

HUMAN RIGHTS IN THE CLIMATE CHANGE
NEGOTIATIONS

Sébastien Jodoin



CISDL Legal Working Paper Series on
Climate Change Law and Policy





LOST IN TRANSLATION: HUMAN RIGHTS IN THE CLIMATE CHANGE NEGOTIATIONS

A CISDL WORKING PAPER

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* With thanks to Stuart Wuttke, AFN; Ulrik Halsteen, OHCHR; Tracy Coates, CISDL; Patricia Parkinson and Paul Crowley, IDLO; and other participants in the CISDL/IDLO 'The Low-Carbon Economy Beyond Copenhagen: The Global Law & Policy Research Agenda,' Copenhagen, December 2009. Adela Maciejewski Scheer's editorial assistance is also gratefully acknowledged.

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LOST IN TRANSLATION: HUMAN RIGHTS IN THE CLIMATE CHANGE NEGOTIATIONS

Sébastien Jodoin¹

1. Introduction

The increased attention given to human rights in the context of climate change policy-making stems from the greater focus on the human dimensions of climate change. Although human rights language has not featured prominently in any decisions or texts adopted through the processes held under the *U.N. Framework Convention on Climate Change* (UNFCCC) and the *Kyoto Protocol* (KP),² a number of states, particularly small island developing states (SIDS) and least developed countries (LDCs), supported by states such as Switzerland and Bolivia, have sought to bring attention to the human rights aspects of climate change.³

In addition, certain environmental or humanitarian NGOs, such as Oxfam International, Greenpeace, Earthjustice, the Centre for International Environmental Law and Friends of the Earth have incorporated human rights issues into their messaging, policy thinking and programming on climate change.⁴ Few human rights NGOs, however, have addressed

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² *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.

³ See, e.g., the Male' Declaration on the Human Dimension of Global Climate Change, adopted by SIDS on 14 November 2007, available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (calling for assistance from the UNHRC and the OHCHR in assessing the human rights implications of climate change). See also 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> and the submissions of the Maldives, the Marshall Islands, Switzerland and Bolivia to the OHCHR on human rights and climate change, available at: <http://www2.ohchr.org/english/issues/climatechange/submissions.htm>.

⁴ See, e.g., Oxfam International, "Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy," Oxfam Briefing Paper 117, available at: http://www2.ohchr.org/english/issues/climatechange/docs/Oxfam_International.pdf; Green Peace, "Human Rights and the Climate Crisis: Acting Today to Prevent Tragedy Tomorrow," available at: http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Greenpeace_HR_ClimateCrisis.pdf; Earth Justice and Centre for International Environmental Law, "Global Warming and Human Rights," available at: <http://www.earthjustice.org/library/references/Background-for-IAHRC.pdf>; Centre for International Environmental Law, "Climate Change and Human Rights: Practical Steps for Implementation," available at: http://www.ciel.org/Publications/CCandHRE_Feb09.pdf; Centre for International Environmental Law, "Climate Change and Human Rights: A Practical Way Forward," available at: http://www.ciel.org/Publications/WayForward_25Feb09.pdf; Friends of the Earth Australia, "A Citizen's

climate change issues in any prominent manner, with the exceptions being academic or policy NGOs such as the International Council on Human Rights Policy and the Danish Institute for Human Rights.⁵

Finally, a number of international organisations and bodies have issued declarations or initiated studies on the links between human rights and climate change. The U.N. Human Rights Council (UNHRC) has adopted two resolutions and commissioned a study from the Office of the High Commissioner on Human Rights (OHCHR) on human rights and climate change.⁶ The Office of the High Commissioner on Refugees (OHCR) has likewise issued a position paper on the links between climate change and human displacement.⁷ Another notable report is the U.N. Development Programme (UNDP) 2007/2008 Human Development Report on climate change, which includes a strong focus on human rights instruments and principles.⁸

These developments set the stage for human rights to play an important role in the negotiations held in Copenhagen in December 2009 on the occasion of the fifteenth conference of the parties to the UNFCCC and the fifth meeting of the parties to the KP (UNFCCC COP-15 / KP MOP-5). During the conference, human rights issues were certainly given greater prominence in the positioning of states and the campaigning of NGOs relative to their treatment in earlier negotiations. For most observers, however, the role that human rights actually played in the negotiations would be hard to gauge because the UNFCCC COP-15 / KP MOP-5 did not deliver any of its key anticipated outcomes. It did not produce a legally binding outcome for governing the post-2012 period (either a new agreement replacing the KP, as sought by most industrialised states, or an extension or amendment of the KP, as sought by China and the G-77). In addition, it did not lead to the adoption of decisions on long-standing topics of negotiation, such as reducing emissions from deforestation and degradation (REDD) or enhanced action on adaptation. Meanwhile, the Copenhagen Accord, the major outcome of these negotiations, does not include any references to human rights.

