

ROUTLEDGE RESEARCH IN INTERNATIONAL
ENVIRONMENTAL LAW

Human Rights Approaches to Climate Change

Challenges and Opportunities

Sumudu Atapattu

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First published 2016
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

Atapattu, Sumudu A., author.

Human rights approaches to climate change : challenges and opportunities / Sumudu Atapattu.

pages cm.—(Routledge research in international environmental law)

ISBN 978-0-415-72709-9 (hardback)—ISBN 978-1-315-84968-3 (ebk)

1. Climatic changes—Law and legislation. 2. Environmental law, International. 3. Human rights. 4. Human security. I. Title.

K3585.5.A98 2015

344.04'633—dc23

2015016896

ISBN: 978-0-415-72709-9 (hbk)

ISBN: 978-1-315-84968-3 (ebk)

Typeset in Baskerville
by Keystroke, Station Road, Godsall, Wolverhampton

Human Rights Approaches to Climate Change

Despite the clear link between climate change and human rights, and the potential for virtually all protected rights to be undermined, the catastrophic impact of climate change on human beings was not really understood as a human rights issue until recently.

This book examines the link between climate change and human rights in a comprehensive manner. It looks at human rights approaches to climate change, including the jurisprudential bases for human rights and the environment, the theoretical framework governing human rights and the environment, and the different approaches to this, including benchmarks. In addition to a discussion of human rights implications of international environmental law principles in the climate change regime, the book explores how the human rights framework can be used in relation to mitigation, adaption and adjudication. Other chapters examine how vulnerable groups – women, indigenous peoples and climate “refugees” – would be disproportionately affected by climate change. The book then goes on to discuss a new category of people created by climate change, those who will be rendered stateless as a result of states disappearing and peoples being displaced by climate change, and whether human rights law can adequately address these emerging issues.

Sumudu Atapattu is the Director of Research Centers and Senior Lecturer at the University of Wisconsin Law School, USA, and Lead Counsel for Human Rights at the Center for International Sustainable Development Law, Montreal, Canada.

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**With apologies to my “future generation” – Praveena and Prasangi –
for bequeathing a problem as complex as climate change that
will have consequences for many generations to come.**

Foreword

The Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly, does not set out a right to environmental protection. Neither do the two International Covenants, on civil and political rights and on economic, social and cultural rights, that the General Assembly adopted in 1966 to codify the rights in the Universal Declaration. The absence is not one of intention, but timing: the Universal Declaration and the Covenants were negotiated and adopted before the dawn of the modern environmental movement in the late 1960s.

As the world woke up to the grave environmental consequences of unbridled industrial development, countries developed domestic and international policies aimed at protecting the environment on which we depend. In addition to writing these policies into regulatory law, states often amended their constitutions to emphasize the importance of environmental protection. More than 90 countries around the world now include an explicit constitutional right to a healthy environment. Regional organizations, including in Africa, the Americas, and Southeast Asia, also adopted the right in human rights instruments.

In addition, the most recent two decades have seen the “greening” of human rights law, through the application of already recognized human rights to environmental problems. Human rights tribunals and other expert bodies have explained how environmental degradation interferes with our ability to enjoy a vast range of human rights set forth in the Universal Declaration, including rights to life, health, and property. And they have gone further: based on states’ obligations under international law to respect and protect human rights, these interpretive bodies have described specific obligations of states to protect the environment on which these human rights depend.

In 2012, I was asked by the United Nations Human Rights Council to study the application of human rights obligations to environmental protection, as the first UN Independent Expert on Human Rights and the Environment. I concluded that the divergent rights affected by environmental harm and the diverse range of bodies applying those rights have given rise to a remarkably coherent set of norms. These norms include: (a) procedural obligations of states to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access

to remedies for environmental harm; (b) substantive obligations of states to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors; and (c) obligations relating to the protection of members of groups in vulnerable situations, including women, children, and indigenous peoples.

Although these legal principles are becoming clearer, much more work remains to be done in specific areas. Nowhere is this task more urgent than in the application of human rights law to climate change, perhaps the gravest environmental threat human society has ever faced. As the UN Office of the High Commissioner for Human Rights (OHCHR) explained in 2009, on the basis of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), climate change threatens an immense range of human rights, including rights to life, health, food, water, housing, and even self-determination. The OHCHR report emphasized that the effects of climate change will be felt most acutely by those who are already in vulnerable situations because of poverty, gender, age, minority status, or disability.

The idea that climate change threatens human rights may have seemed surprising five years ago, but it has become much more widely accepted today. Since 2009, the Human Rights Council, which is composed of 47 governments elected by the General Assembly, has unanimously adopted a series of resolutions calling attention to the harmful effects of climate change on human rights. In 2014, the Fifth Assessment Report of the IPCC reiterated in more detail the effects that unmitigated climate change will have, and is already having, on human well-being. In October 2004, 27 special rapporteurs and other independent experts appointed by the United Nations sent an open letter to the climate negotiators, stating that:

a safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights, including rights to life, health, food, water and housing, among many others. . . . The most recent report of the Intergovernmental Panel on Climate Change (IPCC) brings into sharp focus the grave harm that climate change is already causing, and will continue to cause, to the environment on which we all depend. There can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law.

That climate change threatens human rights seems inarguable. But the consequences of that threat are still not widely understood. The many questions still under discussion include: What obligations do states have to protect against the effects of climate change on human rights? Does every State that contributes to climate change have such obligations? What remedies are available to those communities and individuals most affected by climate change? What rights, if any, are held by future generations? What do human rights norms have to say about the effects of climate change on non-human interests?

