UNIVERSITY OF OXFORD

The Human Rights Based Approach to Climate Change Mitigation: Legal Framework for Addressing Human Rights Questions in Mitigation Projects

By

Damilola S Olawuyi

A THESIS

SUBMITTED TO THE FACULTY OF LAW

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF DOCTOR OF PHILOSOPHY IN LAW (DPHIL)

OXFORD, UNITED KINGDOM

APRIL 2013

FACULTY OF LAW

We the undersigned certify that we have read, and recommend to the Director of Graduate Studies (Research), Faculty of Law, University of Oxford, this thesis entitled: "The Human Rights Based Approach to Climate Change Mitigation" submitted by Damilola S. Olawuyi, in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Law (D. Phil).

_____

Dr. Andrew Shacknove
Thesis Supervisor and Director of International Human Rights Programs,
Faculty of Law, University of Oxford.

_____

Professor Alastair R. Lucas Q.C.
Thesis Supervisor and Professor of International Environmental Law,
Faculty of Law, University of Calgary, Canada.

_____

Professor Catherine Redgwell
External Examiner and Professor of Public International Law,
Faculty of Law, University College London.

_____

Professor Phillipe Cullet
External Examiner and Professor of International and Environmental Law,
Department of Law, School of Oriental and African Studies,
University of London.

Date

ABSTRACT

Over the last decade, the effects of an unprecedented rise in global temperature due to climate change, on the enjoyment of human rights, especially the right to life, have been subjects of intensive scholarly attention. Gallons of juristic ink have been spilled on the need for States to adopt policy measures aimed at combating climate change. However, recent findings show that policy measures and projects aimed at mitigating climate change are in turn producing even more serious human rights concerns, especially in developing countries. These human rights issues include: mass displacement of citizens from their homes to allow for climate change mitigation projects; lack of participation by citizens in project planning and implementation; citing and concentration of projects in poor and vulnerable communities; lack of governmental accountability on projects and the absence of review and complaint mechanisms for victims to obtain redress for these problems. These secondary human rights impacts of policy measures and projects aimed at mitigating climate change have not received sufficient attention in existing literature.

The aim of this research is to examine and analyse the effects of climate change mitigation projects, specifically Clean Development Mechanism (CDM) projects, on the enjoyment of fundamental human rights. It considers how lessons from the approval and execution of CDM projects could inform thoughts on the value and requirements for mainstreaming human rights safeguards into international climate change regimes in general. It analyses the legal and theoretical prospects and paradoxes of adopting the United Nations Human Rights Based Approach (HRBA) as a framework through which human rights standards may be systemically integrated and mainstreamed into extant and emerging international legal regimes on climate change.

ACKNOWLEDGEMENTS

First and foremost, my thanks and appreciation go to God the Almighty for the grace and strength to carry out this research. *Gloria in Excelsis Deo!*

Secondly, my profound gratitude goes to my Supervisors, Dr. Andrew Shacknove and Professor Alastair R Lucas QC, for their immense support and insightful feedbacks in the course of this research. I am highly indebted to them for their kind mentoring and intellectual generosity. Special thanks are also reserved for Professor Stefan Talmon for his initial review of this work and particularly for Dapo Akande and Dr. Bettina Lange for providing ideas and comments during my second year review. Thanks are also due to Dr. Liz Fisher for providing critical comments and thoughts on research methodologies and approach during the first year Course on Legal Research and Methodology (CLRM). Furthermore, I am indebted to the Sauvé Scholars Foundation Montreal, Canada and the Consortium for Peace Studies, University of Calgary, Canada for providing research support, access to important materials and thoughtful feedbacks during my Research Fellowships with them.

I am equally thankful to my family for their support. I thank my dad – Engnr. Fola Olawuyi – for guiding and motivating me from my younger years till now. I am also full of gratitude to my wife – Josephine for providing the necessary support and care on the home front.

Finally, my sincere gratitude goes to the Clarendon Fund Scholarship of the Oxford University Press and the Sloane Robinson Fund of Keble College for the generous financial support and scholarships that aided my studies at the University of Oxford. Without their assistance, this

research would not have been possible. I am also indebted to the Social Sciences and Humanities Research Council of Canada, the Overseas Research Students Awards Scheme, U.K and the A.G Leventis Foundation, Greece for providing additional travel and research fellowships that enabled me to pursue this research without financial worries.

I thank you all for your support and kindness. I commit this thesis to your scholastic minds.

Damilola S. Olawuyi
30 April 2013

DEDICATION

Victoria Ebunlomo Olawuyi
(1953-2005)

CONTENTS

ABSTRACT iii
DEDICATION vi
TABLE OF CASES xiii
TABLE OF OTHER PRIMARY LEGAL SOURCES xvii
Treaties xvii
Resolutions and Declarations xx
Other UN Report and Documents xxiv

CHAPTER ONE: 1
INTRODUCTION 1
1. Background and Factual Context 3
2. About this Thesis 23
2.1 Scholarly Significance 23
2.2 Research Methodology 27
2.3 Definition of Key Concepts 29
A. Human rights 30
B. Environment 33
C. Climate Change, Climate Change Mitigation Projects 35
D. Sustainable Development 37
E. UN Resolutions and Soft Law 44
2.4 Thesis Structure 50

CHAPTER TWO: 56
CLIMATE CHANGE PROJECTS AND HUMAN RIGHTS STRUGGLES 56
1. Introduction 56
A. CDM Project Cycle 56
2. How Climate Change Mitigation projects violate human rights: Lessons from CDM Projects 64
2.1 The Aguan Biogas Project in Honduras 65
2.2 The Kwale Project in Nigeria 67
2.3 The Barro Blanco Hydroelectric Power Plant Project in Panama 71
2.4 REDD+ Projects 76

3. Human Rights Critiques: A Summary 82
3.1 Forced displacements and the right to property 83
3.2 Loss of benefits of culture and tradition 88
3.3 Loss of subsistence rights 91
3.4 Loss of life 96
3.5 Health Issues 99
3.6 Inequalities and discrimination against minority communities and vulnerable groups 102
3.7 Loss of Consultative/Participatory Rights 106
A. The Right to Information 106
B. Participation 118
4. Conclusion: Bringing Human Rights to the Table 140

CHAPTER THREE: 144
THE CONCEPT OF MAINSTREAMING IN INTERNATIONAL LAW 144
1. Introduction 144
2. The Legal Mainstream Paradigm: A Background 144
3. Human Rights Mainstreaming 148
3.1 Origin and Meaning 148
3.2 Tenets of Human Rights Mainstreaming 155
4. Legal and Theoretical Basis for Human Rights Mainstreaming 161
4.1 The Principle of Systemic Integration in International Law 161
4.2 The Legal Transplant Theory/Inter-Doctrinal Legal Transplants 169
4.3 Participatory Development Theory 175
A. The Emergence of the Participatory Development Theory (PDT) 176
B. Robert Chamber's Theory on Participation 180
4.4 The Full Belly Thesis 182
5. Theoretical Critiques of the Human Rights Mainstream Paradigm 187
5.1 Proliferation debates 189
5.2 Novelty or Duplication? – Redundancy Debates 196
5.3 Neo-liberalism and human rights mainstreams 198
5.4 Conflicts of Human Rights 208
6. Conclusion 214

CHAPTER FOUR: 216

THE HUMAN RIGHTS MAINSTREAM PARADIGM AND THE QUESTION OF APPROACH 216
1. Introduction 216
2. Linking Human Rights and Climate Change: Suggested Approaches 217
2.1 Substantive Human Rights Approach 219
A. Reinterpreting existing rights: The Indirect Approach 220
B. The New Human Rights Approach 230
2.2 Procedural Rights Approach: The Human Rights Based Approach 238
A. Justifications 238
Table 4.1 Procedural v Substantive Rights Approaches 244
B. The United Nations Human Rights Based Approach 244
3. Epistemic Debates on the Human Rights Based Approach 253
3.1 Can outsiders interpret and mainstream human rights? 254
3.2 The question of resources 260
3.3 Lack of an operational framework or precedence 262
4. Conclusion 264

CHAPTER FIVE: 266
NORMATIVE CONTENTS/ELEMENTS OF THE HUMAN RIGHTS BASED APPROACH 266
1. Introduction 266
2. Elements of the Human Rights Based Approach 267
2.1 Access to information (ATI) 267
Contents of the Right to Information 267
i) Maximum disclosure 270
ii) Limited scope of exceptions 271
iii) Obligation to publish 274
iv) Costs 279
vi) Public education and awareness 281
2.2 Participation 283
A Elements of Participation 285
I. Taking Part: Free Prior Informed Consents 285

i) Who should participate: Broad based participation
ii) Fairness and Inclusivity
iii) Rationality and Freedom to make choices: 301
iv) Agreement 302
II. Influence
2.3 Non-discrimination, equality and prioritization of vulnerable groups 305
Elements of equality and non-discrimination 306
i) Equality of opportunity and treatment 306
ii) Burden sharing 307
iii) Data segregation and vulnerability proofing 309
2.4 Accountability 310
Elements/Indicators of accountability 314
i) Structural conditions 315
ii) Process 320
iii) Outcomes 320
C) Monitoring Project Threshold: The Example of the World Bank Inspection Panel ... 323
i) Structural conditions of the World Bank Inspection Panel 325
ii) Processes of the World Bank Panel 327
iii) Outcomes of the World Bank Panel 330
2.5 Access to Justice 333
A) Elements of access 333
Table 5.1: Elements of Access to Justice 334
i) Normative legal framework 334
ii) Access to appropriate forums 340
iii) Legal awareness 345
iv) Effective administration of justice 347
3. Conclusion 349

CHAPTER SIX: 351
IMPLEMENTING THE HUMAN RIGHTS BASED APPROACH TO CLIMATE CHANGE MITIGATION: LEGAL AND INSTITUTIONAL FRAMEWORK 351
1. Introduction 351

2. A legal framework for implementation: a minimum legal threshold for projects approval 351
2.1 Pre-project eligibility screen 353
2.2 Sustainable development screen 355
Table 6.1 363
2.3 Human Rights Impact Assessment (HRIA) 364
Table 6.2 *HUMAN RIGHTS IMPACT ASSESSMENT* 368
2.4 Information disclosure system 370
2.5 Stakeholder identification and consultation 374
2.6 Project Review Mechanisms 378
3. Mobilizing Structures: Institutional Framework 382
3.1 Human rights and climate change unit (HRCU) 384
3.2 Reformed CDM Executive Board 390
3.3 Project Review Panel 394
3.4 Reformed Compliance Committee 399
A. New look enforcement branch 402
B. Creation of a new branch: The Public Complaints Branch 404
4. Conclusion 406

CHAPTER SEVEN 408
MAKING MAINSTREAMING WORK: REFLECTIONS ON PRACTICAL POTENTIALS AND CHALLENGES 408
1. Introduction 408
2. Towards a two-step approach for mainstreaming human right norms into climate change regimes 408
2.1 Rights based reform of existing regimes 412
A. The Convention 413
B. The Kyoto Protocol 416
2.2 Additional Accord or Protocol on human rights and climate change 422
3. Practical Barriers to Action 427
A. Political Will 429
B. Negotiation Blocs and Alignments 433
C. Unresolved Dilemmas and Regime Uncertainties 437
4. Conclusion 439

CHAPTER EIGHT
Conclusions and Recommendations 442
1. Summary and Conclusions 442
2. Recommendations
A. Introducing human rights language ... 447
B. Focusing on the indirect effects of climate change ... 450
C. Redefine vulnerability ... 450
D. Restore equity and fairness ... 453
Table 8.1 Proposed Human Rights Recognition Paragraphs ... 454
3. Further Research ... 456

BIBLIOGRAPHY ... 457
I. ARTICLES ... 457
II. BOOKS ... 479
III. WORKING PAPERS AND REPORTS ... 486
IV. NEWSPAPERS ... 495

TABLE OF CASES

Aguinda v Texaco 142 F. Supp. 2d 534 (S.D.N.Y. 2001)
Apirana Mahuika *et al*. v New Zealand Communication No. 547 /1993
Ashby v White (1703) 92 ER 126
Barrios Altos v. Peru, 14 March 2001, Series C, No. 75 (Inter-American Court of Human Rights)
Beanal v Freeport McMoRan 969 F.Supp. 362 (E.D.La. 1997)
Bennett v Spear, 520 U.S. 154 (1997)
Bennett Coleman & Co. v. Union of India, AIR 1973 SC 783;
Beyeler v Italy (Application No 33202/96) 28 May 2002
Bivens v Six Unknown Named Agents, 403 U.S. 388 (1971)
Blank v Canada (Minister of Justice) 2006 SCC 39 [2006] 2 S.C.R. 319
Board of Education v Pico 457 U.S. 853 (1982)
Bombay Environmental Action Group v Pune Cantonment Board, Bombay High Court, A.S. Writ Petition No. 2733 of 1986
Brumarescu v Romania (28342/95) [1999] ECHR 105 (28 October 1999).
Burger v Town of Grafton 235 AD2d 984 [3d Dept 1997]
Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44, [2008] 2 S.C.R. 574
Chassagnou v France 29 April 1999 ECHR 1999-III
Carbonara and Ventura v Italy (24638/94) [2000] ECHR 205 (30 May 2000)
Case of the Indigenous Community Yakye Axa v. Paraguay Merits, Reparations and Costs). Judgment of June 17, 2005 Series C No. 125, para. 96.
Case of the Mayan Indigenous Communities from the Toledo District, Belize. Report No. 40/04, Case 12.053, Merits, Mayan Indigenous Communities from the Toledo District, Belize, 12 Oct. 2004.
Case of the Sawhoyamaxa Indigenous Community v Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 248(1)–(3) (Mar. 29, 2006).
Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya, African Court for Human and Peoples' Rights, Case No. 276/2003 (Endorois Welfare Council vs. Kenya).
Charan Lal Sahu v Union of India AIR 1990 SC 1480.
Cruzan v Director, Missouri Department of Health, 497 U.S. 261 (1990)
D.K.Basu v State of West Bengal (1997) 1 SCC 216,
De Vereninig van Saramakaanse Mary and Carrie Dann Case, Report No. 99/99, Case 11.140 (United States) (1999); Precautionary measures, De Vereninig van Saramakaanse (Suriname) (August 8, 2002).
EHP v Canada Communication No. 67/1980
Fadeyeva v Russia (2007) 45 EHRR 10
Flores v Southern Peru Copper Corporation 343 F.3d 140, 143-44 (2d Cir. 2003) Sarei v Rio Tinto 550 F.3d 822 (9th Cir. 2008).
Flores v Southern Peru Copper Corporation 343 F.3d 140, 143-44 (2d Cir. 2003)
Francis Coralie Mullin v Union Territory of Delhi AIR 1981 SC 746,
Friends of the Earth, Inc. v Laidlaw Envtl. Servs. (TOC), Inc., [2000]528 US 167.
Gabcikovo Nagymoros (Hungary/Slovakia) (1998) 37 ILM 162, 206

Gaskin v The United Kingdom (1989) 12 EHRR 36.
Gbemre v Shell Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05, The officially certified full-text of the judgment in this case can be found at <http://www.climatelaw.org/cases>.
Griswold v Connecticut 381 U.S. 479, 482 (1965)
Guerra v Italy, 4 BHRC 63 (1999)
Guja v Moldova, 12 February 2008, Application No. 14277/04 (European Court of Human Rights);
Hatton v United Kingdom (2002) 34 E.H.R.R. 1
Hentrich v France, A 296-A (1994)
Holy Monasteries v Greece,A 301-A (1994);
Houchins v KQED, 438 U.S. 1, 15–16 (1978)
Ilmari Lansman *et al* v Finland Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994)
Immobiliare Saffi v Italy (22774/93) [1999] ECHR 65, 28 July 1999
Indian Express Newspapers (Bombay) Pvt. Ltd.v India, (1985) 1SCC 641;
Jacobson v Sweden Series, Judgment of 25 October 1989, A 163,
Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others. No. FHC/B/CS/53/05, (Nov. 14, 2005) Federal High Court of Nigeria, <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf> accessed 12 May 2012
Kleindienst v Mandel (1972) 408 U.S. 753.
Kyrtatos v Greece (2003) 36 EHRR 242 [52];
L.K.Koolwal v State of Rajasthan AIR 1988 Raj 2.
Lamont v Postmaster General 381 U.S. 301, 307 -308 (1965)
Lavallee, Rackel & Heintz v Canada (Attorney General) 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37;
Leander v Sweden, 26 March 1987, Application No. 9248/81 (European Court of Human Rights;
Leo Feist v Young 138 F. 2d 97 (1943).
Leon and Agnieszka Kania v Poland (App no 12605/03) 21 July 2009
Lopez Estra case ECHR (16798/1994).
Lovell v Griffin, 303 U.S. 444, 452 , 58 S.Ct. 666, 669,
Lujan v Defenders of Wildlife, 497 U.S. 871 (1990), pg. 983,
M.C Mehta v State of Tamil Nadu (1996) 6 SCC 756;
Manubhai D. Shah v Life Insurance Corporation, AIR 1981 Guj 15;
Maranda v Richer, 2003 SCC 67 [2003] 3 S.C.R. 193;
Marbury v Madison 5 U.S. (1Cranch) 137 (1803)
Marcel Claude Reyes et al v Chile, **(**2003) Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 222.
Marckx v Belgium Case No 00006833/74, (13/06/1979)
Martin v. Struthers (1943) 319 U.S. 141,
Massachsetts v EPA (2007) 549 U.S. 497
Mathur v Union of India (1996) 1 SCC 119
Maya Indigenous Communities of the Toledo District, Report No. 40/04, Case No. 12.053, (Belize) (October 12, 2004), 142.

Mayagna (Sumo) Awas Tingni Community v Nicaragua Int. Am. Ct. H.R. (Ser. C) No. 79 (2001), abridged version reprinted in 19 Ariz. J. Int'l & Comp. Law 395
McGinley and Egan v United Kingdom, 9 June 1998, Application Nos. 21825/93 and 23414/94 (European Court of Human Rights);
Michalak v Zoning Bd. of Appeals of Town of Pomfret [2001] 286 AD2d 906, 906-907
Mikmaq Tribal Society v Canada Communication No. 78/1980 (30 September 1980), U.N. Doc. Supp. No. 40 a/39/40) at 200 (1984);
Moreno Gomez v Spain (2005) 41 EHRR 40;
Mossville Environmental Action Now v United States, Report no 43/10, Petition no 242/05, Admissibility, OEA/Ser LV/II 138 17 March 2010) 5.
Oates v Village of Watkins Glen [3d Dept 2002] 290 AD2d 758
Odièvre v France, 13 February 2003, Application No. 42326/98 (European Court of Human Rights);
Oil Platforms (Islamic Republic of Iran v United States of America) Judgment [2003] ICJ Rep para 41.
Olujic v Croatia (App no 22330/05) 5 February 2009.
Ontario (Public Safety and Security) v Criminal Lawyers' Association (2010) SCC 23
Papachelas v Greece, 99/13 [Application lodged 6.2.1996; Commission report 14.1.1998; Court Judgment 25.3.1999
Pell v Procunier, 417 U.S. 817, 834–35 (1974)
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, December 7, 2005. CIEL, <http://www.ciel.org/Climate/Climate_Inuit.html> accessed 12 May 2012
Phoenix Action Ltd v Czech Republic, ICSID Case No ARB/06/5, April 15, 2009, para 78.
Pierce v Society of Sisters 268 U.S. 510 (1925).
Pine Bush v Common Council of the City of Albany ('Pine Bush'[2009] NY Slip Op 07667)
Prabha Dutt v Union of India, AIR 1982 SC 6
Pressos Compania Naviera SA v. Belgium A332 (1995)
Pritchard v Ontario (Human Rights Commission), 2004 SCC 31, [2004] 1 S.C.R. 809
Purohit and Moore v The Gambia ACHR/ Communication No. 241/2001
R v Somerset CC ex parte Dixon 1998) 75 P. & C.R. 175
R. v Brown, 2002 SCC 32, [2002] 2 S.C.R. 185
Raunaq International Ltd. v I.V.R. Construction Ltd. & Ors., (1999)1 SCC 492
Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers Bombay Pvt. Ltd, AIR 1989 SC 190
Ripley & Company Ltd & Anor v The Board of Trustees for the Port of Kolkata & Ors. W.P. No.16680 (W) of 2010.
Roche v United Kingdom, 19 October 2005, Application No. 32555/96 (European Court of Human Rights)
Ruckelshaus v Monsanto Company, (1984) 467 U.S. 986.
Saramaka People v Suriname Saramaka People v Suriname, Judgment of August 12, 2008 (Interpretation of the Judgment on Preliminary objections, Merits, Reparations, and Costs).
Sarei v Rio Tinto 550 F.3d 822 (9th Cir. 2008).
Saxbe vWashington Post Co., 417 U.S. 843, 849–50 (1974)
Sdruženi Jihočeské Matky v. Czech Republic, 10 July 2006, Application No. 19101/03 (European Court of Human Rights) (in French)

S.P. Gupta vUnion of India, AIR 1982 SC 149,
Shela Zia v WAPDA. PLD 1994 SC 693
Sierra Club v EPA 405 U.S. 727, 1972,
Sîrbu and others v Moldova, 15 June 2004, Applications Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01 (European Court of Human Rights).
Sîrbu and others v Moldova, 15 June 2004, Applications Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01 (European Court of Human Rights).
Smith v Jones, [1999] 1 S.C.R. 455;
Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001). Communication 155/96,).
Society of Plastics Industry, Inc. v County of Suffolk, (1991) 77 N.Y.2d 761.
Sosa v Alvarez-Machain 542 U.S. 692 (2004)
Spacek v the Czech Republic (9 November 1999)
Sporrong and Lonnrith v Sweden Series A52 (1982);
State of UP v Raj Narain, AIR 1975 SC 865;
Subhash Kumar v State of Bihar, (1991) 1 S.C.R. 5; 13 AIR 1991 SC 420
Taskin v Turkey (2006) 42 EHHR 50
Tatar v Romania (App no 67021/01) 27 January 2009
The Belgian linguistic case ECHR/Application No. 6833/74
Toledo Maya Case, see also Inter-Am. C.H.R., Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97 Doc. 29 rev.1, ch. VI (Sept. 29, 1997).
United States v Students Challenging Regulatory Agency Proceedings, 412 U.S. 669 (1973) (SCRAP),
United States v Students Challenging Regulatory Agency Proceedings, 412 U.S. 669 (1973) (SCRAP), and Massachusetts v EPA (2007) 549 U.S. 497.
Van Oord v The Netherlands Communication No. 658/1995
Waldman v Canada HRC/Communication No. 694/1996;
Yanomami Case Rep. No. 12/85, Case 7615 (Brazil), (1985)
Yanomani Indians v Brazil, Inter-Am. C.H.R. 7615, OEA/Ser.L.V/II/66 doc. 10 rev. 1 (1985).

TABLE OF OTHER PRIMARY LEGAL SOURCES

Treaties

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf> (accessed 19 March, 2012).

African Charter Human and Peoples Rights (Adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982).

American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 36.

Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, signed 30 January 1991, entered into force 22 April 1998, <http://www.natural-resources.org/minerals/CD/docs/int_law/Bamako_Convention.pdf> (accessed 20 March, 2012).

Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Adopted 22 March 1989, entered into force 24 May 1992) 1673 UNTS 126. <http://www.basel.int/text/documents.html> (accessed 20 March, 2012).

Charter of the United Nations (Adopted June 26 1945, entered into force on 24 October 1945).

Charter on Human and Peoples Right, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U Doc. CAB/LEG/67/3 Rev. 5.

Convention Againts Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85, reprinted in 23 ILM 1027 (1984).

Convention on Biodiversity (Adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 143. < http://www.cbd.int/convention/ > (accessed 13 March, 2012).

Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993).

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) adopted 25 February 1991, entered into force 10 September 1997.

Convention on the Elimination of All Forms of Racial Dicrimination (CERD) (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, reprinted in 5 ILM 352 (1966).

Convention on the International Trade in Endangered Species (CITES)(Adopted 3 march 1973, entered into force 1 July 1975) 993 UNTS 243 <http://www.cites.org/> (accessed 12 March, 2012).

Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (The London Dumping Convention) (Opened for Signature 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120. <http://www.imo.org/home.asp?topic_id=1488> (accessed 23 March, 2012).

Convention on the Protection and Utilization of Trans boundary Rivers and Lakes (Helsinki, 17 March 1992)

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (Adopted 18 December 1990, entered into force 1 July 2003, reprinted in 30 ILM 1517 (1991).

Convention on Wetlands of International Importance Especially as Waterfowl Habitat 2 February 1971, 996 U.N.T.S. 245, 11 I.L.M. 97 (1971)

European Convention for the Protection of Human Rights and Fundamental Freedoms (Signed 4 Nov. 1950, entered in to force 3 Sept. 1953, 213 UNTS 221, ETS 5).

International Convention for the Protection of All Persons from Enforced Disappearance (Adopted 20 December 2006, G.A. Res. 61/177, 6 UN GAOR, Supp. (No.49), UN Doc.A/61/488 at 408 (2006).

International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).

Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 11 December 1997, entered into force 16 February 2005) U.N Doc. FCCC/CP/1997/L.7/add.1, 37 I.L.M. 22 (1998)

Montreal Protocol on Substances that Deplete the Ozone Layer (Adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 29, <http://ozone.unep.org/Ratification_status/ > (accessed 12 March, 2012).

North American Agreement on Environmental Cooperation 32 I.L.M. 1480 (1993).

Optional Protocol to Convention on the Rights of Persons with Disabilities (CRPD) (Adopted 13 December 2006, G.A Res. 61/106, 61 UN GAOR, Supp. (No. 49), UN Doc. A/RES/61/106/annexI at 65 (2006).

Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW) (Adopted 6 October 1999, entered into force 10 December 1999) 2131 UNTS 83, reprinted in 39 ILM 281 (2000).

Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999);

Protocol to the 1979 Convention on Long-Range Trans boundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Trans boundary Fluxes (Geneva, 18 November 1991),

Rotterdam Convention on Prior Informed Consent on Waste Disposal and the Stockholm Convention on Persistent Organic Pollutants (Adopted 10 September 1998, entered into force 24 February 2004)
<http://ahjwg.chem.unep.ch/index.php?option=com_content&task=blogcategory&id=17&Itemid=42> (accessed 13 March, 2012).

Statute of the International Court of Justice 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

Stockholm Convention on Persistent Organic Pollutants, adopted 23 May 2001, entered into force 17 May 2004 <http://chm.pops.int/Convention/tabid/54/Default.aspx> (accessed 10 May 2012).

UNCLOS Convention, United Nations Convention on the Law of the Sea, 1982, 21 ILM (1982), 1261 (adopted on 10 December 1982, and entered into force on November 16 1994).

UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770
<http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf> (accessed 19 March, 2012).

UNECE, The Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted February 25, 1991 EmuT 991:15.

United Nations Convention on the Law of the Sea (UNCLOS) (Adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.
<http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm > (accessed 23 March, 2012).

United Nations Convention on Transboundary Effects of Industrial Accidents adopted 17 March 1992 in Helsinki 31 I.L.M 1330 (1992).

United Nations Declaration on the Rights of Indigenous Peoples, GA Res, A/RES/61/295, 61st Sess.,UN Doc/ A/61/L.67 (2007).

United Nations' Conference on the Human Environment (Stockholm Declaration) U.*N*. *Doc*. A/CONF.48/PC.13(1971).
<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed 10 March 2012).

United Nations Framework Convention on Climate Change (Adopted 09 May 1992, in force 21 March 1994) 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

Resolutions and Declarations

Clean Development Mechanism Modalities and Procedures, 3/CMP.1 (2005), available at http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf (accessed 12 July, 2012)

Copenhagen Accords,
<http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf> (accessed 10 March, 2010).

Council of Europe, Declaration on Mass Communication Media and Human Right, Resolution 428 (1970)

Council of Europe, Manual on Human Rights and the Environment – Principles Emerging from the Case Law of the European Court of Human Rights (Council of Europe Publishing, 2006).

Declaration on the Right to Development, adopted 4 Dec. 1986, G.A Res, 41/128, 41 UN GAOR, Supp. (No 53), UN Doc. A/RES/41/128 at186.

Declaration of Indigenous Peoples at Durban Climate Change Talks (December 05 2011) <http://www.culturalsurvival.org/news/none/declaration-indigenous-peoples-durban-climate-change-talks> (accessed 12 April 2012).

Declaration of Chapultepec, adopted by the Hemisphere Conference on Free Speech, 11 March 1994, Mexico City. The Governments of 21 countries in the Americas have now signed the Declaration, <http://www.declaraciondechapultepec.org/english/declaration_chapultepec.htm> (accessed 10 December, 2011).

Declaration of Indigenous Peoples at the Durban Climate Change Talks (2011) <http://www.culturalsurvival.org/news/none/declaration-indigenous-peoples-durban-climate-change-talks> (accessed 12 January, 2012).

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), UN General Assembly Resolution 53/144, 8 March

1999:
<http://daccessdds.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>
(accessed 12 January, 2012).

Final Document of the World Conference on Human Rights, Vienna (1993), UN Doc. E/1993/22.
FINALPetitionICC.pdf.> (accessed 12 July, 2012).

General Comment No. 23: The Rights of Minorities 04/08/1994. CCPR/C/21/Rev.1/Add.5.

Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000, <http://www.iachr.org/declaration.htm> (accessed 10 December 2011).

International Shared Vision on Long-Term Cooperative Action, Cancun LCA Outcome, para. 7., available at UNFCCC, <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf>
(accessed 15 April 2012).

IUCN, 'Resolution 4.056, Rights-Based Approaches to Conservation '(IUCN, Barcelona: 2008) <https://community.iucn.org/rba1/RBA%20Wiki/Resolution%204.056%20Rights-based%20approaches%20to%20conservation.aspx> (accessed 12 October, 2011).

IUCN, Resolution 3.015, **'**Conserving Nature and Reducing Poverty by Linking Human Rights and the Environment', (IUCN, Bangkok, 2004)

IUCN, Resolution 4.056, Rights-Based Approaches to Conservation (IUCN, Barcelona: 2008) <https://community.iucn.org/rba1/RBA%20Wiki/Resolution%204.056%20Rights-based%20approaches%20to%20conservation.aspx> (accessed 12 October, 2011).

Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 19 December 2006: <http://www.article19.org/pdfs/standards/four-mandates-dec-2006.pdf>(accessed 12 October, 2011).

Milan Declaration of the Sixth International Indigenous Peoples Forum on Climate Change
<http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/mdocs/milan%20declaration.pdf>
(accessed 21 March 2012).

Tiohtiá:ke Declaration of the International Indigenous Peoples Forum on Climate Change (2005) Statement to the State Parties of the COP 11/MOP 1 of the United Nations Framework Convention on Climate Change (UNFCCC), available at http://www.forestpeoples.org/topics/un-framework-convention-climate-change-unfccc/news/2011/05/tiohtiake-declaration (accessed 13 February 2012).

UNFCCC, Outcome of the Durban Climate Change Conference (November 2011) <http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php> (accessed 10 May 2012).

UNEP, Declaration of the Fourth Global Civil Society Forum held from 1 to 2 February 2003 at UNEP Headquarters, Nairobi, Kenya. <http://www.unep.org/civil_society/PDF_docs/4thGCSF_Recommendations_GC22_Agenda.pdf > (accessed 15 October, 2011).

UNHCR, United Nations Human Rights Council Res. 10/4, in U.N. Human Rights Council, Draft Report of the Human Rights Council on its Tenth Session 13, at 15, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2012).

UNHCR, U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, Report of the Human Rights Council on Its Seventh Session, at 65, U.N. Doc. A/HRC/7/78 (July 14, 2008).

UNHCR 'Report by the Special Rapporteur on the Right to Food' <http://www2.ohchr.org/english/issues/housing/index.htm> (accessed 12 March, 2011).

UNHCR 'Report by the Special Rapporteur on the Right to Housing' <http://www2.ohchr.org/english/issues/housing/index.htm> (accessed 12 March, 2011).

United Nations Declaration on Environment and Development, UN Doc. A/CONF. 151/5/Rev.1 (1992) Rio Declaration.

United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007).

United Nations Declaration on Human Rights Education and Training, U.N. Human Rights Council Res. 16/1, in U.N. Human Rights Council, Report of the Human Rights Council on its Sixteenth Session U.N. Doc. A/HRC/RES/16/1 (19 December 2011).

United Nations' Conference on the Human Environment (Stockholm Declaration) U.*N. Doc*. A/CONF.48/PC.13 (1971). <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed 10 March 2012).

United Nations, 'Outcome Document of the High Level Expert Meeting on the New Future of Human Rights and Environment: An Agenda for Moving Forward (Nairobi, 30 November – 1 December 2009). <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=cTNdmZ_wGK0%> (accessed 12 December 2011).

United Nations, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 12 December 2011).

United Nations, 'Setting International Standards in the Field of Human Rights' G.A., Res. 41/120, U.N. GAOR, 41st Sess., Supp. No. 53, at 178, 179, U.N. Doc. A/41/53(1987).

United Nations, ‘Summit Outcome of the 65th Session of the UN General Assembly’ 17 September, 2010, UN/ A/ 65/L.1

Other UN Report and Documents

UNFCCC, 'Statistics of CDM Projects', <http://cdm.unfccc.int/Statistics/Registration/AmountOfReductRegisteredProjP> (accessed 10 April, 2012).

UNFCCC, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism, <http://cdm.unfccc.int/filestorage/S/D/9/SD94R1COMGNYTP3BIW7QAZ5UH026KJ/eb64_repan01.pdf?t=VVN8bTN0ZXg5fDDM3LBP1KZGmNsZihzMWYmh> (Accessed 10 May 2012).

UNFCCC; 'Statistics of CDM projects' <http://cdm.unfccc.int/Statistics/index.html> accessed 18 January, 2011 (Document 32 C/57) <http://unesdoc.unesco.org/images/0013/001316/131627e.pdf>(accessed 12 May 2012).

UNFPA, 'Core Concepts of a Human Rights Based Approach' (2010) <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/introduction.pdf> (accessed 12 May 2012).

UNHCR, *Frequently Asked Questions on the Human Rights Based Approach* (2005) <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> (accessed 12 December 2011)

UNHRC, 'Human Rights Impact of Climate Change' United Nations Joint Press Kit for Bali Climate Change Conference 3-14 December 2007, UNDOC/ DPI/2483/2007.

UNICEF, 'Guidelines for the Human Rights-Based Programming Approach: Executive Directive' UNICEF/ CF/EXD 1998-04, April 1998;

UNICEF, 'Peru Case Study: A Human Rights Approach' (UNICEF 2002).

UNICEF, Human Rights Based Programming: India Case Study", UNICEF 2003;

UNICEF, Human Rights Based Programming: The Mali Experience (UNICEF 2003)

United Nations, 'Setting International Standards in the Field of Human Rights' G.A., Res. 41/120, U.N. GAOR, 41st Sess., Supp. No. 53, at 178, 179, U.N. Doc. A/41/53(1987).

United Nations (2004) 'Delegation of Authority and Accountability', Report of the UN Joint Inspection Unit, JIU/REP/2004/7, 13.

United Nations (2008) 'Accountability Framework, Enterprise Risk Management and Internal Control Framework, and Results-based Management' A/62/701

United Nations, 'Chan-75 dam, 2009 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples' (A/HRC/12/34/Add.5).

United Nations Environmental Programme, *CDM Information Book* (UNEP 2004) 2-3.

United Nations Framework Convention on Climate Change adopted by the United Nations General Assembly, 20 January 1994, A/RES/48/189,
<http://unfccc.int/resource/docs/convkp/kpeng.html> (accessed 12 December 2011).

United Nations Human Rights Mainstreaming Portal,
available at <http://hrbaportal.org/the-un-and-hrba> (accessed 12 January 2012).

United Nations, Human Rights and the Environment, final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9.
<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bccaa18025675c005779c3?Opendocument> (accessed 10 February, 2010).

United Nations, 'Delegation of Authority and Accountability' (2004) Report of the UN Joint Inspection Unit, JIU/REP/2004/7, at 13.

United Nations, 'Glossary of Climate Change Acronyms and Jargon', available at <http://unfccc.int/siteinfo/glossary.html> (accessed 08 October, 2010);

United Nations, 'Claiming the Millennium Development Goals: A Human Rights Approach' (2008) UN/ HR/PUB/08/3;

United Nations, 'Investing in the United Nations: For a Stronger Organization Worldwide' Resolution of the United Nations General Assembly, 16 May 2006, A/RES/60/260.

United Nations, 'Public Sector Transparency and Accountability in Selected Arab Countries: Policies and Practices' (United Nations 2010).

United Nations, 'Renewing the United Nations: A Programme for Reform, Report of the Secretary General' (A/51/1950), July 14, 1997.

United Nations, 'Statement of the UN Secretary General' <http://www.unece.org/env/pp/> (accessed 12 January 2010).

United Nations, 'Summit Outcome of the 65th Session of the UN General Assembly' 17 September, 2010, UN/ A/ 65/L.1;

United Nations, 'UNDG Human Rights Mainstreaming Mechanism: Operational Plan 2011-2013' (November 2011).

United Nations, 'UN-REDD Programme Guidelines on Free Prior Informed Consent' (UNEP 2012) 12.
UNEP, 'Legal Issues Guide Book to the CDM'
<http://cd4cdm.org/Publications/ImplementingCDM_GuidebookHostCountryLegalIssues.pdf> (accessed 12 December, 2011).

UNEP, ‘UN-REDD Programme Guidelines on Free Prior Informed Consent’ (UNEP 2012) 7.

UNEP, ‘Women at the Frontline of Climate Change: Gender risks and hopes: A Rapid Response Assessment’ (United Nations Environment Programme 2011) 6.

UNESCO, ‘Guidelines for Human Rights-Based Programming Approach’ Executive Directive 1998-004;

UNESCO, ‘Strategy on Human Rights’Adopted by the 32nd UNESCO General Conference 2003

UNFCCC, ‘Kwale CDM Project Monitoring Report: Recovery of Associated Gas that would otherwise be flared at Kwale Oil-Gas Processing Plant, Nigeria’ (2007) UNFCCC/ Document ID: CDM0553- MR01.

UNFCCC, ‘Input to the high-level panel for the CDM Policy Dialogue: Background Paper by the Secretariat’ (22 December 2011)
<http://www.cdmpolicydialogue.org/background/CDM_policy_background.pdf> (accessed 10 May 2012).

UNFCCC, Lists of Registered CDM projects (2011),
< http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view>
(accessed 02 August, 2011).

U.N. Office of the High Commissioner for ‘Human Rights, Mainstreaming Human Rights’ <http://www.unhchr.ch/development/mainstreaming-01.html> (accessed 02 August, 2011).

UKCIP, ‘Understanding Climate Change.’ UK Climate Impacts Programme, <http://www.ukcip.org.uk/index.php?option=com_content&task=view&id=73&Itemid=186> (accessed 08 October, 2010);

U.N. Educational, Social and Cultural Organization, U.N.Doc 30C/INF.11 (24 September 1999).

UN Doc/E/CN.$/Sub 2/2003/38/Rev. 2,
available at OHCHR, http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (accessed 12 April 2012).

UN World Summit, ‘Outcome Document’ (2005)
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>
(accessed 12 January 2012).

UNCTAD Earth Council, ‘Glossary of Climate Change Acronyms and Jargon’ <http://unfccc.int/essential_background/glossary/items/3666.php> (accessed 12 March 2012).

UNDP, ‘The Concept and Measurement of Human Development’: 20; UNDP, Human Development Report 2002 (OUP 2002).

UNDP, 'Capacity Development (Practice Note)' (UNDP 2005) 4.

UNDP, 'Fighting Climate Change: Human Solidarity in a Divided World' (UNDP 2007) 1.

UNDP, 'Going through the CDM Process' <http://content.undp.org/go/cms-service/stream/asset/?asset_id=2222587> (accessed 12 January, 2012),

UNDP, 'Human Rights-Based Reviews of UNDP Programmes, Working Guidelines' (UNDP 2003) <http://www.undp.org/governance/docshurist/030617Guidelines.doc> accessed 10 October, 2010.

UNDP, 'Integrating Human Rights with Sustainable Human Development' UNDP Policy document, (UNDP, 1998) < http://magnet.undp.org/Docs/policy5.html> accessed 12 October, 2010;

UNDP, 'Programming for All: A Practitioner's Guide to a Human Rights Based Approach to Access to Justice' (UNDP 2005) 4-5.

UNDP, 'Using Indicators for Human Rights Accountability' <http://hdr.undp.org/en/media/hdr_2000_ch5.pdf> (accessed 12 January 2011).

UNHRC, 'Human Rights Impact of Climate Change' United Nations Joint Press Kit for Bali Climate Change Conference 3-14 December 2007, UNDOC/ DPI/2483/2007.

UNICEF, 'Guidelines for the Human Rights-Based Programming Approach: Executive Directive' UNICEF/ CF/EXD 1998-04, April 1998

United Nations, The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> (accessed 12 October, 2010).

Ziegler J, 'The Right to Food' (Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, 2001) UN Doc E/CN.4/2001/53 <http://daccessdds.un.org/doc/UNDOC/GEN/G01/110/35/PDF/G0111035.pdf?OpenElement> (accessed 12 May 2012).

CHAPTER ONE:

INTRODUCTION

> There is virtually no aspect of our work that does not have a human rights dimension. Whether we are talking about peace and security, development, humanitarian action, the struggle against terrorism, climate change, none of these challenges can be addressed in isolation from human rights.
>
> Ban Ki-moon, Secretary-General of the United Nations.[1]

The aim of this thesis is to examine and analyse the effects of climate change mitigation projects on human rights; *i.e.* the potential infringement of fundamental human rights by projects undertaken to combat climate change.[2] Drawing examples from Clean Development Mechanism (CDM) projects, it discusses the need to mainstream human rights safeguards into the approval and execution of climate change mitigation projects. It also takes a wider look at how lessons from the CDM could inform thoughts on the value and requirements for mainstreaming human rights principles into the design of emerging project-based mechanisms and into international climate change regimes in general. It examines the legal and theoretical prospects and paradoxes of adopting the United Nations Human Rights Based Approach (HRBA) as a framework through which human rights norms may be mainstreamed into current and emerging international climate change regimes.[3]

---

[1] See the United Nations Human Rights Mainstreaming Portal, <http://hrbaportal.org/the-un-and-hrba> accessed 12 January 2012.

[2] While mitigation covers reducing greenhouse gas (GHG) emissions to prevent climate change, adaptation means coping with those impacts that cannot be avoided. It includes policy adjustments or changes, proposed as means for ameliorating the anticipated adverse consequences associated with climate change. See B Smith, I Burton, R Klein, and J Wandel, 'An Anatomy of Adaptation to Climate Change and Variability' (2000) 45(1) Climatic Change 233-51.

