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Human rights and the impacts of climate change: Revisiting the assumptions

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Abstract

The Paris Agreement acknowledges the need to tackle the permanent and irreversible impacts of climate change. It does not, however, provide means to hold state and non-state actors accountable for the harm to persons, property and the environment associated with climate change. In 2009, the Office of the High Commissioner on Human Rights (OHCHR) noted that qualifying the effects of climate change as human rights violations posed a series of technical obstacles. More than a decade later, applicants around the world increasingly rely on human rights law and institutions to complain about harms associated with the impacts of climate change. National, regional and international human rights bodies stand on the frontline to bridge the accountability gap left by the Paris Agreement. This article therefore revisits the OHCHR's assumptions, suggesting that we use human rights as an interim "gap-filler", while we seek better tools to tackle the impacts of climate change.

Key words

Human rights; climate litigation; state actors; non-state actors; loss and damage

Resumen

El Acuerdo de París reconoce la necesidad de abordar los efectos permanentes e irreversibles del cambio climático. Sin embargo, no proporciona medios para hacer a los actores estatales y no estatales responsables del daño relacionado con el cambio climático

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infligido a personas, propiedades y al medio ambiente. En 2009, la Oficina del Alto Comisionado para los Derechos Humanos (ACNUDH) hizo notar que calificar los efectos del cambio climático como violaciones de derechos humanos presentaba algunos obstáculos técnicos. Más de una década después, solicitantes de todo el mundo se apoyan cada vez más en la jurisdicción sobre derechos humanos y sobre instituciones para protestar por los daños relacionados con el efecto del cambio climático. Entes nacionales, regionales e internacionales sobre derechos humanos están en la primera línea de lucha para cubrir el hueco sobre responsabilidad dejado por el Acuerdo de París. Este artículo revisita los supuestos aceptados por la ACNUDH, y propone que se utilicen los derechos humanos como un "parche" provisional mientras buscamos mejores instrumentos para abordar el efecto del cambio climático.

Palabras clave

Derechos humanos; litigación climática; actores estatales; actores no estatales; pérdida y daño

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1. Introduction

The 2015 Paris Agreement acknowledges the need to tackle the permanent and irreversible impacts of human-induced climate change in the standalone provisions concerning "loss and damage" (Paris Agreement, Article 8). It does not, however, provide means to compensate the harm to persons, property and the environment associated with climate change, and to hold state and non-state actors accountable for these. Instead, Parties to the Paris Agreement excluded compensation from the scope of the treaty and have merely set up an international cooperation machinery to "enhance understanding, action and support" on loss and damage (*ibid.*, Article 8.3). In the meantime, climate change is already having major impacts on human health, livelihoods and rights (A/74/161, para. 6).

The use of human rights to fill the accountability gap on loss and damage left by the Paris Agreement has been the subject of much speculation (Wewerinke-Singh 2019, Savaresi and Hartmann 2020, Toussaint and Martínez Blanco 2020). Already in 2010, Humphreys suggested that "human rights occupy much of the space of justice discourse and therefore represent an 'essential term of reference' to address justice and equity questions in the context of climate change" (Humphreys 2010a, 45).

However, a report by the Office of the High Commissioner on Human Rights (OHCHR) published around the same time warned that "while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense" (A/HRC/10/61, para. 70). The report went on to elaborate that it would be "virtually impossible to disentangle the complex causal relationships" linking emissions to human rights violations, and that the adverse effects of climate change are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred (A/HRC/10/61, para. 70). At the same time, John Knox – the United Nations (UN) Special Rapporteur on Human Rights and the Environment between 2015 and 2018 – warned that, if there was scope to recognize the negative obligation to refrain from causing harm, this would "treat climate change as a series of individual transboundary harms, rather than as a global threat to human rights" (Knox 2009, 211).

More than a decade later, no court has found that the greenhouse gas emissions of a particular actor relate causally to adverse climate change impacts for the purpose of establishing liability. Nevertheless, there has been a surge of climate change litigation around the world, whereby applicants have attempted to push the boundaries of private, public and administrative law to obtain redress for damage to persons, property and/or the environment caused by anthropogenic climate change (Setzer and Vanhala 2019). So far, few such cases have been argued on the basis of human rights law alone. Instead, human rights arguments are largely being used to prop up those based on private or public law, to call for greater efforts to reduce greenhouse gas emissions by state and corporate actors (Peel and Osofsky 2018, Savaresi and Auz 2019). Comparatively few applicants have tried to rely human rights law and remedies to obtain relief for harms associated with climate change. The full scope to use human rights law and remedies in this connection therefore largely remains to be explored.

