

Promoting Human Rights in the Future Climate Regime

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Abstract - Over the past several years, the human rights implications of climate change have become more evident. While extreme weather events and slow onset changes caused by climate change affect the exercise of human rights, the implementation of climate change policies - in relation to both mitigation and adaptation - may also lead to the infringement of the rights of indigenous peoples and local communities. Despite this recognition by the UN Human Rights Council and other bodies, the international climate change regime has failed to address these implications, recognizing only in 2010 the importance for parties to respect human rights in the implementation of the Framework Convention.

The adoption of the Durban Platform for Enhanced Action (ADP), together with the reform of existing mechanisms and the operationalization of new institutions, offers several opportunities to ensure the adequate fulfillment of human rights obligations under the Convention. In this commentary, we highlight four concrete options available to the parties in the upcoming negotiations to guarantee the respect of substantial and procedural rights of all the stakeholders and to offer a redress mechanism in the case of loss and damages caused by climate change.

I. Introduction

Over the past several years, both the academic and international policy communities have become increasingly aware of the human rights implications of climate change. Building on the long-standing recognition that environmental changes can interfere with the realization of fundamental, internationally recognized human rights, it is now understood that the impacts of climate change are threatening the rights to life, food and culture, among others.

Since 2005, when the Inuit submitted a petition to the Inter-American Commission on Human Rights alleging that the U.S.' failure to regulate greenhouse gas emissions had resulted in severe climate change impacts that are threatening the lives, health, culture and livelihoods of the Inuit, the issue of human rights has been an important element of the global climate change debate. Another human rights forum, the Human Rights Council (Council), has recognized that climate change impacts have a "range of implications, both direct and indirect, for the effective enjoyment of human rights."¹ Recognizing the key role of the international climate change

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¹ Human Rights Council Res. 10/4, Human rights and climate change, 10th Sess., 2-27 Mar. 2009, U.N. Doc. A/HRC/RES/10/4 (25 Mar. 2009).

regime in protecting human rights, a 2011 Council ***299** resolution provides a clear mandate to the Office of the High Commissioner on Human Rights to work closely with the UNFCCC secretariat, noting that the “full, effective and sustained implementation of the UNFCCC [...] is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts.”²

The international climate change regime, however, has been cautious in its approach to the recognition of the relationship between human rights and climate change – in fact, the UNFCCC made its first (and only) reference to human rights in the Cancun Agreements adopted in December 2011. Despite the slow progress thus far, the negotiations that will take place in the coming years to further develop the climate regime provide several opportunities to acknowledge and strengthen this relationship, as well as to develop concrete solutions to address the human rights implications of climate change impacts and of the measures taken to mitigate or adapt to these impacts (referred to as response measures). First, looking ahead, the Durban Platform recently launched a new process intended to achieve a post-2020 climate change agreement, these negotiations could allow for a more detailed discussion of the human rights implications of climate change. Second, current negotiations to establish and operationalize the institutions and mechanisms established under the Cancun Agreements are expected to address various aspects of the climate change regime between now and 2020.

Participatory and transparent procedures governing the work of these institutions could minimize the potential impacts of the decisions of these bodies on the rights of indigenous peoples and local communities. Such procedures could also provide a remedy to the individuals, peoples or communities whose rights may be affected by climate change impacts or response measures, and improve the quality of decisions adopted under the climate change framework.

II. Four concrete proposals to address human rights in the Durban Platform (ADP)

a. Recognizing the need to respect human rights obligations and standards when implementing climate policies

The UNFCCC should further acknowledge that the implementation of climate mitigation and adaptation policies may infringe on the rights of indigenous peoples and local communities if safeguards are not in place. In Honduras, for instance, concerns have been raised that the Aguan Biogas project – funded in part by investments channeled through the Kyoto Protocol’s Clean Development Mechanism – is directly associated with human rights abuses against local farmers and is located in a region that is currently under investigation by the Inter-American Commission on Human Rights. However, the Clean Development Mechanism does not have any safeguards in place to prevent (or withdraw) the registration of such projects. Such concerns prompted a discussion of human rights in the negotiations leading up to Copenhagen (COP15) and then Cancun (COP16), when the UNFCCC emphasized that “parties [to the Convention] should, in all climate change-related actions, fully respect human rights”.³ The negotiations under the ***300**

² Human Rights Council Res. 18/22, Human rights and climate change, 18th Sess., 12-30 Sept. 2011, U.N. Doc. A/HRC/RES/18/22 (17 Oct. 2011).

³ Conference of the Parties to the United Nations Framework Convention on Climate Change, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action

Durban Platform should build on this acknowledgment of the need to establish human rights protections in the climate regime by including specific references to human rights obligations and standards at all governance levels.

b. Ensuring full and effective civil society participation

The UNFCCC should also further develop processes that provide for meaningful and effective civil society participation in all aspects of the climate negotiations. Since the establishment of the UNFCCC in 1992, international instruments have repeatedly emphasized the importance of full and effective public participation in decision-making processes. The 1992 Rio Declaration highlights the participation of stakeholders as a key principle of sustainable development (Principle 10).⁴ The 1998 UNECE Aarhus Convention emphasizes that parties are obligated to promote these principles in intergovernmental processes related to the environment.⁵ Most recently, the outcome document of the Rio+20 Conference emphasizes the commitment of all states to “enhance the participation and effective engagement of civil society [...] in the relevant international forums.”⁶

The importance of stakeholder participation in decision-making related to climate change is expressly recognized in the UNFCCC, which provides that all parties have the obligation to “encourage the widest participation in this process, including that of NGOs” and to “promote and facilitate [...] public participation in addressing climate change and its effects and developing adequate responses”.⁷ The general extent of observers’ rights to participate in UNFCCC negotiations is defined by the Conference of the Parties.⁸

The development of new institutions (such as the Green Climate Fund and the Adaptation Board) established under the Cancun Agreements and the Durban Platform provides new opportunities for the UNFCCC to develop participatory processes and to ensure the effective engagement of stakeholders in these processes. Such processes are essential considering that many local stakeholders do not have strong social and environmental protections at the national level, and therefore rely on international safeguard policies and the judicial or administrative remedies associated with those policies.

c. Establishing institutional safeguards systems

In addition to giving civil society an active and meaningful role in decision-making processes

under the Convention, para. 8 (Cancun, 15 Mar. 2011), U.N. Doc. FCCC/CP/2010/7/Add.1 [hereinafter Decision 1/CP.16].

