Dalhousie University Schulich School of Law

From the Selected Works of Sara L. Seck

2016

Business, Human Rights and the IBA Climate Justice Report

Sara L. Seck, *Dalhousie University Schulich School of Law*
Michael Slattery

Available at: <https://works.bepress.com/sara-seck/18/>

COMMENTARY

Business, Human Rights, and the IBA Climate Justice Report

Sara L Seck (PhD) is Senior Fellow, International Law Research Program (ILRP), Centre for International Governance Innovation (CIGI) and Associate Professor, Faculty of Law, Western University, London, Ontario, Canada; and Michael Slattery (MES), is a research assistant, CIGI ILRP, and JD Candidate, Western University.

Abstract

The International Bar Association’s (IBA) 2014 Climate Justice Report makes many important recommendations designed to contribute to the fight against climate change. One important step forward is its explicit recognition of the responsibility of business to respect human rights impacted by climate change. This Commentary explores the extent to which the IBA’s approach to this issue aligns with the business responsibility to respect human rights as described in the 2011 United Nations Guiding Principles on Business and Human Rights. The Commentary also considers other international standards that incorporate business responsibilities for human rights in order to determine whether sufficient guidance has yet emerged for businesses to effectively address human rights and climate concerns.

Introduction

In July 2014, the International Bar Association (IBA) released *Achieving Justice and Human Rights in an Era of Climate Disruption* (Climate Justice Report).¹ The product of a Task Force of IBA members, the Report adopts a ‘justice and human rights-centred approach’ with the explicit intention of ‘shift[ing] the focus of much-needed reform from purely economic and scientific considerations to the human rights and equity consequences of climate change’.² In keeping with this focus, this commentary will examine how the Report incorporates the responsibility of business to respect human rights as endorsed by the United Nations Human Rights Council in the 2011 Guiding Principles on Business and Human Rights (UNGPs).³

¹ International Bar Association Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association 2014) <www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx> accessed 24 August 2015 (Climate Justice Report).

² *Ibid* 3.

³ ‘New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council’ (*Office of the United Nations High Commissioner for Human Rights*, 2011) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164> accessed 24 August 2015; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”: a Framework for Business and Human Rights* (A/HRC/17/31, OHCHR 2011) <<http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>> accessed 24 August 2015 (UNGPs).

Climate change, human rights, and business

That climate change negatively impacts human rights is well established, despite the fact that ‘[h]uman rights treaties do not address climate change explicitly, and climate treaties do not refer to human rights’.⁴ As stated by Professor John Knox, now the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, together with other special procedures mandate holders of the United Nations Human Rights Council:

“Climate change is one of the greatest challenges of our generation with consequences that transform life on earth and adversely impact the livelihood of many people. It poses great risks and threats to the environment, human health, accessibility and inclusion, access to water, sanitation and food, security, and economic and social development. These impacts of climate change interfere with the effective enjoyment of human rights. In particular, climate change has a disproportionate effect on many disadvantaged, marginalized, excluded and vulnerable individuals and groups, including those whose way of life are inextricably linked to the environment.”⁵

Indeed, a broad range of human rights are adversely affected by climate change, including the right to life, to health, to food, to water and sanitation, to housing, and to self-determination, while the rights of vulnerable groups are of special concern, including women, children, persons with disabilities, those living in extreme poverty, and indigenous peoples.⁶ Procedural environmental rights may also be implicated, including rights to ‘*prior assessment* of environmental impacts, *full and informed* participation by those affected, and *effective remedies* for States’ failure to comply with their obligations’.⁷

⁴ John H Knox, ‘Human Rights Principles and Climate Change’ in Cinnamon Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *Oxford Handbook of International Climate Change Law* (OUP 2015) 1

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523599> accessed 24 August 2015.

⁵ ‘Statement of the UN Special Procedures Mandate Holders on the occasion of Human Rights Day’ (*Office of the United Nations High Commissioner for Human Rights*, 10 December 2014)

<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E> accessed 24 August 2015.

