

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**ANALYSIS OF HUMAN RIGHTS LANGUAGE IN THE CANCUN AGREEMENTS
(UNFCCC 16TH SESSION OF THE CONFERENCE OF THE PARTIES)**

This paper provides an analysis of the references to human rights in the Cancun Agreements. This language is an important step towards establishing human rights protections in the international climate regime, and is largely the result of leadership from certain State Parties as well as sustained NGO pressure.

The Cancun Agreements consist of a set of decisions negotiated (and subsequently adopted) under the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA negotiating track) and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol of the UN Framework Convention on Climate Change (UNFCCC) in December 2010.¹ Most notably, the decision that reflects the work of the AWG-LCA negotiating track (Cancun LCA Outcome)² – adopted by the 16th Conference of the Parties (COP) – contains several references to human rights as discussed in detail below.

By analyzing the rights-related language in the Cancun LCA Outcome, this paper focuses on key issues of interest to those concerned with protecting the individuals, peoples and communities most vulnerable to climate change. A rights-based approach to climate change helps to ensure that adaptation and mitigation measures do not cause further suffering, and provides support for the full and effective participation of affected individuals and peoples in decision-making processes.

The rights-related language discussed below has not yet been fully operationalized in existing and proposed UNFCCC bodies and mechanisms. However, the Cancun LCA Outcome is a step forward in the international climate regime's recognition of the human rights implications of climate change and of the responses to climate change. Most importantly, the Cancun LCA Outcome explicitly recognizes the existing human rights obligations of Parties to the UNFCCC, stating that Parties should fully respect human rights in all climate change-related actions.

RECOGNITION OF HUMAN RIGHTS IMPLICATIONS OF CLIMATE CHANGE

The preamble of the Cancun LCA Outcome recognizes the connection between human rights and climate change by referencing Human Rights Council (Council) Resolution 10/4 and its findings on the human rights implications of climate change and vulnerability:

¹ The Cancun Agreements are available at: http://unfccc.int/meetings/cop_16/items/5571.php.

² 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, *available at* http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf.

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.³

This language is significant in that it reflects the first recognition of the human rights impacts of climate change in any international climate agreement. Further, it is a marked improvement over what had been proposed in earlier LCA negotiating texts.⁴

REFERENCE TO EXISTING HUMAN RIGHTS OBLIGATIONS

In the overarching section of the Cancun LCA Outcome, the shared vision for long-term cooperative action “emphasizes that Parties should, in all climate change-related actions, fully respect human rights.”⁵

This is an important first step towards establishing human rights protections in the climate regime. However, while the Parties recognize the need to “respect” human rights in all climate change-related actions, they have failed to clearly acknowledge their obligations to “protect, promote and fulfill” such rights. As such, future decisions to operationalize this language should refer to Parties’ existing obligations to “fully respect, protect, promote and fulfill human rights” in order to, *inter alia*, safeguard the most vulnerable from the adverse impacts of climate change and climate change-related actions.

³ Cancun LCA Outcome, preambular para. 7.

⁴ Previously, this language was divided into two preambular paragraphs, one “noting” Resolution 10/4 on human rights and climate and the other describing the findings of Resolution 10/4. *See e.g.* 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, *available at* <http://unfccc.int/resource/docs/2009/awglca8/eng/17.pdf>. Annex I, preambular paragraphs 8 and 9 provide:

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,

This language was problematic for several reasons. The first preambular paragraph included a reference to the rights of Mother Earth, which are distinct from human rights and not mentioned in Resolution 10/4. As such, they should not have been included in this paragraph. The second preambular paragraph recognized the core findings of HRC Resolution 10/4 – specifically that the “adverse effects of climate change have a range of direct and indirect implications for the full enjoyment of human rights” – but did so in a convoluted way. Instead of using the exact language from Resolution 10/4, the Parties developed their own interpretation, which did not accurately reflect the Council’s findings or existing human rights obligations.

The Cancun LCA Outcome resolved these issues by consolidating the specific findings on human rights implications and vulnerability in Resolution 10/4 into one paragraph.

⁵ Cancun LCA Outcome, para. 8.

PARTICIPATORY RIGHTS

Both the “shared vision for long-term cooperative action” and the “adaptation framework” describe the need for participation of affected individuals and peoples in decision-making processes.

