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## **Climate Change and Human Rights: Shaping the Narrative for Reflexive Responses from Civilization's Leadership to Counter and Abate Climate Change and Enhance the Role of Human Rights in the Rule of Law**

**Michael Donlan**

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*This article offers a bold new legal process for enhancing and upgrading the rule of law to enable civilization to cope with and counter the mounting damage and injustice caused by climate change. Climate change, once an unimaginable threat, is now a brutal, ubiquitous game changer that is leading inexorably to the demise of all humanity. Only by enhancing the rule of law and melding international law with domestic law can civilization fashion a coherent, global action plan for survival.*

*For almost three centuries greenhouse gases have been emitted around the world by the burning of fossil fuel, and—most alarming—these gases remain in the atmosphere permanently, intensifying global warming. Already, the accumulating greenhouse gases have reached saturation and our planet is in an environmental emergency. The acceleration of global warming has led to the unrelenting melting of polar ice, which is releasing further greenhouse gases in the form of methane and carbon dioxide into the atmosphere.*

*As global warming intensifies, sea levels are rising, threatening massive numbers of people in the low-lying islands in the Pacific and Indian Oceans and the low-lying peninsulas in Asia, such as Bangladesh, with the loss of their lands and livelihoods in but a few decades. These injuries will greatly affect their human rights, starting with their right to self-determination. Thus, the rule of law must be enhanced to better preserve and protect human rights. Immediate action is needed, because a monumental injustice caused by rich nations is being inflicted on the poor of the globe.*

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**T**he world is now dealing with a once-unimaginable threat arising from climate change. This change is accelerating and, unless countered, is inexorable, and the threat to all of humanity is immense. Coping with climate change is the challenge of this century. Because our problem is new, we must think anew. All of the strengths of our civilization must be marshaled to meet this challenge. In this article I propose a bold enhancement of the rule of law by melding relevant provisions of international and domestic law that will also integrate the code of human rights as set forth in the 1948 UN Universal Declaration of Human Rights.<sup>1</sup>

As Mary Robinson, former UN High Commissioner for Human Rights, pointed out in a Twitter posting April 29, 2017, we are the first generation to fully understand climate change and the last to be able to do something about it.

Our seas are rising and threatening many major cities around the globe; our rainfall is often accompanied by heavy, destructive flooding or gives way altogether to droughts that inflict multiple years of sour harvests; hurricanes and cyclones accelerate in unprecedented fury, inflicting broad human sufferings—particularly in the Caribbean, the Philippines, and Bangladesh; migrations are mounting to the extent that soon they will be beyond the ability of civilization to cope; local carbon pollution is affecting close to ten million lives a year. Ocean currents were once as reliable as sea level but now are undergoing unprecedented variations: jet streams are now flowing in a wavy pattern (no longer a straight west to east) and the Gulf Stream is slowing down.<sup>2</sup>

Because of climate change, innocent and vulnerable people are suffering major environmental injustice that the rule of law cannot properly remediate. We must make major changes in humanity's ethos and the laws of civilization. The task at hand is the greatest challenge ever to face civilization, and—alas—civilization must plan and act without complete evidence. The future is unknown and the changes that will occur are without precedent. We must not think incrementally; we must think, plan, and function holistically. To effect these changes, new institutional leadership, international and domestic, must come to the fore. Planning and action must proceed promptly; yet, we must be aware that there is an innate inertia to humanity, that the public at large is disposed to think there is still enough time to deal with this crisis. But there is no time. We are already very late.

In December 2015, after decades of effort by the United Nations, a full complement of world leaders signed the Paris Climate Agreement, which provides defined goals for the reduction of greenhouse gases to limit global warming.<sup>3</sup> To ensure the survival of humanity, this seminal international agreement must be accompanied by an elevation of the role of human rights to a more integral part of the rule of law.

The Paris Climate Agreement is a watershed agreement that (belatedly) mobilizes and empowers the UN Framework Convention for Countering Climate Change of 1992 (UNFCCC). These two international legal instruments (one a treaty and the other an implementing agreement) constitute a breakthrough enhancement of international law under the sponsorship of the United Nations. They both oblige all nations to cooperate in the effort to abate climate change. In addition, the Paris Agreement establishes the goal—to be achieved through unanimously called-for national commitments—of keeping global warming at  $< 2^{\circ}\text{C}$  above preindustrial levels (with a hoped-for goal of  $< 1.5^{\circ}\text{C}$ ). But this agreement is only a beginning.

Although the Paris Agreement constitutes a strategic milestone in the rule of law, it was not achieved until two decades after a false start by the supreme decision-making party of the UNFCCC, the Conference of the Parties (COP), and after years during which the immense emergency of climate change went underappreciated. Even more vexing, however, is that the delay consumed precious time during which civilization might have pursued worthy action plans; and, to stress again, civilization is still insufficiently aware of the climate crisis and thus is reacting far too slowly. In addition, civilization needs superb leadership, and leadership is far too scarce.