When this statement was made, Knox was serving as the Independent Expert on human rights and the environment. He subsequently accepted a 3 year mandate as Special Rapporteur. Knox is the Henry C. Lauerman Professor of International Law at the School of Law, Wake Forest University

<<http://law.wfu.edu/faculty/profile/knoxjh/>> accessed September 2, 2015. See also The United Nations Special Rapporteurs on the rights of persons with disabilities, Catalina D Aguilar; the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, John H Knox; extreme poverty and human rights, Philip Alston; the human right to safe drinking water and sanitation, Léo Heller; and the Independent Expert on human rights and international solidarity, Virginia Dandan, ‘The Effects of Climate Change on the Full Enjoyment of Human Rights’ (Paper provided to the Climate Vulnerable Forum in response to the invitation of its chair, the Philippines, *Office of the United Nations High Commissioner for Human Rights, Special Procedures of the United Nations Human Rights Council*, 30 April 2015) <<http://perma.cc/8XHE-R2UK>> accessed 24 August 2015.

⁶ Special Rapporteurs, ‘The Effects of Climate Change’ (n 5 above).

⁷ Knox, ‘Human Rights Principles’ (n 4 above) 6 (emphasis in original). See also John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H. Knox: *Mapping Report* (UNHRC United Nations Mandate on Human Rights and the Environment 30 December 2013) 8-12 <<http://srenvironment.org/mapping-report-2014-2/>> accessed 24 August 2015 (‘Human Rights Obligations’). This report describes State procedural obligations as including ‘duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to

That said, John Knox has also identified challenges with an international human rights law approach to climate change. The challenges stem in particular from developed states' reluctance to accept interpretations of their legal duties as extending to the protection of the rights of those outside of their territory or jurisdiction. While the limitations this reluctance creates may be removed through further development of the state duty to cooperate,⁸ a human rights approach designed to incentivize state implementation is not yet entirely straight forward. Over time, lessons from international environmental law concerned with transboundary harm may facilitate the acceptance of what Knox calls a 'diagonal approach, where States have obligations to those outside their territory but affected by their actions'.⁹

The 2011 UNGPs provide guidance for states with regard to the implementation of the duty to protect human rights from violations by non-state actors including businesses, as well as the duty of the state in providing access to remedy for victims of human rights violations.¹⁰ Yet the UNGPs also adopt a narrow framing of the jurisdictional reach of the state duty to protect, suggesting that while international law is permissive of the exercise of 'extraterritorial' state jurisdiction, exercising such extraterritoriality is not a positive obligation necessary for states to meet the duty to protect.¹¹ Alternatively, the business responsibility to respect human rights as articulated in the UNGPs is explicitly framed to extend beyond the boundaries of state territorial jurisdiction.

The corporate responsibility to respect rights is presented in Principle 11 of the UNGPs: 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.¹² The UNGPs Commentary to this Principle describes the responsibility as a 'global standard of expected conduct for all business enterprises wherever they operate' that 'exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights'.¹³ The responsibility arises in

provide access to remedies for harm.' 8, para 29. See also John H Knox, *Human Rights Obligations to Protect the Environment* (Keynote speech at the UNITAR-Yale Conference on Environmental Governance and Democracy: Human Rights, Environmental Sustainability, Post-2015 Developmental Agenda, and the Future Climate Regime 5 September 2014) 5-8 <<http://perma.cc/4NF4-GXXP>> accessed 24 August 2015; John H Knox, 'Statement by John H. Knox, Independent Expert on Human Rights and the Environment at 'The Development of Environmental Human Rights' (Office of the United Nations High Commissioner for Human Rights, 6 November 2014) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15274&LangID=E> accessed 24 August 2015.

⁸ Knox, 'Human Rights Principles' (n 4 above) 9, 11-12.

⁹ Knox, 'Human Rights Obligations' (n 7 above) 11.

¹⁰ UNGPs, (n 3 above) 6-7 (Principle 1), 7 (Principle 2), 8-13 (Principles 3-10), 22-23 (Principle 25), 23-24 (Principles 26 and 27).

¹¹ *Ibid* 7 (Commentary to Principle 2); Sara L Seck, 'Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights' (2011) 49 *Can YB Intl L* 51, 94-97, 105-113.

¹² UNGPs, (n 3 above) 13 (Principle 11).

