

A CISDL LEGAL BRIEF



FROM COPENHAGEN TO CANCUN : A CHANGING CLIMATE FOR HUMAN RIGHTS IN THE UNFCCC?

Released in the follow-up to COP-16 / CMP-6, Cancun, Mexico
January 10, 2011

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1. Human Rights and the Climate Change Negotiations Held under the Auspices of the UNFCCC

Climate change will have severe consequences for a number of human rights recognized in international law. States are obliged to take all appropriate means to avoid and mitigate harmful climate change as well as assist vulnerable communities in adapting to its consequences. Further, states are also required to ensure that their responses to climate change are consistent and coherent with their human rights obligations. Accordingly, as stated by the Office of the High Commissioner for Human Rights, “human rights standards and principles should inform and strengthen policy measures in the area of climate change.”²

Although the *U.N. Framework Convention on Climate Change* (UNFCCC) and the *Kyoto Protocol* (KP)³ do not include references to international human rights law, resolutions recently adopted by states at the regional level⁴ and at the U.N. Human Rights Council⁵ have recognised the human rights aspects of climate change. As a result, human rights have featured much more prominently in the negotiations aimed at adopting a new international agreement on climate change for the post-2012 period held under the auspices of the UNFCCC.

This legal brief analyses the developments in the treatment accorded to human rights in the context of the negotiations of the text on Long-Term Cooperative Action (LCA text) since the 15th Conference of the Parties to the UNFCCC held in Copenhagen in December 2009⁶ to the 16th Conference of the Parties to the UNFCCC held in Cancun in November/December 2010.⁷

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² Office of the High Commissioner for Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights,” UN Doc. A/HRC/10/61, 15 January 2009, para. 95 [“OHCHR Report on Climate Change and Human Rights”].

³ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, entered into force 21 March 1994; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 ILM 22 (1998), UN Doc. FCCC/CP/1997/7/Add.1, entered into force 16 February 2005.

⁴ See, e.g., the Male Declaration on the Human Dimension of Global Climate Change, adopted by Small Island Developing States on 14 November 2007, available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf; Organisation of American States, AG/RES. 1896 (XXXII-O/02), Human Rights and Climate Change in the Americas, available at: <http://www.oas.org/dsd/FIDA/documents/res1819.htm>.

⁵ U.N. Human Rights Council Resolution 7/23, 7th Session, 14 July 2008, U.N. Doc. A/HRC/7/78; U.N. Human Rights Council, Resolution 10/4, 41st meeting, 25 March 2009, UN Doc. U.N. Doc. A/HRC/10/L.11.

⁶ AWG-LCA, Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its eighth session, held in Copenhagen from 7 to 15 December 2009, 5 February 2010, FCCC/AWGLCA/2009/17 [“Copenhagen LCA Negotiating Text”].

⁷ Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, advanced unedited version, adopted by the Conference of the parties to the UNFCCC, 16th Session, 4 December 2010 [Cancun LCA Text].

2. The Human Rights Implications of Climate Change

2.1 Human Rights, Vulnerability, and the Adverse Impacts of Climate Change

In Resolution 10/4, adopted in March 2009, the U.N. Human Rights Council recognised that climate change-related impacts have a range of direct and indirect implications for the effective enjoyment of human rights.⁸ Throughout the evolution of the LCA text, states have discussed whether and how to include recognition of the human rights impacts of climate change, most notably in the Preamble. The Preamble to the LCA negotiating text produced in Copenhagen included the following two paragraphs:

Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that human beings are at the centre of concerns for sustainable development, and the importance of respecting Mother Earth, its ecosystems and all its natural beings,

Mindful that the adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights, including living well, and that the effects of climate change will be felt most acutely by those parts of the population that are already vulnerable owing to youth, gender, age or disability.⁹

These two paragraphs were problematic in several respects. To begin with, although the preamble noted Resolution 10/4, it did not in fact include the human rights language of the resolution itself. Instead, it referenced the language of the Rio Declaration which affirmed that “human beings are at the centre of concerns for sustainable development.”¹⁰ The preamble also gave the impression that Resolution 10/4 recognises the importance of respecting “Mother Earth” or is somehow related to this concept. Moreover, while the second paragraph in the preamble did recognise the implications of climate change on human rights, it referred to “living well” as one of the rights affected by climate change. The right to live well is related to a new paradigm for addressing global crises supported by the Government of Bolivia.¹¹ Whatever its merits, the concept of living well is unknown to international law and its lack of precision made its inclusion in a final version of the Preamble unlikely. Finally, the last part of the second paragraph, which focused on vulnerable groups, curiously failed to refer to one group that is widely recognised as being vulnerable to the adverse effects of climate change: Indigenous Peoples.

