

**LACLIMA - Latin American Climate Lawyers Initiative for Mobilizing Action**

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**Mr Ian Fry**

Special Rapporteur on human rights and climate change

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**Ref: Submission for Special Rapporteur’s call for inputs on the promotion and protection of human rights in the context of climate change - LACLIMA's Climate Justice Working Group**

Dear Mr. Special Rapporteur,

This submission, signed by the Climate Justice Working Group of the Latin American Climate Lawyers Initiative for Mobilizing Action (LACLIMA),[[1]](#footnote-1) presents contributions about the relationship between human rights and climate change in the Brazilian context. .

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

In order to comply with their obligation to respect, protect and fulfill human rights, States must enact climate change legislation that establishes both substantive rights and procedural rights. The first relates to fundamental rights that enable the enjoyment of a healthy and sustainable environment, and the latter to the tools that enable such enjoyment, including access to information, public participation and access to justice.

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

Loss and damage refers to the consequences of climate change that go beyond what actors can adapt to or when there are options, but the actors in question lack the necessary resources to implement them. As the magnitude of climate change increases, the likelihood of exceeding adaptation limits also increases, with a particularly severe impact on the most vulnerable. Legislation on climate change should address the concept of loss and damage by recognizing the responsibility of countries and companies for damages caused by global warming. It should establish mechanisms to assess, quantify, and compensate for the adverse impacts of climate change on vulnerable communities, ecosystems, and economies. Furthermore, the legislation should promote international cooperation to deal with loss and damage, encouraging technology transfer, adequate financing, and the sharing of best practices among countries. In establishing clear responsibilities for major greenhouse gas emitters, climate legislation ought to point out the companies that significantly contribute to the problem. This may include imposing proportionate financial obligations for the impacts caused and creating specific funds to address loss and damage.

Lastly, the legislation should seek sustainable and long-term solutions to reduce risks and minimize consequences from climate change through adaptation and mitigation strategies. The legislative approach should be flexible and capable of adapting to changes in circumstances and scientific understanding of the losses and damages caused by climate change.

**04. Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries and those that are most affected by climate change? What would this difference look like?**

Yes. The principle of common but differentiated responsibilities is recognized in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, and can be extended to loss and damage. The legal complexities of loss and damage include specific rules on how to quantify and value loss and damage to determine the total amount of compensation or reparation, as well as establishing the causal link to decide who is responsible for the financial burden. Despite the anthropogenic nature of climate change, it is difficult to establish a causal link that demonstrates the connection between damages occurring in one location and greenhouse gas emissions in another. Furthermore, the effects are not distributed uniformly worldwide, and damages can occur long after emissions have taken place, making compensatory models less robust in this context. Therefore, historical responsibilities, current capacities, and future needs of each country must be considered in addressing the complexities of loss and damage.

Moreover, adverse consequences of climate change can directly affect human rights. Climate change has the potential to exacerbate social and economic inequalities, disproportionately affecting vulnerable communities. It is essential to protect the rights of people affected by climate change, and losses and damages related to this phenomenon should be understood as human rights violations. This implies holding accountable the parties responsible for greenhouse gas emissions and developing mechanisms for compensation and reparation for communities experiencing the most severe impacts. For these reasons, legislation on climate change that incorporates losses and damages should differ between major greenhouse gas-emitting countries and those most affected by climate change.

Some possible differences could be (1) adoption of more stringent quantitative targets and shorter carbon neutrality timeframes for major emitting countries, given their historical responsibility for climate change; (2) the most affected countries could have less stringent targets, recognizing the difficulties they face due to climate vulnerability and capacity constraints; (3) the most affected countries could receive additional financial support from major emitters to address the impacts of climate change, recognizing that their economies, infrastructure, and communities are at greater risk. This could include dedicated funds for post-disaster reconstruction, climate insurance programs, and financial solidarity mechanisms; (4) legislation could establish specific mechanisms to facilitate technology transfer and financing from major emitters to the most affected countries. This could include incentives for technology collaboration, sharing of best practices, and provision of financial resources for climate change adaptation and mitigation.

