

The human rights turn in climate change litigation and responsibilities of legal professionals

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Abstract

Climate change is already being felt around the world, impacting a range of human rights including ultimately the right to life. While a healthy environment is a pre-condition for the enjoyment of rights, the environment is not mentioned in the foundational human rights document – Universal Declaration of Human Rights – nor is it specifically protected in subsequent international human rights treaties. This artificial division is partially a function of the separate development of international human rights and environmental law in the last century, which today needs urgently to be bridged. Progress is slowly being made, such as the 2021 Resolution recognising the right to a healthy environment by the UN Human Rights Council and the various petitions being lodged before human rights bodies. This column discusses the (long overdue) recognition of the human rights/environment nexus and the subsequent human rights turn in climate change litigation. In light of the challenges still faced when addressing the impacts of climate change under human rights law, we engage in (self-)reflection on the professional responsibilities of judges/decision-makers, lawyers, and scholars as active participants in the development of the law as well as the struggle for climate justice. We urge these legal professionals to be aware of the power they have in shaping these developments, and discuss how their role can be performed responsibly.

Keywords

Human rights, climate change, environment, judicial activism, professional responsibilities

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Introduction

Rather than imagined, future catastrophes, the impact of climate change is already being felt. The sea level rise in places like Tuvalu and Vanuatu is tangible, as is the melting ice in the US and Canadian Arctic and shifting weather patterns across all continents. The sixth IPCC report from 2021 found that it is ‘unequivocal that human influence has warmed the atmosphere, ocean and land’, with many of the impacts of climate change now ‘irreversible’.¹ As Mary Robinson and others have noted, the climate crisis is a human rights crisis.² Virtually all human rights – including the supreme right to life – will be, and are already, detrimentally affected by climate change. A healthy environment is a pre-condition for the enjoyment of rights, but the environment is not mentioned in the foundational human rights document – Universal Declaration of Human Rights (UDHR) – nor specifically protected in subsequent international human rights treaties. This column discusses the (long overdue) recognition of the human rights/environment nexus and the subsequent human rights turn in climate change litigation. In light of the challenges still faced when addressing the impacts of climate change under human rights law, we engage in (self-)reflection on the professional responsibilities of judges/decision-makers, lawyers, and scholars. Legal professionals are active participants in the development of the law as well as the struggle for climate justice, and we discuss how this active participation can be performed responsibly.

A Long Time Coming: International Recognition of Human Rights/Environment Nexus

The disconnect between human rights and the environment reflects the fragmentation of international law and its separate branches that developed independently. International human rights instruments proliferated after the 1948 UDHR, and international environmental law developed mainly out of the 1972 Stockholm Declaration.³ International human rights and environmental law continued upon different paths – or in silos – into the present century, despite some exceptions.⁴ It was only in 2015 that the Paris Agreement on international climate change law first referred to human rights (but only in its preamble) which was not greatly improved upon in the 2021 Glasgow Climate Pact.⁵ Due to this entrenched division, there is a ‘lack of integration between

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1. Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), Climate Change 2021, The Physical Science Basis, Summary for Policymakers, paras A1 and B5.
 2. See for example Mary Robinson, ‘Why climate change is a threat to human rights’, TEDWomen (May 2015) <https://www.ted.com/talks/mary_robinson_why_climate_change_is_a_threat_to_human_rights> accessed 30 January 2022; UNICEF, *The Climate Crisis is a Child Rights Crisis* (August 2021) <<https://www.unicef.org/reports/climate-crisis-child-rights-crisis>> accessed 30 January 2022.
 3. UN Conference on the Human Environment, Declaration on the Human Environment, Stockholm (16 June 1972) A/RES/2994.
 4. UN General Assembly, Report of the United Nations Conference on Environment and Development, Annex I: Rio Declaration on Environment and Development (adopted at the Rio Conference 3-14 June 1992) UN Doc/A/CONF.151/26 (Vol.1).
 5. While the Glasgow Climate Pact does refer to human rights (in the preamble and para 91), this language is totally absent in its work programme. United Nations Framework Convention on Climate Change (Paris Agreement) (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1; Conference of the Parties, Glasgow Climate Pact (13 November 2021) FCCC/PA/CMA/2021/L.16 and Glasgow work programme on action for Climate Empowerment Decision-/CMA.3.

environmental and human rights law and policy'.⁶ This division urgently needs to be bridged – both conceptually and practically.

