



Legal Response Initiative

Briefing paper 2/15

Human Rights in the 2015 Agreement*

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Introduction

Parties to the UN Framework Convention on Climate Change (UNFCCC) are currently negotiating a new agreement to be adopted in December 2015 within the Ad-hoc Working Group on the Durban Platform (ADP). At its Geneva session in February 2015, the ADP formally adopted a negotiating text for the new agreement, which includes several references to human rights. This briefing paper outlines options to reflect human rights in the 2015 agreement, without promoting specific views and opinions. Instead, the paper uses examples to illustrate the basic approaches and techniques available to Parties. After a short overview on the interplay between human rights and climate law, the paper explores options for including human rights considerations in the new climate agreement based on proposals in the current negotiating text, and reflects on possible alternatives.

Human rights and climate change - the story so far

The adverse effects of climate change threaten the enjoyment of a range of human rights, such as the right to life, adequate food, adequate housing, and to safe drinking water and sanitation. Not all UNFCCC Parties, however, have ratified human rights treaties.¹ Moreover, while some human rights bodies have endorsed the view that states may have human

rights obligations towards those beyond their jurisdiction, most states maintain that human rights obligations are territorially limited. The latter states, therefore, are unlikely to accept that they have obligations to undertake positive action to secure the protection of human rights associated with climate change impacts beyond their territory.

A distinction also needs to be drawn between the impacts on the enjoyment of human rights caused by climate change, and by climate change response measures. The first require states to temper the negative impacts on the enjoyment of human rights associated with a changing climate. Conversely, with climate change response measures, the matter is to ensure that adaptation and mitigation actions and policies do not unduly affect the enjoyment of human rights. In both cases, human rights law and practice may assist in the making and implementation of climate law.

First, UNFCCC parties could draft and interpret rules to address the impact of climate change and of climate change response measures by building upon substantive and procedural human rights. Second, international and regional

* By Dr Annalisa Savaresi, Edinburgh Law School, and LRI expert adviser; and Dr Jacques Hartmann, Dundee Law School, and LRI expert adviser.

¹ While the UNFCCC has been ratified by 195 states, no human rights treaty enjoys universal ratification. The International Covenant on Civil and Political Rights (1966) has 118 Parties and the International Covenant on Economic, Social and Cultural Rights (1966), has 116 Parties.

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human rights bodies may provide institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures. The Human Rights Council (HRC) has acknowledged these synergies, affirming that human rights obligations and commitments have the potential to “inform and strengthen” international and national climate policy making, promoting “policy coherence, legitimacy and sustainable outcomes.”²

This potential has been increasingly discussed at climate negotiations. In 2010, Decision 1/CP.16, (Cancún Agreements) the UNFCCC Conference of the Parties (COP) asserted that Parties “should, in all climate change related actions, fully respect human rights.”³ The Agreements also mention the need to engage a broad range of stakeholders at the global, regional, national and local levels, adding that “effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.”⁴

Human rights in the Geneva text

At the Lima Climate Change Conference in December 2014, a reference to human rights was included in the preamble to the draft negotiating text of the 2015 agreement. More references to human rights were inserted in the negotiating text formally adopted at the Geneva Climate Change Conference (Geneva text).⁵ Text proposals concerning human rights now appear both in the preamble, as well as in the operative parts of the Geneva text. These text proposals are reviewed below.

Preamble

Preambular text normally sets the context of an international legal instrument and may be used as an aid for the interpretation of provisions in a treaty’s operative parts. The Geneva text includes three proposed preamble references to human rights.

Building on an earlier proposal, the first refers to all actions addressing climate change and processes established under the 2015 agreement. Specific reference is made to the rights of workers, gender equality and indigenous peoples:

“Stressing that all actions to address climate change and all the processes established under this agreement should ensure [a gender-responsive approach] [gender equality and intergenerational equity], take into account [environmental integrity] [the protection of the integrity of Mother Earth], and respect human rights, the right to development and the rights of [youth and] indigenous peoples, [as well as the just transition of the workforce and the creation of decent work, in accordance with nationally defined development priorities and strategies]”

The second proposal instead reproduces the wording of the Cancún Agreements verbatim: “Parties should ensure in all climate change related actions full respect to all human rights.”

