

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

Submission to the Special Rapporteur

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1. My work focuses on corporate accountability for violations of human rights and environmental matters. As such, my submission focuses on climate change initiatives that relate to this area.

Examples of climate change legislation that incorporates human rights elements

2. In the corporate accountability area, there are two examples of legislation that involve both climate change and human rights elements.
 - a. The EU's *Corporate Sustainability Reporting Directive*,¹ for example, requires companies to report on both environmental and social and human rights factors. Environmental factors include: climate change mitigation, climate change adaptation, water and marine resources, resource use and the circular economy, pollution, biodiversity and ecosystems. Social and human rights facts include: equal treatment and opportunities for all, working conditions, respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions.²
 - b. Similarly, the proposed EU Corporate Sustainability Due Diligence Directive³ also provides that companies must take appropriate measures to prevent or mitigate potential adverse human rights impacts and adverse environmental impacts.⁴ The Directive also contains a provision requiring companies to adopt a climate change plan in line with the Paris Agreement.
3. In addition to these two legislative initiatives, two other initiatives combine human rights and environmental issues without any specific reference to climate change. These initiatives include:

¹ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.322.01.0015.01.ENG&toc=OJ%3AL%3A2022%3A322%3ATOC

² Amended Article 29b(2) of Directive 2013/34/EU

³ Proposal for a Directive Of The European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

⁴ *Ibid.* art. 7.

- a. Switzerland’s reporting obligations, introduced in 2022, for companies to disclose human rights, environmental, social, anti-corruption and labour issues.⁵
 - b. France’s Loi de Vigilance (2017), which requires companies to perform human rights and environmental due diligence on an annual basis and publish a vigilance plan.⁶
4. In addition to these domestic or regional legislative initiatives, another area where states have been combining human rights and climate change mitigation efforts are in international investment treaties.
- a. For example, the 2022 New Zealand - United Kingdom Free Trade Agreement provides that the treaty parties can adopt, maintain or enforce measures to ensure investment activity in their territory is undertaken in a manner sensitive to environmental or health objectives and goes on to specify that this includes measures relating to climate change mitigation and adaptation.⁷
 - b. Similarly, the 2020 EU - United Kingdom Trade and Cooperation Agreement provides that the treaty parties have the “right to regulate within their territories to achieve legitimate policy objectives, such as: the protection of public health; social services; public education; safety; the environment, including climate change...”⁸

How climate change legislation should frame a connection to human rights obligations

5. With the UN General Assembly’s recognition of the right to a healthy environment, there is no longer a need to separate climate change from human rights. As the General Assembly has observed: climate change is one “of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights”. On this basis, climate change legislation should directly incorporate human rights obligations both for states and for businesses. It is also helpful to draw directly from human rights obligations as these obligations are better delineated. For instance, as part of the state’s obligation to protect, respect, and fulfil human rights obligation, climate change should be considered one of those human rights that states should be addressing.
6. Climate change legislation should therefore specifically reference state’s tripartite obligations under human rights treaty (protect, respect, and fulfil). In other words, legislation should dictate that states have an obligation to protect, respect, and fulfil the right to a healthy environment, an integral part of which includes measures addressing climate change. In addition, as a corollary of this obligation, states should also have an

⁵ Swiss Code of Obligations (2022), art 964. English translation, available at: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en.

⁶ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> [in French]. For unofficial English translation, see https://www.business-humanrights.org/documents/7492/Texte_PPL_EN-US.docx

⁷ New Zealand - United Kingdom Free Trade Agreement (2022), art. 14.18.

⁸ EU - United Kingdom Trade and Cooperation Agreement (2020), art. 1.1(2). See also art. GRP.1(3).

obligation to introduce measures on corporations requiring them also to refrain from contributing to climate change.

7. Legislation directed at corporations requiring them to refrain from contributing to climate change would also align with the United Nations Guiding Principles on Business and Human Rights which expects corporations to refrain from harming human rights.

How human rights considerations are being incorporated into climate change litigation

8. Two examples of this type of litigation are *Shell* and *Mathur*.
9. In *Milieudefensie et al. v Royal Dutch Shell*,⁹ a Dutch court ordered Shell to reduce its global carbon dioxide emissions by 45 percent by 2030. The court found that Shell owed a duty of care to Dutch residents, both current and future, under Dutch tort law. As the duty prescribed under Dutch tort law was unwritten, the court interpreted this unwritten duty of care with reference to human rights law. Specifically, it relied on article 2 and 8 of the European Convention on Human Rights; these are the right to life and the right to respect for private and family life, respectively. The court also drew from “soft law” human rights instruments that Shell had referred to on its website and in its policy documents. These included the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises.
10. The second case is *Mathur v. Ontario*.¹⁰ In that case, seven youth activists acting with an NGO, Ecojustice, alleged that the government of Ontario’s measure to reduce greenhouse gas emissions by 30 percent by 2030 instead of its original target of 45 percent was unconstitutional. Specifically, the plaintiffs argued that the government’s acts were contrary to sections 7 and 15 of the Canadian Charter of Rights and Freedoms. Section 7 of the Charter protects the right to life, liberty and security of the person while section 15 protects an individual’s right to equal protection and equal benefit of the law without discrimination.
11. Although the court dismissed the case because the plaintiffs were not able to show that the government’s actions were arbitrary or grossly disproportionate, it did note that the plaintiffs had made:

...a compelling case that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify the imposition of positive obligations under section 7 of the Charter.
12. The case is currently under appeal.

⁹ *Milieudefensie et al. v Royal Dutch Shell Plc*, District Court of The Hague (26 May 2021), C/09/571932/HA ZA 19-379.

¹⁰ *Mathur et al v His Majesty the King in Right of Ontario* (2023) 2023 ONSC 2316 (Ontario Superior Court).