Environmental rights have not been sufficiently conceptualised, codified, or protected in international law, with rights such as that to water only relatively recently emerging,⁷ and now the right to a healthy environment. Despite being legally protected in some 150 States worldwide,⁸ the right to a clean, healthy, and sustainable environment was only recognised internationally by a UN Human Rights Council Resolution in October 2021.⁹ While this Resolution is very welcome, many questions remain regarding the scope, content, and protection of such a right. This lacuna can be filled partially by reports and efforts by, *inter alia*, the Office of the High Commissioner for Human Rights (OHCHR), UN Special Rapporteurs, regional systems, and scholars. For example, several foundational reports have been delivered by the OHCHR and subsequently by the Human Rights Council mandated Special Rapporteur on the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.¹⁰ While not a panacea to the climate crisis, a legally binding international right like that to a healthy environment would elevate the issue, provide a basis upon which to monitor and measure States' (in)actions, and hold them to account.

Due to the lack of formal or explicit protection of the environment in international human rights treaties, UN supervisory bodies have only belatedly begun to engage States parties on the topic. They have addressed the environment and climate change in their Concluding Observations to individual State reports, in individual complaints, and in their General Comments. For example, the Committee on the Elimination of Discrimination Against Women has raised climate change with States parties and from 2016 introduced the Sustainable Development Goals as a standard item in their Concluding Observations. That Committee focused on climate change in their 2018 General Recommendation on disasters, which was followed the same year by a reference to climate change in the Human Rights Committee's General Comment on the right to life.¹¹ The Committee on the Rights of the Child (CRC Committee) has

6. UN Committee on the Rights of the Child, *Report of the 2016 Day of General Discussion Children's Rights and the Environment* 23, <<https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2016/DGDOutcomereport-May2017.pdf>> accessed 30 January 2022.

7. UN General Assembly, *The human right to water and sanitation* (2010) A/Res/64/292; UN Human Rights Council, *Human rights and access to safe drinking water and sanitation* (2010) A/HRC/Res/15/9; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water* (2002) E/C.12/2002/11.

8. David R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 18 and Table 1.

9. UN Human Rights Council, *The human right to a clean, healthy and sustainable environment* (2021) A/HRC/48/L.23/Rev.1.

10. See for example UN Human Rights Council, Report of the OHCHR on the relationship between climate change and human rights (15 January 2009) UN doc. A/HRC/10/61; OHCHR, Analytical Study in the Relationship between Human Rights and the Environment (6 December 2011) UN doc. A/HRC/19/34; UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on climate change (1 January 2016) UN Doc A/HRC/31/52; UN Human Rights Council, Right to a healthy environment: good practices (30 December 2019) A/HRC/43/53.

11. UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change (7 February 2018) UN Doc CEDAW/C/GC/37; UN Human Rights Committee, General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) UN Doc CCPR/C/GC/36, para 62.

also referenced climate change in previous General Comments and is currently drafting one specifically on the environment and climate change, which will be the most comprehensive Comment on the issue.¹² These initiatives are long overdue. The treaty bodies need to be focusing consistently upon the human rights/environment nexus in their constructive dialogues and guidance to States parties.