[3] The HRBA in this thesis specifically refers to the framework proposed by the United Nations, which encourages all entities of the UN system to mainstream human rights norms into their areas of activities. The implementation of the HRBA across national and regional levels include enacting laws and policies would recognise the rights of citizens to demand for participation, information, protection and justice in environmental issues and the duty of states and non-state actors to protect, respect and fulfil the provisions of such laws. In the international level, it includes mainstreaming human rights into multilateral treaties. See United Nations, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies' (2003)

The research questions posed in this study are: Firstly, are there sufficient legal supports for claims that projects aimed at combating climate change currently threaten or could threaten the protection and fulfilment of fundamental human rights under international law. Secondly, what are the legal and theoretical justifications for emerging proposals on the need to integrate and mainstream human rights standards into climate change regimes? Specifically, what are the theoretical prospects and problems associated with the emerging 'human rights mainstream paradigm' under international law? Thirdly, could the United Nations Human Rights Based Approach (HRBA) be applied as a framework for mainstreaming human rights standards into project execution and approval procedures under extant and emerging climate change regimes? What is the basis, value and novelty of the HRBA as human rights mainstreaming approach as compared with traditional human rights mainstreaming approaches? Fourthly, what are the problems and paradoxes of mainstreaming human rights norms into climate change regimes through the HRBA? And finally what are the legal and institutional strategies and reforms needed to overcome these problems?

This introductory chapter provides a factual context and background on the linkages between climate change mitigation projects, particularly clean development mechanism (CDM) projects, and human rights. It begins with a description of the human rights questions and challenges facing current international climate change regimes and then shows how these challenges have brought about calls for an approach that recognises the cross cutting synergies between human rights and policy measures aimed at combating climate change. It will also lay out the

---

<http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

methodologies to be adopted, the structure of this thesis and the scholarly significance of the research.

1. Background and Factual Context

Climate change is perhaps one of the greatest concerns facing our present generation.[4] Eleven of the last twelve years rank among the warmest years since 1850.[5] With emerging signs of temperature change all over the world, it is now widely accepted that climate change is real, that human emissions of greenhouse gases are a cause; that if left unchecked, climate change may lead to extreme weather events such as droughts and flooding; that it may threaten food security and that it may lead to ill health and economic decline in nations of the world.[6]

---

[4] Global Warming is often used interchangeably with climate change. Climate change is the generic term used to describe any increase in the average temperature of the atmosphere at a rate far from normal, caused by the anthropogenic emission of gases that trap the sun's heat in the atmosphere. These gases called greenhouse gases (GHGs) act like blankets, which absorb heat radiation that should escape to space, thereby heating the atmosphere at a rate far from normal. GHGs that contribute to global warming include carbon dioxide ($C0_2$), methane (CH_4), nitrous oxides, chlorofluorocarbons (CFCs), and halocarbons. J Houghton, *Global Warming*: *The Complete Briefing*, (4th ed., CUP 2009); See also United Nations, 'Glossary of Climate Change Acronyms and Jargon' <http://unfccc.int/siteinfo/glossary.html> accessed 08 October, 2010; J Von Doussa, 'Climate Change: Catastrophic Impacts and Human Rights' (2007) <http://www.humanrights.gov.au/about/media/speeches/speeches_president/2007/20071211_Climate_Change.html> accessed 10 October 2011.

[5] This is according to the last assessment report of the Intergovernmental Panel on Climate Change (IPCC)- a body of over two thousand scientists established by the United Nations to provide comprehensive scientific assessments of current scientific, technical and socio-economic information about the risk of climate change, its potential environmental and socio-economic consequences, and possible options for adapting to these consequences or mitigating the effects. According to the IPCC, the current evidence of changing climate include: an increase in night-time temperatures over many land areas at about twice the rate of day-time temperatures; an increase in the length of the freeze-free season in many Northern Hemisphere mid-to-high latitude land areas; more intense rainfall events over many Northern Hemisphere mid-to-high latitude land areas; a near worldwide decrease in mountain glacier extent and ice mass; a decrease in Northern Hemisphere sea-ice amounts and a substantial thinning of Arctic sea-ice in late summer. See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Synthesis Report. A Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2007); see also E Shuckburgh, 'Climate Change – Global Issues' (University of Cambridge Climate Change Press Pack 2008), <http://www.atm.damtp.cam.ac.uk/shuckburgh/general/Climate_Press_Pack.doc> accessed 10 December, 2011.

[6] J Hansen, 'Defusing the Global Warming Time Bomb' (2004) 3 Sci.Amer. 68-77; see also M Wallstrom, 'Meeting the Long Term Challenge of Global Warming: A European Perspective' in D Michel, (ed.) *Climate Policy for the 21st Century: Meeting the Long-term Challenge of Global Warming* (Center for Transatlantic Relations 2003) 17-25. Professor David King, was perhaps making this same point when he said that: 'Antarctica is likely going to be the world's only habitable continent by the end of this century, if global warming remains unchecked...' See G Lean,

It was in order to avert these disasters that the global community agreed to the Kyoto Protocol in 1997.[7] The Kyoto Protocol is recognised as one of the most important global agreements of the late twentieth century, not only for fixing greenhouse gases (GHG) emission limits to be achieved by industrialized nations by 2012, but also for providing three flexible, project-based mechanisms through which industrialized countries can achieve their emission reduction objectives.[8] Apart from encouraging countries to design domestic policy measures aimed at climate change mitigation and adaptation, the flexible mechanisms of the Kyoto Protocol present industrialized countries additional opportunities to earn emission reduction credits anywhere in the world, at the lowest cost possible by investing in projects that lead to emission reduction and sustainable development.

For example, studies confirm that while it requires US $50 to mitigate one ton of CO_2 eq. in developed countries, the same reduction can be accomplished in developing countries at US $15 per ton of CO_2 eq.[9] The mechanisms thus deliver cheap emission reductions to the investing country and sustainable development gains to the host country. According to the United Nations, through climate change projects, a country could: attract capital for projects that assist in the shift to a more prosperous but less carbon-intensive economy; encourage the active participation of

---

'Global Warming could soon make Antarctica the only place to live, says Chief British Scientist' *The Independent on Sunday* (London, 2 May, 2004).

[7] The Kyoto Protocol is a legally binding set of obligations ratified by 38 industrialized countries and 11 countries in Central and Eastern Europe, to return their emissions of GHGs to an average of approximately 5.2% below their 1990 levels over the commitment period of 2008-2012. Conference of the Parties to the Framework Convention on Climate Change, *Kyoto Protocol*, 10 December 1997, U.N Doc. FCCC/CP/1997/L.7/add.1, 37 I.L.M. 22 (1998).

[8] The three flexible mechanisms: Joint Implementation (JI), Emission Trading (ET) and the Clean Development Mechanism (CDM) allow industrialized countries to meet their emission reduction targets by investing in projects abroad rather than through domestic actions alone. For a detailed and excellent discussion of these mechanisms, see F Yamin and J Depledge, *The International Climate Change Regime* (CUP 2005) 25.

[9] See F Ackerman, 'Financing the Climate Mitigation and Adaptation Measures in Developing Countries' (2009) <http://sei-us.org/Publications_PDF/SEI-WorkingPaperUS-0910.pdf> accessed 02 June 2012. See also United Nations Framework Convention on Climate Change, 'Investment and Financial Flows to Address Climate Change: An Update' (2008) FCCC/TP/2008/7.

both its private and public sectors; provide a tool for technology transfer through projects that replace old, dirty and inefficient fossil fuel technology with cleaner ones; create new industries using environmentally sustainable technologies; and help define investment priorities in projects that meet sustainable development goals.[10] Emission reduction projects could assist developing countries to achieve progress in environmental issues such as cleaner air and water, reduced deforestation, soil conservation, and biodiversity protection. They could also result in social benefits such as rural development, employment, and poverty alleviation; and to encourage private investment and public-private partnerships in economic development.[11] According to Weiner,

> …this system would benefit poorer societies. They would be able to sell extra allowances at a profit, a new and valuable asset. The magnitude of financial flows to major developing countries generated by a GHG allowance trading market could be substantial, rising from approximately $10 billion to over $100 billion per year (in constant dollars) in future decades...[12]

Of the three mechanisms, it is only the CDM that brings developing countries into the picture.[13] The CDM allows developing countries to host climate change mitigation projects sponsored by industrialized countries. The CDM aims to assist developing countries in achieving sustainable

[10] United Nations Environmental Programme, *CDM Information Book* (UNEP 2004) 2-3; K Olsen and J Fenhann,'Sustainable Development Benefits of Clean Development Mechanism Projects: A New Methodology for Sustainability Assessment Based on Text Analysis of the Project Design Documents Submitted for Validation' (2008) 36 Energy Policy 2819-2830.

[11] K Olsen, ibid.

[12] See J Weiner, 'Global Environmental Regulation: Instrument Choice in Legal Context' (1999) 108 Yale L.J. 677 691-692.

[13] Joint Implementation (JI) and Emission Trading (ET) take place between two industrialized countries with emission reduction targets. Since developing countries do not have emission reduction targets under the Kyoto protocol, they are only eligible to take part in the CDM, which is a cooperative mechanism that allows developed countries to invest in developing countries in exchange for emission reduction credits. There are also human rights issues in emission trading in joint implementation; however we focus on the CDM because it has attracted most protests and court cases. Secondly, it is also the only mechanism with a global coverage as it can happen between any developed country and a developing country party to The Protocol. This global reach has generated more concerns especially in developing countries with perennially bad human rights records. Despite our focus on the CDM however, proposals in this thesis could be applicable to the human rights issues in all the three mechanisms.

development by boosting their economies and by promoting environmentally friendly investment from industrialized countries governments and businesses.

Estimates indicate that by 2015, foreign investments through the CDM in a participating developing country could be US$4752 Million annually.[14] Figueres seemed to have summarized the benefits of the CDM to developing countries when she noted that:

> The funding channelled through the CDM should assist developing countries in reaching some of their economic, social, environmental and sustainable development objectives, such as cleaner air and water, improved land-use, accompanied by social benefits such as rural development, employment, and poverty alleviation and in many cases, reduced dependence on imported fossil fuels. In addition to catalysing green investment priorities in developing countries, the CDM offers an opportunity to make progress simultaneously on climate, development, and local environmental issues. For developing countries that might otherwise be preoccupied with immediate economic and social needs, the prospect of such benefits should provide a strong incentive to participate in the CDM.[15]

Recent statistics seem to buttress Figueres' projections.[16] Studies show that over the past decade, the CDM alone has helped nations to mitigate approximately one billion tons of greenhouse gas emissions while saving developed countries a total of US$3.6 billion in mitigation costs.[17] With over 5,200 registered CDM projects in over 80 countries, the CDM has mobilized more than

[14] G Guangshen *et al,* 'Clean Development Mechanism in China; Taking a Sustainable and Proactive Approach' (2004) Sino Sphere Journal 3.
[15] C Figueres, *Establishing National Authorities for the CDM* (CSDA 2004) 21.
[16] See the 2012 Report of the UNFCCC, 'The Benefits of the Clean Development Mechanism 2012' <http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf> accessed 12 January 2013. According to the report, the total investment in registered or soon-to-be- registered CDM projects as of June 2012 is estimated at USD 215.4 billion. Investments in projects that are known to be operating is USD 92.2 billion. The annual investment peaked in 2008 at USD 13.9 billion (operating projects) and USD 40.4 billion (all projects), but the large number of projects undergoing validation could lead to a new, much higher, peak in 2012 or thereafter. Over 750 million CERs had been transferred from the CDM registry by the end of 2011. The revenue generated by the sale of these CERs is estimated to be at least USD 9.5 billion and possibly as much as USD 13.5 billion.
[17] ibid.

US$215.4 billion in investments in developing countries, thereby providing opportunities for socio-economic growth and poverty alleviation in many developing countries.[18]

However, the implementations of project-based mechanisms under the Kyoto Protocol have been fraught with challenges.[19] For example, the CDM has been criticised for not delivering on its sustainable development promises.[20] A number of CDM projects approved by the CDM Executive Board have been criticised for resulting in the violation of fundamental human rights in developing countries.[21] It is estimated that climate change mitigation and adaptation projects

[18] ibid.

[19] See generally N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1(2) Journal of Human Rights and the Environment (where the author identifies areas where current climate change regimes may cause human rights violations in local communities. These include some projects under the Clean Development Mechanism, large hydropower and biomass projects., use of biofuels, choices on energy and adaptation, and REDD+ projects; see also D Driesen, 'Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol' (2008) 83(1) Indiana Law Journal 21; K Umamaheswaran & A Michaelowa, 'Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector' (2006) HWWA Discussion Paper 346; UN Development Programme, *Fighting Climate Change: Human Solidarity in a Divided World* (UNDP 2007) 1; A McMichael *et al*., eds., *Climate Change and Human Health – Risks and Responses* (World Health Organization, 2003); M Sandel, 'It is Immoral to Buy the Right to Pollute' *N.Y.TIMES*, 15 Dec., 1997; T Jackson, 'The Language of Flexibility and the Flexibility of Language' (1998) 10 International Journal of Environment and Pollution 3; I Rowlands, 'The Kyoto Protocol's Clean Development Mechanism: A Sustainability Assessment' (2001) 22 Third World Quarterly 795; M Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell 2005) 29; *Climate Change and Human Rights: A Rough Guide* (International Council on Human Rights Policy 2008) 12-14.

[20] See L Schneider, 'Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement' (Öko-Institut 2007); C Sutter, 'Does the Current Clean Development Mechanisms Deliver its Sustainable Development Claims' (2005) *HWWA Report* 1; R Saner and A Neiderberger, 'Hype or Reality: Can the CDM trigger FDI?' (2005) 2 E.C.P 12; B Haya, *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism* (International Rivers Network, Berkeley: 2002) 1; H Kolshus, 'Can the Clean Development Mechanism attain both Cost effectiveness and Sustainable Development Objectives?' (2001) 8 CICERO Working Paper at 1; K. Umamaheswaran & A Michaelowa 'Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector' (2006) HWWA Discussion Paper 346.

[21] See T Griffiths and F Martone, 'Seeing 'REDD'? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' (May 2009), <http://www.rightsandresources.org/documents/files/doc_923.pdf> accessed 12 January, 2011; See generally E Meijer, 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 New York University Journal of International Law and Politics 873. See also J Barbara, *The False Promise of Biofuels* (International Forum on Globalization and Institute for Policy Studies 2007); E Holt-Giménez and I Kenfield, *When Renewable Isn't Sustainable: Agrofuels and the Inconvenient Truths Behind the 2007 U.S. Energy Independence and Security Act*, Food First Policy Brief No. 13: Agrofuels (Institute for Food and Development Policy 2008).

already displace over 20 million people a year.[22] These tend to be the poorest and the most vulnerable citizens in developing countries where these projects are located. In addition, there are concerns related to pollution caused by the transfer of out dated and inefficient technologies for emission credits.[23] Other human rights concerns include the lack of opportunities for participation by citizens in project planning and implementation,[24] citing of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above-mentioned problems.[25] Due to these problems, the credibility and integrity of project-based mechanisms under the Kyoto Protocol have been doubted.[26] Projects that carry undoubted potential for climate change mitigation have

[22] See A de Sherbinin, *et al*, 'Preparing for Resettlement Associated with Climate Change' (2011) Science 334.6055, 456–457; R Bronen, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine' (2011) 35 New York University Review of Law & Social Change 357–407; K Hoshour & J Kalafut, *A Growing Global Crisis: Development-Induced Displacement and Resettlement* (International Accountability Project Issue Paper 2010); J McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012); B Mayer, 'International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22 Colorado Journal of International Environmental Law and Policy 357–416; J McAdam,(ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010); M Couldrey & M Herson (eds.) *Forced Migration Review*: *Climate Change and Displacements* (Oxford Refugees Studies Center 2008); B Petterson, 'Development-Induced Displacement: Internal Affair or International Human Rights Issue?' (2002) 12 Forced Migration Review 19.

[23] See generally P Lucas and T Patzek, 'The Disastrous Local and Global Impacts of Tropical Biofuel Production' *Energy Tribune* (March 2007) 19. See also 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits'<http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010.

[24] See F Seymour, 'Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs' in S Humphreys, ed., *Human Rights and Climate Change* (CUP 2010) 207; S Jodoin, 'From Copenhagen to Cancun: A Changing Climate for Human Rights in the UNFCCC?' CISDL & IDLO Sustainable Development Law on Climate Change Working Paper Series (January 2011) <http://www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf> accessed 03 August, 2011.

[25] 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, by the Inuit people of the Arctic Regions of the United States and Canada, 7 December 2005. The IACHR informed the petitioners that it would not consider the petition because the information it provided was not sufficient for making a determination and that no legally enforceable right has been violated. Available at< http://inuitcircumpolar.com/files/uploads/iccfiles/ FINALPetitionICC.pdf. > accessed 12 July, 2011.

[26] See L Pottinger, *The CDM's Hydro Hall of Shame, Bad Deal for the Planet: Why Carbon Offsets Aren't Working…And How to Create a Fair Global Climate Accord* (Dams, Rivers and People Report 2008, International Rivers, 2008); S McInerney-Lankford. 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) Harvard Environmental Law Review 431-437; Oxfam, Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy. (2008) Oxfam Briefing Paper on Climate Change and Human Rights

been met with resistance, criticisms and protests due to their impacts on human rights.[27] These concerns have led to questions on whether solutions to climate change are not in fact threatening more human rights than climate change itself.[28] The CDM has in fact been labelled as a 'Cheap and Corrupt Development Mechanism'.[29]

A recent example that has dominated international discussions is the case of the Aguan biogas CDM project in Honduras, which was approved on the 18th of July, 2011 by the CDM Executive Board.[30] This project, sponsored by the UK Government, has been heavily criticized internationally for its gross human rights violations.[31] According to a report of the international human rights mission submitted on 25 March 2011 to the Inter-American Commission on Human Rights, the local project developer Grupo Dinant is alleged to have been at the centre of violent conflicts with local people, who were deprived of their land by the project; about 23

<http://www.oxfam.org.uk/resources/policy/climate_change/downloads/bp117_climatewrongs.pdf> accessed 12 July, 2011; see also C Aminzadeh 'A Moral Imperative: The Human Rights Implications of Climate Change'. (2007) 30 Hastings International and Comparative Law Review 259; M Limon 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 (2) Harvard Environmental Law Review 451.

[27] See German Energy Transition, 'Carbon Credits Tarnished by Human Rights Disgrace' <http://www.euractiv.com/climate-environment/carbon-credits-tarnished-human-r-news-508068> accessed 02 August, 2011.

[28] R Doornbusch and R Steenblik, 'Biofuels: Is the Cure Worse than the Disease?' Background paper for OECD meeting in Paris 11-12 September 2007. SG/SD/RT (2007) 3.

[29] See Down to Earth Group, 'Issues: Flexibility Mechanisms' *Down to Earth Magazine* (November 15, 2005); see also Centre for Science and Environment, 'Current CDM Design Corrupt and 'Unclean'" <http://www.cseindia.org/node/3031> accessed 21 March 2012. This thesis disagrees with this rather sentimental condemnation of the CDM; while it acknowledges the flaws in the current implementation of the CDM, this thesis argues that the CDM could stimulate real economic, social and environmental growth in developing countries if properly restructured. This thesis calls for a reform of the CDM to make it more transparent, accountable and right-based.

[30] See UNFCCC, 'Lists of Registered CDM projects' (2011) < http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view> accessed 02 August, 2011.

[31] See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011. See also CDM Watch, 'Press Release: United Nations under Pressure to denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) <http://www.cdm-watch.org/?p=1872> accessed 02 August, 2011.

peasants have also been killed.[32] A coalition of over seventy international human rights groups called on the UK to withdraw sponsorship for the project and for the CDM Executive Board not to approve or register the project.[33] In response, the UK Secretary of State for Energy promised to follow the findings of the CDM Board on the project.[34] Despite these protests, the CDM Board approved this project. The Board argued as in most cases that it has no mandate to investigate human rights abuses and that any matter related to the sustainable development of a CDM project or its human rights impacts are determined by the government that hosts the project.[35] According to the spokesman for the CDM Executive Board:

> The allegations are deplorable. If human life has been taken, or human rights violated in any other way, it is a flagrant violation of the most fundamental principles of the United Nations… However the CDM board has no mandate to investigate human rights abuses. Any matters related to the sustainable development of the project are determined by the government that hosts the project, in this case the de-facto government of Honduras…[36]

That the CDM Board is not empowered to address human rights complaints emanating from the execution of CDM projects presents a huge challenge to human rights protection in developing

---

[32] For comprehensive details of human rights violations by this project, see CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.>; See also FIAN, Human Rights Violation in Bajo Arguan (2011) <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf> accessed 02 August, 2011.

[33] CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' (2011) <http://www.cdm-watch.org/?p=1648> accessed 02 August, 2011. As a response to protests by several international human rights groups German public development bank DEG (Deutsche Entwicklungsgesellschaft) declared that it will not pay out an already approved loan of $20 million USD for the project. Similarly, EDF Trading, a wholly-owned subsidiary of Electricité de France SA's and one of the biggest CDM investors, pulled out from a contract to buy carbon credits from the project. See CDM Watch, 'German Bank Won't Lend to Honduran CO_2 Project' (April, 2011) <http://www.bloomberg.com/news/2011-04-18/german-bank-won-t-lend-to-honduran-co2-project-cdm-watch-says.html> accessed 01 August 2011.

[34] See Letter by Rt. Hon Chris Huhne M.P, (April 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/UK_Gov_reponse_on_aguan_130411.pdf> accessed 31 July, 2011.

[35] See The Response of the CDM Executive Board to the Petition (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf > accessed 02 August, 2011.

[36] See Climate Connections, 'Carbon Trade Group Backs Call to check Credits on Human Rights' (2011) <http://climate-connections.org/2011/04/18/carbon-trade-group-backs-call-to-check-credits-on-human-rights/> accessed 02 August, 2011.

countries where CDM projects are sited.[37] A further challenge is that the Kyoto Protocol places the decision to host a project in the hands of national governments. Placing such a crucial decision in the hands of a country that is interested in such projects has led to the approval of questionable projects, even projects that lead to loss of life and the violation of human rights. Arguably, States have been more concerned with hosting climate change projects at all costs, irrespective of the human rights consequences of such projects.[38] Due to the scramble by developing countries to host CDM projects, there have been increased tendencies to lower sustainability standards and to encourage foreign CDM projects despite their potential short and long-term effects on human rights.[39] These concerns are most serious in developing countries with abysmal human rights records.[40]

---

[37] N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1(2) Journal of Human Rights and the Environment 211; see also D Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 2(2) Nordic Environmental Law Journal 33-52.

[38] According to the CDM Watch Group:

> …Current CDM Rules rely on the CDM host country government to assess whether a project contributes to sustainable development. This places the assessment of sustainable development in the hands of governments that would like to see more investment in their respective countries. As a consequence it is quite logical that essential criteria to assess sustainable development, which are chosen by host country governments themselves, are already deemed to be fulfilled with the mere requirement that the projects 'increase GDP per capita'. As a consequence, no CDM project has ever been rejected on the basis that it did not contribute to sustainable development. Allegations of serious human rights abuses related to CDM project applications in Honduras and Panama have caused an outcry amongst civil society organizations and widespread dismay that human rights are not being taken seriously under the CDM.

See CDM Watch Group News Letter (February 2011)<http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf>accessed 23 July, 2011.

[39] M Jung, 'Host Country Attractiveness for CDM non-sink projects' (2006) Energy Policy 2174; A Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' HWWAReport 255 at 1; K. Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature' <http://cd4cdm.org/Publication/> accessed 21 January 2011.

[40] In Nigeria for example, six different emission reduction projects have been subjects of intense petition and court actions over their human rights violations. These projects include: the Kwale Project, Ovade Ogharefe project, the Lafarge Cement Project, The West African Gas Project (WAGP), the Asuokpu/Umutu Gas Recovery and Marketing Facility, and the Reducing Emissions from Deforestation and Degradation (REDD) currently being executed in Nigeria by Shell. The violations range from land grabs without compensation, assault on indigenes, killings, lack of participation in decision-making process and the displacements of residents of affected areas. For each of these projects it is reported that the environmental impact assessments were only put together as a smokescreen and forwarded to the CDM Board after Nigerian authorities had already approved the projects. These projects were still approved and registered by the CDM Board despite the protests. See K Adeyemo, 'Nigerians Oppose Climate Development Projects' *The Tribune* (Ibadan, 12 September, 2010) 3; REDD Under Fire in Nigeria, <http://uk.oneworld.net/article/view/165950/1/246> accessed 23 July, 2011, Dont Sell Forests: Group Urge Nigerian Government <http://www.scoop.co.nz/stories/WO1008/S00467/dont-sell-forests-groups-urge-nigerian-govts.htm>

The CDM Modalities and Procedures (CDM Rules) aside, both the United Nations Framework Convention on Climate Change and its Kyoto Protocol are silent on the need for Parties to minimize the human rights impacts of climate change projects and mitigation strategies.[41] Even though both treaties provide that in their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall minimize the adverse economic, social and environmental impact resulting from the implementation of measures taken to mitigate or adapt to the impact on climate change ('response measures').[42] No mention is made of minimizing the adverse impact on human rights of climate change response measures. The preamble to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol also provide that 'responses to climate change should be coordinated with social and economic development in an integrated manner'.[43] No mention is made of coordinating climate change responses with fundamental human rights standards.

These gaps and the high incidents of human rights violations resulting from CDM projects have further increased the calls for a more transparent, accountable and human rights based approach to climate change mitigation in general. Most recently, in March 2012, a coalition of developing

---

accessed 23 July, 2011; See Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010; Bank Information Center, 'Local Groups say project will not end gas flaring, could exacerbate conflicts in the Niger Delta'<http://www.bicusa.org/en/Project.39.aspx> accessed 14 January, 2011.

[41] For succinct accounts of how projects and carbon credit schemes under the UN Climate Change Regimes are Fostering Violence and Human rights abuses, see J Conant, 'Massive UN-Supported African Palm Plantations Leading to Oppression, Kidnapping and Murder' (2012) <http://www.alternet.org/environment/149778/why_u.n.-backed_carbon_credit_schemes_may_be_fueling_land_grabs%2C_kidnappings_and_murder?page=entire> accessed 12 April 2012. See also G Monbiot, 'North Biofuel Appetite Causing South Starvation' The Hindu: November 7, 2007. S Jodoin, 'Lost in Translation: Human Rights in the Climate Change Negotiations' (January 2010) CISDL Legal Working Paper <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf> accessed 02 June, 2011

[42] See UNFCCC, Art 4(1) (h); Kyoto Protocol Article 2 (3), Article 3 (14).

[43] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 11 December 1997, entered into force 16 February 2005) U.N Doc. FCCC/CP/1997/L.7/add.1, 37 I.L.M. 22 (1998).

countries petitioned the United Nations to seek powers to withdraw approvals they have given to emission reduction projects if evidence emerge that they breach human rights or harm the environment.[44] The petition emphasises how policy measures and projects intended to advance emission reduction goals can have serious negative impacts on fundamental human rights.

As negotiators continue to map out details of post 2012 climate change regimes, it is imperative to take stock and examine how these human rights concerns facing the current CDM framework could be pragmatically addressed. The approval and sustained execution of emission reduction schemes that affect human health, lead to loss of property or the denial of the right to water or lead to loss of life would have to be avoided. If not addressed, it might amount to solving one problem by creating many others.[45] As Filzmoser advises:

> …If there are no rules in place that allow for the rejection of projects based on human rights abuses, it is time to change this now…Excluding carbon offset projects that fund human rights abuses from the CDM would only be a logical move given that responsible investors should not be interested in buying carbon credits from projects that violate UN conventions.[46]

Humphreys also notes that:

> it is necessary to examine what will be the consequences in human rights terms, of large forest conservation efforts, biofuel cultivation for export markets or nuclear power dependence, who will be affected and how?, Are institutional forms of redress available in cases of rights violations.[47]

---

[44] Point Carbon, 'CDM Host Nations ask U.N. for Power to Ban Projects' <http://www.pointcarbon.com/news/1.1802068> accessed 30 March 2012.

[45] See P Cullet, 'Rethinking the Legal Regime for Climate Change: The Human Rights and Equity Imperative' in: Böhm, Steffen and Dabhi, Siddhartha, (eds.), *Upsetting the Offset – The Political Economy of Carbon Markets* (MayFly Books 2009) 292-306; see also P Cullet, 'The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions' in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2010) 183-206; D Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 2(2) Nordic Environmental Law Journal 33-52.

[46] A Filmozer, 'CDM Projects Affect Human Rights' (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/> accessed 2 August, 2011; see also N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1(2) Journal of Human Rights and the Environment 211.

[47] See S Humphreys (ed), *Human Rights and Climate Change* (CUP 2010) 23. See also S Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank 2011) where the authors argued that policy measures designed to address climate change may impact the realization

In order to restore faith in project based mechanisms and global carbon markets generally, it is necessary to examine how human rights principles can be mainstreamed into international climate change regimes.[48] Rights-based frameworks are needed to ensure that climate change responses, projects, policies and actions protect, respect and fulfil human rights throughout their various stages, including planning, funding, implementation, monitoring and evaluation. Rights-based frameworks and approaches would not only ensure that responses to climate change conform to existing human rights obligations and principles, they also have the potential to strengthen their acceptability, effectiveness and long-term efficiency.[49] As the *Milan Declaration of the Sixth International Indigenous Peoples Forum on Climate Change* requested:

> The Clean Development Mechanism (CDM) and Joint Implementation (JI) must incorporate principles which address transparency, free, prior and informed consent and equitable benefit sharing with Indigenous Peoples in order to accomplish the objectives of lowering greenhouse gas emissions and achieving sustainable development in developed and developing countries…All development projects within indigenous ancestral territories must respect our fundamental rights to lands, territories, self-determination and ensure our right to our free, prior and informed consent.[50]

---

of human rights. They argued that human rights principles, both substantive and procedural would be relevant to the design and implementation of effective responses to climate change, particularly in relation to adaptation and to some extent also to mitigation. See pages 56-57.

[48] See S Lankford, M Darrow & L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank 2011); M. Macchi, *Indigenous and Traditional Peoples and Climate Change* (International Union for Conservation of Nature 2008). IUCN expressed concern about plans to establish a large-scale biofuel plantation and the threat it constituted to the rights of indigenous peoples to own their lands and enjoy their culture (CERD/C/IDN/CO/3, para. 17); E Meijer and J Werksman, 'Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201; Oxfam International, *Climate Wrongs and Human Rights*: *Putting People at the Heart of Climate-Change Policy*, Oxfam Briefing Paper 117 (Oxfam International, 2008); P Baer, T Athanasiou, and S Kartha, *The Right to Development in a Climate Constrained World*: *The Greenhouse Development Rights Framework* (Heinrich Böll Foundation 2007); E Page, *Climate Change, Justice and Future Generations* (Edward Elgar 2006) 132-60.

[49] See S Jodoin, 'Rights-Based Frameworks for Climate Finance' (Center for International Sustainable Development Law, Legal Working Paper Series 2011) 1-2; see also S Jodoin,'Human Rights and Climate Change Governance' CISDL Legal Working Paper, December 2010).

[50] *Milan Declaration of the Sixth International Indigenous Peoples Forum on Climate Change* (2003) <http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/mdocs/milan%20declaration.pdf.> accessed 21 March 2012.

Similarly, the Office of the United Nations High Commissioner for Human Rights (OHCHR) notes:

> human rights standards and principles should inform and strengthen policy measures in the area of climate change…a human rights framework underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives, 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.[51]

The United Nations Human Rights Commissioner seemed to sum these up when she noted recently that:

> Without explicit human rights safeguards, policies intended to advance environmental or development goals can have serious negative impacts on those rights. Thus, technocratic processes have excluded women from decision-making, economic and social inequalities have been exacerbated (and, with them, societal tensions), indigenous peoples have seen threats to their lands and livelihoods from some emission reduction schemes, scarce food-growing lands have sometimes been diverted for the production of biofuels, and massive infrastructure projects have resulted in the forced eviction and relocations of entire communities. Simply put, participatory, accountable, non-discriminatory and empowering development is more effective, more just, and, ultimately, more sustainable…Member States should commit to ensuring full coherence between efforts to advance the green economy, on the one hand, and their solemn human rights obligations on the other. They should recognize that all policies and measures adopted to advance sustainable development must be firmly grounded in, and respectful of, all internationally agreed human rights and fundamental freedoms, including the right to development…States should resolve to work to advance a *human rights-based approach* to the green economy, based on the principles of participation, accountability (at the national and international levels), non-discrimination, empowerment, and the rule of law in green economy efforts, and to pursue a model of economic growth that is socially and environmentally sustainable, just and equitable, and respectful of all human rights.[52]

[51] OHCHR Report on Climate Change and Human Rights, para. 95. See also S Foot, 'An Evaluation of the Present Clean Development Mechanism' (2004) 16(3) ELM 3*;* A Najama, 'Climate Negotiations Beyond Kyoto: Developing Countries Concerns and Interests' (2009) 3 Climate Policy 221–231.

[52] Emphasis mine. See N Pillay, 'Open Letter by the United Nations Human Rights Commissioner' (30 March 2012)<http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf> accessed 14 April 2012; see also OHCHR, `Pillay urges states to inject human rights into Rio+20`(18 April 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12070&LangID=E> accessed 21 April 2012.

While some scholars have argued for a new generation of market instruments, others have argued that a reformed CDM remains the future of carbon markets.[53] In this thesis, we reckon that for whatever project-based mechanism is adopted as part of the emerging regimes on climate change, robust legal frameworks and governance structures must be put in place to address similar human rights criticisms relating to land grabs, exclusion and discrimination, low level of project information, lack of accountability, lack of participation and lack of access to review mechanisms that have trailed the current CDM. As such, this thesis goes a step further by examining how lessons from the loopholes in the CDM governance structure could inform thoughts on the need to mainstream human rights safeguards into existing legal regimes on climate change in general, towards making them more accountable, right-based and sustainable.

The United Nations has recently recognised the importance of addressing the linkages human rights and climate change through three official resolutions. On 28 March 2008, the Human Rights Council adopted Resolution 7/23 which expressed that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[54] On 25 March 2009, the United Nations Human Rights Council adopted its second resolution- Resolution 10/4 which noted that 'climate change-related impacts have a range of implications, both direct and indirect, for the effective

[53] C Streck, 'Expectations and Reality of the Clean Development Mechanism: A Climate Finance Instrument Between Accusations and Aspirations', in Richard B. Stewart et al. (eds.), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) 67, 67-75; J Wiener, 'Property and Prices To Protect the Planet' (2009) 19 Duke J. Comp. & Int'L L. 515; See generally D Freestone & C Streck (eds.), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (OUP 2009) (discussing carbon trading inside and outside the Kyoto framework as well as the future of carbon markets); A Prouty, 'The Clean Development Mechanism and Its Implications for Climate Justice' (2009) 34 Colum. J. Envtl. L. 513 (discussing a 'climate justice' rationale for mitigating GHG emissions).

[54] U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, Report of the Human Rights Council on Its Seventh Session, at 65, U.N. Doc. A/HRC/7/78 (July 14, 2008).

enjoyment of human rights…'[55] If not pragmatically addressed, emission reduction schemes could produce indirect effects on the effective enjoyment of human rights.

In recognition of these indirect effects of climate change measures on human rights, the Conference of Parties to the United Nations Framework Convention on Climate Change (COP 16) in Cancun, released a decision stating that 'Parties should, in all climate change-related actions, fully respect human rights'.[56] Similarly, in September 2011, the Human Rights Council adopted Resolution 18/22, its third resolution on 'human rights and climate change'.[57] This resolution affirmed that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.

During the 2011 Durban Conference (COP18) the UNFCCC Executive Secretary Christiana Figueres identified with these developments by launching a CDM Policy Dialogue – a panel of independent experts – to take stock of some of the concerns facing the implementation of the CDM, notably the human rights criticisms against CDM projects.[58] This panel was tasked with providing recommendations on the future design and operations of the CDM post-2012, as well spearhead widespread dialogue on the framework for potentially new market-based

[55] U.N. Human Rights Council Res. 10/4, in U.N. Human Rights Council, Report of the Human Rights Council on its Tenth Session 13, at 15, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2009).
[56] International Shared Vision on Long-Term Cooperative Action, Cancun LCA Outcome, para. 8. UNFCCC, <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf> accessed 15 April 2012.
[57] U.N. Human Rights Council Res. 18/22, in U.N. Human Rights Council, Report of the Human Rights Council on Its eighteenth Session, at A/HRC/RES/18/22 (30 September 2011).
[58] UNFCCC, 'Input to the High-Level Panel for the CDM Policy Dialogue: Background Paper by the Secretariat' (22 December 2011)<http://www.cdmpolicydialogue.org/background/CDM_policy_background.pdf> accessed 10 May 2012.

mechanisms.[59] As noted by the UNFCCC:

> While a condition of registering each CDM project is the receipt of a letter from the host country government confirming that the project assists it to achieve sustainable development, there are frequently voiced concerns that this stage in the process is a formality, and that national governments frequently issue such letters without proper investigation and/or appropriate regard to concerns raised by stakeholders. In extreme cases, it has been alleged that CDM projects, despite having been issued with such letters, have been the scene of environmental damages or human rights abuses.[60]

The outcome document of the CDM Policy Dialogue presented at the 18th session of the Conference of Parties to the UNFCCC (COP18) in Qatar, identified the many human rights impacts of CDM projects on local communities and noted that the CDM must strengthen and restructure its governance in order to become a more accountable and efficient organization.[61] It called on the UNFCCC to establish robust guidelines for adequate local consultation procedures to ensure local community stakeholders are properly notified and consulted on proposed project activities. The Panel also called for a redesign of governance structures under the UNFCCC by establishing a grievance mechanism for local stakeholders to address environmental and social concerns of projects and to facilitate the resolution of issues emerging after the registration of a project.[62] The Panel was however silent on the legal and institutional pre-requisites for achieving such robust reform of governance structures under the UNFCCC.

Against widespread expectation that the COP18 in Qatar would lay down concrete frameworks or at least a decision or road map for implementing the recommendations of the CDM Policy

[59] UNFCCC, 'Terms of Reference for the Policy Dialogue on the Clean Development Mechanism' (2012) <http://cdm.unfccc.int/filestorage/S/D/9/SD94R1COMGNYTP3BIW7QAZ5UH026KJ/eb64_repan01.pdf?t=VVN8bTN0ZXg5fDDM3LBP1KZGmNsZihzMWYmh> accessed 10 May 2012.
[60] ibid.
[61] CDM Policy Dialogue, ' Climate Change, Carbon Markets and the CDM: A Call to Action: Recommendations of the High Level Panel on the CDM Policy Dialogue' (2012) <http://www.cdmpolicydialogue.org/report/ues_en.pdf > (accessed 10 January 2013)
[62] ibid.

Panel, the COP 18 only 'took note' of the report in Doha.[63] The Doha meeting adopted the cautious approach of postponing the review of the modalities of the CDM to the next COP meeting. The COP 18/ the Meeting of the Parties (MOP 8) invited Parties and admitted observer organizations to submit to the secretariat, their views on possible changes to the modalities and procedures for the clean development mechanism. It also encouraged Parties to share their experiences in relation to local stakeholder consultation processes.[64] Similarly, the COP18 failed to propose concrete guidelines or legally binding framework on how best to address the broad human rights issues facing the Kyoto Protocol as a whole. The COP extended the Kyoto Protocol until 2020 'to provide adequate time for the negotiation and drafting of a new climate change protocol that would be ready for signing by 2015, and to give parties enough time to ratify the agreement such that it could come into effect by 2020'.[65] The COP noted that it is determined to 'adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention' that would come into effect and be implemented from 2020.[66] In essence, the linkages between climate change projects and human rights, which were brought to the agenda in Cancun, have not been moved further in Durban and Doha.

Despite the failure to substantially move forward the idea of laying down legal and institutional frameworks for addressing the human rights impacts of emission reduction projects at Doha, the fact that the COP took note of the recommendations of the CDM Policy Dialogue is a positive

[63] UNFCCC, Final Decisions Adopted by COP18 and CMP 8 (2012), <http://unfccc.int/meetings/doha_nov_2012/meeting/6815/php/view/decisions.php> accessed 20 January 2013.
[64] Draft Decisions Guidance Relating to the Clean Development Mechanism <http://unfccc.int/files/meetings/doha_nov_2012/decisions/application/pdf/cmp8_cdm_v1.pdf>
[65] UNFCCC, 'Outcome of the Durban Climate Change Conference' (November 2011) <http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php> accessed 10 May 2012.
[66] UNFCCC, 'Advancing the Durban Platform: Outcome of the Doha Climate Change Conference' <http://unfccc.int/files/meetings/doha_nov_2012/decisions/application/pdf/cop_advanc_durban.pdf>

step that could spearhead more concrete recognitions of how climate change response measures and projects violate human rights. Before now, most of the focus had been on the direct impacts of climate change on human rights; thereby obscuring discussions on how policy measures and projects aimed at combating climate change are currently producing human rights violations. As Humphrey rightly notes:

> …existing approaches mobilize human rights rhetoric to underpin a just global climate change regime, they do not examine specific human rights violations resulting from climate change or seek to inject human rights principles into climate change law…they invoke human rights in order to spur action on climate change rather than advocating climate change action in order to prevent human rights consequences.[67]

Jodoin also notes that:

> human rights do not simply warn policymakers 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. Unfortunately, policy discussions at the intersection of human rights and the environment rarely consider the possibilities for win-win scenarios of this sort.[68]

In order to move discussions on the interactions between climate change mitigation projects and human rights beyond mere rhetoric, questions on the legal and institutional frameworks required to incorporate human rights issues into climate change mitigation must be addressed in greater detail.[69] As the IUCN notes, one reason for the limited literature on a rights based approach in

[67] S Humphreys (ed), *Human Rights and Climate Change* (CUP 2010) 16.
[68] S Jodoin, 'Human Rights and the Environment: Key Challenges and Best Practices' (2011) CISDL Brief presented to the United Nations Office of the High Commissioner for Human Rights, 10-11 < http://www.cisdl.org/publications/collaborative005.html> accessed 03 August, 2011.
[69] These issues were given some thoughts in S Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank 2011) which considers procedural and substantive human rights as possible frames for addressing these secondary impacts of climate change policy measures and projects. In the two pages they devoted to this subject, the authors did not provide a detailed examination of the theoretical implications of both approaches and the legal framework required under these frames. See also S Kas 'Integrated Justice: Human Rights, Climate Change, and Poverty' (2009) 18(1) Transnational Law &

the climate change field 'is the current lack of an operational framework that would guide participants through such an approach'.[70] Consequently, human rights issues only get onto the agenda when there is a crisis or a climate change project that affects a wide sector of the general public. The United Nations also notes:

> …Most of the works related to climate change have so far focused on the development and implementation of mitigation and adaptation strategies…Today, a much needed step forward would be to fully integrate human rights when meeting the climate change challenges. *A rights-based approach* to tackling climate change will bring human beings back to the centre of the discussion and enrich international efforts in addressing climate change.[71]

This thesis attempts to make contributions in this area. The crux of this thesis is to investigate the legal and institutional framework needed to address the human rights questions arising from emission reduction projects, with a particular focus on CDM projects. It examines the web of legal and institutional reforms necessary to mainstream human rights principles into the procedures for the approval and execution of CDM projects. This thesis discusses the legal and procedural loopholes within the CDM project approval framework that have resulted in the current culture of 'approvals', human rights violations and procedural impunity in the execution of CDM projects. It then takes a broader look at the interactions between emission reduction projects and human rights generally and examines how lessons from the CDM could inform thoughts on how to mainstream human rights safeguards into current and emerging international legal regimes on climate change as a whole. It argues for a process-based approach that entrenches procedural human rights such as access to information, participation, accountability,

---

Contemporary Problems 115- 138; J Carlson 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18 (1) Transnational Law & Contemporary Problems 45-68.