Building on earlier scholarship in this area and on the analysis of judicial and quasi-judicial human rights complaints related to climate change (Savaresi *et al.* 2017, Savaresi and Auz 2019, Savaresi and Hartmann 2020), this article reflects on the potential to use human rights law as an interim "gap filler" to redress the harm caused by the impacts of climate change, while other and more specific means are devised. There are two main reasons to follow this approach.

First, the use of human rights law as a gap filler to provide remedies where other areas of the law do not is not new, especially in the environmental context. Human rights law and remedies are commonly used as a means to protect environmental interests that can be couched as human rights violations (Shelton 1991, 2011, Boyle and Anderson 1998, Boyle 2007, 2012). As the UN Special Rapporteurs on Human Rights and the Environment recounted in 2018, States should undertake due diligence to prevent environmental harm that interferes with the full enjoyment of human rights and reduce it to the extent possible, providing for remedies for any remaining harm (A/HRC/37/59, para. 5). Human rights law and remedies are specifically helpful to protect environmental interests, because they are widely recognised in both international and national law. This in turn means that, contrary to environmental law obligations, human rights ones may be enforced both nationally and internationally against states – and, to a more limited extent, non-state actors – even in an extraterritorial context (Inter-American Court of Human Rights, Advisory Opinion, 2017, para. 140). The issue is, however, to establish when and how human rights obligations and remedies can be used in relation to the impacts of climate change.

Second, the relationship between climate change and human rights obligations has been abundantly recognised in the literature (Bodansky 2009, Humphreys 2010b, Rajamani 2010, McInerney-Lankford *et al.* 2011, Duyck, Jodoin, and Johl, 2018; Duyck *et al.* 2018), by the parties to the climate regime (Cancun Agreements, Appendix I, 2; and Paris Agreement, Preamble), and by human rights bodies, including the Human Rights Council,[1] its Special Procedures mandate holders (A/HRC/31/52, A/74/161) and the Office of the UN High Commissioner for Human Rights.[2] These acknowledgements show that the relevance of human rights obligations to climate change is beyond dispute, and that systemic integration in the interpretation of the related obligations is increasingly practiced, both at the national and at the international levels (Savaresi 2018, 42).

As the OHCHR noted in 2009, however, arguing that the effects of climate change give rise to justiciable human rights violations poses a series of technical obstacles (A/HRC/10/61, para. 70). Specifically, applicants need to find a judicial or quasi-judicial body willing and able to hear human rights complaints associated with the impacts of climate change. When they have done so, applicants need to persuade said body that they have standing to be heard in relation to such a complaint. Once they overcome these procedural hurdles, applicants must satisfy the adjudicating body that they have suffered for a human rights violation, and that the responsibility for such violation may

[1] The Human Rights Council has adopted ten resolutions on human right and climate change between 2008 and 2020. See https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx

[2] A summary of the activities of the Office of the UN High Commissioner for Human Rights is available at https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx

be attributed to the alleged abuser. This entails providing proof that human rights breaches have occurred and of causation and attribution associated with said breaches.

This article therefore revisits the assumptions made by the OHCHR in 2009, in light of these technical obstacles and recent developments in human-rights based climate litigation. Section two unpacks questions concerning the use of human rights arguments and remedies to address harms associated with the impacts of climate change, singling out questions of causation, attribution, extraterritoriality and the provision of adequate remedies. The following sections analyse each of these matters in greater detail, in the lights of extant human rights complaints and litigation. The conclusion suggests that human rights be systematically used as an interim "gap-filler" while other areas of law gear up to satisfactorily redress the harms caused by the impacts of climate change.

2. The role of human rights law: Unpacking the questions

The impacts of climate change are yet another example of harm largely caused by activities undertaken in industrialised countries and by corporations headquartered therein, wreaking havoc, especially in the world's poorest countries. As the grim judicial sagas associated with Shell's operations in the Niger Delta, and Chevron's operations in Ecuador and Peru well exemplify, it is often difficult for victims to obtain redress for harms person, property and the environment caused by corporations headquartered overseas, alone or with the complicity of domestic authorities (Savaresi and McVey 2020). To overcome these challenges, individual and group victims all over the world have increasingly resorted to human rights obligations and remedies, with varying degrees of success (Osofsky 2010, Patel 2012, Joseph 2012, Popoola 2017). Far from representing an optimal avenue, human rights are oftentimes the last resort to try and provide some redress to the victims and to hold those responsible accountable.