As a COP decision, however, the Cancún Agreements are not legally binding. Therefore, if the 2015 agreement were adopted as a protocol to the UNFCCC, inclusion of a reference to human rights in preambular text would formally enhance the

status of human rights in the climate regime.

The third and last text proposal on human rights in the preamble of the Geneva text draws specific attention to the post 2015 development agenda of the United Nations: “Recognizing that all actions on climate change shall significantly contribute to the post 2015 development agenda of the United Nations with a particular focus on human rights, good governance, gender equality and the needs of particularly vulnerable groups.”

All three proposals can be read as referring both to the impacts on the enjoyment of human rights of climate change, as well as to the implementation of climate change response measures. If enshrined in the 2015 agreement, these preambular references will not lead to new and separate legal obligations for Parties to the UNFCCC. They will merely draw Parties’ attention to obligations they have already undertaken under the human rights treaties they ratified, or may ratify in the future, and to relevant customary norms and domestic laws.

Operative provisions

Some proposals for operative provisions in the Geneva text include references to human rights. Provisions in the operative part of a treaty generally create rights and duties. However, much depends on the wording that is deployed, where in the text the reference to human rights is positioned, and whether it envisages specific activities or rather refers to general aspirations. For example, reference to the protection of human rights in the 2015 agreement could take the guise of a stand-alone principle. This approach is embedded in an entry in the General/Objective section of the Geneva text, which comprises multiple suggestions:

“12 bis. [All Parties [and stakeholders] shall [ensure respect for human rights and gender equality in the implementation of the provisions of this Agreement] [, in all climate change related actions, respect, protect, promote, and fulfil human rights for all. All Parties shall be guided by gender equality and ensure the full and equal participation of women in all climate actions and decision making processes. All Parties should consider in their climate policies and actions a just transition of the workforce that creates decent work and quality jobs.]] [All parties shall implement this agreement, in line with the mandate principles and provisions of the UNFCCC, to protect the integrity of Mother Earth, respect and promote human rights, the right to development and the rights of indigenous peoples].”

Like one of the proposals for the preamble, this entry makes specific reference to the rights of especially vulnerable groups. The focus is on the respect for human rights in the implementation of “all climate change related actions.” The latter term could be interpreted to encompass both the impact on the enjoyment of human rights associated with climate change response measures, as well as with climate change itself.

² Human Rights Council Resolution 10/4 (2009), Preamble.

³ Decision 1/CP.16 (2010), paragraph 8.

⁴ Ibid., paragraph 7.

⁵ Geneva text, available at: <http://unfccc.int/resource/docs/2015/adp2/eng/01.pdf>, p. 4.

The same reasoning may be applied to the last text proposal concerning human rights in the Geneva text, which addresses Parties' obligations concerning adaptation:

"Option 4: Nationally determined adaptation commitments of all Parties shall: Promote and protect all human rights, be gender sensitive, country-driven, participatory and fully transparent, take into account vulnerable groups and ecosystems, be based on science and traditional and indigenous knowledge, and promote the engagement of sub-national and local authorities and other stakeholders."

The legal implications of the inclusion of this or of the previous proposal in the operative part of the 2015 agreement would be context-specific and depend on whether a UNFCCC Party has ratified any human rights treaties or not. For states that have ratified human rights instruments, a reference to human rights in the operative part of the 2015 agreement would link treaty obligations under the climate regime with their human rights obligations. These states would therefore be required to interpret obligations under the climate regime in light of their existing commitments concerning matters such as, for example, public participation, the rights of women and indigenous peoples.

