market Watch \(N.D.\). Harmful CDM projects.](#) *Carbon Market Watch assess the human rights impacts of various projects financed under the UN's Clean Development Mechanism.*

[Alyssa Johl and Yves Lador \(2012\). A Human Rights-based Approach to Climate Finance.](#) *This Friedrich Ebert Stiftung publication proposes that social and environmental safeguards within international financing mechanisms should "fully apply a rights-based approach"*

Human rights and climate-induced migration

[The Nansen Initiative on Disaster-Induced Cross Border Displacement.](#) *The Nansen Initiative is a government-led process to implement a protection agenda for those people forcibly displaced by natural disasters and climate change.*

[Universal Rights Group, 2015. Human rights, climate change and cross-border displacement: the role of the international human rights community in contributing to just and effective solutions.](#) *URG draws out the links between the Paris conference and its implications on human rights and human displacement.*

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