[70] See IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009) 3.

[71] Emphasis mine. See UNHRC, 'Human Rights Impact of Climate Change' United Nations Joint Press Kit for Bali Climate Change Conference 3-14 December 2007, UNDOC/ DPI/2483/2007. See also S Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank 2011).

non-discrimination, empowerment, and access to justice as cornerstones for the design and implementation of effective responses to climate change.

First, the thesis examines the theoretical basis and value of the human rights mainstream paradigm under international law. We start by asking, what would human rights norms bring to or take away from international legal regimes on climate change? We explore some of the contested and unresolved theoretical issues on the prospects and paradoxes of mainstreaming human rights into climate change regimes. We then consider the potentials and pitfalls of the United Nations Human Rights Based Approach (HRBA) as a policy framework through which human rights standards could be mainstreamed into international climate change instruments and governance structures. In discussing the HRBA, we will examine and analyse the legal status of the key normative elements of the HRBA with a view of situating them under international human rights and international environmental law.

Ultimately, the main contribution of this thesis is to answer the question of 'how', *i.e.* what are the legal and institutional frameworks required to incorporate human rights principles into international regimes on climate change. This thesis proposes and develops a legal and institutional framework that could serve as a process-based guideline or template for mainstreaming human rights principles into project execution and approval under international climate change regimes.

2. About this Thesis

2.1 Scholarly Significance

This thesis seeks to contribute to the emerging literature on how to mainstream human rights principles into legal regimes and instruments designed to combat global climate change. It proposes and develops a legal and institutional framework for mainstreaming human rights protection into extant regimes and procedures for the approval and registration of climate change projects. As such, the main concern in this thesis will not be to contribute to debates on the direct impacts of climate change on human rights, but to examine the emerging debates on the indirect effects of climate change mitigation projects on the enjoyment of fundamental human rights.

It considers and contributes to the literature on the theoretical justifications, basis and value of the human rights mainstream paradigm. The human rights mainstream paradigm encompasses proposals that human rights norms should be integrated or 'mainstreamed' into international environmental regimes to address the intersections between human rights and environmental issues such as climate change. Here we ask, what are the values, prospects, paradoxes and frameworks for 'mainstreaming' human rights principles into international climate change regimes.

There is no doubting the importance of this enterprise. Even though the Conference of Parties to the United Nations Framework Convention on Climate Change (COP) in Cancun, stated that 'Parties should, in all climate change-related actions, fully respect human rights';[72] the COP and the Conference of the Parties serving as the meeting of the Parties to the Protocol (CMP) are yet

[72] International Shared Vision on Long-Term Cooperative Action, Cancun LCA Outcome, para. 8. UNFCCC, <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf> accessed 15 April 2012.

to provide detailed guidelines, operational frameworks or mandatory guidelines on what constitutes 'respect for human rights in climate change actions'. Article 7.2 of the UNFCCC gives the COP general authority to periodically review the implementation of the Convention and any related legal instruments, examine the obligations of the parties in light of best available social and economic information and to make decisions necessary to promote the effective implementation of the Convention. Article 9 of the Kyoto Protocol also empowers the CMP to periodically review the Protocol in the light of the best available social and economic information and to take appropriate action to enhance the effective implementation of the Protocol. This thesis posits that there is a need for the COP and the CMP to evoke these powers to review and consider the human rights issues that currently threaten the effective implementation of the Convention and the Protocol and also hinder the realisation of the sustainable development objectives of both agreements.

Furthermore, Article 7(2) (i) of the Convention empowers the COP to establish such subsidiary bodies as are deemed necessary for the implementation of the Convention.[73] Article 13 (4) of the KP equally empowers the CMP to establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol. This thesis argues that there is a need for the COP and the CMP to exercise these powers by establishing appropriate governance structures, committees and

[73] The COP has previously evoked these powers to establish bodies to undertake specific tasks. These bodies report back to the COP when they complete their work. For example COP 1 established two ad hoc groups: the Ad hoc Group on the Berlin Mandate (AGBM) and the Ad hoc Group on Article 13 (AG13) (1/CP.1 and 20/CP.1). Other specialized bodies with limited memberships have been established to address specific areas, namely: the Expert Group on Technology Transfer (EGTT), the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (Consultative Group of Experts, or CGE); and the Least Developed Countries Expert Group (LEG). Other constituted bodies include the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) which are two permanent subsidiary bodies established under the Convention and also serve the CMP; the Clean Development Mechanism (CDM) Executive Board; a Supervisory Committee to verify emission reduction units (ERUs) that are to be transferred and acquired according to Article 6 of the Kyoto Protocol and the Compliance Committee. See UNFCCC Bodies, <http://unfccc.int/bodies/items/6241.php> accessed 12 January 2013.

bodies that would bring together and address the critical linkages between human rights and climate change measures and projects, particularly an institution that would oversee and ensure that international responses and policy measures aimed at combating climate change would not have human rights consequences. As the UN Secretary General noted:

> …There still remains a need for a body that brings together the key developed and developing countries to address the critical inter linkages between human rights and the environment, trade, finance, the handling of pandemic diseases and economic and social development. To be effective, such a body must operate at the level of national leaders…[74]

Similarly, Shue also notes that:

> any institutions to protect the rights threatened by climate change must be international…When a national government fails to carry out its primary responsibility to protect rights, responsibility defaults to the second level consisting of the remainder of humanity, organized under the other national governments and constituting the remainder of the international community. This is essentially the model or picture underlying, for instance, what has come to be called the "responsibility to protect" (or R2P)...The futility of uncoordinated national efforts at protection against effects of climate change is certain. The only conceivable protection of any rights threatened by climate change is protection through concerted action by the international community as a whole.[75]

Shue's views on the need to reform current international legal frameworks and governance structures on climate change to better protect human rights are apposite; a rights-based reform of the UNFCCC could enable it to play more active roles in addressing human rights issues in a more transparent, democratic and accountable way. As our examples in this thesis show, many national governments in developing countries have either turned away from preventing human rights violations from projects or have in the extreme cases aided such violations. This calls for international action and leadership if this concern must be addressed. A rights-based reform at the international level could indeed spur actions at the national and regional levels to ensure that

[74] Report of the UN Secretary General's High-Level Panel on Threats, Challenges and Climate Change (2004) <http://www.un.org/secureworld/report.pdf> accessed 12 May 2012.
[75] H Shue, 'Human Rights, Climate Change, and the Trillionth Ton' in D Arnold (ed.), *The Ethics of Global Climate Change* (CUP 2011) 292.

climate change actions and projects do not threaten the enjoyment and protection of fundamental human rights. This thesis therefore takes an international view in its attempt to fill this gap.

This thesis is premised on the fact that in order for 'parties to fully respect human right in all climate change-related actions' a starting point would be to recognize the linkages between human rights and climate change in the wider context in current and emerging climate change regimes. While specifically discussing the idea of mainstreaming human rights principles into the approval and execution of emission reduction projects, the thesis discusses the legal and institutional reforms that are pertinent ahead of the post-2012 agreements to reflect human right principles in the broader context of international climate change regimes. It provides insights on how international human rights thresholds could be adopted to stem the tide of gross human rights violations in emission reduction projects.

There could be no better time to think of such reforms. As negotiators continue discussions aimed at amending one or both climate change agreements; or establishing a new protocol or other legal instrument that would contain Annex I commitments for the period beyond 2012, it is important for the COP and the CMP to take this opportunity to address the human rights issues facing the implementation of the Convention and the Protocol.[76] Failure to do so would only preserve the current problems and challenges that have trailed extant current regimes and could

[76] At the 17th Conference of the Parties (COP) to the Framework Convention on Climate Change in Durban, South Africa held from November 28-December 9 2011, it was agreed that the Kyoto Protocol would be extended until 2017 to provide adequate time for the negotiation and drafting of a new climate change protocol and to agree on a common legal regime that would be ready for signing by 2015. At the COP 18 in Doha, Qatar the COP restated its determination to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at its twenty-first session, due to be held from Wednesday, 2 December to Sunday, 13 December 2015, and for it to come into effect and be implemented from 2020.

even cast more doubts on the integrity and sustainability of international climate change mitigation measures.

This thesis provides an analytical examination of the legal and institutional reforms that are pertinent to integrate human right principles into climate change regimes. This thesis will specifically aim to contribute to the UNFCCC's ongoing call for proposals for the first review of the modalities and procedures for the clean development mechanism. It will also provide practical recommendations and ideas on the legal and institutional framework for implementing the findings of the CDM Policy Dialogue, which called for 'a reform of the governance structures of the CDM Executive Board in order to transform it to a more transparent, accountable, participatory and right-based institution'.[77]

2.2 Research Methodology

Given the legal and practical nature of this research, the methodology to be adopted will be analytical and expository. The thesis will utilize orthodox methods of legal research such as the historical, doctrinal, analytical and interdisciplinary research methodologies to provide answers to the research questions. Historical research traces the origin and development of a practice or concept over a period of time; doctrinal research is concerned with a systematic exposition and analysis of legal rules and their interrelationships; analytical research is concerned with a critical analysis of the law while an interdisciplinary research approach is concerned with a

[77] CDM Policy Dialogue, 'Climate Change, Carbon Markets and the CDM: A Call to Action: Recommendations of the High Level Panel on the CDM Policy Dialogue' (2012) <http://www.cdmpolicydialogue.org/report/ues_en.pdf > accessed 01 January 2013.

multidisciplinary exposition of concepts that cut across diverse research fields in a simplified manner and in a manner that would be easily understood by scholars in diverse disciplines.[78]

I utilize the historical methodology to present an overview of the linkages between climate change and fundamental human rights. I apply it to trace the history of project-based mechanisms under the Kyoto Protocol and how these mechanisms are now producing human rights consequences. I also employ it to explore the origin and evolution of human rights mainstreaming, drawing out the historical factors that necessitated the paradigm shift from a needs-based approach to a human rights mainstream approach. I adopt the doctrinal methodology to analyse relevant literature on the theoretical basis of the human rights mainstream paradigm. I also employ the doctrinal research approach to analyse the voluminous number of case law and human rights petitions emerging from climate change projects. I adopt the analytical methodology to assess the status and elements of the human rights based approach framework under international law. I employ this methodology to enquire whether each of the elements of the rights based framework can be situated under existing international human rights instruments.

The complex and interdisciplinary nature of the climate change discourse would require an approach that analyses the science of climate change in a way that would be less technical and accessible to a reader with a legal background. I rely on the interdisciplinary research approach to achieve this. I also rely on this approach to break down legal and human rights concepts in a manner that would be appreciated and understood by our friends on the other side of the divide –

[78] My choice of methodologies for this thesis was very well influenced by the timely publication of L Fisher, B Lange and E Scotford, 'Maturity and Methodology: Reflecting on How to Do Environmental Law Scholarship' (2009) Journal of Environmental Law 1-38.

the scientists and core environmentalists. All through this thesis, complex legal terminologies and verbiages are avoided in favour of fluid and simplified analysis.

In writing this thesis, I relied on primary and secondary research and information resources. For example, in reviewing the literature on the human rights mainstream paradigm, I accessed electronic journals containing the literature through the legal database of the Bodleian Law Library, University of Oxford. The literature review informed my discussions on the historical evolution of human rights mainstreaming and the human rights based approach. It also influenced my choice of the principle of systemic interpretation in international law; the inter-doctrinal legal transplant theory, the participatory development theory, and the full belly thesis as legal and theoretical foundations for this thesis. Similarly, in reviewing the growing number of petitions and cases arising from the effects of climate change projects on human rights; I relied on the jurisprudence of the UN Human Rights Committee, the Committee on Racial Discrimination, the African Court on Human and People's Rights, and the Inter-American Court of Human Rights on the scope and content of the specific rights discussed. Lastly, I relied on newspapers, climate change periodicals and CDM bulletins to monitor current trends and reports on climate change projects and to monitor petitions arising from these projects.

3 Definition of Key Concepts

Some concepts run across this thesis. Readers will find terms such as 'environment', 'human rights', 'climate change regimes', 'sustainable development', 'soft law', 'mitigation', and 'mitigation projects' in almost every page of the thesis. Many of these concepts have acquired varied and most times highly contested meanings. To avoid any confusion, it is pertinent to clarify their usages and context within this thesis as early as possible. The definitions provided

here are far from exhaustive; they are however intended to provide the appropriate sign posts and background for subsequent and more detailed discussions in the thesis.

A. What are human rights?

In the literature on human rights mainstreaming, human rights itself is a contested concept.[79] The different interpretations of human rights influence human rights mainstreaming efforts.[80] For example, many scholars fault attempts to mainstream a human right to food or right to water into decision-making processes pointing to their contested legal status under international law.[81] On the other hand, theorists point to the interdependent and indivisible nature of all human rights to argue that some human rights are pre-requisites for enjoying other rights, and as such all rights must be mainstreamed into policy making. These are debates on the sources and hierarchy of rights. It is pertinent to clarify the meaning we attach to the idea of human rights in general, in order to put human rights mainstreaming into proper context.

In this thesis, we define human rights as those inalienable legal entitlements recognized in core international human rights instruments, conventions, and legal instruments under international law.[82] This conception of rights denies *a priori* sources of rights and posits that all human rights

[79] A Langlois, 'The Elusive Ontology of Human Rights' (2004) 18(3) Global Society 245; See also D Kennedy, 'The International Human Rights Movement: Part of the Problem' (2001) European Human Rights Law Review 245-267 where Kennedy argues that one of the problems of the human rights movement is that the concept of human rights 'generalizes too much'. See also J Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987) 561-2.

[80] See J Shestak 'The Philosophical Foundations of Human Rights' in J Symonides, *Human Rights Concepts and Standards* (Ashgate, 2000) 33-35.

[81] See N Aryeh, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1; see also P Alston, 'Resisting the Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann' (2002) 13(8) EJIL 815.

[82] There are ten core international human rights instruments: International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR); the International Covenant on Economic, Social and Cultural

stem from what legal institutions prescribe. It contrasts sharply with natural law theories of human rights.[83] As Kamenka rightly notes, rights are claims that have achieved a special kind of endorsement or legal success, by a legal system, by widespread sentiment or an international order.[84] In this thesis, we will not delve into debates on the theories of rights or on what human rights ought to be. Instead we align with the views that human rights are entitlements that have achieved legal recognition under existing international treaties, conventions, courts, and legal instruments under international law. As such, our analysis on human rights mainstreaming will focus on human rights that have been endorsed and enshrined in existing legal instruments under international law.

Rights, Dec. 16, 1966, 993 U.N.T.S. 3(hereinafter ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (hereinafter CERD); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611. See OHCHR, 'Core International Human Rights Instruments' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 12 March 2013.

[83] See J Finnis, *Natural Law and Natural Rights* (OUP 1980) 280. The doctrine of natural law was popularized and developed by a number of classical Greek philosophers including Aristotle. However it was the work of St Thomas Aquinas (1225-74) that was most notable. In his *Summa Theologiae* he described natural law as conferring certain immutable rights upon individual as part of the law of God. They were goods or behaviours that were naturally right (or wrong) because God ordained it so. Humans could ascertain what was naturally right by 'right reason' - thinking properly. Hugo Grotius and Samuel von Pufendorf defined natural law as a dictate of right reason. Grotius described international law as laws derived from the will of man and from the principles of nature. Hugo Grotius further expanded on this notion in *De jure belli et paci*, where he propounded that the Law of Nature is so unalterable, that it cannot be changed even by God himself. According to Hettinger, 'the best description of natural law is that it provides a name for the point of intersection between law and morals. The principal claim of natural law is that what naturally is, ought to be' R Hittinger, 'Natural Law and Virtue: Theories at Cross Purposes' published in R George (ed.), Natural *Law Theory Contemporary Essays* (OUP 1994) 63; See also R Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (OUP 2005) 15.; J Locke, *The Two Treatises of Civil Government* (Hollis 1689.), see also R George, 'Natural Law' (2008) 31(1) Harvard Journal of Law and Public Policy 171-96; T Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007), N Ferreira, 'The Expanding Realm of Human Rights' (2008) 14 Res Publica 57; M Cranston, *What are Human Rights?* (Taplinger Publishing Co 1973) 36; J Shestak 'The Philosophical Foundations of Human Rights' in J Symonides, *Human Rights Concepts and Standards* (Ashgate, 2000) 33-35

[84] E Kamenka, 'Human Rights, Peoples' Rights' in J Crawford (ed.), *The Rights of Peoples* (OUP 1988) 127.

In this thesis, our notions of 'legal instruments under international law' are based on the broad understanding of the sources of international law. Article 38(1) of the International Court of Justice (ICJ) statute is generally recognised as an authoritative statement of the sources of international law.[85] It requires the ICJ to apply, among other things: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This includes international treaties, conventions, customs, general principles and rules that have achieved legal recognition under existing legal regimes on international human rights. In discussing the human rights based approach in this thesis, we shall specifically rely on human rights identified in core international human rights treaties, and the Universal Declaration of Human Rights (UDHR).[86]

This immediately raises questions on the relative importance of different types of rights under international law. For example, speaking of mainstreaming a human right to food or right to participation may sound outrageous to pundits who question the legal status of such rights in the first place, despite their broad recognition in the ICESCR and other core international human rights instruments.[87] These are questions that go back to debates on the hierarchy of rights.[88] In

[85] Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

[86] Though not binding, the UDHR is an important foundation for many binding international human rights instruments and is considered as providing evidence of customary international human rights law. See J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 2.

[87] Article 11 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to an adequate standard of living. This includes, but is not limited to, the right to adequate food, clothing, housing, and "the continuous improvement of living conditions. It also creates an obligation on parties to work together to eliminate world hunger. It is also enshrined in the 1948 Universal Declaration of Human Rights (Article 25). When

this thesis we share the view that all human rights– political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the other. We posit that all human rights are important, indivisible and interdependent whether they relate to civil, political or economic and social issues; and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. This thesis therefore argues for an integrated understanding and implementation of all human rights under international law.

As such, in this thesis, human rights mainstreaming connotes integrating those human rights that have been recognised in existing core international human rights instruments into legal regimes on climate change. The human rights mainstream approach we speak of focuses on integrating endorsed human rights under international law into climate change mitigation responses and actions.

B. Environment

The term environment has acquired different meanings over time, while some scholars define it from an eco-centric and nature standpoint, others assign an anthropocentric/human related connotation to the term. For example, the environment has been defined as the sum of all

in force, the 2009 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights would makes the right to food justiciable at the international level. The right to participation is recognized in Art. 25 of the International Covenant on Civil and Political Rights (ICCPR).

[88] The term 'hierarchy of rights' has been defined as the idea that certain categories of human rights are more important than others. While some scholars stress the importance of civil and political rights others mostly scholars from the South tend to attach primary importance to economic, social and cultural rights. See H Quane, 'Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous People' (2012) 25 Harvard Human Rights Journal; J Donnelly, *Universal Human Rights in Theory and Practice* (2d ed. Cornell University Press 2003) 27–33; G Teeple, *The Riddle of Human Rights* (University of Toronto Press 2004) 24; J Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 Hum. Rts. Q. 984, 985.

external conditions affecting the life, development and survival of an organism.[89] It has also been defined as all the elements of the physical and biological world (including humans), and the interactions between them.[90] From an anthropocentric or human point of view, the environment has been defined as the relationship of human beings with water, air, land and all biological forms; the combination of elements whose inter-relationships make up the settings, surroundings, and conditions of life of the individuals and the society.[91] The Stockholm Declaration of the United National Conference on the Environment recognizes both aspects of the environment, the natural and the man-made as essential to well being and to the enjoyment of basic human rights, the right to life itself.[92] It describes attributes that make up the environment to include the natural resources of the earth, such as air, water, land, flora and fauna and wildlife.[93] This definition in the Stockholm Declaration is central to the recognition of the linkages between elements of the environment and the enjoyment of basic human rights, and that environmental protection is a *sine qua non* for the enjoyment of other human rights. This thesis adopts this cross cutting understanding of the environment to mean the interactions between natural ecosystems and humans. Most of the discussions here center on how failures to protect the environment from climate change and its direct and indirect impacts, could affect human life and the enjoyment of fundamental human rights. Specifically, we focus on the impacts of climate change mitigation projects on human rights.

[89] United States Environmental Protection Agency, Terms of Environment: Glossary, Abbreviations, and Acronyms, EPA<http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=2cwMQCcdsnSchlrQXyXqGfhcYt2yWm4hCsYltCL22QFzlpFNd6p1!709404430> accessed 12 January 2013.
[90] See A Ballance, 'What is the State of the Environment?' Poverty Times 1, UNEP & GRID Arendal, GRIDA <http://www.grida.no/publications/et/ep1/page/2509.aspx> (accessed 12 January 2013).
[91] See D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) at 9 -11.
[92] Para. 1, The *Stockholm Declaration on the Human Environment*, UN Doc A/CONF48/14/Rev.1, (1972) .
[93] ibid.

C. Climate Change, Climate Change Mitigation Projects

In this thesis, climate change is defined as an increase in the average temperature of the atmosphere caused by the anthropogenic emission of gases (known as greenhouse gases) that trap the sun's heat in the atmosphere. Despite overwhelming scientific predictions on climate change, its certainty and the accuracy of the scientific predictions themselves are far from settled.[94] Greenhouse gases (GHGs) that contribute to climate change have been identified to include: carbon dioxide ($C0_2$), methane (CH_4), nitrous oxides (N_20), water vapour (H_20), Ozone (0_3); and high global warming potential gases (high GWP gases) such as chloroflourocarbons (CFCs), hydroflourocarbons (HFCs), perfluorocarbons (PFCs), and sulfur haxaflouride (SF6).[95] Climate change mitigation therefore refers to efforts designed to reduce or prevent the emission of greenhouse gases. When we speak of emission reduction projects or climate change mitigation projects in this thesis, we mean projects aimed at reducing the volume of greenhouse gases (GHGs) emitted into the atmosphere.

Climate change mitigation projects are not mere foreign development investments (FDI) or infrastructural projects; instead they are undertaken specifically for the purpose of emission

[94] This thesis proceeds on the notion that there is now sufficient scientific consensus on the fact that climate change is real and that anthropogenic emissions are a cause. See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007*, the Fourth Assessment Report (AR4), in which the IPCC stated that the likelihood was 90 percent to 99 percent that emissions of heat-trapping greenhouse gases such as carbon dioxide were the dominant cause of the observed warming of the last 50 years. According to the Panel, it is 'very likely' that human activity is the main driver of the rise in temperatures since 1950. See also W Stevens, 'On the Climate Change Beat, Doubt Gives Way to Certainty' (2007) *New York Times*; E Rosenthal, A Revkin, 'Science Panel Calls Global Warming 'Unequivocal' (2007) (*New York Times* 02-03-2007. C Tickell, *Climatic Change and World Affairs* (Harvard University Press, 1986). See also The European Renewable Energy Council, 'Climate Protection', in Energy Revolution- A Sustainable World Energy Outlook (Amsterdam: European Renewable Energy Council, 2007).

[95] See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007*, the Fourth Assessment Report (AR4), ibid.

reduction as part of efforts to mitigate climate change.[96] They are projects undertaken in order to meet specific and binding emission reduction targets under the Kyoto Protocol. Under the Kyoto Protocol, developed countries can receive emission reduction credits for investing in GHG reductions in other countries.[97] Emission Reductions credits refer to one metric tonne of CO_2 or its GHG equivalent reduced from the atmosphere by a mitigation activity or project. There is the Certified Emission Reduction (CERs) given for the generation of credits under the CDM and Emission Reduction Units (ERUs) awarded under Joint Implementation (JI). Both CERs and ERUs are standardised GHG reduction credits that are becoming commodities that can be bought and sold on the global market, and in some cases banked for the future.[98] As noted earlier, while it requires US $50 to mitigate one ton of CO_2 eq. in developed countries, the same reduction could be accomplished in developing countries at US $15 per ton of CO_2 eq.[99]

[96] For example one of the eligibility requirements for CDM projects is that the project must be 'additional'. Additionality refers to an effort that is supplemental to the business-as-usual (BAU) scenario in at least two areas: (i) the additionality of financial contributions of developed countries to mitigate climate change in developing countries; and (ii) the additionality of greenhouse gas (GHG) emissions generated by mitigation activities. According to Paragraph 43 of the CDM Modalities and Rules, a CDM Project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM Project activity. FDI projects, infrastructural projects or other projects that do not result in real and measureable emission reductions are not eligible under the CDM. However, the problem of defining and measuring additionality remains one of the main challenges of the CDM. See J McFarland, 'Carbon Reduction Projects and the Concept of Additionality' (2011) 11 (2) Sustainable Development Law & Policy 15–18; C Streck, 'The Concept of Additionality under the UNFCCC and the Kyoto Protocol: Implications for Environmental Integrity and Equity' (2010); K Umamaheswaran & Axel Michaelowa, 'Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sectors' (2006) HWWA Discussion Paper 346; A Michaelowa, 'Determination of Baselines and Additionality for the CDM: A Crucial Element of Credibility of the Climate Regime' in F.Yamin, (ed.), *The Kyoto Protocol Flexible Mechanism: Implementation and Evolution within Europe and Worldwide* (Earthscan 2004).

[97] See Article 3, 5, and 12 of the Kyoto Protocol.

[98] See UNCTAD Earth Council, 'Glossary of Climate Change Acronyms and Jargon' <http:/ /unfccc.int/essential_background/glossary/items/3666.php> accessed 12 March 2012. See also D Olawuyi, 'Rethinking the Place of Flexible Mechanisms in Kyoto's Post 2012 Commitments' (2010) 6 (1) Journal of Law, Environment and Development 21.

[99] See F Ackerman, 'Financing the Climate Mitigation and Adaptation Measures in Developing Countries' (2009) <http://sei-us.org/Publications_PDF/SEI-WorkingPaperUS-0910.pdf> accessed 02 June 2012. See also United Nations Framework Convention on Climate Change (2008), 'Investment and Financial Flows to address Climate Change: An Update' FCCC/TP/2008/7.

This arguably explains why an investing country would be willing to at times carry through a project even in the face of gross human rights violations. There have been allegations of collusion by developed countries with despotic regimes in developing countries to violate human rights during the CDM approval process; there have also been allegations of corruption against certain developed countries that have gone as far as bribing accredited CDM project verifiers (called Designated Operational Entities-DOEs) to verify projects that do not meet project eligibility requirements, with the CDM EB having to suspend four DOEs.[100] What has been described as the 'emission reduction at all cost' motivations behind these projects call for legal frameworks beyond the broad spectrum of FDI or developmental projects.[101] While the main focus of this thesis are projects designed to generate emission reduction credits under the Kyoto Protocol, specifically under the CDM, this thesis also provides some non-CDM examples to buttress the need for robust governance structures to ensure that all emission reduction projects deliver on their sustainable development promises and do not produce human rights consequences.

D. Sustainable Development

[100] In 2009, SGS United Kingdom, arguably the world's largest DOE was suspended from the CDM scheme amidst allegations it had failed to properly vet projects that it had approved for CDM registration and that it received bribes to verify a CDM project. J Murray 'Carbon Market under Fire as UN suspends British CDM Project Accreditor' (2009) <http://www.businessgreen.com/bg/news/1806434/updatedFcarbonFmarketFunFsuspendsFbritishF cdmFprojectFaccreditor>. In 2008, DNV-a Norwegian DOE was suspended after it was found to have authorised five projects for registration, despite not having surveyed them. In 2010, the CDM EB also suspended German DOE-TUEV SUED and Korea's Energy Management Company (KEMCO) for various allegations of procedural irregularities. As the WWF, notes 'verifiers are paid by the project operators, so there is a vested interest to approve as many projects as possible. We would like to see the scheme changed so that the CDM Executive Board randomly appoints the verifiers to the projects'. See Reuters, 'UN Panel Suspends Two More Carbon Emissions Auditors' (26 March 2010); see also World Wildlife Fund, 'A Rating of Designated Operational Entities (DOEs) Accredited under the Clean Development Mechanism (CDM): Scope, Methodology and Results' (A Report by the Oko-Institute for the WWF 2009) . See also Green Peace International, 'Carbon Scam, Noel Kempff Climate Action Project and the Push for Sub-national Forest Offsetts' (2009) available at <http://www.greenpeace.org/france/PageFiles/266591/carbonscam.pdf> (accessed 12 January 2013).

[101] See F Allen *et al*, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4.

The twin objectives of the Kyoto Protocol are to achieve emission reductions and to promote sustainable development.[102] As such, the concept of sustainable development sits at the heart of this thesis. The most commonly cited definition of sustainable development is the definition provided by the Brundtland Commission: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[103] Article 3(1) of the 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific also defines sustainable development as:

> the process of progressive change in the quality of life of human beings, which places them as the centre and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.[104]

The above definition places humans as the subject of efforts to protect the environment while pursuing economic growth and development. As the ICJ noted in the *Gabcikovo – Nagymaros Case*, the need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development.[105] The Rio+20 United Nations World Summit on Sustainable Development held in 2012 specifically identifies the three mutually reinforcing pillars of sustainable development as economic development, social development and

[102] See Art. 2 and Art.12 of the Kyoto Protocol.
[103] The United Nations World Commission on Environment and Development Report (the Brundtland Report) *Our Common Future* (OUP 1987).
[104] United Nations Environment Program (UNEP), 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (Antigua Convention) Adopted 18 February 2002, <http://www.unep.ch/regionalseas/main/nep/nepconve.html> accessed 03 January 2013.
[105] *Case Concerning the Gabcikovo-Nagymaros Dam* (25 September 1997) *(Hungary v Slovakia)* I.C.J. Rep., 37 I.L.M. (1998) 162.

environmental development.[106] The UNFCCC in its recent evaluation report takes a more expansive view of sustainable development by classifying: respect and consideration of the rights of local/indigenous people and community or local/regional involvement in decision-making, as part of the social indicators of sustainable development.[107] This interpretation embeds the respect for human rights as part of social development.[108]

In this thesis, we adopt this expansive understanding of sustainable development that considers respect for human rights as part of social development. We define the concept of sustainable development as development that promotes economic development, environmental protection, social development, (which includes the fulfilment of fundamental human rights) in a balanced, mutually supportive and integrated manner. Here we take the view that the protection and fulfilment of human rights is a pre-requisite and a pre-condition for achieving sustainable development.[109] Studies point to ongoing trade-offs in climate change projects in which projects

[106] 2012A/CONF.216/L.1, United Nations, Rio de Janeiro, Brazil 20-22 June. See also the 2009 United General Assembly Resolution A/RES/64/236 which also describes economic development, social development and environmental protection as interdependent and mutually reinforcing pillars of sustainable development, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/475/99/IMG/N0947599.pdf?OpenElement> accessed 12 January 2013.

[107] UNFCCC, 'Benefits of the Clean Development Mechanism 2012' <http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf> accessed 12 March 2012.

[108] See the 2009 United General Assembly Resolution (A/RES/64/236) which also describes economic development, social development and environmental protection as interdependent and mutually reinforcing pillars of sustainable development, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/475/99/IMG/N0947599.pdf?OpenElement> accessed 12 January 2012.

[109] Ever since the 1986 *United Nations Declaration on Development* described the lack of attention for the implementation, promotion and protection of civil, political, economic, social and cultural rights as one of the obstacles to development; and that the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms, many scholars have argued that respect, protection and fulfilment of human rights is crucial to achieving sustainable development. This is the argument that human rights and sustainable development are interdependent and mutually reinforcing concepts. One cannot be achieved without the other. This idea was affirmed at the World Conference on Human Rights in the 1993 Vienna Declaration and Programme of Action, which stated that democracy, development, respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. It was acknowledged that the full enjoyment of human right requires durable economic and social progress, and vice versa: in other words, there cannot be full attainment of human rights without development, nor can there be development without respect for human rights. See also Resolution 1819 of the General Assembly of the Organization of

that generate huge emission reductions have not been the most sustainable.[110] To avoid such trade-offs, there is a need to balance emission reduction goals with the goal of respecting and protecting fundamental human rights.

This leads to the second question, what is the legal status of the concept of sustainable development under international law? Understanding the legal status of the concept is critical to understanding why so much attention should be paid to it anyway, it will also emphasise its place in the *corpus* of international law. The question whether sustainable development falls into any of the formal categories of international law identified by Article 38(1) of the ICJ has not been without debates.[111] The same may be said about some of the other concepts in international environmental law, for example the legal status of the precautionary principle has also been intensely debated.[112] While some scholars argue that the persistent recognition the principle of

---

American States which asserts that: "the effective enjoyment of all human rights, including the right to education and the rights of assembly and freedom of expression, as well as full enjoyment of economic, social, and cultural rights, could foster better environmental protection by creating conditions conducive to modification of behavior patterns that lead to environmental degradation, reduction of the environmental impact of poverty and of patterns of unsustainable development…" In this thesis, we support this argument. This thesis is premised on the argument that without explicit safeguards, policies and projects intended to advance environmental or development goals can have serious negative impacts on fundamental human rights. It shows that emission reduction projects that are designed to promote environmental development have resulted in massive land grabs, forced eviction and relocations of communities to allow for projects, social exclusion for the poor and vulnerable groups, killings, maiming and oppressions. This thesis argues that real sustainable development can only be achieved if human rights are protected in climate change regimes.

[110] L Pottinger, *The CDM's Hydro Hall of Shame, Bad Deal for the Planet: Why Carbon Offsets Aren't Working…And How to Create a Fair Global Climate Accord* (Dams, Rivers and People Report 2008, International Rivers, 2008); S McInerney-Lankford. 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) Harvard Environmental Law Review 431-437; Oxfam, Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy. (2008) Oxfam Briefing Paper on Climate Change and Human Rights <http://www.oxfam.org.uk/resources/policy/climate_change/downloads/bp117_climatewrongs.pdf> accessed 12 July, 2011; see also C Aminzadeh 'A Moral Imperative: The Human Rights Implications of Climate Change'. (2007) 30 Hastings International and Comparative Law Review 259; M Limon 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 (2) Harvard Environmental Law Review 451.

[111] 1945 Statute of the International Court of Justice (Adopted on 26 June 1945) 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

[112] The Precautionary Principle which postulates that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation has itself become a great source of uncertainty in international law. The legal status of the precautionary principle under international law is hugely debated. Many point to the use of the term 'approach'

sustainable development in national, regional and international laws and treaties, case law and state practice point to the fact that it has become a general principle of international law and is maturing into a custom of international law, others opine that the reluctance to formalise its distinctive legal status means it is too early to describe it as a customary rule or principle of international law.[113] It has also been argued that while sustainable development may not be a customary principle of international law, one of the principles of international law related to sustainable development includes the 'principle of integration'.[114]

Due to space constraints, we will not endeavour to go into an exhaustive discussion of these debates. We instead align with the views that even though it might be too early to speak of sustainable development as part of customary international law, the concept of sustainable development can be described as a general principle of international environmental law

---

by Rio Declaration as evidence that it is a mere approach to decision making and not a principle of international law. It has also been argued that the lack of a uniform understanding of its meaning ands scope makes it a mere guideline and tool for the development of decision-making procedures. In this thesis, we take the view that the precautionary principle has become a general principle of international environmental law. Its adoption in several national, regional and international laws and treaties, case law and state practice point to the fact the precautionary principle has been recognised as a general principle relevant to international environmental law. See C Stone, 'Is there a Precautionary Principle?' (2001) 31 Envtl. L. Rep. 10790; J Macdonald, 'Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management' (1995) 26 Ocean Devel. & Int'l L. 255; O McIntyre & T Mosedale, 'The Precautionary principle as a Norm of Customary International Law' (1997) 9 J. Envtl. L. 221; D Freestone, 'The Precautionary Principle' in R Churchill & David Freestone (eds.), *International Law and Global Climate Change* (Graham & Trotman 1991); D Freestone & Ellen Hey, 'Origins and Development of the Precautionary Principle' in D Freestone & E Hey (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer Law International 1996) 3; W Gullett, 'Environmental Protection and the 'Precautionary Principle': A Response to Scientific Uncertainty in Environmental Management'' (1997) 14 Envtl. & Plan. L.J. 52 at 56; E Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (2002) 4 Geo. Int'l Envtl. L. Rev. 303 at 305.

[113] See V Lowe, 'Sustainable Development and Unsustainable Arguments' in A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) at 36. See also A Boyle and D Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) at 16 – 18.

[114] See 2002 *International Law Association New Delhi Declaration on Principles of International Law Related to Sustainable Development* (ILA 2002), see also 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' in *International Environmental Agreements: Politics, Law and Economics* (Kluwer Academic Publishers 2002) 209-216, available at <http://www.kluweronline.com/issn/1567-9764/current>. See also M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (OUP 2004) 45 – 50; D. French, *International Law and Policy of Sustainable Development* (Manchester University Press 2005) at 51.

recognized by civilized nations.[115] The concept of sustainable development has become one of the recognized general principles of international environmental law, and there are evidence to suggest that it is maturing into a custom of international law.

In asseverating that sustainable development is a general principle of international law, we point to the fact that it has been vastly recognized as a yardstick for measuring development in many countries and internationally.[116] The concept of sustainable development is arguably an integral object and purpose of international environmental law and many environmental treaties. Currently, there are over 300 international legal instruments in addition to other soft law declarations, guidelines and General Assembly Resolutions that have identified and recognised the principle of sustainable development.[117] For example, the idea of sustainable development lays at the center of efforts to mitigate climate change. The FCCC is a direct product of the 1992 United Nations Rio Conference on Environment and Development, which laid down sets of principles (Rio Declaration) and Conventions intended to deliver sustainable development.[118] Principle 3 of the Rio Declaration states that the right to development must be fulfilled so as to

[115] This thesis aligns with the views expressed by Alston and Simma that General Principles derive legitimacy from their recognition by states; and that what is required for the establishment of general principles in international law is an evidence of general recognition by states, even if it is widely violated. Evidence of state practice is not a pre-requisite for establishing the existence of general principles in international law. This narrows the query to whether sustainable development has been sufficiently recognized by states? Arguably, in the light of the evidence of recognition adduced in this section, this will receive an affirmative answer. See generally, P Alston and B Samma, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles* (1991) 12 Australian Yearbook of International Law 102. This point was emphasised in *South West African Cases*, ICJ Report 1966, where Tanaka J held that 'the behaviour and consent of States are thus not a necessary prerequisite to the recognition of general principles'. See P. Hulsroj, 'Three Sources – No River: A Hard Look At the Sources of Public International Law with Particular Emphasis on Custom and General Principles of Law' (1999) 54 Zeitschrift für öffentliches Recht, 245; I. Brownlie, *Principles of International Law* (6th ed, OUP 2003).

[116] Environmental Sustainability is recognized as part of the Millennium Development Goals. See the United Nations, *Summit Outcome of the 65th Session of the UN General Assembly*, 17 September, 2010, UN/A/ 65/L.1; See also United Nations, *Claiming the Millennium Development Goals: A Human Rights Approach* UN/HR/PUB/08/3.

[117] For a comprehensive list of these instruments, see the United Nations Sustainable Development Knowledge Platform, 'Major Agreements and Conventions' available at <http://sustainabledevelopment.un.org/index.php?menu=122> accessed 12 January 2013.

[118] The UNFCCC is one of the three 'Rio Conventions', adopted at the Rio Earth Summit. The other two are the UN Convention on Biological Diversity and the Convention to Combat Desertification.

equitably meet developmental and environmental needs of present and future generations.[119] Principle 27 of the Rio Declaration states that States shall cooperate in good faith in the further development of international law in the field of sustainable development. Similarly, even though the aim of the UNFCCC is to achieve a stabilization of GHGs at a level that would prevent dangerous interference with the climate systems, the UNFCCC calls on Parties to ensure that responses to climate change are coordinated with social and economic development in an integrated manner taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty. [120]

The concept of sustainable development has also frequently gained recognition in national and international case law,[121] and in national laws and policies.[122] Similarly, a cursory look at how

[119] United Nations' Conference on Environment and Development (Rio Declaration) U.N. Doc. A/CONF.48/PC.13(1971). <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163> (assessed 21 Jnaury 2013).

[120] See the Preamble to the United Nations Framework Convention on Climate Change (Adopted 9 May 1992; entered into force on 21 March 1994).

[121] See the *US – Shrimp Case*, where the WTO Appellate Body stated that:

> …[t]his concept has been generally accepted as integrating economic and social development and environmental protection...and the concept is elaborated… so as to put in place development that is sustainable… that 'meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.

See also *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998), WTO Doc. WT/DS58/AB/R at note 107. See also *Case Concerning the Gabc íkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep., 37 I.L.M. (1998) 162 at 140; *United States- Import Prohibition of Certain Shrimp and Shrimp Products* (20 September 1999), WTO. Doc. WT/DS58/AB/R (Appellate Body Report) and *Permanent Court of Arbitration: In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway, between the Kingdom of Belgium and the Kingdom of the Netherlands* (May 24, 2005) at 59, 114, Award of the Arbitral Tribunal; and national cases such as *Vellore Citizens Welfare Forum* v. *Union of India* (1996, Supreme Court of India), *Bulankulame* v. *Secretary, Ministry of Industrial Development and Others* (the Eppawela Case) (2000, Supreme Court of Sri Lanka), and *Rajendra Parajuli and Others* v. *Shree Distillery Pvt. Ltd. & Others* (Writ No. 3259, 1996, Supreme Court of Nepal).

[122] There is a plenitude of examples. See the Australian NSW Protection of the Environment Administration Act 1991, The Nigerian National Environmental Standards and Regulations Enforcement Act (NESREA) Act; The 2005 UK Sustainable Development Strategy, Securing the Future, Canada`s 1985 Fisheries Act R.S.C. 1985 c. F-14, ss. 34-42; 1999 CEPA (The Canadian Environmental Protection Act) S.C. 1999 c. 33, ss. 39-103; The United States`1980 CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980) 42 U.S.C. ss. 9601-9675, US 1990 OPA (Oil Pollution Act of 1990) 33 U.S.C. ss. 2701 – 2761; German Environmental Liability Act 1990; Venezuela`s 1976 Environmental 'Frame' Act.

many countries are active parties to environmental treaties and Conventions which are developed based on the idea of sustainable development, show that the concept has gained sufficient recognition by countries. For example, with respect to climate change, 195 countries have signed and are parties to the UNFCCC, while 191 countries have signed and ratified the Kyoto Protocol.