In the wake of climate change, this use of human rights law has gained new prominence. So far, no specific form of liability for the impacts of climate change has been devised. As explained above, the Paris Agreement's provisions on loss and damage do not provide means to redress harm, and an interpretative declaration specifies that they do "not involve or provide a basis for any liability or compensation" (Paris Agreement, 52). As a result, the harms associated with the impacts of climate change have to be squared with existing private and public law liability schemes.

These schemes, however, are scarcely equipped to deal with harm associated with atmospheric pollution, which is widespread and transboundary in nature, and whereby both defendant and plaintiff are difficult to identify. The impacts of climate change are predictable to the extent that we know they will happen, if not where, when and with what level of harms. Establishing the "liability of particular defendants to particular claimants" (Lee 2015, 2) is particularly arduous. Most legal systems require that victims have a sufficient interest to file an admissible tort complaint (Faure and Nollkaemper 2007, 136). This in turn entails that the victim's rights be either infringed or endangered, whereas *actio popularis* complaints are usually not admissible (Faure and Nollkaemper 2007, 136). Furthermore, the widespread nature of harms caused by climate change makes it hard to persuasively argue that they give rise to a sufficient interest to bring a tort law claim (Faure and Nollkaemper 2007, 136).

In recent years, progress in the attribution science concerning state and non-state actors' historical contribution to greenhouse gas emissions has made it easier to trace causal connections between particular emissions and the resulting harms (Heede 2014, Frumhoff *et al.* 2015, A/HRC/31/52, paras 36–37, Ekwurzel *et al.* 2017, Harrington and Otto 2019).

The history of environmental law clearly shows that this conundrum is not impossible to solve, but that solutions require adequate supporting political will. For example, in several countries, ultra-hazardous activities may only be performed under a regime of compulsory insurance and pursuant to a regime of absolute liability. So in case of harm, those performing ultra-hazardous activities are responsible for all harm occurring, regardless of whether or not they are at fault, often under joint and several liability regimes (Li and Jin 2014, Olszynski *et al.* 2017, Adshead 2018, Shavell 2019).

In relation to the emission of greenhouse gases, it is conceivable that in the not so distant future the burning of fossil fuels will be treated as an ultra-hazardous activity, to be carried out under license and subject to compulsory insurance and a regime of absolute liability. What seems clear therefore is that extant liability and insurance schemes will need to be reformed, in order to capture and address this changed reality and help to address the numerous and complex distributive and restorative justice considerations associated with the impacts of climate change at the individual and at the aggregate levels (Caney 2005, Thistlethwaite 2012).

Before such specific reforms are introduced, human rights remedies may be used as an interim gap filler to bridge the climate accountability gap left by the Paris Agreement, by naming and shaming polluters, thus provide at least some redress for the harms associated with climate change, which can be framed in terms of human rights violations. For example, in 2013 the Athabaskan people asked the Inter-American Commission on Human Rights (IACHR) to declare that Canada's failure to implement adequate measures to substantially reduce its black carbon emissions violates rights affirmed in the American Declaration on Human Rights; and to recommend that Canada take steps to protect the rights of Athabaskan peoples within and without Canada, by adopting measures to limit emissions of black carbon (*Petition to the IACHR Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples* – hereinafter, Athabaskan petition –,86*)*.

Similarly, in 2015 a group of national and international civil society organisations and individuals – led by Greenpeace – asked the Philippines Human Rights Commission to investigate the responsibility of the world's largest corporate emitters – so-called "Carbon Majors" – for human rights violations or threats thereof resulting from the impacts of climate change (*Petition Requesting Investigation of the Responsibility of the Carbon Majors for Human Rights Violations* – hereinafter, Carbon Majors petition –, 2015). The petition was filed following the widespread loss of life and harm to property and persons associated with increasingly extreme weather events in the Philippines.

These and similar complaints before human rights bodies all over the world provide an opportunity to examine whether the points made in 2009 by the OHCHR on the justiciability of human rights violations associated with climatic harms are still valid. The next sections discuss this matter in greater detail, considering specifically the

attribution and causation of climate harms, retrospectivity and the provision of adequate remedies.

