



Climate Change & International Human Rights Law: The Challenges for Business

Report of the Expert Workshop and Public Meeting, London 27th May 2015

Business and Human Rights Resource Centre and University of Notre Dame Law School

Top Line Summary

Infancy and Rapid Development: Work on climate justice, human rights and business is at an early stage, but has substantial promise in strengthening action on regulation, litigation, and incentives, as well as on company policy, practice and benchmarking.

From Market Failure to the Common Good: Climate change and its human rights impacts are a result of “the biggest-ever market failure”. Therefore business and governments must work to make markets sustainable and uphold the human rights of this and future generations.

A Smart Mix for Bold and Successful Action: A “Just Transition” to a low carbon economy is urgently needed. Human rights and sustainability are twin concepts for a just transition that help guarantee public support for bold action to reduce greenhouse gas emissions. Equally, we need mutually-reinforcing action by governments to create the legal, regulatory, and incentives environment; by progressive business to drive innovation and implementation; and by civil society and the legal community to monitor, benchmark, rank and litigate as a spur for greater action by government and business. We need to highlight the climate implications of the UN Guiding Principles and the OECD Guidelines for MNCs, and to break down the siloes created within companies, governments and civil society by the ‘triple bottom line’ and the false divisions between climate justice and human rights.

Litigation against Polluters: There is rising interest in this, based on growing uncertainty around attribution of damage both through advances in climate science, and the identification of the primary polluters. Experience to date suggests that human rights law is deployed as a secondary strategy to tort law, adding a compelling ethical narrative for public support.

A Durable Coalition to Drive Change: We need advocates for human rights and climate justice across business, government, and civil society to coordinate better their action around key opportunities and threats, to ensure their actions are more mutually reinforcing for the bold measures that are urgently needed.

Introduction

“Climate change is the greatest threat to human rights in the 21st Century”, Mary Robinson said in 2014. And yet the importance of a human rights perspective to addressing climate change is virtually undeveloped and untested. The International Bar Association (IBA) took a crucial first step in 2014 when it organised a Task Force on Climate Justice and Human Rights. The Task Force made important advances. But Task Force members reported the most contentious section of the report was the section on “Corporate Responsibility”, as the views ranged from “we should not be discussing corporates at all” to “we should recommend suing all those involved in emissions and negligent adaption strategies”.

The IBA Report, and this key area of contention, was what inspired Business & Human Rights Resource Centre and Notre Dame Law School to organise the expert workshop and public meeting this report describes.

Human rights as a code of international moral standards has enormous relevance to climate change: the right to life and security for those facing more frequent or intense extreme weather events; the right to food for small farmers seeing their rainfall patterns change; the right to water for those in areas that are becoming increasingly arid; the right to health as the malarial range increases to both high latitudes and altitudes; and the right to subsistence for coffee and maize farmers whose yield and quality of harvest are damaged by higher temperatures.

However, human rights law appears currently difficult to use to seek remedy for climate impacts due to the system not being designed for this type of litigation. Firstly the Universal Declaration of Human Rights was drawn up in 1948: the authors could not have conceived of the complex global inter-connectedness that climate change leads to today. And secondly, the state of human rights law, especially internationally, and extra-territorially, is not in good shape – with far too few examples of success in achieving redress, especially against corporate negligence and abuse. In this sense human rights law and institutions need to evolve fast to meet the unprecedented challenge of climate change, including a model statute that the IBA is now developing to help countries adapt their rules on climate change liability and establish the basis of unified global framework, and the incorporation of the Right to a Safe Environment, as proposed by John Knox, UN Special Rapporteur on human rights and the environment.

Regulation, Litigation, and Extra-territoriality

In terms of litigation, regulation and incentives for corporate responsibility, the IBA states: “each state should take steps to develop sufficient judicial capacity to hear complaints and enforce remedies against all corporations *operating or based in their territory*”. This ensures that local capacity is developed to deal with events which happen in the local jurisdiction (i.e. South African courts dealing with subsidiaries based in South Africa in relation to environmental and human rights breaches occurring in South Africa). But that responsibility must be accompanied by development of coherent and clear regulatory standards that make compliance possible.”¹

There is increasing interest in litigation relating to both state and corporate responsibility regarding climate change. This comes partly from the increased scientific knowledge that gives more certainty on causation, and therefore those responsible; partly from increased clarity on the companies which have contributed most to emissions (the ‘Carbon Majors’); and partly from the sense that litigation increases risk for companies, and can therefore act as a spur to both bolder regulation, and corporate due diligence, including prevention of abuse, to lower risks of being sued.

However, evidence so far suggests that, in the current context, successful litigation will use human rights law as a powerful secondary strategy to tort law, with human rights providing the compelling moral legitimacy of the case, and an ethical narrative that inspires public support. In a majority of cases, climate-sensitive projects are stopped by environmental planning laws and Environmental Impact Assessment procedures. Interestingly, in the USA, the paralysis of the legislature on climate issues is demonstrated by no new environmental law being passed since the early 90s. This paralysis

¹ IBA Task Force on Climate Justice and Human Rights, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association, 2014) p. 152

appears to have led the judiciary to provide greater space for progressive leaders, such as President Obama, to create and enforce higher levels of regulation, including, for instance, defining elevated CO2 levels as a pollutant.

