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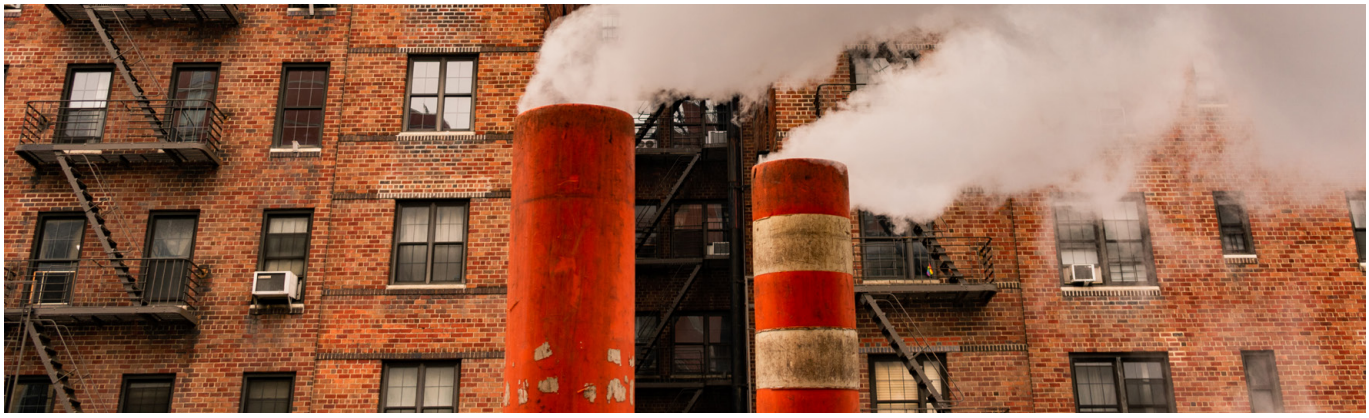

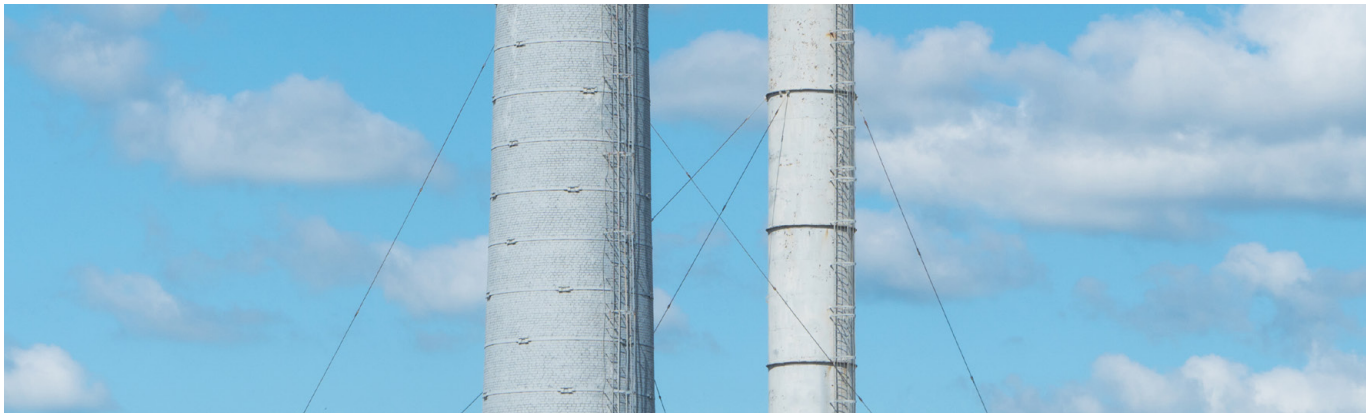

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

The Human Right to a Clean and Healthy Environment under Custom and Treaty

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The Human Right to a Clean and Healthy Environment under Custom and Treaty

In 2009, the Office of the United Nations High Commissioner for Human Rights published its first report related to human rights and climate change. The report recognised that there exists a "broad agreement that climate change has generally negative effects on the realization of human rights" (para. 69). Nonetheless, it was sceptical that the effects of climate change "can be qualified as human rights violations in a strict legal sense" (para. 70), and, given the collective responsibility of States for causing climate change, considered it "doubtful that an individual would be able to hold a particular State responsible for harm caused by climate change" (para. 72).

