

## **Defensoría del Pueblo de Ecuador**

### **El cambio climático y el derecho a la salud**

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**1. Please describe, in your view, the relationship between climate change and the enjoyment of the right to health and any human rights obligations to mitigate and adapt to climate change that can be derived therefrom.**

#### **Climate change and its impacts on human rights**

As the “The Effects of Climate Change on the Full Enjoyment of Human Rights”<sup>1</sup> report, prepared by United Nations special procedures and presented on 1 May 2015 to the Conference of Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC), clearly states, “it is now well understood that climate change can and does adversely affect the enjoyment of a broad range of human rights”. Based on this report, 27 Special Procedures produced a joint statement to “draw attention again to the grave harm climate change poses to the worldwide enjoyment of human rights”.

Likewise, acknowledging the science that serves to construct these statements, the Defensoría del Pueblo del Ecuador recognizes the deeply negative impacts on the enjoyment of a broad range of human rights climate change provokes.

Nevertheless, it is necessary to critically review these assertions in order to better comprehend the conceptual link between human rights and climate change, and consequently the State obligations it entails.

If the adverse consequences of climate change on human rights are proven and internationally recognized, a reevaluation of the nature of the actions that contribute to climate change is mandatory. Can they in themselves be considered a human rights violation? For example, concerning the right to health, if undoubtedly the emissions of greenhouse gases (GHG) negatively impact negatively on the enjoyment of the right to health, why are the uncontrolled and unregulated emissions of GHG in themselves not considered a violation of such right? The same reasoning may be applied to the right to self-determination, recognized in the first article of both Covenants (ICCPR and ICESCR). If it is established beyond any doubt a causality link between the emissions of greenhouse gases and rising sea level, causing the physical disappearance of small island states and the deprivation of those peoples own means of subsistence, can the uncontrolled, unregulated or even the non-prohibition of emissions of GHGs *per se* amount to a violation of the right to self-determination of those peoples?

The report on “The Effects of Climate Change on the Full Enjoyment of Human Rights” quickly elaborates on such causality link between climate change and the right to life, right to health, right to food, right to water and sanitation, right to housing and the right to self-determination. But it lacks in its depth of the consequences of recognizing this causality, mainly that unregulated, uncontrolled or ill-regulated and ill-controlled GHG emissions might be considered human rights

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<sup>1</sup>Special procedures of the United Nations human Rights Council, “The Effects of Climate Change on the Full Enjoyment of Human Rights”, 30 April 2015.



violations in themselves. And if they are, what are the consequences on State obligations concerning climate change.

### **State obligations and climate change**

States have mainly four obligations concerning human rights: respect, protect, fulfil and promote<sup>2</sup>. “The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”<sup>3</sup> We will argue that, beyond the obligation to mitigate and to adapt to climate change, as an obligation to fulfil, (1) States have an obligation to protect against climate change and the curtailing of the full enjoyment of human rights it provokes; and (2) States have an obligation to respect human rights by refraining from causing climate change, acknowledging the human rights violations its consequences can constitute.

In the Fifth Assessment Report of the Intergovernmental Panel on Climate Change of 2014<sup>4</sup>, Adaptation is defined as “the process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects”. And the mitigation of climate change is “a human intervention to reduce the sources or enhance the sinks<sup>5</sup> of greenhouse gases (GHGs). This report also assesses human interventions to reduce the sources of other substances which may contribute directly or indirectly to limiting climate change, including, for example, the reduction of particulate matter emissions that can directly alter the radiation balance (e.g., black carbon) or measures that control emissions of carbon monoxide, nitrogen oxides, Volatile Organic Compounds and other pollutants that can alter the concentration of tropospheric ozone which has an indirect effect on the climate.”

In the domain of human rights, States have specific recognized obligations. To comprehend how the obligations to mitigate and adapt may correspond to a human rights obligation an analogy is the best instrument.

Hypothetically, if a certain business is polluting a river with deadly chemicals and is therefore affecting negatively a series of human rights of a group of people, from a human rights perspective, it is unthinkable that the only obligations the State possesses are to mitigate, that is “to reduce the sources or enhance the sinks of” the polluting chemicals, and to adapt, to “adjust to actual or expected [*pollution*] and its effects”.

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<sup>2</sup>Although the general obligation to promote is one of the main State obligations, the center of this section will be the obligations to protect and respect.

<sup>3</sup>OHCHR, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

<sup>4</sup>IPCC, Fifth Assessment Report, 2014, Annex II - Glossary.

<sup>5</sup>According to the AR5 of the IPCC, sink is “any process, activity or mechanism that removes a greenhouse gas (GHG), an aerosol or a precursor of a GHG or aerosol from the atmosphere”.

Those measures are surely due to be undertaken, for they constitute a form of positive action to facilitate the enjoyment of basic human rights, as a form to observe its obligation to fulfil, but they are most evidently insufficient regarding the totality of the human rights obligations the State has towards this type of rights damaging actions, namely the obligation to protect and the obligation to respect.

In the case of climate change, the logic is similar. Mitigation and adaptation can account for the State obligation to fulfil but fall short in accounting for the State obligations to protect and to respect.

The general obligation to protect presupposes four specific obligations: prevent, investigate, sanction and redress human rights violations. In the case of the polluted river, it is expected that the State takes all measures necessary to prevent the pollution of the river, for example through regulation, control or even prohibition of that particular polluting activity near the river or anywhere else. It is also expected to investigate the facts, determine responsibilities, sanction those responsible and redress the victims.