Human Rights Turn in Climate Change Litigation

The human rights/environment nexus is apparent in the turn to human rights law in litigating climate change. While neither the European nor the American Conventions on Human Rights explicitly protect the environment, this fact has not stopped either of their Courts from creatively adjudicating the cases before them regarding the environment.¹³ Most of the rights 'greened'¹⁴ in these cases before both Courts have focused on the rights to life, livelihood, property, privacy and family life, participation in cultural life, and health. There is now a plethora of jurisprudence by the European Court of Human Rights (ECtHR) on the environment, stemming from its landmark 1994 judgment *Lopez Ostra v Spain*, where the Court found a violation of Article 8 on privacy and family life due to environmental pollution.¹⁵ Since then, the Court has produced a large body of case law regarding human rights and the environment, and there is a recommendation for an amending protocol to the European Convention recognising the right to a healthy environment.¹⁶ Directly relating to climate change and its impacts, the Court currently has several petitions before it by applicants from Norway, Switzerland, and Portugal.¹⁷

The Inter-American Court of Human Rights has also addressed the environment in several decisions under the American Convention, most notably its 2017 Advisory Opinion and landmark 2020

12. UN Committee on the Rights of the Child, draft general comment no 26 on children's rights and the environment with a special focus on climate change, concept note <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRC_GC26_concept_note.aspx> accessed 14 January 2022. For a detailed examination of the Convention on the Rights of the Child and its Committee regarding climate change see Karin Arts, 'Children's Rights and Climate Change' in Claire Fenton-Glynn (ed) *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (Cambridge University Press 2019).
13. The newer African and Arab Charters and the ASEAN Declaration on human rights have not required such creativity given their explicit protection of the environment: *African Charter on Human and Peoples' Rights* (Banjul Charter) (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 Article 24; League of Arab States, *Arab Charter on Human Rights* (adopted May 2004, entered into force on 15 March 2008) Article 38 and 39(2)(f); Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (18 November 2012) art 28(f). However, as newer instruments they are also less developed than other regional human rights systems, lacking jurisprudence, with the exception of the African system, which has heard environmental cases, that is *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).
14. Elina Pirjatanniemi, 'Greening Human Rights Law: A Focus on the European Convention on Human Rights' in Gerhard Bos and Marcus Düwell (eds), *Human Rights and Sustainability: Moral Responsibilities for the Future* (Routledge 2016).
15. *Lopez Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994). Other key cases include *Kyrtatos v Greece* App No 41666/98 (ECtHR, 22 May 2003); *Öneryıldız v Turkey* App No 48939/99 (ECtHR Grand Chamber, 30 November 2004); *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009).
16. See Council of Europe, Parliamentary Assembly, Recommendation 1885 (2009) Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment.
17. *Duarte Agostinho and Others v Portugal and 32 other States* App No 39371/20; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20; *Greenpeace Nordic and Others v Norway* App No 34068/21.

Lhaka Honhat case.¹⁸ In this case, the Court recognised for the first time a justiciable right to a healthy environment as derived from Article 26 of the American Convention. However, the Inter-American system's track record when faced with petitions explicitly addressing the impacts of climate change is wanting. The first petition from 2005 was rejected by the Inter-American Commission as it was unable 'to determine whether the alleged facts would tend to characterize a violation of rights', and the second petition has been left pending since 2013.¹⁹ Similar petitions before the UN treaty bodies have also been unsuccessful. The CRC Committee rejected the *Sacchi et al.* petition in 2021 as inadmissible, and in 2020 the Human Rights Committee found that the impacts of climate change on Kiribati did not violate the International Covenant on Civil and Political Rights.²⁰ These cases, not just before international bodies but also regional and domestic courts, represent the 'rights turn' in climate change litigation.²¹

However, despite this rights turn in litigation, challenges remain in their adjudication under human rights law. First, these cases expose interpretive challenges in dealing with climate change under human rights law, including how to interpret victim status/standing, causation, and (extraterritorial) jurisdiction so as to do justice to the transnational and transgenerational impact of climate change. These interpretive challenges are further complicated by fundamental critiques of the legitimacy of interpreting (human rights) law in climate-friendly ways. Finally, practical challenges arise when cases linger for years as pending petitions (like the 2013 *Athabaskan* petition before the Inter-American Commission) or when applicants are required to exhaust time-consuming domestic remedies (as in the CRC Committee's 2021 *Sacchi* decision). Even after legal obligations are established, governments and corporations sometimes drag out proceedings and delay compliance with court rulings.