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

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In Brazil, human rights considerations are increasingly being incorporated into litigation on climate change, especially regarding traditional and indigenous communities that are particularly affected by climate impacts.

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

The main barriers to initiating litigation on climate change can include:

(i) Jurisdiction: determining which court has the authority to adjudicate cases related to climate change can be challenging, especially when the issues involved are transnational. Litigation may involve multiple parties in different jurisdictions, making the choice of the appropriate forum an initial barrier.

(ii) Causation proof: establishing a direct causal connection between the actions of a particular defendant and the damages caused by the climate can be difficult. Climate change is a complex phenomenon involving multiple factors and extensive time scales. Convincingly demonstrating that the activity of a specific individual or company is responsible for the damages can be a significant challenge.

(iii) Standing: often, parties interested in climate change-related lawsuits face difficulties in establishing their legal standing. This is because the impacts of climate change typically affect society as a whole, making it challenging for an individual or group to demonstrate a specific and direct harm that entitles them to sue.

(iv) Scientific complexity: climate change involves complex and constantly evolving scientific concepts. Understanding and effectively communicating climate science in a legal context can be challenging for both lawyers and judges. Lack of knowledge or understanding can be a barrier to successfully advancing climate change litigation.

(v) Political and financial resistance: climate change litigation can face strong political and financial resistance. Large corporations and powerful economic sectors may attempt to hinder or delay proceedings by investing significant resources in lobbying, political influence, and legal challenges. Lack of political will or sufficient financial resources can hinder access to justice for those seeking to hold the responsible parties accountable for climate change.

(vi) Time and cost: legal proceedings are notoriously lengthy and costly. Lengthy litigation can be financially unattainable for many, and the time required to obtain a judicial decision can compromise the effectiveness of legal actions, especially in the context of climate urgency.

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

The Brazilian judiciary has been making efforts to understand the connection between human rights and climate change. However, there are still challenges and gaps in comprehending and applying this complex relationship. Some Brazilian courts have issued decisions recognizing the importance of human rights in the context of climate change, especially in contexts where indigenous peoples or traditional communities are involved, seeking to protect citizens and ensure compliance with international agreements. For example:

1. Xokleng Case: in 2019, the 4th Regional Federal Court recognized the rights of the Xokleng indigenous people to their land, taking into consideration the threat of climate change and the importance of environmental preservation for the protection of their cultural and social rights.

2. Public Civil Action on Deforestation in the Amazon: in 2020, the Supreme Federal Court (STF) ruled that the Brazilian government must take measures to combat illegal deforestation in the Amazon, recognizing the importance of environmental protection and the rights of affected indigenous peoples.

3. Public Civil Action on the Pollution of the Doce River: following the environmental disaster caused by the rupture of the Fundão dam in Mariana, Minas Gerais, in 2015, the Federal Public Ministry filed a public civil action demanding reparations for the affected communities. In 2020, the Federal Court ruled that Samarco (a joint venture of Vale and BHP Billiton) should compensate the affected individuals, recognizing the violation of human and environmental rights resulting from the disaster.

These are just three relevant decisions, but there are other ongoing legal initiatives in Brazil that recognize the connection between human rights and climate change, seeking to protect citizens and promote environmental responsibility.

**10. How could this be improved?**

Firstly, Brazilian law does not expressly mention the relationship between human rights and climate change. Not even Brazil’s National Policy on Climate Change mentions its impacts on the exercise of human rights. Because Brazil’s legal system has preserved its civil law origins, both in its influence on and from a judge’s decision, improving the quality of this debate in the judiciary is crucial.

In that regard, the judiciary's ability to fully understand this connection depends on the training and knowledge of the judges, the availability of adequate resources and infrastructure, and access to up-to-date scientific information on the subject. It is important that the Brazilian judiciary continues improving its understanding of the implications of climate change on human rights, seeking fair and equitable solutions to the challenges arising from this intersection.