The UNFCCC was formed at an omnibus conference in Rio de Janeiro.<sup>4</sup> At the time most nations had little appreciation of the existential nature of the threat of climate change. The COP established by the UNFCCC is expected to fashion and forge an implementing agreement to achieve an effective instrument of international cooperation that will have the force of law. Little progress was made until the United States and China teamed up with a bold initiative in 2015. The United States issued the holistic Clean Power Plan through its Environmental Protection

Agency (EPA) and China promised to make strong reductions in its coal-fired plants. Presidents Barack Obama and Xi Jinping performed the leading role at the twenty-first annual COP in Paris in 2015, where all nations signed the Paris Agreement, which went into effect in 2016.

The Paris Agreement needs shoring up; and the United States, the recognized leader in matters involving multilateral international cooperation, must overcome its current myopia at the federal level and resume its critical, long-standing leadership role. Although the agreement is the first ever to call for bold, ethos-reorienting international cooperation, the parties to the agreement—even as late as 2015—still did not appreciate the extent and imminence of the threat facing humanity. International literature available at the time accorded scant acknowledgment that climate change had started to accelerate. Also, the Paris Agreement is a hybrid agreement; each nation must publish its own nationally determined contribution (NDC) toward decarbonization.<sup>5</sup> Though these contributions are only voluntary, the procedural parts of the agreement are binding, in that each nation must be transparent about the extent to which it is cooperating. The UNFCCC has a secretariat that publishes each nation's NDC and the overall degree of accomplishment and organizes negotiating sessions, including the annual COP, which has demonstrated a new earnestness about building on this modest but salutary beginning. The starting year of performance under the agreement is 2020; and every five years, the secretariat and each nation party will participate in a “stocktaking” review of the need for modifying (that is, increasing) its decarbonization commitment. It is now generally understood, however, that the initial NDCs (for decarbonization) declared in 2015 must be substantially increased because global warming is steadily accelerating—and the prospect of achieving the goals of  $<2^{\circ}\text{C}$  or  $<1.5^{\circ}\text{C}$  are much diminished.<sup>6</sup> Today, many commentators expect that the Paris Agreement will hold global warming only to  $3.5^{\circ}\text{C}$ ; and there is an expectation that by the end of the century, a temperature of  $4.5^{\circ}\text{C}$  is very possible.<sup>7</sup>

The United Nations is strategically positioned to be the principal sponsoring institution in bringing together international and domestic law in the effort to halt climate change and the potential devastation of all humanity. Its effectiveness, however, depends on its enjoying strong support and cooperation from national domestic authorities and evolving regional collaborations, such as the European Union and the global south.

The meld will be simple. The product of public international law, the Paris Agreement sets the numeric goal at which to limit global warming, and laws implemented by domestic regulatory agencies are to respond to that goal. The promise of cooperation among nations as set by the Paris Agreement is grounded in each nation's following and fulfilling its NDC. It also means that if, during periods of review, it is apparent that the degree of cooperative fulfillment of NDCs is insufficient, the COP would reach out to all the parties with a request to modify (presumably increase) their respective NDCs.

A broad range of nations and regional collaborations are now coming forward to shore up the Paris Agreement and in so doing to gain a much-needed momentum to abate climate change. Finland, for example, which currently holds the presidency of the European Union, has promised to provide clear leadership for the European Union in fulfilling its role under the climate agreement.<sup>8</sup> On this issue, conversely, the United States under President Donald Trump has relinquished the world leadership it has held since World War II by withdrawing from the Paris Agreement. The existential threat to all humanity from climate change presents the United States with a clear imperative as it moves toward the 2020 presidential election: to provide the critical leadership (along with the international constabulary and cooperating nations) that is needed to save humanity.

In confronting the most fearsome challenge civilization will ever face, we will need strong and effective leadership to develop international law that can interface with traditional domestic law. That is the challenge and role undertaken by the United Nations, which created the UNFCCC as a framework to encompass all nations. Another notable role has been the trail-blazing work by the UN Human Rights Council in promoting appreciation of human rights in environmental policymaking.

The UN Intergovernmental Panel on Climate Change (IPCC), which publishes periodic updates of ongoing measurements of climate change, has made significant progress.<sup>9</sup> The goals set by the Paris Agreement were informed and grounded by the IPCC. The most recent IPCC report, published in fall 2018, sets out a doomsday of twelve years to make the remediations necessary to keep global warming to a minimum of either 1.5°C or 2°C.<sup>10</sup> The 1.5°C goal is projected to be harsh; yet, the 2°C goal is projected to be seemingly unlivable.<sup>11</sup> In either case, humanity would continue to be in an environmental emergency. Moreover, the periodic reports of the IPCC (like all scientific prognostications) have been consistently conservative.