Guide to Climate Refugees,” available at: <http://www.foe.org.au/resources/publications/climate-justice/CitizensGuide.pdf/view>.

⁵ See International Council on Human Rights Policy, “Climate Change and Human Rights: A Rough Guide,” (Geneva: ICHRP, 2008), available at: http://www.ichrp.org/files/reports/45/136_report.pdf; Danish Institute for Human Rights, “Human Rights and Climate Change Exploring the nexus, the human rights implications and regulatory frameworks,” 24 November 2009, available at: <http://www.humanrights.dk/files/pdf/FINAL%20REPORT%20HR%20and%20CC.pdf>.

⁶ U.N. Human Rights Council Resolution 7/23, 7th Session, 14 July 2008, U.N. Doc. A/HRC/7/78 (“UNHRC Resolution 7/23”); U.N. Human Rights Council, Resolution 7/23, Human Rights and Climate Change, 10th session, 25 March 2009, UN Doc. U.N. Doc. A/HRC/10/L.11 (“UNHRC Resolution 10/4”); U.N. Human Rights Council, Resolution 10/4, 41st meeting, 25 March 2009, UN Doc. U.N. Doc. A/HRC/10/L.11 (“UNHRC Resolution 10/4”); 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. 70 (“OHCHR Report on Climate Change and Human Rights”).

⁷ 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 (“OHCHR Report on Climate Change, Natural Disasters and Human Displacement”).

⁸ U.N. Development Programme, Human Development Report 2007/2008: Fighting climate change: Human solidarity in a divided world, available at: http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

Given the paucity of concrete legal developments in the many points of contact between human rights and climate change, this paper focuses on the dynamics of policy debates involving human rights issues or language during the UNFCCC COP-15 / KP MOP-5. The draft texts as they evolved during the negotiations, particularly those led by the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA), are therefore a particular focus of analysis.⁹ Section 2, the core of the paper, reviews the key legal trends and challenges that have characterised the relationship between human rights and climate change. Section 3 outlines some of the innovative legal best practices that could address many of these challenges, ensuring that human rights principles and obligations both constrain, support, and guide policy responses to climate change. Section 4 concludes with suggestions for future legal research on the role that human rights should play in international policy-making on climate change.

2. Legal Trends and Challenges

This section is structured around four key legal trends and challenges that have characterised the relationship between human rights and climate change: the impacts of climate change on human rights (section 2.1), climate change and migration (section 2.2), equity and the right to development (section 2.3), and the consistency of responses to climate change with human rights (section 2.4).

2.1 The Impacts of Climate Change on Human Rights

It is widely recognised among human rights experts and bodies that climate change has a number of generally negative impacts on human rights. For instance, in a resolution adopted in March 2009, the UNHRC noted that:

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.¹⁰

In the context of debates around climate change, a number of states and NGOs have argued that the projected impacts of climate change on a range of human rights provide a moral and legal justification for states, particularly developed states, to take action to address climate change. They argue that the human rights impacts of climate change oblige states to mitigate the impacts of climate change on vulnerable communities by reducing their emissions of greenhouse gases (GHGs) and to assist vulnerable communities in adapting to the effects of climate change by providing them with funding, cooperation and assistance.

Increasingly, the proponents of this approach have also emphasized the liability and responsibility of developed states for the alleged human rights violations arising from human-induced climate change. For instance, in 2005, a group of Inuit in the Canadian and

⁹ The draft negotiating texts referred to in this paper were collected throughout the UNFCCC COP-15 / KP MOP-5 and are on file with the author.

¹⁰ UNHRC Resolution 10/4, preamble.

Alaskan Arctic sought compensation from the United States for alleged violations of their human rights resulting from climate change before the Inter-American Commission on Human Rights (IACHR).¹¹ Although the IACHR deemed the case inadmissible,¹² similar litigation has been or is in the course of being launched.¹³

In the context of the climate change negotiations leading up to and during the UNFCCC COP-15 / KP MOP-5, developing countries in particular sought to link the notion of human rights responsibility of large emitters for climate change with the obligations to avoid climate change and to provide funding for the climate programmes of developing countries. Not surprisingly, the largest emitters among industrialised countries and the emerging economies have vehemently opposed recognition of or references to this type of responsibility. In fact, this second group of states are suspicious about any strong references to the human rights impacts of climate change that might implicitly recognise any sort of responsibility or liability on their part for the human rights impacts of climate change.