Self-reflection within the human rights community is needed on our role as professionals within the context of these larger developments. How can we responsibly position ourselves vis-à-vis the challenges noted above, taking into account our professional duties? We acknowledge that judges, lawyers, and scholars must give their good-faith interpretation of what the law is and that this task must be conducted with professional rigour, a willingness to engage with opposing arguments, and intellectual independence. However, interpretation is not a value-free, objective, or neutral activity (as elucidated by feminist, queer, and TWAIL scholars).²² Interpreting and advising on the law

18. Inter-American Court of Human Rights, *Environment and Human Rights*, Advisory Opinion OC-23/17, Series A No 23 (15 November 2017); Inter-American Court of Human Rights *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, Judgment of February 6, 2020 (Merits, reparations, and costs).

19. Two petitions have been brought before the Inter-American Commission on Human Rights against the USA and then Canada by Inuit groups, see Sheila Watt-Cloutier *et al* Petition No P-1413-05 (and decision by the Commission on 16 November 2006) and petition by the Athabaskan Peoples (23 April 2013). See further Agnieszka Szpak, 'Arctic Athabaskan Council's petition to the Inter-American Commission on human rights and climate change – business as usual or a breakthrough?' (2020) 162 *Climatic Change* 1575-1593.

20. UN Committee on the Rights of the Child, *Sacchi et al v Argentina et al* (8 October 2021) CRC/C/88/D/104/2019; UN Human Rights Committee, *Ioane Teitiota v New Zealand* (23 September 2020) CCPR/C/127/D/2728/2016.

21. Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37. For discussion of cases see also Ingrid Leiten, 'Human rights v. Insufficient climate action: The *Urgenda* case' (2019) 37 *Netherlands Quarterly of Human Rights*, 112.

22. This point in relation to human rights law and climate change was recently debated by scholars in response to the blog by Benoit Mayer, 'Why I can't sign the world lawyers' pledge on Climate action' (*EJIL:TALK*, 15 September 2021) <<https://www.ejiltalk.org/why-i-cant-sign-the-world-lawyers-pledge-on-climate-action/>> accessed 14 January 2022.

(especially the open-ended, transnational norms common in human rights law)²³ require the interpreter to exercise judgment. This judgment is necessary to decide how (legal) principles, teleological arguments, and the (lack of) hierarchy of norms apply in a specific case, and how to utilise available litigation tactics. Below, we focus on the duty of judges, human rights lawyers, and scholars regarding exercising their judgment in legal interpretation, advice, and litigation in a professionally responsible manner.

Professional Responsibility of Judges / Legal Decision-Makers

When dealing with the interpretive challenges posed by climate change, we call on judges to be guided by an understanding that their responsibility includes actively ensuring that individuals and groups excluded from formal political decision-making are given voice and consideration in court.²⁴ This follows from Nancy Fraser's conceptualisation of justice requiring parity of participation. Fraser argues that this is ensured, among others, by inclusion in contests over justice. In Fraser's words, 'injustice occurs when political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on par with others' in political arenas and other spaces where the meaning of justice is decided.²⁵ She limits her definition of those 'wrongly' excluded to those people who are affected by a particular exertion of authority but unable to participate equally in the decision on whether to exert that authority.²⁶

This is precisely the type of exclusion that occurs in relation to contests over climate justice.²⁷ Those most affected by climate change are un(der)-represented in the relevant decision-making bodies. Children, future generations, and residents of those countries most threatened by climate change are systematically excluded from parliamentary decision-making procedures as they may not vote or stand for election in the polities where the most impactful climate decisions are being made. Moreover, the electoral pressures of most contemporary democratic systems lead to 'presentism', the favouring of interests of current voters over the long-term interests of children or future generations.²⁸ In the face of political bodies' failure to address the wrongful (and often structural) exclusion from political

23. Dana Burchardt, 'Intertwinement of Legal Spaces in the Transnational Legal Sphere', (2017) 30 *Leiden Journal of International Law* 305-326.