For states that have not ratified human rights instruments, a reference to human rights in the operative part of the 2015 agreement could have the effect of creating new obligations. The content of such obligations would, however, depend on the wording that is used. If the 2015 agreement included only a generic reference to human rights (e.g. Parties should ensure in all climate change related actions full respect to all human rights) it would be difficult to ascertain what this would entail. Instead, the inclusion of specific references to issues such as public participation could create new obligations.

Finally, the Geneva text makes no specific reference to human rights in relation to human displacement associated with climate change. So-called 'climate refugees' are included in the notion of 'refugees' in extant international law. Therefore no international law instrument presently addresses the complex matter of human displacement associated with climate change.

In this regard, the HRC Special Procedures mandate-holders have invited UNFCCC Parties to refrain from viewing their human rights responsibilities in relation to climate change as stopping at their national borders.⁶ Conversely, the 2014 International Law Association's (ILA) Legal Principles Relating to Climate Change suggest that, in developing and implementing policies and actions regarding climate change, states take into account "the differences in vulnerability to climate change of their populations, particularly indigenous peoples, within their borders and take measures to ensure that all their peoples' rights are fully protected."⁷

These two suggestions draw parties in almost opposite directions. While the first contemplates the extraterritorial application of human rights obligations, the second more cautiously considers climate change impacts only with respect to those falling within the jurisdiction of a given state. The latter approach, therefore, would be of limited consequence in addressing the gap in international law concerning the displacement of people associated with climate change. All it

would do is to draw attention to states' human rights obligations towards those within their jurisdiction.

Other options to integrate human rights in the 2015 agreement

Conflict clause

One way to draw attention to UNFCCC Parties' extant human rights obligations in the climate regime would be to include a so-called 'conflict clause' in the 2015 agreement. These clauses address the relationship between international law instruments and typically specify that a treaty 'is subject to,' or that 'it is not to be considered as incompatible with, an earlier or later treaty,' or that 'the provisions of that other treaty prevail.'⁸

The ILA Legal Principles Relating to Climate Change include a suggestion for a conflict clause as follows: "States shall formulate, elaborate and implement international law relating to climate change in a mutually supportive manner with other relevant international law."⁹ This clause is in line with the so-called principle of systemic integration,¹⁰ according to which a treaty is to be interpreted in light of any "relevant rules of international law applicable between the Parties."¹¹

A conflict clause could also draw specific attention to action that Parties should undertake, encompassing institutional actors beyond the UNFCCC, pointing to the fact that they too should be guided by respect for human rights. In this regard, the ILA Legal Principles include a text proposal, suggesting: "States and competent international organizations shall respect international human rights when developing and implementing policies and actions at international, national, and subnational levels regarding climate change."¹² Again, such formulation would not create new obligations for states that are not already parties to human rights treaties.

Institutional arrangements

Any commitment or mandate on human rights included in the 2015 agreement could lead to the adoption of additional measures, processes and institutions. The HRC Special Procedures mandate-holders have invited UNFCCC Parties to launch a work program to ensure that human rights are integrated into all aspects of climate actions. The creation of a work program would constitute a space for Parties to consider whether and how to better integrate human rights in the climate regime, exchange information and share good practices.

⁶ Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014).

⁷ International Law Association, Legal Principles Relating to Climate Change, Article 10.3(b).

⁸ Vienna Convention of the Law on Treaties, Article 30.2.

⁹ International Law Association, Legal Principles Relating to Climate Change, Draft Article 10.1.

¹⁰ International Law Commission, Report of the International Law Commission on the Work of Its Sixty-Third Session, 2011, at 410-480.

¹¹ Vienna Convention of the Law on Treaties, Article 31.3(c).

¹² International Law Association, Legal Principles Relating to Climate Change, Draft Article 10.3(b).