The Preamble included in the Cancun LCA Text resolves all of these difficulties. It provides as follows:

Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability.¹²

This paragraph includes a clear reference to Resolution 10/4 and its human rights language and includes Indigenous Peoples and minorities among groups identified as vulnerable to the effects of climate change. Of course, this paragraph merely “notes” UNHRC Resolution 10/4, a drafting term that carries no legal significance whatsoever. Most importantly, this paragraph does little to move the debate beyond mere recognition of the human rights impacts of climate change to an understanding of the human rights obligations that arise in the context of national and international efforts to address climate change. For instance, while some earlier proposed LCA texts, such as the one released by the African Group in Copenhagen,¹³ had the virtue of drawing on some of the existing language in the International Covenant on Economic, Social, and Cultural Rights. However, such rights language was never seriously considered for inclusion in the LCA text. In addition, while there are other sections of the Cancun LCA Text that refer to vulnerability, these sections often focus on states as a whole and fail to draw on human rights as the basis for understanding vulnerability.

⁸ UNHRC Resolution 10/4, Preamble: “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.”

⁹ Copenhagen LCA Negotiating Text, Annex IA, p. 7.

¹⁰ See UNHRC Resolution 10/4, preamble, referring to *Rio Declaration on Environment and Development*, UN Doc. A/CONF. 151/6/Rev. 1 (1992), principle 1.

¹¹ See Government of Bolivia, “Living Well,” available at: http://www.boliviaun.org/cms/?page_id=621

¹² Cancun LCA Text, Preamble.

¹³ The Third Text proposed by the African Group during UNFCCC COP-15 / KP MOP-5 on 11 December 2009 included the following preambular paragraph: “*Recognizing* that adaptation to climate change has a human rights dimension because the effects of climate change if not addressed will make impossible the realisation of the economic and social rights including the right to life, to food, to housing and to health” (on file with author).

In sum, what emerges from the Cancun LCA Text adopted in Cancun is a clear, albeit preambular, reference to the human rights impacts of climate change – the first recognition of the human rights impacts of climate change in any text to emerge from the UNFCCC. The key question that remains in the negotiations to come is whether and how states will take these human rights impacts into account in construing, developing, and operationalising their shared commitments and objectives to combat climate change.

2.2 Human Rights and Environmental Migration / Displacement

The issues raised by the human migration and displacement brought about by environmental conditions or catastrophes caused by or exacerbated by climate change is not likely to be resolved soon in the UNFCCC negotiations or elsewhere.¹⁴ Migration and displacement issues have not been a focus of the LCA text negotiations. However, the Copenhagen LCA Negotiating Text did include a bracketed paragraph on “environmental refugees” in the context of economic and social consequences of responses measures:

[Noting the need for developed country Parties to compensate [developing country Parties, especially] the economies of Africa, least developed countries and small island developing States for environmental, social and economic losses arising from the implementation of climate change response measures in the context of environmental justice and environmental refugees,]¹⁵

Although this proposed a commitment to compensate developing countries for the losses associated with environmental migration and displacement may have been worthy of support, the unclear basis for granting and calculating compensation, and the political controversies arising therefrom, made its eventual adoption by the Conference of the Parties highly unlikely. In particular, the refusal by many states, including those states that adopted the current definition of refugees in 1951, to recognise the category of “environmental refugee” may have sealed this paragraph’s fate.¹⁶

In its place, the Cancun LCA Text includes an invitation to the parties to enhance action on adaptation by undertaking, among other things, “(f) [m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels”.¹⁷ This paragraph may be the first step towards effectively addressing the thorny and complicated problem of environmental migration and displacement. To be sure, enhanced action by states to work towards resolving this problem is urgent and critical and such action will hopefully become the focus of greater and more focused international discussion and cooperation not simply within the UNFCCC, but in other regimes as well.

3. The Human Rights Implications of Responses to Climate Change

The High Commissioner for Human Rights has stated that “human rights standards and principles should inform and strengthen policy measures in the area of climate change.”¹⁸ Among other things, this entails that states should take into account and address the human rights implications of responses to climate change – an issue that has not always received its fair share of attention in the climate change negotiations.

3.1 References to the Human Rights Implications of Climate Change and Related Obligations

While the Copenhagen LCA Negotiating Text lacked even a reference to the human rights implications of responses to climate change, the Cancun LCA Text emphasizes that “Parties should, in all climate change-related actions, fully respect human rights”.¹⁹ This provision evolved from a bracketed reference included in the LCA Negotiating Text produced in Bonn in August 2010, which provided as follows:

¹⁴ See Office of the High Commissioner for Refugees, “Climate Change, Natural Disasters and Human Displacement: A UNHCR perspective,” 14 August 2009, available at: www.unhcr.org/climate.

¹⁵ Copenhagen LCA Negotiating Text, Annex I.H, pp. 38-39.

