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Human Rights in the Paris Agreement

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Abstract

The Paris Agreement contains the first mention of human rights in a climate change treaty. This article recounts the build-up of human rights advocacy since the Cancun Agreements. It then discusses the significance of the inclusion of a provision on human rights in the preamble to the Paris Agreement and explores other relevant provisions adopted at the 21st Conference of the Parties to the UN Framework Convention on Climate Change in Paris in December 2015.

Keywords

Paris Agreement on climate change – human rights

1 Introduction

The preamble to the Paris Agreement includes an acknowledgement “that climate change is a common concern of humankind” and that “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.¹ The latter statement, in particular, has no equivalent in the UNFCCC or in the Kyoto Protocol. Its insertion in the Paris Agreement is, largely, the outcome of years of advocacy by civil-society organizations. Also adopted were provisions to promote gender equality, and participation, sustainable development, and poverty eradication as

¹ Paris Agreement, recital 12.

side-benefits, or, more generally, as a context for climate action. Thus, the Paris Agreement contributes to the development of a political narrative justifying climate action by reference to human rights. However, because it specifies no concrete measures, its direct impact on the protection of human rights in climate action will remain very limited.

This short note presents an overview of the advocacy movement that called for the insertion of human rights provisions at the Paris Conference, before analysing the legal value of the specific recitals, and briefly discussing a few other relevant provisions of the Paris Agreement.

2 The build-up of human-rights advocacy before Paris

In the course of the last ten years or so, numerous academic publications and civil-society reports have revealed the connections between climate change and human rights.² Some international organs have lent support to this increase in momentum. The Human Rights Council, in particular, between 2008 and 2015, adopted five resolutions on climate change and human rights.³

This advocacy movement achieved its first success in 2010 with the insertion of human-rights language into the Cancun Agreements. Recital 8 of that decision reads:

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, or disability...⁴

In addition, paragraph 8 of the Cancun Agreements “emphasize[s] that Parties should, in all climate change related actions, fully respect human rights”.⁵

2 See, for instance, Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press, 2010); and Ottavio Quirico and Mouloud Boumghar, *Climate Change and Human Rights: An International Law Perspective* (Routledge, 2015).

3 Human Rights Council resolutions 7/23 (2008), 10/4 (2009), 18/22 (2011), 26/27 (2014), and 29/15 (2015).

4 Decision 1/CP.16, recital 8.

5 *Ibid.*, para. 8.

These provisions of the Cancun Agreements encouraged demands for the inclusion of human rights language within the climate regime. In 2014, the UN Special Procedures mandate-holders to the states negotiating in the Ad-Hoc Working Group on the Durban Platform published an open letter calling for “inclusion” of human rights in a new climate agreement.⁶ In the lead-up to the Paris Conference, more than thirty states signed the “Geneva Pledge for Human Rights in Climate Action”.⁷ The Human Rights and Climate Change Working Group, a civil society network which had already been influential in Cancun, coordinated the actions of multiple non-governmental organizations calling for the inclusion of particular language in the work of the ADP. The website of this advocacy coalition reflected a widely shared feeling that “With the 2015 climate agreement under negotiation, NOW is the time to fully integrate rights protections in the climate regime”.⁸

Recognition of the relationship between climate change and the enjoyment of human rights was certainly an important component of the demands formulated by this advocacy movement, but more specific proposals were also put forward. It was argued that a new agreement should “recognize the adverse effects of climate change on the enjoyment of human rights”,⁹ especially of vulnerable groups. In the Cancun Agreements, those adverse effects were merely alluded to in a reference to a resolution of the Human Rights Council. A treaty would provide a stronger statement and a more authoritative reference than a COP decision. Such a provision could have implications for litigation, for example in domestic cases taking on mitigation policies, but also (and perhaps more importantly) for domestic advocacy of climate change mitigation.

Furthermore, demands were pressed for a clear recognition that all measures adopted in response to climate change should conform with states’ human rights obligations. In the words of John Knox, the UN Special Rapporteur on human rights and the environment, “Governments do not check their human rights obligations at the door when they respond to climate change.”¹⁰

6 “A New Climate Change Agreement Must Include Human Rights Protection for All” (17 October 2014).