Despite this warning 13 years ago, there has been a litany of cases before courts and tribunals around the world seeking to enlist human rights law in the fight against climate change. It is easy to understand why. Human rights law directly addresses individuals' lived experiences of climate change: the threats to their health, their lives, their homes and their culture. Unlike many of the major inter-State environmental agreements, many human rights systems have mechanisms for adjudicating on whether States are living up to their obligations, however imperfect those mechanisms are. And many of these fora are directly accessible to individuals who may be frustrated by national governments' inaction on climate change.

It is clear that the impact of climate change on human rights has become a key concern for States. In November 2022, Vanuatu published a draft resolution for the United Nations General Assembly ("UNGA") setting out questions which, if the resolution were to pass, the International Court of Justice ("ICJ") would be asked to answer in the form of an advisory opinion. The draft referred to treaties including the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), as well as the Universal Declaration of Human Rights, and posed the question: "What are the obligations of States under the above-mentioned body of international law to ensure the protection of the climate system and other parts of the environment for present and future generations"?

In light of these developments, this blog considers the extent to which there is a human right to a clean and healthy environment which could be engaged by a State's failure to take adequate action to mitigate or adapt to climate change. It addresses this issue in relation to: (i) customary international law; (ii) human rights treaties which include an express right to a clean and healthy environment (or similar); and (iii) human rights treaties which do not include such an express right.

Customary International Law

Customary international law is the unwritten body of rules binding on States by virtue of them being reflected in the widespread and representative practice of States, and in the belief held by States that they reflect legal rights and obligations (this belief being known by the Latin shorthand *opinio juris*).

Obligations owed under customary international law can have concrete implications in a range of fora. They are, for example, relevant to the interpretation of treaties. As well, because in England there is a presumption that legislation is intended to be consistent with the UK's obligations under customary international law, they could have direct relevance to litigation before English courts concerning the interpretation of domestic statutes. For that reason, the question of whether, putting aside any duties owed under a treaty, States are under a customary international legal obligation to provide individuals with a clean and healthy environment is an important one.

There is some support for the view that an obligation on States to provide a clean and healthy environment does exist under custom. Champions of this view point to a suite of texts concluded over several decades which, while not binding in their own right, may be said to reflect not only the practice of States but also States' belief that such a human right does exist under international law, thus showing the necessary *opinio juris* for a customary rule. They may look back as far as the 1972 Stockholm Declaration and Action Plan for the Human Environment and the 1992 Rio Declaration on Environment and Development.

Proponents of this view may also point to two very recent developments within the United Nations. On 8 October 2021 the UN Human Rights Council adopted Resolution 48/13. Paragraph 1 "[r]*ecognizes* the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights" (emphasis added). This resolution received 43 votes in favour (including the UK), 4 abstentions (from Russia, India, China and Japan), and no votes against.

Then, in July 2022, the UNGA passed Resolution 76/300. Paragraph 1 states that the Assembly "[r]*ecognizes* the right to a clean, healthy and sustainable environment as a human right". The preamble refers specifically to the impacts of climate change, which it says "interfere with the enjoyment of a clean, healthy and sustainable environment". On this occasion, 161 States voted in favour, none voted against, and 8 abstained.

