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# Editorial

## Climate change and human rights: the defining dilemma of our times?

No one can fail to be aware of the very public failure of the fifteenth conference of parties of the United Nations Framework Convention on Climate Change (UNFCCC COP 15) in Copenhagen in December 2009 to deliver a legally binding agreement to succeed the soon to be defunct Kyoto Protocol and commit parties to further substantive reductions in greenhouse gas (GHG) emissions. While the parties did not leave the summit entirely empty-handed, the Copenhagen Accord which emerged (representing a combination of holding position and statement of intent as agreed by the parties) arguably gives cause for concern that goes far beyond its non-binding nature. For the purposes of addressing the vexed relationship between human rights and climate change and the signal failure of international law to engage coherently with it, the fact that the Accord does not at any point explicitly refer to human rights is both worrisome and all too typical. That said, its content does at least point to a strong underpinning in this regard by making implicit reference to justice and rights-based concerns. Thus the Accord makes much of the imperative need to act 'on the basis of equity' and recognizes 'the critical impacts of climate change and the potential impacts of response measures on countries particularly vulnerable to its adverse effects'. In so doing, the Accord clearly recognizes that, for developing countries, 'social and economic development and poverty eradication are the first and overriding priorities' and that, for them, addressing climate change is necessarily a less pronounced concern. At the same time, the Accord recognizes that the most vulnerable, notably those in least developed countries generally (and small island developing states and Africa in particular) stand most in need of help with adaptation, to which end funding is promised, though given past failures of promised aid to materialize, one could be forgiven for viewing this with a degree of scepticism, despite the fact that the establishment of a high-level Panel, directly accountable to the COP, does something to counter this. Mitigation is recognized to be a primarily developed-world obligation, though voluntary action by least developed countries is encouraged in this regard. Initiatives involving forests (notably REDD+) feature prominently in the document.

In this respect, the Accord is very much the product of UNFCCC process which spawned it in that, while the justice-based arguments recognizing developed-world generated climate change and its effects on the developing world are clearly acknowledged in principle, reaching political and legal agreement on scientifically meaningful emissions reductions targets (those arrived at under the Kyoto Protocol being widely regarded as grossly inadequate) on this basis has, thus far, proved impossible in practice. It is however equally true to say that, insofar as addressing climate change is concerned, perhaps for the first time in international affairs, the developing world has a decisive say on the international stage; for, while the developed world may choose


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to act to address the legacy of pollution that it has contributed to the problem, the enormous pollution potential of developing countries in this regard ensures that, without their buy-in, any initiative adopted is bound to fail. This new status for developing countries is predicated on the recognition of one dimension of the truism that climate change stands to affect us all. An equally important aspect of this point lies in the need to understand how this manifests itself, not only practically, for example in the form of predicted sea-level rise and desertification etc., but also (and this issue has yet to be satisfactorily addressed by the international community) legally, in terms of impinging on the human rights of those directly and indirectly experiencing the result of these phenomena. In current political and legal praxis, realization of the links between climate change impacts and human rights violations is at best inchoate. This issue of the *Journal of Human Rights and the Environment* therefore seeks to articulate and examine some of the most pressing ramifications of climate change in respect of human rights.

As discussed above, one area where climate change thought at least does attempt to engage with fundamental concerns in principle is in its recognition of the need to address the inherent injustice of climate change impacts falling most markedly on those who have done least, in historical terms, to generate GHG emissions. It is therefore unsurprising that the impact of climate change on the most vulnerable in global society is a strongly expressed concern in each of the contributions to this issue, with Pedersen focusing on the plight of the disadvantaged, including victims of climate change-forced migration; Kotzé drawing attention to the plight of the poor in South Africa; and Roht-Arriaza, Westra, and Osofsky considering climate change impacts on a number of indigenous communities – respectively forest peoples, the Inupiat in Alaska and the Ogoni people of the Niger delta. As the authors observe, the most vulnerable in developed countries and indigenous peoples, regardless of location, often stand to sustain the greatest damage as a result of climate change. This damage is complex and multi-faceted, manifesting itself in physical terms at present, as indigenous peoples bear the brunt of both profligate resource stripping (as, for example, in the case of deforestation, as discussed by Roht-Arriaza) and the pollution that results from unnecessarily damaging exploitation practices (as in gas flaring as the result of oil extraction in Nigeria considered by Osofsky) in their immediate areas. On a broader scale, as observed by Westra, the present physical impacts of more remote climate change-implicated activities are also beginning to make themselves felt for Arctic peoples; a phenomenon that is only, on current models, projected to become more widespread as the effects of historic emissions come to fruition. As emphasized in Westra's article, while such physical impacts are potentially disastrous in and of themselves, their impact on indigenous communities with strong spiritual and cultural connections to particular territories is incalculable. Current law and human rights thought, which, despite initiatives such as the UN's Declaration on the Rights of Indigenous Peoples, remains largely dominated by Western individualist approaches, is at best ill-equipped and at worst potentially unable to address such community or collective impacts.

