



**PROTECTING THE MOST VULNERABLE:  
SECURING A LEGALLY BINDING CLIMATE AGREEMENT**

Remarks by

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It is a great pleasure to return to LSE and speak on the issue of climate justice, about which I am passionate. It is also appropriate because in a roundabout way LSE influenced my early thinking on this subject.

When I last spoke here, it was to help Professor Conor Gearty launch the LSE Human Rights Centre. I was very supportive and recall saying to Conor; *'now remember you need to reach out and address human rights issues in Africa'*. A few years later Conor invited me to attend a conference in Rwanda, which LSE and the Centre for Human Rights co-hosted with the Government of Rwanda on *'Climate Change, Development, Adaptation and Human Rights'*. It was a very good conference, bringing together experts from a number of African countries. Listening to these experts describe the negligible contribution African countries had made to greenhouse gas emissions, and the devastating impact climate change was already having on subsistence farmers there, persuaded



me to focus on climate justice and establish the Mary Robison Foundation – Climate Justice.

Now as the climate change agenda has moved on through Copenhagen and Cancun, we need to probe more deeply into some of the key areas. This evening I would like to focus on the legal aspects of a climate agreement and the implications for climate justice and ultimately those men, women and children most vulnerable to the impacts of climate change.

The people who bear the brunt of the impacts of climate change did least to cause the problem, and yet are suffering already – as I saw on a visit to Bangladesh last month. Traveling to the delta region, already prone to cyclones, I was struck by how vital new adaptation methods and climate resilient techniques will be, as severe weather patterns increase and water levels continue to rise. Above all, securing a new legally binding climate change agreement would be an important step in protecting their lives and livelihoods by reducing greenhouse gas emissions in advanced economies and avoiding dangerous climate change. A legally binding agreement could also ensure that richer nations provide adequate financial and technical support to enable the poorest countries to adapt to climate change and embrace low carbon development.

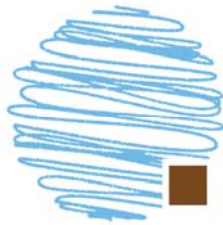
- **Why we need a legally binding agreement**

Without a legally binding international agreement, there is no obligation to act. The alternative is high level political commitment, but this is very vulnerable to changes in government and world events – as demonstrated by the current economic crises. We have many examples of political declarations falling short of expectations – for example the 2002 Monterrey Consensus on financing for development, under which developed countries pledged to deliver 0.7% of GDP in ODA. Few countries have reached this goal despite repeated political statements of intent. Likewise, 2015 looms near and while some progress has been made on meeting the UN Millennium Development Goals, progress is far from what was expected by 2011.

Political commitments to reduce greenhouse gases cannot guarantee to keep warming below dangerous levels. If all world leaders were convinced that climate change was a top priority, political commitment might be enough. But with many competing national and international priorities, all too often climate change slips down the agenda.

### **What is legally binding?**

A legally binding agreement would include measures for holding the international community and individual states to account for their actions. Nothing short of a new international treaty or protocol can provide this level of commitment and certainty.



As we know, decisions taken by the Conference of the Parties of the UNFCCC and the Meeting of the Parties of the Kyoto Protocol do not legally bind Parties to act. They represent political commitments but there is no process of accountability between the Parties. To be effective, such legally binding international commitments need to be accompanied by a system for enforcement and compliance. The robustness and credibility of a post-Kyoto regime depends on clear rules and incentives for compliance which are more likely to be achieved through legally binding commitments.

- **The current situation – KP expiring / Cancun Agreements**

At present we have a situation where the first commitment period of the Kyoto Protocol is set to expire on the 31<sup>st</sup> December 2012. While imperfect (the US has not ratified and emission reductions are not ambitious enough), the Protocol represents the only legally binding international commitment to reduce GHG emissions.

As a result of COP 16 in Mexico last December, we have the Cancun Agreements, a set of COP decisions which provide a framework from which to develop a comprehensive international response to climate change. But they are not legally binding and more work is needed to develop them into a new climate regime.