24. Laura M. Henderson, 'Internalizing Contestation in Process-Based Judicial Review' (2019) 20 *German Law Journal* 1167-1181; Laura Davies and Laura M. Henderson, 'Judging without Railings: An Ethic of Responsible Judicial Decision-Making for Future Generations', working paper Professional Ethical Judgment for Global Challenges Research Project, Utrecht University Centre for Global Challenges 2022 <<https://papers.ssrn.com/sol3/papers.cfm?abstractid=4021115>> accessed 14 January 2022.

25. Nancy Fraser, 'Reframing Justice in a Globalizing World' (2005) 36 *New Left Review* 76.

26. *ibid.* While many others have argued that *democracy* requires such participation, Fraser extends the argument to apply to *justice* as well.

27. For an examination of colonial exclusion and contestation of the meaning of 'climate justice' see Jan Wilkens and Alvine R. C. Datchoua-Tirvaudey, 'Researching climate justice: a decolonial approach to global climate governance' (2022) 98 *International Affairs* 125-143.

28. Danielle Zwarthoed, 'Political Representation of Future Generations' in Marcus Düwell, Gerhard Bos and Naomi van Steenberghe (eds), *Towards the Ethics of a Green Future: The Theory and Practice of Human Rights for a Future People* (Routledge 2018) 81.

decision-making, the judge may legitimately offer an alternative forum for these excluded interests to be considered.²⁹

We see this as having at least two concrete implications. First, we call on judges to grant standing more liberally to those claiming victim status in climate change cases.³⁰ In many such disputes, issues of standing pose significant challenges to victims having their claims assessed on the merits. In March 2021, for example, the Court of Justice of the European Union (CJEU) dismissed the *People's Climate Case* for lack of standing. In this case, ten families (including children) from around the world who have been particularly affected by climate change brought a claim against the EU. The CJEU held that because the applicants were not directly and individually concerned by an act of the EU, they did not have standing.³¹ This standard of direct and individual concern is nearly impossible to meet in climate change cases as climate change affects *everyone*. We follow Advocate General Jacobs who, already nearly 20 years ago, concluded that Union law allows for an interpretation of standing for individuals for whom a measure 'has, or is liable to have, a substantial adverse effect on his [sic] interests.'³² This more open reading of standing would allow access to justice for all those whose interests are substantially affected by climate change. Judges must use the interpretive space they have to ease restrictions on standing to allow those affected by climate change standing to dispute in court governmental or private actions that cause climate change. Otherwise, redress for human rights violations remains illusory for those affected by climate change.³³ As the ECtHR has oft reiterated, human rights must be 'practical and effective', not 'theoretical or illusory'.³⁴

Second, judges must critically assess other admissibility criteria to ensure they do not bar access to a remedy. In its recent *Sacchi* decision, the CRC Committee declared the applications inadmissible, because the applicants had not exhausted domestic remedies. As Wewerinke-Singh notes, the applicants, particularly those from small island States, may have fewer than 15 years before they permanently lose their homes to climate change.³⁵ She concludes that 'expecting these children

29. Judges are already doing this when they engage in process-based fundamental rights review. Regional and international courts are increasingly focusing on assessing the quality of the domestic decision-making procedures that led to interference with the applicant's rights. When relevant groups have been excluded or not been able to (sufficiently) participate in these procedures, or relevant interests were not considered, the judge can increase the scrutiny of her review to balance these interests. See Leonie Huijbers, *Process-Based Fundamental Rights Review: Practice, Concept and Theory* (Intersentia 2019).