3. Attribution

Determining a *prima facie* human rights violation associated with the impacts of anthropogenic climate change is relatively straightforward in principle. For example, in the Carbon Majors inquiry the petitioners argue that, as a result of damage to property and persons associated with increasingly frequent and extreme weather events, they have suffered violations of a range of human rights, including those to life; the highest attainable standard of physical and mental health; food; water; sanitation; adequate housing; and self-determination (Carbon Majors petition, 8). In support of their complaint, the petitioners cite UN Human Rights Council resolutions and other acknowledgements of the human rights implications of climate change by Special Procedures of the UN Human Rights Council (Carbon Majors petition, 12).

Determining *who* is to be held responsible for these human rights violations, however, is much more complex. Human rights law hinges on the obligations of states, as the primary duty bearers. Human rights obligations specifically relating to the environment have been widely recognized (A/HRC/37/59, Annex, para. 33). These require states to take both preventative measures to avert environmental harms affecting the enjoyment of human rights; and remedial measures to address such harms, once they have occurred (A/HRC/37/59, at 5–6).

The obligation to protect human rights does not require states to prohibit all activities that may cause environmental degradation. Instead, states have discretion to strike a balance between environmental protection and other legitimate societal interests. As both the Special Rapporteurs on human rights and the environment have noted, however, this balance must not be "unjustifiable or unreasonable" (A/HRC/37/59, para. 33). For example, decision to allow massive oil pollution in the pursuit of economic development "could not be considered reasonable, in light of its disastrous effects on the enjoyment of the rights to life, health, food and water" (A/HRC/37/59, n. 22).

States' obligations to address environmental harms that interfere with the full enjoyment of human rights extend to violations caused by climate change impacts (A/HRC/31/52, paras 50–54; 72–73). In recent years, human rights bodies have clarified the content of states' obligations in this connection. This interpretative work shows that obligations associated with both substantive human rights (e.g. the right to life, adequate housing, food, and the highest attainable standard of health) and procedural human rights (e.g. the right to access to remedies and to take part in the conduct of public affairs) take on a specific character in relation to climate change.

In relation to climate change, these obligations entail taking action to reduce emissions, on the one hand, and, on the other, to adapt to changes that are foreseeable, such as rising sea levels, or increased floods, wildfires, etc. (A/HRC/31/52, para 33). States must also guarantee effective remedies for human rights violations associated with the impacts of climate change. They must furthermore take adequate measures to protect all persons from human rights harms caused by business activities and, where such harms do occur, ensure effective remedies. Finally, human rights obligations require that states engage

in international cooperation to deal with the global and transboundary implications of climate change (A/HRC/31/52, paras 43–44).

Due to faltering political will, inter-state cooperation on climate change has been notoriously problematic and dysfunctional (Savaresi 2019, Boyle 2020). The Paris Agreement set the path to net zero emissions, but it does not provide the means to hold state actors to account for failing to deliver on their promised emission reductions.

At the same time, although greenhouse emissions are conventionally attributed to states, an increasingly robust body of scientific evidence has identified a relatively small group of global corporate actors as historically responsible for the majority of global greenhouse gas emissions (Heede 2014, Frumhoff *et al.* 2015, Ekwurzel *et al.* 2017). Following the adoption of Paris Agreement in 2015, many companies announced voluntary measures to tackle carbon emissions, but there has been a glaring gap between words and action (Savaresi and McVey 2020). A report by the Union of Concerned Scientists of 8 major US-based fossil fuel companies found that "none had made a clean break with disinformation on climate science and policy or planned adequately for a world free from carbon pollution" (Union of Concerned Scientists 2018). The same study pointed out that the companies were members of trade associations and other industry groups that spread disinformation about climate science and/or seek to block climate action, with many holding leadership positions.

Recent developments at the international, regional and national level already acknowledge corporate human rights responsibilities. Specifically, the 2008 UN *Protect, Respect, Remedy Framework* and the 2011 UN *Guiding Principles on Business and Human Rights* articulate the corporate responsibility to respect human rights. The UN Guiding Principles establish that a company's responsibility to respect human rights extends to its business relationships with suppliers, customers, and governments in operating countries (UN Guiding Principles, 13). Courts all over the world have increasingly relied on the UN Guiding Principles to maintain that businesses "must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities" (*Kaliña and Lokono Peoples v Suriname,* 2015, at 224). Corporate responsibility to respect human rights translates into a duty of due diligence, which requires corporations "to identify, prevent, mitigate and account for how they address their adverse human rights impacts" (UN Guiding Principles, 17).

