

**Response to the Call for input “Gender and Toxics”**

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**Premise**

After reading the text of the very inspiring call, we would like to, and we are honoured to be able to do so, share with the Special Rapporteur some preliminary reflections based on ongoing research conducted by three Italian universities: Ca’ Foscari University of Venice (leading), Palermo and Florence. The research “Gendering international legal responses to chronic emergencies” (GenREM)[[1]](#footnote-1) is particularly relevant for the topic of the call. The project does not deal with disasters per se but with the phenomenon that precedes violence and is not sufficiently addressed from a legal perspective. International disaster relief law looks at the downstream phase, but rarely considers that pandemics, megafires, droughts, landslides, severe flooding, hurricanes, are the product of what this project calls “chronic emergencies.” They refer to the degradation of the environment that creates the conditions for the spread of, e.g., pandemics and natural disasters. They encompass but are not limited to climate change. Climate change perpetuates gender inequality,[[2]](#footnote-2) as other manifestations of slow violence do. The legal and political approach to emergencies is generally to delve into one single disaster, and with an anticipatory response, which produces an immediate shock and an impact on the general public, without grasping the complexity of the whole system of violence that anticipates the disruptive force. For example, climate change policies have been moved to the background because of the pandemic, without understanding the strong connection between chronic emergencies like climate change and other phenomena.[[3]](#footnote-3) The concept of chronic emergencies relies on the one of slow-onset emergencies (OCHA 2011, COP16), but is different from the latter, because it does not describe the dynamics of the single disaster but refers to the underlying phenomenon of environmental degradation caused by irresponsible exploitation of natural resources and absence of adequate responsible preventive policies. The project reflects on the dichotomy normality v state of exception and on the reconceptualisation of states’ obligations, providing also a practical example in Italy.

**Introduction**

Toxic substances might have short, medium and long-term health effects, either due to continued exposure or due to their effects stretching over time.[[4]](#footnote-4) The effects of toxic substances are gendered, because they reproduce mechanisms of discrimination and subordination in our societies. It is therefore apparent at first sight that the problem must be dealt with from the perspective of the intersection between the pollution or environmental degradation (and the consequent negative effects on health) given by toxic agents on the one hand and the characteristics of human groups that determine how these negative effects manifest on the other. This is certainly true for the rules that human communities give themselves. Given then the characteristics of the phenomena in question, transnational, which do not know borders, in the legal discourse it is the international law to be primarily concerned, in particular the areas of international environmental law, human rights, international humanitarian law, and disaster law, putting those “limits to the action of the States” that then determines or influences their behaviours and decisions on the domestic level (and ultimately the effect on human health).[[5]](#footnote-5)  However, in order to be able to deal with the issue from the point of view of international law, it is necessary to reason about categories that are not known to international law (or are only partially known or are only partially used).

**The concept of chronic emergency**

In our understanding, the release of toxics and harmful substances fall under the concept of chronic emergency as conceptualised in our project. This concept legalises the idea of “slow violence” coined by the professor of humanities and environmental sciences Rob Nixon in 2011.[[6]](#footnote-6) The American scholar focused on environmental themes and on those phenomena that, by their nature, “damage” in a slow, invisible way. These are phenomena such as global warming and, more generally, environmental degradation, such as ocean pollution or acidification of rainfall, but also social transformation or armed conflict, often linked to each other. Certainly, the impact of toxics falls among those forms of violence that cause harm at a slow onset. The adjective “chronic” stresses a new “normality” that is affected by the use of toxics and harmful substances. The disruption of this normality requires a reconceptualization of traditional categories of international law.

As we know, traditionally, the law has ignored invisibility and slow emergence in favour of focusing on individual events, "causes and crises",[[7]](#footnote-7) or, more broadly, reasoning on a rule (or of the norms) to apply to a particular event, which will present issues that go beyond the definition of the concept of slow violence from a legal perspective. In fact, the approach of the law to the phenomenon of crisis responds to the traditional structure of human societies, which, for certain reasons, turn their attention back to individual events, “spectacular"[[8]](#footnote-8) common to all areas of human activity. In fact, it has been noted that in the traditional sense of the terms, crises or disasters prevail, in terms of the attention received both from the general public and the decision-making authorities, over other critical situations that are “slow” and “invisible” but potentially more harmful,[[9]](#footnote-9) as, moreover, they emerged precisely in relation to the reproductive health of women. Despite this, other disciplines have been able to better, or at least faster, grasp the changes in place. With regard to law, and in particular international law, an initial change of perspective can begin to be appreciated in the area of climate change and disaster management, where it is traceable to the idea that there are phenomena that, as a whole, cannot be contained in a single moment either on the temporal or on the spatial dimension.[[10]](#footnote-10)