7 Geneva Pledge for Human Rights in Climate Action, adopted on 27 February 2015, available at <www.fes.de/GPoI/klimanewsletter/Genf_2015-02-27_The-Geneva-Pledge_13022015-final.pdf>.

8 <<http://climaterights.org/>>.

9 “A New Climate Change Agreement Must Include Human Rights Protection for All” (17 October 2014), at 1.

10 Office of the High Commissioner for Human Rights, “COP21, ‘States’ human rights obligations encompass climate change’ – UN expert” (3 December 2015), available at <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16836&LangID=E#sthash.qoPqbvvt.dpuf>.

In line with the provision of the Cancun Agreements to this effect,¹¹ it appeared important to leave no doubt that international cooperation against climate change, in particular transnational projects, would not support projects that disregard the human rights of the populations concerned. Further, advocacy highlighted the need to “facilitate informed public participation in decision-making”.¹²

Some advocates also called for the inclusion of human-rights language in the article defining the purpose of the agreement under negotiation (article 2).¹³ However, others in favour of recognition of the significance of human rights in climate actions were more reluctant to support a reference to human rights in article 2, as they considered that a climate change treaty should have a clear “climate goal”,¹⁴ not a human rights goal.

3 The Reference to Human Rights in the Preamble to the Paris Agreement

Human rights per se were not among the top priorities of any negotiating party in the negotiations held in the ADP and later at COP 21.¹⁵ The inclusion of some general language recognizing the relevance of human rights agenda was relatively consensual. Thus, a reference to the obligation of parties to “respect human rights, the right to development and the rights of indigenous peoples” was included, without brackets, in the so-called “elements for a draft negotiating text” compiled at COP 20 in Lima.¹⁶ Negotiations conducted in the ADP in 2015 focused on the specific phrasing of this reference and to its location in the eventual decision/agreement. Inclusion of the “right to development” along with “human rights” was emphatically demanded by some developing

11 See supra note 5.

12 “A New Climate Change Agreement Must Include Human Rights Protection for All” (17 October 2014), at 3.

13 See e.g. Climate Action Network, closing intervention at ADP 2–11 (October 2015), at 3: “Human rights must be included in the operative text (specifically Article 2) of the Paris Agreement, as a means to protect the rights of the people and communities that are most vulnerable but least responsible for climate change.”

14 Norway, “COP 21: Indigenous peoples, human rights and climate changes” (7 December 2015), available at <www.regjeringen.no/no/aktuelt/cop21-indigenous-peoples-human-rights-and-climat-changes/id2466047/>.

15 Thus, there is no reference to human rights in any of the two “aide-mémoire” drafted by the co-Presidencies following informal ministerial consultations on 20–21 July and 6–7 September 2015.

16 Decision 1/CP.20, Lima call for climate action (2014), annex, at 6.

countries.¹⁷ Other parties supported a reference to other vulnerable groups, including certain groups recognized in instruments of international human-rights law (e.g. migrants, persons with disabilities) and certain others that are not (e.g. local communities, young people¹⁸).

A lengthy recital in the preamble to the Paris Agreement has been copied, verbatim, into the preamble to the decision adopting the agreement:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity...¹⁹

The recital recognizes the applicability of human rights to measures on climate change. While paragraph 8 of the Cancun Agreements hinted at obligations to “respect” these rights, the Paris Agreement recalls the positive obligations for states to “promote and consider” these rights through climate change actions. The main added value of this provision is its insertion in a treaty²⁰ rather than a COP decision.

The legal force of a recital as opposed to an operative clause may be questioned. The preamble of a treaty may not be capable of creating rights or obligations on its own (even though it could contribute to the formation of a customary norm).²¹ Nevertheless, the relevance of clauses contained in the preamble of a treaty for the interpretation of that treaty is clearly recognized in customary international law.²² This means that, although the Paris

17 See, e.g., Submission by Angola on behalf of the Least Developed Countries Group: ‘surgical insertions’ to co-chairs’ non-paper (October 2015).

18 ADP 2-10, Streamlined and consolidated text, version of 11 June 2015, 16:30, at 3.

19 Provision common to Paris Agreement, recital 12, and to Decision 1/CP.21, Adoption of the Paris Agreement (2015), recital 8 (emphasis in the original).