¹³ *Ibid* 13 (Commentary to Principle 11), 4 (para 6), describing it as 'the basic expectation that society has of business in relation to human rights.'

relation to all ‘internationally recognized human rights’.¹⁴ Further, according to Principle 13, the responsibility requires business enterprises to:

- ‘(a) Avoid causing or contributing to adverse human right impacts through their own activities, and address such impacts where they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.¹⁵

Business relationships ‘include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services’.¹⁶ Indeed, the responsibility to respect ‘applies to all enterprises regardless of their size, operational context, ownership and structure’.¹⁷ Implementation of the responsibility to respect requires the adoption of a policy commitment to human rights, a human rights due-diligence process ‘to identify, prevent, mitigate and account for how they address their impacts on human rights’ and ‘processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute’.¹⁸ Operational principles expand upon these requirements.¹⁹ Notably, human rights due diligence must go beyond a one-sided examination of material risks to the company ‘to include risks to rights-holders’.²⁰

While business responsibility to respect human rights under the UNGPs is framed as a social expectation rather than an obligation under international human rights law, it remains nonetheless legally relevant. Adherence to the UNGPs serves both to protect rights-holders, and to protect enterprises from the potential of future litigation risks.²¹ Since 2011, it has been integrated into numerous guidance documents for business enterprises²² including the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines),²³ the International Finance Corporation’s Sustainability Performance Standards²⁴--which inform the standards adopted by the Equator Principles

¹⁴ UNGPs, (n 3 above) 13 (Principle 12).

¹⁵ *Ibid* 14 (Principle 13).

¹⁶ *Ibid* 14 (Commentary to Principle 13). See further *ibid* 16 (Principle 17(a) on human rights due diligence).

¹⁷ *Ibid* 14 (Principle 14).

¹⁸ *Ibid* 15 (Principle 15).

¹⁹ *Ibid* 16-24 (Principles 16-21).

²⁰ *Ibid* 18-19 (Commentary to Principle 17).

²¹ Michael Torrance, ‘Persuasive Authority Beyond the State: A Theoretical Analysis of Corporate Social Responsibility Norms as Legal Reasons within Positivist Legal Systems’ (2011) 12 *German L J* 1573; Yousuf Astab, ‘The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies’ (2014) 60 *Rocky Mt Min L Inst* 19-1.

²² Sara L Seck, ‘Business, Human Rights, and Canadian Mining Lawyers’ (2015) 56 *Can Bus L J* 208, 216-222.

²³ Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD 2011) 31-34 <<https://mneguidelines.oecd.org/text/>> accessed 24 August 2015.

²⁴ International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (IFC 2012) Performance Standard 1, Performance Standard 3

<www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes> accessed 24 August 2015; International Finance Corporation, *International Finance Corporation’s Guidance Notes: Performance Standards on Environmental and Social Sustainability* (IFC 2012)

<www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes>

Sara L Seck & Michael Slattery, “Business, human rights and the IBA Climate Justice Report” (2016) 34:1 *Journal of Energy & Natural Resources Law* 75-85

financial institutions²⁵--and the International Organization for Standardization’s (ISO) Social Responsibility Standard 26000.²⁶ Each of these standards also addresses environmental concerns in different ways, including in some cases with reference to climate change.²⁷ However, none of these provide comprehensive guidance on how such responsibility for human rights affected by climate change should be integrated into business practice.

The IBA’s Climate Justice Report

According to Task Force co-chair Helena Kennedy’s public synthesis,²⁸ the first steps that state legal systems should formally take to implement the Climate Justice Report recommendations are to:

- 1 – Recognise climate change victims;
- 2 – Reinforce human rights;
- 3 – Hold corporations to account;
- 4 – Beef up international institutions; and
- 5 – Get the trade system right.

Kennedy’s synthesis is consistent with the Report’s general observation that, ‘[w]ith respect to corporate responsibility, the current regulatory regime imposed by international environmental, human rights or trade law is, at best, inconsistent and, at worst, ineffective’.²⁹ It is without surprise, then, that half of the Report is concerned with enhancing existing legal regimes.³⁰

The Task Force has focused on the success of the first Model Law on International Commercial Arbitration (UNCITRAL Model).³¹ Having fostered ‘a hospitable legal climate for such proceedings in those states that have adopted it’,³² and its widespread adoption globally, the

k+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes> accessed 24 August 2015.

²⁵ Equator Principles Financial Institutions, *The Equator Principles* (Equator Principles, June 2013) <www.equator-principles.com/index.php/equator-principles-3> accessed 24 August 2015.

²⁶ International Organization for Standardization, *ISO 26000:2010 Guidance on Social Responsibility* (ISO 2010) ch 4 <www.iso.org/iso/home/standards/iso26000.htm> accessed 24 August 2015.