International law has timidly begun to incorporate the idea of events that produce their effects slowly and continuously in the Concluding Report of the Sixteenth Conference of the Parties (COP16) to the Rio Accords, held in Cancun,[[11]](#footnote-11) in 2010, before the expression “slow violence” became widespread. The report uses the term slow onset event in relation to events such as rising sea levels and temperatures, ocean acidification, reduction of glaciers and “related impacts”, salinization, degradation of forest soils, loss of biodiversity, and desertification.[[12]](#footnote-12) The presence in the environment of toxic agents and exposure to them could, at first glance, be included in this list. A development of the concept can be found in the 2011 report of the UN Office for Coordination of Humanitarian Affairs,[[13]](#footnote-13) which introduces the idea of a slow-onset emergency. While focusing on the disaster itself, it is recognised that this can derive from a succession of phenomena that are prolonged over time and have little immediate impact. Almost simultaneously, the concept of a slow-onset event formulated by COP16 is placed in 2012 at the heart of a technical report,[[14]](#footnote-14) which develops the idea of “loss and damage”, all those permanent negative consequences that in turn are the cause of negative events. A further development comes from the idea of slow onset disaster, to which the background paper on the proposed updated terminology on disaster risk reduction[[15]](#footnote-15) refers, for example, and which takes on the time dimension, as in the report of the UN Office for Coordination of Humanitarian Affairs as a process that originates in time (the past dimension) and has effects on the future and future generations.

However, the above-mentioned developments of the first half of the 2010s need further development in order to be able to address the problem adequately. The point is once again offered by a discipline other than law, the history of disasters. It is in this field that the concept of slow disaster is introduced as a disaster that not only has its origin in the past (like the slow onset emergency) but extends in its effects beyond those generally considered (loss and damage, as in the slow onset event).[[16]](#footnote-16) While remaining focused on the moment of the disaster itself, a slow disaster extends the time dimension of the event to both the past and the future. A further step involves revisiting the concept of slow disaster in the light of slow violence. This shift removes the focus from the moment of the disaster itself and instead concentrates on the continuum of time and the constant adverse effects of the event. It is at this point that we can then insert the concept of chronic emergency, such as those emergency situations, or rather of breach of normality, "invisible," which originate in past events and which produce their adverse effects in a constant way. The impact of the presence of toxic agents in the environment and their effects on human health fits perfectly into the dynamics described. However, we need to go into the details of the peculiarities of the chronic emergency to understand how this, as defined, is intrinsically linked to the gender issue. In addition to the elements of duration and "invisibility," the chronic emergency has at least two other elements of peculiarity and problematicity compared to disasters or emergencies seen as those phenomena traditionally considered by law.

**Victims of toxics and harmful substances**

The first element is closely linked to the slow nature of chronic emergencies and is the intergenerational element: the potential victims of today’s chronic situations may also not have been born yet.[[17]](#footnote-17) This would involve at least an obligation to mitigate and reduce damage, and an obligation of adaptation on the part of states in order to deal with the permanent “loss & damage” that the chronic emergency entails, as also noted in the decision of the Human Rights Committee in the case *Daniel Billy et al v Australia,*[[18]](#footnote-18) from which it appears to emerge that, if States are also parties to the Paris Agreement, the positive duty to protect human rights should be read in the light of the latter.[[19]](#footnote-19)

The second characteristic element of a chronic emergency is vulnerability. In Christian & Dowler’s above-mentioned work, it emerges that situations of slow and invisible violence affect different social groups in different ways.[[20]](#footnote-20) In legal terms, there are numerous acts dealing with situations that can be characterised as chronic emergencies that refer to this “diversified impact” of the phenomenon in question with the concept of vulnerability. This is seen as an element that aggravates the impact that a particular phenomenon has on the individual, and it is found that greater vulnerability can be both intrinsic to a social group due to the structures of the society itself, or characteristic of certain emergency situations.[[21]](#footnote-21) This is particularly relevant when we talk about gender and toxics. It is not only the fact that certain substances have a major effect on the reproductive health of women, but also mechanisms rooted in society that determine the vulnerability (social conditions, economic status, etc.).

