

Submission to the Special Rapporteur on the promotion and protection of human rights in the context of climate change

Consultation response

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About this report

This report consists of a response to a call for inputs on ‘Enhancing climate change legislation, support for climate change litigation and advancement of the principle for intergenerational justice’ by the Special Rapporteur on the promotion and protection of human rights in the context of climate change. The submission was made on 25 May 2023. It was prepared by Ian Higham and Catherine Higham on behalf of the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science.

More information about the call for inputs can be found here: <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-enhancing-climate-change-legislation-support-climate-change>.

This report presents a lightly edited version of the response.

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This submission has been informed by research conducted using the [Climate Change Laws of the World database](#), which is maintained by the Grantham Research Institute and is the world's most comprehensive database on climate legislation, litigation, and policy. The database is powered by machine learning and natural language processing technology developed by Climate Policy Radar. The database originates from a collaboration between the Grantham Research Institute and GLOBE International on a series of Climate Legislation Studies, which started in 2011.

The Climate Change Laws of the World team has to date identified over 3,000 climate laws and policies at the national level in approximately 200 countries. Laws and policies are included in the database if they set out a government's response to climate change or part of a government's response to climate change. In general, only laws and policies with national application are included, although we make an exception for supranational legislation introduced by the European Union.

Since 2015, the Climate Change Laws of the World team at the Grantham Research Institute has collaborated with the Sabin Center for Climate Change Law at Columbia University, supporting the tracking and analysis of developments in climate change litigation, including through the production of the annual 'Global Trends in Climate Litigation' series of reports. The 2022 report can be accessed [here](#) and the 2023 report will be released in June.

This submission answers questions 1, 2, 4, 5, 8 and 9 as they are particularly relevant to the research conducted by the Climate Change Laws of the World team.

Question 1. Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?

Human rights elements

The Climate Change Laws of the World database includes examples of climate change legislation that incorporate human rights elements and obligations relating to loss and damage.

The Grantham Research Institute's definition of climate change legislation includes both 'framework' legislation that establishes the governance architecture for dealing with climate change and sectoral legislation (Sridhar et al, 2022). National governments worldwide have rapidly adopted framework climate change laws in recent years. These may address various necessary governance functions, depending on the socio-historical and political context of the country in which the law is adopted (ibid.). The definition also includes sectoral legislation, which can include legislation solely aimed at introducing a climate policy response for a given sector, or "legislative regimes governing specific issue areas that have climate change requirements or considerations grafted within them, such as laws regulating environmental impact assessments, energy laws, water or forest management" (ibid.). Sectoral laws may include only a single clause on climate change; the *UK Pensions Schemes Act of 2021*, for example.

Several climate framework laws incorporate human rights. The Portuguese *Framework climate law no 98/2021* includes a core objective to "Guarantee climate justice, ensuring the protection of communities most vulnerable to the climate crisis, respect for human rights, equality and collective rights over the commons". The Ugandan *National Climate Change Act 2021* states that the responsible government department shall take into account 'gender and human rights issues' when developing a 'Framework Strategy on Climate Change'. Other governments have adopted decrees declaring climate emergencies, which may also include human rights elements. Peru adopted the *Supreme Decree 003-2022-MINAM declaring the climate emergency of national interest* in 2022, which stated that the Government should urgently implement climate action measures in line with its Nationally Determined Contribution under the Paris Agreement. Article 2 of the decree identifies human rights and climate justice as a priority area, and states that relevant ministries will develop a human rights and climate justice approach to mitigate the social impacts of climate change on vulnerable populations as a

consequence of the loss of ecosystems that constitute the source for their subsistence and development.

Climate Change Laws of the World also includes human rights-focused legislation that incorporates climate elements. One clear example is the *Decree 9.571/2018 establishing National Guidelines on Business and Human Rights* in Brazil. The Decree established guidelines for medium and large corporations, including transnational corporations operating in Brazil, and it is meant to guide the State in its responsibility to protect human rights in a business context. Article 12 of the Decree states that it is up to companies themselves to adopt initiatives for environmental sustainability, including reducing greenhouse gas emissions to contribute to the fight against climate change.