These examples explain how environmental law and sustainable development are intertwined. As the Permanent Court of Arbitration noted in *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands):*

> environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm. ... This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.[123]

We agree with this dictum. The increased reflection of the concept of sustainable development in national laws, international treaties, and case law, all provide evidence that it has gained recognition as a principle relevant to international law on environment and natural resources.

E. UN Resolutions and Soft Law

This thesis discusses several UN resolutions, declarations, general comments and normative recommendations of treaty bodies, which have no legally binding force under international law.[124] For example the United Nations Human Rights Based Approach, the Ruggie Guiding Principles for Business and Human Rights, Decisions and Guidelines by the COP to the

[123] *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)* (May 24, 2005).
[124] On the status and normative importance of these instruments, see D Forsythe , *Human Rights in International Relations* (CUP 2006) 12. See also A Cassese, *International Law* (OUP 2001).

Convention and General Comments of UN treaty bodies. This goes to the question on the legal and normative value and importance of these documents under international law. This has remained a highly debated issue.[125] These debates can be traced to questions on the legal status and role of soft law under international law.

Soft law has been defined as those legal instruments that are not directly enforceable in courts and tribunals but nonetheless have an impact on international relations and, ultimately, international law.[126] Broadly put, soft law instruments include resolutions and declarations of the United Nations and its organs, normative recommendations, declarations of principles, codes of conduct, codes of practice, Programmes of Action (PA) and other non-treaty obligations which do not create binding obligations, but often propose guidelines and rules of behavior which are important and useful for responding to emerging challenges. Soft law is often contrasted with hard law.[127] While some scholars have argued that soft law is not law, some question the importance of soft law generally under international law since they do not create binding obligations.[128]

This thesis does not intend to delve extensively into these debates. Instead, it aligns itself with the views that even though resolutions adopted by the United Nations General Assembly, or

[125] For example, UN General Assembly resolutions have been described as attempts to impose norms of international law on dissenting minorities and to change radically the way in which international law is made. See O Schachter, *International Law in Theory and Practice* (Kluwer Academic Publishers 1991). See also A Peters and I Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective' (February 28, 2006) NEWGOV: New Modes of Governance; F Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed.) *The Construction of Europe: Essays in Honour of Emile Noël* (Springer 1994) 198.
[126] See P Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 Mich. J. Int'l L. 420, 422-25, 428-31.
[127] M Reisman, 'Hard Look at Soft Law' (1988) 82 Am. Soc'y Int'l L. Proc. 371-77.
[128] A Guzman and T Meyer, 'International Soft Law' (2010) 2 J. Legal Analysis 171.

General Comments by UN treaty bodies are not international treaties and therefore do not have legally binding force; they have important legal functions and normative effects to the extent that they often elaborate and interpret norms.[129] They provide interpretations and guidelines on how a country should apply a treaty in order to fulfill its international obligations. In this thesis, we take the view that soft law instruments play significant roles in the development and evolution of international law. As Higgins noted, the passing of binding decisions by an international body is not the only way in which the development of the law occurs. Legal consequences can also flow from acts which are not, in the formal sense, 'binding'.[130] Not only do soft law instruments provide flexible guidelines on how to tackle emerging concerns, they provide a template on how international policies can be implemented, they also serve as forbearers to binding hard law instruments in the future.[131]

For example, since the HRBA became popularized by the UN through the *1997 Program for Reform* launched by the UN Secretary General,[132] it has prompted a flurry of efforts to mainstream human rights principles within the UN systems and internationally.[133] For example

[129] For an excellent discussion of the normative effects and importance of UN Resolutions and Declarations see D Forsythe, *Human Rights in International Relations* (CUP 2006) 12.
[130] R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994).
[131] A Guzman and T Meyer, 'International Soft Law' (2010) 2 J. Legal Analysis 171; A Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) International and Comparative Law Quarterly 901-913. R Andorno, 'The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics (2007) Paper delivered at a workshop jointly organized by the German Ministry of Foreign Affairs and the German UNESCO Commission, Berlin, 15 February 2007 <http://www.unesco.de/1507.html> accessed 12 May 2012. D Tillinghast and R David, H Higenberg, 'A Fresh Look at Soft Law' (1999) 3 European Journal of International Law 502.
[132] According to the Secretary General, 'A major task for the United Nations, therefore, is to enhance its human rights programme and fully integrate it into the broad range of the Organization.s activities' . The Secratary geenral called on all *agencies* of the United Nations to commit themselves to the formulation, promotion and implementation of human rights'. See UN *Secretary-General's Programme for Reform, UNDoc. A/51/950 14 July 1997* (paragraphs 78 -79).
[133] In 1988 there was The Oslo Symposium on 'Human Development and Human Rights', which brought together UN organizations, NGOs and academic experts. The aim was to develop a background on how to apply the human rights-based approach and how to operationalize an integrated human rights-based approach to human development. The Symposium laid the groundwork for the 2000 Human Development Report.

in 2007, the World Health Organization released sector specific guidelines for adopting the HRBA in relation to health issues. The Food Agency Organization (FAO) also released guidelines, which comprised a 'human rights-based practical tool addressed to all states'.[134] The guidelines cover the full range of actions that need to be taken at national level to build an enabling environment for the provision of food and to ensure food security. Currently, the HRBA has been adopted and applied by a number of other agencies with appreciable success, especially in the areas of development, poverty reduction, social protection and security.[135] In 2011, the UNDG-HRM released a comprehensive action plan on how human rights mainstreaming could be achieved within UN systems. The plan amongst other things called for the adoption of a human rights based approach (HRBA) within UN systems and teams as a policy approach for mainstreaming human rights within their areas of activities and mandate.[136] The UNDG also provided normative recommendations and guidelines to on how to ensure that an HRBA will form the guiding principles and basis for activities and programmes at the national level.

The HRBA has also been recognized in a number of countries as a framework for mainstreaming human rights issues into decision-making.[137] Countries including Australia,[138] Denmark,[139]

[134] Voluntary Guidelines to Support the Progressive Realization or the Right to Adequate Food in the Context of National Food Security, Adopted by the 127th Session of the FAO Council, November 2004.
[135] For an excellent and detailed discussion of the adoption of the HRBA by the International Labour Organization; United Nations Development Programme; United Nations Children's Fund; United Nations Educational, Scientific and Cultural Organization; United Nations High Commissioner for Refugees; United Nations Human Settlements Programme; World Health Organization; Food and Agricultural Organization; World Bank and International Monetary Fund and the World Trade Organization, see G Oberleitner, *Global Human Rights Institutions* (Wiley 2007) particularly chapter 5 on 'Mainstreaming Human Rights'; see also See D Rozga, 'Applying a Human Rights Based Approach to Programming: Experiences of UNICEF' (2001) <http://www.handicap-international.fr/bibliographie-handicap/3ApprocheDroit/OutilProgMEO/ApHRight.pdf> accessed 12 October, 2010.
[136] See UNDG, available at < http://www.undg.org/index.cfm?P=2> accessed 20 January 2012.
[137] Swedish International Development Agency, Human Rights Based Approach (2012), <http://www.sida.se/English/Partners/Sida-Partnership-Forum/Sida-Partnership-Forum1> accessed 12 December, 2012.

Ireland,[140] New Zealand,[141] Mali,[142] Peru[143] and India[144] have developed robust national guidelines, which direct national authorities to mainstream human rights norms into programming through the HRBA framework.[145] In 2000, the Government of Sweden identified the HRBA as a better and revolutionary strategy for focusing on the root causes of human rights violations and for ensuring the accountability of agents of the state.[146] It described the HRBA as a more efficient analytical tool based on internationally accepted standards, which provides a legal standard and a framework that clarifies state obligations to protect and realize human rights.

The HRBA is a good example of how soft law instruments can aid the development of international and domestic law. Soft law instruments provide ground rules for the conduct of development policies. Though not binding, their consistent recognitions in national legislations and policies play a vital role in the formation of broadly accepted general principles of international law and international customary law. Consequently, in this thesis we discuss both hard law instruments such as treaties and conventions; and soft law instruments such as United

---

[138] Australian Human Rights Commission, Human Rights Based Approach, available at <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2011/20110413_rights_women.html> accessed 12 December, 2012.

[139] See J Boesen and T Martin, *Applying a Rights Based Approach in Denmark: An Inspirational Guide for Civil Society* (Danish Institute for Human Rights 2007).

[140] See International Human Rights Network, O*ur Rights, Our Future Human Rights Based Approaches in Ireland: Principles, Policies and Practice* (Dublin 2005).

[141] UNICEF, *Human Rights Based Programming: The Mali Experience* (UNICEF 2003)

[142] UNICEF, *Peru Case Study: A Human Rights Approach* (UNICEF 2002).

[143] See UNICEF, *Human Rights Based Programming: India Case Study* (UNICEF 2003)

[144] J Theis, *Promoting Rights-Based Approaches Experiences and Ideas from Asia and the Pacific* (Save the Children 2004).

[145] See OHCHR *Handbook on National Human Rights Plans of Action*, 29 August 2002, UN Professional Training Series No. 10.

[146] A Frankovits and P Earle, *Working Together, The Human Rights Based Approach to Development Cooperation in Sweden Parts 1 & 2* (SIDA and HRCA 2001).

Nations declarations, resolutions and norms that have been recognized as part of international climate change regimes.

Consequently, when we speak of 'climate change regimes' in this thesis, we mean the web of convention, protocol, modalities, decisions, including governance structures and institutions established by the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) to limit and reduce the emission of GHGs and to cope with whatever impacts are inevitable.[147] We specifically identify the Kyoto Protocol and its Doha Amendment;[148] the Framework Convention on Climate Change (FCCC), the Marrakech Accords on the Modalities and Procedures on the CDM and other relevant COP decisions as sources of the rules and frameworks that govern the approval and execution of CDM projects discussed in this thesis. Similarly, the UNFCCC Secretariat, the COP, the Compliance Committee, the CDM Executive Board are the principal governance institutions that come under the categories of climate change regimes discussed in this thesis.[149] This thesis will show how the HRBA may

[147] This definition draws from Krasner's classic definition of international regimes as 'a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'; S Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S.D. Krasner (ed.), *International Regimes* (Cornell University Press 1983) 2.

[148] At the COP meeting held in Doha, Qatar, in December 2012, Parties to the Kyoto Protocol adopted the Doha Amendments to the Kyoto Protocol, which amongst other things confirmed the second commitment period to be 2013-2020. The Doha Amendment will enter into force pursuant to Article 20 (4) and (5) of the Kyoto Protocol, which provides that such amendments shall enter into force on the ninetieth day after the date on which Parties deposit with the Depositary an instrument of acceptance of the said amendment. See UNFCCC, Doha Amendments to the Kyoto Protocol <http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf> accessed 12 January 2013.

[149] The Conference of the Parties is the supreme decision-making body of the Convention. The COP adopts rules and take decisions necessary to promote the effective implementation of the Convention.The COP serves as the Meeting of the Parties to the Kyoto Protocol (CMP). All States that are Parties to the Kyoto Protocol are represented at the CMP, while States that are not Parties participate as observers. See UNFCCC, 'Bodies', <http://unfccc.int/bodies/items/6241.php> accessed 21 January 2013.

serve as a template for mainstreaming human rights language into these regimes on climate change.

2.4 Thesis Structure

This thesis is divided into eight chapters to reflect a transition from conceptual and theoretical issues to practical and substantive issues. This introduction is the first chapter. Using existing projects in Honduras, Nigeria and Panama as examples, **Chapter Two** discusses how climate change mitigation projects, specifically CDM projects are producing human rights concerns in developing countries. These human rights issues include: mass displacement of citizens from their homes to allow for climate change mitigation projects, lack of participation by citizens in project planning and implementation, citing and concentration of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of these problems. Chapter Two also provides a human rights critique of existing international climate change regimes. Here, it is argued that existing climate change regimes as they currently stand are incapable of dealing with some of the human rights situations arising from emission reduction projects. The nature and design of extant climate change regimes make possible for climate change projects to compromise international human rights. This is mainly due to the lack of transparency and accountability in the verification and registration of projects, lack of safeguards on the disclosure of relevant project information, lack of opportunities for broad based stakeholder participation and the absence of a complaint mechanism or procedure under current regimes through which public concerns and complaints could be addressed. I discuss how these oversights have entrenched a culture of 'approvals'

through which mitigation projects are approved and registered irrespective of their human rights consequences. This chapter essentially lays a foundation on the need for mainstreaming human right standards into international climate change regimes.

A theoretical thread that runs through this entire thesis is the concept of human rights mainstreaming, i.e. the idea of integrating human rights norms into climate change responses and actions. Given the pivotal nature of this concept to this thesis, it is pertinent from the onset to analyse and discuss the meaning, nature, theoretical basis and value of human rights mainstreaming. This is the focus of **Chapter Three.** In this chapter, I review, explore and contribute to emerging debates on the human rights mainstream paradigm under international law. This chapter discusses the theoretical underpinnings, values and problems associated with the human rights mainstream paradigm. Apart from definitional questions, certain theoretical questions that are more specific to the legal basis of the human rights mainstream paradigm as a whole are raised and discussed. Theoretical questions such as: the novelty or duplication question, neo-liberalism critique, determinacy, and the conflict of rights debates are identified and discussed. This chapter also examines the legal and theoretical foundations and bases for human rights mainstreaming. It will analyse how we could evoke the principle of systemic integration of international law; the inter-doctrinal legal transplant/ cross-fertilization theory, participatory development theory and the full belly thesis as legal and theoretical anchor for the human rights mainstream paradigm.

One of the most knotty debates in the human rights mainstream literature is the question of approach. Put simply, if we were to agree that human rights mainstreaming is important and

necessary, how should it be done? What is the best policy mix or approach for achieving the goal of human rights mainstreaming? This question is the focus in **Chapter Four**. Here, I unpack the legal debates on the question of approaches for mainstreaming human rights into international climate change regimes. I examine the two main strategies that have been proposed: the substantive rights approach and the procedural rights approach (human rights based approach). I provide justifications for the choice of the procedural rights approach as illustrated by the United Nations Human Rights Based Approach (HRBA) as a policy framework for mainstreaming human rights norms into policymaking. It is argued here that the HRBA provides a procedural framework, which focuses on the institutionalization of human rights into existing climate change regimes. Through procedural rights, the design of climate change regimes could be strengthened to anticipate, avoid and prevent some of the human rights issues; this is unlike traditional approaches that are reactive in nature. By ensuring that the execution and approval of projects are dependent on the consent and cooperation of stakeholders, individuals and communities, human rights infringements due to climate change projects may be avoided it the first place. I discuss the HRBA as a preventive, transformative and forward-looking approach that avoids the human rights versus environment arguments; prompts changes in institutional practices and also provides a preventive/ long-term process through which human rights are systematically integrated into environmental systems, structures and practices.

In **Chapter Five** I examine the normative contents and elements of a human rights based approach. I discuss what the HRBA entails. There are five inter-connected human rights norms and principles, that have been recognised in the literature as forming the core of the HRBA, they are: access to information (ATI); participation; accountability; equality and non-discrimination;

and access to justice.[150] I analyse why these elements form the core of the HRBA. I then examine the legal status of each of these elements under international human rights law and answer the question 'are these elements human rights?' It will be shown that these elements are derived from well-entrenched principles of international human rights law. I establish how each of these procedural human rights have been recognised in human rights treaties and conventions, and also discuss their normative contents.

Chapter Six addresses the question of 'how', i.e. what are the legal and institutional frameworks required to mainstream human rights norms into international climate change regimes under a human rights based approach? Developing theoretical formulations on human rights mainstreaming through the HRBA is only part of the task. Other essential questions relate to the mechanisms which are to be put in place to carry through those decisions, how the concepts are to be operationalized and translated into concrete work programmes, how progress will be monitored and evaluated, and what further action should be taken in case of unsatisfactory progress. This chapter develops a legal framework that would assist in moving the idea of human rights mainstreaming from theory to practice. Here I show that two complementary types of reforms are required: legal and institutional reforms. The necessary legal reforms include the need to entrench and adopt a minimum legal threshold that must be met and demonstrated before projects are approved and registered. In this chapter, I propose a six-part legal threshold that should serve as the minimum core content of a reformed rights based climate change regime. They are: project eligibility screen, sustainable development screen, human rights impacts

[150] See United Nations, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies' (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

assessment, stakeholder identification and consultation, information disclosure system and project review mechanism. This threshold emphasises the importance of an integrated assessment to identify the human rights, social and environmental impacts and risks of projects; the importance of effective community engagement and consultation with local communities on matters that directly affect them; and the need for project proponents to manage and disclose the human rights, social and environmental performance of a project throughout the lifecycle of the project. It is argued here that adopting this minimum legal threshold as the basis for project approval and registration at the international level could go a long way in addressing some of the human rights issues that have been identified in many climate change projects; they could also provide guidance to policymakers at the national level on how to design balanced and rights based policy responses and projects for climate change mitigation.

This chapter also discusses the nature of institutional reforms necessary to spearhead such a legal reform process. Institutions would go a long way to determine how the identified legal threshold would be operationalized and enforced, how progress will be monitored and evaluated, and what further action could be taken in case of unsatisfactory progress. I identify and discuss four complementary institutional reforms that are required to move the idea of human rights mainstreaming within the context of international climate change regimes from theory to practice. They are: the creation of a specific human rights and climate change unit (HRCU) within the UNFCCC secretariat to be responsible for the overall mainstreaming strategy; the expansion of the terms of reference and powers of the CDM Executive Board; empowering the enforcement branch of the compliance committee to ensure that after registration, the execution of projects are in line with approved standards and do not create unanticipated problems; and the

setting up of a public complaint branch of the compliance committee that could hear appeals by stakeholders who may be adversely affected. This institutional framework mirrors the shift away from top-down planning towards more participatory forms of development and recognition for stakeholders in climate change adaptation and mitigation. It provides a window of opportunity and a platform for stakeholders to bring their complaints about a project, before an international supervisory body at every stage of project planning and execution *i.e.* prior to registration and post registration. It is argued here that mobilizing and empowering institutions would enable individuals, communities and NGOs to have a voice in the processes of approving climate change projects, the current pervasive culture of approving emission reduction projects without adequate attention to their potential impact on human rights could be addressed in a balanced and transparent way.

In **Chapter Seven**, I examine the practical steps and requirements for translating these theoretical perspectives into practice. Proponents of the human rights mainstream paradigm have not devoted sufficient attention to the relationship between its theoretical importance and the practical implications. Laying down a theoretical framework is one thing, understanding its practical implications, possible real life limitations and the requisite steps for moving the concepts from the realm of theory to practice is another. In Chapter Seven, I examine the legal and practical potentials, and the difficulties that may arise in carrying through the sort of reforms proposed in this thesis. This chapter shows that to ensure the recognition of the suggested legal and institutional frameworks in the design and implementation of extant and emerging market mechanisms, there is a need to adopt a step-by-step approach. This approach would include two complimentary steps: the reform or expansion of the scope of the current climate change regimes

and the adoption of an additional Protocol on climate change and human rights. **Chapter Eight** provides conclusions and recommendations.

CHAPTER TWO:

CLIMATE CHANGE PROJECTS AND HUMAN RIGHTS STRUGGLES

1. Introduction

The aim of this chapter is to identify the linkages between climate change mitigation projects and human rights. The question here is, to what extents have human rights being respected and protected in the execution of climate change mitigation projects? Using CDM projects as examples, this chapter demonstrates that existing international climate change regimes are incapable in their design to deal with some of the human rights concerns arising from climate change projects. This chapter describes how the lack of transparency in the processes for verification and registration of CDM projects; non-disclosure of relevant project information by project proponents; limited opportunities for stakeholder participation and absence of public complaint procedures under the current CDM governance framework and most importantly the absence of human rights safeguards in the Framework Convention on Climate Change and its Kyoto Protocol, have entrenched a culture of 'approvals' in which all manner of projects are been registered and approved for carbon credits under the CDM. To provide some background and context for our discussions, this chapter begins with a succinct description of the approval processes and procedures under the CDM.

A. CDM Project Cycle

The CDM allows developed countries that are parties to the Kyoto protocol to acquire Certified Emission Reductions (CERs) by investing in projects that lead to emission reductions in a developing country.[151] It allows industrialized countries to buy CERs and to invest in emission

[151] For a developing country to become eligible to host CDM projects, it must have ratified the Kyoto Protocol. See Article 12 of the Kyoto Protocol.

reduction projects wherever it is cheapest globally.[152] Procedurally, a developed country identifies an investment that would lead to a reduction in the emission of greenhouse gases in a developing country and approaches the government of the country where the investment is to be located for its approval. The Government then decides whether such project meets its sustainable development criteria and then approves it as a CDM project.

This is best illustrated with a practical example. Let us consider two countries: United Kingdom (UK) and Nigeria. Under the Kyoto Protocol, the UK agreed to ensure its emissions of greenhouse gases were at least 12.5 percent lower than base year levels, on average, over the 2008-2012 period (1st commitment period). This equates to annual emissions of 682.4 million tonnes carbon dioxide equivalent (MtCO2e) on average over the period.[153] For the second commitment period, Parties have so far pledged to reduce GHG emissions by at least 18 percent below 1990 levels in the eight-year period from 2013 to 2020.[154] If the UK is to achieve its targets through domestic action alone, it would require legislation and policies that might compel its industries to embark on drastic cut down on emissions of GHGs. This might put a lot of

[152] M Grubb, 'The Economics of the Kyoto Protocol' (2003) 4 (3) World Economics 159.

[153] See UNFCCC, 'The United Kingdom's Kyoto Commitments' <http://www.defra.gov.uk/environment/climate/> accessed 10 January 2012.

[154] For the second period the European Union (EU) has taken on emission reduction commitments in line with its domestic target of cutting emissions by 20% of 1990 levels by 2020,The EU also registered a conditional offer to move to a 30 per cent reduction by 2020 compared to 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities. The EU and its Member States, which includes the UK, will fulfill the reduction commitment jointly. The targets of all countries participating in the second period will be revisited by 2014 with a view to considering raising ambition. According to the UK Energy and Climate Change Secretary, the UK The UK, as part of the EU, will be working to meet these commitments. See COP18: Statement from UK Energy and Climate Change Secretary (9 December 2012) available at <https://www.gov.uk/government/speeches/cop18-statement-from-uk-energy-and-climate-change-secretary> accessed 19 January 2013; See also, Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, C.N.718.2012.TREATIES-XXVII.7.c, (Adopted 8 December 2012, Not yet in Force). Pursuant to Article 20, paragraph 4, and Article 21, paragraph 7 of the Kyoto Protocol, the Amendment shall enter into force for those Parties having accepted it, on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to the Kyoto Protocol.

pressure on UK industries that may have to cut down their levels of production. This might ultimately strain the UK economy. Nigeria on the other hand is a developing country with no specific emission reduction commitments under the Kyoto Protocol. Nigeria's major priorities include boosting its economy, achieving sustainable development and proffering solutions to its numerous environmental problems such as gas flaring, oil spillage and air pollution to mention just a few.[155] Thus, for the UK to meet its emission reduction target under Kyoto Protocol, it could invest in projects that reduce gas flaring in Nigeria or that lead to solutions to any of its environmental problems. The GHG reduction achieved by such a project will then be credited to the UK while Nigeria could benefit from cleaner air, better environment, job opportunities and more income through such projects. The CDM thus allows both parties involved to benefit from the mechanism: while it promotes sustainable development in the host country it allows the investing country attain their emission reduction targets in a flexible manner.[156]

The process involved in carrying out a CDM project begins with obtaining formal written approval from the Designated National Authority (DNA) of the host country for the proposed project and an affirmation that the project will assist the Host Country to achieve sustainable development.[157] The CDM Rules allow every developing country to develop its sustainable

[155] See The Nigerian National Planning Commission, *Nigeria's NEEDS* <http://siteresources.worldbank.org/INTPRS1/Resources/Nigeria_PRSP(Dec2005).pdf> accessed 12 June 2012.

[156] See I Rowlands, 'The Kyoto Protocol's Clean Development Mechanism: A Sustainability Assessment' (2001) 22 Third World Quarterly 795; see also D Olawuyi, 'Beautifying Africa for the Clean Development Mechanism: Legal and Institutional Issues Considered', in B Richardson, Y Bouthillier, H Mcleod-Kilmurray and S Wood (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing 2009).

[157] The CDM Rules require every developing country to establish a Designated National Authority (DNA), which will serve as its CDM monitoring body responsible for approving or rejecting a prospective CDM investment. The DNA serves as the focal point between investors and the host country government. Its functions include providing potential projects for investors; processing framework agreements with investors; ensuring that an environmental impact assessment is carried out before approving projects and considering the assessment reports carefully; providing legal advice for project investors; coordinating with other relevant official entities and authorities within the host country; drawing up standardized baselines; monitoring ongoing CDM projects; granting export of

development priorities and criteria. As such, the responsibility for determining whether a CDM project contributes to national sustainable development as defined by the host country rests with its designated national authority (DNA). Once the DNA endorses a project as meeting the national sustainable development criteria, it grants it 'host country approval' which is a formal written authorization from the developing country of its voluntary participation of the proposed project.[158]

The next stage is for the project proponent (*i.e* the investing country) to develop a Project Design Document (PDD) containing details of the project activity, the proposed monitoring methodology and baseline, the crediting period of the project, the project participants and the method by which the participants will communicate with the CDM Executive Board. The PDD is the sent to a Designated Operational Entity (DOE) to verify.[159] DOEs are independent auditors that have been accredited by the CDM Executive Board (CDM EB) to validate project proposals or verify whether implemented projects have achieved planned greenhouse gas emission reduction.[160] They are responsible for: verifying the accuracy of the PDD; ensuring that proposed CDM project activities meet all requirements established by the COP/MOP and the CDM EB;

---

emissions rights (CERs); conducting public relations and providing information on CDM implementation in the host country through advertisements in the media and through the web. It is also to design and establish an evaluation procedure that adopts international eligibility criteria to assess the contribution of the prospective CDM projects to sustainable development in the host country. See P Manso, *Establishing a National Authority for the Clean Development Mechanism (CDM): The Costarican Experience* (OECD 2003) 5-6.

[158] See paragraphs 28 -30 of the annex of Decision of the COP-7 (Clean Development Mechanism Modalities and Procedures).

[159] For an excellent and detailed description of the CDM Process, see UNDP, *Going through the CDM Process*, <http://content.undp.org/go/cms-service/stream/asset/?asset_id=2222587> accessed 12 January, 2012, see also UNEP, *Legal Issues Guide Book to the CDM*, <http://cd4cdm.org/Publications/ImplementingCDM_GuidebookHostCountryLegalIssues.pdf> accessed 12 December, 2011.

[160] See UNFCCC, 'Designated Operational Entities (DOE)' <http://cdm.unfccc.int/DOE/index.html> (accessed 12 June 2012). See Para 20 of the CDM Modalities & Procedures, which provides that the Executive Board, shall maintain a publicly available list of designated operational entities.

and submitting the project proposals to the CDM Executive Board (EB) for registration.[161] Considering the prominent roles they play in the project approval procedures, the DOEs can be effectively described as 'trusted agents' or 'an extended arm' of the CDM EB.

The Executive Board of the CDM is the supervisory authority established by the COP to approve and register CDM projects.[162] Once the CDM EB receives a project proposal from DOE, it then decides whether to register it or not. The CDM Rules as elaborated in the Marrakech Accord, contain project eligibility requirements that must be met by all projects before registration.[163] The Rules stipulate that any project proposed as a CDM project must promote sustainable development in the country where it is to be located. This requirement is simply met by showing that it has been endorsed by the developing country as meeting its sustainable development criteria. The other requirements are that the project must be real, measurable, long-term, and additional to reductions that would have occurred without the project.[164] Similarly, funding for

[161] See Para. E, CDM Modalities & Procedures, 3/CMP.1 (2005), <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.

[162] The main tasks of the EB include making detailed rules for modalities and procedures for the CDM according to the decision and recommendation of the COP, suggesting simplified rules for small-scale CDM projects, developing and approving new methodologies for CDM, making recommendations to the COP for the designation of operational entities, developing procedures for the CDM; accrediting DOEs; registering CDM projects, issuing CERs, making publicly available information on proposed CDM Project activities in need of funding and investors seeking opportunities; and maintaining a public database of CDM Project activities containing information on registered Project Design Documents. See L Myung-Kyoon, *CDM Information and Guide Book* (UNEP Risoe Center 2004) 40-43

[163] Decision 17/COP.7 of the Seventh session of The Conference of Parties to the UNFCC (COP-7) in Marrakech.

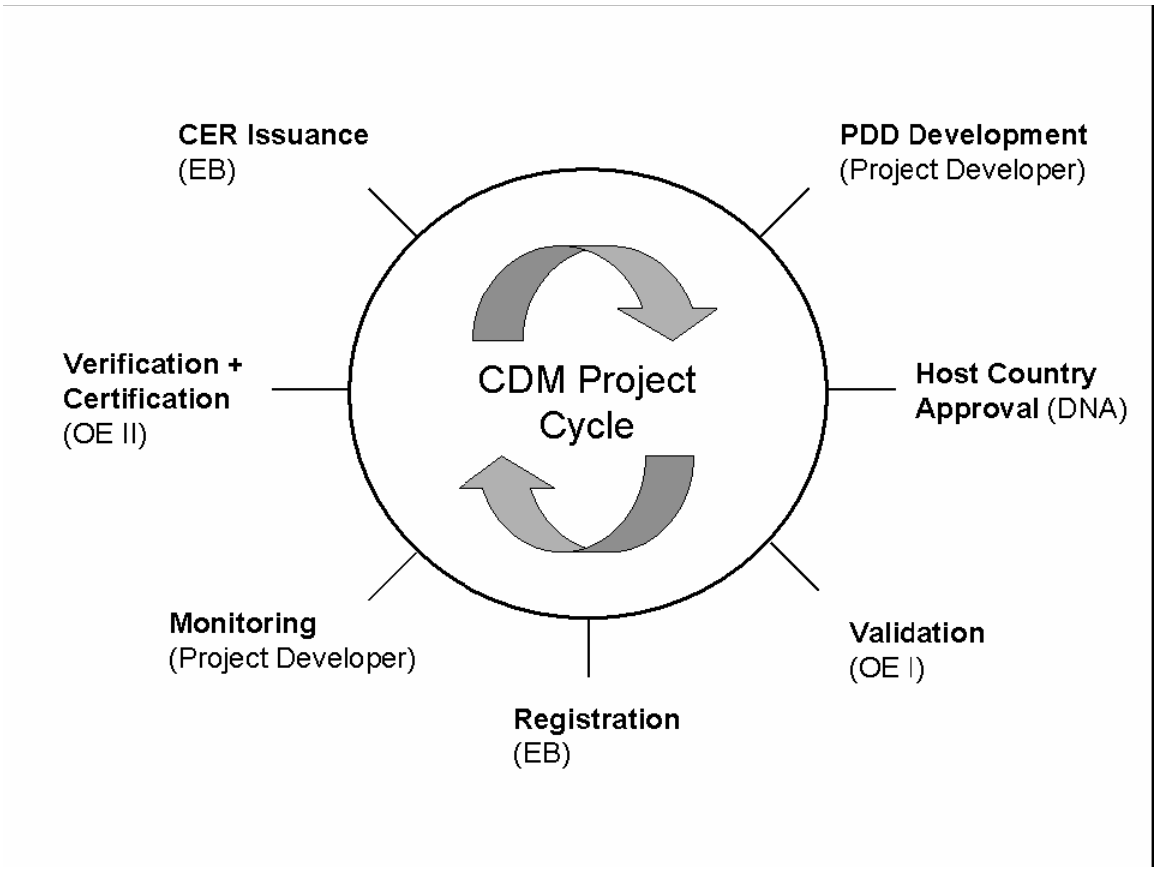
[164] The requirements also include that the project has to generate CERs compared to the baseline emission, the methodology applied by the project has to be approved and if the project has a great environmental impact, a solution has to be made to minimize that impact. The project baseline should also be established on a project-specific basis; in a transparent and conservative way; taking into account the relevant national or sectoral policies; and a reasonable system boundary has to be set and the leakage issue needs to be fully considered. These requirements have been criticized as very ambiguous. Most especially the additionality requirement. See A Michaelowa, 'Determination of Baselines and Additionality for the CDM: A Crucial Element of Credibility of the Climate Regime, in F Yamin (ed.), *Climate Change and Carbon Markets* (Routledge 2005) ch. 7.

such CDM projects must not divert funding from existing official development assistance (ODA)**.**[165] The CDM EB registers a project once it meets these requirements.

Post registration formalities includes the requirement to operate the project in a manner that reduces, abates or sequesters GHGs and the need to monitor the emission reductions achieved by the project in accordance with the monitoring plan in the PDD. The DOE is responsible for undertaking a periodic review and verification of the achieved emission reductions by another DOE. The DOE then certifies to the CDM EB that the project has achieved the number of emission reductions verified and then submits a request to the CDM Executive Board to issue CERs for the amount of Greenhouse Gas abatement, which occurred during the Verification period. The culmination of the process is that the CDM EB issues CERs as evidence of the emission reductions achieved by the project. The CDM cycle is illustrated below:

TABLE 1

[165] ODA refers to a concessional financial assistance from official government agencies to developing countries and multilateral institutions, which aims primarily to promote the economic development and welfare of developing countries. Developed countries are not expected under the CDM Rules to use the CDM as a substitute for existing forms of ODA. This requirement seeks to underscore the differences between the CDM and other forms of ODAs. <http://www.oecd.org/department/0,2688,en_2649_33721_1_1_1_1_1,00.html> accessed 21 January 2013.



Source: Going through the CDM Process, <http://www.undp.org/energy/docs/cdmchapter2.pdf> accessed 12 July, 2011.

The above procedures contain many loopholes that have brought about human rights concerns. Notably, the CDM Rules do not include the requirement that projects must not infringe on the human rights of the host communities, neither do the Rules establish detailed human rights threshold to be met by a project before registration and approval. The Rules also fail to establish procedures that allow individuals and members of the community to play active roles in blocking or reporting projects that infringe on human rights after regsitration.

Also, the CDM Board confers excessive discretion on host countries to approve projects that meet their respective sustainable development criteria. The CDM as a market mechanism

involves many developing countries competing to host projects. Its market outlook is further underscored by the fact that developed countries have wide discretion in deciding on which developing country they want to invest in or in which country they choose to pursue their emission reduction investments, based on the level of derivable profit.[166] Thus developed countries, like prudent investors, are always in search of investment locations that guarantee maximum profits and offer safe investment climate. Such countries are perceived as attractive investment locations. In a situation where countries are under pressure to attract foreign CDM investments or to deliver cheap projects, states often tend to lower sustainability standards in order to attract projects; approve dirty technologies and often force through project approvals irrespective of legitimate opposition from stakeholders and citizens.[167] These have resulted in a long list of human rights concerns as demonstrated by some approved CDM projects.

Similarly, the CDM EB outsources some of its most important oversight roles to the DOEs which are mostly for-profit audit companies, to determine and verify the accuracy of the PDD and to ensure that proposed CDM project activities meet all requirements established in the CDM Rules. While this might appear a decent arrangement on the face ot it, current implementation of CDM projects have been trailed by different accusations of bribery, corruption and lack of transparency by DOEs. In a number of cases, projects that have been

[166] Profits here are measured in terms of which developing country generates more CERs at a lesser price. See CDM Modalities & Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011; for a discussion of these see D Olawuyi, 'Beautifying Africa for the Clean Development Mechanism-Legal and Institutional Issues Considered' in B Richardson, Y Le Bouthillier, H McLeod- Kilmurray & St Wood (eds.), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Community* (Edward Elgar Publishing 2009) 262.

[167] M Jung, 'Host Country Attractiveness for CDM non-sink projects' (2006) Energy Policy 34 at 2174; A Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' (2006) HWWA Report 255, at 1.

resisted for violating human rights have been inexplicably approved by DOEs.[168] This arrangement also raises the question whether auditors and verifiers would have the capacity and training to identify and assess human rights infringements in a proposed project before granting it an 'all clear'.[169]

These and many other loopholes in the CDM Rules have entrenched a culture of approvals, through which different questionable projects have been approved without a thorough examination of their human rights consequences on host communities.

2. How Climate Change Mitigation projects violate human rights: Lessons from CDM Projects

It is impossible to discuss all climate change mitigation projects that have attracted human rights litigation and protests. Therefore in this thesis, we draw examples from CDM projects that have been approved by the CDM EB cutting across different mitigation options. Our examples include a gas flaring reduction project in Nigeria, Biogas power generation project in Honduras, a

[168] In 2009, SGS United Kingdom, one of the world's largest DOE was suspended from the CDM scheme amidst allegations that it had failed to properly vet projects that it had approved for CDM registration and that it received bribes to verify a CDM project. See J Murray 'Carbon Market under Fire as UN suspends British CDM Project Accreditor' (2009) <http://www.businessgreen.com/bg/news/1806434/updatedFcarbonFmarketFunFsuspendsFbritishF cdmFprojectFaccreditor>. In 2008, DNV-a Norwegian DOE was also suspended after it was found to have authorised five projects for entry into the CDM, despite not having surveyed them. As the WWF,notes 'verifiers are paid by the project operators, so there is a vested interest to approve as many projects as possible. We would like to see the scheme changed so that the CDM Executive Board randomly appoints the verifiers to the projects'. See "A Rating of Designated Operational Entities (DOEs) Accredited under the Clean Development Mechanism (CDM): Scope, Methodology and Results (A Report by the Oko-Institute for the WWF 2009) . See also Green Peace International, 'Carbon Scam, Noel Kempff Climate Action Project and the Push for Sub-national Forest Offsetts' (2009) available at <http://www.greenpeace.org/france/PageFiles/266591/carbonscam.pdf> accessed 12 January 2013.

[169] For example, the SGS United Kingdom is run by Accountants, Economists, Environmental Scientists and Business Administrators. This raises questions on their capacity to identify human rights concerns and implement human rights standards. See Board and Executive Management, <http://www.sgs.com/en/Our-Company/About-SGS/Board-and-Executive-Management/Operations-Council.aspx> assessed 12 January 2013.

hydroelectric power project in Panama, and REDD+ projects in Nigeria.[170] We also make references to some non-CDM projects to show that the tendency to achieve emission reduction credits at all cost, with less attention to the human rights impacts of projects is arguably the foundation for human rights violations in emission reduction schemes. As such, even if the CDM is totally abandoned and replaced with the currently proposed New Market Mechanisms or any other project-based mechanism, it might not solve all the problems associated with the carbon markets.[171] A more robust solution would lie in drawing appropriate lessons from the implementational challenges facing the CDM; and then mainstreaming human rights safeguards into international legal frameworks and governance structures on climate change to correct these flaws, so as to better protect human rights in climate change actions and projects.

2.1 The Aguan Biogas Project

The Aguan biogas project is undoubtedly one of the most controversial CDM projects that have been registered in recent times. This project, sponsored by the UK Government, is located in the Bajo Aguan region in Honduras. It is designed to reduce greenhouse gas emissions by collecting biogas from methane emissions and replacing fossil fuels utilized for heat generation in a mill of a palm oil plantation of Grupo Dinant's subsidiary-Exportadora del Atlantico. Its emission

[170] Our choice of case studies for this research is influenced by an attempt to provide examples that cut across different types of GHG emission reduction projects in different developing countries. Each of these case studies illustrates the nature of projects that constitute emission reduction projects. They also highlight how the absence of a solid human rights culture in these jurisdictions and the absence of a protective framework in international climate change regimes have reduced the integrity of emission reduction projects and the efficacy of international climate change regimes as a whole. For other examples and studies on the impacts of climate change projects on human rights see the Xioaxi Hydropower Project and the Guangxi Xiafu Hydropower Project in China. See H Jiang, 'Carbon-Trading Scheme Undermined by Chinese Projects' *Epoch Times* (Washington 9 December 2009).

[171] At the COP-17 in Durban, Parties decided that a new international new market mechanism (NMM) should be established under the UNFCCC that will complement the CDM and JI. The details of how the NMM will work however remain unclear. See AWG-LCA, 'Various Approaches for Mitigation including Opportunities for Using Markets to Enhance Cost Effectiveness of and to Promote Mitigation Actions, Bearing in Mind Different Circumstances of Developed and Developing Countries: Views on the New Market-Based Mechanism' (2012) FCCC/AWGLCA/2012/MISC.6/Add.6.

reduction projections are large scale; estimates suggest that it would reduce about 23,000 tonnes of carbon dioxide annually, generating about US$ 2.8 million between February 2010 and January 2017.[172] However, this project has been heavily criticized internationally for its gross human rights violations.[173] According to a petition submitted to the Inter-American Commission on Human Rights, the local project developer Grupo Dinant is alleged to have been at the center of violent conflicts with local people, mass displacements of people from their ancestral lands, violent repressions of protesters; and the killing of about 23 peasants and human rights defenders.[174] A coalition of over seventy international human rights groups called on the UK to withdraw sponsorship for the project and for the CDM Executive Board not to approve or register the project.[175] The International Finance Corporation of the World Bank has recently launched a full-scale investigation into the activities of the project developer.[176]

---

[172] CDM Watch, 'United Nations Under Pressure to Denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) <http://www.cdm-watch.org/wordpress/wp content/uploads/2011/04/180411_PR_UN_under_Pressure_to_denounce_human_rights_abuses_in_carbon_offsetting_scheme.pdf> accessed 12 December, 2011.

[173] See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (July 2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011.

[174] For comprehensive details of human rights violations by this project, see Inter-American Commission on Human Rights (IACHR), 'Human Rights Situation in the Bajo Aguán Honduras' (Oct. 24, 2011); IACHR, 2011 Annual Report, ch. IV, 297-302; IACHR, 2010, Country Report, Honduras, 118-12; see also CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.> accessed 02 August, 2011; See also FIAN, Human Rights Violation in Bajo Arguan (July 2011), <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf> accessed 02 August, 2011.

[175] CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' (2011)<http://www.cdm-watch.org/?p=1648> accessed 02 August, 2011. As a response to protests by several international human rights groups German public development bank DEG (Deutsche Entwicklungsgesellschaft) declared that it will not pay out an already approved loan of $20 million USD for the project. Similarly, EDF Trading, a wholly owned subsidiary of Electricité de France SA's and one of the biggest CDM investors, pulled out from a contract to buy carbon credits from the project. See CDM Watch, 'German Bank Won't Lend to Honduran CO_2 Project' (April 2011) <http://www.bloomberg.com/news/2011-04-18/german-bank-won-t-lend-to-honduran-co2-project-cdm-watch-says.html> accessed 01 August 2011. For the official response of the UK Government, s*ee* Letter by Rt. Hon Chris Huhne M.P, (April 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/UK_Gov_reponse_on_aguan_130411.pdf > accessed 31 July, 2011.

[176] Office of the Compliance Advisor/Ombudsman, 'Audit of IFC's Environmental and Social Performance in relation to Dinant, Honduras' (Feb. 26, 2013).

