

International-Lawyers.Org's Response to the OHCHR Questionnaire on the Analytical Study on the Impacts of Climate Change on the Right to Health

Preliminary Remarks:

International-Lawyers.Org reiterates its strong appreciation for the Council's continued concern with human rights impacts of climate change on health. We also note the decision taken in HRC Resolution 29/15 (para 4) requesting the Office of the High Commissioner for Human Rights (OHCHR) to prepare in consultation with Member States and other relevant stakeholders, a detailed analytical study on the impacts of climate change on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Indeed, human health is defined as one of the greatest harms resulting from the adverse consequences of climate change in article 1, para. 1, of the United Nations Framework Convention on Climate Change.

We regret, however, that the Council has neither created a mandate focused on climate change nor endowed the OHCHR with the resources to and expertise within the secretariat to undertake such a study. In this respect, and in the name of transparency, we urge the OHCHR to clearly identify the names and qualifications of any outside consultants who have worked with them on this study. Such transparency can lead to greater acceptance of the conclusions of the study and wider appreciation of its content. Conversely failure to fully disclose the names and qualifications of the persons involved in the study can lead to claims of bias and lack of transparency in the process of preparing the study.

We also note that para. 4 of HRC Resolution 29/15 (para 4) requests the OHCHR to work with the World Health Organization (WHO), consulting with them and taking into account their views. We further note that the WHO possesses significant expertise in the area that the report is to cover, but that they have not been sufficiently involved in the process to date according to the feedback we recently solicited from WHO staff.

Similarly, despite this welcomed questionnaire the ECOSOC accredited NGOs who have led the work in human rights and climate change in Geneva, including International-Lawyers.Org, have not been requested to make any input into the development of the questionnaire. This is regrettable and the consequence is reflected in the failure of the questionnaire to take into account international processes in both the field of health and climate change. Nevertheless, International-Lawyers.Org still remains willing to assist in the process of evaluating the data received from this questionnaire should the OHCHR request its assistance.

Question 1: Please describe, in your view, the relationship between climate change and the enjoyment of the right to health and any human rights obligations to mitigate and adapt to climate change that can be derived therefrom.

There are at least three preliminary points that are not clearly expressed in the question, but should have been. First, mitigation and adaptation must be adequately distinguished from each other. Second, the obligations of developed States (listed in Annex I of the UNFCCC), on the one hand, and including developing States (non-

Annex I States under the UNFCCC), must be distinguished from each other. The failure to make these distinctions can lead to confusion in the legal understanding of the parameters of the question. While the former States have unconditional legal obligations, the latter have largely conditional legal obligations that depend on the former States having met their legal obligations towards the latter States. And third, the question could better have asked about the relationship between international climate change law and international human rights law as understanding that relationship correctly is a *conditio sine qua non* for understanding States' responsibilities for harm done by climate change. In this respect it should be noted that while these two corpus of law exist side-by-side, international human rights law provides States with general obligations to protect the welfare of individuals—and in some cases groups—through domestic and regulatory action and through international assistance and cooperation, while international climate change law prescribes the types of actions that States must take to responsibly deal with climate change. As such international climate change law clarifies States' discretion in relation to its obligations to protect human rights when these rights are threatened by climate change.

An example might be the action needed to deal with increased temperatures that create a greater burden of an environmentally influenced disease such as malaria. While State might protect people in their State and in other States who are affected by malaria by providing drugs or adequate protective equipment (bed nets, sprays, etc.), the UNFCCC instructs States to cut their emissions to ensure temperatures do not rise to dangerous levels. States that have international legal obligations to cut their emissions, but do not cut their emissions sufficiently and thereby contribute to the adverse effect of climate change that is temperature rises and thus the greater exposure of people to disease, are responsible for the resulting harm to human health. While these States might take other actions to effectively protect the victims of harm, if other actions do not protect the victims each State that has failed to meet its obligations under international climate change law, will be also be responsible for the consequences that violate international human rights law.

As concerns mitigation or the reduction of greenhouse gas emissions, international law provides that States that do not abide by their obligations under International climate change law as reflected in the UNFCCC, among other applicable instruments, as well as the legal obligation emanating from international customary law to do no harm to other States, are responsible jointly and severally for the harm done by their acts or omissions. This responsibility does not depend on evidence of a causal link between a State's emissions and specific injury, as State responsibility arises automatically from an act attributable to a State and the inconsistency of that act with an international obligation. Even though it may seem unfair to put the burden of the harm done to many States and billions of people on the shoulders of a single State this is exactly what international law does. It does so out of respect for the sovereignty of States, which provide them with the significant responsibility towards their people and towards others whose welfare they might impact. Of course, a State that feels the burden of responsibility is too great has the discretion to call on others who have also contributed to harm to contribute to addressing the consequences that have resulted from a jointly done internationally wrongful act.

As concern adaptation, international climate change law prescribes obligations on States based on the common but differentiated responsibilities and respective capabilities to adapt to climate change and cooperate in preparing for adaptation in accordance with article 4(1)(e) of the UNFCCC. Where a failure to comply with this obligation leads to human rights violations, the principles of State responsibility described above similarly apply.

Question 2: Please share a summary of any relevant data on the impacts of climate change on the enjoyment of the human right to health including its underlying determinants (education, water and sanitation, food, housing, etc.), disaggregated to the extent possible.