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

With the exception of actions filed at superior courts (the Supreme Federal Court and the Superior Court of Justice), which follow different constitutional and legal parameters, climate litigation in Brazil has a common configuration: NGOs act as plaintiffs, and public and private entities as defendants. In most cases, actions are filed against public entities. For instance, the Popular Action (Lawsuit) nº 5008035-37.2021.4.03.6100 seeks to question Brazil’s federal government on the update of its latest NDC, since it was a less ambitious goal than the previous one. Another example is the Popular Action n. 1068508-84.2021.8.26.0053, filed against São Paulo’s state government for breaching its state policy on climate change.

However, it is expected that Brazill, in line with recent trends in other countries, will start to fight climate change through litigation against private entities. In cases such as these, the state is only a filer: one example is the civil public action n. 1005885-78.2021.4.01.3200, in which climate litigation is not the main focus, but simply one facet of the demands made against the defendant - a farmer responsible for the illegal deforestation of more than 20 km². In this case, the plaintiff, Ministério Público de São Paulo, demanded that the defendant pay compensation for intermediate material damage and climatic residuals estimated at R$44,779,679.32. In this scenario, one may notice that the main difficulties these lawsuits face are: (i) the resource disparity between plaintiff and defendant; (ii) the configuration of Brazil’s environmental liability. On the other hand, there are ways Brazil’s juridical system is accessible, such as: (iii) its class action system; (iv) the establishment of environmental rights and its valuable deployment in Brazilian law.

Regarding (i) resource disparities, which describes how the defendants are frequent players in the judiciary, possessing more knowledge and manpower about how to successfully execute and influence cases due to being involved in more actions than the plaintiffs. In that regard, the plaintiffs, commonly NGOs, despite having knowledge and research about the social guidelines they defend, are not always able to reconcile that with the manpower and legal knowledge required to effectively influence case outcomes.

Secondly, (ii) the configuration of environmental liability in Brazilian law is also a hindrance for the discussion of climate change in lawsuits, especially in cases where the defendant is a private entity. Proving the nexus of causality (one of the requirements of environmental liability) is very difficult in climate change cases. This is due to the synergistic effect that emissions of GEEs have on our planet, effects that cannot be traced back to one specific polluter. To solve that issue, it is recommended that the understanding and conceptualisation of the nexus of causality is adapted to address the need for the mitigation of climate change. However, that does not make it less necessary to study and develop its impact in other fields of law.

That said, both the (iii) Brazilian system of class actions and (iv) environmental rights make it easier to propose not only the climate change’s debate, but also any other violation against the environment in which quantifying all harms and victims is impossible.

**12**. **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?**

In Brazil, the Federal Constitution enshrines respect for future generations in the article dedicated to the environment:

“Article 225. Everyone has the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both government and community shall have the duty to defend and preserve it for present and future generations.”

To cite just one example, in a recent judgment from the Brazilian Supreme Court, ADPF No. 708[[2]](#footnote-2), this principle was decisive for the judges deciding that the Paris Agreement would have supralegal status in the national legal system, and was equated on this occasion to other international human rights treaties.

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

The basic concept is that all generations are partners caring for and using the Earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them.

This leads to three principles of intergenerational equity: options, quality, and access. The first, comparable options, means conserving the diversity of the natural resource base so that future generations can use it to satisfy their own values. The second principle, comparable quality, means ensuring the quality of the environment on balance is comparable between generations. The third one, comparable access, means non-discriminatory access among generations to the Earth and its resources. These principles satisfy the basic criteria of balance, flexibility, cultural acceptability, and clarity. One criterion is to balance the needs of future generations with those of the present, neither licensing the present generation to consume without attention to the interests of future generations nor requiring it to sacrifice unreasonably to meet indeterminate future needs.

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

Yes, the concept of intergenerational justice has been increasingly incorporated into litigation related to climate change. It is argued that inadequate actions to mitigate climate change can cause significant harm to future generations, violating their fundamental rights. Therefore, lawyers and activist groups have used the concept of intergenerational justice to argue for more ambitious measures to reduce greenhouse gas emissions and protect the environment. In Brazil, examples include:

• Xokleng vs. Brazil: In 2019, the Xokleng indigenous community filed a lawsuit against the Brazilian government, arguing that deforestation in the southern region of Brazil was harming their traditional way of life and violating their intergenerational rights. The lawyers representing the Xokleng community used the concept of intergenerational justice to emphasize the importance of protecting the environment and ensuring the sustainability of future generations.