Despite the petitions and protests, this project was approved by the Government of Honduras and subsequently registered by the CDM Executive Board on the 18th of July, 2011.[177] The CDM Board argued as in most cases that it has no mandate to investigate human rights abuses and that any matters related to the sustainable development of the project or human rights is determined by the government that hosts the project.[178]

The approval of this project by the CDM Executive Board in the face of the human rights issues such as repressive land grabs without compensation, murder of peasants and land owners and the environmental pollution brought about by the project (to mention but a few), raise fundamental questions on the need for a mechanism through which the CDM Executive Board, DOEs and the respective National Authorities (NA) are empowered to consider the human rights consequences of a project in granting or withholding project approval and secondly to screen out projects which violate human rights. Approving such projects diminishes the gains that have been made under international human rights law, they also make it difficult for such projects to lead to real and demonstrable sustainable development.

2.2 The Kwale Project in Nigeria

Nigeria's Kwale project provides another illustration of how emission reduction projects could result in human rights violations.[179] In 2006, Nigeria approved the Kwale gas flaring reduction

---

<http://www.caoombudsman.org/documents/CAOcommuniqueDinant_February2013.pdf> accessed 20 March, 2013.

[177] See UNFCCC, Lists of Registered CDM projects (2011) < http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view> accessed 02 August, 2011.

[178] See 'The Response of the CDM Executive Board to the Petition'<http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf > accessed 02 August, 2011.

[179] Nigeria is a party to the Kyoto Protocol having ratified the instrument on 10 December, 2004. Nigeria is thus eligible to host and execute projects under the Clean Development Mechanism. A number of CDM projects are currently registered and ongoing in Nigeria. These include the Kwale Project, Ovade Ogharefe project, the Lafarge Cement Project; and recently the Asuokpu/Umutu Gas Recovery and Marketing Facility. Reducing Emissions from

project under the CDM to reduce greenhouse emissions caused by gas flaring.[180] The main objective of the project is to address the perennial problems of gas flaring in Nigeria through the capture and recovery of associated gas that would otherwise be flared at Kwale Oil-Gas Processing Plant (OGPP).[181] It involves the capture of a substantial chunk of the associated gas previously flared at the Kwale plant, and transportation via a pipeline to the Okpai combined cycle gas turbine power plant to generate electricity.[182] The recovery and utilization of flared gases through this project started in 2006. As at 2010, the total emissions reduction generated by the project was estimated to be above 791,325 tons of CO_2 eq.[183]

The Kwale project promises huge emission reductions and most importantly good prospects of resolving the gas-flaring conundrum that Nigeria has struggled unsuccessfully to combat for over a decade.[184] However, the many human rights petitions and protests that have trailed its approval

---

Deforestation and Degradation (REDD) projects are also currently being executed in Nigeria by Shell. All these projects have been subjects of protests and condemnation by stakeholders and host communities. See F Allen et al, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in *Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting* (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4. See also N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report*, (Environmental Rights Action/Friends of the Earth May 2011); Carbon Trade Watch, 'Groups slam Nigeria's submission of gas flare reductions for carbon credits' (Amsterdam, 29 March 2006).

[180] One of the main environmental issues in Nigeria is the problem of gas flaring. Nigeria is reputed to flare more natural gas associated with oil extraction than any other country on the planet. Estimates suggest that of the 3.5 billion cubic feet of associated gas produced annually, 2.5 billion cubic feet, or about 70% is wasted via flaring. This equals about 25% of the UK's total natural gas consumption, and is the equivalent to 40% of the entire African continent's gas consumption. See 'Flames of Hell: Gas Flaring in the Niger Delta' <http://www.saction.org/home/saction_image/flames_of_hell.pdf> accessed 12 February, 2011; See also ERA, Facts Sheet: *Harmful Gas Flaring in Nigeria*; Vanguard `Nigeria loses $150 billion to gas flare in 36 yrs', *Vanguard*, (Lagos, July 12 20080 3; See also Environmental Rights Action/Friends of the Earth Nigeria, 'Gas flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (June 2005) <http://www.climatelaw.org/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdfaccaessed> accessed 12 February, 2011.

[181] See UNFCCC, 'Kwale CDM Project Monitoring Report: Recovery of Associated Gas that would otherwise be flared at Kwale Oil-Gas Processing Plant, Nigeria' (2007) UNFCCC/ Document ID: CDM0553- MR01.

[182] ibid 2.

[183] ibid 3-4.

[184] Gas flaring in Nigeria has remained a major contributor to global climate change and a major source of Africa's net contribution to greenhouse gas emission. See ERA, Facts Sheet: *Harmful Gas Flaring in Nigeria*; see also `Nigeria loses $150 billion to gas flare in 36 yrs', *Vanguard*, (Lagos, July 12 2008); Environmental Rights

and registration arguably detract from its 'clean' potential. The approval of this project has generated more negative publicity than positive.[185] First is the absence of a transparent environmental impact assessment on the short and long term impact of the project. Environmental groups in Nigeria have raised concerns about the prospects of a leakage problem in the long term. Considering the nature of the pipeline transportation options available in Nigeria, there is a high possibility of leakage due to low storage capacity formations or low-density seals that could ultimately result in the escape of captured gas. Escape of gas could pose health problems for citizens. Large concentrations of CO_2 in the soil could also lead to acidification, thus harming soil fertility and killing plants. This could cause more problems than good in a country where seventy per cent of the population depend on agriculture and farming for food.[186] The project proponents failed to address these concerns by conducting a transparent environmental impact assessment that could provide comprehensive details on the short and long term impact of the project.[187]

There is also the failure to provide detailed information on the project to the relevant stakeholders and indigenes of Kwale, and the failure to seek and obtain their prior and informed consent in the planning and approval stages of the project. There have been strong indications

---

Action/Friends of the Earth Nigeria, 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (June 2005) <http://www.climatelaw.org/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdfaccaessed> accessed 12 February, 2011.

[185] See F Onojiribholo, 'Kwale Chief Laments Plight of Communities' (*Daily Independent* 16 August 2011); F Allen et al, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4; see also N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report* (Environmental Rights Action/Friends of the Earth May 2011) Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (Amsterdam, 29 March 2006).

[186] See The World Food Programme, *Climate Change and the World's Hungry* <http://www.wfp.org/ENGLISH/?ModuleID=137&Key=2708> accessed 15 January, 2011.

[187] Allegedly, the EIA for this project was conducted as a smokescreen after the project had already been approved by the Nigerian DNA and registered by the CDM EB. See K Adeyemo, 'Nigerians Oppose Climate Development Projects' *The Tribune* (Ibadan, 12 September, 2010) 3.

that stakeholders and indigenes were not carried along or provided project information during the planning, execution and implementation of this project.[188] The lack of information on the project and the lack of participation by citizens and shareholders in the approval process have been the main reasons behind the strong resistance to the project by the local communities in Kwale.[189] According to the Environmental Rights Action Nigeria (ERA):

> …In our view, the acceptance of an associated gas-flaring project in Nigeria as a CDM project cannot be justified. If CDM credits were to be granted in respect of activities that are violations of human rights, this would also bring the CDM process into disrepute… Gas flaring reduction in Nigeria should not qualify for CDM credits as such projects fail on the additionality and sustainable development criteria. Such a project can only expose the flaws in CDM, as a system that pays the polluter and punishes the victims.[190]

Despite the campaigns and protests by ERA and other environmental groups in Nigeria, the Nigerian Government approved the Kwale project as a sustainable CDM project. The United Nations CDM Executive Board has also registered the project.[191] This project demonstrates the danger in entrusting national authorities with the final authority to determine the sustainability of CDM projects, and how the absence of an international review process for approved projects have undermined the enormous sustainable development potentials of many CDM projects. It also underscores the need for a more transparent, accountable and rights-based process for approving and registering CDM projects.

---

[188] D Idowu, 'ERA condemns Nigeria's Kwale CDM Project' *Vanguard* (Lagos, 02 September, 2009).

[189] Environmental Rights Action/Friends of the Earth Nigeria, 'Gas flaring in Nigeria: a Human Rights, Environmental and Economic Monstrosity' (June 2005) <http://www.climatelaw.org/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf> accessed12 February, 2011.

[190] See N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report*, (Environmental Rights Action/Friends of the Earth May 2011); Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010. See also Sanction, Flames of Hell: 'Gas Flaring in the Niger Delta' Social Action <http://www.saction.org/home/saction_image/flames_of_hell.pdf> accessed 12 January 2011.

[191] See UNFCCC; 'Statistics of CDM projects' <http://cdm.unfccc.int/Statistics/index.html> accessed 18 January 2011.

2.3 The Barro Blanco Hydroelectric Power Plant Project in Panama

Debates on the human costs of large hydroelectric power projects and whether there are truly cleaner sources of energy have been on for a while. For example, the environmental and human rights impacts of the Changuinola (Chan 75) hydroelectric dam project in Panama have been extensively analysed and debated.[192] Even though it is not a CDM project, the Chan-75 project demostrates how the execution of a project designed to reduce GHG emissions, cut down the high cost of energy in Panama, generate cleaner energy and to foster a reduced dependence on fossil fuels could produce negative human rights impacts.[193] Perhaps the most significant interference of hydroelectric projects with human rights is the massive resettlement of people from ancestral lands and homes.

Efforts to register hydroelectric power plant projects as CDM projects have only intensified these debates.[194] A good example is the Barro Blanco hydroelectric power plant project in Panama that

[192] B Mayer, 'Judicial Review of Human Rights Impacts of Hydroelectric Projects' (Center for International Sustainable Development Law 2012); P Fearnside, 'Greenhouse Gas Emissions from Hydroelectric Dams: Controversies Provide a Springboard for Rethinking a Supposedly "clean" Energy Source' (2004) *Climatic Change* 66 (1-2), 1-8; S Aird, 'China' s Three Gorges: The Impact of Dam Construction on Emerging Human Rights' (2001) 8(2) Hum. Rts. Brief 24; B Wehrli, 'Climate Science: Renewable but not Carbon-Free' (2011) Nature Geoscience ; K Hoshour & J Kalafut, *A Growing Global Crisis: Development-Induced Displacement and Resettlement* (International Accountability Project Issue Paper 2010). For example, the United Nations Special Rapporteur on human rights and indigenous people has criticized the project stating that 'a significant impact on the indigenous communities in the surrounding area' and concluded that none of the communities were adequately consulted nor had the opportunity to give their consent in relation to relocation. See *Chan-75 dam*, 2009 *Report of the Special Rapporteur on the Situation of Human Rights and fundamental freedoms of indigenous peoples* (A/HRC/12/34/Add.5). See also UN Criticizes displacements of Panama Dam Tribe, *Terra Daily* (2008) <http://www.terradaily.com/reports/UN_criticises_displacement_of_Panama_dam_tribe_999.> accessed 12 December 2011.

[193] See *Chan-75 dam*, 2009 *Report of the Special Rapporteur on the Situation of Human Rights and fundamental freedoms of indigenous peoples* (A/HRC/12/34/Add.5). See also UN Criticizes displacements of Panama Dam Tribe, *Terra Daily* (2008) <http://www.terradaily.com/reports/UN_criticises_displacement_of_Panama_dam_tribe_999.> accessed 12 December 2011; 'Petition, Human Rights violations by the Government of Panama against the Ngöbe indigenous communities and individuals in the Changuinola River Valley, Bocas del Toro, Panama' (28 Mar. 2008) 5.

[194] See the Michaelowa and Lazarus Debate, in A Michaelowa and R Lazarus, 'Arguing the Point: Should Large-Scale Power Projects Have a Future under the CDM?' (2013) Carbon Mechanisms Review 14-15 (Michaelowa

was registered as a CDM project on 26th January 2011.[195] The Barro Blanco project has been criticised as violating several human rights of the Ngöbe indigenous people of Panama.[196] The Baro Blanco project is a 28.84 MW hydroelectric power project in the district of Tole, within the Chiriqui province in Panama. The project was designed to reduce the high cost of energy in Panama, to generate cleaner energy and to foster a reduced dependence on fossil fuels in power generation in Panama.[197] The project is developed by Generadora del Istmo S. A. (GENISA), and financed by the German Investment Corporation (DEG), the Netherlands Development Finance

---

insists 'Do not throw out the child with the bathwater!' while Lazarus argues that 'maybe this kid has become too big for the bathtub!).

[195] International Rivers, 'Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project' (Feb. 9, 2011); Carbon Market Watch, 'Baro Blanco Hydropower Project in Panama Violates CDM Rules' (2011) <http://carbonmarketwatch.org/barro-blanco-hydropower-project-in-panama-violates-cdm-rules-newsletter-12/> acessed 12 March 2013; see also Agence France-Presse, 'Protests over planned dam turn violent in Panama' (March 9, 2013); Intercontinental Cry, Nagare Barro Blanco, Mar. 17, 2013; Intercontinental Cry, 'Panama: Police Brutality signals impending storm over Barro Blanco hydroelectric project' (March 21, 2013); C. Patrick Morris, 'Hydroelectric Development and the Human Rights of Indigenous People' in Paul A. Olson, ed., *The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World* (University of Nebraska - Lincoln, Center for Great Plains Studies, 1990) 193. D Cullenward & D Victor, 'An Editorial Comment: The Dam Debate and its Discontents' (2006) 75 Climatic Change 81; Ivan B. T. Lima et al., 'Methane Emissions from Large Dams as Renewable Energy Resources: A Developing Nation Perspective' (2006) 13:2 Mitigation and Adaptation Strategies for Global Change 193; L Liu, H Chen, X Yuan, Z Chen and Y Wu, 'Unexpected CH4 Emission from the Three Gorges Reservoir and its Implications' (2011) 31:5 Acta Ecologica Sinica 233;)

[196] The Ngöbe, numbering about 170,000 people, are the largest indigenous group in Panama with a vast majority still living in their traditional lands in Western Panama. See International Rivers, 'Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project' (Feb. 9 2011)' < http://www.internationalrivers.org/resources/letter-to-the-cdm-executive-board-regarding-the-barro-blanco-hydroelectric-project-3078> accessed 01 April 2013; see also Petition, 'Human Rights violations by the Government of Panama against the Ngöbe indigenous communities and individuals in the Changuinola River Valley, Bocas del Toro, Panama' (28 Mar. 2008) 32-33.

[197] The project is one of the concession projects designed by the Government of Panama to increase the country's energy capacity by 15% and energy production by 18%. The Baro Blanco project aims to increase the country's installed energy generation capacity by approximately 2.35%; increase the presence of energy generated with autochthonous natural resources, as compared to the generation of energy with hydrocarbons; protect the national energy market from the rising cost of hydrocarbons in the international markets; reduce or mitigate the CO_2 emissions derived from the generation of electricity with hydrocarbons in the medium and long-term, thus contributing to the sustainable development of the region and the country.See See 'The CDM Project Design Document: Barro Blanco Hydroelectric Power Plant Project' (27 April 2010) <https://cdm.unfccc.int/filestorage/B/O/L/BOLWGNA7FS4YKM23JCHPQ695ZIU8ET/Barro%20Blanco%20PDD%20v3.08?t=Rmt8bWtsYzZnfDD39eq-NE9PUI8ll0bveLu5> accessed 01 April 2013.

Company (FMO), and the Central American Bank for Economic Integration (CBIE). Total funding from the three banks amounts to USD 78.3 million.[198]

Despite its clean energy prospects, this project has been massively criticized internationally and by the people of Panama.[199] According to a submission filed on March 25, 2013 with the CDM Executive Board, some of the human rights violations experienced by the indigenous people include arbitrary displacements from homes and farms, loss of housing and destruction of crops, as well as the excessive use of force and detention of opponents of the project. It is projected that the project will displace residents of four Ngöbe villages – Culantro, Cascabel, Mununi, Piedra Roja, and Rio Luis – that are home to approximately 1,005 people. Another 4,000 Ngöbe living in neighbouring villages, will also be negatively affected because the dam will destroy their transportation routes, harm their agricultural plots, cut off their access to their farmlands, or open up their territories to non-Ngöbe settlers.[200]

The environmental side effects of the project have also been highlighted. Already, the project has reportedly led to excessive flooding, death of plants and a rapid destruction of the vegetation of one of the world's most notable diversity hotspots.[201] Over 25,000 people have been forced to

[198] See 'The CDM Project Design Form: Barro Blanco Hydroelectric Power Plant Project' (27 April 2010) UNFCCC, <https://cdm.unfccc.int/Projects/DB/AENOR1261468057.59/view> accessed 01 April 2013.
[199] International Rivers, 'Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project' (Feb. 9, 2011) <http://www.internationalrivers.org/resources/letter-to-the-cdm-executive-board-regarding-the-barro-blanco-hydroelectric-project-3078> accessed 02 March 2013.
[200] See 'Submission Regarding Human Rights to the CDM' (March 25 2013) <http://www.internationalrivers.org/resources/submission-regarding-human-rights-to-the-cdm-7899> accessed 28 March 2013; see also Petition, 'Human Rights violations by the Government of Panama against the Ngöbe indigenous communities and individuals in the Changuinola River Valley, Bocas del Toro, Panama' (28 Mar. 2008) 5.
[201] See 'Submission Regarding Human Rights to the CDM' (March 25 2013) ibid.

abandon their farmlands, the majority of them being indigenous peoples.[202] Flooding is also expected to kill and decrease wildlife in the affected areas.[203]

Scientific experts have also determined that there is a high risk of losing the endangered *Tabasará* rain frog species and the *diadromous* – a rare migratory river fish species in Panama – because the dam will destroy their migration routes. Some of these species, such as the *Joturos Pitchardi,* locally called 'bocachica', are a central source of protein in the Ngöbe diet.[204] The project is expected to prevent them from moving up the river to their spawning grounds, thereby killing them. The high emission of methane by the project could also pose a great threat to the fish thus aiding their extinction.[205]

There have also been massive human rights repressions, assaults, arbitrary detention, public humiliation, threats and illegal destruction of crops and homes at the hands of the Panama police and the project executors-Generadora del Istmo, S.A. (GENISA). According to the Petition, about fifty-four protesters have been arrested including 13 minors (two of whom were infants.) The police allegedly killed several peasants, broke the nose of a nine-year-old and injured the

[202] Amnesty International, 'Panama Dam Flooding threatens Indigenous Families' (26 May 2011) <http://www.unhcr.org/refworld/docid/4ddf3cd32.html>accessed 12 December 2011; ShelterBox, 'Desperate Need in Flood-hit Panama' <http://www.shelterbox.org/news.php?id=564> accessed 12 December 2011.

[203] J Stein, 'Resistance to Dam Nation: An Analysis of the Stance and Strategies of the Opposition Movement to the Chan-75 Hydroelectric Project in Bocas del Toro, Panama' (Wesleyan University 2008).

[204] Petition on the Human rights Violations by the Government of Panama directed against Ngöbe Indigenous Communities and Individuals in the Changuinola River Valley, Bocas del Toro.

[205] Estimate show that hydroelectric power plants such as the Chan-75 and the Baro Blanco plant emit 104 million metric tonnes of methane annually from reservoir surfaces, turbines, spillways and rivers downstream. The direct effect of vegetation, plants and soil flooded by reservoirs and hydroelectric dams is that when such plants rot they produce methane. When methane is released back into the river, it increases water toxicity and threatens the survival of fish and other aquatic animals and plants. Building materials used during dam construction are also an important cause of methane emissions into dams. See I Lima, F Ramos, L Bambace and R Rosa, 'Methane Emissions from Large Dams as Renewable Energy Resources: A Developing Nation Perspective (2008) Mitig. Adapt. Strat. Glob. Change 13:193–206.

arm of a twelve-year-old during an anti-Barro Blanco protest.[206] It is also alleged that as the project nears completion, the Panama government has increased military presence in the area in response to farmers and indigenous peoples protests against the project.[207]

Human rights groups have also highlighted the lack of a participatory process or a prior informed consent of the traditional people by the Government or the project proponents. According to the different human rights submissions and petitions on the project, project proponents forcefully acquired family lands without consulting with the representatives of the community.[208] The Project Design Documents (PDDs) that were submitted for the project also failed to document the impacts of the Barro Blanco reservoir on the Bakama area of the Ngobe-Bugle community.

Despite these concerns, the accredited DOE for this project-the Asociación Española de Normalización y Certificación (AENOR) issued a validation report that recommended the approval and registration of the project. The project was subsequently registered by the CDB EB and its construction is currently nearing completion. The absence of a participatory process through which some of the issues of displacements, relocation and compensation could have been discussed and agreed upon further highlights the lack of transparency and accountability in the planning and execution of this project. Not only does it diminish the emission reduction gains of the project, it casts doubts on the credibility of the Panama government and on the sincerity of

[206] See 'Panama: Police Brutality Signals Impending Storm over Barro Blanco Hydroelectric Project' (March 21 2013) <http://intercontinentalcry.org/panama-police-brutality-signals-impending-storm-over-barro-blanco-hydroelectric-project/> accessed April 01 2013.
[207] See 'Submission Regarding Human Rights to the CDM' (March 25 2013) <http://www.internationalrivers.org/resources/submission-regarding-human-rights-to-the-cdm-7899> accessed 28 March 2013; see also Petition, 'Human Rights violations by the Government of Panama against the Ngöbe indigenous communities and individuals in the Changuinola River Valley, Bocas del Toro, Panama' (28 Mar. 2008) 5.
[208] See 'Submission Regarding Human Rights to the CDM' (March 25 2013), ibid.

the project proponents.[209] Addressing these issues within the framework of the fundamental human rights of the Ngobe people could have perhaps avoided some of the criticisms, protests and petitions that have trailed the project. The manner of approval and execution for this project and the attendant negative publicity it has generated further underscore the importance of integrating human rights considerations into the planning and implementation of climate change projects.[210]

2.4 REDD+ Projects

Scientific studies show that deforestation and forest degradation, through agricultural expansion, conversion to pastureland, infrastructure development, destructive logging and fires, account for nearly 20 per cent of global greenhouse gas emissions, more than the entire global transportation sector and second only to the energy sector.[211] The United Nations therefore recommends actions aimed at Reducing Emissions from Deforestation and Forest Degradation, sustainable management of forests and conservation, and enhancement of forest carbon stocks (REDD+). REDD+ is a financial mechanism that compensates countries for the prevention of deforestation and forest degradation that would otherwise occur. The REDD+ concept is predicated on the need to reduce emissions from the forest sectors occasioned by deforestation and forest degradation.[212] REDD+ allows industrialized countries to gain credits by engaging in forest conservation efforts and efforts that protect trees from being cut down. Currently only a portion

[209] 'Role Of The United Nations Questioned - Barro Blanco Hydro Electric Project' (May 12 2012) <http://www.panama-guide.com/article.php/20120531154806624> accessed 12 March 2013.
[210] See CDM Policy Dialogue, 'Climate Change, Carbon Markets and the CDM: A Call to Action, Report of the High-Level Panel on the CDM Policy Dialogue', Sept. 2012, p. 56.
[211] See A Angelsen *et al*, *Reducing Emissions from Deforestation and Forest Degradation: An Options Assessment Report* (Meridien Institute 2009) 3-4.
[212] ibid. See also B Strassburg, A Kelly, A Balmford, R. Davies, *et al* 'Global Congruence of Carbon Storage and Biodiversity in Terrestrial Ecosystems' (2009) 3 Conservation Letters.

of REDD+ activities are included in the CDM, namely afforestation and reforestation (A/R). Therefore, there have been increased calls for all REDD+ projects to be included as part of the CDM in post-2012 regimes.[213]

The Bali Action Plan (BAP) identified REDD+ as a prominent potential emission mitigation strategy.[214] Some estimates suggest that REDD+ projects have a potential of producing emission reductions of up to 7.8 billion tonnes per year.[215] BAP calls for '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'[216] Further UNFCCC decisions have reaffirmed the crucial role of REDD+ and have called for more consideration on the necessary methodologies to enable its expansion beyond a project-based approach to possibly include sectoral approaches.[217] REDD+ was again recognized in the Copenhagen Accord in 2009, as having a 'crucial role' in global mitigation efforts.[218] A more detailed REDD+ decision

[213] R O'Sullivan *et al*, 'Should REDD+ be Included in the CDM? Analysis of Issues and Options (June 2012) A Policy Paper Prepared for the CDM Policy Dialogue <http://www.cdmpolicydialogue.org/research/1030_Redd.pdf> accessed 01 April 2013.

[214] At the United Nations Climate Change Conference held in 2007 in Bali, Indonesia, the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP13) adopted the Bali Road Map that included the Bali Action Plan (BAP). See UNFCCC Decision 1/CP.13.

[215] A Angelsen *et al*, *Reducing Emissions from Deforestation and Forest Degradation: An Options Assessment Report* (Meridien Institute 2009) 3-4.

[216] UNFCCC Decisions 2-4/CP.13, Decision 2/CP.13 was dedicated to REDD.

[217] Currently under the CDM, only afforestation and reforestation activities of REDD+ are included due to initial environmental and market concerns with other activities in the full scope of REDD+. However, Parties to the Kyoto Protocol are currently considering expanding the scope of eligible land use activities beyond afforestation/reforestation. The CDM EB is expected to clarify several technical and governance issues such as additionality, baselines, leakage, non-permanence, monitoring and also land use and human rights concerns to ensure the integrity of REDD+ emission reductions. See Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention; which affirmed that the implementation of REDD-plus activities should include the promotion and support of a number of safeguards, including consistency with the objectives of national forest programmes and relevant international conventions and agreements.

[218] Decision 2/CP.15. Copenhagen Accord. Paragraph 6.

was agreed in Cancun.[219] Paragraph 70 provides that when undertaking REDD+ projects, the following safeguards should be promoted and supported:

> …Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples; (The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities, in actions referred to in paragraphs 70 and 72 of this decision.

A number of developing countries have demonstrated the willingness to execute REDD+ projects by granting multinationals the permission to execute them across their countries, Nigeria is one good example.[220] The UN has recognised Nigeria as a UN-REDD partner country.[221] Nigeria's first REDD project is financed by Shell Canada and Gazprom.[222] If implemented with robust human rights and environmental safeguards, REDD+ activities can increase investment in Nigeria, improve forest governance, and help to protect important ecosystems that are critical to the livelihoods of many of the country's poorest communities.[223] With fewer opportunities for CDM investments in other sectors, Nigeria could in fact become a major player in the REDD+ market.

However, REDD+ has had a very rough start in Nigeria. The mere mention of Shell as a sponsor of REDD+ projects in Nigeria triggered widespread unrests and demonstrations across Nigeria.

---

[219] See Section 6, Decision 1/CP.16. Policy approaches and positive incentives on issues relating to reduction emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest crbon stocks in developing countries.

[220] S Ogidan, 'Nigeria to Earn N 34.44 Billion yearly in Tree Planting' *Nigerian Compass* (Lagos, 14 February, 2011).

[221] T Hassan, 'Nigeria to become Full Member of REDD' <http://allafrica.com/stories/201010280686.html> accessed 12 January, 2011.

[222] D Forgarty, 'Shell Bankrolls REDD Project in Nigeria' <http://climatevoices.wordpress.com/2010/09/07/shell-bankrolls-redd/> accessed 13 January, 2011.

[223] I Mustalahti, A Bolin , E Boyd and J Paavola, 'Can REDD+ Reconcile Local Priorities and Needs with Global Mitigation Benefits? Lessons from Angai Forest, Tanzania' (2012) 17(1) Ecology and Society 16; see also N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) (1)(2) Journal of Human Rights and the Environment 211 at 215-219.

This is due to the perception of Shell as a major contributor to the many environmental problems of Nigeria's Niger Delta. There is a general perception of current REDD+ efforts by Shell as potentially an attempt at the 'largest land grab of all time'.[224] As Nigeria's main environmental group argued:

> We have suffered Shell's destruction of communities and biodiversity as well as oil spills and illegal gas flaring for decades. Now we can add financing REDD for green wash and profits to the long list of Shell's atrocities…Yes, that's the same Shell Canada that is mining tar sands. It's the same Shell that continues to flare gas in Nigeria, with devastating impacts on local communities and the climate. It's the same Shell that was the first western company to get its hands on Iraq's gas reserves since the 1970s, after secret negotiations with the Iraqi government…And it's the same Shell that is coming to Nigeria with REDD- another attempt to grab our lands…[225]

Similarly, the Indigenous Environmental Network, has argued that:

> Shell already committed genocide against the Ogoni People of the Niger Delta. REDD allows Shell and other polluting corporations to expand fossil fuel extraction and continue destroying the climate and violating Indigenous Peoples' rights worldwide…Shell is compounding its devastating impacts on mother earth and Indigenous Peoples by financing REDD which may result in the largest land may grab of all time and more genocide against Indigenous Peoples…Most of the forests of the world are found in Indigenous Peoples' land. REDD-type projects have already resulted in land grabs, violations of human rights, threats to cultural survival, militarization, scams and servitude.[226]

There is evidence to support claims that the process that led to the approval of Shell Canada for REDD+ projects in Nigeria was not sufficiently participatory. Not only did it not carry along relevant stakeholders, it was the decision of the Nigerian authorities alone, without the consent and approval of the indigenous communities who own the lands and trees in question. The people of Cross River State, whose ancestral lands are targeted for the REDD+ project allegedly

[224] It has been described as 'perverse incentives' to convert Nigeria's natural forests into monoculture tree plantations and to actually increase deforestation. See 'REDD under fire in Nigeria' (2011) <http://uk.oneworld.net/article/view/165950/1/246> accessed 13 January, 2012.
[225] ibid.
[226] C Lang, 'Shell Project Slammed in Nigeria' (September 2010) <http://www.redd-monitor.org/2010/09/08/indigenous-environmental-network-and-friends-of-the-earth-nigeria-denounce-shell-redd-project/> accessed 19 January, 2012.

woke up to hear of it in the news.[227] What followed was immediate protest. As the official spokesperson of the indigenous community noted:

> Forests in Cross Rivers State – some of the few remaining tracks of mangrove and rainforest reserve in the world targeted for REDD are in grave danger due to the scheme, hence the need for participants to uncover any cover-ups by government which is detrimental to community forests and the environment. To us, carbon trading/market mechanism promoted by the REDD are false solutions to climate change; REDD promotes deforestation, more plantation and corporate land grabs.[228]

The absence of the participation of the indigenous communities in the REDD process is further highlighted:

> …The Nigerian Government should actively engage forest community dwellers; civil society groups in the ongoing REDD negotiation process and adopt Community forest management practices as one of the concrete solutions to climate change…Government should conduct Environmental Impact Assessment (EIA) on REDD in targeted forest communities. Allowing rich countries to keep polluting in the North otherwise known as annex 1 countries and coming to the south addressed as third world countries to cultivate plantations for rubber, palm oil, agro fuels, and palm oil is not the answer to climate change. This is unacceptable. They owe us an ecological debt as a result of the inequitable use of global commons and disproportionate contribution to emissions that have resulted in climate change. Forest is not for sale! It is our life and source of livelihoods for millions of forest-dependent peoples in forest-bearing communities in Africa. World Bank, IMF, UNEP and other multilateral institutions should hands off our forests.[229]

For projects that could alter the lifestyles and existence of inhabitants of these areas who depend on these forests for peasant farming and for food, lack of information and participation has led to a misunderstanding of the mitigation prospects of REDD+. Instead, as noted above, peasants and community members most of whom are uneducated understandably construe it as an attempt to

---

[227] See 'REDD under fire in Nigeria' (September 2010) <http://uk.oneworld.net/article/view/165950/1/246> accessed 13 January, 2012.

[228] See C Lang, 'Shell Project Slammed in Nigeria' (September 2010) <http://www.redd-monitor.org/2010/09/08/indigenous-environmental-network-and-friends-of-the-earth-nigeria-denounce-shell-redd-project/> accessed 19 January, 2012.

[229] ibid

forcefully grab their lands, subject them to servitude and destroy their means of existence. A transparent, informative and participatory approach could have arguably addressed these concerns.

Equally problematic is the absence of a framework for compensation or providing alternatives for the indigenous people of these areas who depend on the forests for their lives. While REDD+ projects would contribute to climate change mitigation, taking a large proportion of land from the indigenous communities by brute force without providing compensation or settlement options is a major human rights concern. As the indigenous group argued:

> Nigeria's forest dependent poor may be forcefully evicted from their land and denied access to the forests that form basis of their culture and livelihoods by the REDD. Forest-dependent communities that have been the original custodian of native forests have not been engaged or incorporated by government in the REDD negotiation process.[230]

Another important concern is the absence of an Environmental Impact Assessment on the impacts of REDD+ projects on the inhabitants of these areas. As the ERA noted:

> Government should conduct Environmental Impact Assessment (EIA) on REDD in targeted forest communities. Governments should engage civil society groups and forest community people in the entire REDD process. Awareness should be raised at all levels on the implications of REDD. Awareness on REDD is very low at all levels of engagement in Nigeria as there are obvious capacity gaps among government negotiators on the REDD debate. REDD attraction for the Nigerian government is the huge fund involved not the devastating environmental and socio-cultural implications.[231]

The concerns of the absence of an EIA, lack of participation and inclusion and the lack of remedies for victims raise genuine concerns on the potentials of REDD+ to contribute to sustainable development in developing countries. If REDD+ are to be included as part of the

[230] A Sampson, 'Don't Sell Forests: Group urge Nigerian Government'. <http://www.scoop.co.nz/stories/WO1008/S00467/dont-sell-forests-groups-urge-nigerian-govts.htm> accessed 18 January, 2011.
[231] ibid

CDM, there is a need for robust participatory framework that would allow citizens to take part in and influence decision making on projects.[232] There is a need to consider supplementing the current method of certification by national governments (the DNA) with additional prerequisites or minimum criteria for participation at the level of the CDM EB, which will require host countries to demonstrate that appropriate human rights thresholds have been met.

3. Human Rights Critiques: A Summary

The above examples demonstrate how climate change responses and projects are producing human rights consequences. Projects aimed at mitigating climate change have focused more on the emission reduction prospects and economic benefits, neglecting the human rights consequences on host communities. This threatens the respect and protection of several human rights under international law. It is important that the emission reduction goals of mitigation projects are harmonized and balanced with the respect and protection of fundamental human rights, most especially the right to development (RTD).[233] In this section, I provide a summary of some of the major human rights violations brought about by these projects.

---

[232] See Y Katerere, 'REDD+ Lessons for Sustainable Development. Climate Change: the New Economy' (2012); L Crippa and Gordon G., 'International Law Principles for REDD+: The Rights of Indigenous Peoples and the Legal Obligations Of REDD+ Actors', (Indian Law Resource Centre, May, 2012); E Fenton E. (ed), 'Realising rights, protecting forests: An Alternative Vision for Reducing Deforestation Case studies from the Accra Caucus' June 2010; R Lyster, 'REDD+, Transparency, Participation and Resource Rights: The Role of Law' (2010) 14 Environmental Science and Policy.

[233] Even though scholars have questioned the status of the RTD under international law, it remains an important reference point on the need to frame development within the context of respect and fulfilment of human rights. The right to development emphasises the need to balance development with the respect and protection of human rights. The pursuit of development goals cannot justify the violation of human rights. In this thesis, we will not go into the debates on the status of the RTD, instead we align with the view that the RTD as promoted in many UN Declarations and resolutions is crucial for mainstreaming human rights principles into international climate change regimes. The UN has promoted the need for all its agencies to balance development goals with the respect and protection of fundamental human rights. The extent to which the UNFCCC as a part of the UN system has identified and recognized human rights principles within the context of climate change actions and projects however remains obscured. The *UN Declaration on the Right to Development* emphasizes that failure to observe human rights in development processes constitutes an obstacle to development. It stresses that development process should be respectful of all human rights and fundamental freedoms, and should help the realisation of rights. An aspect of the RTD is the right of individuals to participate in decision-making processes. The RTD also encourages States to treat development as a comprehensive process; the attainment of one goal should not be at the expense of the other.

3.1 Forced displacements and the right to property

One of the most repressive aspects of many mitigation projects is the arbitrary displacement of people from their ancestral lands and homes without compensation. Apart from displacements and land grabs, the right to property is also often affected in hydroelectric power projects such as the Chan-75 and the Barro Blanco projects in Panama where water allegedly escaped from reservoirs, flooding the homes of citizens in the project areas. This affects the rights of individuals to exclusively own and enjoy their properties.

The right to exclusively own and possess property is guaranteed under international law. It is one of those rights recognised in John Locke's human rights tripod of 'life, liberty and possessions'.[234] Though not recognised in the ICCPR and the ICESCR, it is recognized in a number of other core international human rights instruments. For example, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that everyone has the 'right to own property alone as well as in association with others' and 'the right to inherit'.[235] Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also establishes rights to ownership, acquisition, management, administration, enjoyment and disposition of property for both men and women. Mention should also be made of Article 17 of the Universal Declaration of Human Rights (UDHR), which recognises the right of individuals to the exclusive possession and use of

Within the African context for example, the right to development is recognized in Article 22 of the 1981 African Charter on Human and Peoples' Rights as a definitive individual and collective human right. Article 22(1) provides that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

[234] J Locke, *Two Treatises of Government* (1690) <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> accessed 21 January 2012.

[235] UNGA Resolution 61/295.

property.[236] Though not legally binding, the United Nations Declaration on the Rights of Indigenous Peoples also stipulates that states shall, *inter alia*, provide effective mechanisms for prevention of, and redress for any action, which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources.[237] The right to property is also recognized in regional human rights instruments such as the American Convention on Human Rights,[238] the African Charter on Human and Peoples Rights,[239] and in Protocol No. 1 to the European Convention on Human Rights.[240]

The right to property is not absolute; States have a wide degree of discretion and a 'margin of appreciation' to restrict the right of individuals to the use of their property for public interest. Abuses of such discretionary powers by autocratic governments are commonplace in less democratic countries.[241] For example in Nigeria, the Land Use Act vests the absolute ownership, management and control of land in each state of the federation in the Governor, who is to hold

[236] Though not binding, the UDHR is recognized as a foundation of many human rights under international law. It provides that 'Everyone has the right to own property alone as well as in association with others'. Under s.17 (2) No one shall be arbitrarily deprived of his property. See UDHR, adopted 10 Dec.1948, G.A Res.217A9 (III), 3 UN GAOR, UN Doc. A/810 at 71 (1948).

[237] United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295, adopted 2 October 2007. See also J Ruggie, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Document A/HRC/17/31 (21 March 2011) paras 8-12.

[238] Article 21 provides that 'Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society'. While Art. 21(2) provides that 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest…' See American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 36.

[239] Article 14 provides that 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. Charter on Human and Peoples Right, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U Doc. CAB/LEG/67/3 Rev. 5.

[240] Article 1 provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

[241] See K Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 Human Rights Quarterly 70, the author discusses some of the practical challenges facing human rights in developing countries, he cited examples of a government that arbitrarily refuses to apply available resources for the benefit of its population's health.

the land in trust and administer it for the benefit of all Nigerians.[242] Section 28 of the Act further provides that land may be appropriated for 'overriding public interests'. This includes 'the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith'.[243] This provision has been at the heart of many arbitrary land deprivation cases in Nigeria, for example in the Kwale case and in REDD+ projects in Cross River state where lands were forcefully taken from citizens without compensation. There have also been instances where lands are taken for reasons that do not apparently fall under overriding public interest category.[244]

In the absence of a defined right to property in the ICCPR, the Human Rights Committee has only admitted or commented on petitions on the violation of the right to property where it relates to the violation of any of the rights recognized in other core international human rights instruments, for example non-discrimination under CEDAW.[245] However, the European Court has held in a number of cases that even though States have a wide degree of discretion and a 'margin of appreciation' to restrict the right of individuals, they are to provide just compensation whenever deprivation of property occur.[246] The African Court on Human Rights also provided the same ruling in the case of *SERAC v Nigeria* where it upheld that the forceful acquisition of the land belonging to the Ogoni people of Nigeria without compensation was in violation of

[242] *Land Use Act of 1979*, Laws of the Federation of Nigeria 2004, c L5, s 1.
[243] For an excellent and detailed criticism of this section and the Land Use Act in general, see R Ako, 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice' (2009) 53(2) Journal of African Law 289-304.
[244] ibid.
[245] See for example *Adam, Blazek and Marik v. The Czech Republic; Oló Bahamonde v. Equatorial Guinea*; *Ackla v. Togo and Diergaardt of Rehoboth Baster Community et al. v. Namibia*.
[246] See *Sporrong and Lonnrith v Sweden* Series A52 (1982); See also *Marckx v Belgium* Case No 00006833/74, (13/06/1979).*; Jacobson V Sweden* Series A 163; *Hentrich v. France,* A 296-A (1994); *Holy Monasteries v. Greece,*A 301-A (1994); *Pressos Compania Naviera SAv. Belgium* A332 (1995); *Aka v. Turkey* 1998-VI (1998); *Papachelas v. Greece* (25 March 1999); *Brumarescu v. Romania* (28 October 1999); *Immobiliare Saffi v. Italy* (28 October 1999); *Spacek v. the Czech Republic* (9 November 1999); *Beyeler v. Italy* (5 January 2000); *Chassagnou v. France* (29 April 2000); *Carbonara and Ventura v. Italy* (30 May 2000); *Former King of Greece and Others v. Greece* (23 November 2000).

Article 14 of the African Charter on Human and Peoples Right.[247] The African court provided the same ruling in the *Malawi African Association case,* where the Commission found that the confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses constituted a violation of the right to property.[248]

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Inter American Court addressed some of the difficulties faced by individuals who have never been given formal tittle to their lands and are therefore unable to enforce their property rights, by recognizing the principle of communal land ownership. The court found that the right to property imposes positive obligations on states to delimit, demarcate and provide formal titles to lands and that failure to register ancestral land cannot justify a denial of the right to property. The court held that the Government of Nicaragua had violated the rights of the Awas Tigni people to their property by granting concessions to a foreign company to log on traditional lands without consulting the Awas Tignis and without getting their consent.[249] It found that the protection of right to property extends to the rights of members of the indigenous communities within the framework of communal property. This principle is further illustrated in *Yakye Axa Indigenous Community v. Paraguay*.[250] These cases suggest that justifications for arbitrary deprivation of property rights, particularly non-payment of compensation are very unlikely to be accepted as parts of the margins of appreciation before an international forum.[251]

---

[247] (2001) AHRLR 60 (ACHPR 2001). Communication 155/96.

[248] *Malawi African Association Amnesty International,* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000); *Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania, Communications 54/91, 61/91, 98/93, 164/97 -196/97 and 210/98.*

[249] (2001) 79 (c) Int. Am. Ct. H.R.

[250] Judgment of June 17, 2005. (Merits, Reparations and Costs).