There are good reasons to think that both sides in this debate are wrong to focus on the potential of human rights responsibility for the impacts of climate change. As underscored by the OHCHR, it is less than clear that the invocation of state responsibility for human rights violations arising from climate change finds strong support in existing international human rights law:

Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.¹⁴

As such, in justifying the obligation of states to take action to avoid climate change and reduce its effects, it may be more appropriate to refer to the existing obligations of states to respect, protect and fulfil rights protected in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). This would entail that developing countries should comply with the minimum core obligations under each right, take deliberate, concrete and targeted measures available to them to move as expeditiously and effectively as possible towards the

¹¹ See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States, submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, 7 December 2005, available at: <http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

¹² In a letter dated November 16, 2006, the IACHR informed the petitioners that it would not consider the petition because the information it provided was not sufficient for making a determination. In March 2007 however, the IACHR did hold hearings with the petitioners to address matters raised by the petition without revisiting the issue of its admissibility.

¹³ See Center for Climate Change Law, Columbia Law School, Climate Change Litigation Resources, available at: <http://www.law.columbia.edu/centers/climatechange/resources>.

¹⁴ OHCHR Report on Climate Change and Human Rights, para. 70.

full realization of rights, and guarantee non-discrimination in access to these rights in spite of the impacts and consequences of climate change. With respect to developed states, they would remain under the obligation to provide cooperation to assist developing countries in the implementation of economic, social and cultural rights in light of these same impacts and consequences.¹⁵

Unfortunately, the measured approach advocated by the UNHCHR was not reflected in the draft negotiating texts produced during the UNFCCC COP-15 / KP MOP-5. One aspect of the negotiations that addressed the human rights impact of climate change concerned the preamble to “The outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention” (AWG-LCA 8, item 3), known commonly as the Shared Vision draft text. This text, produced by the AWG-LCA, was meant to serve as the foundations of any post-2012 agreement.

In one of the first drafts produced by the AWG-LCA, on 9 December 2009, the draft Shared Vision text included the following preambular paragraph:

17. Noting the resolution of the UN Human Rights Council (HRC/10/4) on human rights and climate change and the adverse effects of climate change have a range of direct and indirect implications on the full and effective enjoyment of human rights – including the right to sustainable development, self determination, statehood, life, the right of people not to be deprived of their own means of subsistence, the right to water and the right to live well – and are increasingly posing a risk to security and the survival, sovereignty and territorial integrity of States.

One major flaw with this paragraph was its unfortunate reference to a right with no basis in any international instrument or decision, the “right to live well,” an issue that carried through to the last draft Shared Vision text. Another problem with this paragraph was its inclusion, if not conflation, of many different types of individual rights (such as the right to water) with collective rights (such as the right to self-determination) or state rights (such as the right to statehood). Later draft Shared Vision texts, however, introduced two or three paragraphs focusing on different types of rights.

The last draft version of the Shared Vision text produced by the AWG-LCA before its work was essentially halted thus included the following three preambular 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,

Recognizing the right of all nations to survival and that sustainable development and poverty eradication are the first and overriding priorities of developing country Parties..

¹⁵ *Ibid.*, paras 75-77 and 84-86.

Evidently, these three paragraphs do little to move policy debates towards a position focused on existing obligations within the realm of economic, social and cultural rights. While some proposed Shared Vision texts, such as the one released by the African Group,¹⁶ had the virtue of drawing on some of the existing language in the ICESCR, such language was never adopted in the draft texts produced by the AWG-LCA.

More worrisome though is the weakness and inadequacy of the drafting of certain aspects of these paragraphs. The first paragraph merely “notes” UNHRC Resolution 10/4, an expression without any legal consequence whatsoever that does little to strengthen the links between these two regimes and issue areas. The reference itself does not even refer to the human rights language of the resolution and instead focuses on a reference included in the resolution to the Rio Declaration and its affirmation that “human beings are at the centre of concerns for sustainable development.”¹⁷ Instead, the passage which follows the reference to UNHRC Resolution 10/4 gives the impression that the latter recognises the importance of respecting “Mother Earth” or is somehow related to this concept.

While the second paragraph does recognise the implications of climate change on human rights, it regrettably refers to “living well” as one of the human rights affected by climate change. It is not at all clear why the recognised right to an adequate standard of living inscribed within ICESCR was not used in this paragraph instead of the novel right to live well. The second part of the second paragraph, which focuses on vulnerable groups, would have been much improved if it had also focused on one key vulnerable group identified by the OHCHR in its study: indigenous peoples.