Likewise, acknowledging the deeply negative effects on the full enjoyment of a broad range of human rights, why would the State obligation to protect be any different in the case of climate change? Bearing in mind the vocabulary contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>6</sup>, States have consequently the duty to “take appropriate legislative and administrative and other appropriate measures to prevent” climate change; investigate its adverse effects on the enjoyment of human rights “effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible”; “provide those who claim to be victims of a human rights [...] violation with equal and effective access to justice [...] irrespective of who may ultimately be the bearer of responsibility for the violation”; and “provide effective remedies to victims, including reparation” for climate change and its consequences.

Furthermore, beyond their responsibility to protect against human rights abuses from third parties, do States have an obligation to respect human rights vis-à-vis climate change?

Revisiting the analogy of the polluted river, if the business having polluted the river is a State owned corporation, then logically it is the State that is responsible for polluting the river and failed in its obligation “to refrain from interfering with or curtailing the enjoyment of human rights” of the people affected by such pollution. As with the river, the emissions of greenhouse gases are in a considerable proportion responsibility of State owned entities. The interference and curtailment of human rights such emissions provoke being out of any doubt, as we explained earlier, States are obliged to stop GHG emissions, not merely reducing emissions, as a form of compliance with their obligation to respect human rights.

Finally, when debating “the relationship between climate change and the enjoyment of the right to health and any human rights obligations to mitigate and adapt to climate change that can be

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<sup>6</sup>General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2015), available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

derived therefrom”, the sole conclusion possible is that the enjoyment of the right to health is dependent on the observance of the State obligations regarding climate change. Nevertheless, those obligations rise above mitigation and adaptation and must be bound to the general obligations of human rights, to fulfil, protect, and respect, with all the implications it entails.

In this sense, acting exclusively on mitigation and adaptation may result in States failing in their obligations to protect and respect the human right to health vis-à-vis climate change, thus committing a violation of the right to health.

**2. Please share a summary of any relevant data on the impacts of climate change on the enjoyment of the human right to health including its underlying determinants (education, water and sanitation, food, housing, etc.), disaggregated to the extent possible.**

In conformity with its constitutional and legal competencies, the Defensoría del Pueblo del Ecuador does not work with information on this matter and does not possess any relevant data.

**3. Please describe existing national commitments, legislation and policy frameworks related to climate change mitigation and adaptation including any specific measures intended to prevent the worst impacts of climate change on the right to health; to ensure access to information, transparency, participation, and other procedural rights of persons affected by climate actions; to promote, protect and fulfil all human rights particularly those closely linked to the underlying determinants of health such as food, water and sanitation, housing, etc.; and to ensure that climate-related actions respect, promote, protect and fulfil human rights. Please share any relevant information on the implementation of existing commitments to address climate change and its impacts.**

All governmental action has to be guided by the general principles contained in the Constitution (2008). Concerning climate change, two constitutional provisions frame all policy: Nature’s rights recognized in articles 71 to 74, and article 414 that obliges the State to “adopt adequate and transversal measures for mitigation of climate change, through the limitation of emissions of greenhouse effect gasses, deforestation and atmospheric pollution; it will take measures for the conservation of forests and vegetation, and it will protect the population at risk”<sup>7</sup>.

Secondly, as specified in the Second National Communication on Climate Change (2011), the Executive Decree 1815 of 2009 declares the mitigation of climate change and adaptation to its effects a State policy, and the Executive Decree 495 of 2010 creates the Inter-institutional Committee on Climate Change, managed by the Undersecretary of Climate Change of the Ministry of the Environment, itself created in 2009.

These compromises led to the creation of the National Strategy on Climate Change 2012-2025 by the Ministry of the Environment with support of the Inter-institutional Committee on Climate Change. It defines the priority sectors of action and implementation mechanisms of the strategic action lines with specific objectives towards 2015. Among those is the Objective 3 to “implement prevention measures to protect human health of the impacts of climate change”<sup>8</sup>.

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<sup>7</sup> Constitution of the Republic of Ecuador (2008)

<sup>8</sup> Estrategia Nacional de Cambio Climático 2012-2025, p. 44.



Subsequently, the National Plan for Sumak Kawsay 2013-2017 (National Development Plan) recognizes that “preventive strategies facing the environmental threats to health must be developed, in particular facing those linked to climate change and various forms of pollution”<sup>9</sup>. And within the National Development Plan’s Objective 7 to “guarantee the rights of nature and promote environmental, territorial and global sustainability” is the objective 7.10 to “implement measures of mitigation and adaptation to climate change and reduce the economic and environmental vulnerability with an emphasis on priority attention groups”.

**4. Please describe any relevant national accountability and oversight mechanisms designed to ensure access to remedy for those who suffer human rights harms as a result of climate change. Please highlight any relevant jurisprudence on this subject and indicate what measures, regulatory or otherwise (i.e. impact assessments), are in place to prevent harms caused by third parties.**

The Defensoría del Pueblo del Ecuador is the National human Rights Institution and therefore has a mandate to protect and promote the human rights of the Ecuadorian people in the Ecuadorian territory and abroad. Within its mandate is the duty to protect against human rights violations and violations of the rights of Nature, recognized in the Constitutions, among these is the duty to protect against human rights violations deriving from climate change but, to this day, it has not had the opportunity to do so.

**5. Please describe any concrete mitigation and adaptation measures being taken to address the impacts of climate change on the human right to health and good practices in this regard including those related to: international cooperation; local and community-based initiatives; private sector initiatives; development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases; and the exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change and the economic and social consequences of various response strategies.**

In conformity with its constitutional and legal competencies, the Defensoría does not work with information on this matter.

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<sup>9</sup> Plan Nacional del Buen Vivir 2013-2017, p.65.