[251] See also Art 21(2) of the American Convention on Human rights`No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to

Despite these rulings however, the extent to which property rights are protected in host countries especially the less democratic countries remain doubtful. Even though many climate change projects are arguably public interest projects, whenever such projects could displace individuals from homes, governments in many developing countries, for example in Nigeria have not done much to provide minimum procedural guarantees to ensure the active participation of individuals in such decisions and to ensure just compensation is provided for them. This weak enforcement of the right to property at the national level raises the need for increased protection and enforcement at the international level particularly prior to the approval and registration of such projects by the CDM EB. For example, the question whether CDM project proponents in Panama could use certified emission reductions (CERs) to compensate victims of land grabs as proposed by the project proponents in the Barro Blanco project, has been put before the Inter American Human Rights Commission. Even if the Commission answers this in the affirmative, it does not prevent or address the causes and sources of these land grabs and the other human rights questions linked to the project.[252]

This underscores the need for international climate change regimes to lay down clear criteria on how projects could prevent such arbitrary displacements and on the need for adequate compensation where a project inevitably infringes on property rights. There is a need for a mandatory requirement that host countries would have to demonstrate that project sites and lands have not been arbitrarily acquired, and that compensation has been paid to individuals and communities whose lands are affected as part of a project plan whenever such is inevitable. This

---

the forms established by law. See American Convention on Human Rights (pact of San Jose) signed 22 Nov. 1969, entered into force 18 July, 1978, 1144 UNTS 123, OASTS 36, OASTS 3.

[252] CDM Watch, 'Massive Protests against Barro Blanco Hydropower Project in Panama' (2011) <http://carbonmarketwatch.org/wp-content/uploads/2011/04/cdm_watch_newsletter_2_april_2011.pdf> accessed 12 March 2013.

will go beyond mere ticking of a box in the Project Design Document, instead mechanisms must be put in place to verify such claims before projects are approved and registered. This will emphasise the need for states to take human rights seriously in the design and execution of climate change mitigation projects and activities.

3.2 Loss of benefits of culture and tradition

The displacements of people from their homes are intricately intertwined with the loss of some important aspects of their traditional lifestyles and culture. For example, the people of Cross River State in Nigeria are known to be peasant farmers that depend on subsistence farming for food and as part of their cultural life. Their massive displacements due to REDD+ projects have resulted in the loss of these elements of their culture.[253] Similarly, studies show that wind turbine projects in Panama could kill off migratory birds thereby threatening the rights of indigenous people who depend on them for food and cultural use.[254] The right to religion and culture would also be affected in Panama by hydroelectric projects, which flood the ceremonial sites of the indigenous peoples.[255] Land grabs due to REDD+ projects reduce access to the resources through which indigenous people could enjoy benefits of their culture thereby threatening their cultural rights.

Cultural rights have been recognized in a number of core international human rights instruments. For example, Article 27 of the International Covenant on Economic Social and Cultural Right (ICESCR) provides that persons belonging to minorities have the right to enjoy their own

[253] See N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report* (Environmental Rights Action/Friends of the Earth May 2011) 4.
[254] See World Bank, *Environmental Matters* (World Bank Group 2009).
[255] ibid

culture.[256] Article 27 of the International Covenant on Civil and Political Rights (ICCPR) also provides that 'persons belonging to minorities shall not be denied the right in community with other members of the group to enjoy their own cultures'.[257] Though not one of the core UN human rights treaties, Convention 169 on Indigenous and Tribal Peoples, a legally binding convention that was adopted by the International Labour Organization in 1989, also establishes the right of indigenous peoples to 'exercise control, to the extent possible, over their own economic, social and cultural development'.[258] The Convention requires parties to respect and protect the cultural rights of indigenous peoples that relate to their ways of making a living, language, customs and traditional lifestyles**.** Article 4 of the Convention calls for special measures to be adopted to safeguard the persons, institutions, property, labour, cultures and environment of indigenous peoples. Art. 14 also requires States Parties to identify lands traditionally occupied by indigenous peoples and guarantee their ownership and protection.

In 2007, the U.N. General Assembly recognised the importance of lands to indigenous peoples when it adopted the Declaration on the Rights of Indigenous Peoples. While not legally binding, the Declaration recognises that indigenous peoples have the right to the lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.[259] It also recognises the rights of indigenous peoples to own and develop resources on their land and a right to redress for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged.

[256] International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).
[257] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[258] The Convention has been ratified by 20 countries, including Honduras. The Convention expects countries that have ratified the Convention to 'align legislation, policies and programmes to the Convention'. See <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> accessed 12 March 2013.
[259] See Art. 26(2), 26(3) & 28. United Nations, Declaration on the Rights of Indigenous Peoples.

Regionally, the African Charter on Human and Peoples' Rights and American Declaration of the Rights and Duties of Man also guarantees the right of individuals to take part in the cultural life of their community.[260]

Since the complaint mechanism of the legally binding ICESCR is yet to come into force, there is a dearth of international cases in which the violation of cultural rights have been commented upon.[261] Decisions by the Inter American Commission on Human Rights are however instructive. The right has been interpreted to include the right to maintain close ties with cultural lands. The Inter American Human rights Court held in the *Case of the Mayan Indigenous Communities from the Toledo District, Belize* that certain indigenous peoples maintain special ties with their traditional lands and a close dependence, as such the use and enjoyment of the land and its resources are integral components of the survival of the indigenous communities.[262] Similarly, in *Saramaka People v Suriname* the court held that the use of traditional lands was critical to the cultural structure of the Saramaka Tribe, as such the Government of Suriname violated fundamental human rights law when it denied them these benefits through the forceful

[260] Art. 17 of the African Charter and Article 13 of the American Declaration of the Rights and Duties of Man

[261] This Optional Protocol was adopted by the UN General Assembly on 10 December 2008 and it opened for signature on 24 September 2009. It is expected to enter into force on 05 May 2013 as it has now been ratified by the required 10 parties. Uruguay triggered the coming into force of the Optional Protocol when, on 5 February, 2013 it became the tenth country to ratify, joining Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia and Spain. According to the UN High Commissioner for Human Rights, Navi Pillay, 'The Protocol will provide an important platform to expose abuses linked to poverty, discrimination and neglect, which up until now victims have had to endure without any possible recourse at the international level. It will provide a way for individuals, who may otherwise be isolated and powerless, to make the international community aware of their situation'. See 'Pillay Welcomes Major Breakthrough Enabling Individual Complaints on Economic, Social and Cultural Rights' OHCHR, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12968&LangID=E> accessed 10 February 2013.

[262] Report No. 40/04, Case 12.053, Merits, Mayan Indigenous Communities from the Toledo District, Belize, 12 Oct. 2004.

acquisition of their land.[263] In the *Case of the Indigenous Community Yakye Axa v Paraguay* the court formed the same conclusions.[264]

Based on the understanding that all rights are interdependent and important, there is a need to protect cultural rights in climate change mitigation efforts at the international level, particularly prior to the approval and registration of such projects by the CDM EB. The impacts of emission reduction schemes such as REDD+ on the cultural rights of the people of the Cross River community in Nigeria, particularly the massive dislocations of citizens from their communal and ancestral lands have to be examined and addressed by international climate change regimes. Through robust human rights impact assessments, project proponents can discover how a project can impact the culture of the people and how best to minimize or avoid such impacts. There is a need for a mandatory requirement that compels host countries to demonstrate that a comprehensive human rights impact assessment has been completed and that cultural lands would not be affected before projects are approved and registered. This will emphasise the need for states to take human rights seriously in the planning and design of climate change mitigation projects and activities.

3.3 Loss of subsistence rights

Cultural rights aside, mitigation projects could deny citizens of their rights to earnings from farming especially in rural communities where most of the local food supplies and income are generated from farming. When citizens are ejected from ancestral lands, they lose the ability and right to make their living from subsistence farming and hunting. For example, farmers in Cross

[263] *Saramaka People v Suriname,* Judgment of August 12, 2008 *(Interpretation of the Judgment on Preliminary objections, Merits, Reparations, and Costs).*
[264] (Merits, Reparations and Costs, Judgment of June 17, 2005 Series C No. 125) 96.

Rivers state of Nigeria that are known for subsistence farming and whose only source of income are from selling agricultural produce are facing increased pressure due to their massive dislocations from their farmlands. Same for the Ngobe community in Panama where residents depend on hunting and farming for food. This aside, studies show that REDD+ projects in Cross Rivers State, Nigeria may lead to a lowering of the water table resulting in water shortage and loss of crop yields. [265] These concerns threaten the ability of farmers in these communities to retain their sources of livelihood and subsistence

Access to the resources through which indigenous people could enjoy dietary elements of their culture is a major part of subsistence rights. The right to food is expressly recognized in Article 11 of the ICESCR as part of the right to an adequate standard of living. Though not yet in force, the 2009 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, would make the right to food justiciable at the international level before the Committee on Economic, Social and Cultural Rights.[266] Furthermore, though they do not enjoy any binding legal status under international law, several UN general comments, declarations and resolutions provide significant and influential normative interpretations of subsistence rights to include access to traditional foods.[267] For example, Article 25 of the 1948 Universal Declaration of

[265] This concern has also been raised about the impacts of biofuel projects. Firstly, by contributing significantly to the increase in food prices recent studies show that biofuel production has already contributed to the steep increase in food prices. Secondly, by causing land concentration for plantation-type production, due to considerations of economy of scale, biofuel projects would result in evictions of indigenous groups froim their farmlands. See A Eide, 'The Right to Food and the Impact of Liquid Biofuels' (FAO, 2008)18-20; R Doornbusch and R Steenblik, 'Biofuels: Is the Cure Worse than the Disease?' Background Paper for OECD meeting in Paris 11-12 September 2007. SG/SD/RT (2007) 3.

[266] The 2009 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, though not yet in force would make cultural rights justiciable at the international level before the Committee on Economic, Social and Cultural Rights.

[267] See for example General Comment No. 23: The Rights of Minorities (Art. 27): 04/08/1994. CCPR/C/21/Rev.1/Add.5 which recommends that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include traditional activities such as fishing, or hunting or the right to live in reserves protected by law. The enjoyment of

Human Rights recognises the right to food as part of the right to an adequate standard of living.[268]

Summarily, when a community's food-growing capacity is affected by a mitigation project or when their abilities to secure foods that are traditionally part of their diet is undercut, elements of their culture may also be at risk. A good example is the Barro Blanco project in Panama, which has allegedly affected the rights of the Ngöbe communities to eat Joturos Pitchardi, locally called 'bocachica', a rare and central source of protein in the Ngöbe diet.[269] The high level of illiteracy and low level of human rights awareness in such communities, often hinder the capabilities of individuals there to demand their human rights, this exacerbates and deepens human rights oppressions as such communities are most times with the cooperation of national governments targeted as sites for mitigation projects. When such national governments (for example the Government of Panama) are then entrusted with having a final say on project eligibility, it leaves

---

those rights mat require positive legal measures of protection and measures to ensure participation of members of minority communities in decisions which affect them. See also General Comment 12 which notes that the food a community or people grow and how they grow it, their choice of food, the way they prepare and eat it-all of these are imbued with cultural values. See also Similarly, Art. 1 of the UN Declaration on the Right to Development which provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. See also Art. 1 of the UNESCO Principles on International Cultural Co-operation, which provides that each culture has a dignity and value, which must be respected and preserved. Every people have the right and the duty to develop their culture. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

[268] The UN Special Report on the Right to Food has provided influential and persuasive explanations on the content of the right to food under international law. Though this report does not have a binding legal status under international law, it interprets the right to adequate food is a human right, inherent in all people to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear. J Ziegler, *The Right to Food* (Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, 2001) UN Doc E/CN.4/2001/53 at p. 2. <http://daccessdds.un.org/doc/UNDOC/GEN/G01/110/35/PDF/G0111035.pdf?OpenElement> accessed 23 April 2012.

[269] See Petition on the Human Rights Violations by the Government of Panama directed against Ngöbe Indigenous Communities and Individuals.

ordinary individuals with little or no opportunities to block the approvals of such projects or to demand its rethink. There is a need to provide international supervisory mechanisms and platforms through which such human rights issues could be addressed prior to the approval and registration of such projects as emission reduction projects.

Loss of farmland also infringes on the rights of members of the community to work. As the Food and Agricultural Agency (FAO) has aptly noted, 'rural landlessness is often the best predictor of poverty and hunger'.[270] Farmland constitutes the main asset from which the rural poor are able to derive a livelihood. Arbitrary land grabs therefore affects the rights of individuals to work. Several international human rights instruments and other non-binding interpretive documents therefore recognize the need to protect access of peasants to farmlands as part of the right to work.[271]

Article 6 of the ICESCR recognises the right to work, which it defines as the opportunity of everyone to gain their living by freely chosen or accepted work. Parties to the ICESR are required to take appropriate steps to safeguard this right by adopting policies that enable citizens to engage in their freely chosen occupation. States are enjoined to pursue reforms that would ensure that citizens and particularly the rural communities continue to have access to arable lands.[272] Article 23 of the UDHR also provides that everyone has the right to work, to free choice

[270] Food and Agricultural Agency (FAO), *Voluntary Guidelines on Responsible Governance of Tenure of Land and other Natural Resourcesi* (FAO 2012) i.
[271] See The Vancouver Declaration on Human Settlements, UN Conference on Human Settlements, *Adopted* June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture Organization of the United Nations.
[272] See Art. 11(2) and Art 14(2) (g) of the ICESCR, which deal with agricultural reform to ensure access to arable land.

of employment, to just and favourable conditions of work and to protection against unemployment.

The jurisprudence evolved by the Inter American Commission on Human Rights on the right to work is instructive on the content of this right. In the *Toledo Maya* case, the Commission noted that 'development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.[273] The Commission ruled that the state's contraventions had a negative impact on the natural environment upon which they depend for subsistence.[274] Similarly in *Yanomami Case* the Inter American Commission recognised the right of indigenous people in Brazil to use their land for farming, hunting and subsistence. The Commission therefore called on States to take the measures aimed at restoring, protecting, and preserving the rights of indigenous peoples to their ancestral territories, which they depend upon for subsistence, and continuity of life.[275] These cases suggest that access to farmland is crucial to the protection of the right to work of peasants, particularly in rural areas.

[273] *Toledo Maya Case;* see also Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1, ch. VI (Sept. 29, 1997).

[274] The petitioners claimed that international instruments, including the UN and Inter-American draft declarations on indigenous peoples and the Rio Declaration, acknowledge the need for states to protect the natural environments on which indigenous peoples depend and that such an obligation is 'implicit in the provisions of the American Declaration in the context of indigenous land claim issues'. The Commission did not expressly address this point, but considered that environmental damage had occurred and had a negative impact on indigenous property rights. The Commission found that the damage resulted in part from the fact that the State failed to put into place adequate safeguards and mechanisms, to supervise, monitor and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to Maya lands and communities. ibid 53 and 147.

[275] *See, e.g., Yanomami Case*, Rep. No. 12/85, Case 7615 (Brazil), (1985).

Mitigation projects that deny farmers the opportunity of farming and hunting pose major threats to the enjoyment of their subsistence rights.[276] It is not enough for the COP to declare that Parties should in all climate actions respect human rights. The COP must go a step further by providing practical frameworks and guidelines that would prevent the approval and registrations of mitigation projects that violate human rights. Mainstreaming human rights safeguards into the approval and registration processes for climate change mitigation projects would enable the UNFCCC to become a more responsive, accountable and rights-based regime.

3.4 Loss of life

The fact that climate change mitigation projects could lead to the direct and indirect loss of life was brought to the fore by the Aguan biogas project in Honduras. It is estimated that over 23 peasants and human rights defenders in the Bajo Aguan region where the project is located were killed by national authorities for refusing to vacate their lands for the project to commence and for leading protests against the project.[277] Despite the evidence of loss of life, the CDM Board approved and registered the project. National Authorities especially in many developing countries have often demonstrated the penchant to execute economically and socially rewarding climate change projects at all cost, leading to human rights repressions. Such repressions, mutilations and detentions were also alleged in the Panama case.[278]

[276] Green Peace International, 'Human Rights and the Climate Crisis: Acting Today to Prevent Tragedy Tomorrow' A Briefing Paper by Greenpeace (2008) 4. <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Greenpeace_HR_ClimateCrisis.pdf> accessed 12 March 2012.

[277] See CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.> accessed 23 March 2012.

[278] See Agence France-Presse, 'Protests over planned dam turn violent in Panama' (March 9, 2013); see also Intercontinental Cry, 'Panama: Police Brutality signals impending storm over Barro Blanco hydroelectric project' (March 21, 2013).

The right to life is a fundamental human right under international law. Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life.[279] It provides that every human being has the inherent right to life, and that this right shall be protected by law. The right to life has also been identified as one of the rights for which no state shall derogate from, even in time of emergency threatening the life of the nation.[280] Article 3 of the UDHR also upholds the right to life, liberty and security of the person.[281] Regionally, Article 4 of the African Charter on Human and Peoples Rights (AfCHPR) recognises the right to life.[282]

The UN Human Rights Committee has held in numerous cases that state repressions, summary executions by police and army are violations of the right to life.[283] Though not legally binding, the Ruggie Guiding Principles on Business and Human Rights also condemns the taking of life and the deprivation of the right to life during business operations by corporations and other business enterprises.[284] The protection of the right to life has been interpreted to include the obligation of governments to take all possible measures to reduce mortality and to increase life

[279] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[280] See The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984). The Siracusa Principles developed by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1984 states that no state party shall even in time of emergency threatening the life of the nation, derogate from a number of key guarantees which include the right to life.
[281] Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[282] African Charter Human and Peoples Rights (Adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982); See also Art. 2 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms 1949) and American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July, 1978) O.A.S. Res. 447 (IX-0/79).
[283] See Annual Reports of the UN Special Rapporteur on Summary and Arbitrary Executions UN-Doc. E/CN.4/1995/61.
[284] J Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) A/HRC/17/31.

expectancy.[285] It also includes the duties of government to prevent projects that threaten human life and survival.

A number of cases try to establish a link between environmental quality and the right to life.[286] For example the Inter American Commission in the *Yanomami's case*, held that the failure of the Brazilian Government to preserve environmental quality by approving a construction project which led to the spread of disease and loss of life, was a direct violation of the fundamental right to life guaranteed by Article 1 of the American Declaration. The court held *inter alia* that the right to have one's life respected is not limited to the protection against arbitrary killing, and that the realization of the right to life is in many ways dependent upon one's physical environment.[287] In the Nigerian case of *Gbemre v Shell* the court in a radical stance held that Shell's action in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Nigerian Constitution and the African Charter on Human and People's Rights.[288] This case sets precedence in Nigeria as the first and only case to declare gas flaring as a breach of the fundamental human right to life.

The Stockholm Declaration is a major influence for the expansionist view that environmental protection is a pre-requisite for enjoying all forms of rights, including the right to life. It links environmental protection to the ability of human beings to enjoy and realise human rights. This

[285] See United Nations General Comment 6/16 of 27 July 1982, para. 5.
[286] Indian courts have provided a number of landmark decisions that link environmental protection to the right to life. See for example, *Subhash Kumar v State of Bihar* AIR 1991 SC 420.
[287] *Yanomami Case*, Rep. No. 12/85, Case 7615 (Brazil), (1985);
[288] Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05. The officially certified full-text of the judgment in this case can be found at <http://www.climatelaw.org/cases>.

Declaration has led to a flurry of declarations, resolutions and reports, which also establish that environmental protection is a sine qua non for the enjoyment of the right to life.[289] We align with the views that without adequate protection for the environment, the human right to life would be substantially threatened.[290] Mitigation projects that pollute the environment pose direct threats to human survival and to the enjoyment of the right to life. As such, there is a need for an international approach that mainstreams the protection of the right to life and other human rights into project approval processes specifically in the context of climate change mitigation projects. Similarly, there is a need to prevent direct threats to life for example killing citizens that oppose projects, repressions and executions, in the rush to attract emission projects or in a bid to push through the registration of as many CDM projects as possible. This diminishes the integrity of the climate change regimes and reduces support for emission reduction schemes as a whole.[291]

3.5 Health Issues

The construction of projects without detailed environmental impact assessments have brought about health concerns to local residents. There is also the issue of siting projects in residential areas, especially in poor neighbourhoods. These practices have resulted in air and water pollution leading to health related concerns. For example in Nigeria, it has been reported that the gas

[289] United Nations' Conference on the Human Environment (Stockholm Declaration) U.*N. Doc*. A/CONF.48/PC.13(1971). <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed 10 March 2012).

[290] See also, The Preamble to the Aarhus Convention, which links human rights and environment. It notes that adequate protection of the environment is essential to the enjoyment of basic human rights. UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf> (accessed 19 March, 2012).

[291] See S Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 Vermont Journal of Environmental Law 513; see also CDM Policy Dialogue, 'Climate Change, Carbon Markets and the CDM: A Call to Action', Report of the High-Level Panel on the CDM Policy Dialogue (Sept. 2012) 56.

flaring reduction project in Kwale has caused health concerns to residents of the area. It has also been estimated that many residents of that community would be diagnosed with cancer in their lifetimes due to effluents from the project.[292]

Studies have also shown that biogas and other biofuel projects could produce adverse long-term effects on human health.[293] Pesticides and other chemicals connected with biofuel production are reported to contaminate water resources and give rise to health problems.[294] Wind power projects have also been reported to produce unprecedented levels of noise to residents leading to sleep deprivation and insomnia thereby affecting their health. These concerns violate the rights of citizens to the highest attainable standard of health.

The human right to health has been recognised in Article 12 of the ICESCR, which explicitly provides for 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[295] The ICESCR also defines steps that states should take to realize progressively the 'highest attainable standard of health', including the improvement of all aspects of environmental and industrial hygiene. Though not legally binding, Article 25 of the Universal

[292] Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010; Bank Information Center, 'Local Groups Say Project Will Not End Gas Flaring, Could Exacerbate Conflicts in the Niger Delta'<http://www.bicusa.org/en/Project.39.aspx> accessed 14 January, 2011.

[293] See P Lucas and T Patzek, 'The Disastrous Local and Global Impacts of Tropical Biofuel Production' *Energy Tribune* (March 2007) 19. Some of the highlighted challenges of biofuels include the environmental impact of expanded crop production in the manufacturing of biofuels, land use conflicts, soil erosion issues, loss of biodiversity and the impact on water availability. Sugarcane, which is among the most efficient feedstock for biofuel, is heavily dependent on extensive use of water. Competition between biofuel production and requirements for water for other needs, including household use is thus likely to occur. See D Mitchell, *Biofuels in Africa: Opportunities, Prospects and Challenges* (The World Bank 2010).

[294] C Furgal and J Seguin, 'Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities' (2006) 114 Environmental Health Perspectives 1964-1968.

[295] See B Toebes, *The Right to Health as a Right in International Law* (Hart 1999).

Declaration on Human Rights (UDHR) provides that everyone has the right to a standard of living adequate for the health and well being of themselves and their family.[296]

At the regional level, Article 16(1) of the African Charter on Human Rights provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. Article 12 of the European Social Charter recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'[297] while Article 10 of the First Protocol to the American Convention on Human Rights provides that 'everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social wellbeing'

In order to foster the protection of the right to health, States are to take public health measures to prevent epidemic, endemic, occupational or environmental diseases.[298] This has been interpreted to include removing as far as possible, all causes of ill health.[299] One way to reduce the short and long term impacts of climate change projects is to ensure that transparent environmental impact assessments (EIA) are conducted before the approval of such projects to show clearly their likely environmental and health impacts.[300] In the 2006 case of *Sawhoyamaxa Indigenous Community v Paraguay*, the Inter-American Court of Human Rights unanimously found Paraguay in violation of rights to health, life, and property of the Sawhoyamaxa indigenous community for failing to

[296] Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[297] See also European Convention for the Protection of Human Rights and Fundamental Freedoms (Signed 4 Nov. 1950, entered in to force 3 Sept. 1953, 213 UNTS 221, ETS 5).
[298] See Art. 12(2), International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).
[299] See A Chapman, 'Core Obligations Related to the Right to Health' in A Chapman, S Russell, eds. *Core Obligations: Building a Framework for Economic, Social and Cultural Rights.* (Intersentia 2002) 85–216.
[300] See UNECE, The Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted February 25, 1991 EmuT 991:15.

remove projects that caused pollution, ill health and diseases in these indigenous communities.[301] The Court called on the State to demarcate the indigenous lands and provide a development fund, among other remedies.[302]

It is critical for national authorities to ensure that projects that threaten human health are not approved; and for supervisory institutions such as the CDM Executive Board to ensure that projects approved without an EIA are not registered. The same applies to projects such as the Kwale project that was allegedly approved by the host country after it connived with project proponents to stage-manage an EIA. Without good health, the ability to enjoy other human rights would be significantly threatened.[303]

3.6 Inequalities and discrimination against minority communities and vulnerable groups

Discriminatory trends in climate change mitigation efforts take two main dimensions: the targeting of poor communities as locations for projects; and the exclusion of women and vulnerable minority groups from stakeholder meetings and consultations.[304] In Nigeria and Panama for example, large emission reduction projects have been sited in poor and disadvantaged communities where citizens do not have the means and resources to demand

[301] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, 248(1)–(3) (Mar. 29, 2006).
[302] ibid 239–241.
[303] As Herophilus the Physician to Alexander the Great wrote in his often quoted poem: 'When health is absent Wisdom cannot reveal itself, Art cannot become manifest, Strength cannot fight, Wealth becomes useless and intelligence cannot be applied' *Encyclopedia of World Biography Supplement* (Vol. 25, Thomson Gale 2005).
[304] See N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol' in C Bruch, ed., *New Public: The Globalization of Public Participation* (ELI 2002) 203; G Terry, 'No Climate Justice Without Gender Justice: An Overview of the Issues' (2009) 17(1) Gender & Development, 5-18; see also G Terry, 'Climate Change and Gender Justice' (Oxfam, 2009) 3; N Roht-Arriaza,'Human Rights in the Climate Change Regime' (2010) (1)(2) Journal of Human Rights and the Environment 211 at 215-219; S Jodoin, 'Human Rights and Climate Change Governance' (CISDL Legal Working Paper, December 2010).

accountability or to resist such projects.[305] Such trends build on well-entrenched power imbalance, low level of awareness and other discriminatory practices such as limited opportunities for education, stereotypes and bias against women, poverty and inequitable resource distribution, traditional caste systems amongst others, to place the burden of climate change mitigation policies and projects on poor and marginalized groups.[306]

Studies have shown that women and vulnerable minority groups that could be affected by climate change projects are often excluded or marginalized from project decisions and from meetings when stakeholder comments and participation are provided for. According to a 2011 Report of the United Nations, skewed power relations coupled with inequitable, cultural and social norms, often mean that the perspectives of women are neglected in the planning of mitigation projects with only few programmes designed for them to carry them along in the process and to ensure their active participation in climate change mitigation.[307]

---

[305] See F Allen et al, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4.

[306] A good example of discrimination in environmental planning was the case of environmental racism, which was the subject of intense debates and litigation in the US in the late 1990s. It included the intentional siting of hazardous waste sites, landfills, incinerators, and polluting industries in communities inhabited mainly by African-American, Hispanics, Native Americans, Asians, migrant farm workers, and the working poor. For example the South Side of Chicago, which is predominantly African-American and Hispanic, has the greatest concentration of hazardous waste sites in the USA. See C Beasley 'Of Pollution and Poverty' (1990) 2 (4) The Environmental Journal 38-45; R Bullard, Confronting Environmental Racism: Voices from the Grassroots (South End Press 1993); K Colquette, K Michele, and A Elizabeth, H Robertson 'Environmental Racism: The Causes, Consequences, and Commendations' (1991) 5 (1) Tulane Environmental Law Journal 153- 207.

[307] According to the report, several societal dynamics contribute to this, they include: lack of access to formal education, poverty, discrimination in job distribution, food insecurity, limited access to resources, exclusion from policy and decision-making institutions and processes and other forms of social marginalization. These dynamics put women at a distinct disadvantage. See UNEP, *Women at the Frontline of Climate Change: Gender Risks and Hopes: A Rapid Response Assessment* (United Nations Environment Programme 2011) 6. See also M Hemmati, 'Gender Perspectives on Climate Change', Emerging Issues Panel, Commission on the Status of Women Fifty-second session New York, 25 February/7 March 2008. See also O Oyebode, 'Nigeria Fails Commonwealth's Mark for Women Representation' (*Saturday Punch*, June 30, 2007), Pp A1; Nigerian CEDAW NGO Coalition, *The Situation of Nigerian Women Rights in Nigeria* (A Report Submitted to the 41st session of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women, New York 2008).

These discriminatory trends in climate change mitigation are violations of the fundamental human rights against discrimination, a right recognised in a number of core international human rights instruments.[308] Article 26 of the ICCPR provides that all persons are equal before the law, and are entitled without any discrimination to equal protection of the law. It requires States to prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[309] Article 2(3) and 3 of the ICESCR also contains similar provisions on non-discrimination.[310]

The UN Sub-commission on the Prevention of Discrimination and Protection of Human Rights,[311] described prevention of discrimination as the prevention of any action which denies to individuals or groups of people the equality of treatment which they may wish. Article 1 of the Convention on the Elimination of Racial Discrimination (CERD) defines discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[312]

---

[308] See G Terry, 'No Climate Justice Without Gender Justice: An Overview of the Issues' (2009) 17(1) Gender & Development, 5-18; see also G Terry, 'Climate Change and Gender Justice' (Oxfam 2009) 3.

[309] International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[310] International Covenant on Economic Social and Cultural Right adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, reprinted in 6 ILM 360 (1967).

[311] This commission was created by the United Nations to specifically address the issues of equality and non-discrimination. See A Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 Human Rights Quarterly 5.

[312] Convention on the Elimination of All Forms of Racial Dicrimination (CERD) (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, reprinted in 5 ILM 352 (1966).

Article 7 of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) also provides for the elimination of discrimination against women in political and public life.[313] Article 5 encourages States to take measures to eliminate prejudices and stereotypes against women. Article 1 of the Universal Declaration of Human Rights (UDHR) also provides that 'All human beings are born free and equal in dignity and rights'. Article 2 notes that 'everyone is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 4 provides that 'No one shall be held in slavery or servitude' while Article 7 declares unequivocally that 'All are equal before the law and are entitled without any discrimination to equal protection of the law'.[314] Though not legally binding, the UN Commentary on the Norms and Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights provides detailed and persuasive explanation of how discriminatory trends can be avoided in project planning and execution. It provides that transnational corporations and other business enterprises should ensure equality of opportunity and treatments as recognised in international law to ensure that all forms of discrimination are eliminated from business related activities.[315] The commentary in Para 2(c) specifically notes that 'Particular attention should be devoted to the consequences of business activities that may affect the rights of women'.[316] It also provides that transnational corporations and other business enterprises shall ensure that the burden of negative

[313] See Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW) (Adopted 6 October 1999, entered into force 10 December 1999) 2131 UNTS 83, reprinted in 39 ILM 281 (2000).
[314] Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[315] Article 2 (c), E/CN.4/Sub.2/2003/38/Rev.2. See also J Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011) A/HRC/17/31.
[316] ibid

environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups.[317]

The Conference of Parties to the United Nations Framework Convention on Climate Change (COP16) in the Cancun Decisions also recognised that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.[318] However, the COP did not provide concrete guidelines or frameworks on how issues of discrimination and inequity can be addressed in mitigation actions and projects.

To protect and fulfil the non-discrimination requirements of international human rights law, host countries must be required to demonstrate site selection criteria including detailed human rights impacts assessment reports on how the rights of vulnerable communities and groups have been taken into consideration at the design stages of the mitigation project. Host countries and Parties to climate change regimes in general must be encouraged to eliminate discriminatory practices that place the burden of climate change mitigation on a specific section of the society.

3.7 Loss of Consultative/Participatory Rights

A. The Right to Information

As Aristotle once wrote, 'All human beings by nature desire to know'.[319] One of the key criticisms against the CDM is that many host communities are not provided adequate information on the likely impacts and benefits of projects. Most notable is the charge that states cloak project description documents in such secrecy that citizens find it hard to know how these

[317] See Para 14 (c) of Commentary, E/CN.4/Sub.2/2003/38/Rev.2.
[318] International Shared Vision on Long-Term Cooperative Action, Cancun LCA Outcome, para. 7., UNFCCC, <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf> accessed 15 April 2012.
[319] Aristotle, *Metaphysics*, Book VII, 4 (241B [1029b6-9]).

projects might affect them in the short and long term.[320] As such, projects that should normally be lauded end up being opposed by citizens who were excluded from the approval and implementation process. This raises the need for a public disclosure system that provides citizens with up-to-date information on projects that could affect their lives. Current CDM do not provide adequate opportunities for individuals to know about or to obtain relevant information about projects that could affect them.

Under the CDM Rules, project proponents are required to facilitate access to information by making information publicly available.[321] Project proponents are required to provide three categories of information: information that is related to a specific project; information contained in a database or registry; and; information that is related to CDM governance, procedures, or policy. While the Rules stipulate that these categories of information must be made publicly available, the manner and time frame for making specified CDM documents 'publicly available' remain unelaborated.[322] This ambiguity with regard to the meaning and nature of 'publicly available' has been a major flaw in the CDM rules.[323] The ambiguity is in the fact that information that appear after registration of projects elude the public as the Rules do not establish mandatory disclosure requirements over the life time of a project. The Rules do not also expatiate on the elements of full and maximum disclosure as vital

[320] See F Onojiribholo, 'Kwale Chief Laments Plight of Communities' (*Daily Independent* 16 August 2011).
[321] Para. 27(h), CDM Modalities & Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.
[322] See N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol` in Carl Bruch, ed., *New Public: The Globalization of Public Participation* (ELI 2002) 205.
[323] ibid.

Again, while the CDM Rules require states to provide information on an EIA, this requirement applies only when an EIA is necessary. According to the Rules, an EIA would only be necessary 'if the impacts are considered significant by the project participants or the host party'.[324] What this implies is that it is the host country or the project developers that decide if an EIA is important. Current experience show that most states have undermined the protection for the public by waiving aside the 'significant impact' requirement for a number of projects; thereby leading a number of projects without an EIA.[325] This leaves the public at the mercy of huge projects that produce significant short and long term environmental effects.

There are some debates on the legal status of a right to information under international law. While some scholars identify the right to information as part of the right to expression and free speech, other scholars consider such views as attempts to expand the right to expression beyond its traditional limits.[326] We do not intend to go into these debates in this thesis, instead we align with the views that ATI as enshrined in a number of core international human rights instruments is part of the fundamental human right to expression, which includes the right to seek, receive and impart information.[327] As Jagwanth rightly notes, 'given that rights are interdependent, in

[324] Para. 27(h), CDM Modalities & Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.

[325] See L Atsegbua, 'Environmental Law and Practice in Nigeria-Commentaries' (2004) 4 I.U.L.J at 12.

[326] UNFPA, 'Core Concepts of a Human Rights Based Approach' (2010) < http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/introduction.pdf> accessed 15 July, 2011; see also F Nguyen, 'Emerging Features of a Rights-Based Development Policy of UN, Development Cooperation & NGO Agencies' (2002) Discussion paper, OHCHR Asia- Pacific Regional Office. < http://www.un.or.th/ohchr/issues/rba/Pdf/discussrba.pdf> accessed 12 October, 2010.

[327] Several Reports have been released by the Special Rapporteur on the Right to Freedom of Opinion and Expression that recognise ATI as part of the right to freedom of expression. Though not binding, these reports provide normative interpretations of the right to information as one of the most essential elements of freedom of speech and expression. According to the Special Rapporteur, 'The right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…'See Report of the *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 1. See also Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc.

order to be able to exercise our rights more generally, people must be given access to information'.[328] In this thesis, we define access to information (ATI) as the right to 'seek, receive and impart' information about mitigation projects. The elements of ATI include maximum disclosure of project information, obligation to publish and disclose new information, establishing processes to facilitate timely access to information at a reasonable cost and increased public education and awareness. Information provides the necessary precondition that makes it possible for people to exercise and demand their rights.[329]

The right to seek, receive and impart information is recognised in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) which provides that everyone shall have the right to freedom of expression; this right shall include freedom *to seek, receive and impart information*…'[330] Article 19 of the Universal Declaration of Human Rights (UDHR) also provides that 'everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and *to seek, receive and impart information*

E/CN.4/1997/31, 4 February 1997; Report of the Special Rapporteur, *Promotion and Protection of the right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/1995/31, 14 December 1995, para. 35. Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 26 November 1999 <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-1999.pdf> accessed 12 May 2012. See also Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 6 December 2004 <http://www.unhchr.ch/huricane/huricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument> accessed 12 May 2012; and the Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 19 December 2006 <http://www.article19.org/pdfs/standards/four-mandates-dec-2006.pdf > accessed 12 May 2012.

[328] S Jagwanth, 'The Right to Information as a Leverage Right' in R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre 2002) 3-16; see also J Klaaren 'A Right to a Cell Phone? The Rightness of Access to Information' in R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre 2002) 17-26.

[329] P Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 Admin. L. Rev. 177 at 210.

[330] Emphasis mine. See International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

and ideas through any media and regardless of frontiers'.[331] Similarly in 1998, the UN General Assembly adopted the Declaration on Human Rights Defenders. Though not legally binding, it provides in its Article 6 that the right to seek, obtain and receive information is fundamental to the effective promotion and protection of human rights.[332]

Regionally, Article 13 of the legally binding American Convention on Human Rights (ACHR) provides that 'everyone has the right to freedom of thought and expression. This right includes freedom to *seek, receive, and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice'.[333] The Inter-American Court of Human Rights has interpreted Article 13 to include the freedom of information as 'a fundamental human right that is as important to a free society as freedom of expression'. This includes the right and freedom to seek, receive and impart information and ideas of all kinds.[334] The Special Rapporteur of the American Commission also noted that the right to access to official information is one of the cornerstones of representative democracy.[335] The Inter-American Court of Human Rights has upheld this right in *Marcel Claude Reyes et al v Chile*, when it held that withholding information on a developmental project is a violation of the right to information of the petitioners.[336] The court noted that this right

[331] Universal Declaration on Human and Peoples Rights, (Adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[332] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Declaration on Human Rights Defenders), UN General Assembly Resolution 53/144 (8 March 1999) <http://daccessdds.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement> accessed 12 May 2012.
[333] Emphasis mine.
[334] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.
[335] *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter III.
[336] Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 222 (2003). In that case non-governmental organizations (NGOs) and individuals, alleged that the Government of Chile violated their right

includes not only the right and freedom to express one's own thoughts, but also 'the right and freedom to seek, receive and impart information and ideas of all kind'.

In Europe, Article 10 of the European Convention on Human Rights (ECHR) provides that the right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority. The Council of Europe also invited 'member states which have not yet done so to introduce a system of freedom of information, i.e. access to government files…' In its Recommendation Council No.R (81) 19 on the Access to Information Held by Public Authorities the Council affirmed that everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities and that this shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order, the economic wellbeing of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.[337]

to access to information under Article 13 of the American Convention on Human Rights when the Chilean Committee on Foreign Investment failed to release information about a deforestation project known as 'Río Cóndor' which the petitioners tried to evaluate. The state argued that the requested information was confidential and that releasing it could discriminate against the investors. According to the state 'reservation of information in this type of company constitutes a cornerstone of constitutional economic guarantees and Chilean foreign investment policy' and that the release of said information would constitute arbitrary discrimination against the investors. The court upheld the right of the petitioners to seek, receive and impart information.

[337] Recommendation No. R (81) 19 of the Committee of Ministers of the Council of Europe on Access to Information Held by Public Authorities, adopted 25 November 1981 <http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)19.asp> accessed 12 May 2012.

The Council of Europe also provided perhaps what was the very first comprehensive attempt to link the right to seek, receive, and impart information to environmental matters- The Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which provides for access to information and access to justice in environmental matters.[338] Under Articles 13 to 16, public authorities are to provide access to information to any person upon request and without the person having to prove an interest. According to Article 14 any person shall, at his request and without his having to prove an interest, have access to information relating to the environment held by public authorities. Article 15 provides that any person shall have access to information relating to the environment held by bodies with public responsibilities for the environment and under the control of a public authority. Access shall be given via the competent public administration or directly by the bodies themselves.[339]

In 1998 the United Nations Economic Commission for Europe (UNECE) adopted the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Despite debates on the practical aspects of implementing some of its provisions, it is still regarded as one of the most elaborate

[338] See Council of Europe, Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993). Speaking of environmental information, the Rio Declaration on Environment and Development, as far back as in 1992 recognised in its Principle 10 that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. See also Agenda 21, the Blueprint for Sustainable Development, which was also adopted in Rio, it states that individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information protection measures.

[339] ibid.

discussions of the right to information and participation in environmental matters.[340] Article 4 provides that each Party shall ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested. Such information is to be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.[341]

Under this Convention, the grounds upon which a request for environmental information may be refused are: if the public authority to which the request is addressed does not hold the environmental information requested; if the request is manifestly unreasonable or formulated in too general a manner; or if the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.[342] The implication is that except when information is not available or when non-disclosure is in the overall interest of the public, all project information must be disclosed.

The right to seek, receive, and impart information provides a platform for individuals and communities to demand information on a project that could affect them. Governments therefore

[340] See S Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 2 (1) Journal for European Environmental and Planning Law 1–11.
[341] UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), UN Doc. ECE/CEP/43, 25 June 1998, entered into force 30 October 2001.
[342] See Art. 4 (4) of the Aarhus Convention on the grounds for withholding information in public interest.

have responsibilities to provide or to compel project proponents to disclose to citizens pertinent information about development projects. As the African Commission on Human and Peoples' Rights held in *SERAC v Federal Republic of Nigeria*, by colluding with Shell and by allowing the continuous oil spillage and gas flaring in the Niger Delta, the Government of Nigeria had violated many rights of the Niger Delta people. One of which is the right to access information in matters that concern their lives and well-being.[343]

The scope and contents of the right to information are elaborated in greater details in other parts of this thesis. We explore two dimensions of the right to information. First is the right of individuals to information to which access must be given upon request; this includes situations where citizens request additional or detailed information about a governmental policy or project. The right to information places a duty on governments to oblige such requested information. Secondly, the right to information includes the right to such information that must be published and disseminated *suo motu* (proactively) by public authorities. This places a duty on governments to run disclosure programmes that allow individuals to gain regular access to publicly held information. This could be by keeping a public database or by releasing periodic documents on governmental affairs. This second aspect is important especially in poor and less literate countries where some less privileged members of the society might not on their own

[343] (2002) ACHPR/COMM/A044/1. This was a case instituted on behalf of the Ogoni people to challenge the Government of Nigeria on the impact of oil exploration in their community. They allege that the government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry that the government has withheld from Ogoni Communities information on the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland and that the government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. They allege the violation of the rights to information under the African Charter. The commission held that the Nigerian government was in violation of several rights including the right to information by giving the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.

volition request for public information. Putting the information out there through public disclosure programmes would ensure transparency and a level playing field.[344]

The right to seek, receive and impart information places a duty on states to lay down laws and policies that allow for maximum disclosure in the conduct of state affairs, except where public security and interests dictate otherwise.[345] A number of countries have enacted Freedom of Information Acts, which enable this to happen.[346] However, the extents to which such laws are respected and information requests are complied with vary from country to country. In many developing countries where CDM activities take place, there have been tendencies not to comply with information requests on projects even when FOI Acts are present. For example in Nigeria, there were hopes that the passing of the Freedom of Information Act 2011 would end governmental secrecy and make public records and information more accessible. However no FOI request has been granted till date.[347] This emphasises the need for an international approach

[344] See ARTICLE 19, 'A Model Freedom of Information Law' <http://www.article19.org/pdfs/standards/modelfoilaw.pdf> accessed 12 May 2012; ARTICLE 19, 'The Johannesburg Principles: Principles on National Security, Freedom of Expression and Access to Information' (1996): <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> accessed 12 May 2012; ARTICLE 19, 'Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations' (2000): <http://www.article19.org/pdfs/publications/freedom-of-information-truth-commissions.pdf> ; Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, 'Global Trends on the Right to Information: A Survey of South Asia' (2001) <http://www.article19.org/pdfs/publications/south-asia-foi-survey.pdf> accessed 12 May 2012.