30. This argument is made in more depth in Laura Davies and Laura M. Henderson, 'Judging without Railings: An Ethic of Responsible Judicial Decision-Making for Future Generations', working paper Professional Ethical Judgment for Global Challenges Research Project, Utrecht University Centre for Global Challenges, 2022 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4021115> accessed 31 January 2022.

31. Court of Justice of the European Union, *Armando Carvalho and Others v The European Parliament and the Council* ('*The People's Climate Case*') no. C-565/19 P, Judgment of 25 March 2021, paras. 70-73.

32. Opinion of Advocate General Jacobs, Case C-50/00P delivered on 21 March 2002, para. 60.

33. Lena Hornkohl, 'The CJEU Dismissed the People's Climate Case as Inadmissible: The Limit of Plaumann is Plaumann' (*European Law Blog*, 6 April 2021) <<https://europeanlawblog.eu/2021/04/06/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann/>> accessed 31 January 2022.

34. *Scordino v Italy* (no. 1) App No 36813/97 (ECtHR Grand Chamber, 29 March 2006), para 192. This emphasis on 'effectiveness' is also seen at the international level. See Julie Fraser, 'Challenging State-centricity and legalism: Promoting the role of social institutions in the domestic implementation of international human rights law' (2019) 23 *The International Journal of Human Rights* 976.

35. Margaretha Wewerinke-Singh, 'Case Note 2021/10 on Communication 104/2019 Chiara Sacchi et al v. Argentina et al. Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the rights of the Child's Decision on Sacchi v. Argentina' (*Leiden Children's Rights Observatory*, 28 October 2021). <<https://childrensrighsobservatory.nl/case-notes/casenote2021-10>> accessed 31 January 2022.

to experiment with largely untested, highly complex and expensive transnational litigation strategies in order to satisfy the exhaustion of domestic remedies requirements suggest that the committee will only hear complaints when it is almost certainly too late to prevent the most serious violations of their rights.³⁶ To protect those most at risk from climate change (and who hold the least political and economic means to impact decisions on climate change) judges must assess in each individual situation whether admissibility requirements prevent applicants from gaining an effective remedy. If so, judges should apply these requirements with ‘some degree of flexibility and without excessive formalism’ to allow for applicants’ access to justice.³⁷ To avoid further delays, judges should also consider fast-tracking such cases, as the ECtHR has recently done with the *Duarte Agostinho et al.* petition.

Professional Responsibility of Lawyers

When advising clients on their legal obligations relative to the environment or when engaging in climate litigation, lawyers must consider their responsibilities beyond those toward their client. The typical dynamic of climate disputes involves natural persons (individuals or groups) attempting to hold legal persons (a government or corporation) to account and is often characterised by an asymmetry in the resources, information, and time that parties have available.³⁸ The respondent in these cases generally has access to capital on a far greater scale than the applicant; has access to information that the applicant needs to substantiate their claims; and is not subject to the same urgency that the human life span imposes upon the mortal applicant. These asymmetries risk perverting the legal system, giving an unfair advantage to parties who can afford to drag out proceedings and withhold crucial information. In litigation, judges are tasked with guarding the fairness of procedures, but a multitude of disputes do not go to trial (or if they do only after many years of negotiations). If lawyers do not take action to mitigate these asymmetries also in the pre-litigation phase, the legal system cannot function properly and fairly.

At first glance, mitigating these asymmetries might appear to be at odds with the zealous defence that a lawyer is required to offer her client. Along with Van Domselaar and De Bock, we submit that this need not be the case.³⁹ Indeed, by taking third party interests into account the lawyer ensures that her client complies with current legally relevant obligations. Developments in business and human rights frameworks mean that corporations are already under a duty to respect human rights and to remedy the negative impacts of their actions on the enjoyment of human rights.⁴⁰ Lawyers acting on behalf of these corporations must operate under a similar duty, as affirmed by the International Bar Association’s Practical Guide on Business and Human Rights for Business Lawyers.⁴¹ Similarly, the human rights obligations on governments logically require government

36. *ibid.*

37. *Sejdovic v Italy*, App No 56581/00 (ECtHR Grand Chamber, 1 March 2006), paras 44 and 45. The ECtHR has established in their jurisprudence many exceptions to the need for victims to have exhausted domestic remedies.