¹⁶ See J. Hong, “Refugees of the 21st Century: Environmental Injustice,” (2001) 10 Cornell Journal Law & Public Policy 323.

¹⁷ Cancun LCA Text, para. 14(f).

¹⁸ Office of the High Commissioner for Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights,” UN Doc. A/HRC/10/61, 15 January 2009, para. 95. [OHCHR Report on Climate Change and Human Rights].

¹⁹ Cancun LCA Text, para. 8.

1 bis. [Parties shall, in all climate change-related actions, ensure the full respect of human rights, including the inherent rights of indigenous peoples, women, children, migrants and all vulnerable sectors, and also recognize and defend the rights of Mother Earth to ensure harmony between humanity and nature.]²⁰

Although the paragraph eventually adopted in the Cancun LCA Text does not include specific references to the rights of vulnerable groups and the stronger language “shall”, as opposed to “should”, it nonetheless constitutes a significant step forward in stressing the necessity for states to address and mitigate the human rights implications of responses to climate change. Of course, this paragraph may also be relevant to the commitment of states to undertake climate change-related actions in the first place, to the extent that inadequate levels of climate action may fail to fully respect human rights. Indeed, the earlier paragraph included in the Bonn LCA Negotiating Text suggests this implication. However, given the wording and its place in the Cancun LCA text, the paragraph more clearly refers to the commitment on the part of states to ensure that their climate actions do not in themselves lead to human rights violations, by discriminating against certain groups in the implementation of adaptation programmes or by failing to abide by procedural rights relating to land or housing.

Once again, the key question that remains is how states will interpret and further develop this commitment in the context of further negotiations under the auspices of the UNFCCC as well as actions to be taken at the national level. In this first regard, apart from the REDD+ mechanism discussed below, there is a complete lack of human rights language in other sections of the Cancun LCA Text, including in sections that could clearly benefit from human rights language such as those addressing enhanced action on adaptation and economic and social consequences of response measures. Indeed, it is noteworthy that while the Bonn LCA Negotiating Text provided, in brackets, that enhanced action on adaptation should be undertaken in accordance with “international human rights instruments,”²¹ the Cancun LCA Text avoids rights language in affirming that:

enhanced action on adaptation should be undertaken in accordance with the Convention; follow a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems; and be based on and guided by the best available science and, as appropriate, traditional and indigenous knowledge; with a view to integrating adaptation into relevant social, economic and environmental policies and actions, where appropriate;²²

In terms of the consequences of response measures, the Cancun LCA Text also avoids referring to the rights to work and to an adequate standard of living and refers instead to the concept of a “just transition,”²³ a term supported by labour advocates, but whose content is less than clear. Moreover, while the Bonn LCA Negotiating Text included, in bracketed form, a very detailed reference to the *UN Declaration of the Rights of Indigenous Peoples* (UNDRIP), including the right to free, prior and informed consent,²⁴ the Cancun LCA Text includes a much less significant and specific reference, merely “[t]aking note of relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples.”²⁵

Although these were positive developments, especially when compared to the complete lack of human rights language in the Negotiating Texts from Copenhagen on the same topics, the August 2010 Negotiating Texts do not go far enough in aligning concerns over the impacts of responses to climate change with human rights language or principles. It would instead be useful to recognise that response measures to climate change could affect a wide range of human rights and that concerns over the human rights implications of responses are not limited to situations involving Indigenous peoples.

3.2 Rights to Participation, Remedy and Access to Justice

As emphasized by the High Commissioner for Human Rights, a human rights framework “underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives” and “stresses the importance of accountability mechanisms in the implementation of measures and policies in the area of climate change,” requiring “access to administrative and judicial remedies in cases of human rights violations.”²⁶

²⁰ AWG-LCA, Negotiating Text, 13 August 2010, FCCC/AWGLCA/2010/14 Chapter I.A., p. 6 [Bonn LCA Negotiating Text].

²¹ *Ibid.*, p. 8.

²² Cancun LCA Text, para. 12.

²³ *Ibid.*, p. 14. See also *ibid.*, para. 10.

²⁴ Bonn LCA Negotiating Text, Chapter I.C.6, p. 27: “59 bis [A]grees that, in accordance with relevant international instruments, including the UN Declaration of the Rights of Indigenous Peoples, the Parties shall cooperate with the indigenous peoples through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing measures that may affect them.]”

²⁵ Cancun LCA Text, p. 14.

²⁶ OHCHR Report on Climate Change and Human Rights, paras 81-83.

Despite the relevance and importance of these participatory and procedural rights, the LCA text emphasizes instead the importance of ensuring the participation of stakeholders:

7. Recognizes the need to engage a broad range of stakeholders at global, regional, national and local levels, be they government, including subnational and local government, private business or civil society, including youth and persons with disability, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change;²⁷

While some of this language is certainly aligned with a participatory approach, it could be further strengthened with references clearer and stronger references to key participatory and procedural rights, such as the rights to information, full and effective participation, and access to justice. The lack of participatory rights language is evident elsewhere in the Cancun LCA Text, including in sections dealing with enhanced action on adaptation and the consequences of response measures.