²⁷ See, eg, André Abadie and Michael Torrance, ‘Performance Standard One: Assessment and Management of Environmental and Social Risks’ in Michael Torrance (ed), *IFC Performance Standards on Environmental & Social Sustainability: A Guidebook* (LexisNexis Canada 2012) 37; Tina Costas, ‘Performance Standard Three: Resource Efficiency and Pollution Prevention’ in Michael Torrance (ed), *IFC Performance Standards on Environmental & Social Sustainability: A Guidebook* (LexisNexis Canada 2012) 120, 128-135 (IFC Guidebook).

²⁸ Helena Kennedy, ‘Five Ways to Achieve Climate Justice’ *The Guardian* (London, 12 January 2015) <www.theguardian.com/sustainable-business/2015/jan/12/achieve-climate-justice-human-rights>, accessed 24 August 2015.

²⁹ IBA, Climate Justice Report (n 1 above) 16.

³⁰ See generally *ibid* ch 3.

³¹ *Ibid* 127; see also United Nations Commission on International Trade Law Secretariat, *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* (UNCITRAL Secretariat 2013) 15 <<http://perma.cc/G5XC-DK7G>> accessed 24 August 2015, whereby ‘The Model Law on International Commercial Arbitration, which could be described as a procedural instrument, provides a discrete set of interdependent articles.’

³² IBA, Climate Justice Report (n 1 above) 127; see also United Nations Commission on International Trade Law, ‘UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006’ (UNCITRAL, 2015) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>

Sara L Seck & Michael Slattery, “Business, human rights and the IBA Climate Justice Report” (2016) 34:1 *Journal of Energy & Natural Resources Law* 75-85

Task Force felt the UNCITRAL Model would be the best avenue to follow for a Model Statute on the Legal Remedies for Climate change. Ultimately, ‘The Model Statute would be relevant not just for purposes of developing domestic statutes, but in promoting the development of consistent international legal standards relevant to procedural rights related to climate justice litigation, which face many of the same conceptual difficulties and issues’.³³ Recommendations are also made with regard to the potential of other accepted international dispute resolution mechanisms, including both the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).³⁴ As fora intended to address the type of disputes foreseen by the Task Force, there are challenges in following the ICJ and ITLOS processes. These include limited state acceptance of ICJ and ITLOS jurisdiction, the lack of enforcement mechanisms, and the fact that states themselves must enforce recommendations and the execution of judgments.³⁵

Although section 3.1.3 of the Climate Justice Report focuses upon Climate Justice and Corporate Responsibility, it retains a somewhat state-centric approach in its analysis and recommendations. The introductory material highlights that while the Report ‘supports the increasing international recognition of corporate responsibility for environmental and human rights harms,’ this responsibility:

‘must be accompanied by development of coherent and clear regulatory standards that make compliance possible. The impetus is upon states and international organisations to come to coherent and consistent standards to regulate corporates and multinationals within their jurisdiction as part of their efforts to mitigate and adapt to climate change’.³⁶

Accordingly, the Report presents a ‘multi-faceted approach to corporate responsibility that will increase the ability of corporations to self-regulate, including in response to increased regulation by states’.³⁷

The first step in this approach is the recommendation that corporations ‘adopt and promote’ the UNGPs ‘as they pertain to human rights and climate change’ and that the OHCHR ‘develop a model internal corporate policy’ to advance corporate responsibility specifically in the climate change context.³⁸ According to the Report a model policy should require corporate commitment to three steps: first, the adoption of an explicit policy stipulating measures to prevent or mitigate climate impacts linked to operations; second, the implementation of a due-diligence process ‘to identify, prevent, mitigate and account’ for ‘actual climate change impacts’ which must then be translated ‘into active efforts to minimise or reverse’ impacts; and third, implementation of ‘remediation processes that allow for open communication with stakeholders

accessed 24 August 2015, where to date 69 states have adopted the UNCITRAL Model Law, for a total of 99 trade jurisdictions.

³³ IBA, Climate Justice Report (n 1 above) 127.

³⁴ *Ibid* 28.

³⁵ *Ibid* 138-39.

³⁶ *Ibid* 148.

³⁷ *Ibid*.