20 Although the Paris Agreement may or may not be a “treaty” for the sake of domestic legal systems, for instance in the United States, it is clearly a “treaty” for the sake of public international law. See articles 2(1)(a) and 11 of the Vienna Convention on the Law of Treaties, 23 May 1969, and article 38(1)(a) of the UN Charter.

21 See, e.g., International Law Commission, the Second report on identification of customary international law by Michael Wood, Special Rapporteur (22 May 2014), at para. 76(f).

22 Vienna Convention on the Law of Treaties, art. 31(2). As the International Law Commission noted on the commentary on the draft of this convention, “That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment.” See

Agreement does not create any self-standing human-rights-related obligations, its parties-to-be must recognize an obligation to comply with their respective human-rights obligations when carrying out climate-change-related actions under the Agreement.

Of course, had the provision been left out, a similar conclusion could be reached on the grounds of general treaty interpretation. A treaty is always to be interpreted with consideration to the “relevant rules of international law applicable in the relations between the parties”.²³ The general provisions of the UN Charter on states’ human-rights obligations prevail over the Paris Agreement through the application of article 103 of the Charter.²⁴ It also follows from the “principle of harmonization” identified by the working group of the ILC on the fragmentation of international law that mutual accommodation should be sought between norms arising from the human rights regime and norms arising from the climate change regime.²⁵

More than just a change in the law, the proponents of this recital felt the “need to *reference* ... human rights and gender”²⁶ in the Paris Agreement, as a somewhat symbolic statement, a way of conveying a certain normative vision of the climate regime, and, not least, of reaffirming the relevance of human rights in responses to the greatest problem of our time. As I mentioned, a bolder step was pursued for the insertion of a reference to “respect for human rights” in article 2 (on the agreement’s purpose).²⁷ Driven by NGOs, the proposal failed to gain any substantial party support. Such an operative clause could more readily have been interpreted as imposing *new* human-rights obligations on some states (in particular on states that have not ratified all basic human-rights conventions) in the context of their climate actions. As many

Yearbook of the International Law Commission, 1966, vol. II, at 221, para. 13 of the commentary under draft article 27.

23 Vienna Convention on the Law of Treaties, art. 31(1)(c).

24 Article 103 of the UN Charter provides that, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” An affirmation of states’ human rights obligations can be found in article 1(3). Yet, some parties to the UNFCCC that are not parties to the UN Charter (the Cook Islands, Niue, and the European Union) could become parties to the Paris Agreement.

25 See generally the Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (18 July 2006), UN Doc. A/CN.4/L.702, in particular conclusions 4, 17, and 26.

26 ADP 2-10, working document, version of 8 September 2015, 18:00, at 4 (emphasis added).

27 Bracketed language in “version 1” of 9 December 2015, 15:00.

other concessions were being sought from emerging economies (e.g. China) and Middle East oil producers—countries that had not always shown great enthusiasm for international human-rights law—such proposals were not politically opportune.

4 Other Relevant Provisions in the Paris Agreement

Beyond the umbrella recognition of the applicability of human rights to climate change actions, the Paris Agreement and the decision adopting it contain several other considerations that relate, broadly, to the advancement of human rights, ranging from gender equality and participation, to sustainable development and poverty eradication. Some of these clauses are relatively concrete and operative; many, however, appear rather vague and invocatory. Below, I identify a few such trends at play in the Paris Agreement without offering a complete review of the agreement's implications for the respect and promotion of human rights.

A first series of provisions highlight certain affinities between the objectives of the climate regime and objectives related to the advancement of human rights. A Paris Agreement recital “emphasiz[es] the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.”²⁸ Paragraph 109 of the Decision “recognizes [the] co-benefits [of voluntary mitigation actions] for adaptation, health and sustainable development.”²⁹ Another recital of the Agreement recognizes “the particular vulnerabilities of food production systems to the adverse impacts of climate change”,³⁰ suggesting a justification of climate action as a means to safeguard food security. In article 8, the parties “recognize ... the role of sustainable development in reducing the risk of loss and damage”.³¹ These elements reinforce certain discourses that may contribute to raise a political impetus for action against climate change and its impacts, although they are unlikely to have far-reaching legal implications.

