

**Call for inputs**

**Special Rapporteur on the promotion and protection of human rights
in the context of climate change**

**“Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice”**

**Purpose**

To inform the Special Rapporteur on the promotion and protection of human rights in the context of climate change’s report on enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice, to be presented to the United Nations General Assembly in October 2023.

**Background**

One of the thematic priorities identified by the Special Rapporteur relates to enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice.

As countries meet their commitments under the Paris Agreement, many are developing national legislation. The Special Rapporteur wishes to understand, from the perspective of his mandate, whether countries are incorporating human rights considerations in their legislation and whether they are developing elements of legislation relating to Article 8 of the Paris Agreement which relates to loss and damage.

With respect to climate change litigation, a UNEP report[[1]](#footnote-2) states that the current levels of both climate ambition and climate action are inadequate to meet the challenge. As a consequence, individuals, communities, non-governmental organizations, business entities, governments and others have brought cases seeking to compel enforcement of those laws, replace them with stronger ones (and sometimes weaker ones), extend existing laws to address climate change, or define the relationship between human rights and the impacts of climate change. UNEP suggests that climate cases to date often fall into one or more of six categories: (a) climate rights; (b) domestic enforcement; (c) keeping fossil fuels in the ground; (d) corporate liability and responsibility; (e) failure to adapt and impacts of adaptation; and (f) climate disclosures and greenwashing.

The Special Rapporteur is particularly interesting in whether climate change litigation incorporates considerations of human rights.

The principle of intergeneration equity goes back to the Stockholm Declaration 1972. This principle occurs in many agreements including the preamble to the Paris Agreement. Nevertheless, the concept of intergenerational justice does not appear to be well advanced in international or national laws. Intergenerational justice in the context of climate change and human rights is founded on the principle that people must protect current and future generations from the adverse impacts of climate change.

The Special Rapporteur wants to explore whether intergeneration justice has been incorporated into international law, national constitutions and domestic laws and how it can be anchored in these key elements of law.

**Questionnaire**

The Special Rapporteur is therefore seeking input from States, business enterprises, civil society organizations and intergovernmental organizations on how to enhance climate change legislation, how to support climate change litigation, and how to advance the principle of intergenerational justice.

The Special Rapporteur invites and welcomes your answers to the following questions:

**Enhancing Climate Change Legislation:**

1. Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?
2. How to you think climate change legislation should frame a connection to human rights obligations?
3. How do you think climate change legislation should engage the concept of loss and damage?
4. Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?

**Supporting Climate Change Litigation:**

1. How are human rights considerations being incorporated into climate change litigation?

Climate change has direct and indirect effects on the enjoyment of human rights. The Global Climate Litigation Report: 2023 Status Review (“2023 Litigation Report”, 2023 UNEP, forthcoming) has highlighted that litigants are increasingly using “climate rights” as the basis for challenges to action or inaction on climate change. They claim that insufficient climate mitigation or adaptation violates human rights to life, health, food, water, liberty, family life, and health environment. These cases refer to both international and domestic commitments made to ensure that people will enjoy a safe and stable climate as well as other rights that do not explicitly focus on climate but have an impact in addressing climate change. Cases brought in domestic forums have argued that climate rights emerge from existing constitutional and fundamental rights under domestic law, and often relate to international obligations under the Paris Agreement.

Cases linking human rights to climate change have been brought in a number of various forums:

1. Via petitions filed with United Nations bodies;
2. Via requests for advisory opinions on climate change from international courts;
3. At regional tribunals or courts overseeing the implementation of specific conventions and human rights convention tribunals; and
4. Cases brought in domestic courts and tribunals.

The 2023 Litigation Report shows that courts are also increasingly finding favour in these claims, and there has been an increasing number of successful cases in courts globally that have accepted this link. Courts and tribunals are making this connection to enforce existing climate laws, compensate for climate harms, and establish human rights. In so doing, courts have made decisions requiring legislators, policymakers, and business enterprises to be more ambitious in their plans to mitigate or adapt to climate change.

1. Are there issues with making the link between human rights and climate change litigation?

The 2023 Litigation Report highlights a number of challenges litigants have faced in bringing climate change litigation. Courts have dismissed cases based on the finding that litigants did not have appropriate standing to bring the case. In [Armando Ferrão Carvalho and Others v. The European Parliament and the Council (the People’s Climate Case)](http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/), for example, the Court of Justice of the European Union found that since everyone is impacted by climate change in one unique way or another, the applicants could not demonstrate that they were individually impacted by the European Union’s climate policy.