38. Iris van Domselaar and Ruth de Bock, ‘The Case of David vs. Goliath. On Legal Ethics and Corporate Lawyering in Large Scale Civil Liability Cases,’ working paper Professional Ethical Judgment for Global Challenges Research Project, Utrecht University Centre for Global Challenges, 2022 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025141> accessed 28 February 2022.

39. *ibid.*

40. UN Human Rights Council, Resolution 17/4, Guiding Principles on Business and Human Rights A/HRC/17/31 (16 June 2011).

41. IBA Practical Guide on Business and Human Rights for Business Lawyers (*IBA Net*, 28 May 2016) 23, 40 <<https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4>> accessed 31 January 2022.

lawyers to take into account third party interests by assessing how government action will affect human rights. We encourage lawyers to be aware that their professional duties include taking into account the third party effects of their clients' actions in their legal advice and assessing how these actions affect human rights.

Professional Responsibility of Legal Scholars

We encourage scholars to design interpretive practices and methodologies that include historically marginalised and excluded individuals and groups, and especially indigenous peoples. As a social construction that reflects power in society, law can function (and does) to perpetuate inequalities across various levels. To the extent that the laws being interpreted affect these marginalised individuals and groups, including their voices in the practice of interpretation will enhance the legitimacy of the scholar's interpretation. It also furthers the objective of international human rights law to be universal. After all, the full implication of principles like human dignity, human rights, and protection of a healthy environment can only be fully understood if informed by all voices affected by the law.

Moreover, legal scholars are particularly well-placed to take considered positions on what the law should be and to advocate these positions in social and policy debates. We recognise that legal scholars play a role in the interpretation, development, and also creation of law. Legal scholars' expertise on the legal system as a whole and how it functions allows them to see flaws that other, non-legally trained scholars, scientists, or politicians may not. Further, in our observation, law students are increasingly enjoying broad training in politics, philosophy, and (social) sciences, which aid in their ability to understand the wider implications of the law.⁴² This is not to say that legal scholars should be the only ones engaging in such discussions, but we do believe that the quality of the discussion will be served if (a diverse range of) legal scholars take part in it as well.

Conclusion

The climate crisis is 'the most significant threat on the human horizon today'.⁴³ Cases are pending before various human rights bodies, including a case against Australia by Torres Strait Islanders before the UN Human Rights Committee, and several before the ECtHR. Many more cases are coming before domestic courts. Influential decisions are being taken as we speak by corporations and governments on how to comply with legal duties to mitigate climate change. We call on decision-makers, lawyers, and scholars to be aware of the power they have in shaping these developments and their responsibility to use it. As Mary Robinson said: 'The magnitude of this threat demands a response in every area of the law: all of you have a responsibility at meeting that demand.'⁴⁴

42. While this has been the case for some time in common law countries, the Netherlands is quickly catching up as law students are following interdisciplinary bachelor educational programmes before (or in addition to) specialising in law. See for example the discussion about the T-shaped lawyer in the Netherlands: Elaine Mak, *The T-Shaped Lawyer and Beyond: Rethinking Legal Professionalism and Legal Education for Contemporary Societies* (Boom 2017).

43. UN GA, Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune, A/75/298, 10 Aug 2020, para 21.

44. Mary Robinson, 'The legal community must refuse to remain silent in the face of the climate crisis' (*The Elders*, 2 November 2021) <https://theelders.org/news/legal-community-must-refuse-remain-silent-face-climate-crisis> accessed 31 January 2022.