Some countries have already adopted legislation on this matter (O'Brien and Dhanarajan 2015), and more are considering doing so, including the European Union. In the meantime, national (e.g. *Vedanta Resources PLC and another v Lungowe and others*, 2019) and international (e.g. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, 2016) tribunals have increasingly recognised at least some accountability for human rights violations associated with corporate activities. For example, in Urbaser, the arbitral panel concluded:

> At this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by *an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.* (*Urbaser,* at 318, emphasis added)

International human rights bodies have bolstered these arguments, by suggesting that corporate responsibility exists "regardless of whether domestic laws exist or are fully enforced in practice" (Committee on Economic, Social, and Cultural Rights 2018, para. 9). Finally, ongoing negotiations of a new UN treaty on human rights responsibilities of business may soon deliver better and more streamlined prevention and remediation avenues to address transnational corporate human rights breaches (*Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, 2019).

As a result of these developments, corporate human rights violations have been increasingly alleged, as a result of environmental impacts that affect health. In such instances, corporations are expected to rely on "established and quite precise international as well as national standards" in undertaking due diligence *(Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* 2011, 53). Specific attempts to articulate fossil fuel companies' responsibility to prevent and redress the human rights impacts of climate change have increasingly been made – see for example *Principles on Climate Obligations of Enterprises* (Expert Group on Climate Obligations of Enterprises 2018).

Most recently, the UN Special Rapporteur on human rights and the environment has framed business' human rights responsibilities in relation to climate change as follows: reduce greenhouse gas emissions from their activities, subsidiaries, products and services; minimize greenhouse gas emissions from their suppliers; publicly disclose their emissions, climate vulnerability and the risk of stranded assets; ensure that people affected by business-related human rights violations have access to effective remedies; and support, rather than oppose, public policies intended to effectively address climate change (A/74/161, paras 71–72).

This and similar interpretations of corporate responsibilities are at the basis of ambitious human rights-based climate change complaints, which argue that it is possible to attribute specific responsibilities to the fossil fuel industry for the impacts of climate change.

4. Causation and retrospectivity

The increasing recourse made to human rights law and remedies is justified by the fact that, under human rights law, victims have a less stringent burden of proof when compared, for example, with tort law. This important discriminating factor played out favourably for the applicants in the famous *Urgenda* case. In *Urgenda*, civil society organisations and citizens successfully challenged the Dutch government for not taking sufficiently ambitious action to reduce greenhouse gas emissions (*The State of the Netherlands v Urgenda Foundation,* 2018). Although the case was not about the impacts of climate change, it is particularly important for the present purposes, as the state's duty of care was interpreted on the basis of the right to life and the right to respect for private and family life, as enshrined in the European Convention on Human Rights.

The Court of Appeal established that causality "only plays a limited role" when the matter of the dispute is not the award of damages (*State v Urgenda*, 2018, para. 64). Instead, the Court reasoned, when damages are not at stake, "a real risk" of a danger for which measures have to be taken is sufficient for a complaint to be admissible (*State v*

Urgenda, 2018, para. 64). Even with this significant caveat, *Urgenda* represents an important milestone for establishing causation and the use of human rights arguments in this connection. The appeal judges specifically rejected the "drop in the ocean" defence put forward by the Dutch government, noting how "Urgenda does not have the option to summon all eligible states to appear in a Dutch court" (*State v Urgenda*, 2018, para. 64). This way of reasoning resonates with a joint and several approach to liability, which, as mentioned above, is already widely applied to environmental harm across the world.

Similar arguments are being made also in relation to corporate actors. Generally, human rights bodies recommend that states strike an appropriate balance between "evidential burdens of proof between the claimant and the defendant company" (A/HRC/32/19, pt. 12.5). According to the Committee on Economic, Social and Cultural Rights, "shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant" (Committee on Economic, Social and Cultural Rights 2017, para 45).

In relation to climate change, human rights responsibility is the result of the growing body of evidence of corporate global emissions; and of the fact that these corporate emitters have long known that they contribute substantially to climate change, and to the related impacts. Indeed, recent studies suggest that corporations continue to promote misleading information, casting doubt on the connection between fossil fuels and climate change (Union of Concerned Scientists 2018).