 Another potential barrier to plaintiffs’ proof of standing will likely be the issue of climate change attribution. To prove the existence of an obligation or a breach of duty, plaintiffs or petitioners in some cases will likely have to demonstrate both that their injuries were caused by climate change and that the defendant substantially contributed to climate change.

The 2023 Litigation Report also highlights that in children and youth-led claims, many cases have been unsuccessful on the merits and were dismissed for a lack of justiciability, standing, or on the court’s decision to defer to the executive and legislative branches.

Other litigants have failed on the grounds of separation of powers. In [Lho’imggin et al. v. Her Majesty the Queen](http://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/), the Canadian Federal Court dismissed a claim brought by Indigenous groups that challenged the Government’s overall approach to climate change on separation of powers grounds. The court found that climate change is an inherently political issue left to the executive and legislative branches of government.

1. What do you think are the major barriers to initiating climate change litigation?

The 2023 Litigation Report notes that “anti-climate” cases – or backlash cases – which aim to delay or dismantle existing or emerging regulations that promote climate action are on the rise. These include (i) Investor-State dispute

Settlement (ISDS) claims, (ii) just transition litigation and (iii) criminal cases brought against climate activists. Backlash cases will likely continue to be brought to curb advancements in climate change mitigation and adaptation actions.

Aligning national policies with climate needs will inevitably affect investments in the field of fossil fuel infrastructure across the supply chain. Therefore, the more compelling the need to adopt ambitious and abrupt measures to pursue climate objectives, the higher the risk of ISDS cases being brought against host States.

As noted in the 2023 Litigation Report, the issue of equity in global decarbonization policies will also rise to “anti-regulatory” or “defensive” climate litigation. Similar to backlash cases, these lawsuits aim to delay or dismantle existing or emerging regulatory measures that promote climate action. With governments adopting decarbonization strategies, it is likely that just transition cases brought by workers and communities in vulnerable situations impacted by these policies will lead to lawsuits questioning potential breaches of their human rights. These cases often centre around the participation of impacted communities in government decisions.

The 2023 Litigation Report also notes a rise in the use of legislation aimed to maintain public order or public peace being used to justify the prosecution of climate activists and protesters.

Other barriers to initiating litigation, as outlined in the Environmental Rule of Law: First Global Report include:

* Corruption and lack of judicial independence
* Intimidation and violence against environmental implementers, enforcers, activists, vulnerable indigenous groups, and women
* Lack of specialized knowledge and specialized environmental courts and tribunals. The lack of know-how particularly in developing countries of how climate change affects the enjoyment of human rights is another barrier to initiation climate change litigation.
1. Are the barriers different in different parts of the world? What are they?

The 2023 Litigation Report demonstrates that there has been a steady increase in the number of climate-related cases filed over the years. The Litigation Reports note that 884 climate-related cases were filed in 2017, 1,550 in 2020 and 2,180 cases as at 31 December 2022. However, the majority of these cases, about 70%, originate from courts in the United States of America. Of top ten countries after the United States of America with the highest number of climate-related cases filed, all were developed countries, with the exception of Brazil and Mexico.

In Africa, the region with the highest number of least developed countries, only 2.3% of the cases observed in the 2023 Litigation Report were filed.

Many factors influence the amount of climate litigation in a country. The 2023 Litigation Report does not examine the reasons for the underlying reasons behind this observation in the geographical distribution of cases. However, known challenges regarding access to justice and lack of specialized knowledge and capacity in developing countries, as noted above, could be contributing factors.

1. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

The increasing number of cases being heard around the world by courts as noted in the 2017, 2020 and 2023 Litigation Reports suggest a growing awareness and increasing capacity of courts to deal with climate change and human rights-related issues. Still, the lack of observation in many countries of climate change and human rights-related claims filed by the courts could also indicate issues related to judicial capacity.

How could this be improved?

According to UNEP’s Environmental Rule of Law Report, improved financing of the judiciary and to support capacity building and awareness raising on issue related to human rights and climate change could strengthen capacity of judiciaries to consider such cases. Establishing specialised courts and tribunals could also support climate-related cases to heard and determined in a timely manner.

Sensitizing the general public of the link between climate change human rights could also empower them to demand access to courts that are capacitated to deal with their claims.

1. Are there particular issues with getting access to the courts?

UNEP’s Environmental Rule of Law Report notes several issues hindering access to courts. The geographical remoteness of courts may limit access as some courts are located in towns only which are inaccessible to those in remote locations. Intimidation and politically motivated violence against judicial officers, environmental implementers, enforcers, activists, vulnerable indigenous groups, women and those from lower socioeconomic status may also deter potential litigants from seeking redress by the courts.