So time is ticking – without Kyoto we have no legal imperative to reduce emissions – just a pledge and review system which essentially allows countries to set their own levels of ambition. The pledges on the table do not correspond with the now shared objective of limiting warming to less than 2°C above pre-industrial levels. In fact they have us on a trajectory towards dangerous climate change with warming in excess of 3°C.

To date, there has been a 2-track approach to securing a new agreement, one track under the Kyoto Protocol and the other under the UNFCCC, called Long-term Cooperative Action (LCA).

On the KP side, efforts have focused on amending Annex B of the protocol which contains emission limitation and reduction targets. This discussion on the 'numbers' and level of ambition has been difficult and we are still far from agreement. In order to amend the Protocol, changes would have to be made at the climate conference in Durban this December to allow for the required 6 month notification period before changes could be adopted at COP 18 in December 2012. In addition, three quarters of the Parties would need to complete their domestic ratification processes and deposit their acceptance of amendments by 3 October 2012. As a result, a gap between the end of the first commitment period and the beginning of a new one is very likely.

In the short term, a gap would not affect the application of the Kyoto Protocol if Parties remain committed to it. The Conference of the Parties to the

Convention and the Meeting of the Parties to the Protocol, could continue to carry out their functions and decide on subsequent commitments at a later point in time. But there would be no binding emission reduction targets and the operation of some of the Kyoto Protocol's processes (e.g. maintenance of a national inventories and reporting) and mechanisms (especially CDM and emissions trading) would be uncertain.

If Parties do not reach an agreement on Kyoto in Durban, the only real hope for avoiding a gap between commitment periods is to make a provisional amendment to the Kyoto Protocol (as allowed by the 1969 Vienna Convention on the Law of Treaties). A new commitment period or an extension of the existing commitment period could be provisionally applied before the end of 2012. So there is some more time – if there is political will to keep the Kyoto Protocol alive.

There are obvious limitations of the KP notably that the largest emitters are not part of it – in particular the USA and China. This is why a parallel negotiating track under the Convention has been trying to develop a new agreement that would include all Parties to the Convention. This LCA track has made progress but did not deliver the much hoped for climate agreement in Copenhagen in 2009. A new agreement or treaty would replace or complement the Kyoto Protocol and create a new climate regime. Proposals by Parties for new legal instruments have not gained enough momentum to be considered real contenders. However the Cancun Agreements do signal a

desire to keep working under the LCA track with a legally-binding agreement still the objective – the decision states that *'nothing in this decision shall prejudice prospects for, or the content of, a legally-binding outcome in the future'*. However, the legal form of a final deal that may establish a wider comprehensive framework to tackle climate change remains an open question.

What is lacking is a compelling sense of urgency. Unfortunately, the horizons of political leaders tend to be short term, a matter of four or five years. From a climate justice perspective, the time horizons are longer, yet the need to act starts now. It is imperative that the world is made safer and fairer with a legally binding agreement in Durban, which guides us to 2050 and beyond. That is clearly what climate justice demands. However, in the absence of the necessary urgency and foresight, it becomes necessary to consider a wider range of options to strengthen a new climate regime. Work is ongoing on several fronts to assess the options open to the international community, including some work supported by the Government of Ireland and carried out by UNEP and the World Resources Institute which will be finalised by the Bonn session of the UNFCCC this June.

**What I would like to do next is to examine some of these options.....**

- i) To continue to develop COP decisions based on the Cancun Agreements**

In Cancun, the Convention or LCA track was extended for one year to present the results of its work to COP 17 in Durban. Its mandate is to continue to work



on developing measures related to adaptation, mitigation in developed and developing countries, technology transfer and capacity building. Steps will be taken to set up the institutions established by the Cancun agreements (including an Adaptation committee, a transitional committee to design the Green Climate Fund and a Technology Executive Committee). At COP 17 a series of further (non-binding) decisions can be expected that will gradually fill the broader institutional and regulatory frameworks created in Cancun.

The 'pledge and review' system established in Copenhagen and adopted in Cancun, could continue to develop and hopefully increase in ambition. But at present the levels of ambition are not adequate to prevent dangerous climate change and the review system is not strong enough to hold Parties to account.