The controversy, however, is how much these texts reveal about customary international law. The most recent UNGA resolution provides a helpful case study. Clearly, this resolution provides compelling State practice: a near consensus of States signing up to a text that declares the existence of a human right to a clean and healthy environment. However, whether the necessary *opinio juris* can be derived from it is more questionable. The ICJ's *Nuclear Weapons* Advisory Opinion stated that "General Assembly resolutions, even if they are not binding, may sometimes … provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*" (para. 70). More specifically, UNGA resolutions can play an important role in the emergence of human rights under customary international law, as is evident from the ICJ's 2019 Chagos Archipelago Advisory Opinion and its

treatment of UNGA resolutions in the crystallisation of a customary right to self-determination.

In the case of the UNGA resolution at issue here, there are some indicators of *opinio juris* supporting a customary right to a clean and healthy environment. The resolution's text is cast in the language not of mere aspiration but of legal rights — it refers unequivocally to a "human right". It also refers to this as a standalone right, rather than saying only that a clean and healthy environment is a prerequisite to the enjoyment of *other* human rights, such as the right to life (as some earlier instruments had done).

On the other hand, however, speeches by a number of States' representatives in the UNGA militate against the resolution reflecting any legal rule. Pakistan, for example, described the resolution as a political text. The UK stated that environmental degradation "is an issue of deep concern to all of us", but also that "[t]here is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment and we do not consider that it has yet emerged as a customary right". The United States expressed the view that the resolution reflected "moral and political aspirations" but not customary international law. The answer is not clear cut.

Treaties Containing An Express Right To A Clean And Healthy Environment

In some contexts, it is not necessary to go through the difficult process of trying to ascertain whether a rule of customary international law exists, because there are some human rights treaties which expressly enshrine a standalone and enforceable right concerning the type of environment in which individuals are entitled to live. This is true of, for example, the African Charter on Human and Peoples' Rights ("the African Charter") (Article 24), the Arab Charter on Human Rights (Article 38), and the San Salvador Protocol to the American Convention on Human Rights (Article 11).

In the African system, the landmark case on the right in Article 24 of the African Charter to date is the 2001 decision in *Social and Economic Rights Action Center v Nigeria*. This case concerned degradation of the environment of the Ogoni people caused by oil companies, which the claimants accused the Nigerian government of having condoned and facilitated. The African Commission on Human and Peoples' Rights found that Nigeria had violated numerous provisions of the African Charter, including Article 24. In doing so, it emphasised that the Charter imposed on Nigeria a negative obligation to refrain from violating human rights itself, as well as a positive obligation to protect rights-holders against harm, including to their environment, caused by other actors (paras. 45–47). This finding is critical in relation to climate change, where a litigant's aim may be to hold governments accountable not only for their own greenhouse gas emissions but also for their failure to regulate or mitigate the emissions of private actors. Further, the Commission stressed that Article 24 had a substantive aspect, requiring Nigeria to "prevent pollution and ecological degradation", as well as a procedural dimension, which required it, for example, to carry out environmental impact studies and consult communities which could be impacted by a new industrial project (paras. 52–53). Again, it is easy to see how requirements concerning transparency and consultation could carry across to the climate change context.

In September 2021 the Parliamentary Assembly of the Council of Europe passed a resolution supporting a new protocol to the European Convention on Human Rights ("ECHR") which would expressly recognise a human right to a healthy environment. Although the Committee of Ministers has not yet agreed to draft such a protocol, the inclusion of such a right would undoubtedly lead to extensive European jurisprudence on this topic.

Treaties Without An Express Right To A Clean And Healthy Environment

A number of human rights treaties, including the ECHR as it currently stands, do not expressly guarantee a right to a clean and healthy environment. However, a body of law has developed concerning the extent to which the rights which are expressly enumerated in these treaties guarantee a satisfactory environment for individual rights-holders. This post will address three distinct human rights regimes.