The Paris Agreement constitutes a major and strategic reconfiguration of the rule of law. For the first time in history, international law is intruding on and functionally interfacing with national domestic law (involving supplementing and guiding—for respective domestic regulatory administrative law). Before the Anthropocene epoch—the name scientists are now using to describe the era that abruptly and permanently replaced the twenty-thousand-year Holocene epoch—public international law functioned apart from national domestic laws. Now, because of the global crisis, major new rules must be made at the level of international law, and they must be implemented at the level of domestic law. National and state governments must responsibly and sustainably regulate and thus control the operation of companies that emit greenhouse gases and comprehensively regulate the realms of energy and the environment. But with the advent of the Paris Agreement, each nation is called on to function cooperatively to abate climate change. One immediate cause of concern, however, is that climate change is accelerating and already outpacing the goals set by the NDCs of the participating nations. Furthermore, the Paris Agreement is not sufficiently binding to achieve the intended goal of having all nations function cooperatively to abate climate change and insure the survival of humanity. The participating nations must recognize that their contribution to decarbonizing the atmosphere is worth the cost and sacrifice the Paris Agreement calls for.

The UNFCCC secretariat, the annual COP, and the full environmental constabulary at the United Nations (especially its persistently proactive Human Rights Council and its functionally collaborating High Commissioner for Human Rights) are the principal prospects now in place for institutional, legally oriented international leadership serving civilization in this challenge. Yet, the ultimate success of the Paris Agreement depends on how well the respective domestic authorities regulating energy and the environment will follow through in their respective states. International law is to set the international goal for abating climate change; but each nation, including the United States, is counted on to fulfill the goals set internationally.

No individual nation or group of nations has come forward to offer leadership. Although most nations recognize the need for leadership, in many countries, internal politics are moving in the direction of populism. This new century, with its much expanded modalities for affiliated communication, affords a new avenue for minority right-wing populism to gain a plurality, especially in response to right-wing demagogues. This rise in populism is a troubling counter to the obligations for states to engage in cooperation under the Paris Agreement and under the Charter of the United Nations.

Even worse, two signal nations, the United States and Australia, have been backpedaling. In 2019, the EPA weakened the provisions of the Clean Power Plan that had been passed and promulgated in 2015 when the United States joined and provided leadership for the forging of the Paris Agreement.<sup>12</sup> Australia is exalting its coal economy and is even situating a coal plant near its Great Barrier Reef.<sup>13</sup> But the Roman Catholic Church, through the Vatican, along with most other global religions, has sought to generate support for international responsibility in the effort to abate climate change.<sup>14</sup> These efforts, however, have yet to gain enough sway.

The withdrawal of the United States from the Paris Agreement under President Trump and the brazen denial of climate change by the White House and our federal regulatory agencies, especially the EPA and the Federal Energy Regulatory Commission (FERC), and their opposition to decarbonization efforts (to the extent that they are seeking to rejuvenate the once-primary role of coal-fired power plants) has prompted countering responses from the policy leaderships and regulatory agencies of several progressive states, most notably California, Massachusetts, New York, and Washington. These states have aggressive programs in place that advance the cause of decarbonization and the development of clean, sustainable energy. Washington's governor, Jay Inslee, in his brief run for president, sought to make climate change a primary issue in the 2020 presidential campaign. Front-runners, such as Senator Elizabeth Warren of Massachusetts, are strong advocates of decarbonization, and they support the proposed Green New Deal, legislation that would address climate change and economic inequality.

The melding of international law and domestic law consistent with and the specific enhancements of the rule of law advocated here will not alone generate enough momentum to restore the heating balance of our planet. To meet the threat, civilization must undergo broad change in its ethos, and that change must be bold, effective, and unprecedented. Unfortunately, such coordination would ordinarily take a decade to work out. But we have less than a decade to implement a legal and programmed plan of action.

## **Enhancing the Role of Human Rights in International Law**

In 1948, the nascent United Nations adopted the Universal Declaration of Human Rights and thereby accorded a strategic, new, codified global posture to human rights. This document was notable because its updated principles delve into the proactive obligations of governments. In the past, documents involving human rights typically were designed to protect individuals from being victimized by their own government. Since the promulgation of the Declaration of Human Rights, regional human rights courts have been instituted. These include the European Court of Human Rights, the most active and inclusive; the Inter-American Court of Human Rights; and the African Court of Human Rights. In an advisory opinion issued in October 2018, the Inter-American Court of Human Rights asserted the human right to a healthy environment.<sup>15</sup>