Building on these premises, the Carbon Majors petition argued that corporate actors have breached their due diligence obligations "by directly or indirectly contributing to current or future adverse human rights impacts through the extraction and sale of fossil fuels and activities undermining climate action" (Carbon Majors petition, 21). While the findings of the inquiry are yet to be released, there are strong indications that the Philippines Human Rights Commission will establish that the Carbon Majors may be held responsible for the human rights violations associated with the impacts of climate change. This finding would have a significant symbolic effect and could contribute to better define the contours of corporate due diligence obligations, including in the extraterritorial context.

This outcome would be gravid of consequences for ongoing climate litigation against corporate actors that is argued on the basis of human rights law. One of the most prominent pending case at present is *Milieudefensie et al. v Royal Dutch Shell plc* (Milieudefensie 2019). In this pathbreaking lawsuit a group of civil society organisations and citizens have sued Shell for breaches of its duty of care to preventing dangerous climate change (Milieudefensie 2019, para. 503). Similar to *Urgenda*, the applicants relied, *inter alia*, on the right to life and the right to respect for private and family life under the European Convention of Human Rights to define Shell's duty of care and to demand it "to follow with immediate effect a worldwide CO2 emission reduction scenario that has been provided by the IPCC" (Milieudefensie 2019, para. 850).

The fact that emissions took place, or at least started, at a time when states and corporations were unaware of their projected impacts is not in and of itself an obstacle to establishing responsibility. In principle, it is possible to argue for responsibility for impacts of climate change ever since widespread scientific consensus emerged, and

certainly since the first report of the Intergovernmental Panel on Climate Change (Faure and Nollkaemper 2007, 174, Rich 2019). In this connection, the question is to establish when the knowledge of the impacts of climate change led the way to a breach of an obligation to foresee and avert these. As far as states are concerned, the adoption of the UN Framework Convention on Climate Change may be regarded as an obvious point in time to draw a line (Tol and Verheyen 2004).

In as far as corporations are concerned, similar to the tobacco industry, fossil fuel companies have long been aware of the climate risks associated with their operations (Supran and Oreskes 2017, Influencemap 2019). Yet, they failed to inform the public of these risks and to adopt measures to stop further harm and remedy harm already caused (Supran and Oreskes 2017, Olszynski *et al.* 2017). In the Carbon Majors petition, the applicants have specifically asked the Philippines National Human Rights Commission to consider lack of corporate disclosure as an indicator of reprehensibility and as a basis to establish responsibility (Carbon Majors petition, 23). Similarly, in *Milieudefensie,* the applicants argue that Shell has mislead and continues to mislead the general public about its real intentions and about the urgency of the climate issue (Milieudefensie 2019, paras. 581–585).

5. Extraterritoriality

Obligations to protect human rights can be enforced by national and international judicial and quasi-judicial bodies and, in some circumstances, also in relation to abuses committed abroad. This use of human rights instruments has been relatively common in relation to egregious instances of environmental pollution caused by the operations of transnational corporations. The impacts associated with Shell's operations in the Niger Delta are perhaps the most notorious example of human rights abuses carried out by a fossil fuel corporation, with the complicity and direct involvement of state authorities. A UNEP Report found that the oil industry had polluted air and water and destroyed natural habitats, which in turn, seriously affected local and indigenous communities' life and health (United Nations Environment Programme – UNEP – 2011). Furthermore, protests against widespread and persistent oil pollution have been brutally repressed, with loss of life and a series of other egregious human rights violations. Victims of these severe human rights abuses have sought remediation for the harm caused to their lands, water and livelihood, before courts within and outside Nigeria and before international human rights bodies. In cases such as these, human rights remedies may be used as a means to name and shame corporate actors, but they do not in and of themselves pave the way to compensation, injunctions for the clean-up of pollution and/or the cessation of harmful activities. Human rights complaints and tort litigation therefore typically run in parallel and are used alongside or in combination with one another (Savaresi and McVey 2020, 31).

Some human rights bodies (*Sergio Euben Lopez Burgos v Uruguay* (Communication nº R12/52) para 12.3) have maintained that it may be possible to argue that state's human rights obligations have an extraterritorial reach. An Advisory Opinion of the Inter-American Court has recently confirmed this understanding and significantly expanded the extraterritorial reach of state obligations in this connection (Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017).