[345] See *Gaskin v The United Kingdom* (1989) 12 EHRR 36.

[346] As far back as 1766, the Government of Sweden enacted the *Freedom of the Press Act, which* allows Swedish citizens to access public data. This was followed by Finland many years later when it came up with the *Publicity of Documents Act* in 1951; Denmark's *Public Access Act* in 1970 and the Dutch *Administrative Transparency Act* of 1978. See M Halstuk and B Chamberlin, 'The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To' (2006) 11 Comm. L. & Pol'y, 511. See also C.36, Laws of the United Kingdom 2000 <http://www.legislation.gov.uk/ukpga/2000/36/contents> accessed 12 December 2011; Canada's Freedom of Information Act 1982; United States' Freedom of Information Act of 1966, New Zealand's Access to Information Act, Chapter A-1. See P Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 Admin. L. Rev. 177, 179, 210.

[347] The Preamble to the Nigerian Act says it is enacted to make 'public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest… However a number of journalists and human rights advocates have been

to ensuring that adequate information on mitigation projects are released. While we do not suggest here that international guidelines or threshold is a one time fix for all disclosure problems, it allows the CDM EB and other supervisory boards to block the approvals and registrations of projects that do not meet the necessary disclosure thresholds.

Lack of information on mitigation projects creates tensions and resistance for projects that with adequate information and awareness could have drawn support from environmental groups and individuals. Information disclosure increases the transparency of government decision-making, thereby reducing tensions and fostering public trust. Lack of transparency brings about and feeds the suspicion of corruption by the public even when it is absent. This places a perpetual burden on the government to defend its actions and policies thereby slowing down reforms and reducing the efficacy of mitigation programs. Information disclosure leads to greater transparency as it allows citizens to understand governmental actions, programs and projects; it also allows citizens to be carried along in the process of decision making. [348]

Information disclosure fosters transparent public debates on governmental actions. It provides opportunities for citizens to oversee governmental actions to ensure that human rights are

---

arrested for requesting information under the FOI Act. Similarly, the Act is replete with more exception sections and clauses that tend to deny access to information than those that grant it, a situation which allows government agencies to deny information access. For example, while only two sections (sections 1 & 3) deal with access to information, ten sections (sections 7, 11,12,14,15,16,17,18, 19, and 28) deny the public access to information. Also, the time limit provided for in the law for granting or refusal of requests as provided for in section 4 of the Act is very short. The cost of requesting information is also very high. These problems were discussed in the recent case of *Nigerian Contract Monitoring Coalition V The Power Holding Company of Nigeria (PHCN)* (2012) FHC/ABJ. See generally, 'Nigeria's Access to Information Law is Not Working' (December 4, 2012) < http://www.icirnigeria.org/index.php?id=28> accessed 12 January 2013; see also 'Nigeria: Reality of the Freedom of Information Act' (*Daily Trust* , September 17 2012).

[348] L Brandeis, 'What Publicity Can do' in *Other People's Money* chapter 5, p. 92 (1932), first published in *Harper's Weekly,* December 20, 1913.

respected.[349] It also keeps project proponents alert. Information disclosure supplies ready tools for environmental advocates to pin point violations and to expose them. It allows citizens and advocates to serve as watchdogs for projects. Reducing secrecy allows citizens to scrutinize the failures of the markets and to take them up accordingly. This prevents market forces from lowering sustainability standards and from trampling on the rights of individuals under the guise of secrecy.[350]

There is a need for international climate change regimes to develop a mandatory threshold on project information that must be disclosed within the lifetime of a mitigation activity or project. This threshold is proposed and discussed in subsequent parts of this thesis. For example, people ought to be informed and updated about any project or governmental plan that might lead to human rights violations or any project that might lead to adverse environmental impacts.[351] Such information would be provided first by conducting an environmental impact assessment of the likely environmental effect of a proposed project and making public the findings of such an assessment. When the measure of the changes that a process of development might have on the environment are assessed, in order to establish how deleterious they might be, and these changes are communicated without secrecy, and people are given the chance to comment on these findings, then access to information will be guaranteed.

---

[349] C Sunstein, 'Informational Regulation and Informational Standing: Akins and Beyond' (1999) 147 U.Pa.L.Rev 613, 625.
[350] S Jagwanth, 'The Right to Information as a Leverage Right' in R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre, Cape Town 2002) 3-16.
[351] See J Echeveria and J Kaplan, *Poisonous Procedural Reforms: In Defense of Environmental Right to Know* (Georgetown University 2002).

B. Participation

Apart from the lack of timely and adequate information on climate change projects, the CDM Rules do not contain expansive provisions that allow stakeholders to participate in the planning and execution of climate change projects.[352] This gap has resulted in many ambiguities and concerns on the infringement of the right to participate in decision-making processes. In this thesis, participation is defined as the right of the public to 'take part in' and to 'influence' decision-making processes on mitigation projects. This goes beyond mere consultation. It involves the right of key stakeholders to influence and share control over projects, policies, decisions and resources that affect them.[353]

Many scholars doubt whether international law has fully embraced participatory rights; there are also questions about what it truly means and whether the right to participate can be fully implemented.[354] Despite these debates, the doctrine of participation and inclusion has made its way into a number of core international human rights instruments. The legally binding International Covenant on Civil and Political Rights (ICCPR), guarantees participatory rights in its Article 25(a) which stipulates that every citizen shall have the right and opportunity to participate, without distinction and without unreasonable restrictions, in the conduct of public

[352] See International Rivers, 'Submission Regarding Human Rights to the CDM' (March 25 2013) <http://www.internationalrivers.org/resources/submission-regarding-human-rights-to-the-cdm-7899> accesed 01 April 2013.
[353] The question of what constitutes 'stakeholders' and 'public' is addressed later in this chapter. The World Bank, *The World Bank Participation Sourcebook* (The World Bank 1996) 3.
[354] See for example G Fox, 'The Right to Political Participation in International Law' in G Fox & B Roth,(eds) *Democratic Governance and International Law* 2000, Fox questioned whether the international community is prepared to accept a right to participation.

affairs, directly or through freely chosen representatives.[355] Article 27 also provides that in states in which ethnic, religious or linguistic minorities exist, persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Though not legally binding, the United Nations Declaration on the Right to Development gives a prominent recognition to participation as a key requirement for development. This Declaration states that the right to development includes the right to participate in, contribute to, and enjoy economic, social, cultural and political development. It recognises that there are three human rights standards that are particularly relevant to the full enjoyment of the right to development: the right to self-determination, sovereignty over natural resources and popular participation.[356]

The significance of the right to participation to the realization of development was later underscored by the General Assembly in another resolution that stressed the importance of the adoption of measures to ensure the effective participation, as appropriate, of all the elements of society in the preparation and implementation of national economic and social development policies and of the mobilization of public opinion and the dissemination of relevant information in the support of the principles and objectives of social progress and development.[357]

A more expansive provision on the right to take part and influence decision making was included in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which confers on indigenous peoples the right to choose the modalities of participation and the right to participate

[355] International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[356] United Nations Declaration on the Rights to Development, GA Res A/RES/41/128, 97th Plenary Meeting 41/128 (1986).
[357] UN Res/A/37/55 (1982)

fully 'through representatives chosen by themselves in accordance with their own procedures'[358] and through procedures determined by them**,** in devising legislative and administrative measures that may affect them.[359] Article 18 reads that:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 32(2) elaborates further:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[360]

Similarly, Article 2 of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provides that actions respecting indigenous peoples shall be developed with the participation of the peoples concerned. It provides that States Parties must consult indigenous peoples and provide for their participation in formulating national and regional development plans that may affect them[361] The rights include 'the right to participate in the use, management and conservation of these resources'.[362] Article 30 requires governments to make known to the peoples concerned their rights and duties.

The United Nations Human Right Council (UNHRC) has interpreted these provisions to include the rights of indigenous peoples to take part without any unreasonable restrictions and to

[358] Art. 18, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007). UNDRIP was adopted by the General Assembly on 13 September 2007 by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions. Since its adoption, Australia, New Zealand, Canada and the United States have all reversed their positions and now endorse the Declaration.
[359] ibid Art. 19.
[360] ibid.
[361] Art. 6 and 7, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007).
[362] Art. 15.

influence decisions on projects that affect their linguistic, cultural and religious rights, land and resources, subsistence and participation rights, among others.[363] It recognizes the potential of indigenous peoples to enrich decision-making processes, to share perspectives and to participate as citizens and actors of change. Even though it specifically focuses on the rights of children, Article 12 of the Convention on the Rights of the Child also recognises the rights of children to express their views freely in all matters affecting them, and that those views should be given due weight.[364]

In human right terms therefore, it could be said that participation includes the right to 'take part' in decision making processes and 'to influence' the decisions taken. It includes the right of individuals to take part in decision-making processes on matters affecting them and to give or withhold their consent to development activities that affect their human rights. According to the HRC, in *Ilmari Lansman et al v Finland,* the essential thing is that the people have an adequate opportunity to ventilate their concerns fully about a proposed activity that may affect them, thus

[363] See the case of *Mikmaq Tribal Society v. Canada* Communication No. 78/1980 (30 September 1980), U.N. Doc. Supp. No. 40 a/39/40) at 200 (1984); where the Mikmaq Tribal Society alleged that they were excluded from Canada's political reform process in contravention of Article 25(a) of the ICCPR. The Court recognised that the right of citizens to *take part* in the conduct of public affair without discrmination, but however held that even though inviting Representatives of the Mikmaq tribal society to meetings on aborignal matters was part of the right to take part in public affairs, in this case the right had not been violated as the group had not been subjected to any unreasonbale restrictions. See Decisions, Para.6, Communication No. 205/1986. See also F MaCkay, 'A Briefing on Indigenous Peoples Rights and the United Nations Human Rights Committee' (2001) Forest Peoples Programme, online: Forest Peoples Programme, <http://www.forestpeoples.org/documents/law_hr/unhrc_fpp_brief_dec01_eng.shtml#V_C> accessed 18 February, 2011; D Shelton, 'The UN Human Rights Committee's Decisions' (2005) Human Rights Dialogue: 'Cultural Rights', Carnegie Council for Ethics and International Affairs, <http://www.cceia.org/resources/publications/dialogue/2_12/section_3/5151.html> accessed 18 February, 2011.

[364] It includes the right of a child to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body. See Convention on the Rights of the Child, UN G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (Adopted 20 November 1989, entered into force September 2 1990).

to determine their priorities and that those concerns are given due weight in the design and implementation of the project.[365]

B) Participation in environmental treaties

Participation has also gained increased recognition in a number of international environmental instruments.[366] Notably, Agenda 21, adopted at the Rio Earth Summit in 1992, declares that:

> …one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work.[367]

The Convention on Transboundary Effects of Industrial Accidents was the first international environmental treaty to provide for the three procedural environmental rights: information, participation and access to remedies.[368] The Convention requires its parties to ensure that adequate information is given to the public in all areas capable of being affected by an industrial accident arising out of a hazardous activity. Article 9(3) provides that States Parties shall provide natural and legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident with access to, and participation in relevant

---

[365] Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), UNHCHR, <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument> accessed 17 February, 2011. See also *Apirana Mahuika et al. v. New Zealand* Communication No. 547 /1993.

[366] See the 1994 UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa arts. 3a), 10(e), and 19(1); 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat 2 February 1971, 996 U.N.T.S. 245, 11 I.L.M. 97 (1971) [Ramsar Convention].

[367] See the preamble to chapter 23 of Agenda 21, approved by the UN Conference on Environment and Development on 13 June 1992: UN doc A/CONF.151/26 (vols I–III) (1992). See also Principle 22 of the Rio Declaration states: Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

[368] United Nations Convention on Transboundary Effects of Industrial Accidents adopted 17 March 1992 in Helsinki 31 I.L.M 1330 (1992).

administrative and judicial proceedings, including the possibility of starting a legal action and appealing a decision affecting their rights, again equivalent to those available to persons within their own jurisdiction.[369]

The Convention on Biodiversity also contains detailed provisions on participation. Article 8(j) obliges each contracting party to, as far as possible and as appropriate:

> …subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.[370]

Article 1 of the 1993 North American Agreement on Environmental Cooperation provides that the objectives of the Agreement are to promote transparency and public participation in the development of environmental laws, regulations and policies.[371]

The Aarhus Convention also emphasizes the rights of the public to participate in environmental matters.[372] Article 3(9) provides that 'the public' shall have the opportunity to participate in decision-making 'without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.' Article 6 adds that, public information and participation is required for all

[369] ibid.
[370] Convention on Biodiversity (Adopted 5 June 1992, entered into force on 29 December 1993). See also Art 14(1)(a).
[371] North American Agreement on Environmental Cooperation (1993) 32 I.L.M. 1480.
[372] UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf > accessed 19 February, 2011.

decisions on whether or not to permit industrial, agricultural and construction activities listed in Annex I to the convention. Article 6 (4) provides that each Party shall provide for early public participation, when all options are open and effective public participation can take place. Article 7 also provides that each Party shall make appropriate practical provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. According to the convention, the public shall then be allowed to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.[373] The opinion expressed by the public should as far as possible be taken into account in deciding on embarking on the proposed activity.[374] Aarhus therefore covers the rights of the public to take part in decision-making and to influence the final decision on whether or not an activity or project should move ahead.

Similarly, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, also guarantees non-discriminatory public participation in environmental impact procedures within the scope of the Convention.[375] The Convention requires Parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm. Article 2(6) provides that states shall 'provide an opportunity to the public in areas likely to be affected to participate in relevant impact

[373] Article 6 (7), see also Article 8 of Aarhus Convention, ibid.
[374] Article 6 (8), ibid.
[375] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (adopted 25 February 1991 in force 27 June 1997), 30 ILM (1991) 802.

assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.' Article 3 states that the concerned states shall ensure that the public of the affected party in the areas likely to be affected be informed of, and be provided with, the opportunity for making comments or objections on the proposed activity, and for the transmittal of these comments or objections to the competent authority of the party of origin, either directly to this authority or, where appropriate, through the party of origin.[376]

Questions on what constitutes 'adequate participation'; specifically the normative elements of 'taking part' and 'influencing' decision making processes, would be considered in greater details in subsequent parts of this thesis. Generally, it would be shown that existing climate change regimes establish mere consultative procedures that fall short of the human rights requirements on participation. Even though Article 6 of the Framework Convention on Climate Change, provides that parties 'shall promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities public access to information and public participation', it fails to provide elaborate expansion on what constitutes good participation with respect to mitigation projects. It also fails to provide compulsory participatory procedures for project approvals. Similarly, Article 4 (1) i of the Framework Convention on Climate Change obliges parties to promote public awareness related to climate change and encourage the widest participation in this process,

[376] Article 3 para. 8.

including that of non-governmental organizations.[377] It fails to expatiate what 'widest participation' entails.

Questions such as what constitutes wide participation, how and when should project proponents extend invitation to participate; what should the mode of participation be, what are the requirements for and frequency of consultative follow ups, and the requirements for the implementation of stakeholder views, have all been left unanswered. They also fail to establish a prior informed consent procedure for indigenous peoples and minority groups.[378] Specifically, the CDM Rules do not specify how or when stakeholder comments on projects should be solicited neither does it provide clear guidance on the standards to be applied by the validating operational entities in deciding whether project participants satisfy the notice and comment provisions under the rules.

Similarly, the CDM Rules contain a narrow definition of stakeholders, which excludes important human rights gatekeepers from the participatory process created. Paragraph 1(e) of the CDM Rules define stakeholders to mean the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.[379] The Rules adopt a protective approach, which excludes non-governmental organizations and groups that even though may not be directly affected by a project; but could

[377] United Nations Framework Convention on Climate Change adopted by the United Nations General Assembly, 20 January 1994, A/RES/48/189 <http://unfccc.int/resource/docs/convkp/kpeng.html>accessed 12 December 2011.
[378] WCD, *Dams and Development: A New Framework for Decision-Making* (Earthscan 2000) 215, (Stating that 'Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior and informed consent'). See also A Johl & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300
[379] Para. 1(e)., Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, FCCC/CP/2001/13/Add.2

nonetheless 'have an interest' in a project.[380] This thesis argues for an expansive definition of stakeholders to include individuals, landowners, community leaders, corporations and other business organizations, and representatives from non-governmental organizations and interests groups affected or likely to be affected by, or having an interest in, the project. This thesis posits that these are members of the public that should take part in and influence decision-making processes on the design and approval of mitigation projects such as CDM projects.[381]

Even though some scholars point to the dangers of an expansive approach to participation,[382] broad based participation by NGOs and human rights and environmental gatekeepers most times prove to be the only life line in less democratic countries where a large percentage of the population are either unsophisticated, unaware, disenchanted or simply uninterested due to many years of social exclusion, imbalance power relations and governmental oppression.[383] For example, the roles played by environmental groups such as Environmental Rights Action in raising awareness on environmental and human rights issues; and in monitoring the fulfilment of

[380] N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol' in C Bruch (ed.), *New Public: The Globalization of Public Participation* (ELI 2002) 210.

[381] This definition follows the example of Art. 2(5) of the Aarhus Convention, which defines the 'public concerned' to mean the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

[382] Some of these criticisms include concerns on whether pre-conceived standpoints and opinions will not stand in the way of real deliberation and real progress, and that some interests groups might delay or block the approvals of beneficial projects For a discussion of the complexity of participation, and the limitations of legally protected rights to participate. See M Lee, C Armeni, J De Cendra, S Chaytor, S Lock, M Maslin, C Redgwell and Y Rydin, 'Public Participation and Climate Change Infrastructure' (2012) Journal of Environmental Law where the authors discuss how untempered public participation might become a 'simple bureaucratic hurdle, frustrating for all concerned'. See also M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80; C Sunstein, 'Deliberative Trouble? Why Groups Go To Extremes' (2000) 110 Yale Law Journal 71; J Black,'Proceduralizing Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 597, and 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33.

[383] As Roth notes, the strength of NGOs such as Human Rights Watch in less democratic countries is not their rhetorical voice but their shaming methodology—their ability to investigate misconduct and expose it to public opprobrium. K Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 (1) 63-73.

human rights obligations in Nigeria cannot be overemphasised.[384] Generally, the absence of robust national planning laws, transparent environmental impact assessment processes, governmental accountability and an overall culture of human rights protection as found in many established democracies, gives the right to participation a different impetus in a developing country context- the focus of many of the concerns addressed by this thesis. While untempered public participation process might act as a stumbling block to beneficial emission reduction projects, due to the tendencies of many interest groups to attend decision making meetings with pre-conceived standpoints and opinions that could stagnate or frustrate decision making processes. The importance of democratic checks and balances are however crucial, particularly in countries with poor human rights records where there have been increased cases of governments colluding with project proponents to approve projects that affect the rights of host communties.

For example, one of the complaints against the Kwale project was that the Nigerian DNA only arranged the smokescreen EIA and consultation meetings after the project had already received

[384] For example, most of the communications to the Aarhus Compliance Committee regarding non-compliance with the provisions of the Convention by member states to the Convention were submitted by NGOs. See, e.g., Communication from Association Green Salvation (a Kazakh NGO) against Kazakhstan, ACCC/C/2004/02, 17 March 2004 (alleging that Kazakhstan constructed high-voltage power lines without notifying the residents along the proposed route regarding public hearings on environmental impact assessment of the project contrary to article 6 of the Convention); Communication from Ecopravo-Lviv (a Ukrainian NGO) against Ukraine, ACCC/C/2004/03 (alleging that Ukraine failed to provide for public participation in a decision-making process on State "environmental expertiza" linked with the technical and economic evaluation of a proposed project to construct a navigation canal in the Danube Delta passing through an internationally recognized wetland contrary to article 6 of the Convention); and Communication by the Centre for Regional Development/Transparency International Armenia, the Sakharov Armenian Botanical Society (Armenian NGOs) against Armenia, ACCC/C/2004/08 (alleging that Armenia failed to provide access to information and public participation in decision-making on modification of land use designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchads). The full texts of the Communications can be accessed at <http://www.unece.org/env/pp/pubcom.htm>accessed 12 January 2013.

host country approval.[385] The participatory process excluded many members of the Kwale community in the Niger Delta area of Nigeria who had no opportunity to take part in the process due to lack of information on the venue, date, time and details of the participatory meetings. The consultative meeting was also conducted in English language in a community where majority of the community speak and understand only the native Ukwuani-Aboh-Ndoni language.[386] As some commentators have rightly noted:

> CDM projects in Nigeria have no prospects for success given the context in which they have been initiated. Such projects are characterized by fraud, exclusion, the destruction of natural habitats, and the degradation of the livelihoods of local communities, and of soil and water resources. For these reasons, Nigeria's leading environmental advocacy group, Environmental Rights Action and its allied community organisations are providing leadership against the oil companies, the government and the CDM process.[387]

In the absence of robust protection at the national level to prevent exclusion and to allow for broad based participation in the planning and design of mitigation projects, the responsibility to protect the rights of communities in host countries that are affected by mitigation projects must fall somewhere.[388] By building in project safeguards such as the requirements for host countries to demonstrate that a 'genuine participatory process' has been conducted, the international community will be able to monitor and ensure that projects designed to combat climate change

[385] See also N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report*, (Environmental Rights Action/Friends of the Earth May 2011); Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (Amsterdam, 29 March 2006).

[386] See F Onojiribholo, 'Kwale Chief Laments Plight of Communities', (*Daily Independent* 16 August 2011).

[387] F Allen *et al*, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in *Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting* (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4.

[388] Bassey argues that with the spate at which CDM projects affect the rights of communities in Africa, Africa may be 'cooked' before the international community wakes up to the reality of investigating the dangers of carbon markets. N Bassey, *To Cook a Continent* (Oxford Pambazuka Books 2011). See also T McVeigh, 'Biofuels Land Grab in Kenya's Tana Delta Fuels Talk of War'. (*Guardian.*2 July 2011).
<http://www.guardian.co.uk/world/2011/jul/02/biofuelsFlandFgrabFkenyaFdelta.>
accessed 12 December 2012.

are not creating long lasting human rights problems.[389] This thesis therefore calls for an international approach that builds in a necessary balance between the need for participation and the need to avoid extremities by NGOs. This balance can be achieved through a transparent process that allows NGOs with genuine complaints about a project the opportunities to access project information and take part in the decision-making processes on such projects.

C. Project Review/Complaints Procedure and Access to Justice

The importance of providing stakeholders opportunities to seek redress or review projects that violate human rights is very crucial. The idea of access to justice has gained increased recognition in a number of core international human rights instruments. In this thesis, we define access to justice as the ability of the public to seek and obtain a remedy through formal and informal institutions.

The UNFCCC, Kyoto Protocol, as well as the CDM Rules fail to establish complaint mechanisms and procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed by mitigation projects to seek redress, to challenge the approval of such projects or to seek the review of already approved projects. For example, the Kyoto Compliance Committee only examines questions of implementation with obligations under the Kyoto Protocol, mainly issues relating to estimation, reporting, and verification of emissions and credits of Annex I parties and overall compliance by parties with their emission reduction obligations.[390] Since the Kyoto Protocol itself does not expressly include human rights

[389] The elements of a 'genuine participatory process' are considered in Chapter 5 of this thesis.
[390] Some of the overall weaknesses of the Kyoto Compliance Mechanism and Procedures with respect to monitoring and verifying emission reductions have been exhaustively identified elsewhere. See M Doelle, 'Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design' <

obligations or respect for human rights in the design and execution of climate change responses, the Kyoto Compliance Committee does not have the mandate to consider compliance with human rights. As such issues relating to how policy measures aimed at achieving emission reductions affect human rights fall outside the mandate and expertise of the enforcement or facilitative branches of the compliance committee.[391] This gap must be addressed if the COP is truly serious about its Cancun Decision that 'Parties should in all climate change actions respect human rights'. It is not enough to simply include human rights paragraphs or safeguards in

---

http://law.dal.ca/Files/MEL_Institute/Doelle_Kyoto_Compliance_Final_Draft.pdf>; S Oberthür and R Lefeber, 'Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience' (2010) 1 Climate Law 133-158; J Brunnée, 'A Fine Balance: Facilitation and Enforcement in the Design of a Compliance for the Kyoto Protocol' (2000) 13 Tul. Envtl. L.J. 223. See also M Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell 2005), C Breidenich, D Bodansky, 'Measurement, Reporting and Verification in a Post-2012 Climate Agreement' (2009 Pew Centeron Global Climate Change), available at: <http://www.pewclimate.org/docUploads/mrv-report.pdf> (accessed 12 January 2013); P Rodgers Kalas and Alexia Herwig, 'Dispute Resolution under the Kyoto Protocol' (2000) 27 Ecology L.Q. 53; D Victor, 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 Duke Envtl. L. and Pol'y F. 147.

[391] So far, the Enforcement Branch of the Kyoto Compliance Committee has to date been confronted with eight questions of implementation related to a party's compliance with its Kyoto commitments. The cases involved Greece, Canada, Croatia, Bulgaria, Romania, Ukraine, Lithuania and Slovakia . Procedurally, a question of implementation can be brought before the Compliance Committee either by a Party to the Kyoto Protocol or by an Expert Review Team (ERT). The Bureau of the Committee then determines whether it comes within the jurisdiction of the Enforcement Branch (EB) or the Facilitative Branch (FB), or both. Once the EB receives a question of implementation from the Bureau it conducts a preliminary review of the issue raised and makes a determination whether to proceed. A human right question will most likely stop at this stage as it falls outside the jurisdiction of the committee. For issues coming within its jurisdiction, the party under investigation is informed of the decision of the EB to proceed.mSuch Party has the right to request a hearing and make written submissions. The EB will usually hear from the party, the ERT, any other party, and any independent experts it feels are needed to resolve the issue raised. The EB can also request specific information from the party under investigation, and can consider submissions from non-parties. Timelines are set for the major steps in the process. After the hearing, the EB makes a preliminary finding as to whether the party is in compliance. The party has an opportunity to comment on the preliminary finding. If it does not, the preliminary finding stands as the final decision of the EB. If the party submits comments on the preliminary finding, the EB issues a final decision in light of the comments filed. The EB has to give reasons for its decisions. A finding of non- compliance will result in a range of consequences depending on the nature of the violation. A key part of the process is the preparation of a compliance plan within three months of the determination of non-compliance, with regular updates thereafter on the implementation of the compliance plan. Key substantive requirements for the compliance plan are set out in Section XV (6) of the Compliance Procedures. For a comprehesinve overview of the process, see a comprehensive overview of the process, see S Oberthür and R Lefeber, 'Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience' (2010) 1 Climate Law 133-158, see also M Doelle, 'Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design' < http://law.dal.ca/Files/MEL_Institute/Doelle_Kyoto_Compliance_Final_Draft.pdf>

climate change regimes. It must be accompanied by a reform in governance structures to establish robust systems to monitor and enforce complaice with human rights.

This aside, the current Compliance Committee does not have powers to receive compliance complaints from the public. Compliance issues can only be referred either by a party to the Kyoto Protocol or by an Expert Review Team (ERT).[392] Private individuals or members of the public do not have access to request a review or a question of implamentation under the current Compliance Rules. This further narrows the scope of the committee and reduces the impacts it could make with respect to investigating questions of implementation or complaints by members of the public.

Apart from the Compliance Committee, the CDM Executive Board and DOEs do not have the mandate to consider projects from a human rights standpoint.[393] Rather, both bodies examine the technical requirements of projects and whether projects have met national requirements of the host country. For example, the CDM EB in response to allegations of fraud and procedural impunities brought against DOEs, established a complaint procedure in 2010. This procedure would allow the public to bring forward complaints about fraud or unethical behavior by a DOE or to challenge a DOE that has not complied with its own accredited system and/or the CDM requirements.[394] However, despite the potentials and promises of this new complaint procedure, its efficacy has been hindered by the fact that respect for human rights is not one of the CDM

[392] See Annexes to Decisions 4/CMP.2 and 4/CMP.4 on the Compliance Committee, FCCC/KP/CMP/2006/Add.1 (2 March 2007), 17, and FCCC/KP/CMP/2008/11/Add.1 (19 March 2009), 14. (hereinafter "Rules of Procedure")
[393] See The CDM Executive Board, <http://cdm.unfccc.int/EB/index.html > accessed 12 February, 2011.
[394] CDM Executive Board, 'Appendix 3: Handling of Complaints against an AE/DOE' , in Procedure for Accrediting Operational Entities by the Executive Board of the Clean Development Mechanism (CDM) <http://cdm.unfccc.int/Reference/Procedures/accr_proc01.pdf> accessed 01 April 2013.

requirements, as such DOEs just like the CDM EB do not have powers to consider human rights impacts of a project. This gap makes it impossible for individuals to approach the executive board to review projects that affect their human rights, leaving states as the only option for redress.

Another loophole is the fact that individuals are not recognised under the CDM Rules and cannot request a project review. Currently, only governments or three CDM Executive Board members can request a review of projects under the CDM Rules.[395] As expected, States that have approved projects would most unlikely instigate such review processes. Stakeholders whose rights are violated do not currently have any way to request a review of a CDM project prior to registration. The Kyoto Protocol does not also confer the CDM Board with the authority to refuse a project based on human rights complaints or with the discretion to hear appeals from members of the public whose rights might be affected by a project even in cases such as the Aguan gas project where several petitions were received that indicated significant infringements of human rights.

Similarly, the Kyoto Protocol does not contain any requirement or provision that provides access to justice or administrative recourse to individuals or the public, when any human right is violated or when proper processes and procedures have not been followed in the design and execution of a project.[396] Dispute resolution mechanisms established in the Kyoto Protocol

[395] CDM Modalities & Procedures, 3/CMP.1 (2005)<http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.

[396] Article 19 of the Kyoto Protocol and Article 14 of the Convention only provide for dispute settlement amongst parties. It reads: 'In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice'. See P Kalas and A Herwig, 'Dispute Resolution Under the Kyoto Protocol' (2000) 27 Ecology Law Quarterly 53-111.

relates to dispute between any two or more Parties concerning the interpretation or application of the Convention which also applies *mutatis mutandis* to the Protocol.[397] Focus is on disputes between Parties; it does not establish a complaint mechanism or project appeal panel through which the public can file disputes, complaints or grievances on a project. Similarly, the CDM Rules fail to establish complaint mechanisms and appeal procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed to seek redress, to block the approval of CDM projects or to seek the review of already approved projects. This freezes out the public whose fundamental human rights might be repressed by host countries.

These gaps create a one-way mechanism in which the decision of the State is final and most often rubber stamped by the international supervisory body. This has enthrenched a culture of approvals which freezes out the common citizen whose fundamental human rights may be repressed by the home state and the repression endorsed by the UNFCCC. Grievance mechanisms support the identification of any adverse human rights impact as part of the human rights due diligence on a project; they also make it possible for grievances, once identified, to be addressed and for any adverse impact to be remediated early and directly by project proponents, thereby preventing harm from being compounded and grievances from escalating.[398] As new project information emerges, new human rights issues could also emerge. As such, it is not enough to only provide updated information on projects, there must also be a project review dispute resolution platform for stakeholders to seek a review of projects and to address any human rights concerns that might arise. A review mechanism complements wider stakeholder

[397] Art 19 Kyoto Protocol, Art. 14 UNFCCC
[398] ibid.

engagement as it provides opportunities for stakeholders to raise emerging issues that were not discussed or during the pre-approval consultations.

A number of international human rights instruments guarantee access to justice as a fundamental human right. Though not legally binding, Article 8 of the Universal Declaration of Human Rights provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[399] The right to remedy includes the right not to be denied fair representation. Article 10 also provides that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations. The ICCPR also discusses access to justice as a human right, specifically with respect to criminal trials.[400]

Similarly in December 2012, the International Commission of Jurists (ICJ) released a Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems. Though not legally binding, this declaration identifies that the universal realization of human rights requires meaningful access to justice for all persons and that it is the responsibility of States and other human rights duty bearers to act to remove barriers to the full access to justice. The ICJ also noted that without the availability to rights holders of avenues to seek and obtain effective remedies and reparations for violations, human rights guarantees may be illusory and go unrealized.[401] Regionally, Article 7 of the African Charter specifically provides that 'every

[399] Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[400] International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[401] International Commission of Jurists (ICJ) is an international non-governmental organization consisting of a group of 60 eminent jurists (judges and lawyers) from across the world that seeks to promote human rights and the rule of

individual shall have the right to have his cause heard'.[402] Article 6 of the European Convention on Human Rights (ECHR) goes further to provide that 'in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[403]

This aside, virtually all international human rights treaties establish individual complaint procedures that allow private citizens to bring complaints before an international quasi-judicial committee for human rights abuses.[404] The complaint procedures under these treaties are designed to be uncomplicated and accessible to the layperson, such that even a peasant whose rights are threatened and is unfamiliar with legal and technical terms could bring a complaint before the bodies concerned. A complaint mechanism that allows individuals to bring complaints against States under the ICESCR is expected to enter into force on 05 May 2013. When in force, the 2009 Optional Protocol to the International Covenant on Economic, Social and Cultural

---

law. It is not part of the UN systems, neither is it related to the International Court of Justice (ICJ). See <http://www.icj.org/about/> accessed 12 January 2013.

[402] African Charter Human and Peoples Rights (Adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982).

[403] European Convention for the Protection of Human Rights and Fundamental Freedoms (Signed 4 Nov. 1950, entered in to force 3 Sept. 1953, 213 UNTS 221, ETS 5)..

[404] At the international level, individual complaint mechanisms are found under eight human rights conventions: in the First Optional Protocol to the International Convenant on Civil and Political Rights (ICCPR); the new Optional Protocol to the ICESCR (opened for signature and ratification in March 2009), Article 22 of the Convention against Torture (CAT) talks about the competence of the Committee to receive and consider communications from or on behalf of individuals subject to State jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention; same as the Optional Protocol to the CEDAW; Article 14 CERD, Article 77 CMW, the Optional Protocol to CRPD and in Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance (As of February 2010, 81 states have signed, and eighteen have ratified. It will come into force when ratified by 20 states). The African Charter Human and Peoples Rights also allows individuals and NGOs to submit complaints. Article 56 states that communications can be submitted by private individuals, non-governmental organizations and various other entities and the petitioner does not have to be the victim. Under the European system, an individual complaint mechanism is found under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the Inter-American level, Article 44 of the American Convention on Human Rights allows petitions to be brought unconditionally before its supervisory body, the Inter-American Commission on Human Rights, unconditionally meaning that no separate acceptance by the state of the individual complaint procedure is required. The petitioner under this system does not have to be the victim but the petition must be submitted to the Commission within six months after the local remedies have been exhausted.

Rights, would make the Economic, Social and Cultural Rights discussed in this thesis justiciable at the international level before the Committee on Economic, Social and Cultural Rights.[405]

Such is the reform that is needed under the Kyoto protocol. Considering the fact that climate change concerns have peculiarities that might not be easily addressed before a human rights body, especially due to the fact that many of these human rights instruments do not specifically address climate change issues, there is a need for the UNFCCC to build in: a project review mechanism and a project appeal panel that would allow members of the public whose rights are directly or indirectly threatened by climate change to seek and obtain redress. A number of international environmental law treaties already have such robust grievance redress mechanisms that could provide lessons to the UNFCCC on how best to establish an international complaint mechanism.[406] For example the Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides access to justice and adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement for victims of environmental damage.[407] It provides broad standing for environmental organizations to seek the prohibition of an unlawful activity that poses a grave threat of damage to the environment and to seek orders against operators in order to prevent or mitigate damage. In Article 14, it provides remedies for any person who considers that his request for information has been unreasonably refused or ignored or has been inadequately answered by a public authority. Such persons are entitled to seek a judicial or administrative review of the decision, in accordance with the relevant legal system.

[405] The UN General Assembly adopted this Optional Protocol on 10 December 2008 and it opened for signature on 24 September 2009. The Protocol is expected to enter into force on May 5, 2013.
[406] Council of Europe, Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) 21.VI.1993. 18 ETS 150
[407] See Art 1.

Article 16 provides that a person suffering damage may at any time: request the court to order an operator to provide specific information in so far as this is necessary to establish the existence of a claim for compensation under the Convention.

The Aarhus Convention also establishes a robust framework that allows individuals and members of the public to demand the enforcement and review of an infringement of any of the procedural rights guaranteed under the Convention.[408] Article 9 (1) of the Aarhus Convention provides that 'any person' who has requested information under Article 4 can challenge decisions. Article 4 allows 'any member of the public' to request information, while Article 4(2) defines the 'public' as natural or legal persons, and their associations, organizations or groups. This grants standing to a wide variety of the society falling within the definitions of the public. This provision opens the door to NGOs and members of the public to challenge any action that violate the established procedural rights the convention. Despite the implementational challenges of this expansive approach, it allows members of the public to challenge actions of public bodies that infringe procedural rights to information, participation and access to justice.[409] The Aarhus Convention also establishes one of the more forward-looking compliance committees. The Aarhus Compliance Committee allows member of the public to send communications to it

[408] UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770; See C Redgwell, 'Access to Environmental Justice', in F. Francioni (ed.), *Access to Justice as a Human Right* (OUP 2007) 153-175. Redgwell identifes the landmark contributions of the Aarhus Convention as the only environmental convention that significantly addresses the obstacles to environmental justice.

[409] While Aarhus is well regarded for providing broad legal standing and access to justice provisions, its implementation has been problematic. A recent study shows that almost all EU countries have problems in at least one of the essential elements for the implementation of Article 9 provisions mostly in the areas of transparency, length of procedures and cost of legal action. See J Darpo, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (2012) available at < http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf> accessed 23 January 2013. See also 'The Aarhus Convention: How are its Access to Justice Provisions being implemented?' (2008) A Report on a Conference organised by the European Commission in Brussels on 2 June 2008.

concerning a Party's compliance with the convention. Article 15 of Aarhus Convention establishes the compliance committee to be a forum for reviewing compliance with the provisions of the Convention. This provides a vanguard framework through which the public can take governments to task for violating procedural human rights and environmental laws. Based on the fact that the Aarhus Convention is opened to accession by non-ECE countries, it posseses stronger potentials to serve as a global framework for strengthening access to justice, participation and access to information in environmental matters globally. Despite some concerns on its practical implementations, the Aarhus framework can serve as model for the improvement of international climate regimes to also allow the public to enforce human rights obligations.[410]

The elements of access to justice are explored in greater details in Chapter Five of this thesis. Generally, we argue that there is a need to establish formal grievance mechanisms through which members of the public could seek redress for human rights violations that could result from a planned project. There is also a need for a project review board or panel that could examine new evidence of human rights violations by a registered project. These bodies would allow the public to block the approval and registration of a project that could affect their human rights, and the opportunity to seek a post-registration review of an approved project in the light of new facts or evidence. We also discuss the need for compliance mechanisms under international climate change regimes to measure and monitor human rights compliance in the execution of mitigation projects. This might be by expanding the current mandates of current climate change regimes to

[410] UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.

empower them to monitor human rights compliance or by establishing a separate human rights compliance monitoring branch as a third branch of the Compliance Committee.

However such effort must at first be preceeded by identifying human rights safeguards as part of the climate change regimes. Before we speak of compliance, current climate change regimes must first mainstream the obligation to protect and respect human rights as part of efforts to combat climate change. This would then provide a legal basis to expand and reform climate change governance structures. When such structures are established, they can then monitor how countries are respecting human rights in climate change actions. Such governance structures would also create synergy with national efforts by encouraging member states to monitor approved projects and report human rights compliance as part of the periodic reporting requirements which parties currently have under the Kyoto Protocol.[411]

Conclusion: Bringing Human Rights to the Table

Although the respect and protection of human rights are critical if climate change projects are to deliver real and substantial sustainable development to developing countries, both the UNFCCC and the Kyoto Protocol do not talk about human rights.[412] Not only are both instruments silent on the above-mentioned impact on human rights caused by climate change projects, they also do not give supervisory boards (such as the CDM Executive Board or DOEs) any authority to consider

[411] The UNFCCC Reporting Guidelines on Annual Inventories require Annex I Parties, to provide by 15 April each year, annual national GHG inventories, including a National Inventory Report (NIR) on the institutional structures and quality assurance and control procedures adopted by Parties in meeting emission eduction commitments. See Articles 4 and 12 of the Convention; see also The UNFCCC Reporting Guidelines on Annual Inventories FCCC/SBSTA/2006/9 (18 August 2006).

[412] For an excellent and detailed discussion of the procedural shortcomings of the Kyoto Protocol, see N Eddy & G Wiser, 'Public Participation in the Clean Development Mechanism of the Kyoto Protocol' in C Bruch, ed., *New Public: The Globalization of Public Participation* (ELI 2002) 203.

human rights issues prior to the approval and registration of projects.[413] Instead, the UNFCCC places the decision to host a project in the hands of national governments if it meets their sustainable development needs.[414] Placing such a crucial decision in the hands of a country that is interested in such projects has led to a culture of 'approvals' under which questionable projects, even the ones that lead to loss of life and the violation of human rights are approved by host governments and registered by the CDM Executive Board.[415]

Due to the scramble by developing countries to host CDM projects, there have been increased tendencies to lower sustainability standards and to encourage foreign CDM projects despite their potential short and long term effects on human rights enjoyment.[416] As such, states have been more concerned with hosting climate change projects at all costs, irrespective of the human rights consequences of such projects.[417] These concerns are more serious in developing countries with poor human rights records.[418]

---

[413] See S Jodoin, 'Lost in Translation: Human Rights in the Climate Change Negotiations' CISDL Legal Working Paper (January 2010) <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf> accessed 02 June, 2011.

[414] See Art. 12.5(a) of the Kyoto Protocol, see also the CDM Modalities and Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.

[415] N Eddy & G Wiser, `Public Participation in the Clean Development Mechanism of the Kyoto Protocol` in C Bruch, (ed.), *New Public: The Globalization of Public Participation* (ELI 2002) 203.

[416] M Jung, 'Host Country Attractiveness for CDM Non-Sink Projects' (2006) Energy Policy 2174; A. Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' HWWA Report 255 at 1; K. Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature', <http://cd4cdm.org/Publication/ > accessed 21 January 2011. See also D Olawuyi, 'Beautifying Africa for the Clean Development Mechanism: Legal and Institutional Issues Considered' in B Richardson, Y Le Bouthillier, H McLeod-Kilmurray & Stefan Wood (eds.), *Climate Change Law and Developing Countries: Legal and Policy Challenges for the World Community* (Edward Elgar Publishing 2009).