⁴ Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151.26 (1992), princ. 10.

⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [Aarhus Convention], art. 3.7 (Aarhus, Denmark, 25 June 1998), 2161 U.N.T.S. 447 (1999), *entered into force* 30 Oct. 2001.

⁶ Outcome of the Rio+20 Conference, U.N. Conference on Sustainable Development, U.N. Doc. A/CONF.216/L.1 (2012), para. 76(h).

⁷ United Nations Framework Convention on Climate Change [UNFCCC], arts. 4.1(i), 6.a(iii) (New York, 9 May 1992) 1771 U.N.T.S. 107, *entered into force* 21 Mar. 1994.

⁸ *Id.* at art. 7.6.

that directly affect their lives, the UNFCCC must also establish legally binding standards (or safeguard policies) to ensure that mitigation and adaptation activities deliver their intended benefits.

Particularly within climate finance, strong institutional safeguards provide a means to assess and minimize social and environmental harms. These safeguards also help to ensure that human rights are respected in the implementation of climate activities. For example, the UNFCCC safeguards to be applied to REDD+ activities – established under the Cancun Agreements – call for the “[r]espect for the knowledge and rights of indigenous peoples and members of local communities” consistent with international obligations.⁹ However, it is important to note that while *301 the UNFCCC REDD+ safeguards include some of the essential elements of a safeguards framework, much work remains to be done to elaborate how they should be implemented.

However, social, environmental and human rights safeguard policies in and of themselves are not enough – there must also be accountability processes to ensure that these protections are being implemented and, if not, to allow aggrieved individuals, peoples and communities to seek recourse. International monitoring systems are essential to assess whether safeguards are being effectively implemented on the ground. Such systems must be independent, transparent and participatory, and should build on existing processes (e.g. Universal Periodic Review of the Human Rights Council) to create common guidelines for monitoring and reporting.

In addition to monitoring systems, safeguard policies must be accompanied by robust grievance processes that allow those who may be negatively affected by mitigation and adaptation activities to submit complaints and have them addressed in a timely manner. It is well-established that institutional grievance mechanisms (such as those in multilateral development banks) minimize harm to communities and ecosystems by protecting existing rights, obligations and standards. By facilitating participation and transparency, grievance mechanisms also help to ensure that projects are legitimate and effective, and promote sustainable development.

At present, grievance processes are under negotiation in the Clean Development Mechanism (i.e. the proposal for an appeal procedure in relation to decisions by the CDM Executive Board) and on the agenda for consideration in the Green Climate Fund, but a more comprehensive approach is needed. The Cancun Agreements explicitly describe the need to consider “information from those affected, and evidence of actual impacts” of response measures.¹⁰ Although the Parties have not seriously addressed how this language should be operationalized, it effectively creates a mandate for the Parties to establish a grievance process for those whose rights may be impacted by any mitigation or adaptation activities.

d. Developing a loss and damage mechanism

An additional issue that must be urgently addressed within the UNFCCC is the loss and damage associated with the adverse effects of climate change and how the international community will respond to assist those most vulnerable to the changing climate. In other words, what will

⁹ Decision 1/CP.16, Annex I, para 2(c).

¹⁰ Decision 1/CP.16, at para. 92.

happen to those countries that are not able to adapt to inevitable changes and, as a result, suffer substantial losses of human lives and livelihoods? Although the UNFCCC has not yet established an appropriate institutional framework to address loss and damage, various proposals for a mechanism are under discussion, and this issue will be on the agenda to be decided in Doha in December 2012.¹¹

These negotiations have proven to be highly controversial, as developed countries generally favor a decentralized insurance scheme, while the Alliance of Small Island States and other developing countries support a compensation approach. However, to protect the rights of affected communities from loss and damage, poor countries must have a means to seek adequate and reliable resources (both financial and technical) for rehabilitation and restructuring. In addition, affected individuals and *302 communities, such as those who are forced to relocate as a result of extreme weather events and slow onset processes (such as coastal erosion and sea level rise), must be able to seek compensation for their losses. The loss and damage mechanism should therefore allow civil society to submit relevant information, including firsthand accounts of the impacts of climate change, and make requests for compensation.

III. Conclusion

A rights-based approach to climate change helps to ensure that mitigation and adaptation policies do not result in human and environmental harm, and improves overall implementation of these policies. This approach must include more effective participation of stakeholders, both in policy design at the international level and in implementation of such policies and projects at the national level. It also requires consideration of the implications of climate change on substantive rights, such as the rights to life, food, water and culture.

The upcoming negotiations, particularly those taking place under the Durban Platform which are expected to culminate in a legally binding agreement in 2015, must address the potential effects of climate change policies on the enjoyment of human rights. In the long-term, the negative impacts of climate change and of response measures are expected to increase, thus putting greater pressure on the rights of vulnerable peoples and communities. By directly addressing this issue and developing rights-based standards and institutional mechanisms, the UNFCCC – in cooperation with other UN bodies – would ensure that the international community does not create other social crises in its efforts to address the climate crisis.

¹¹ Decision 1/CP.16, at para. 25-29.