Paragraph 7 of the Cancun LCA Outcome states that a shared vision:

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;⁶

This paragraph describes the participatory rights of “stakeholders”, but does not explicitly affirm rights of access to information, full and effective participation, and access to justice, all of which are essential to protecting human rights.⁷

In paragraph 12, the “adaptation framework” addresses participatory rights as follows:

Affirms 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;⁸

As with paragraph 7, this language recognizes the need for a participatory approach, but does not explicitly state how Parties are expected to guarantee key procedural rights, such as the rights of access to information, full and effective participation, and access to justice. It is important to note that, with the exception of the REDD safeguards outlined below, the mitigation section of the Cancun LCA Outcome does not include additional language describing the need for participation (or other procedural rights). As such, there are no participatory requirements for mitigation actions beyond the shared vision language referenced above.

⁶ *Id.*, para. 7.

⁷ Further, while it is important for the Cancun LCA Outcome to recognize the need for effective participation of women and indigenous peoples, this language should similarly apply to the other vulnerable, and oftentimes underrepresented, groups and sectors listed in this paragraph. To operationalize this paragraph, participatory rights in the context of climate-related decision-making processes should be expressly applied to civil society generally, without exclusions.

⁸ Cancun LCA Outcome, para. 12.

SAFEGUARDS IN REDD

With respect to forest conservation and management, the Parties made significant progress on the recognition and protection of human rights, particularly indigenous rights and rights of local communities. Annex I of the Cancun LCA Outcome establishes specific safeguards to be applied in activities related to reducing emissions from deforestation and forest degradation in developing countries (REDD).

The following safeguards, among others, “should be promoted and supported” by developing country Parties:

(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;⁹

The Cancun LCA Outcome requests developing country Parties to “provide[e] information on how the safeguards” referenced above are being addressed and respected in the implementation of REDD-related activities.¹⁰ The Outcome further mandates the Subsidiary Body for Scientific and Technological Advice (SBSTA) to develop guidance for such reporting on the implementation of REDD safeguards for consideration by the COP in December 2011. The reporting guidelines (to be developed by SBSTA) provide an opportunity to operationalize the safeguards, which could include independent reporting and/or a grievance mechanism to ensure that these safeguards are met and to provide recourse if they are not.

SAFEGUARDS IN FINANCE

The Parties also agreed to develop safeguards that will apply to the newly established Green Climate Fund. The Cancun LCA Outcome created a Transitional Committee to design the Fund, including its operational documents that address, among other things, mechanisms to “ensure financial accountability and to evaluate the performance of activities supported by the fund” and to “ensure the application of environmental and social safeguards.”¹¹

This provides an opportunity to develop strong environmental and social safeguards, which could include a grievance mechanism. The first meeting of the Transitional Committee originally scheduled for March has been postponed until April 2011.

⁹ *Id.*, Annex I, paras. 2(c)-(d).

¹⁰ *Id.*, para. 71(d).

¹¹ *Id.*, Annex III, para. 1(h).

HUMAN RIGHTS IMPACTS OF RESPONSE MEASURES

In Cancun, the Parties considered the potential social consequences, including human rights impacts, associated with response measures to mitigate climate change. Notably, Paragraph 92 of the Cancun LCA Outcome describes the need to consider “information from those affected, and evidence of actual impacts” of response measures.¹² This paragraph also mandates the Parties to consider existing channels, such as national communications and possible submissions of supplementary information, as a means for “those affected” to provide such information.

While the details of the work programme on impacts of response measures will be negotiated over the next year, this may provide an opportunity to create a process or mechanism that would consider complaints from affected peoples and communities.

CONCLUSION

Considering that the rights language in earlier versions of the LCA negotiating text was under attack and had been removed in some instances, the Cancun LCA Outcome reflects significant progress in establishing rights protections. If implemented effectively, this language will guide the development of the processes and mechanisms mandated by the Cancun LCA Outcome (*e.g.*, REDD safeguards, finance safeguards, response measures mechanism). In the lead-up to COP 17 in Durban, South Africa, these processes must consider how to include a rights-based approach to protect all peoples and communities, particularly those most vulnerable to climate change.

¹² *Id.*, para. 92.