Finally, Climate Change Laws of the World includes recent legislation with 'just transition' elements, which may explicitly or implicitly relate to human rights. In 2021, Ireland passed amendments to its framework *Climate Action and Low Carbon Development Act 2015* that call for attention to be paid to: the social imperative for early action in relation to climate change; the protection of public health; and the requirement for a just transition to a climate-neutral economy which aims to maximise employment opportunities and support persons and communities that may be negatively affected by the transition. Just transition elements are also included in the aforementioned Bahamian framework legislation.

Additional examples of just transition elements in legislation can be found at the sub- and supra-national levels. The *Climate Change (Scotland) Act 2009* (outside the scope of Climate Change Laws of the World) was amended in 2019 to require the Scottish Government to produce a climate plan that must include 'just transition principles'. These principles include support for environmentally and socially sustainable jobs; support for low-carbon investment and infrastructure; development and maintenance of social consensus through engagement with workers, trade unions, communities, nongovernmental organisations, representatives of industry, and others deemed appropriate; creation of decent, fair, and high-value work in a way which does not negatively affect the current workforce and overall economy; and contributions to resource efficient and sustainable economic approaches that help to address inequality and poverty. The climate plan must explain how the proposals and policies included will affect different sectors of the economy with regard to these principles.

At the supranational level, the European Union (EU) has established the European Just Transition Fund and proposed the Social Climate Fund under the pillar of social rights. *Regulation (EU) 2021/1056* establishes the Just Transition Fund, which will mobilise over €25 billion in funding to regions and sectors most adversely affected by decarbonisation. The *Social Climate Fund* would mobilise a proposed €86.7 billion to address the distributional impacts of the EU's Emissions Trading Scheme, and it would require Member States to develop Social Climate Plans that set out measures to address the impacts of higher carbon pricing on vulnerable groups. For an analysis of the ramifications of this legislation and how it would shape European jurisprudence, see Higham et al., 2023. For additional analysis of just transition elements in climate legislation, see Chan et al., 2022.

Loss and damage

There are very few laws and policies found in Climate Change Laws of the World that use the explicit 'loss and damage' framing found in UNFCCC rhetoric, but the database does include certain disaster risk management policies that cover specific sector-based loss and damage – e.g., from the agricultural sector. These policies are not always framed in climate terms and may not always consider transboundary loss and damage. A policy brief from the Grantham Research Institute explains how governments tend to associate their adaptation frameworks with both climate change and disaster risk reduction and provides an example of legislation related to loss and damage from flooding (Nachmany et al., 2019). The Grantham Research Institute has also produced a report with recommendations on how the Warsaw International Mechanism on Loss and Damage under the UNFCCC could support a holistic climate policy approach at all governance levels (Byrnes and Surminski, 2019).

Other laws and policies address consequences of loss and damage. There are several laws and policies in Climate Change Laws of the World that address climate-induced migration, which is a common consequence of loss and damage (Higham and Koehl, 2023). Examples include the *Framework climate law no 98/2021* from Portugal, which requires the Government to actively defend the concept of a

'climate refugee' in international diplomacy, and the *Climate Change (Management) Act 2015 (No. 19 of 2015)* from Papua New Guinea, which requires the Government to anticipate and adapt to climate-induced natural disasters known to cause migration.

For brevity, we have not included all relevant references to human rights elements in climate legislation, but we invite the Special Rapporteur to review the Climate Change Laws of the World database further and to contact us for further input.

Question 2. How do you think climate change legislation should frame a connection to human rights obligations?

It is our view that legislation should explicitly recognise the human rights impacts of climate change and the need to align national ambition and action with the best available science to prevent the worst adverse human rights impacts resulting from climate change. There are multiple ways to conceptualise the climate-human rights nexus in law, including the obligation or responsibility for the State or non-state actors to reduce emissions to mitigate climate change and its associated adverse human rights impacts; the right to a clean, healthy, and sustainable environment; and the provision of redress for loss and damage, or the obligation to finance adaptation measures, based on historical emissions.

Climate change legislation may include human rights in preambular commitments. These provisions are an important framing device, but legislation should also incorporate substantive elements on procedural rights and on human rights issues to be considered in decision-making processes, such as the creation of subsequent policies or strategies for implementation. The Ugandan *National Climate Change Act 2021* cited above is one example of this approach.