Since the United Nations adopted the Universal Declaration of Human Rights, elevating human rights in its own orbit, it has sponsored a host of binding international treaties involving human rights.<sup>16</sup> Moreover, in recent decades the UN Human Rights Council commissioned two rapporteurs, whose reports, adopted by the council, acknowledge the inextricable connection between human rights and climate change and recognize that climate change, now resulting from the actions of dominant, yet largely immune, major corporations, is seriously degrading the critical value of human rights. These reports effectively structured the policy agenda for the council (and, in turn, the United Nations). Their influence continues and is most observable in a

series of reports issued between 2015 and 2018 that underscore the inextricability of climate change and the need for states to protect human rights as a matter of hard international law and assert that this legal obligation should include efforts to ensure that each state's corporations also respect human rights.<sup>17</sup> To that end, corporations are expected to report on their due diligence review of risks that could cause injury to human rights.<sup>18</sup>

In 2011, the UN Office of the High Commissioner for Human Rights published *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.<sup>19</sup> The European Union is now promoting those principles to its member states and collateral regional financial institutions. Also, in collaboration with the United Nations, the European Union has recommended (and is initiating a multi-lateral negotiating process) that the 2011 principles be used as the basis for a binding international treaty. Unfortunately, the parties have been stymied by an impasse between powerful corporate lobbyists, who insist on a soft-law treaty, and the individual EU member states, who seek a hard law treaty.<sup>20</sup>

## **Harnessing the Rule of Law and the Power of Regulatory Agencies**

As a first step to ensure the survival of humanity, civilization must establish organized, aggressive institutional programs to phase out the use of fossil fuel, which, at the moment, accounts for 80 percent of its energy, and develop new, innovative technology. Clean, sustainable energy in the form of solar and wind power, which could save humanity, is now available at affordable prices. Yet, the continuous burning of fossil fuel under the free enterprise system is destroying our planet and creating ongoing, even accelerating, environmental injustice—a market failure of global proportions. To ameliorate that injustice, we must harness and enhance the rule of law. First, however, we must overcome two vexing features of the rule of law: it evolves too slowly, and it has tended to give priority to insuring public order and protecting the rights of property.

It is central to our analysis that we highlight the dramatic and strategic creation of the many administrative agencies that arose at the federal level after the Great Depression and led to the development of administrative law to govern those agencies. That strategic entrée of administrative law added new dimensions and broader scope and capability to the rule of law and its legal process. For example, regulatory agencies were created with responsibility for energy and public health; a generation later, the EPA was created to oversee the environment. And, for the first time, the rule of law was able to function both *ex ante* and *ex post facto* within these distinct realms of administrative regulation because these new agencies were empowered to set and enforce standards. Furthermore, these two increasingly dominant realms, energy and the environment, are now overlapping in their jurisdictions and, as such, should coordinate their efforts to meet the challenges of climate change.

Regulatory agencies must fashion a sliding, rational process of reconstruction and remediation of regulatory infrastructure, acting in collaboration with the corporate subjects of regulation. During the transition from fossil fuels to safer, clean forms of energy, regulatory agencies must adopt a unique (but brief) concept of balancing that allows national economies to stay afloat while avoiding immediate catastrophe due to climate change. The use of fossil fuel that emits greenhouse gases must virtually cease; the human rights of affected civilizations will mandate that such transition be phased-in. The new legal processes of regulatory agencies, however, must be fair and equitable to the conflicting interests, taking into account the

immediate interests of local public health (wherein many million die each year from localized carbon pollution).<sup>21</sup> Before the current crisis, the balancing was one-dimensional and involved the costs of operating power plants and the per-unit pricing of electricity that made it affordable. By the end of the transition period, fossil fuel will have been eliminated and a new regulatory modality will be in place.

No one has ever modeled such a phaseout and never on a global scale. And no one has ever modeled an ongoing process (post phaseout) of periodic balancing of new power sources and energy usages. Moreover, the fossil fuel industry should be consulted about how to accomplish the phaseout and afforded opportunities to rectify past failures to warn civilization of the growing climate crisis it was, and still is, causing.

Serious thought also must be given to the protection of individual rights. All nations have domestic courts of general jurisdiction, and parties suffering injustice can file complaints—most often under tort law, ascribing damages (so suffered) as caused by a defendant who acted negligently despite a duty to act with reasonable care. But traditional tort law cannot effectively regulate the rampant, global level of injustice befalling victims around the world as a result of the ubiquitous use of fossil fuel. And even if there were a global court to hear and adjudicate remediations of injury to person and property resulting from climate change, there could be no useful award of financial damages for such injury since the principal damage from climate change is broad devastation to all humanity. Nonetheless, the interests of all humanity can be a proper consideration of domestic-empowered administrative processes whenever compelling evidence identifies global mortalities (and morbidity) resulting from the continued local use of fossil fuel. In the United States, with our national regulatory agencies studiously ignoring the problem, diligent and progressive state regulatory agencies can come forward with a grassroots rescue effort. The state authorities responsible for regulating energy and the environment must revise their regulatory processes to bring about a cessation in the use of fossil fuel by initiating a complete transition to clean energy.