The above discussion has highlighted concerns about the use of human rights language in the preamble to the draft Shared Vision text. Of course, similar arguments could also be made about the lack of references to ICESCR in the negotiations texts on “Enhanced action on capacity-building,” “Development and transfer of technology,” and “Enhanced action on the provision of financial resources and investment” (AWG-LCA 8, item 3). In addition, one important topic that cut across many negotiating topics was the notion of vulnerability. Although a human rights approach could strengthen the climate change regime’s understanding of vulnerability by focusing on vulnerable individuals and groups, the last versions of the draft negotiating texts produced by the AWG-LCA did not include any references to human rights and remain focused on vulnerable states. This is one area where a human rights approach could be of great use to states in conceptualising the impacts of climate change in human terms and in designing policies, especially in terms of adaptation to climate change, that respect, protect and fulfil the economic, social, and cultural rights of especially vulnerable individuals and groups.

The negotiations as they related to the human rights impacts of climate change evince the negotiators’ lack of understanding of established international human rights law. This lack of

¹⁶ The Third Text proposed by the African Group 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”.

¹⁷ 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.

understanding does not set the stage for very productive or useful exchanges between the climate change and human rights regimes.

2.2 Climate Change and Migration

Another issue that has featured prominently within climate change debates relates to the displacement and migration of individuals and populations as a result of the consequences of or responses to climate change. Although this issue has not actually been addressed in any decision or treaty within the UNFCCC process to date, a number of states and certain NGOs have referred to persons displaced by the effects of climate change as “climate refugees” or “environmentally-displaced refugees.” Few well-established environmental NGOs have incorporated the term “climate refugees” into their programming, but one notable example is Friends of the Earth.¹⁸ The term “climate refugee” has thus begun to take hold in the climate change community as the most commonly-used term for describing persons who will be displaced or migrating due to the effects of climate change. In the draft negotiating texts produced during the UNFCCC COP-15 / KP MOP-5, a related term, “environmental refugees,” most notably appears in bracketed form in the preamble of the draft text on “Economic and social consequences of responses measures” (AWG-LCA 8, item 3):

[Noting the need for developed country Parties to compensate the economies of African and least developed countries, for environmental, social and economic losses arising from the implementation of climate change response measures in the context of environmental justice and environmental refugees.]

This use of the terms “climate refugee” or “environmental refugee” have continued to grow in popularity and prominence despite the repeated statements of the OHCHR and others opposing this practice due to fears that it could undermine the existing international refugee regime and calling for a new approach to issue of persons displaced as a result of environmental catastrophes.¹⁹ As noted by the OHCHR, international refugee and human rights law do not provide any clear answers or solutions to the challenges relating to mass displacement and migration resulting from climate change.²⁰ Although human rights principles certainly have a role to play in developing solutions to these challenges, the level of debate thus far remains mired in generalities and rhetoric. The fact that many states and NGOs continue to refer to the current refugee system as a point of departure or even as the ultimate focus of their campaigning and policy thinking is not helpful and further evinces the divide between the climate change and human rights regimes.

2.3 Equity and the Right to Development

The principles of equity and common but differentiated obligations have long been recognised as being key to global cooperation for addressing climate change.²¹ Accordingly, the UNFCCC and KP both recognised that developed states should take the lead in

¹⁸ See Friends of the Earth Australia, “A Citizen’s Guide to Climate Refugees,” available at: <http://www.foe.org.au/resources/publications/climate-justice/CitizensGuide.pdf/view>.

¹⁹ See, e.g., OHCHR Report on Climate Change, Natural Disasters and Human Displacement; Inter-Agency Standing Committee, “Climate Change, Migration and Displacement: Who will be affected?,” Working paper submitted by the informal group on Migration/ Displacement and Climate Change of the IASC, 31 October 2008, available at: <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>.

²⁰ OHCHR Report on Climate Change and Human Rights, paras 55-60.

²¹ See, e.g., UNFCCC, Preamble, arts 3(1), 3(2), 4(5)-4(7).

combating climate change and its effects as a result of their historical responsibility for emitting GHGs and their greater resources and capabilities. Moreover, actions to combat climate change should take into account the objective of developing countries for the achievement of sustained economic growth and the eradication of poverty.

One human right that has often been featured in discussions of equity in the context of climate change is the collective right to development or even the right of states to sustainable development.²² As noted above, the term “right to sustainable development” was referenced in early versions of the preamble of the draft Shared Vision text produced by the AWG-LCA. The last version of the draft Shared Vision text refers instead to the “right of all nations to survival.”