It may be desirable in some cases to enshrine the right to a healthy environment explicitly in Constitutional protections. This approach requires nuance, however. Constitutionalising climate change commitments offers a pathway to domestic law that is accessible and potentially more enforceable, but it requires sensitivity to domestic contexts and may create legitimacy deficits under certain socio-cultural conditions (Setzer and de Carvalho, 2021; Ghaleigh et al., 2022).

Ideally, climate change legislation should also recognise the potential human rights impacts of climate action as part of a just transition and the procedural and distributional justice aspects of the transition (see e.g. Savaresi and Setzer, 2022).

We also recommend that 'business and human rights' legislation and corporate sustainability legislation explicitly recognise both human rights *and* environmental issues – including climate change – as well as their interconnectedness. The UN Guiding Principles on Business and Human Rights do not clarify the duties of States or the responsibilities of business in relation to companies' indirect contributions to human rights abuses, such as tax avoidance (Aronson and Higham, 2013). This gap extends to the issue of climate change and is replicated in other authoritative standards that incorporate the UN Guiding Principles, such as the OECD Guidelines for Multinational Enterprises (although we note that a more integrated approach to climate change and human rights could potentially be included in revisions to the OECD Guidelines that will be published in June 2023). So-called 'mandatory due diligence' legislation should take an integrated approach that clarifies corporate responsibilities related to the adverse human rights impacts of climate change.

Existing legislation in Norway only covers due diligence for human rights and decent work, although the Norwegian National Action Plan on business and human rights acknowledges that greenhouse gas emissions may have adverse impacts on a broad range of human rights and that companies are therefore responsible for addressing these impacts (Norwegian Ministry of Foreign Affairs, 2017). French and German mandatory due diligence laws require companies to conduct both human rights and environmental due diligence, but these laws do not expressly refer to the interconnections of environmental and human rights issues, and they do not explicitly name climate change at all. The proposed EU Corporate Sustainability Due Diligence Directive would require firms to produce climate transition plans, but it is not clear that the final draft will taken an integrated approach to address the human rights-related impacts of climate change, as civil society groups have advocated (Amnesty International, 2023).

Finally, we note that legislating for climate change can benefit from public participation and inclusion through deliberative democratic processes aligned with procedural rights enshrined in international instruments, such as the Aarhus Agreement and the Escazu Agreement. Climate assemblies are a form of deliberative process that may bring informed citizen perspectives to policymaking to generate or recommend appropriate policy options (Stasiak et al., 2021). We recommend considering how climate assemblies may inform and promote the inclusion of human rights elements in climate change legislation.

Question 4. Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?

The Grantham Research Institute has not published recent work on this issue, however we would draw the Special Rapporteur's attention to a report that examines the ways in which principles of private international law enable governments to take action against fossil fuel polluters, including a public proposal for the text of a Climate Compensation Act clarifying the principles of liability for large-scale greenhouse gas emitters that could in principle be enacted in countries worldwide (Gage and Wewerinke, 2015).

Question 5. How are human rights considerations being incorporated into climate change litigation?

Human rights is a crucial element of recent climate change litigation. Savaresi and Setzer (2022) identify more than 100 climate cases relying on human rights arguments to push forward climate action, as well as a growing number of cases that challenge climate action on human rights grounds ('just transition litigation'). Human rights arguments are applied in litigation against both governments and corporations. More than 70% of 'framework' cases against governments rely on human or constitutional rights arguments (see e.g. Setzer et al., 2022a). For a broader overview of trends in climate litigation, including in relation to the use of human rights arguments in cases, see our series on 'Global Trends in Climate Litigation' (Setzer and Higham, 2022). The next report will be published in June 2023.

Cases against corporations have drawn on 'soft' international human rights instruments, including the UN Guiding Principles and OECD Guidelines. Perhaps the most prominent example of such a case is *Milieudefensie et al. v Royal Dutch Shell plc*, in which the court ruled that Shell had a 'duty of care' in relation to climate change under Dutch law, with the UN Guiding Principles and OECD Guidelines being examples of established norms for executing this duty of care.

