

**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-1) 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:

***This submission was drafted by Associate Professor Sara L Seck, Yogis & Keddy Chair in Human Rights Law, Schulich School of Law, Marine & Environmental Law Institute (MELAW), Dalhousie University, Canada, and director of the Global Network for Human Rights and the Environment. Contact:*** ***Sara.Seck@dal.ca***

**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?

*A preliminary question is what is meant by ‘climate change legislation’. For example, it is increasingly common for (environmental) impact assessment laws to incorporate consideration of climate change impacts. In the Canadian context, the federal Impact Assessment Act (IAA)* S.C. 2019 *requires consideration of the extent to which proposed projects subject to assessment would contribute to or hinder the federal government’s “ability to meet its environmental obligations and commitments in respect of climate change.” While the IAA does not fully incorporate a human rights-based approach, among factors to be considered under s22(1) are the impact of a project on the rights of any Indigenous group, Indigenous knowledge, Indigenous culture, findings of an Indigenous-led assessment, as well as gender-based analysis plus; s63 further requires consideration of Indigenous rights among public interest factors for the Minister’s determination.*

*A team of researchers at MELAW (led by myself) conducted a study of the relationship between the Impact Assessment Act and responsible business conduct guidance tools that incorporate human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights. We also considered climate change as part of our study. Materials are available online (*[*https://digitalcommons.schulichlaw.dal.ca/ialawrbc/*](https://digitalcommons.schulichlaw.dal.ca/ialawrbc/)*) including an* [*Issue Brief*](https://digitalcommons.schulichlaw.dal.ca/ialawrbc/5/) *and an* [*Environmental Human Rights Toolbox*](https://digitalcommons.schulichlaw.dal.ca/ialawrbc/4/) *for government, businesses, civil society, and Indigenous communities. We believe that best practices in the crafting of impact assessment legislation should bring together both a human rights lens and attention to climate change (and other aspects of the triple planetary crisis), and this can be done while aligning with and pushing developments in responsible business conduct guidance tools. These best practices could then guide proponents engaged in carbon intensive industries as well as those engaged in green energy transition sectors. They could also serve to ensure meaningful consideration of the human rights implications of climate change in decision-making.*

*In a yet to be published journal article (forthcoming in Climate Law), I and co-authors are exploring the possibility of linking the regulatory social cost of carbon tool with impact assessment law and loss and damage. At present the social cost of carbon is used in regulatory decision-making in the United State and Canada, however the ‘cost’ is far too low and does not integrate the real costs of climate harms, including loss and damage, to the extent that these can be given a monetary value. It is imperative that decision-makers understand the human rights implications of climate change including loss and damage. This may be one pathway forward.*

1. How to you think climate change legislation should frame a connection to human rights obligations?

*Human rights obligations could be incorporated in climate legislation, if legislation that aims to hold governments to account for meeting Paris Agreement targets at the same time incorporates obligations to ensure that climate action in support of these targets does not undermine human rights. There is also the separate question of whether Paris Agreement targets are themselves sufficiently robust from a human rights perspective given the temptation to treat all climate harms that arise before the Paris temperature targets are breached as ‘legal’ (especially given the failure of developed states to accept liability for loss and damage). I would argue that the dominant approach in the climate regime is therefore inconsistent with both the ‘do no harm’ principle of international environmental law (Rio Principle 2), and international human rights law, including human rights due diligence as understood in responsible business conduct tools following the UNGPs (which notably includes an expectation to remedy harm that a company has caused or to which it has contributed.) [See discussion of this in Seck, S. L. (2021) “A relational analysis of enterprise obligations and carbon majors for climate justice”, Oñati Socio-Legal Series, 11(1), pp. 254–284. Available at:* [*https://opo.iisj.net/index.php/osls/article/view/1217*](https://opo.iisj.net/index.php/osls/article/view/1217) *(Accessed: 25 May 2023)].*

*An alternate framing might be to ask how human rights legislation could incorporate reference to climate change – while the Philippines Human Rights Commission has demonstrated this possibility, many human rights commissions do not have mandates that could extend to human rights concerns in relation to environmental harm including climate harms. The UNGA resolution recognizing the right to a clean, healthy and sustainable environment suggests this kind of evolution may be on the horizon and I would suggest should be strongly encouraged. Further domestic human rights bodies could do more to educate businesses on their responsibilities both in relation to human rights and climate change as well as environmental issues more broadly.*

1. How do you think climate change legislation should engage the concept of loss and damage?

*An important preliminary question is what is meant by the concept of loss and damage. Within the international climate regime, loss and damage is associated with impacts on the most climate vulnerable states that are also the least responsible. However, outside the climate regime, the concept of loss and damage may be applied more broadly to all impacts that are not avoided through a combination of mitigation and adaptation efforts, and so may capture impacts on vulnerable communities and natural systems within all states. For example, while Canada is a high-emitting developed state, certain groups within Canada are particularly at risk from climate harms, such as Inuit communities whose rights to culture are dependent upon the ‘right to be cold’ (see Sheila Watt-Cloutier,* [*The Right to be Cold*](https://www.penguinrandomhouse.ca/books/417373/the-right-to-be-cold-by-sheila-watt-cloutier/9780143187646)*). Climate loss and damage should of course encompass both economic and non-economic loss and damage and apply to both slow onset and extreme weather contexts.*