³⁸ *Ibid*.

most affected by the corporation’s operations’.³⁹ The measures to be adopted ‘must include due diligence of corporate projects, including the environmental practices of the company’s affiliates, and as far as is reasonably practicable, its major contractors and suppliers’.⁴⁰ In terms of translating awareness of impacts into active efforts, the Report provides further guidance, stating:

‘The corporation should consider measures it can implement to assist in achieving the objective of limiting global warming to no more than a 2 degree Celsius increase. The corporation’s goal should be to implement the most advanced available technology to minimise its carbon footprint. In situations where negative impact on the environment is unavoidable given current technology or if the cost of such technology is prohibitive, the corporation bears responsibility for corresponding mitigation and remediation’.⁴¹

While this is an important statement on business responsibilities for human rights with regard to climate change, it also can be questioned for its silence. The statement fails to suggest that there may be situations where the negative impact on human rights affected by climate change would be so severe that, irrespective of the implementation of mitigation and remediation measures, a proposed project should simply not proceed. The implications of such a position are undoubtedly far reaching, but are not, however, unreasonable. For example, in 2003, members of the International Council of Mining and Metals agreed that existing World Heritage properties should be treated as ‘no-go’ areas.⁴² Of course, a key problem in the climate change context is that it is cumulative emissions which create the global problem, not emissions from individual projects. Yet, if the atmosphere were conceptualized as part of the global public trust – arguably analogous to ‘world heritage’ – then limiting the amount any single project may harm the atmospheric trust is more easily justifiable.⁴³ The reference made to responsibility for ‘corresponding mitigation and remediation’ measures may be intended to ensure that the atmospheric trust is preserved in full. However, it is a weaker formulation than a proposal that either sets or identifies the need to set a ‘no-go’ emissions threshold.

The recommendation that remediation processes be implemented to provide opportunities for ‘open communication with stakeholders most affected by the corporation’s operations’ also raises a concern. Specifically the issue is with the causal difficulty (if not impossibility) of linking individual GHG emissions to specific ‘directly affected’ stakeholders. Depending on the theory of liability, establishing a chain of causation in climate change claims is an unresolved issue, due to the inherent difficulty of delineating individual climate changing activities from the

³⁹ *Ibid* 148-149. Specifically, the rationale given for the third recommendation is that ‘internal assessments of potential environmental or human rights impacts can fall short of a complete picture of the actual impact on nearby and distant communities.’

⁴⁰ *Ibid* 148.

⁴¹ *Ibid* 149.

⁴² ‘Mining and Protected Areas: Position Statement’ (ICMM, 2003) <<http://perma.cc/L8UM-X8JX>> accessed 24 August 2015. The International Council on Mining and Metals (ICMM) was created in 2001 as a response to a multi-stakeholder initiative on sustainable mining. It is a membership organization with members drawn from global company and industry associations. ICMM, ‘About Us’ <<http://www.icmm.com/about-us/about-us>> accessed 2 September 2015. See alternately IFC Performance Standard 6 with regard to ‘no net loss of biodiversity’ (where feasible) as discussed in Torrance IFC Guidebook (n 27 above) 247-249.

⁴³ On the atmosphere as a global public trust see Mary Christina Wood, ‘Atmospheric Trust Litigation’ in William CG Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009); Mary Christina Wood, *Nature’s Trust: Environmental Law for a New Ecological Age* (CUP 2014).

collective whole. The Task Force makes some suggestions as to what standard would establish causation. One is relying on credible scientific claims of future harm; another is similar in fashion, but has less legal certainty, and that is to adhere to the Precautionary Principle.⁴⁴ Alternatively, the Task Force suggests adhering to a standard of partial causation that would require only showing the defendant’s conduct was a substantial factor in bringing about harm, or, avoiding any need to establish an anthropogenic source of climate change harm, a claimant would need only to establish a prima facie case that the defendant is a net emitter of greenhouse gases, creating a rebuttal presumption of causation and shifting the burden of proof to the defendant.⁴⁵

It is well understood by members of the extractive industries that it is prudent to identify and engage with stakeholders.⁴⁶ This includes in particular indigenous and local affected communities, in advance of project implementation, even at the earliest possible stage of exploration. The most recent guidance on point is the draft OECD ‘Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector,’ released for comment in April 2014.⁴⁷ The OECD draft Guidance carefully distinguishes ‘stakeholders’ from ‘rights-holders,’ noting that while all stakeholders have human rights, not all ‘will have their human rights put at risk or impacted by an extractive project or its associated activities’.⁴⁸ It further acknowledges that meaningful engagement with local communities may even involve seeking consent, particularly if the community self-identifies as indigenous with a right to free, prior and informed consent under international law.⁴⁹ Pointedly, the draft Guidance identifies potential rights holders as including individuals in a community whose only water source has been polluted – infringing

⁴⁴ IBA, Climate Justice Report (n 1 above) 131. The Precautionary Principle is not defined in the IBA Climate Justice Report. A frequently quoted definition is Principle 15 of the 1992 Rio Declaration: ‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ See also definition of the Precautionary Principles in the Oslo Principles (n 74 below).