So, while it can be argued that on some issues such as adaptation and capacity building, COP decisions provide adequate commitment and guidance for Parties to act; other issues such as emissions reductions and financial commitments require a legally binding agreement.



- **Make COP decisions legally binding**

It has also been suggested that the COP could decide that its decisions are legally binding, in order to add weight to agreements made by Parties in this forum. However, strict legal interpretation could conclude that this step alone would merely confer stronger political commitment to these decisions – it would not make them legally binding.

- ii) **Political agreement outside the UNFCCC**

While Copenhagen was a lesson in how not to do multilateralism (lack of transparency, high levels of mistrust) – the Copenhagen Accord does provide a possible model for progressing the negotiations. A smaller group of countries could work on the key issues and seek a political agreement outside the formal process. The key elements of this agreement could then be brought into the UNFCCC process at a later date – as in the case of the Cancun Agreements which draw heavily on the Copenhagen Accord. However, there are risks to this approach – which tends to focus on the agendas of large emitting countries rather than small, vulnerable countries. Any future use of this model would have to carefully consider transparency, the inclusion of small, low emitting and vulnerable nations and the role of the UN system in international decision making.

- iii) **Overarching framework and schedules**

Another suggested way forward is to have a new overarching framework agreement or treaty setting out a common goal of limiting warming to below



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2°C (while exploring the feasibility of limiting warming to 1.5°C) and agreeing to review progress in 2015 - along the lines of what was agreed in Cancun – but making it legally binding. This could be accompanied by a set of schedules (as proposed by Australia in the negotiations) setting out each Parties commitments to reduce emissions in line with key milestones, for example 2015, 2020, 2030 and 2050. In this form the schedules would not be legally binding but Parties could decide to incorporate them into the framework treaty or a new protocol at a later date – for example when they have established that the measures are feasible domestically. This approach would appeal to the US and China who are unwilling to commit internationally until they have domestic agreement.

However, there are risks – at present the pledges of Parties are not ambitious enough to prevent dangerous climate change and there is no guarantee that Parties would step up their levels of ambition in time to avoid warming of more than 2°C.

#### **iv) Incremental approaches**

If a comprehensive legal deal is not on the cards right now – it is necessary to examine incremental approaches to securing agreement. Could we, for example, agree a road map in Durban which determines the type of legal agreement we are aiming for and which sets out milestones to reaching that objective? Again there are risks that we may not progress in line with the

commitments – but it would at least indicate a shared desire to have a legally binding agreement.

Another incremental approach could be to set a goal for emissions targets and then start to work towards this, sector by sector – starting with those that are easiest to identify, measure, report and verify. As with the EU experience in setting up an emissions trading system – we could start with large single point sources of CO<sub>2</sub>, namely power plants and big industrial installations. Even on a global scale these are identifiable, quantifiable and lend themselves to monitoring and verification. They would also facilitate emissions trading at global scale and keep the carbon market alive, now that it is finally starting to reap dividends for Africa and least developed countries. In time other sectors such as transport could be added, thereby increasing overall emissions reductions.

**v) Code of Conduct for major polluters**

Linked to the incremental, sector by sector approach I just mentioned, is the potential for a code of conduct for major polluters to reduce their emissions. In contrast to a sector by sector approach under the Convention, which would be top down and potentially legally binding, a code of conduct for polluters would by-pass nation states and exist outside the Convention. Under such a model, the major polluting industries would sign up to a voluntary code of conduct and participating companies would set their targets and hold each other accountable. With the GDP and emissions levels of some multinational

corporations exceeding those of some developed countries, there is potential for significant emissions reductions.

A good example of what can be achieved through this approach is the International Organization for Standardisation (ISO), a non-governmental body that develops worldwide standards, including voluntary environmental management standards for corporations. ISO 14,000 certification requires a corporation to commit at the top-level of management to a range of environmentally beneficial actions including the prevention of pollution. Corporations are driven to achieve the ISO 14,000 standard by market demand with increasing numbers of customer's requiring ISO certification to do business.