Data on the impacts of climate change on health can be found in numerous reports ranging from the Fourth and Fifth Assessments Reports of the International Panel on Climate Change (2015) to the WHO report of about a decade ago, Anthony J. McMichael, A., Campbell-Lendrum, D., Kovats, S., Edwards, S., et al., “Global Climate Change” in Ezzati, M., Lopez, A., Rodgers, A., et al., *Comparative Quantification of Health Risks, Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, Geneva, World Health Organization, 2004, pp. 1543-1650 available at <http://www.who.int/publications/cra/chapters/volume2/1543-1650.pdf>). WHO has also established a page under its Global Health Observatory (GHO) data website focusing specifically on data related to public health and the environment (<http://www.who.int/gho/phe/en/>).

Question 3: Please describe existing national commitments, legislation and policy frameworks related to climate change mitigation and adaptation including any specific measures intended to prevent the worst impacts of climate change on the right to health; to ensure access to information, transparency, participation, and other procedural rights of persons affected by climate actions; to promote, protect and fulfil all human rights particularly those closely linked to the underlying determinants of health such as food, water and sanitation, housing, etc.; and to ensure that climate-related actions respect, promote, protect and fulfil human rights. Please share any relevant information on the implementation of existing commitments to address climate change and its impacts.

States are bound by their international obligations and should ensure that they are implemented in domestic law. Therefore, all international obligations of States , especially those found in the UNFCCC and its Protocols from Kyoto and Doha should be implemented in the domestic laws of States that are Parties to these instruments. Similarly, States Parties to international human rights instruments should ensure that these instruments are incorporated into domestic law.

Question 4: Please describe any relevant national accountability and oversight mechanisms designed to ensure access to remedy for those who suffer human rights harms as a result of climate change. Please highlight any relevant jurisprudence on this subject and indicate what measures, regulatory or otherwise (i.e. impact assessments), are in place to prevent harms caused by third parties.

There have been several domestic cases dealing with climate change. Although

these are easily accessible via the Internet, International-Lawyers.Org, brings three important cases to the attention of the OHCHR.

In the Netherlands, Petitioners were successfully in first instance when a Dutch Court found in *Urgenda Foundation v. Kingdom of the Netherlands*, [2015] HAZA C/09/00456689 (District Court of the Hague, The Netherlands, 2015), that the Dutch government had failed to meet its international obligation to bring its GHG emissions to 25% below 1990 levels by 2020. The State claimed that it would cut emissions by 17% was deemed insufficient to meet its obligations under the UNFCCC and general international law. A part of the damage that petitioners' claimed was the adverse effects of climate change on human health

In Belgium a case known as *VZW Klimaatzaak v. Kingdom of Belgium, et al.*, (Court of First Instance, Brussels, Belgium, 2015) is pending with the claim that Belgian government's failure to reduce greenhouse gas emissions to 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050 violates its international obligations. Among the claims of damage are that the adverse effects of climate change will injure human health. See paras. 2, 25, 28, 30, 34, 45, 57-58, 68, 69, 76, 92, 97-103, nn. 90-91, pp. 4, 10-11, 16, 20-21, 23, 26, 29-30 of the Summons filed with the Court and served on four Belgian Ministers on 27 April 2015. This case is pending at the stage of observations or secondary pleadings.

In the United States a case against the State of Montana claiming that the State had "the affirmative duty to protect and preserve the atmosphere, including establishing and enforcing limitations on the levels of greenhouse gas emissions as necessary to mitigate human-caused climate change" was dismissed. *Barhaugh v. State*, 264 P.3d 518 (Montana Supreme Court, 15 June 2011). Among the issues this case raised was the injury done to human health due to the US State of Montana's adequate regulation of the release of greenhouse gases into the atmosphere by industry operating in the State. The State Court dismissed the case on jurisdictional grounds ruling that the case had to be filed in a federal court.

Question 5: Please describe any concrete mitigation and adaptation measures being taken to address the impacts of climate change on the human right to health and good practices in this regard including those related to: international cooperation; local and community-based initiatives; private sector initiatives; development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases; and the exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change and the economic and social consequences of various response strategies.

A comprehensive indication of concrete mitigation and adaptation actions taken or to be taken by States can be found in the NAPAs (http://unfccc.int/adaptation/workstreams/national_adaptation_programmes_of_action/items/4583.php) and INDCs (<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>)

that States have submitted and which are available through the UNFCCC website. Approximately two-thirds of the INDCs include health as an adaptation priority with several developing countries specifying in detail the interventions in the field of health for which they will require finance, capacity building and technology transfer from developed countries. As indicated above in response to Question 1, these interventions often turn to the obligations States have under international climate change law to provide a guide for and sometimes a restraint on actions that States might take to ensure the right to health in light of the challenges posed by climate change.

We hope that the analytical study will examine these documents in detail as they provide perhaps the best description of State Parties' visions of the relationship between climate change and health. It would be advisable that the OHCHR at least review these sources, extract information from them, and analyze that information.

Final Remarks:

While we very much welcome the consideration of health in the context of climate change we regret that the Council has ignored the constantly repeated calls for the better part of decade of almost all of civil society for the creation of a mandate on human rights and climate change. We repeat that call here again and request that the OHCHR report indicate that civil society representatives, including numerous ECOSOC-accredited NGOs, continue to call for the Council to establish a mandate on human rights and climate change to adequately address concerns related to human rights and climate change. We believe that the shortcomings of how these concerns have been addressed to date, including the inability of other mandate-holders that have multiplying responsibilities to adequately deal with climate change and human rights, illustrate the urgent need for the creation of a mandate devoted solely to human rights and climate change. We hope, therefore, that the OHCHR will reinvigorate its commitment to advocate for the creation of the mandate as called for by the participants of the 2010 Social Forum on Human Rights and Climate Change.