⁴⁵ *Ibid* 132. For a detailed proposal of what a common law tort for negligent climate adaptation might well appear as, see also Maxine Burkett, ‘Legal Rights and Remedies’ in Michael B Gerrard and Katrina Fisher Kuh (eds), *The Law of Adaptation to Climate Change: United States and International Aspects* (ABA 2012) ch 25; Maxine Burkett, ‘Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice’ (2012) 42 *Env L R* 11144; Maxine Burkett, ‘Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change’ (2013) 20:3 *Geo Mason L Rev* 775.

⁴⁶ Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002); Rachel Davis and Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector* (Harvard Kennedy School 2014).

⁴⁷ Organization for Economic Co-operation and Development, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector, Draft for comment* (April 2015) 4 <<http://perma.cc/E6PS-PGMA>> accessed 24 August 2015 (Due Diligence Guidance Draft).

⁴⁸ *Ibid* 11.

⁴⁹ *Ibid* 46, Annex B ‘Engaging with Indigenous Peoples’. See also IFC, Performance Standards (n 24) Performance Standard One (affected community engagement), Performance Standard Seven (indigenous peoples’ right to Free Prior Informed Consent); Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *Extractive Industries and Indigenous Peoples* (A/HRC/24/41, UNHRCOR 2013) <<http://unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples>> accessed 24 August 2015.

a right to water.⁵⁰ Despite this, the OECD draft Guidance is silent on climate change, and so is of no assistance for extractive companies on how to respect human rights affected by climate change.

In contrast, the IFC Standards, do provide some limited guidance. For example, they explain how to identify and then take into account general climate change impacts as risks that might arise in association with a proposed project, even though not ‘caused’ by project carbon emissions.⁵¹ The Climate Justice Report identifies the need for open communication with affected stakeholders including ‘nearby and distant communities’ so as to obtain a ‘complete picture’ of ‘climate change impacts, which are not strictly localised to any one area’.⁵² It remains to be seen whether effective guidance can be developed to assist companies that seek to purposefully avoid infringing human rights affected by climate change. A broad consideration of the rights of the vulnerable (such as children, future generations, and indigenous peoples) may assist, perhaps in conjunction with implementation of procedural environmental rights, and acceptance of submissions by concerned non-governmental organisations.⁵³

Three other recommendations are identified in section 3.1.3 of the Climate Justice Report to further climate change justice and corporate responsibility. Recommendation two addresses reporting by corporations and is two-fold. On the one hand businesses should incorporate ISO carbon footprint standards in GHG management programs, and on the other hand states and international organisations should develop and adopt in parallel ‘clear and implementable objective standards for corporate reporting in respect of human rights issues pertaining to the environment’.⁵⁴ International institutions must then monitor corporate compliance with GHG emissions limits.⁵⁵ Recommendation three draws attention to the state duty to protect human rights and the need for ‘robust regulation of corporations within each state’s jurisdiction’ including the development of ‘sufficient’ judicial capacity to hear complaints and enforce remedies against all corporations *operating or based in their territory*.⁵⁶ The Task Force then highlights the need for states to identify clear obligations for corporations ‘so that corporates are

⁵⁰ OECD, Due Diligence Guidance Draft (n 47 above) 11, 30-33 (Table II(1) identifying potential human rights impacts of extractive industries).

⁵¹ Abadie and Torrance, ‘Performance Standard One’ (n 27 above); see however Costas, ‘Performance Standard Three’ (n 27 above) 120, where she notes that as ‘forecasts of climatic changes over a project life-time (often more than 20 years) are either unavailable, unreliable, or can be conflicting’ in many parts of the world, a ‘significant technological burden’ is imposed on the companies seeking ‘to determine if a new development is likely to be affected by, or exacerbate the effects of, climate change.’

⁵² IBA, Climate Justice Report (n 1 above) 149.