*In our* [*Research Handbook on Climate Change Law and Loss and Damage*](https://www.elgaronline.com/display/edcoll/9781788974011/9781788974011.xml) *[co-edited by Meinhard Doelle and Sara L Seck (Edward Elgar Publishing, 2021)], we adopt this broad approach to climate loss and damage. Several chapters consider how legislation might incorporate loss and damage, most notably the chapter by Sharon Mascher contemplating the structure of legislation that adopts a civil liability approach to loss and damage. The aim would be to facilitate the bringing of loss and damage claims against polluters.*

*An alternate approach not discussed in our book is the possibility that loss and damage could be incorporated in legislation by linking it to carbon pricing mechanisms – the price would then be informed by the actual cost of harm suffered to the extent that valuation techniques can be applied to both economic and non-economic harms. And ideally the funds collected could be passed along to remedy loss and damage or support adaptation. To my knowledge, this is not how carbon pricing legislation has been approached to date. If it were, it would better signal that greenhouse gas emissions do in fact cause harm, rather than conveying the message that they are ok as long as priced appropriately. [There would still be the need to address justice concerns in carbon pricing so that those who struggle with energy access are not penalized when alternatives are not available to them.]*

 *[A chapter by Cymie Payne in our book speaks to valuation of Loss and Damage, while other chapters raise concerns over what is left out when nature is assigned a monetary value in this process (Usha Natarajan), and others points to racial capitalism (Carmen Gonzalez) and Indigenous settler colonial frameworks (Kyle Powys Whyte) as important pieces of the loss and damage conversation].*

1. 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?

*Yes. For major greenhouse gas emitting countries, incorporation of loss and damage in climate change legislation could serve as a way to gather contributions to climate loss and damage funds of the international climate regime, as well as contributions to loss and damage funds within the regulating country which could pay out to vulnerable groups within the state and those outside the state that are not able to access international funds (as they are not sufficiently poor or vulnerable). The need for loss and damage funds within the state would be particularly important for settler-colonial states that have created vulnerabilities for Indigenous communities through colonial legacies that have not be addressed. (See chapter in our book by Kyle Powys Whyte on climate loss and damage and reconciliation.)*

*The adoption of civil liability loss and damage legislation (as noted above) would also be most useful in major greenhouse gas emitting countries to the extent that polluters are easily identified that could be subject to the legislation.*

**Supporting Climate Change Litigation:**

1. How are human rights considerations being incorporated into climate change litigation?
2. Are there issues with making the link between human rights and climate change litigation?

*This depends on the country context, whether states are monist or dualist, and the extent of constitutional incorporation of relevant rights or openness to ‘greening’ of existing rights. I believe it also depends on the extent to which the country is actively engaged in promoting the OECD responsible business conduct agenda through promotion of the OECD MNE Guidelines including the human rights chapter modelled on the UNGPs. In countries with robust OECD NCPs it may be easier to make the linkage to business responsibilities for human rights in courts. (an unproven theory!)*

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

*Our Climate Loss & Damage book includes chapters on barriers – for example, there are challenges in bringing group actions and funding litigation (chapter by Camille Cameron and Riley Weyman) as well as private international law doctrines that create hurdles in terms of who can be sued, by whom, and under which laws (chapter by Andrew Gage).*

1. Are the barriers different in different parts of the world? What are they?
2. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

*In my opinion, no. There is work to do in Canada in terms of judicial legal education, but also legal education more generally about the relationship between sources of international human rights law and environmental concerns. It is hoped that the recent endorsement by Canada of the UNGA resolution on the right to a clean, healthy and sustainable environment will provide motivation for these conversations and education initiatives (like, for example, our toolbox and issue brief and related materials noted earlier in this submission.) There has been tremendous movement on UNDRIP implementation which gives cause for hope.*

1. How could this be improved?
2. Are there particular issues with getting access to the courts?

*We believe there are and have launched a GNHRE sponsored project to clarify the extent of the problem and pathways forward:* [*https://gnhre.org/2023/05/access-to-justice-and-human-rights-approaches-to-procedural-environmental-rights-lessons-from-and-for-canada-a-call-for-blog-posts-and-bibliography-submissions/*](https://gnhre.org/2023/05/access-to-justice-and-human-rights-approaches-to-procedural-environmental-rights-lessons-from-and-for-canada-a-call-for-blog-posts-and-bibliography-submissions/)

**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?
2. How would you best define intergenerational justice in the context of climate change and human rights?
3. Has the concept of intergenerational justice been incorporated into climate change litigation?
4. What options are available for enshrining the principle of intergenerational justice in international law?
5. How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?
6. 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?

**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.

\*\*\*

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-1)