• Aldeia Maracanã vs. State of Rio de Janeiro: The Aldeia Maracanã, an urban indigenous community in Rio de Janeiro, fought for the preservation of a historic building they occupied. The lawyers in this case utilized the concept of intergenerational justice to argue that the destruction of the building would be detrimental to future generations, depriving them of an important cultural heritage.

• Northeast Oil Spill: Following the severe oil spills that impacted the beaches of Northeast Brazil in 2019, non-governmental organizations and lawyers filed lawsuits demanding more effective environmental protection measures and holding those responsible accountable. The concept of intergenerational justice was used to highlight the long-term impact of these spills on future generations and emphasize the need for urgent action to prevent irreparable damage to the environment.

**17. 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?**

Active participation of young people, who are disproportionately affected by climate change, is crucial in shaping their future through legal means. Ensuring access to justice and due process becomes even more vital in cases with power imbalances, as in climate litigations against governments and corporations to compel action or nullify acts detrimental to the environment. However, many countries, including Brazil, face challenges with courts being disconnected from the public, hindering the protection of young people’s rights. It is the State's responsibility to facilitate legal protection and promote justice by implementing mechanisms that ensure access to justice. Latin American examples, such as the Brazilian "popular action" and the Colombian "tutela" empower youth to challenge actions that harm public assets and rights. Notable cases, such as "Six Youths v. Minister of Environment and Others" and "Future Generations v. Ministry of the Environment and Others," demonstrate the positive impact of these mechanisms. The latter compelled the Colombian government to halt deforestation and safeguard the rights of society and nature, while the resolution of the Brazilian case is still pending.

The 'Greta effect' has had an impact on climate activism of young people around the world. However, it is important to consider the different realities between countries of the Global North and the Global South. Examples of climate action by young people in Brazil include: FFF - Fridays For Future, which emerged in Brazil in 2019, Engajamundo (2012), Plant-for-the-Planet, and Youth Climate Leaders (YCL), both in 2017. Additionally, it is worth mentioning other groups engaged in activism who may not necessarily identify as climate activists, such as indigenous peoples, who have an intrinsic connection with nature and have long been involved in environmental and climate advocacy due to their worldview. It is noteworthy that the important "Escazú Agreement," which includes access to justice for activists, is currently under consideration in the Brazilian legislative chamber. In this context, climate litigation involves the judiciary as an important tool for climate activism, but there are also differences between the Global North, where this type of litigation originated, and the Global South. Although still in development, Brazil provides fertile ground for this tool due to its proximity to well-established environmental litigation, climate-related legal obligations, and broad procedural instruments. Regarding young people, it is important to highlight the "Ação Popular'' instrument, which allows citizens to be legitimate parties and is the most likely climate litigation tool for such activists. In Brazil, an example of climate litigation initiated by young people is the "Climate Action by Six Youths v. Minister of Environment and Others,” filed in 2021 by six young climate activists associated with Engajamundo and FFF. The action was taken against the so-called "pedaladas climáticas," alleging that the Brazilian government violated the Paris Agreement by not properly updating the climate target for the next five years.

1. This submission includes contributions from: Alcebiades Meireles Meneses, Amanda Abbud Rodrigues da Costa, Cinthia Rhemann Dias Ferreira, Daniel Jaoude, Enéas Xavier de Oliveira, Gabriel Mantelli, Gysele Maria da Cunha Bastos, Heloíse Almeida Luna, Isabel Monteiro de Barros Alfano, Isabela Corradini Antunes, Lais Paiva Siqueira, Vitor Goulart Nery and Wallace Almeida de Souza. [↑](#footnote-ref-1)
2. In literal translation into English, the acronym “ADPF” stands for Argument of Noncompliance with a Fundamental Precept. [↑](#footnote-ref-2)