Even established individual human rights-based models are problematic where climate change impacts are concerned: Westra, for example, points to the failure of law generally to engage with the nexus between the right to life and need for an explicit human right to water in most cases. Kotzé shows that, even where such rights are adopted, as is the case in South Africa, the implications may not have been fully realized and as a result, when it comes to determining their actual content, as

demonstrated in the Phiri litigation, the courts are faced with issues that are at once hugely problematic and tendentious.

Broader problems with the underdeveloped consideration of the necessary links between climate change and human rights as reflected in law and policy seem to be borne out by experience in the nascent litigation of climate change impacts. In cases to date, human rights-based claims have been notably absent from litigation, as for example in the Kivalina and Ogoni litigation. Advocates instead have had to make recourse to other areas of law, such as torts litigation, which often has its own problems in accommodating environmental claims more generally. There is little comfort to be gained by the potential explanation that problems in this regard result from the absence of explicit substantive protection for human rights pertaining to climate change. Such rights could of course be implied as necessary corollaries to other rights, centrally the right to life; though such a course is unlikely to result from judicial law-making, as its political and practical ramifications would be likely to be viewed as requiring explicit state endorsement in the form of statutory or treaty commitments. Even accessing potentially applicable procedural rights in respect of climate change impacts, such as those referred to by Pedersen and Roht-Arriaza, presents similar significant challenges in theory and practice.

Further problems with the viability of litigation as a tool (albeit one amongst many) to address climate change lie in the more general problem of how to address the enmeshed roles of States and Transnational Corporations in climate change-implicated activities, as discussed by Westra, Roht-Arriaza and Osofsky. This raises a number of fundamental difficulties, not least the sensitive concerns as to state sovereignty that underpin international law issues in general and those related specifically to climate change referred to above, and the vexed issue of how to deal with problems arising from the activities of huge and powerful global enterprises. The latter area may ultimately be addressed, at least in part, by adding to the strategic approaches available for the harnessing of corporate voluntarism (as discussed by Roht-Arriaza and Osofsky) in order, in the first place, to take a more preventative approach and hopefully reduce the need to have recourse to the courts, with all the difficulty and delay that that entails.

In summary, while in theory the human rights and climate change debates and the policy and law that is harnessed to attempt to engage with them offer an opportunity for a harmonious coordination of goals and objectives, to date this area has been characterized by dissonance. It remains to be seen whether COP 16 in Mexico City in December 2010 will be any more successful than the missed opportunity of COP 15 in forging the legally binding agreement that is so necessary in order to take commitments to address climate change from the political arena into legal reality. Past experience tells us that there are certainly grounds for fear but, given the very high stakes involved, the imperative need to make progress also makes it necessary to hope. It is arguable that, in order to even begin to adequately address climate change problems, coherent and explicit engagement with human rights must at least be referred to from the outset. Once this essential foundation has been laid, we can look to the nuts and bolts of mitigation and adaptation and the issues of human rights and justice that must be an integral part of addressing them in a more structured and viable fashion. If, as seems increasingly apparent, climate change offers complex challenges not only to our scientific capacity to address its impacts, it is also the case that it will require us to harness all of the legal ingenuity at our disposal to ensure that, in so doing, we do not simply perpetuate, or worse, aggravate the long-standing injustices that it manifests. To this end, it would seem profligate to fail to engage and

(where necessary) coherently augment human rights norms in order to ensure that the legal ramifications of aspects of the climate change challenge are addressed as effectively as possible. Therefore, one can only echo the passionate arguments of the contributors in hoping that these issues will not be lost in the broader controversies of the climate change debate.

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