In Brazil, the Supreme Court has given unprecedented recognition to the importance of the Paris Agreement, which it has interpreted as a human rights instrument. The case in question, *PSB et al. v. Brazil (on Climate Fund) (ADPF 708)*, challenged the government-induced paralysis of the Climate Fund, established by Brazil's National Policy on Climate Change to promote the financing of climate mitigation and adaptation projects. The decision brings significant lessons in a broad range of aspects of climate litigation (Tigre and Setzer, forthcoming). Recognising the Paris Agreement as a human rights treaty helps to integrate climate change and human rights into a shared framework for action, promoting greater accountability, international cooperation and climate justice. This is just one of several ways in which Latin American litigants and courts have been at the forefront of recent reliance on human rights in climate litigation, with the region also having seen the most frequent reliance on constitutional protections for the right to a healthy environment (de Vilchez and Savaresi, 2023).

Question 6. Are there issues with making the link between human rights and climate change litigation?

There are likely to be issues with making the link between human rights and climate change litigation, although we have not currently identified a comprehensive list of these. Potential issues may relate to

the perception of internationally recognised human rights as a primarily Western construct and to the imposition of rights or ‘constitutionalisation’ of climate action without sensitivity to local socio-cultural contexts (see e.g. Ghaleigh et al., 2022).

Question 7. What do you think are the major barriers to initiating climate change litigation?

Major barriers to initiating climate litigation primarily arise from power disparities and socioeconomic inequalities between litigants and defendants. These may include prohibitive cost regimes as well as ‘inequality of arms’ (Chhabra, 2019) between litigants and corporate or state defendants. It is also worth noting that many potential claimants may be put off by the threat that they may themselves be subject to through strategic litigation against public participation (SLAPP suits) if they engage in litigation. The main objective of SLAPPs is not to obtain redress, but to intimidate and silence the target of the SLAPP, whilst exhausting the defendant’s resources (Diaz Crego and Del Monte, 2022). SLAPPs are an abuse of the legal process that commonly involve expensive and meritless litigation, and, in the context of climate change, can be used to harass opponents, deter climate activism and public participation, and jeopardise a just transition (Kaminski, 2022).

Another related barrier is access to scientific and technical expertise, which is often necessary to make a successful and comprehensive argument in court. Recent research from the Climate Social Science Network has shown the importance of this knowledge for communicating scientific information to judges and lawyers (Merner et al., 2022).

Other barriers that could arise relate to justice issues caused by restrictive interpretations of standing rules. Standing rules generally require a litigant to demonstrate a direct effect on their personal interests. They could present a barrier in the context of climate change, which is both intergenerational and community-wide, and not limited to direct effects on the individual (Kelleher, 2022).

Question 8. Are the barriers different in different parts of the world?

There has been relatively little research on climate litigation in the Global South. For a discussion of capacity constraints on strategic climate litigation experienced in Global South countries, see Setzer and Benjamin (2020).

Question 9. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

The Grantham Research Institute was recently invited to produce a report for the European Forum of Judges for the environment on climate litigation in Europe, which provides a synthesis of information on climate litigation throughout the EU and in other European countries, including the United Kingdom (Setzer et al., 2022b). The report includes coverage of cases that apply human rights arguments. We invite the Special Rapporteur to review this report – and the national reports on climate litigation from judges in 20 countries that were produced and published alongside the report.