Some states and NGOs have also begun to develop new related rights such as the right to the atmosphere or the right to pollute, both of which imply that all states have the right to emit GHGs in an equitable manner. More recently, certain states and NGOs have also begun to refer to individual rights in their conceptions of equity in the context of the climate change regime. They emphasize that while individuals in the developing world have contributed very little to the overall proportion of GHGs in the atmosphere, they will suffer the most from the impacts of climate change on human rights. They argue that developed states shoulder a responsibility for addressing climate change and for assisting the developing world with its transition to a low-carbon economy and its adaptation to the effects of climate change through international cooperation, funding and technology transfer. One of the best known of these new individualised approaches is the framework of greenhouse development rights (GDRs). GDRs set up a level of welfare known as the “development threshold”: individuals below this level are taken as not having realised their right to development and as bearing little responsibility for curbing GHGs while individuals above this level must assume the costs of curbing the GHGs associated with their level of welfare.²³

Although the right to development, and certainly any of the new related rights that have emerged in policy debates on climate change, are not formally recognised as obligations under international human rights law, there is no doubt that human rights standards and principles can play a key role in providing support to the principles of equity and the principle of common but differentiated responsibilities in the climate change regime. Indeed, a human rights framework recognises that the climate change regime should take into account the particular responsibility of developed states in assisting with the progressive realization of economic, social and cultural rights in developing states. It also recognises the specific needs of socio-economically disadvantaged groups in both the developed and developing worlds through ensuring that they do not shoulder a burden that affects the enjoyment of human rights in their jurisdictions.²⁴ Despite the potential for the principles inscribed in ICESCR to support this conception of equity within the climate change regime, it was not referenced in any draft negotiating text produced during the UNFCCC COP-15 / KP MOP-5.

2.4 The Consistency of Responses to Climate Change with Human Rights

²² See *ibid.*, art. 3(4).

²³ See “Green Development Rights Framework,” available at: <http://www.ecoequity.org/GDRs>.

²⁴ OHCHR Report on Climate Change and Human Rights, paras 84-88.

One issue at the interface of human rights and climate change that has received little attention in the context of the climate change negotiations relates to the consistency of responses to climate change with human rights obligations. Although this issue has not been addressed by the UNHRC in either of its resolutions on human rights and climate change, the OHCHR has stated that “human rights standards and principles should inform and strengthen policy measures in the area of climate change.”²⁵

Regrettably, the central importance of ensuring that responses to climate change are supported by and consistent with existing human rights obligations and principles has not featured prominently in the climate change negotiations. This shortcoming is perhaps most obvious when one considers the draft negotiating text on the “Economic and social consequences of response measures” (AWG-LCA 8, item 3). Although the last version of this draft text produced by the AWG-LCA does refer to the social and economic impacts of responses to climate change in a manner that could be aligned with human rights concerns, it does not include any references to human rights language or principles. Given the importance of ensuring that states respect their human rights obligations when taking action on climate change, it is regrettable that this text does not recognise that human rights violations could possibly result from response measures to climate change and that such violations should be avoided.

One topic in the negotiations in which the issue of human rights safeguards was seriously discussed concerned the draft negotiating text on “Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries” (AWG-LCA 8, item 3), commonly known as the REDD text.²⁶ There are a number of concerns raised by the potential impacts of REDD and REDD-plus financing mechanisms on the rights of local communities, in particular those of Indigenous peoples, that have rights to forested territories, live near or in forests, or depend on their resources. As stated by the Permanent Forum on Indigenous Issues, new proposals for REDD and REDD-plus “must address the need for global and national policy reforms [...] respecting rights to land, territories and resources, and the rights of self-determination and the free, prior and informed consent of the Indigenous peoples concerned.”²⁷

Unfortunately, the human rights safeguards included in the last version of the REDD text produced by the AWG-LCA are weak and inadequate. They amount to the following two sub-paragraphs of the preamble:

- (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account [, inter alia,] relevant international

²⁵ *Ibid.*, para. 95.

²⁶ REDD is a financial incentive to reduce deforestation and forest degradation in developing countries that is expected to become part of the post-2012 international climate change regime. It includes actions that would protect existing forests from immediate or medium term threats of forest conversion and further degradation and that recognize the importance of achieving a balance between biomass, biodiversity and forest health in addressing forest degradation. A related framework, REDD-plus, adds components for the sustainable use of forestry and institutional capacity-building for local communities. REDD is expected to be financed by public funds (ODA), private finance (trading of carbon credits on the international carbon market) or by a combination of both.