This use of human rights remedies has been attempted also in relation to the impacts of climate change. As recounted above, in 2013, the Athabaskan people asked the Inter-American Commission on Human Rights to declare that Canada has breached its human rights obligations by causing significant adverse impacts in the Artic, which affect Athabaskan communities within and without Canada's territory (Athabaskan petition). Similarly, the Carbon Majors inquiry provides an example of how a national human rights body may be asked to investigate corporate human rights abuses associated with the impacts of climate change.

Both petitions confront human rights bodies with unprecedented questions concerning the impacts of climate change: one in relation to the impacts felt across nations and beyond the boundaries of the State accused of human rights abuses (Canada); the other with impacts felt nationally but allegedly caused by corporate actors headquartered overseas. Neither process has come to a conclusion at the time of writing.

The Athabaskan petition bears several similarities with the so-called Inuit petition, which was lodged in 2005 before by the Inter-American Commission against the US (*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*, 2005) and dismissed on procedural grounds (Harrington 2007). A petition against Canada should in principle not encounter the same procedural hurdles and furthermore benefit from the generous interpretation on the extraterritorial reach of States' human right obligations concerning environmental harm recently delivered by the Inter-American Court of Human Rights (2017). As mentioned above, in 2017 the Court reasoned that states have the obligation to prevent any significant damage to the environment inside or outside their territory, produced by *themselves* or *third parties* (Inter-American Court of Human Rights, 2017, para 140). From this obligation to prevent significant damage, a series of specific obligations arise, which include a general *obligation to regulate, supervise and monitor* activities carried by private entities under a state's jurisdiction that can lead to environmental damage (Inter-American Court of Human Rights, 2017, paras. 145–150). When applied to the Athabaskan petition, this reasoning could enable the Commission to find Canada responsible for human rights violations associated with climate change in all Athabaskan territories, including those outside the Canadian state.

Instead, the Carbon Majors inquiry is the first instance where a human rights body was asked to consider the responsibility of corporate actors for the impacts of climate change overseas. In deciding whether to hear the petition, the Philippines Human Rights Commission was careful in specifying that the decision to investigate Carbon Majors was within its constitutional mandate to investigate the allegations of violations of human rights of the Filipino people put forward by the applicants (Statement from Case No. CHR-NI-2016-0001 Meeting of Parties. December 11, 2017. On file with the author). Some of the respondents nevertheless challenged the Commission's powers to investigate, arguing that the exercise of jurisdiction over foreign corporations is an act of interference with other states' sovereignty and "tantamount to an undue encroachment on the territorial jurisdiction and sovereignty of such other states where Respondents are domiciled and operate" (Shell and Royal Dutch Shell 2016).

As argued elsewhere, however, these objections do not really stand and simply overlook the fact that, as a matter of course state authorities exercise both prescriptive jurisdiction

(i.e. the power to create, amend, or repeal legislation) and adjudicative jurisdiction (i.e. the ability of national courts, tribunals, or other bodies exercising judicial functions to hear and decide on matters) over persons or events outside their territory (Savaresi and Hartmann 2020). This exercise of jurisdiction is generally accepted, as long as there is a clear connecting factor between the state exercising jurisdiction and the person or conduct that it seeks to regulate (Savaresi and Hartmann 2020, 66). Accordingly, the principles of jurisdiction do not preclude state authorities from regulating conduct or adjudicating over activities occurring outside their territory. Indeed, the opposite is true. And even though the Philippines Human Rights Commission has not elaborated on which jurisdiction principles it relied on, its decision to investigate the Carbon Majors petition has already demonstrated that national human rights institutions may look at the responsibilities of corporations, even when these are not headquartered in the territory of the state where the investigation takes place.

6. The provision of adequate remedies

Human rights remedies typically provide declaratory relief to name and shame human rights abusers but offer limited, if any, compensatory relief, or means to deter further harm, and typically may be invoked only after the abuse has been carried out. In and of themselves, therefore human rights complaints make little difference, if they are not followed by action to remedy the harm caused and to prevent further harm. Even the enforcement of court judgements is not to be taken for granted and the history of human rights law is full of pyrrhic victories, especially in the environmental context (Gilbert 2018). So, victims of human rights violations associated with oil extraction in the Niger Delta are still waiting for remediation of the harm caused to their lands, water and livelihood, in spite of multiple court victories before national, regional and international tribunals. There are risks too, relating to clashes between human rights claims, that may be relied upon to protect a quality of life that imposes unacceptable climate costs on society (Pedersen 2011). For example, human rights arguments and remedies are increasingly being relied on to resist the development of renewable energy infrastructure (Peeters and Nóbrega 2014, Peeters and Schomerus 2014). And while human rights are no trumps (Pildes 1998), their use in the context of the energy transition certainly merits further investigation (Savaresi 2020).