First, this issue has been addressed within the Inter-American human rights system. In an Advisory Opinion of 2018, the Inter-American Court of Human Rights recognised the existence of an "autonomous" right to

a healthy environment under the American Convention on Human Rights. This was despite the fact that the American Convention does not refer to rights related to the environment. However, Article 26 enshrines an obligation on States to "adopt measures … with a view to achieving progressively … the full realization of [certain implicit] rights", and it was this provision that provided the hook for the Court's analysis. On this basis, claimants in the Inter-American system may advance claims relating to environmental harm without anchoring the claim in, for example, a breach of the right to life or the right to property — they can claim pursuant to a free-standing, implied right to a healthy environment.

Secondly, a body of relevant case law has built up around the ECHR. Although a number of climate change-related cases have been brought before the European Court (including one brought by six Portuguese children against all the Council of Europe member States), the European Court of Human Rights ("ECtHR") has not issued a judgment on any of them. However, the ECtHR has over time rendered numerous judgments holding that, for example, the right to life under Article 2 and the right to private and family life under Article 8 include a right to be protected against serious damage to the environment (see, for example, *Öneryildiz v Turkey* and *López Ostra v Spain*). The ECtHR has accepted that States have a positive obligation to prevent or mitigate environmental harm — including by regulating hazardous activities by private actors. As recently as October 2022, the Court handed down judgment in *Pavlov v Russia*. In that case, the 22 applicants claimed that Russia had breached the ECHR by failing to protect them against industrial air pollution. The Court accepted that Russia had violated its positive obligation to take "reasonable and appropriate measures" to protect the applicants' rights under Article 8, especially given its longstanding awareness of the critical environmental situation (paras. 77–93). It is easy to see the potential parallels that could be drawn in a claim related to climate change.

Thirdly, the UN Human Rights Committee — the body which hears individual claims of alleged breaches of the ICCPR — has, like the ECtHR, addressed climate change not pursuant to any discrete right to a clean and healthy environment but through the prism of other rights.

One prominent example was the Committee's 2019 decision in *Teitiota v New Zealand*. In that case, the claimant was a national of Kiribati who had claimed refugee status in New Zealand on the basis of his home island becoming uninhabitable, but had been rejected. He claimed that New Zealand's decision exposed him to a risk to his life in violation of Article 6 of the ICCPR. The Committee found that New Zealand had been entitled to reach the decision it did because it could reasonably find that the risk faced by Mr Teitiota in his home country was not sufficiently "imminent" to prevent his return. Although the Committee found against this individual, some of its findings may well be instructive in future cases. In particular, it accepted in principle that where climate change fuelled violence, led to a lack of potable water, made subsistence farming impossible, or led to an increase in flooding, this could create conditions incompatible with the right to life if the risk was sufficiently personal to Mr Teitiota and/or immediate (paras. 9.7–9.12).

In September 2022, the Committee published its views in *Billy v Australia*, a communication by a group of indigenous Torres Strait Islanders who lived on low-lying islands. The Committee accepted that Australia's failure to take adequate measures to adapt to climate change amounted to a failure to protect the authors' right to home, private life and family in violation of Articles 17 and 27 of the ICCPR. The fact that the authors were members of a vulnerable indigenous minority group was core to the decision, as they could demonstrate that their ability to practise their culture had already been impaired by climate change (para. 8.13). However, like in the *Teitiota* case, the Committee considered that there was not a sufficiently "extreme precarity" to the authors' lives to make Australia liable for a breach of the right to life under Article 6 of the Covenant (para. 8.6). It is difficult to predict whether the Committee may take a different view on such issues in five years, or ten years, if predictions about the accelerating effects of climate change regrettably transpire to be accurate.

Conclusion

A decade after the 2009 report of the High Commissioner and its view of the somewhat limited role of international human rights law in combatting climate change, the tenor had changed in UN documents. A joint statement of five UN human rights treaty bodies in September 2019 stated that "human rights mechanisms have an important role to play in ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures aimed at mitigating climate change".

There has already been an explosion in the human rights jurisprudence and commentary relating to climate change — and yet it is clear that there is much more to come.

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