²⁷ UN Doc. E/C.19/2008/13, at para. 45.

obligations, national circumstances and laws, and noting that the General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;

(d) Full and effective participation of relevant stakeholders, including in particular indigenous peoples and local communities, in actions referred to in paragraphs 1 and 3 below.

These two paragraphs do very little to ensure that the rights of Indigenous peoples and forest-dwellers will not be violated by the design, funding or implementation of REDD and REDD-plus projects. Not only is the inclusion of these paragraphs in the preamble regrettable, but the human rights references and language contained within them are quite unsatisfactory: the reference in paragraph (c) to the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) comes with no legal consequence of any kind and the notion of full effective participation and the conceptualisation of Indigenous peoples as stakeholders falls far short of ensuring that the land rights of Indigenous peoples will be not be violated by REDD and REDD-plus activities. The weakness of the language is all the more disappointing since earlier versions of the draft REDD text included a stronger, though bracketed, reference to the UNDRIP, including the right to free, prior and informed consent:

(e) In accordance with relevant international agreements [, such as the United Nations Declaration on the Rights of Indigenous Peoples,] and taking into account national circumstances and legislation, respect the knowledge and rights of indigenous peoples[, including their free, prior and informed consent,] and members of local communities and promote the full and effective participation of all relevant stakeholders in actions referred to in paragraphs 2 and 5 above;²⁸

A credible source involved in the negotiations of the REDD text confirms that objections by Australia and Canada to strong references to UNDRIP, combined with the position of other states concerned with ensuring that REDD and REDD-plus remained “workable” and “implementable” led to the weaker language eventually included in the last version of the REDD text produced by the AWG-LCA.

One final issue of concern that cut across a number of negotiating texts during the UNFCCC COP-15 / KP MOP-5 related to participatory rights in decision-making in climate change policy and projects. As emphasized by the OHCHR, 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.”²⁹

²⁸ 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, UN Doc. 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.

²⁹ OHCHR Report on Climate Change and Human Rights, paras 81-83.

The issue of participatory rights most notably featured in the negotiations of the preamble to the Shared Vision text, as evinced in the following paragraph in the last version produced by the AWG-LCA:

Further recognizing that a broad range of stakeholders needs to be engaged on global, regional, national and local levels, be they governmental, including subnational and local government, private business or civil society, including the 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.

Other draft texts also referred to participation, such as the text on “Adaptation 1 (c)” (AWG-LCA 8, item 3). The last version produced by the AWG-LCA of this text included the following paragraph:

3. Affirms that enhanced action on adaptation should be undertaken in accordance with the Convention and the provisions thereunder; follow a country-driven, gender-sensitive, participatory approach to adaptation; be based on and guided by the best available science, traditional knowledge, as appropriate, and good governance and mutual accountability; with the aim of integrating adaptation actions into relevant social, economic and environmental policies.

While some of the above language contained in these two paragraphs is certainly aligned with a participatory approach, they could certainly be strengthened with clearer and stronger references to key participatory and procedural rights, such as the rights to information, to full and effective participation, and to justice.

Of all the issues discussed in this paper, the consistency of responses to climate change with human rights obligations is perhaps the most concerning. Indeed, without strong and adequate safeguards built into the climate change regime itself, the risk that state responses to climate change may involve human rights violations or may override human rights considerations is significant. This is especially the case for individuals or groups already vulnerable to violations of their rights in contexts that do not involve the urgency of climate change and the importance of responding to it.

3. Innovative Legal Best Practices

In many ways, the legal practices governing the interaction between climate change and human rights remain in their infancy as the points of contact between the two regimes have been few and far between thus far. As such, this section draws on legal practices that have been developed in other areas, in particular the notion of a rights-based approach to policy.

One critical starting point for this analysis is the idea that best legal practices should be focused not on addressing climate change issues in the context of the human rights regime, but instead on respecting human rights obligations and principles in the context of the climate change regime. Rather than seeking major changes in how human rights apply to environmental harm or migration, policy-makers should pay more attention to the potential application and contribution of existing human rights commitments and structures to the climate change regime. As such, the discussion below has little to say about the issue of

climate change and human migration and instead mostly focuses on the impacts of climate change on human rights and the consistency of responses to climate change with human rights.