A second series of provisions calls for integrating particular human-rights considerations within climate actions. Two articles of the Paris Agreement acknowledge that adaptation action and capacity-building should be

28 Paris Agreement, recital 9.

29 Decision 1/CP.21, para. 109.

30 Paris Agreement, recital 10.

31 *Ibid.*, recital 8(1).

“gender-responsive”.³² A provision of the Decision requires that the members of the facilitative expert committee created by article 15 of the Agreement should be elected “while taking into account the goal of gender balance”.³³ Other provisions, including an Agreement recital, highlight the importance of “public participation, public access to information and cooperation at all levels”.³⁴ Public participation should be promoted in all adaptation and capacity-building efforts.³⁵ Article 2 of the Agreement emphasizes that climate action must be conducted “in a manner that does not threaten food production”.³⁶

A third series of provisions mentions human-rights-related considerations merely as a relevant “context” for actions against climate change and its impacts, without specifying in what ways these elements are relevant—whether, for instance, human rights could be conducive, or rather an obstacle, to climate actions. Article 2 of the Paris Agreement mentions the aim of “strengthen[ing] the global response to the threat of climate change ... in the context of sustainable development and efforts to eradicate poverty”.³⁷ The same “context” is recalled again in article 4(1), on efforts to peak emissions globally as soon as possible, and in article 6(8), which recognizes the “importance of integrated, holistic and balanced non-market approaches”.³⁸ It is not clear what legal effect, if any, this allusion to a “context” of sustainable development and poverty eradication could have.

Such overly vague provisions, repeated almost *ad nauseam*,³⁹ will frustrate those who expected concrete measures from the Paris summit. One concrete demand of the human-rights movement was guarantees that international funding would not support projects that cause disproportionate harm to local populations, as allegedly has occurred, most prominently, in hydroelectric projects.⁴⁰ Safeguard policies are of great importance, for instance to avoid project-induced displacement and resettlement, or, when such results are

32 Ibid., articles 7(5) and 11(2).

33 Decision 1/CP.21, para. 103.

34 Paris Agreement, recital 15.

35 Ibid., articles 7(5) and 11(2).

36 Ibid., article 2(1)(b).

37 Ibid., article 2(1), chapeau.

38 Ibid., article 6(8).

39 Thus, “sustainable development” is mentioned twelve times in the Paris Agreement, including in each of the first four paragraphs of article 6.

40 For instance, on the controversial Belo Monte project, partly funded by CDM credits, see Jonathan Watts, “Belo Monte, Brazil: The tribes living in the shadow of a megadam” *The Guardian* (16 December 2014).

justifiable, to ensure that appropriate schemes are adopted and implemented for the protection of the human rights of affected populations. Instead, only a general aim of “fostering sustainable development”⁴¹ conditions the mechanism which, under article 6(4) of the Paris Agreement, will succeed the Clean Development Mechanism.

Further developments in the relation between human rights and climate change can be expected to build on the Paris Agreement. It is possible to conceive of domestic legal proceedings based upon, or otherwise making use of the acknowledgment of human-rights law in the preamble to the Paris Agreement and the provisions that call for integrated consideration of human rights within climate action, most likely when contesting particular governmental measures taken in response to climate change or its impacts. Within the UNFCCC regime, human-rights advocacy will likely be reinforced by the Paris Agreement. Fields for further advocacy will include the definition of many of the modalities of application of the Paris Agreement, including the sustainable development mechanism,⁴² adaptation efforts,⁴³ and approaches to address loss and damage.⁴⁴

5 Conclusion

While the Paris Agreement constitutes a step forward for advocacy on climate change and human rights, its provisions on human rights are mostly vague and incantatory. Further negotiations will be needed to give concrete meaning to the objectives expressed therein. In particular, steps are necessary to ensure that international funding for mitigation projects does not lead to a torrent of projects that are devoid of appropriate social safeguards. On the other hand, the non-inclusion of a reference to human rights in article 2 of the Paris Agreement reflects a welcome orientation towards a more climate-centred climate regime—one which does not attempt to solve all the issues of our time while addressing the most difficult one.

41 Paris Agreement, article 6(4).

42 Ibid.

43 Ibid., article 7.

44 Ibid., article 8.