The third characteristic element of chronic emergency is the impact on nature. The effects of toxics and harmful substances matter a lot when they have an impact on human beings, and on nature only inasmuch as humanity is also directly or indirectly affected. However, major slow and gradual effects determined by pollution because of harmful substances such as mercury started with their impact on non-human animals and natural objects, before being reflected on humanity – and in a disproportionate way depending on the condition of the individual in the society. It is time to endorse a holistic and ecological approach that conceives clearly and unequivocally that human beings are part of an environment which is primarily jeopardised by toxics and harmful substances. Endorsing such an approach allows: a) a more rapid response; b) the acknowledgment of the role of humanity, or a part of it, on the use of these substances.

A concrete example of how these three characteristics manifest themselves in a chronic emergency is provided precisely by cases related to the presence of toxic agents in the environment. Both the Minamata and Chernobyl cases are emblematic: the effects of mercury in one case and of radioactive agents in the other, affect the lives of all affected human beings, but not in the same way. In fact, it is women who suffer more, as their reproductive health is affected. The Minamata case is particularly emblematic here. Rachel Carson, in her well-known Silent Spring, highlighted the toxic relationship between pesticides, environmental degradation and inter-species health.[[22]](#footnote-22) In the same period, Yayori Matsui, a journalist, worked on the Minamata disaster and reflected on the impact of colonialism on women’s rights and environmentalism.[[23]](#footnote-23) As acknowledged by the *Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, in the report of 2022: “Women and girls aged 14–45 years are particularly vulnerable to the neurotoxic impact of mercury. Particular risks involve the impact on unborn children.”[[24]](#footnote-24)

**States’ obligations**

Once the concept has been defined, it remains to be seen how, within this framework, there are obligations states must abide by and whether there are therefore possible violations of international law. As has already been pointed out in the Committee's decision, firstly, there is a duty of due diligence, both in relation to adaptation measures and those of mitigation (and reduction of damage), that appears to emerge as a result of the combination of human rights and environmental law obligations[[25]](#footnote-25), and furthermore, it confirms that the two areas cannot be kept separate. Additional soft law instruments referring to the “slow” element are the Sendai Framework, which also applies to slow-onset disasters, although it targets the disaster itself[[26]](#footnote-26), and the general recommendation (37) on the gender dimension in disaster risk reduction in the context of climate change by the Committee on the Elimination of Discrimination against Women[[27]](#footnote-27) which includes slow-onset disasters among the cases to which it applies. In parallel with the identification of obligations, there is the problem of finding violations and international responsibility. Remaining on broad-based obligations, such as due diligence obligations in the areas of adaptation, mitigation, and the positive obligation to protect human rights. If, on the one hand, a first reasoning can be made on these and on the responsibility that states have to protect people in their own territory but also, based on the *dédoublement fonctionnel* theory, to protect the fundamental collective interests of the international community, that may not be enough. In the case of *Daniel Billy et al. v. Australia*, the Committee noted that the violation of human rights stems mainly from the failure to adopt adequate adaptation measures, while, as far as mitigation is concerned, it has merely noted Australia’s inability to take adequate measures without breaking rights under the Covenant on Civil and Political Rights. The unique geographical and environmental characteristics of the Torres Islands made this possible. In other contexts the situation is far more complex and the two diligences alone may be insufficient: think for example of the state’s absolute impossibility to adopt some effective measure of adaptation or mitigation; the fact that the causes of the chronic emergency are shared with other actors, if not a complete disconnection between those who create the chronical emergency state and those who suffer its consequences; the technical difficulty, as happened in the Australian case, to link causes and effects, difficulties that must also be dealt with by the natural sciences; at last, in cases in which the state unable to conduct the two-diligence is the victim of a violation that contributes to the chronic emergency, as in the case of soil pollution following the Russian invasion of Ukraine, in another case where the different impact of gender and generation emerges[[28]](#footnote-28).

Therefore, new or not fully explored concepts become useful: the shared responsibility between States[[29]](#footnote-29); the concept of justice jurisdiction by which, for example, in matters of investment and the environment, the courts of the States where the phenomena originate (home State) can hear disputes relating to events that occurred elsewhere, the victims of which have different nationalities[[30]](#footnote-30); and the separate delict theory, according to which the State is also responsible for violations committed by third parties (private persons) under its competence if it has failed to prevent such violations and does not allow victims access to justice[[31]](#footnote-31).

Bearing in mind that the phenomena taken into account can result in a disaster, understood in the traditional sense of the term, the attention of the law cannot be limited exclusively to that moment and not even to the causes, but must also necessarily look at the victims of the events even outside the disaster itself. Exploring the legal response to the chronic emergency remains an ongoing journey. Embracing these new concepts immediately can result in a stark clash with reality; ignoring them hinders progress towards a future with fewer inequalities and greater equity.

Venice, 29 March 2024

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17. Ibid*.* [↑](#footnote-ref-17)
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