Despite this narrow focus, the latent implications of a rights-based policy shift are extensive: if states applied their existing human rights obligations across the board in a proactive manner, the global response to climate change would be significantly strengthened. A rights-based approach to climate change would seek to ensure that responses to climate change protect, respect and fulfil human rights obligations and would apply throughout the various stages of such responses, including planning, funding, implementation, monitoring and evaluation. Its influence on policy-making varies with the type of responsibility involved: while the responsibility to protect and respect human rights *constrains* policy-making, the responsibility to fulfil human rights *supports* and *guides* policy-making. These three roles for human rights in policy-making will be discussed in turn.

3.1 Human Rights as Constraints

The analysis included in section 2.4 on the consistency of responses to climate change with human rights above evinces that the latter have often been neglected or sidelined in policy negotiations on climate change. Human rights of course are not mere administrative formalities that stand in the way of responding to climate change, they represent binding legal obligations of states and they should surely be taken much more seriously by negotiators and policy-makers.

A rights-based approach would ensure that international policy on climate change takes into account human rights obligations and principles, thereby avoiding conflicts between the human rights and climate change regimes and minimizing the risks that responses to climate change could lead to human rights violations. To the extent that one of the priority concerns of human rights has always been the protection of individual rights in the face of governmental action, it is only natural that state responses to climate change, which are likely to involve major policy changes and large projects with impacts on the life, safety, and free movement of individuals, would attract the scrutiny of human rights.

The right to housing provides a useful example: in relocating individuals vulnerable to the effects of climate change, states would be obliged to abide by the safeguards set out in the prohibition on forced evictions in international human rights law. As such, in situations where evictions are justified, the Committee on Economic, Social and Cultural Rights has specified that states must ensure that they are carried out in a manner warranted by a law which is compatible with applicable human rights standards, including the following procedural protections:

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) all persons carrying out the eviction to be properly identified;

- (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (g) provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.³⁰

Some other areas that are of particular concern include:

- the impacts of renewable energy projects and other carbon or climate projects or mechanisms (such as CDM or REDD) on the rights of local communities, including Indigenous peoples,
- the impacts of policy measures increasing the costs of energy or transportation on key economic and social rights of socio-economically disadvantaged individuals,
- the impacts of policy measures in favour of a transition towards a green economy on the right to work of affected workers,
- the impacts of policy measures or projects for relocating or protecting vulnerable communities on the rights of these communities,
- the need for policy processes on climate change to respect participatory and procedural rights, and
- the need to ensure that responses to climate change are consistent with the principle of equality and non-discrimination.

3.2 Human Rights in Support of Policy-Making

Climate change will have devastating consequences for a number of economic, social and cultural rights, especially in developing countries and responses to climate change that would avoid or reduce these impacts thus find support in existing human rights obligations. In particular, responses to climate change funded or led by industrialised countries find legal support in obligations to provide international funding, assistance, and cooperation for the protection and fulfillment of human rights in developing countries. As the Committee on Economic, Social and Cultural Rights has stated, “in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States.”³¹

This obligation is surely a more helpful way of addressing issues of responsibility and equity in the climate change regime than more problematic conceptions of human rights liability for climate change. Being grounded in existing international human rights law, it has the potential to be more acceptable to industrialised countries as a basis for cooperation on climate change. More importantly, unlike the climatic liability approach, it strengthens rather than undermines the notion that all states have a shared responsibility for realising human rights, whether or not they contributed to situations that may make the realization of such rights more challenging. For instance, in a scenario involving five tropical storms, four of which could be found to be linked to climate change, while the climatic liability approach would impose a responsibility to act upon industrialised states for four of these storms, the established principle of international cooperation in the realization of human rights would instead impose such a responsibility for all five storms. It is surely better policy in the long

³⁰ CESCR, General Comment no 7, 20 May 1997, U.N. Doc. E/1998/22, para. 15.

³¹ CESCR, General Comment no 3, 14 December 1990, U.N. Doc. E/1991/23, para. 14.

run to focus on how strengthening the human rights regime as a whole could cover various forms of environmental harm rather than only those forms of harm which could be linked, with great difficulty legally and factually, to the responsibility of states. Simply put, obligations to fulfill all human rights for all, including through international assistance and cooperation, may provide a more constructive legal justification for the international response to climate change than notions of liability.

3.3 Human Rights as Guides for Policy-Making

A rights-based approach also recognises that human rights can form the basis for designing equitable and effective policies for responding to climate change.

First, human rights could serve as guidelines and benchmarks in developing adaptation policies and programmes. In particular, economic, social and cultural rights could provide key indicators for identifying the ways in which climate change will affect the health, safety and livelihood of individuals and the means of enhancing the resilience of a community adapting to these effects. For example, the right to housing could be instrumental in assisting states in strengthening existing housing options or providing alternative housing for vulnerable individuals and communities. As such, key to any policies addressing housing issues would need to take into account the broad notion of the adequacy of housing set out by the Committee on Economic, Social and Cultural Rights.

