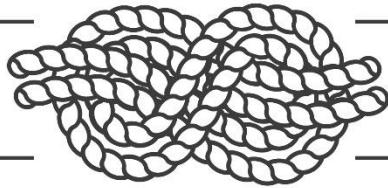

ISLAND



RIGHTS

INITIATIVE

CLOSING THE GAP BETWEEN HUMAN RIGHTS PROTECTION AND LOSS AND DAMAGE: RECOMMENDATIONS FOR COP 23

Introduction

Loss and Damage is an area of climate negotiations that is of particular relevance to island States. Islands are the ‘canary in the coalmine’ - they have contributed the least to greenhouse gases emissions, but will be the first to fall victim to the consequences with limited ability to fully recover. With Hurricane Maria and Irma hitting the islands of Barbuda, Dominica, the British Virgin Islands, Anguilla and others, the need to advance discussions about loss and damage grows.

Islands remain resilient, but they need to press for urgent solutions to the difficult questions and dilemmas that they are facing as a result of climate change. The United Nations Framework Convention on Climate Change (UNFCCC) has identified non-economic loss as part and parcel of loss and damage enhancing the limited discourse around human rights and climate change. But there is more to be done. While there has been significant focus on the necessary infrastructure for adaptation that States require and the resilience of communities, there has been limited attempts to address the serious human rights impacts that are and will arise as a result of climate change. The Fijian Presidency of COP23 gives an opportunity to make sure that the concerns of island populations and the human cost of climate change are at the forefront of the discussions.

Human Rights Implications

Climate change has the potential to affect the human rights of islanders in many ways. It has implications for the right to self-determination as well as a range of economic, social and cultural rights and civil and political rights including the right to life.

Right to Self Determination (Article 1 ICCPR)

The Montevideo Convention stipulates the criteria that must be satisfied to qualify for Statehood which includes a population, a government, a defined territory and capacity to engage in legal relations. But for islands their statehood is undermined because of the rising sea levels eroding their defined territory which may lead to the complete disappearance of islands or make them

uninhabitable through the salination of agricultural land. Loss of sovereignty and the potential breach of the right to self-determination are significant human rights threats arising out of climate change which require solutions.

Right to an Adequate Standard of Living (Article 11 ICESCR)

Islands are heavily reliant on the ocean for their livelihood, source of food and other economic activities. Another pressing issue that is riddled with uncertainty is what will become of the Exclusive Economic Zone (EEZ) of islands. Pursuant to the Law of the Sea, the EEZ is up to 200 nautical miles from basepoints that are located along the general direction of the coastlines of islands (with some exceptions in archipelagic islands) but with coastal erosion moving the coastline further inland, legal commentators are uncertain as to whether the basepoints will also move and therefore, lead to a corresponding movement of the outer limits of the EEZ inwards. This would mean a reduced size or even disappearance of the EEZ affecting the source of food and other economic activities which raises the right to an adequate standard of living through the loss of their primary wealth generator. Climate change will also have a direct impact on access to drinking water and adequate housing. The economic impact of climate change, therefore, has direct consequences for the human rights of island populations.

Right to Life (Article 6 ICCPR)

Climate change poses a serious risk to the right to life as can be seen from the increase in natural disasters leading to extensive loss of life linked to climate change. For many island populations, it is a fundamental threat to their safety and security. In some cases, populations have been displaced in order to avoid the serious risks to life of climate change. With the existential threat that islands face, a mass movement of populations from islands to neighbouring countries may be expected. This implies a loss of security (including legal rights) and agency (the ability to control one's location and livelihood). The identification of non-economic losses is recognised under loss and damage but there are huge challenges in measuring and addressing non-economic loss to promote and protect the human rights of those most acutely affected by climate change.

Frameworks to address the issues

To address substantive human rights concerns related to climate change effectively the existing mechanisms of the UNFCCC need to be used alongside other international frameworks for the protection of human rights. The limited discussion of human rights during the UNFCCC processes is compounded by the minimal discussion about climate change in other international frameworks.