Regarding regulation and incentives, it is clear that the imperative to propel a just and rapid transition requires these to be effective, smart, and strong. It will require bold action on taxes, trade regulation, caps on emissions, as well as incentives to establish new markets quickly – such as the success of government investment in renewables research and operations, alongside feed-in tariffs. All these actions must be “Long, Legal, and Loud” as progressive companies have asked for. Rapid mitigation of greenhouse gas emissions, will be the most important action of companies and governments regarding the promotion, protection, and respect for human rights.

Nevertheless, a rapid transition that ignores human rights will likely lead to regressive redistribution as the benefits of the new economy are monopolised by elites, and could lead to a popular backlash and rejection by the many workers, farmers, particularly women, whose rights and aspirations are damaged by transition policies. Regulation for a ‘Just Transition’ that sustains and builds public support will ensure costs and risks of carbon mitigation, and adaptation of supply chains, will be shared fairly using principles such as “common but differentiated responsibility” and “polluter pays”. It will require consolidating further the fiduciary duty of business in company law to deliver shareholder value in the long term, rather than quarterly.

Governments also have a key role in ensuring full transparency of companies on their emissions, and due diligence in their operations and supply chains, regarding both mitigation of emissions and adaptation. EU member states should make sure they incorporate these aspects of climate justice as they begin transposing the EU non-financial reporting directive. Transparency is the first step in achieving accountability to communities, and to investors, and also helps drive benchmarking and a “race to the top”, at least amongst those with brand reputations to protect.

Those affected by polluting companies (mostly the poor and vulnerable) face major challenges when attempting to seek compensation for loss and damage, including lack of time and adequate resources. However complementary strategies to litigation are being advanced, including the concept of a global fossil fuel extraction levy to be paid into the international mechanism for loss and damage. A recent report has also identified how much the top 90 polluting entities (primarily fossil fuel producers) have contributed to emissions in the atmosphere, thus providing a possible answer to one half of the attribution dilemma. More details [here](#).

Corporate Policy, Monitoring, and Benchmarks

In terms of corporate policy, monitoring and benchmarks, the IBA Task Force Report states: “First, the corporation should adopt an explicit policy that stipulates measures designed to prevent or mitigate adverse climate change impacts linked to its operations. Such measures must include due diligence of corporate projects....Secondly, the corporation should implement a due-diligence process to identify, prevent, mitigate and account for its actual climate change impacts....Thirdly, the corporation should implement remediation processes that allow for open communication with stakeholders most affected by the corporation’s operations.”²

In the current political context, it is clear that governments and business are more likely to adopt market approaches and voluntary paths to changing company policy and practice. The increasing importance of the UN Guiding Principles for Business and Human Rights, and the innovation and

² IBA Task Force, pp. 16-17.

bold action taken by progressive companies demonstrate the potential of this approach of shifting norms, setting standards, and soft law. An increasing number of major companies, alongside innovative smaller companies, recognise the advantages and savings from action on climate and human rights, as well as the many costs, and reputation risks of inaction. However, the fact that [only 39% of listed companies disclose even their carbon emissions](#) (let alone their due diligence on human rights impacts), demonstrates there is still a big gap in transparency, as well as accountability.

There is also a danger of rising competition between action and reporting on “sustainability” versus “human rights”. This is reinforced by the siloes that are created by different reporting frameworks for each, and different departments in companies dealing with each issue. Responsible action on climate change will require more integrated reporting systems. As yet no company or reporting framework has pulled these twin aspects together. There are clearly opportunities now for a dialogue of projects such as the Carbon Disclosure Project, with emerging business and human rights benchmarks and reporting frameworks. Equally as mentioned earlier, transposing the EU non-financial reporting directive is an opportunity for member states to integrate climate justice into their national legislation. The EU can advise member states to do so during its “transposition workshops”, the next of which will take place in September.

There are important innovations happening on the investor front: three stock exchanges – Amsterdam, Johannesburg, and Helsinki – now require reporting for sustainability indices, which highlight for investors which companies carry greater risk in environmental and climate risk. A further innovation is the global divestment campaign from fossil fuels and their “toxic assets”.

In this light, there are great opportunities for innovation in areas such as “greening” both the UN Guiding Principles and the OECD Guidelines so that their implications for climate justice are spelt out fully for human rights and climate advocates in business, civil society, and government.

It should also be noted that there are major dependencies between “hard” regulation and law, and “soft” norms and voluntary action. Regulation, law, and litigation generate powerful market signals for business to shift investment, especially when those signals are long term. Equally, bold innovation by progressive companies in a sector can open space for, and help justify action by politicians to provide followership by raising regulatory standards to cut out the cowboys who would externalise all their climate and human rights costs for tax-payers and future generations to pick up. For this reason, we need to develop a “Smart Mix” of action on regulation, voluntary action, and litigation to maximise our impact.

A final conclusion to the session was the need for a “durable and diverse coalition” from across progressive civil society, business, and governments. Each faces major challenges to bring more of their major actors to prioritise climate, human rights, and business. By acting in concert, bringing the strengths of each sector to bear on key opportunities and challenges, we are far more likely to achieve some of the urgent change we want to see, even when we have significant differences of analysis.