Notion of Adequacy of Housing³²	
Legal security of tenure	“Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”
Availability of services, materials, facilities and infrastructure	“An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;”
Affordability	“Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.”
Habitability	“Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.”
Accessibility	“Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources.”
Location	“Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. (...) Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants”
Cultural adequacy	“The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.”

Second, by emphasizing participatory rights, rights-based approaches can do much to strengthen the design and the application of climate policies in so much as their effectiveness

³² CESCR, General Comment no 7, 20 May 1997, U.N. Doc. E/1998/22, para. 8.

will often depend on the consent and cooperation of individuals. In particular, by providing meaningful opportunities for the participation and empowerment of individuals and communities in climate mechanisms and programmes, policy-makers can provide legitimacy, stability and security to projects and initiatives, thereby avoiding delays and other difficulties caused by the conflict and litigation that often results from less collaborative approaches.

4. Conclusion

This paper is not meant to be an exhaustive discussion of the links between human rights and climate change, but merely highlights some of the ways in which interactions between these two regimes has featured in on-going policy negotiations held under the UNFCCC and KP.³³

As discussed above, the treatment accorded to human rights in the climate change negotiations is far from satisfactory and the meagre role played by human rights obligations and principles does not reflect their importance for or potential contribution to climate change policy-making. Human rights are misunderstood and misapplied, as reflected by the unsophisticated debate on human rights liability within the negotiations; human rights language is often misused, as reflected by references to “the right to live well” or “environmental refugees” in negotiating texts; human rights safeguards are often weak, as reflected by the REDD text; and important aspects of human rights are simply neglected, as reflected by the lack of consideration accorded to economic, social and cultural rights in the negotiating texts.

This misuse and neglect of a human rights framework in the climate change regime raises the issue of what sort of contribution human rights should make to international and national policy-making in this area. For one thing, it is clear that the human rights – climate change policy nexus should be reconfigured in a way that enables climate change policy to be shaped by existing human rights principles and obligations rather than the other way around. As such, this requires policy-makers to take into account the boundaries of international human rights law and its limited ability to provide solutions to thorny problems such as liability for the impacts of climate change or human migration caused by climate change. On the other hand, human rights principles and obligations should constrain, support and guide policy-makers in the development and implementation of responses to climate change. In doing so, states should seek not only to avoid potential conflicts between the human rights and climate change regimes, but also pursue mutually supportive policy options that enhance respect for human rights and the efficiency of responses to climate change. In other words, human rights do not simply warn policy-makers about policy measures that might violate human rights, they also point them towards good policy measures that focus on the realization of rights and the empowerment of rights-holders and build on our shared, global responsibility for human rights.

³³ For a more substantial discussion of the links between climate change and human rights, see sourced cite above in fn. 4; OHCHR Report on Climate Change and Human Rights; Stephen Humphreys, ed. *Human Rights and Climate Change* (Cambridge: CUP, 2009); Ron Dudai, “Climate Change and Human Rights Practice. Observations on and around the Report of the Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights,” 2009 1(2) *Journal of Human Rights Practice* 294-307.

For this sort of non-conflicting and mutually supportive policy dialogue to take place, future legal research and capacity-building must seek to build bridges between these regimes and their respective constituencies. In the short term, it will be vital to enhance the capacity of actors in both regimes to ensure that existing human rights are protected, respected, and fulfilled in the context of responses to climate change. In the long term, actors in both regimes will need to work together to address some of the problems which will require major paradigmatic shifts such as the challenge of human migration induced by climate change.

The human rights regime's overall purpose of protecting human dignity should guide its continuing engagement with the climate change regime. Its first challenge in the short-term will be to ensure that individuals are protected from harm caused by government actions motivated by a desire to mitigate or adapt to the consequences of climate change. As the experience of counter-terrorism has shown, there are strong grounds for believing that respect for human rights may indeed be challenged by the urgency of addressing climate change issues and problems. In this context, it should therefore be of overriding importance for policy-makers to ensure that adequate safeguards are built into climate change law and policy at the international level. However, if the recent negotiations in Copenhagen are any guide, it seems that human rights principles and obligations may once again end up playing a reactive rather than proactive role in response to a major global policy trend. This situation has serious implications, not only for human rights, but for the climate change regime as well. Policy-makers in both regimes continue to ignore each other at their own peril.