The answers to these and many other questions are of vital importance. The great virtue of this book is that Sumudu Atapattu provides a careful, detailed explanation of where the human rights law of climate change now stands. She does not pretend that human rights law already provides all of the answers, but she persuasively argues that the law of climate change and human rights has developed enough that it can provide a useful, even essential, framework for examining this problem. This book provides an excellent guide to that framework.

Professor John Knox
Henry C. Lauerman Professor of International Law,
Wake Forest University
and UN Special Rapporteur on Human Rights and the Environment

Acknowledgements

This book is the culmination of several months of research and writing, which at times seemed never-ending because the topic is a moving target. It grew out of my interest in the link between environmental issues and human rights and the fact that they do not necessarily complement each other. Having worked at both a human rights organization and an environmental organization in Sri Lanka, I came to realize that one group does not always see the “other side.” This motivated me to research the link between human rights and the environment and find ways to complement the two legal regimes. With climate change becoming the biggest threat to human rights, the link between the two seemed a logical extension of my research on human rights and the environment. While I have always been interested in the topic, the real impetus for the book came with the course I started teaching at University of Wisconsin Law School on “Climate Change, Human Rights and the Environment.”

This publication would not have seen the light of day without the support of many people and institutions. I would like to thank the University of Wisconsin Law School for giving me the opportunity to experiment with innovative courses and for supporting my research. The campus-wide Human Rights Program at University of Wisconsin–Madison provided an important venue to collaborate with colleagues across various disciplines. I would like to thank my colleagues at the Law School and the Human Rights Program for their support and encouragement, especially Heinz Klug, Mitra Sharafi, Alex Huneus, Pam Hollenhorst, Ruth Robarts, and Karen Koethe and the very helpful law library staff.

The Center for International Sustainable Development Law (CISDL) has provided me with an intellectual home to test new ideas, collaborate with like-minded colleagues, and to brainstorm on a new field of law. I gratefully acknowledge their support throughout the period of research and writing, and would like to thank the “CISDL family” for their stimulating conversations and innovative work.

To my research assistant, Maro Kim, I owe a special debt of gratitude. Without her research assistance, her painstaking attention to detail and her meticulous formatting of footnotes, this publication would not have been possible. As a law student, Maro has many demands on her time, but she was thorough with her work and always had a smile on her face.

I would also like to thank Minister Tony de Brum and his assistant Thom Woodrooffe of Marshall Islands for providing me a first-hand account of the consequences of climate change and for their untiring efforts to bring the plight of their people to the attention of the international community.

A special thank you goes to Professor John Knox, Independent Expert (now Special Rapporteur) on Human Rights and the Environment, not only for writing the foreword for this book amidst numerous demands on his time, but also for including me in his consultations and giving me the opportunity to participate in events involving his mandate.

As always, my family had to bear the brunt of long hours of research and writing. I thank my husband, Dhammika, our daughters, Praveena and Prasangi, my mother and siblings as well as extended family for their constant love and support throughout my career.

Finally, I would like to thank Mark Sapwell and Katherine Carpenter at Routledge for their patience with the submission process and for accommodating my requests for extensions and Katherine Laidler and Hayley Kennard for their assistance. I hope this publication will contribute in some small measure to the efforts of human rights and environmental communities to address the myriad challenges caused by climate change. I have tried to make this publication as current as possible by including events up to April 2015.

Needless to say, of course, any errors here are all mine.

Sumudu Atapattu

April 2015

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About the author

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Abbreviations

ACJP	Australian Climate Justice Program
AOSIS	Alliance of Small Island States
BASIC	Brazil, South Africa, India and China
CAA	Clean Air Act
CAF	Cancun Adaptation Framework
CAT	Convention against Torture
CBDR	Common But Differentiated Responsibility
CCPR	Climate Change Programme Review
CDM	Clean Development Mechanism
CED	Convention on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHMP	Common Heritage of Mankind Principle
CMW	Convention on Migrant Workers
COP	Conference of Parties
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DRR	Disaster Risk Reduction
ECE	United Nations Economic Commission for Europe
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency (USA)
ETS	Emissions Trading System
EU	European Union
FAO	Food and Agriculture Organization
FPIC	Free, Prior and Informed Consent
GAD	General and Development Approach
GDP	Gross Domestic Product
GEF	Global Environment Facility
GHGs	Greenhouse Gases
GMOs	Genetically Modified Organisms

GNP	Gross National Products
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ICP	Informed Consultation and Participation Process
IDPs	Internally Displaced Persons
IE	Independent Expert
IFC	International Finance Corporation
IIED	International Institute of Environment and Development
ILA	International Law Association
ILC	International Law Commission
ILRC	Indian Law Resource Center
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
LDCs	Least Developed Countries
MDB	Multilateral Development Bank
MDGs	Millennium Development Goals
MRVs	Measurable, Reportable and Verifiable Mitigation Measures
NAPAs	National Adaptation Programs of Action
NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
P4R	Program for Results
PS 7	Performance Standard 7
PSNR	Permanent Sovereignty over Natural Resources
REDD	Reducing Emissions from Deforestation and Forest Degradation
SDGs	Sustainable Development Goals
SIDS	Small Island Developing States
SIDSNET	Small Island Developing States Network
UDHR	Universal Declaration of Human Rights
UNCED	United Nations Conference on Environmental Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNICEF	United Nations Children's Fund
UNISDR	United Nations International Strategy for Disaster Reduction
USACE	United States Army Corps of Engineers
WB	World Bank
WCED	World Commission on Environment and Development

WEDO	Women's Environment and Development Organization
WHO	World Health Organization
WID	Women in Development Approach
WMO	World Meteorological Organization
WTO	World Trade Organization

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