Key questions that arise if this approach is to be pursued include; i) how to ensure that a code of conduct complements actions taken by nation states and ii) how to incorporate such a code of conduct in a legally binding agreement?

**vi) Reassessing the scope of COP authority**

The mandate of the Conference of the Parties (COP) to amend the UNFCCC or KP, or adopt a new legal agreement is broadly limited by the UNFCCC's objective and guiding principles. The objective of the Convention and any related legal instruments is to achieve the *'stabilisation of greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system'*.

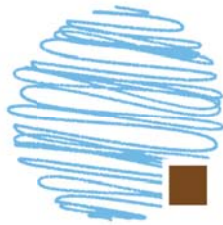
Core principles guide Parties in achieving this objective, such as the principle of common but differentiated responsibilities and respective capabilities. This is usually interpreted in relation to the Convention's distinction between developed and developing countries, with developed country responsibility for historic greenhouse gas emissions resulting in a legal obligation to reduce emissions and provide support to developing countries. Most developing countries believe this distinction between developed (annex 1) and developing countries (non-Annex 1) should underpin a new agreement.

However, the differentiation between countries on the basis of different situations and needs is not static. The Convention recognises that *'the share of global emissions originating in developing countries will grow to meet their social and development needs'*. It is a living instrument that will develop to reflect present and future conditions. It does not preclude alternative forms of differentiation which could, for example, allow the Annex 1 list to be amended to include advanced developing countries and the OPEC nations. This would alter the dynamic in which the negotiations take place by allowing differentiation between the large heterogeneous group of countries currently classed as developing. This could influence the development of a second commitment period of the KP or indeed a new agreement.

**vii) The UN Human Rights system**

It was significant that the Maldives, a country facing severe climate related impacts, brought the issue of climate change to the UN Human Rights Council in 2008, resulting in the first ever resolution by the Council on this subject. A number of follow up steps, including a subsequent report in 2009 by the Office of High Commissioner for Human Rights on the relationship between climate change and human rights and a further resolution by the Council in 2009 have continued to strengthen government attention to the links between the international human rights and climate change regimes. Discussions in Geneva during the ongoing session of the Human Rights Council are exploring a number of additional options that could be taken by the UN human rights system in the years ahead. These include the possibility of a new UN human rights expert mandate that could take forward some of the normative and legal issues still outstanding involving states' human rights obligations and how to increase legal accountability for human rights abuses brought about by environmental issues including climate change.

I should point out here as well that in 2009 the resolution of the Human Rights Council and report of the OHCHR were transmitted to the UNFCCC "for its consideration". This led to preambular language being introduced at Copenhagen, which was strengthened in the shared vision section of the Cancun agreements (para 8) which emphasises that "parties should, in all climate change-related actions, fully respect human rights."



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#### **viii) Regional approaches**

Regional approaches to reducing greenhouse gas emissions have been developed in North America in the absence of federal legislation and binding international commitments (due to non-ratification of the Kyoto Protocol). Twenty-three US states and four Canadian provinces participate in three regional cap-and-trade schemes to reduce GHG emissions. In the US, these schemes account for half the US population and GDP and one third of all US greenhouse gas emissions. The Canadian provinces account for three quarters of the population and GDP and almost half of national emissions.

These schemes operate independently of the provisions of the Kyoto Protocol which has both advantages and disadvantages. The key advantage is that even if there is a gap between commitment periods of the KP, these programs will continue to operate and reduce emissions. The key disadvantage is that they are not guided by ambitious international targets and they are not reflected in federal legislation or in the federal position when negotiating at an international level.

In contrast the EU Emissions Trading Scheme is an international scheme for the trading of greenhouse gas emission allowances established by the Community and its Member States to fulfil their commitments to reduce anthropogenic greenhouse gas emissions consistent with obligations under the Kyoto Protocol. The EU ETS covers some 11,000 power stations and industrial plants

in 30 countries with the potential to link with compatible systems around the world to form a global carbon market. The absence of a second commitment period of the KP would arguably limit the future of the EU ETS to EU member states where new targets could be agreed and enforced within the Union.