UNFCCC

The Warsaw International Mechanism on Loss and Damage (WIMLD) was set up in November 2013 and is endorsed in the Paris Agreement. The work plan of WIMLD provides an explicit directive to develop recommendations to improve data and knowledge with regards to non-economic loss and how climate change affects patterns of migration and displacement. This would be an appropriate forum to develop recommendations and solutions on the questions of loss of Statehood and the creation of Stateless populations due to climate change.

UN Convention on the Law of the Sea (UNCLOS)

There is an urgent need to ascertain what will be the position of islands and their EEZ in cases where they are experiencing extensive coastal erosion due to rising sea levels. This question needs to be addressed both within the UNFCCC framework but also that of the United Nations Convention on the Law of the Sea (UNCLOS).

UN Convention on the Status of Refugees

A legal issue for peoples displaced due to climate change is the fact that they are not explicitly covered by the Convention on the Status of Refugees (1951). Article 1 (A) (2) restricts the status of refugees to “being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.” A narrow interpretation of this definition means that it does not embrace the specific situation that climate change presents. As displacement due to climate change increases, there is an urgent need to assess the way that those affected can have access to adequate protections under international law.

International Human Rights Frameworks

There is a need for policies that relate to human rights, climate change and development that support a rights-based approach to climate action. The UN Special Procedures, in particular the [UN Special Rapporteur on human rights and the environment](#) (UNSR) have become increasingly engaged on the human rights implications of Climate Change. In his 2016 report, the UN SR concluded that: “*human rights norms clarify how States should respond to climate change. As the Paris Agreement recognizes, whenever States take action to address climate change, they should respect, protect and consider their respective obligations on human rights. Complying with human rights obligations not only helps to protect the rights of everyone affected by climate change. As the Human Rights Council has affirmed, it also promotes policy coherence, legitimacy and sustainable outcomes.*”

Initiatives such as the Geneva Pledge for Human Rights in Climate Action are welcome, but there is also a need for fulfilment of climate commitments and the consequences for human rights to be considered as a matter of course in human rights monitoring mechanisms like the Universal Periodic Review.

National Human Rights Frameworks

Strengthening national human rights institutions, the judiciary and national laws is fundamental to addressing loss and damage and assigning responsibility to both private and public actors. Domestic legal frameworks need to ensure that there are effective remedies for individuals and that systematic deficiencies relating to climate change are addressed. For island populations, given the challenges of remoteness, particular support may be needed to ensure effective access to justice and the participation of civil society representing vulnerable groups in efforts to ensure that human rights issues are embedded in climate policy and vice versa. For many island

populations, the impact of climate change is not theoretical - their voices will be crucial in keeping up pressure for change.

Green Climate Fund (GCF)

The establishment of the Green Climate Fund seems to have stalled progress on the concepts of 'compensation' and 'liability' preferring rather a financing mechanism that is still millions of dollars away from its target with countries competing for funding. This is simply not enough to address the human rights implications of climate change.

Recommendations for COP23

Action on climate change and the protection of human rights are inextricably linked. With the Fijian Presidency of COP 23, the human rights issues facing island populations should be brought to the forefront of discussions.

The Island Rights Initiative calls on the COP23 to:

- a) Ensure the GCF is equipped to address the consequences of the human rights implications of climate change
- b) Give prominence to human rights law in the discourse around loss and damage
- c) Develop dialogue with international human rights mechanisms to ensure that issues relating to climate change are mainstreamed in international human rights processes
- d) Support domestic efforts to promote and protect human rights in the context of climate change.



The Island Rights Initiative is a network of specialist human rights and environmental lawyers, stands ready to support Island governments, communities and civil society, in advancing this agenda both in the international political and legal processes whilst also providing advice on strengthening national human rights institutions, legal frameworks and civil society.

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