References

- Aaronson S and Higham I (2013) "Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms. *Human Rights Quarterly* 35(2): 333–264. <https://muse.jhu.edu/article/507780>
- Amnesty International (2023) "Closing the loopholes": Recommendations for an EU Corporate Sustainability Law that works for rightsholders. London: <https://media.business-humanrights.org/media/documents/IOR6065392023ENGLISH.pdf>
- Byrnes R and Surminski S (2019) Addressing the impacts of climate change through an effective Warsaw International Mechanism on Loss and Damage. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/10/GRI_Addressing-the-impacts-of-climate-change-through-an-effective-Warsaw-International-Mechanism-on-Loss-and-Damage-1.pdf
- Chan T, Higham C, Muller S, Setzer J, Robins N (2022) *An assessment of just transition elements in the Inevitable Policy Response*. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. <https://www.lse.ac.uk/granthaminstitute/publication/an-assessment-of-just-transition-elements-in-the-inevitable-policy-response/>
- Chhabra R (2019) Equality of Arms: Difference in Interpretations of the ad hoc Tribunals and European Court of Human Rights. *Cambridge International Law Journal*. <http://cilj.co.uk/2019/09/22/equality-of-arms-difference-in-interpretations-of-the-ad-hoc-tribunals-and-european-court-of-human-rights/>
- de Vilches P and Savaresi A (2021) The right to a healthy environment and climate litigation: A game changer? *Yearbook of International Environmental Law* 32(1): 3–19. <https://doi.org/10.1093/yiel/yvac064>
- Diaz Crego M and Del Monte M (2022) *Strategic lawsuits against public participation (SLAPPs)*. EU Legislation in Progress Briefing. Brussels: European Parliamentary Research Service.
- Gage G and Wewerinke M (2015) *Taking climate justice into our own hands: A Model Climate Compensation Act*. Vanuatu and Vancouver: Vanuatu Environmental Law Association and West Coast Environmental Law. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906252
- Ghaleigh, Setzer, and Welikala (2022) The Complexities of Comparative Climate Constitutionalism. *Journal of Environmental Law* 34(3): 517–528. <https://doi.org/10.1093/jel/eqac008>
- Higham C (2023) *Climate change law in Europe: What do new EU climate laws mean for the courts?* London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/03/Climate-change-law-in-Europe-what-do-new-EU-climate-laws-mean-for-the-courts.pdf>
- Higham C and Koehl A (2023) How can climate policy better address climate-driven population displacement? Commentary, 6 January. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. <https://www.lse.ac.uk/granthaminstitute/news/how-can-climate-policy-better-address-climate-driven-population-displacement/>
- Kaminski I (2022) SLAPP attack: The clap-back against lawsuits that threaten climate activism. Plus news.... Blog post, 5 October. *The Wave*. <https://www.the-wave.net/slapp-attack/>
- Kelleher O (2022) Systemic climate change litigation, standing rules and the Aarhus Convention: A purposive approach. *Journal of Environmental Law* 34(1): 107–134. <https://doi.org/10.1093/jel/eqab037>
- Merner D, Franta B and Frumhoff P (2022) *Identifying gaps in climate-litigation-relevant research: An assessment from interviews with legal scholars and practitioners*. Providence, Rhode Island: The Climate Social Science Network.
- Nachmany M, Byrnes R and Surminski S (2019) *National laws and policies on climate change adaptation: a global review*. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/12/National-laws-and-policies-on-climate-change-adaptation_A-global-review.pdf
- Norwegian Ministry of Foreign Affairs (2017) *Business and human rights: National Action Plan for the implementation of the UN Guiding Principles*. <https://globalnaps.org/wp-content/uploads/2017/10/NAP-Norway.pdf>

- Savaresi A and Setzer J (2022) Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers. *Journal of Human Rights and the Environment* 13(1): 7–34. <https://www.elgaronline.com/view/journals/jhre/13/1/article-p7.xml>
- Setzer J and Benjamin L (2020) Climate Litigation in the Global South: Constraints and Innovations. *Transnational Environmental Law* 9(1): 77–101. <https://doi.org/10.1017/S2047102519000268>
- Setzer J and de Carvalho D (2021) Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate. *Review of European, Comparative and International Environment Law [RECIEL]* 30(2): 197–206. <https://doi.org/10.1111/reel.12409>
- Setzer J, Higham C and Bradeen E (2022a) *Challenging government responses to climate change through framework litigation*. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. <https://www.lse.ac.uk/granthaminstitute/publication/challenging-government-responses-to-climate-change-through-framework-litigation/>
- Setzer J, Narulla H, Higham C, Bradeen E (2022b) Climate litigation in Europe: a summary report for the European Union Forum of Judges for the Environment. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. <https://www.lse.ac.uk/granthaminstitute/publication/climate-litigation-in-europe-a-summary-report-for-the-european-union-forum-of-judges-for-the-environment/>
- Sridhar A, Dubash N, Averchenkova A, Higham C, Rumble O, Gilder A (2022) *Climate Governance Functions: Towards context-specific climate laws*. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/10/Climate-Governance-Functions_17_Nov_22.pdf.
- Stasiak D, Averchenkova A, Morán A, Renn O (2021) *Legitimacy and resonance*. KNOCA Briefing No. 3. Knowledge Network on Climate Assemblies [KNOCA]. <https://knoca.eu/legitimacy-and-resonance-of-climate-assemblies-in-wider-society/>