The work program could also be a forum to discuss institutional linkages between international and regional bodies with a specific mandate on the protection of human rights and UNFCCC bodies. For example, Parties could entrust the UNFCCC Secretariat to collaborate with the Office of the High Commissioner for Human Rights to integrate human rights into all aspects of climate action. Historically, UNFCCC Parties have been reluctant to establish inter-institutional linkages. Even when they have done so, very limited results have been obtained. This is largely due to the opposition of some UNFCCC Parties, who have maintained that even the so-called Rio Conventions have a “distinct legal character, mandate and membership.”¹³ This restrictive attitude could be more accentuated with regard to human rights instruments, whose membership is more heterogeneous than that of the Rio Conventions. Still, a provision on institutional cooperation with human rights bodies along these lines could be included in the 2015 agreement: “Parties shall cooperate with each other and competent international organizations in good faith to address the adverse effects of climate change and climate change response measures on the enjoyment of human rights.”

The 2015 agreement could also specifically emphasize the possibility to use extant human rights bodies as means to seek redress for human rights breaches associated with the implementation of climate change measures. A provision on enhanced cooperation that specifically captures this role of human rights bodies could read: “Parties shall monitor, with the assistance of international or regional organizations, the impact on the enjoyment of human rights associated with climate change response measures.”

Another option could be using the UN Universal Periodic Review (UPR) to specifically highlight human rights concerns associated with climate change.¹⁴ The review is carried out under the auspices of the HRC and encompasses the human rights records of all UN Member states. It provides an opportunity for each state to report actions to improve human rights protection in its territory and to fulfill its human rights obligations and for other states and NGOs to question this. The UPR could become a tool to see how UNFCCC

Parties address human rights concerns associated with climate change and a way to disseminate best practices. There are, nevertheless, considerable limitations to using the UPR, such as the strict limits on the amount of documentation that may be submitted and on the amount of time for questioning each state.

Finally, the governing body of the 2015 agreement could establish a dedicated institution to support the consideration of human rights issues in the climate regime. This institution could consist of a team of specialists, or an informal platform to strengthen and facilitate linkages among climate and human rights bodies. This institution could be entrusted to promote the sharing between Parties of information and good practices on the integration of human rights in climate action. To support this task, UNFCCC Parties could be required to report efforts to integrate human rights into climate actions and policies in their national communications, or as part of their reporting obligations under human rights instruments.

Another option could be to adopt safeguards for climate change response measures that make specific reference to human rights. One example is the UN-REDD Programme rights-based approach to the interpretation of the REDD+ safeguards included in the Cancun Agreements.¹⁵ Similarly, the UNFCCC COP could entrust a new institution to develop safeguards and accountability processes that ensure that climate response measures are designed, implemented and monitored in a manner that protects the human rights of affected people and communities. The new institution could also function as a grievance mechanism for those complaining of human rights violations associated with the implementation of climate change response measures.

¹³ See for example the position by the US in Views on the Paper on Options for Enhanced Cooperation Among the Three Rio Conventions, Submissions from Parties, UN Doc. FCCC/SBSTA/ 2006/MISC.4, at 16. The same point was made by Australia, *Ibid.*, at 5.

¹⁴ Human Rights Council Resolution 60/251 (2006).

¹⁵ UN-REDD Programme Social and Environmental Principles and Criteria (2012), p. 2.

The international negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) are amongst the most complex multilateral law and policy making processes ever. Meetings are characterized by the use of technical jargon, reference to legal principles and procedural norms. The Legal Response Initiative (LRI) supports delegates from poor and particularly climate vulnerable developing countries as well as civil society observer organizations free of charge through a global network of lawyers from law firms, barrister chambers and universities. They provide hands-on assistance during meetings, publish briefing papers and build the capacity of lawyers and negotiators from developing countries. We constantly seek experienced lawyers with expertise in one or more areas of the law from any jurisdiction with a good command of English to extend our network of pro bono legal expert advisers. Please contact the advice coordinator directly if you are interested in joining the network: coordinator@legalresponseinitiative.org. If you require legal advice in connection with the international climate negotiations please contact: enquiries@legalresponseinitiative.org



Legal Response Initiative

c/o Simmons & Simmons, CityPoint, One Ropemaker Street, London EC2Y 9SS, UK

enquiries@legalresponseinitiative.org www.legalresponseinitiative.org

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