For centuries, the free market has accorded a seemingly benign prerogative to power plant operators and energy users to burn fossil fuel and freely dump carbon emissions into the global atmosphere. In recent decades, however, the code of human rights has evolved in a direction that shows an increased sensitivity to justice. Furthermore, the terms of the Paris Agreement prompt attention to human rights through remediation of the environment. And, correspondingly, a new era of regulatory comprehension will result from the advent and fulfillment of the Paris Agreement.

In the past, the rule of law tended to prioritize the protection of property by defaulting to property, as if by norm. But now there is compelling evidence that the rule of law should rebalance this property-protection bias by giving parity to human rights. Experts who appear before an administrative regulatory agency should be charged with acknowledging that gross environmental injury is being caused that is plainly unjust and unacceptable. And once the agency identifies that the reach of such injury is international, it should then identify and recognize that human rights are being degraded on the international level. Because such regulatory agencies are state empowered, the protection of all human rights should be a clear duty and responsibility.

As another issue to be addressed, regulatory agencies should be petitioned to give clear notice to the fossil fuel industry that it has some responsibility for remediating the effects of climate change because of its sustained program of disinformation undertaken in an effort to dissuade the public and its body politic from moving ahead to avert the looming catastrophe.<sup>22</sup>



Furthermore, the fossil fuel industry should be asked by regulatory agencies to show the steps it will take to effect remediation and to acknowledge that it recognizes the embrace of the code of human rights into the administrative regulatory process in coping with climate change. The fossil fuel industry should also be called on to study recent developments within the European Union to undertake a public/private dialogue to create a more empathetic regulatory process. As discussed in a later section, France is leading the way with major legislation that calls corporations to account.

The fossil fuel industry is the most successful industry in history. It has served the public by producing reliable electrical energy at affordable prices. And, to the credit of both government and the fossil fuel industry, each has contributed mightily to more than a century of prosperity. But the fossil fuel industry has flown too close to the sun; it has become extraordinarily powerful and, in turn, mindless; it has forgotten that it has been treated with respect and given advantages by the public/private process and as a result it has lost its sense of concomitant responsibility to share important information, that is, its critical (internal) knowledge of portending devastation.

If the steps outlined here were to be undertaken, the regulatory process would become the beacon for the rule of law, by guiding the capitalist economy to make changes that would enable domestic administrative regulation to stand firm against the self-destruction now looming and to acknowledge that such destruction is anathema to human rights. These combined regulatory agencies would conclude that the continued use of fossil fuel will result in a form of ecocide and massive injustice in every dimension in the short term (millions are dying every year from carbon pollution) the middle term (hundreds of millions are set to suffer from rising seas, which will result in massive migration), and the long term (the planet will be uninhabitable if climate change continues unabated).<sup>23</sup>

The continuous accumulation of greenhouse gases in the atmosphere will intensify global warming for decades and even centuries. Worse still, global warming is being exacerbated by self-feeding; for example, the melting of Arctic permafrost is emitting ever greater quantities of greenhouse gases into the atmosphere in the form of methane and carbon dioxide. The rate of melting is being monitored—and the reports are frightening. The increasing quantities of greenhouse gases in the atmosphere advocate for the continued use of the term *existential* to describe the current crisis. At some point (in this century or the next), no counterforce will be able to stop or reverse global warming.

Regulatory agencies are currently compounding the dire threat to humanity because they are carrying on business as usual, ignoring broad-scale environmental and human rights issues. The commissioners of FERC, for example, are concerned only that energy being so regulated is both reliable and affordable to consumers. And, hence, they have been presuming that it is not their responsibility to comprehend the ubiquitous and accelerating injury to all humanity.

In the United States, administrative regulators have been expected to limit themselves to setting rates for electricity and imposing costs to protect the local environment. But when measuring right to life, human suffering, loss of habitat, and death against commercial profit, we are entering unprecedented territory. A new legal dynamic must be learned and mastered by regulators and their staffs. And, we all must come to understand that major change is necessary—to reduce global warming; and such change will require extensive additional legal analysis and planning-out of a new ethos of societal sharing. To repeat: we are in emergency. We must get started. Just as we have no way to know when a point of no return has been reached with global warming, we have no precedents for balancing loss of life or habitat against the continued need for coal-fueled power plants to make a profit.

The rule of law has always been comfortable in venturing into issues of equality and equity, and the legal process often uses the term *fairness*. But balancing life, family, and habitats against comfortable profits for power companies has been long been adroitly avoided in our legal parsing. We will be beyond normative experiences and benchmarks for such balancing as we undertake to balance the principles of human rights against the principles of economics.