3.3 Human Rights Safeguards for REDD+

One area in the LCA text that has specifically focused on human rights safeguards is REDD+.²⁸ In particular, while Indigenous peoples stand to benefit from the economic opportunities generated by REDD+, there is also considerable apprehension that REDD+ activities may fail to adequately respect the rights of local communities that have rights to forested territories, live near or in forests, or depend on their resources, most notably Indigenous peoples.²⁹

The Conference of the Parties in Cancun adopted the two following safeguards that should be respected in the implementation of REDD+ activities:

- (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;
- (d) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities, in actions referred to in paragraphs 70 and 72 of this decision;³⁰

These two paragraphs are essentially those that were included in the Copenhagen LCA Negotiating Text³¹ and which were included as option 2 in the Bonn LCA Negotiating Text. Option 1 in the Bonn LCA Text was much stronger however in its recognition of Indigenous rights than the option eventually adopted in Cancun. Option 1 included as safeguards, in article 2, the following:

- (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, [[and noting][in particular] [that] the [General Assembly has adopted the] United Nations Declaration on the Rights of Indigenous Peoples [that was adopted by the General Assembly];]
- (d) [Actions where there is] [Full and effective participation of relevant stakeholders [and local communities], including, in particular, indigenous peoples [rights to free prior and informed consent (FPIC)] and local communities in actions referred to in paragraphs 3 and 5 below;] ³²

Although much of the language in this paragraph was bracketed, paragraph (d) had the virtue of referring specifically to the rights of free prior and informed consent, also included in bracketed form in LCA Negotiating Texts predating Copenhagen.³³ Option 1 also ensured even greater respect for the rights of Indigenous Peoples through article 1 (d) bis,

²⁷ Cancun LCA Text, para. 7.

²⁸ REDD+ stands for a set of policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.

²⁹ Permanent Forum on Indigenous Issues, Report on the seventh session, 21 April – 2 May 2008, Economic and Social Council, UN Doc. E/C.19/2008/13, at para. 45.

³⁰ Annex I: Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, Cancun LCA Outcome, para. 2.

³¹ Copenhagen LCA Negotiating Text, Annex I.G, p. 35.

³² *Ibid.*, p. 53.

³³ AWG-LCA, Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its seventh session, held in Bangkok from 28 September to 9 October 2009, and Barcelona from 2 to 6 November 2009, 20 November 2009, 20 November 2009,

Option 1, which affirmed, in bracketed text, that the implementation of REDD activities shall “[Guarantee rights of indigenous peoples under the basis of international normative instruments and local communities].”³⁴ Moreover, in an (equally bracketed) article 1 bis which set out eligibility criteria for funding forest related activities. Option 1 provided that: “(c) Proposals shall not be considered that allow industrial scale logging or that involve conversion of natural forests to plantations or other commercial or infrastructure activities and projects that damage the environment or violate the rights of local communities.”³⁵

Thus, the Cancun LCA Text falls short of protecting the rights of Indigenous Peoples and local communities at the level contemplated in the Bonn LCA Negotiating Text. Indigenous peoples are conceptualised as stakeholders and none of their rights are specifically recognised as safeguards. This is one area where it cannot be said that much progress was made from Copenhagen to Cancun. Then again, by the end of the Cancun negotiations, many Indigenous delegates and advocates were of the view that this was the most realistic outcome given the reluctance of states to include any references to the right to free, prior, and informed consent in the LCA Text.

4. Conclusion: The Road to Durban

There is no doubt that the treatment accorded to human rights language and principles improved significantly during the negotiation of the LCA text from Copenhagen to Cancun. However, it cannot escape notice that the Cancun LCA Text failed to incorporate the stronger and more detailed drafting options included in the Bonn Negotiating Text produced in August 2010. Much critical work remains in strengthening and operationalising the human rights-related provisions agreed to in Cancun and in developing provisions dealing with important, but often neglected issues relating to displacement, human rights-related complaints and grievances, and compensation for loss and damage.³⁶ Negotiations leading up to Durban in December 2011 will thus be key to ensuring that states deliver on their commitment to human rights in the development of the post-2012 international climate change regime.

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FCCC/AWGLCA/2009/14, Item III.C, Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, p. 92.

³⁴ Bonn LCA Negotiating Text, Chapter VI, p. 52.

³⁵ *Ibid.*, p. 53.

³⁶ See in this regard the work of the Human Rights & Climate Change Working Group, whose activities are facilitated by Alyssa Johl at the Center for International Environmental Law, www.ciel.org.