There are no regional cap and trade schemes operating in developing countries and it is questionable whether these regions would have the capacity and resources to initiate such schemes without the support of the international community. This implies that an international agreement is needed if regional approaches are to have a significant impact on global emissions. The experience gained through the design and implementation of successful regional cap-and-trade programs is hugely valuable if shared with developing country regional groups.

#### **ix) Investing in the green economy**

While not a legal strategy as such, highlighting the positives of investing in a green economy can help to change the conversation around climate change and create real incentives for agreeing a new climate regime.

The latest research carried out by the United Nations Environment Programme (UNEP) shows that investing just 2% of global GDP in ten key sectors can kick-start a transition towards a low-carbon, resource efficient economy. While 2% of Global GDP equates to USD 1.3 trillion, this is only a fraction of total gross capital formation which was 22% of global GDP in 2009. Greening the economy





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generates growth and produces higher growth in GDP and GDP per capita than a business as usual scenario within just 5-10 years. Key investments in sectors such as agriculture, energy, tourism, forestry, fisheries, water and waste management can contribute to poverty alleviation and create much needed jobs.

The research also found that while global demand for energy will rise, it returns to current levels by 2050 which is about 40% less than what is expected under a business as usual scenario thanks to advances in energy efficiency. In addition a green investment scenario is projected to reduce energy-related CO<sub>2</sub> emissions by about one-third by 2050 compared to current levels. This would enable atmospheric concentrations of CO<sub>2</sub> to be held below 450 ppm by 2050, thus minimising the risks of dangerous climate change.

At the international and national level policy reform in the area of subsidies, trade and investment will be needed to facilitate green growth. Steps are already been taken in this direction; investment in green technology is at an all-time high, with 40% of global investment coming from non-OECD countries including India, Brazil and China. The green economy approach is a positive way of addressing the twin challenges of growth and climate change, while decoupling growth from intensive energy and resource use. I believe that if the climate change negotiations could reflect this potential and opportunity it would greatly facilitate the agreement of a legally binding treaty.



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- **Maintaining Momentum**

Finally, in the time ahead we must build on the momentum around addressing climate change that has been set in train in recent years and recognise that doing so will require compromise. It will also require us to present the challenges and opportunities associated with climate change more effectively. President Nasheed of the Maldives has stressed the importance of keeping the current process alive and has been willing to be flexible in order to keep things moving, in order to keep a legally binding treaty on the cards, in order not to kill the process. He believes strongly in the opportunities an effective response to climate change can bring. As he put it in a statement last year:

*'I think we have a serious problem over the way we present climate change to the outside world.*

*I believe we need to view climate change not just as a challenge but also as an opportunity.*

*Cutting carbon should not be considered a burden that will destroy jobs and hamper economic growth.*

*Instead, going green should be seen as the greatest economic opportunity since the Industrial Revolution.*

*This is an opportunity to improve things...*

*... to grow our economies in more sustainable ways...*

*... and to create wealth and employment.*

*A deal should be viewed, not as an impediment to growth, but as a boost.*

*A deal must not be seen as a drag on development, but as a way of doing things better.'*



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Luckily, Cancun demonstrates that the process is far from dead. It has generated a renewed sense of momentum, and although not as imminent as many of us would wish – a legally-binding deal is once again a possibility. Like President Nasheed, I am willing to go step by step and layer by layer if that is what is needed to secure a meaningful agreement. But we have to be cognisant of time – the impacts of climate change are already being felt, growing seasons are changing, sea level is rising and people in the poorest parts of the world are at risk.

The fundamental question is – how can we marshal the arguments and political will needed to secure a legal binding agreement? What more could we be doing today to make the case for why this approach is so vital to achieving a sustainable way forward?

We need every good idea, every ally, every innovative approach that is available. My aim and that of my foundation is to contribute to the global effort needed to secure a safe future for the poor and vulnerable, and to amplify their voices and concerns at the international level. 2011 is the year to get to grips with the legal form of a future agreement and to set down concrete measures for achieving it. Time is running out....and there is a lot of work to be done. I ask you to set your minds to these questions and I look forward to a fruitful discussion with you all.

Thank you.