## **Environmental Regulation in the Anthropocene Epoch**

In the past two generations, environmental regulation has burgeoned from its original, peripheral status, and, today, the major environmental protection agencies of the world are respected for their holistic and global analytic ability—and their recognition of their duty to all humanity.<sup>24</sup> The Paris Climate Agreement of 2015, for example, grew out of the Obama administration's Clean Power Plan.<sup>25</sup>

It is becoming increasingly clear that transnational corporations are causing harm, especially in poorer nations, where regulation tends to be relatively lax, and in richer nations, where dark money is funding undue levels of campaign contributions to politicians who can be counted on to protect them from regulation. Moreover, corporations have tended to evolve ever-more protective and immunizing techniques that allow them to avoid transparency and exposure to legal remediation through the use of subsidiaries, outsourcings, and supply chains.

While the European Union is advancing new initiatives that meld domestic and international law and is focusing on enhanced responsibilities of their corporations, the United States at the federal level is muddling along in another direction. Our corporate/economic culture and our legal culture tend to move slowly, often enabling the corporate realm to stand still or even push back against progressive efforts to enhance the protection of its citizens. Efforts are under way, however, at the state level to bring some accountability. The attorneys general of New York and Massachusetts, for example, have brought suit against Exxon, charging the company with fraud for deceiving its shareholders about its knowledge of the consequences of climate change.<sup>26</sup>

It should be noted that efforts are emerging from the nonprofit sector directed at prompting the fossil fuel industry to make proper disclosures about the risks attendant to climate change.<sup>27</sup> And there are other instances, discussed in the Conclusion, in which groups have come together to force governments to act to mitigate the effects of climate change.

The public—at long last—is becoming sufficiently aware that climate change must be accorded a very high priority and that all complementing forces of civilization must be brought to bear. At the same time, however, the public at large is disinclined to suffer serious financial burdens to counter the risk. Governments and the best private institutions must cooperatively develop effective action plans.

A major feature of climate change that is not yet properly appreciated is the ubiquity of the injuries and injustice it is causing. Civilization has no prior experience with such an upending and self-destructive dynamic, which is about to increase exponentially. Another major feature is the cruel asymmetry between the (relatively) modest injuries suffered by the rich industrial nations (during this generation) that caused this environmental emergency and the life-altering injuries that are being sustained by vulnerable and wholly innocent poorer nations. A third major feature of climate change is the need to raise a proper alarm over how little time is left for civilization to mount and mobilize a broad-based and resonate set of action plans to effect a rebalancing of the heating-imbalance being caused by the atmosphere saturated with greenhouse gases that causes global warming. These action plans must be planet wide.

Again, our goal is to enhance the rule of law to best equip our civilization to rebalance our out-of-balance planet.

### **Recent Breakthrough by France to Enhance the Rule of Law**

A statute adopted in France in 2017 requires all major corporations to publish an annual risk map in which they identify the impact of their commercial enterprises, including subsidiaries and supply chains, on human rights and the environment and invite comments from stakeholders and labor unions. Corporations in the garment and shoe industries, for example, that manufacture in poorer nations, must consider the working conditions in their factories, while France's major fossil fuel corporation, Total, must show how it will confront its contribution to climate change.

The effectiveness of this aspect of the statute has been revealed by research showing that dozens of French cities have written to Total, complaining that it has not yet responded to the disclosure obligation in the statute and threatening legal action to force compliance.<sup>28</sup> That response suggests that the United States could use the French statute as a starting point for our own legislation requiring that corporations that sell or use fossil fuel proactively disclose the impacts they and their subsidiaries now have and will have on human rights and the environment. That information would allow the public sector (including labor unions and environmental groups) to fashion a comprehensive set of follow-up interrogatories for response by the fossil fuel industry requesting that they acknowledge that the use of fossil fuel is harmful locally and globally to all humanity, that the burning of fossil fuels causes the release of greenhouse gases that remain in the atmosphere virtually permanently, and that all newly released greenhouse gases combine with those released previously to cause an acceleration of climate change. These requests for acknowledgment would cite other features in nature that will aggravate the effects of climate change, such as rising sea levels; melting of the Arctic ice, which reduces the beneficial albedo effect—that is, less of the sun's harmful radiation is reflected back into space—and the melting frozen methane and inexorable release of greenhouse gases from the thawing permafrost in Alaska, Canada, and Russia. Through these interrogatories, the corporations would be asked to show what they will do to mitigate the growing impact of climate change and how they plan to reduce their sales and use of fossil fuel.