Human rights obligations are therefore no replacement for effective legislation concerning climate change, and human rights remedies are no replacement for effective preventative and remedial measures against harm caused by climate change. Yet, the role of human rights instruments as a precious gap filler should not be discarded. The commissioner in charge to investigate the Carbon Majors has explained how the inquiry was initiated to ”help establish processes for hearing human rights victims especially with regard to transboundary harm, clarifying standards for corporate reporting and helping to identify basic rights and duties relative to climate change” (Cadiz 2018).

This statement clearly illustrates how human rights complaints can provide opportunities to raise grievances concerning climate change that might otherwise be overlooked. Such claims give visibility to state and corporate responsibility for the impacts of climate change. While not a remedy *ex se*, these landmark complaints make it possible to highlight the manifold complex justice questions associated with the impacts

of climate change, including questions related to who should be held liable and responsible.

7. Conclusion

This article has reflected on the role of human rights complaints in climate change litigation globally. Human rights arguments and remedies have enabled plaintiffs and petitioners to link climatic harms to obligations owed directly to individuals, and give access to remedies that may not otherwise be available. By highlighting principles of universality and non-discrimination, the rights of future generations and of those living outside a state's territory, human rights give a voice to the voiceless. In this connection, human rights often provide the only means to complain about harm produced by climate change and bridge the climate accountability gap left by the Paris Agreement.

This is, however, an area where human rights also present clear limitations. Human rights remedies provide declaratory relief to name and shame abusers, but this makes little difference, if is not followed by action to prevent further harm and remedy the harm caused. Similarly, human rights remedies offer little, if any, compensatory relief for the impacts of climate change, and limited means to deter further harm and emissions. So, if on the one hand the *Urgenda* victories provide a hopeful example of litigation that successfully put pressure on national governments to take legislative action on climate change, the *Carbon Majors inquiry* well exemplifies human rights bodies' limited powers to alter the behaviour of transnational corporate actors.

As in other cases of environmental harm, the viability of litigation reliant on human rights arguments concerning climate change depends on both "legal and social variables" (Anderson 1998, 21). It requires that rules about standing (the right to bring a case before a court or tribunal) be interpreted in a way to enable individuals or groups to be heard, and an independent and sympathetic judiciary (Anderson 1998, 21). So, in the *Urgenda* case, the applicants convinced a national court to order a state to reduce its emissions on the basis, amongst others, of human rights obligations. Similarly, in the Philippines applicants were able to formulate complaints against transnational corporate actors, which would have been impossible under tort law.

Some significant milestones have therefore been achieved and the boundaries of the law have already shifted (Savaresi and Auz 2019). Prominent human rights-based litigation has brought to the attention of the public the plight of islanders, children and other groups vulnerable to the impacts of climate change. And past experience suggests that successful human rights complaints can help to bring about a change in attitude by courts and lawmakers.

Much more can be done going forward. Human rights grievance mechanisms at the national, regional and international level may be used as institutionalized pathways to monitor and sanction human rights violations, and to put pressure on state and non-state actors to redress the harm associated with climate change. Inter-state litigation could be initiated by states that are particularly vulnerable to the impacts of climate change, who could claim that climate change harms represent a breach of international human rights obligations. In case of success, the finding of a breach of an international human rights law obligation could be accompanied by an order to provide compensation for the harm suffered (Wewerinke-Singh 2019, 160).

It is however important to remain realistic. Human rights litigation is no silver bullet and is limited in its capacity to redress human rights abuses and address their structural roots. Human rights law is nevertheless an important complement to counter the significant shortfalls in the treatment of loss and damage in national and international law. It emphasises states' obligation to adopt legislation, enforce it properly and provide access to adequate remedies and properly sanction corporate misbehaviour.

So, we have already come a long way compared to where we were a decade ago, when the OHCHR report made its first assessment of the link between climate change and human rights. And, given the climate accountability gap left by the Paris Agreement, human rights law and remedies more than ever represent an "essential term of reference" to address justice and equity questions arising in the context of climate change (Humphreys, 2010a, 45).

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