**Advancement of the principle of intergenerational justice**

1. What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?

<https://www.un.org/sites/un2.un.org/files/our-common-agenda-policy-brief-future-generations-en.pdf>

Children, youth-led and future generations are increasingly filing claims seeking to address intergenerational inequities imposed by our current generation on future generations and how available natural resources can be used without threatening the sustainable functioning of the planet’s ecosystems. They further assert insufficient climate mitigation or adaptation violates the enjoyment of human rights for future generations. These cases have been noted in UNEP’s 2017, 2020 and forthcoming 2023 Litigation Reports. The 2023 Litigation Report notes that as at 31 December 2022, about 34 cases have been brought by and on behalf of children and youth (usually defined as people younger than 25 years old) based on human rights. These cases rely on children and youth’s special vulnerability to climate harm and on the principle of intergenerational equity. Children and youth plaintiffs argue that due to their young age, they will endure the effects of climate change – which will intensify over time – for longer.

1. How would you best define intergenerational justice in the context of climate change and human rights?

Intergeneration justice can be best defined in the context of climate change and human rights through the increasing number of litigants such as children and youth-led claimants who are asserting that they will endure the effects of climate change that will intensify over time and for longer. UNEP’s Global Climate Litigation Report 2023 highlights such cases including: *Ali v. Federation of Pakistan*, where a 7-year-old girl challenged Pakistan’s climate policies from a rights-based perspective and *Pandey v. India*, where a 9-year-old girl questioned the adequacy of India’s climate mitigation efforts based on the public trust doctrine as well as *Juliana v. United States* where twenty-one youth sought to compel the government to take action to reduce CO2 emissions. These cases relate to intergenerational justice as they demonstrate how children and future generations will have to endure the inherited effects of climate change as a result of actions and/or inactions of their governments and current generations to mitigate climate change.

1. Has the concept of intergenerational justice been incorporated into climate change litigation?

 The concept of intergenerational justice has increasingly been incorporated into climate change litigation by litigants who are increasingly making arguments for climate action based on the public trust doctrine, which assigns the state responsibility for the integrity of a nation’s public trust resources for future generations. Cases arising from these arguments have been highlighted in our 2017, 2020 and the upcoming 2023 Climate Litigation Reports; they include cases brought by children and youth-led who are asserting that they will endure the effects of climate change that which will intensify over time and for longer if climate change in not mitigated.

1. What options are available for enshrining the principle of intergenerational justice in international law?

Options available in enshrining the principles of intergenerational justice in international law include implementing sustainable development goals (SDGs). According to UNEP LEAP, intergenerational equity can also be achieved through implementing the Rio Declaration principles 3 on the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations, and principle 6 on giving special priority to needs of least developed and vulnerable countries.

1. How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?

States can incorporate the concept of intergenerational justice in their legislations by *inter alia*, implementing SDGs, incorporating international and regional laws that conserve and protect natural resources diversity in their constitutions and ensuring that they enact laws that will ensure the current generation does not unduly restrict the options available to future generations in solving their problems and satisfying their own values.

1. Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?

<https://unsceb.org/united-nations-system-common-principles-future-generations>

There are various good practices that allow youth to be represented in courts and have their views expressed. These include principles of the UN system common principles on future generations like: promoting a vision for future generations based on human rights and equity, pursue fairness between present and future generations, recognize and foster an interconnected world, having a think, plan and act with future generations in mind, ensuring meaningful representation of future generations and their interests, fostering open science, data and knowledge for the future, fostering a future-oriented organizational culture and capabilities, and strengthening inclusive partnerships and global cooperation.

Other good practices may include improving the legal standing of youth or minors in accessing courts by *inter alia* appointing court representatives to represent them. Lowering court fees and legal costs for financially challenged youths or minors. This is because financial challenges may impede access to justice. Addressing instances of intimidation and violence against vulnerable youths can further allow them to be better represented in court.

**Submission of responses**

We strongly encourage you to please send your responses to the questionnaire in Word format **by email** to: hrc-sr-climatechange@un.org

We kindly request that your submission be concise and limited to a maximum of
5 pages (or 2,500 words), not including appendices or attachments. Due to a limited capacity for translation, we also request that your inputs be submitted in English, French, or Spanish.

**The deadline for submission is 25 May 2023.**

All submissions will be made publicly availableand posted on the Special Rapporteur’s homepage at the OHCHR website.

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1. UNEP, *Global Climate Litigation Report: 2020 Status Review* (Nairobi, 2020), https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review. [↑](#footnote-ref-2)