Although these interrogatories are designed to occur at the national level, in the United States we are faced with the challenge that the current administration is obdurately contrarian. Some states and municipalities, however, are diligently proactive in decarbonizing the energy realm. Also, the online publication of the responses to the interrogatories might well draw a cadre of commentators who would offer to delve further.

The French statute constitutes a breakthrough whereby large transnational corporations will proactively engage in self-declarations of the most vexing risks that have been going unheeded; and yet such corporations and their subsidiaries and supply chains are in the best position to anticipate such risks and to interact with their active constabulary and stakeholders to raise the level of attention to such risks. And, further, in the case of fossil fuel constabulary, they are already becoming targets of public reckoning; and – although they would prefer to continue along in a semi-immune posture – the sooner these corporations and their insurers come to a state of currency and vigilance, as to these risks (which are building up and even accelerating) the sooner they can stop flying blind.

## **Finding a Human Right to a Healthy Environment**

Although there is no universal declaration for the human right to a healthy environment, regional human rights courts have begun advancing the role of human rights in coping with climate change, including the human right to a healthy environment.<sup>29</sup> It is well to point out that the global south is pushing these efforts, while the global north is typically averse. Within the global north, however, the European Union, inspired by the trail-blazing French statute, is biased in favor of its evolving its own, unique branch of regional-international law.

## **Conclusion**

The legal process has been striving to find new pathways in the face of the accelerating injustices caused by climate change. Claims have been brought in multiple court venues seeking to chastise and chasten governments to respond more competently and aggressively to climate change and the ensuing injustices. The first round of cases were pushed off and dismissed by the use of procedural barriers. But two notable litigations have persisted. *Juliana v. United States* was filed before the federal courts in Oregon by “youthful plaintiffs” who are represented by a nonprofit organization, Our Children’s Trust. Another, similar litigation, *Urgenda v. The State of the Netherlands*, brought by nine hundred Dutch citizens suing their government to strengthen its response to climate change, has been receiving much attention internationally.<sup>30</sup> *Juliana* seeks to bring our federal energy regulators (FERC) to heel but has encountered rare maneuvers that are frustrating the evidentiary component of the trial. *Urgenda*, however, has succeeded at the trial and appellate levels.

The vexing failure of domestic national legislatures to adopt any agenda toward countering and abating climate change has sensitized some trial courts to seek a proper, if creative, role toward remediating gross injustice. But, while courts can and will (in time) find a contributory role to cope with new injustice, such as in *Juliana* and *Uganda*, the thrust of this article is to point out that the legal process and the enhanced rule of law now offers a speedier pathway for civilization to mobilize such rule of law to rescue humanity: starting from the UNFCCC and the Paris Climate Agreement to interface with domestic regulatory jurisprudence to effect a transition away from foul fossil fuel to clean, sustainable fuel. Each nation (and in some instances substates) has established processes for regulating energy and the environment through which climate change can be better and more speedily treated than through the courts.

The sheer survival of humanity demands a rational, strategic, and sustained reduction in the burning of fossil fuel and its inexorable and irremediable emission of greenhouse gases. Through an enhanced rule of law and creative programming within the legal process, however, we must find novel and creative ways to balance the sustained pace at which a reduction in the use of fossil fuel should proceed. We are the last generation that can shape a new paradigm so that succeeding generations will have a chance at survival.

## **Notes**

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<sup>1</sup> Universal Declaration of Human Rights, United Nations, available at <https://www.un.org/en/universal-declaration-human-rights/> (accessed October 1, 2019).