⁵³ For a detailed review of issues with implementing Principle 10 of the Rio Declaration on Environment and Development, see Forum for a Sustainable Future, *Review of Implementation of the Rio Principles* (UN-DESA 2011) 67-73 <<http://perma.cc/M5ZY-W8KV>> accessed 24 August 2015. See also The Access Initiative, ‘Environmental Democracy Index’ (*Environmental Democracy*, 2015) <www.environmentaldemocracyindex.org/> accessed 24 August 2015, which tracks states’ laws protecting transparency, participation, and justice in environmental decision-making; cf Meinhard Doelle, ‘Climate Change and Human Rights: The Role of International Human Rights in Motivating States to take Climate Change Seriously’ (2004) 1 Mq J Intl Comp Env L 1 <<http://ssrn.com/abstract=2502276>> accessed 24 August 2015; or cf Albert Koehl, ‘EA and Climate Change Mitigation’ (2010) 21 J Env L & Prac 181. But see Costas, ‘Performance Standard Three’ (n 27 above) on informational challenges.

⁵⁴ IBA, Climate Justice Report (n 1 above) 149-150.

⁵⁵ *Ibid* 151-152.

⁵⁶ *Ibid* 152 (emphasis in original).

able to put in place strategies to comply with regulation’ which must ‘strike the proper balance between under- and over-regulation’ and not be ‘characterised by gaps and loopholes’ that would create ‘enforcement difficulties and hamper the effectiveness of remedies’.⁵⁷ Given the challenges associated with the design of such regulation, it is not surprising that the Task Force then returns to the importance of regulation ‘through legislation requiring full disclosure of GHG emissions both at home and abroad’.⁵⁸ Here the Task Force does not, as it does later in the report, suggest that regulation ‘ultimately’ include ‘more stringent regulation of global fossil fuel reserves’ due to the ‘cumulative carbon budget’, nor does it--more provocatively--suggest that regulation could mean a prohibition⁵⁹ on future fossil fuel extraction.

Recommendation four of section 3.1.3 turns to sector-specific initiatives in banking and finance. Here, reference is made to the work of the UNEP Finance Initiative, Equator Principles financial institutions, and the OECD’s Arrangement on export credit agencies.⁶⁰ While there are hopeful signs that increasing attention is being paid to climate change in these and related initiatives,⁶¹ it is not at all clear that the steps being taken neatly align with business responsibilities for human rights affected by climate change. The Climate Justice Report’s ‘encouragement’ of ‘sector specific initiatives promoting human rights and in particular environmental rights, as seen in the banking and finance sector’ is a step in the right direction. Even so, it falls short of stating that the prevention and remediation of violations of human rights affected by climate change is an unavoidable and legally relevant responsibility of all businesses, including the financial industry, and not merely a nice idea.

Conclusions

This commentary has examined the extent to which the IBA’s Climate Justice Report incorporates the business responsibility to respect human rights affected by climate change, in accordance with the UNGPs. While the focus of the IBA Report is multi-faceted and some attention is given to the UNGPs, it is not a fully comprehensive treatment. This is unsurprising, as little guidance has been developed to date that brings together business responsibilities with environmental rights, nor the even more challenging task of guiding business responsibilities to prevent and remedy human rights violations arising from climate change. However, as John Knox identifies in a recent report, some businesses have shown leadership by intertwining and aligning their human rights and environmental policies throughout their global supply chains.⁶² Problematically, this approach is not universal to companies nor does it solve the divisive issue of the transboundary harm wrought by climate change. As Knox summarizes, ‘Many areas require further attention...in particular: the importance of clarifying and implementing human

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid* 176.

⁶⁰ *Ibid* 134.

⁶¹ See, eg, OECD, OECD Guidelines (n 23 above) and IFC, Performance Standards (n 24 above) as discussed earlier.

⁶² Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox, *Compilation of Good Practice* (A/HRC/28/61, OHCHR 2015) 21 <<http://srenvironment.org/2015/03/02/annual-report-to-the-human-rights-council-2/>> accessed 24 August 2015.

rights obligations relating to transboundary environmental harm, in particular with regard to the global harm caused by climate change’.⁶³

Guidance for business is clearly needed, indeed long overdue, given how slowly state action has materialized. As Professor John Ruggie, the author of the UNGPs, constantly reiterates, ‘there is no silver bullet’⁶⁴ – meaning normative principles, guidance, and laws are needed for both states and businesses, indeed, all individuals and organisations. This many-sided approach is consistent with economist and Nobel Laureate Elinor Ostrom’s identification of the need for a ‘polycentric order’ to address climate change.⁶⁵ Climate change creates inherent challenges for achieving cooperation on a global scale, challenges magnified when combined with endemic problems in controlling GHG emissions, exemplified by the issue of carbon leakage.⁶⁶ A polycentric order is ‘one where many elements are capable of making mutual adjustments for ordering their relationships with one another within a general system of rules where each element acts with independence of other elements’.⁶⁷ Ultimately, ‘The advantage of a polycentric approach is that it encourages experimental efforts at multiple levels, as well as the development of methods for assessing the benefits and costs of particular strategies adopted in one type of ecosystem and comparing these with results obtained in other ecosystems’.⁶⁸

One of the recommendations of the IBA Climate Justice Report is to increase ‘international recognition of corporate responsibility for human rights harms stemming from climate change’.⁶⁹ Such recognition has been bolstered by the recent ‘Oslo Principles on Global Obligations to Reduce Climate Change’, adopted by a group of legal experts on 1 March 2015.⁷⁰ The Oslo Principles ‘identify and articulate a set of Principles that comprise the essential obligations States and enterprises have to avert the critical level of global warming’.⁷¹ They are clear that legal responsibility for climate change rests not only with states, but also with

⁶³ *Ibid* 21.

⁶⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (A/HRC/8/5, OHCHR 2008) para 7

<<http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>> accessed 24 August 2015.

Ruggie is the Berthold Beitz Professor of Human Rights and International Affairs at Harvard University’s Kennedy School of Government and an Affiliated Professor of International Legal Studies at Harvard Law School

<<http://www.hks.harvard.edu/about/faculty-staff-directory/john-ruggie>> accessed 2 September 2015.

⁶⁵ See Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* (Policy Research Working Paper, World Bank 2009) 5 <<http://dx.doi.org/10.1596/1813-9450-5095>> accessed 24 August 2015. Here she states that ‘The classic theory of collective action predicts that no one will change behavior and reduce their energy use unless an external authority imposes enforceable rules that change the incentives faced by those involved. This is why many analysts call for a change in institutions at the global level’.

⁶⁶ *Ibid* 12, 29 – 31. Leakage refers to either leakage by production, where GHG producing activities relocate out of a jurisdiction that limits GHG emissions to a jurisdiction that has fewer limits, or market leakage, which ‘refers to changes in price structure that may occur as a result of restrictions on harvesting from forests.’ These restrictions may decrease the volume of timber cut in designated areas but may also create an incentive to relocate extraction to exploit forest resources in another jurisdiction.

⁶⁷ Vincent Ostrom, ‘Polycentricity—Part 1’, in Michael McGinnins (ed), *Polycentricity and Local Public Economies* (University of Michigan 1999) 52-74 (as cited in Ostrom, *Polycentric Approach* (n 65) 33).

⁶⁸ Ostrom, *Polycentric Approach* (n 65 above) 39.

⁶⁹ IBA, *Climate Justice Report* (n 1 above) 8; cf pages 25 – 31.

⁷⁰ Oslo Principles, *Oslo Principles on Global Climate Change Obligations* (Oslo Principles, 2015) <www.osloprinciples.org/principles/> accessed 24 August 2015.

⁷¹ *Ibid* 1.

‘enterprises’: ‘While all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises’.⁷² Responsibility arises from a duty of humanity as ‘guardians and trustees of the Earth’ to ‘preserve, protect and sustain the biosphere’ as part of the ‘common heritage of humanity’.⁷³ The Oslo Principles are said to reflect existing legal obligations to ‘respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere,’ and are said to be derived from sources of law that are ‘local, national, regional, and international’ including ‘international human rights law, environmental law, and tort law’ as well as the Precautionary Principle.⁷⁴ It is natural then that the authors’ Commentary to the Oslo Principles references the UNGPs directly.⁷⁵ The Climate Justice Report, and subsequent Oslo Principles, point to the urgent need for increased guidance on the implementation of business responsibilities for human rights harms arising from climate change.

Funding

The authors would like to thank CIGI ILRP for funding support.

⁷² *Ibid.* Note that ‘Enterprises’ is not defined.

⁷³ *Ibid.*

⁷⁴ *Ibid* 3: ‘a. The Precautionary Principle requires that: 1) GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and 2) the level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts. b. The measures required by the Precautionary Principle should be adopted without regard to the cost, unless that cost is completely disproportionate to the reduction in emissions that will be brought about by expending it.’

⁷⁵ Oslo Principles, ‘Oslo Principles Commentary’ (*Oslo Principles*, 2015) 81, 83-84 <www.osloprinciples.org/oslo-principles-commentary/> accessed 24 August 2015.