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- <sup>2</sup> “Why Does the Jet Stream Affect Our Weather?,” New Scientist, May 22, 2019, <https://www.newscientist.com/lastword/mg24232311-600-why-does-the-jet-stream-affect-our-weather/>.
- <sup>3</sup> “The Paris Agreement,” United Nations Climate Change, 2019, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.
- <sup>4</sup> “Rio Declaration on Environment and Development,” Convention on Biological Diversity, UN Environment, <https://www.cbd.int/doc/ref/rio-declaration.shtml> (accessed October 1, 2019).
- <sup>5</sup> “Nationally Determined Contributions (NDCs): The Paris Agreement and NDCs,” United Nations Climate Change, 2019, <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>.
- <sup>6</sup> “Are the Goals of the Paris Accord Slipping out of Reach?,” PBS NewsHour, December 6, 2018, <https://www.pbs.org/newshour/show/are-the-goals-of-the-paris-accord-slipping-out-of-reach>.
- <sup>7</sup> “Temperatures: Addressing Global Warming,” Climate Action Tracker, last updated September 19, 2019, <https://climateactiontracker.org/global/temperatures/ast>.
- <sup>8</sup> “Finland Puts New Climate Target Top of EU Leadership Agenda,” Climate Home News, January 7, 2019, <https://www.climatechangenews.com/2019/07/01/finland-puts-climate-target-top-eu-leadership-agenda/>.
- <sup>9</sup> “Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C Approved by Governments,” IPCC, October 8, 2018, <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>.
- <sup>10</sup> Ibid. “To overshoot the mark by only a small amount, or not at all, requires reducing emissions by about 45 percent relative to 2010 levels by the year 2030, and reaching net zero around 2050,” the report notes. In comparison, to get to “below 2 degrees Celsius, emissions must decline by about 20 percent by 2030 and reach net zero by about 2075.”
- <sup>11</sup> Carolyn Gramling, “Limiting Global Warming to 1.5 degrees versus 2 Has Big Benefits, the IPCC Says,” *Science News*, October 7, 2018, <https://www.sciencenews.org/article/global-warming-limit-degrees-ipcc-climate-change>.
- <sup>12</sup> See U.S. EPA, “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,” 84 Fed. Reg. 32,520, 32,524, *Federal Register*, July 8, 2019. For an analysis of the EPA’s retreat from the holistic Clean Power Plan, see Joseph Goffman and Caitlin McCoy, “EPA’s House of Cards: The Affordable Clean Energy Rule,” Environmental and Energy Law Program, Harvard Law School, October 23, 2019, <http://eelp.law.harvard.edu/wp-content/uploads/ACE-Paper-Final.pdf>.
- <sup>13</sup> Andrew Beatty, “Australia Approves Vast Coal Mine Near Great Barrier Reef,” *Jakarta Post*, June 13, 2019, <https://www.thejakartapost.com/news/2019/06/13/australia-approves-vast-coal-mine-near-great-barrier-reef.html>.
- <sup>14</sup> The 2015 Catholic Climate Covenant is available at <https://catholicclimatecovenant.org/encyclical>.
- <sup>15</sup> “Inter-American Court Upholds Healthy Environment as Human Right,” ESCR-Net, February 5, 2018, <https://www.eschr-net.org/news/2018/inter-american-court-upholds-healthy-environment-human-right>.
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- <sup>17</sup> See John H. Knox, “Selected Reports to the United Nations,” in Knox’s curriculum vitae, available at <https://law.wfu.edu/faculty/profile/knoxjh/>.
- <sup>18</sup> See, for example, “UN Guiding Principles,” Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/un-guiding-principles> (accessed October 1, 2019).
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- <sup>20</sup> For a full study, see *The EU and the Corporate Impunity Nexus: Building the UN Binding Treaty on Transnational Corporations and Human Rights*, facilitated by the European Network of Corporate Observatories (Amis de la Terre France, CETIM, Observatoire des multinationales, OMAL, and the Transnational Institute, 2018), available at [https://www.tni.org/files/publication-downloads/the\\_eu\\_and\\_corporate\\_impunity\\_nexus.pdf](https://www.tni.org/files/publication-downloads/the_eu_and_corporate_impunity_nexus.pdf).
- <sup>21</sup> “As Carbon Dioxide Levels Climb, Millions at Risk of Nutritional Deficiencies,” press release, Harvard T. H. Chan School of Public Health, August 27, 2018, <https://www.hsph.harvard.edu/news/press-releases/climate-change-less-nutritious-food/>.

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- <sup>22</sup> See Kate Aronoff, “How to Bury the Fossil Fuel Industry,” In These Times, April 22, 2019, <https://inthesetimes.com/features/green-new-deal-public-control-of-coal-fossil-fuel-industry.html>; Coral Davenport, “Major Climate Report Describes a Strong Risk of Crisis as Early as 2040,” *New York Times*, October 7, 2018, <https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html>.
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- <sup>27</sup> The work of one such nonprofit, Ceres, is described on their website: <https://www.ceres.org/>.
- <sup>28</sup> “Fourteen Cities and NGOs Call On Total to Comply with French Duty of Vigilance Law,” Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law> (accessed October 21, 2019).
- <sup>29</sup> See John H. Knox and Ramin Pejan, introduction to Knox and Pejan, eds., *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press), doi:10.1017/9781108367530.001.
- <sup>30</sup> *Juliana v. United States* 217 F.Supp.3d 1224, 1239 (D. Or. 2016); *Urgenda v. The State of the Netherlands The “Reflex Effect”—Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*, 13 MCGILL J. SUST. DEV. L. 305, 324 (2017). For a comparison of the two cases, see, Inga Caldwell, “Utilizing Litigation to Propel Climate: A Comparison on Juliana and Urgenda,” Green Law blog, October 18, 2019, <http://greenlaw.blogs.pace.edu/2019/10/18/utilizing-litigation-to-propel-climate-action-a-comparison-of-juliana-urgenda/>. For a list of litigations pursuits around the world, see *The Status of Climate Change Litigation: A Global Review* (Nairobi, Kenya: United Nations Environment Programme, 2017), <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.