[417] See CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> accessed 23 July, 2011.

[418] In Nigeria for example, six different emission reduction projects have been subjects of intense petition and court actions over their human rights violations. The violations range from land grabs without compensation, assault on indigenes, killings, lack of participation in decision-making process and the displacements of residents of affected areas. For these projects it is reported that the environmental impact assessment was only put together as a smokescreen and forwarded to the CDM Board after Nigerian authorities had already approved the projects. These projects were consequently approved and registered by the CDM Board despite the protests. See K Adeyemo, 'Nigerians Oppose Climate Development Projects' *The Tribune* (Ibadan, 12 September, 2010) 3; 'REDD Under Fire in Nigeria', <http://uk.oneworld.net/article/view/165950/1/246> accessed 12 October, 2010, SCOOP, Don't Sell

In this chapter, we have examined some of the loopholes in the design, mandates and procedures under the Kyoto Protocol and the CDM Modalities and Rules. These loopholes have made it difficult for the CDM Executive Board to deal with the plenitude of human rights concerns arising from CDM projects. This brings to the fore, the need to reform extant climate change to take into account the interactions between climate change mitigation projects and human rights.[419] Without this, it might amount to attempting to solve the problem of climate change by creating many others. The need to examine how existing human rights frameworks can be mainstreamed into climate change actions and projects has therefore become imperative.

The way forward lies in an approach that mainstreams human rights safeguards into the processes and procedures for the approval and registration of climate change projects.[420] The human rights mainstream paradigm has emerged within the last decade as an integrated approach for promoting human right ideas at the decision-making level. It is believed that by mainstreaming human rights standards into climate change programmes and policies, human

---

Forests: Group Urge Nigerian Government <http://www.scoop.co.nz/stories/WO1008/S00467/dont-sell-forests-groups-urge-nigerian-govts.htm> accessed 12 October, 2010; See Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010; Bank Information Center, 'Local Groups say project will not end gas flaring, could exacerbate conflicts in the Niger Delta'<http://www.bicusa.org/en/Project.39.aspx> accessed 14 January, 2011.

[419] See J Knox, 'Linking Human Rights and Climate Change at the United Nations.' (2009) 33 Harvard Environmental Law Review 477; A Parsons. 'Human Rights and Climate Change: Shifting the Burden to the State?' (2009) 9 (2) Sustainable Development Law & Policy 22-23.

[420] See E Meijer and J Werksman, 'Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201; The World Bank, *Development and Climate Change*: *World Development Report 2010* (The World Bank, 2010); Oxfam International, *Climate Wrongs and Human Rights*: *Putting People at the Heart of Climate-Change Policy*, Oxfam Briefing Paper 117 (Oxfam International 2008).
P Baer, T Athanasiou, and S Kartha, *The Right to Development in a Climate Constrained World*: *The Greenhouse Development Rights Framework* (Heinrich Böll Foundation 2007); E Page, *Climate Change,Justice and Future Generations* (Edward Elgar 2006) 132-60.

rights issues would be better recognised and protected thereby reducing the perennial conflicts between human rights and mitigation projects.[421]

However, the human rights mainstream paradigm is not without its critics. Questions continue to emerge regarding the legal and theoretical basis for human rights mainstreaming; whether mainstreaming human rights would not further exacerbate the concerns on human rights proliferation and the devaluation of the human rights currency; whether human rights mainstreaming could effectively tackle market-driven inequalities; and whether human rights mainstreaming would not be merely cosmetic and redundant or whether it could add anything new to extant climate change regimes.

In the next chapter, we shall examine and comment on the debates on the human rights mainstream paradigm under international law.

[421] See S Jodoin, 'Human Rights and Climate Change Governance' (CISDL Legal Working Paper December 2010); see also D Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 2(2) Nordic Environmental Law Journal 33-52.

CHAPTER THREE:

THE CONCEPT OF MAINSTREAMING IN INTERNATIONAL LAW

1. Introduction

This chapter examines the emerging concepts of mainstreaming under international law. Given the pivotal nature of this concept to this thesis, it pertinent at this stage to analyse and discuss the meaning, nature, theoretical basis and value of human rights mainstreaming. In this chapter, I review, explore and contribute to the emerging debates on the theoretical underpinnings, values and problems associated with the human rights mainstream paradigm. In response to the charge that the human rights mainstream paradigm lacks a theoretical core, I will analyse how the principle of systemic integration in international law, the inter-doctrinal legal transplant/cross-fertilization theory; participatory development theory; and the full belly thesis could provide theoretical underpinning for the human rights mainstream paradigm. This chapter also discusses the legal basis for human rights mainstreaming. Questions such as: the definition question, novelty or duplication question, neo-liberalism critique, determinacy, and the conflict of rights debates are examined.

2. The Legal Mainstream Paradigm: A Background

Over the last decade, the idea of mainstreaming has emerged under different genres of public international law as a legal and policy response to emerging and hitherto undeveloped areas of law. It has emerged as a strategy for expanding the scope of law beyond the traditional frontiers of law. It is a paradigm that seeks to advance the rule of law into diverse societal strata, such as the arts, business, education, environment, faith, finance, government, labour, gender, media,

public safety, public health, and science.[422] It employs an action oriented and a multidisciplinary approach to understanding and resolving legal problems.

The roots of the legal mainstreaming concept can arguably be traced to the fundamental legal assumption in many common law jurisdictions that the crux of law is that *ubi jus ibi remedium*: when there is a wrong there mustc be a remedy.[423] As per Justice Kerner in *Leo Feist v Young*, regardless of the specificity of the social injustice issue involved, legal solutions must be found for the common man within existing bodies of law.[424] It does not matter to the law, under what genre the remedy is found; the welfare of the people is the supreme law.[425] If the remedy cannot be found in an emerging area of law e.g. health law or environmental law, legal mainstreaming advocates the borrowing, moving and merging of legal principles and best practices from developed areas of law to an obscure or emerging area of law. Legal mainstream theorists advocate that legal solutions could be found when strict effect is given to the sanctity of rule of law in any situation.[426]

---

[422] See J Soussan, *Making Mainstreaming Work* (SEI 2007) 2, see also World Justice Project, *Mainstreaming the Rule of Law*, (2011) <http://worldjusticeproject.org/mainstreaming/> accessed 12 December, 2011.

[423] One of the elementary maxims of equity is that there is no wrong without a remedy. This principle was key in the case of *Ashby v White* (1703) 92 ER 126 where the court held *inter alia*:

> …If a man has a right, he must…have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it… indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

See also *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Marbury v. Madison* 5 U.S. (1Cranch) 137 (1803).

[424] 138 F. 2d 97 (1943).

[425] As Brown LJ observed *inter alia* in *Ashby v White* (1703) 92 ER 126:

> …Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and *ubi eadem ratio, ubi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frighted when a matter of property comes before us, by saying it belongs to the Parliament; we must exert the Queen's jurisdiction. My opinion is founded on the law of England.

[426] See F Beveridge, S. Nott, and K. Stephen, 'Mainstreaming: A Case for Optimism and Cynicism', Feminist Legal Studies (2002) 10(3): 299-311; F Beveridge, S Nott and K Stephen 'Mainstreaming and the Engendering of Policymaking: A Means to an End?'(2000) 7(3) Journal of European Public Policy 385-405.

Mainstreaming has therefore emerged as a legal approach that involves the circulation of legal models between different bodies of law and between legal theorists.[427] It is an approach for the inclusion or moving of legal rules or practice (most times a well-developed legal rule) to achieve legal solutions. It is based on the premise that multidisciplinary collaboration and an integrated interpretation of the law is the most effective way to advance the rule of law.[428] The concept of mainstreaming provides a tool for a legal reformer to source solutions to societal problems within existing bodies of law. Legal mainstream theorists therefore advocate that a flexible, dynamic, integrated and multifaceted interpretation of the rule of law must be reflected in all decision and policymaking at all levels.[429]

Even though the concept of mainstreaming is not new to international law, it has recently gained increased recognition as a multifaceted and action oriented approach to responding to social justice concerns.[430] A plenitude of literature has been generated on gender mainstreaming, anti-corruption mainstreaming, health mainstreaming, environmental mainstreaming, and human rights mainstreaming.[431] Even though these different models of mainstreaming have different

[427] W Twinning, 'Diffusion of Law: A Global Perspective' (2009) 49 J. Legal Pluralism 1; Z Elkins & B Simmons, 'On Waves, Clusters, and Diffusion: A Conceptual Framework' (2005)598 Annals Am. Acad. Pol. & Soc. Sci. 33; Y Dezalay & B Garth, 'The Import and Export of Law and Legal Institutions: International Strategies and National Palace Wars' in D Nelken and J Feest (eds.), *Adapting Legal Cultures* (Hart 2001) 241.

[428] See World Justice Project, *Mainstreaming the Rule of Law*, (2011) <http://worldjusticeproject.org/mainstreaming/ > accessed 12 December, 2011.

[429] See J Soussan, *Making Mainstreaming Work* (SEI 2007) 2, R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (Installment II of II), (1991) 39 Am. J. Comp. L. 343.

[430] For recent developments on legal mainstreaming, see World Justice Project, *Mainstreaming the Rule of Law* (2011)
<http://worldjusticeproject.org/mainstreaming> accessed 12 December, 2011.

[431] See N Kabeer, *Mainstreaming Gender in Social Protection for the Informal Economy* (Commonwealth 2008); A Brooke 'Gender Mainstreaming and Women's Human Rights' (2005) Prepared for the International Studies Association Annual Convention, Honolulu, Hawaii, March 1-5; H Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights Journal 1-18; C Bacchi, 'Gender Mainstreaming: A New Vision, More of the Same, or Backlash?'(2001) Dialogue*: Academy of the Social Sciences* 20(2): 16-20. 'Environmental Mainstreaming' is the informed inclusion of relevant environmental concerns into the decisions of institutions that drive national and sectoral development policy, rules, plans, investment and action. See B Clayton & S Bass, *The Challenges of Environmental Mainstreaming* (IEED 2009);

applications and conceptual connotations that are specific to them, the critical concepts and theoretical underpinnings are arguably the same. Mainstreaming advocates the adoption of harmonized and multi-pronged strategies to engage the expertise of policymakers in designing laws, policies and regulations that reflect the pressing socio-justice issues. [432]

The type of mainstreaming that is the bedrock of this thesis is human rights mainstreaming. The crux of this thesis is to investigate the potentials and pitfalls of mainstreaming human rights principles into climate change regimes, particularly the approval and execution of climate change mitigation projects. Therefore, the starting point will be to examine and review the growing literature on the concept of human rights mainstreaming in international law, so as to identify the optimism and cynicism in the literature about the concept. It makes no organizational sense to propose a human rights based approach to climate change – a practical approach founded on the human rights mainstream paradigm – without first analysing, examining and addressing the core theoretical basis of the human rights mainstream paradigm itself as a whole. I begin my enquiry by considering from the outset, the origin, meaning, debates and the core theoretical underpinnings and justifications for the human rights mainstream paradigm.

World Bank, Mainstreaming Climate Change Adaptation in Irrigated Agriculture Project (World Bank 2008); M Kok and H de Connick, 'Widening the Scope of Policies to Address Climate Change: Directions for Mainstreaming (2007) 10(7-8) Environmental Science & Policy 587-599; Meta Management and Overseas Development Institute, *Ideas and Experiences in Mainstreaming Environment and Water* (Netherlands Ministry of Foreign Affairs / Development Cooperation 2006); F Seymour, C Maurer & R Quiroga *Environmental Mainstreaming: Applications in the Context of Modernization of the State, Social Development, Competitiveness, and Regional Integration* (Inter-American Development Bank 2005); See also T Clark and F Crepeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 Netherlands Quarterly on Human Rights, 389-390.

[432] See World Justice Project, *Mainstreaming the Rule of Law* (2011) <http://worldjusticeproject.org/mainstreaming> accessed 12 December, 2011; see also Y Ghai and J Cotterel, 'The Rule of Law and Access to Justice' in *Marginalized Communities and Access to Justice* (Routledge-Cavendish 2009).

3. Human Rights Mainstreaming

3.1 Origin and Meaning

Human rights mainstreaming is a subset of the legal mainstream paradigm that advocates the harmonization or integration of human rights norms and practices with social justice issues such as development, environmental protection, health, education, business, safety, government and labour.[433] It advocates that the protection of those international human rights principles, which took the world many years to foster, must be paramount in policy and decision-making at all levels of government. It is a transformative strategy aimed at including human right norms at the decision-making level. Simply put, human rights mainstreaming involves the integration of human rights norms and practices into social justice issues such as environmental protection.

The origin of the human rights mainstream movement can be traced to the 1997 United Nations Programme for Reform, launched by the United Nations Secretary General.[434] The report designates human rights as a crosscutting issue in each of the four substantive fields covered by the United Nations.[435] The reform programme called on all entities of the UN to 'mainstream human rights norms' into their respective mandates and activities.[436] The report recommends the extension of human rights activities by the integration of human rights into all principal United

[433] NZAID, *Human Rights Mainstreaming* (New Zealand Agency for International Development 2009) 4; I Bynoe & S Spencer, *Mainstreaming Human Rights in Whitehall and Westminster* (IPPR 1999); E Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law' (2000) 37 Common Market Law Review 1363-1382; T Pajuste, *Mainstreaming Human Rights in the Context of the European Security and Defence Policy* (Erik Castre´n Institute 2008) 10.

[434] United Nations, *Renewing the United Nations: A Programme for Reform*, Report of the Secretary General, (A/51/1950), July 14, 1997, p. 87,

[435] These include peace and security; development cooperation; economic and social affair; and humanitarian affairs. *Ibid.*

[436] For an excellent and detailed account of the history of human rights mainstreaming, see A Frankovits, *Mainstreaming Human Rights, The Human Rights-Based Approach and the United Nations System* (UNESCO 2005).

Nations activities and programmes. It gives a mandate to UN agencies to fully integrate human rights into their areas of activities. According to the UN Secretary General:

> …We must put people at the centre of everything we do…A more people-oriented United Nations must be a more results-based organization, both in its staffing and its allocation of resources.[437]

This report was followed by the 1998 Report of the Secretary General to the UN Economic and Social Council which also recommended inter alia the: (i) adoption of a 'human rights-based approach' to activities carried out within the respective mandates of components of the United Nations system; (ii) development of programmes/projects addressing specific human rights issues; (iii) reorientation of existing programmes as a means of focusing adequate attention on human rights concerns.[438]

Ever since this wholesale reform programme was launched, the idea of mainstreaming human rights has found significant support in the activities of most UN agencies, the World Bank, regional bodies such as European Union, African Development Bank, Asian Development bank, and even national governments and agencies at the domestic level.[439] For example, in response to the UN Secretary's Reform Programme, UNESCO in 2003 adopted its Strategy on Human

[437] United Nations, *Renewing the United Nations: A Programme for Reform*, Report of the Secretary General, (A/51/1950), July 14, 1997, p. 87.

[438] See UN/UNDOC/GEN/N97/A/51/950/1997. See UNESCO, 'Guidelines for Human Rights-Based Programming Approach' Executive Directive 1998-004; see also J Theis, 'Evolution and Future of Rights-based Approaches' (Save the Children Sweden 2003) 10.

[439] See T Greiber, M Janki, M Orellana, A Savaresi-Hartmann and D Shelton, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009); A Frankovits, *Mainstreaming Human Rights, Human Rights Based Approach and the United Nations System* (UNESCO 2006); C Nyamu-Musembi, and A Cornwall, 'What is the 'Rights-Based Approach' all about? Perspectives from International Development Agencies' (2004) IDS Working Paper 234, K Svadlenak-Gomez, 'Human Rights and Conservation: Integrating Human Rights in Conservation Programming' 48 (USAID 2007); I VeneKlasen, 'Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation' (2004) IDS Working Paper 235; J Theis, 'Promoting Rights-based Approaches: Experiences and Ideas from Asia and the Pacific' (2004) CRIN Working Documents www.crin.org/docs/resources/publications/hrbap/promoting.pdf accessed 15 July, 2010; I Hamm, Brigitte, 'A Human Rights Approach to Development' (2001) *Human Rights Quarterly* 23: 1005-31; G Castillo and M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (2007) in *Conservation and Human Rights*, CEESP/IUCN http://cmsdata.iucn.org/downloads/pm15.pdf accessed 15 May 2010.

Rights to 'strengthen…the promotion and protection of human rights through the application of a coherent and Organization-wide vision of human rights'.[440] The UNESCO Strategy proposed the development of a 'phased plan to mainstream human rights into all of UNESCO's programmes and activities on the basis of human rights instruments and the conclusions of treaty monitoring bodies'.[441] The need to mainstream human rights in decision-making at all levels of governance has also been identified as top priority by the United Nations High Commissioner for Human Rights.[442]

In 2005, Heads of Governments and world leaders at the United Nations World Summit, resolved to integrate the promotion and protection of human rights into national policies and to develop and support human rights mainstreaming strategies. They noted that 'the respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals'. The summit also recognised that human rights, development and peace and security are the three related pillars of the United Nations system.[443] According to the summit outcome:

> We resolve to *integrate* the promotion and protection of human rights into national policies and to support the *further mainstreaming of human rights* throughout the United Nations system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies.[444]

[440] UNESCO, *Strategy on Human Rights*, Adopted by the 32nd UNESCO General Conference 2003 (Document 32 C/57) <http://unesdoc.unesco.org/images/0013/001316/131627e.pdf> accessed 23 February 2012.
[441] ibid
[442] The Commissioner called for the reform of the Human rights secretariat so as to be the centre of mainstreaming human rights within the UN systems. See U.N. Office of the High Commissioner for 'Human Rights, Mainstreaming Human Rights' <http://www.unhchr.ch/development/mainstreaming-01.html> accessed 23 January 2012.
[443] See UN World Summit, *Outcome Document* (2005) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> accessed 12 January 2012.
[444] Emphasis mine. See Para. 126, UN World Summit, ibid.

In 2009, the United Nations Development Group launched what is currently the most comprehensive human rights mainstreaming plan within the international development circle – the UNDG Human Rights Mainstreaming Programme (UNDG-HRM).[445] The UNDG-HRM aims to mainstream human rights norms and standards into the work and activities of all UN agencies and programmes. The UNDG-HRM seeks to further institutionalize human rights mainstreaming efforts in the UN development system and to strengthen system-wide coherence, collaboration and support. It provides the platform for a coordinated and coherent UN system-wide approach towards the integration of human rights principles and international standards into operational activities for development. In 2011, the UNDG-HRM released a comprehensive action plan on how human rights mainstreaming could be achieved within UN systems. [446] The plan seeks to strengthen coherence in human rights mainstreaming policies and practices across UN systems; enhance the adoption of a human rights based approach (HRBA) within UN systems and teams; enhance UN system-wide knowledge codification and sharing on HRM and strengthen capacity,

[445] The UNDG was established in 1997 as a coalition of over 32 UN agencies, funds, programmes, and offices, plus five observers that play a role in development. The group meets at least three times yearly to decide on issues related to country level coordination to achieve the internationally agreed development goals, including the MDGs. The UNDG seeks to coordinate, harmonize and align the 32 UN agencies, departments, and programmes that are involved in international development. The group's common objective is to deliver more coherent, effective and efficient programmes within the UN system. See UNDG, available at < http://www.undg.org/index.cfm?P=2> accessed 20 January 2012. The United Nations Environment Programme (UNEP) is a part of the UNDG. For a comprehensive list of members see UNDG Members, <http://www.undg.org/index.cfm?P=1503> accessed 20 January 2012.

[446] The UNDG-HRM identifies four broad priorities:

1. Promoting a coordinated and coherent UN system-wide approach towards the integration of human rights principles and international standards into UN operational activities for development;
2. Providing coherent and coordinated support to Resident Coordinators and UN country teams in mainstreaming human rights;
3. Developing a coherent UN-system wide approach, through cooperation and collaboration among UN agencies, to providing support towards strengthening national human rights protection systems at the request of governments; and
4. Contributing to the integration of human rights issues in the overall UNDG advocacy on development agenda and global issues

See UNDG, *UNDG Human Rights Mainstreaming Mechanism: Operational Plan 2011-2013* (November 2011) available at <http://undg.org/docs/12173/UNDG-HRM%20OperationalPlan%20Nov%202011.pdf> accessed 23 January 2012.

collaboration and policy dialogue on human rights mainstreaming across the UN.[447] Summarily, the UNDG-HRM aims to strengthen UN system-wide policy coherence, advocacy, knowledge sharing and accountability for results in mainstreaming human rights.[448]

Human rights mainstreaming has also received enormous attention from legal scholars and commentators.[449] McCrudden, Oxford Law Professor and a leading commentator on human rights mainstreaming defines it as the reorganization, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policymaking.[450] Clark defines it as a social justice-led approach to policymaking in which human rights principles, strategies and practices are integrated into the work of government and other public bodies.[451] It has been framed as a new, better, revolutionary strategy, and a dominant policy framework aimed at reducing the gap between policy intentions and actual results; and as 'a wonder drug' for equal opportunities in international law.[452] Harvey describes it as the task for the century and as a revolutionary

[447] See 'Priority 1: Promoting a coordinated & coherent UN system wide approach to human rights integration' in UNDG, *UNDG Human Rights Mainstreaming Mechanism: Operational Plan 2011-2013* (November 2011), ibid.
[448] ibid at 12.
[449] See E Petersmann, 'From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law' (2000) 37 Common Market Law Review 1363-1382; T Pajuste, *Mainstreaming Human Rights in the Context of the European Security and Defence Policy* (Erik Castre´n Institute 2008); F Beveridge, S Nott, and K Stephen 'Mainstreaming: A Case for Optimism and Cynicism', (2002) 10(3) Feminist Legal Studies 299-311; J Squires, 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12(3) Social Politics: International Studies in Gender, State & Society 366-388; J Theis, 'Evolution and Future of Rights-based Approaches' (Save the Children Sweden 2003) 10; P Alston, Resisting The Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann, (2002) 13(8) EJIL 815; M Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47.
[450] J C McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart, 2005); J C McCrudden, 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' in E McLaughlin and N Faris (eds), *Section 75 Equality Duty: An Operational Review* (North Ireland Office 2004).
[451] T Clark and F Crepeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 Netherlands Quarterly on Human Rights, 389-390.
[452] F Beveridge, S Nott, and K Stephen 'Mainstreaming: A Case for Optimism and Cynicism' (2002) *Feminist Legal Studies* 10(3): 299-311.

strategy for an effective enforcement and implementation of international human rights standards. According to Harvey:

> …As the human rights movement moves forward in this new century, we all must turn to effective enforcement and implementation of international standards. Mainstreaming human rights norms is the task for this century. Human rights lawyers should engage with other fields of knowledge in order to advance these ends. Human rights law must matter, not simply to individual litigants, but to the vast array of oppressed individuals and groups. Making human rights law matter in a concrete sense to others engaged in connected struggles (those working on participatory models of development, for example) to achieve the practical realisation of the ideals of human rights law.[453]

Human rights mainstreaming seeks to promote the protection and fulfillment of existing international human rights by upholding the reflection of human rights norms in policymaking. The current robust principles of international human rights law came about after several years of intense campaigns against societal oppressions and injustices.[454] As such, what human rights mainstreaming seeks to achieve is to ensure that the ideas and spirits behind human rights law, which are that of liberty, equality and fraternity, are permanently enshrined in human consciousness, by establishing policies that create the appropriate conditions for the enjoyment of human rights.[455] According to the ICCPR, 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his social, economic and

[453] J Harvey, 'Review Essay: Gender, Refugee Law and the Politics of Interpretation' (2000) IJRL 12(680).

[454] Human rights are a product of philosophical debates that have raged for over two thousand years. The debates have focused on a search for moral standards of political organization and behaviour that are independent of the contemporary society. For an excellent overview of the history of human rights, see J Shestack, 'The Philosophical Foundations of Human Rights' in J Symonides (ed.), *Human Rights Concepts and Standards* (Ashgate 2000) 31-56; A Heard, 'Human Rights: Chimeras in Sheep Clothing?' (1997) <http://www.sfu.ca/~aheard/intro.html> accessed 12 December, 2011. See also J Manique, 'Universal and Inalienable Human Rights: A Search for Foundations' (1990) 12 Human Rights Quarterly 465-485.

[455] Theorized by Jean-Jacques Rousseau in the *Social Contract* as the basis of human rights, the slogan of 'Liberty, Equality and Fraternity' has found its way into the Constitutions of many nations including France, India, Haiti, Chad, Gabon and Niger. Also Article 1 of the UDHR states that: 'All human being are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. See Universal Declaration of Human Rights, adopted 10 de.1948, G.A Res. 217A9III), 3 UN GAOR, UN Doc. A/810 at 71 (1948). See also C Wraight, *Rousseau's The Social Contract: A Reader's Guide* (Continuum Books 2008).

cultural rights'[456] Human rights mainstreaming seeks to ensure that these conditions are put in place through the design of right-based policies. Mainstreaming advocates for the enactment of law and the building of institutions that promote, respect, and protect human rights. As law and institutions are vital conditions for the enjoyment of human rights, the mainstream paradigm seeks to ensure that these conditions are permanently in place. As the United Nations High Commissioner for Human Rights noted:

> …Mainstreaming human rights in the UN system is not just a mandate for me as the High Commissioner, but a common endeavour for all UN agencies and staff...Over the last decade, there has been significant progress in mainstreaming human rights in the work of the UN system. An increasing number of UN agencies are not only integrating human rights into their internal policies, but also actively advocating for human rights through their mandated work – on the rights of people affected by HIV, on the rights to food, education, health and shelter, and on the fundamental rights of workers…human rights are no longer add-ons to long list of other priorities, but a foundation on which they can build the UN's coherence and comparative advantages.[457]

Generally, the international community is arguably recognizing the need for an integrated approach to development that mainstreams human rights safeguards as a foundation for international policy making. More than before, UN agencies are increasingly playing important roles to ensure that respect for human rights are incorporated into efforts aimed at addressing issues such as climate change. The importance of this new drive is that human rights are not only recognised when there is a problem, instead respect for human rights form part of the rules of the game in the design of international legal regimes.

---

[456] See Preamble to the International Covenant on Civil and Political Rights, adopted 16 Dec.1966, entered into force 23 March 1976, 999 UNTS 171 <http://www2.ohchr.org/english/law/ccpr.htm> accessed 02 January, 2012.

[457] Statement by N Pillay, United Nations High Commissioner for Human Rights at the Launch of the United Nations Development Group Human Rights Mainstreaming Mechanism (UNDG-HRM) Multi-Donor Trust Fund (27 November 2011) <http://www.undg.org/docs/12174/Statement%20by%20High%20Commissioner%20for%20Human%20Rights-%20Ms.%20Navi%20Pillay.pdf> accessed 23 January 2012.

3.2 Tenets of Human Rights Mainstreaming

A fundamental purpose of human rights mainstreaming is to develop 'a human rights culture' in international, regional and national governance.[458] Under this paradigm, human rights issues would not only come to the table when there is a violation, infringement or problem. Instead, human rights would always be placed at the table when governmental decisions are made. According to Blackburn, 'human rights should form part of the 'rules of the game' under which the system of politics and government is conducted'.[459] Decisions such as building a new airport, constructing a new road or sports complex, exploiting a natural resource or building a pipeline and constructing a hydroelectric power plant ought to be made with full appraisal of their likely human rights consequences, and with the full participation and inclusion of citizens whose rights would be affected in the decision-making process. Creating a human rights culture would represent a radical shift from a needs-based approach where human rights are treated as 'add ons'; to an approach that enshrines a human rights culture at the heart of policymaking. Under this model, human rights are not relegated to the background; instead human rights issues are placed at the fore of policymaking, actions and resource allocation.[460]

The human rights mainstream paradigm would present an opportunity for citizens to demand from their governments, the respect for and the enforcement of their human rights. This approach

[458] According the to the United Nations, the crux of human rights mainstreaming is to integrate human rights in all development efforts undertaken by UN Agencies, organizations, funds and programmes, in order to ensure that development is participatory, equitable, sustainable and accountable. See Human Rights Council, 'Draft Concept Note: High Level Panel Discussion on Human Rights Mainstreaming' (1 March 2013), Palais des Nations, Geneva, Switzerland); M Wewerinke & C Doebbler, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' 2011 (10) Chinese Journal of International Law 141–160; I Bynoe and S Spencer, *Mainstreaming Human Rights in Whitehall and Westminster* (IPPR 1999); see also UNDG, *UNDG Human Rights Mainstreaming Mechanism: Operational Plan 2011-2013* (2011) available at <http://undg.org/docs/12173/UNDG-HRM%20OperationalPlan%20Nov%202011.pdf> accessed 23 January 2012.

[459] R Blackburn, 'Towards a Constitutional Bill of Rights for the United Kingdom' Pinter.1999 p xxxii.

[460] ibid.

would enlighten citizens of their rights and provide them with many opportunities to enforce them. It empowers citizens to demand that governments, all public authorities and private authorities which fulfil public functions ensure that they comply with human rights standards.[461] Citizens are provided with the information, education and legal assistance to demand the enforcement of their human rights. Under this paradigm, citizens are not mere observers or objects of decision-making, rather, they are active participants, subjects and in fact the most important stakeholders in the decision-making realm. Citizens are empowered to understand their rights to act as active gatekeepers in ensuring that decisions, policies or governmental projects that can affect their human rights do not see the light of the day. As Baros argued:

> …a new type of relationship between the individual and state is needed. A full and participatory citizenship would have to be an ideological framework within which the proposed improvements should take place. Greater awareness of legal and political entitlements by citizens and meaningful participation in political life is a precondition for developing a partnership with the government and therefore contributing to a more positive human rights culture.[462]

Human rights mainstreaming is not all about giving individuals a stick with which to beat the State or a voice to compete with state apparatus, rather it seeks to create a society in which rights and responsibilities are properly balanced.[463] It promotes the establishment of institutions that promote effective relationships and correlations between rights and responsibilities. The whole idea is not only about empowering the individual with rights against governmental excesses. Rather, mainstreaming presents what Hunt describes as the 'communitarian conception of a human rights culture' whereby rights and responsibilities are properly balanced.[464] Citizens

[461] ibid, see also C Harvey, 'Talking about Human Rights' (2004) 5 E.H.R.L.R 500-516.
[462] M Baros, 'A New Human Rights Culture and Deliberate Constitutionalisation' (2007) Hertfordshire Law Journal 5(1), 115.
[463] J Straw, Home Secretary, 'Building a Human Rights Culture', an address delivered at a Civil Service College Seminar, 9 December 1999.
[464] M Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 (1) Journal of Law and Society 90.; see also R Bellamy, 'Constitutive Citizenship versus Constitutional Rights:

understand their rights and freedoms and at the same time understand their obligations and duties. According to Hunt:

> …it is designed to introduce a culture of rights that is more communitarian than libertarian in its basic orientation. In such a human rights culture, the individual citizen is more than the mere bearer of negative rights against the state, but is a participative individual, taking an active part in the political realm and accepting the responsibility to respect the rights of others in the community with whom he or she is interdependent…It introduces a distinctly social democratic model of human rights protection, combining the protection of individual rights with a role for participative citizens involved in the democratic decision-making in their community.[465]

Straw in his detailed exposition also notes that under human rights mainstreaming, the underlying idea is that rights do not exist in a vacuum:

> The culture of rights and responsibilities we need to build is not about giving the citizen a new cudgel with which to beat the State. That's the old-fashioned individualistic libertarian idea that gave the whole rights movement a bad and selfish name. The idea that forgot that rights don't exist in a vacuum; that forgot the relationship between the individual and the group. That's not the culture of rights and responsibilities we want or need. The culture we want is not a litigious collection of individuals and interest groups who see rights as a free good and the Human Rights Act simply as a means of enforcing the rights of individuals against public authorities. The culture we need is one, which is not always soft when an individual's rights are in play. The true culture of rights and responsibilities may actually sometimes require us to be quite robust about an individual's rights to maintain the rights of others.[466]

The human rights mainstream paradigm is a move from individualistic libertarian conceptions of rights as popularized by activists that fail to emphasise the linkages between human rights and duties that are enshrined in international human rights instruments. This paradigm seeks to establish a culture of mutual respect for human rights between citizens and the state and between citizens amongst themselves. Such a community-based method of promoting human rights finds expression in international human rights instruments. For example the preamble to the ICCPR

Republican Reflections of the EU Charter and the Human Rights Act' in T Campbell, K Ewing & A Tomkins, (eds.), *Sceptical Essays on Human Rights* (OUP 2001)15-39.

[465] M Hunt, ibid.

[466] J Straw, Home Secretary, 'Building a Human Rights Culture', address to Civil Service College seminar, 9 December 1999.

notes that the 'individual, having duties to other individuals and to the community in which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'[467] Article 29 of the Universal Declaration of Human Rights states that 'everyone has duties to the Community in which alone the free and full development of his personality is possible'.[468] The African Charter on Human and Peoples' Rights, specifically notes that an individual has duties and obligations both to other individuals and to the state. Human rights mainstreaming allows for a balanced mix of rights and duties. Through balanced policy designs, mainstreaming manifests itself in equal measures: the human rights of citizens and their responsibilities to other individuals, the community and to the state. It promotes a human rights culture that is not all about a collection of individuals and interest groups who see human rights as a free good and primarily as a means of enforcing their rights against national authorities without regard to the interests of other individuals and/or the wider community.[469]

Human rights mainstreaming also advocates the protection of human rights through multi-faceted, multi-dimensional and cross-disciplinary efforts.[470] The fundamental assumption of human rights mainstreaming is that human rights are relevant in all aspects of human endeavour including environment, arts, business, education, engineering, faith, labour, media, military, public health, public safety, and law enforcement. The mainstream paradigm represents a focal

[467] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[468] Universal Declaration on Human and Peoples Rights, adopted on December 10, 1948) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[469] See United Nations, 'Concept Note: High Level Panel on Human Rights Mainstreaming' (March 01 2013) < www.ohchr.org/.../panel-on-mainstreaming2013_concept_note.docx> accessed 12 April 2013; see also Home Office notes on 'The Human Rights Culture' <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/hrcult.htm> accessed 12 May 2012.
[470] See M Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press 2011) 8-10, see also 89.

point that allows an effective mixture and fusion of human rights with other sectors. It provides the knowledge, resources and tools that allow practitioners in the diverse fields to understand, take ownership of and apply human rights norms in their areas of activities. It promotes a shared understanding of human rights across diverse sectors and stimulates a clear, common statement of rights and responsibilities that forms the anchor for all policymaking in the respective sectors.

Such an approach allows for holistic and harmonized responses to emerging societal issues, rather than a fragmented, sectoral or demand-based approach. The problem of fragmentation of international law has been well theorized.[471] Human rights obligations are scattered in a plenitude of treaties and conventions, while there are also countless other international treaties that speak to a broad range of issues ranging from the environment, terrorism, trade, agriculture, tourism, medicine, aviation, war, humanitarian intervention, health, food, water, gender, housing, banking, religion, family and culture to mention but a few. Some of these treaties are either overlapping, counter productive or duplicative raising the need for a coordinated and harmonized approach to international law.[472] An integrated approach as typified by the human rights mainstream paradigm represents a shift from the 'one pipe-at-a-time' approach to a forward-looking, harmonized and holistic approach. Such an approach is important because socio-justice

[471] See M Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012); S Singh, 'The Potential of International Law: Fragmentation and Ethics (2011) 24(1) Leiden Journal of International Law 23-43; A Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 LJIL 1; M Koskenniemi & P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 (3) Leiden Journal of International Law 553-579; J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 5 Mich. J. Int'l L. 903; M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalised by M. Koskenniemi, A/CN.4/L.682.

[472] See H Van Asselt, F Sindico and M Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30 Law and Policy 423, where the authors describe how climate change regimes conflict with pre-existing international law regimes particularly the biodiversity regimes. They argue that an understanding of the institutional aspects of these relationships may allow enhanced political cooperation and coordination. See also M Doelle, 'Linking the Kyoto Protocol and Other Multilateral Environmental Agreements: From Fragmentation to Integration? (2004) 14 *Journal of Environmental Law and Practice* 75–104.

issues are crosscutting and often react with one another, the root causes of societal injustices are also similar. For example the causes of poverty, environmental pollution, health issues, food scarcity and lack of housing can all be traced to governmental inadequacy in recognising and providing certain entitlements needed to enjoy established human rights such as right to life and right to education. As such a human rights mainstream approach recognises that international law obligations interact with one another and that if they must all be respected and fulfilled, there is a need for an 'integrated approach' which takes into account the cross-cutting issues in different treaty regimes. It promotes a coherence of international obligations with respect to human rights and other issues, through a harmonized approach.[473] Unlike traditional piecemeal approaches, the mainstream approach enables the problems to be identified and causes tackled, rather than merely treating the symptom on a 'as it happens' basis. The fundamental idea is to foster a human rights culture and to spread the human rights message by ensuring that all governmental actions integrate human rights principles.

Despite the fact that human rights mainstreaming has been espoused and developed by a plethora of UN organizations, regional bodies, and state governments, the theoretical basis for the human rights mainstreaming concept itself not been significantly probed in existing literature. Much scholarly attention has not been devoted to asking the question, what is the legal and theoretical basis for human rights mainstreaming? This has led to the charge that human rights mainstreaming has a fuzzy core with less theoretical underpinnings.[474] As some commentators

[473] According to the United Nations, human rights mainstreaming aims to promote a coordinated and coherent UN system-wide approach towards the integration of human rights principles and international standards; and to develop a coherent UN-system wide approach, through cooperation and collaboration among UN agencies. See 'Priorities of the UNDG-HRM' <http://www.undg.org/index.cfm?P=1452> accessed 12 March 2013.
[474] See M Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47.

have argued, 'the somewhat vague and non-specific character of the concept of mainstreaming has probably aided this rapid ascendancy; everyone understands the general idea but no one is sure what it requires in practice'.[475]

The value of the mainstreaming approach would be manifest if its scope and content are clarified. There is a need to further the conceptual understanding of the human mainstreaming paradigm, by providing strong legal and theoretical underpinnings, and by providing a greater understanding of the potential benefits and problems associated with its application within a specific context.[476] This is our next endeavour.

4. Legal and Theoretical Basis for Human Rights Mainstreaming

In this part, the task is to examine the legal and theoretical underpinnings for the human rights mainstreaming paradigm. I show here that strong theoretical basis for human rights mainstreaming can be found in an in-depth exploration of the principle of systemic integration in international law, the inter-doctrinal legal transplant/cross-fertilization theory; the participatory development theory and the full belly thesis.

4.1 The Principle of Systemic Integration in International Law

One of the central tenets of human rights mainstreaming is the idea of integration, *i.e* integrating or harmonizing human rights obligations and norms into policy making through a coordinated or

[475] See M Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' ibid.; see also G Oberleitner, *Global Human Rights Institutions* (Polity 2007) 45; B Fiona, S Nott, and K Stephen 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10 (3) Feminist Legal Studies 299-311.

[476] G Oberleitner, *Global Human Rights Institutions*, ibid., see also J C McCrudden, 'Mainstreaming Human Rights'in C Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005), also available at <http://ssrn.com/abstract=568642> accessed 12 April 2011.

holistic approach.[477] Arguably, one might invoke the importance of the principles of systemic integration and coherent intepretation of international law obligations laid down in Article 31(3)(c) of the Vienna Convention on the Law of Treaties to emphasise that this idea of integrating obligations established in climate change treaties with obligations in human rights instruments is a mandatory requirement of treaty interpretation and implementation under international law.[478]

Article 31 of the Vienna Convention establishes the general principles or rules of intepreting international treaties. It provides that one of the factors to be taken into account while intepreting a treaty includes 'any relevant rules of international law' applicable in the relations between the parties.[479] It is the idea that States must take into account relevant rules or obligations under international law while intepreting or implementing specific treaty obligations. The principle speaks to the need to coordinate the reading of international law instruments in a mutually supportive way.[480]

[477] See United Nations, 'Concept Note: High Level Panel on Human Rights Mainstreaming' (March 01 2013) < www.ohchr.org/.../panel-on-mainstreaming2013_concept_note.docx> accessed 12 April 2013.

[478] See C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(C) Of The Vienna Convention' (2005) 54 ICLQ 279, see also Combacau and Sur, who refer to it as the 'Principe d' Integration'; J Combacau and S Sur, *Droit International Public* (Montchrestien 2004), at 175. See the Report of the International Law Commission which descrbes Article 31(3)(c) of the Vienna Convention on the Law of Treaties as a ' a mandatory part of the interpretation' that covers all the sources of international law, including custom, general principles, and, where applicable, other treaties. International Law Commission (ILC), *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682, at para. 426. See also WTO Panel in *EC - Measures Affecting the Approval and Marketing of BiotechProducts* (7 February 2006) WT/DS291-293/INTERIM, p. 300, para. 7.69.which confirmed the application of Art. 31 (3) to treaty interpreatation. See also M Wewerinke & C Doebbler. 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) (10) Chinese Journal of International Law 141–160.

[479] Vienna Convention on the Law of Treaties (VCLT), 22 May 1969, 1155 UNTS 331.

[480] International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*. A/CN.4/L.682 (13 April 2006).

It advocates the inclusion of rules from external sources that are relevant to the norm under interpretation, giving the international adjudicator the possibility to take into account the broader normative environment.[481] It also speaks of a presumption that states, when creating new rules of international law, do not intend or aim to violate their obligations under other, pre-existing rules, but rather intend to operate within a coherent international law framework.[482] Generally the systemic integration principle provides that international obligations must be interpreted by reference to their normative environment or existing international law obligations.[483]

What this principle advocates therefore is that a treaty must be applied and interpreted against the background of the general principles of international law [484] As was suggested by Hanqin, Article 31 (3) (c) operates like a 'master key' to the house of international law. In case there is a systemic problem - a conflict, an inconsistency, an intersection or an overlap between two or more international law obligations or norms - and no other interpretative means provides a resolution, then recourse may always be had to Article 31 (3) (c) in order to proceed in a reasoned way such that they produce effects which accord with existing rules of international law.[485] Even though it is a principle of treaty interpretation, it provides a basis for harmonizing

[481] See V Tzevelekos 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 Michigan J Int'l L 621, at 631.

[482] See B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 (2) European Journal of International Law; see also P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Dupuy, Francioni & Petersmann (eds), *Human Rights in International Investment Arbitration* (OUP 2009) 45–62*;* R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn 1992), at 1275

[483] International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*. A/CN.4/L.682 (13 April 2006).

[484] R Gardiner, *Treaty Interpretation* (OUP 2008) 11; O Elias and P Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years On* (Brill 2010) 4.

[485] Xue Hanqin coined this term during the ILC debate on the significance of art 31(3)(c). ILC, see Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and

and coordinating international law obligations such that an attempt to perform one obligation does not lead to conflict with or the violation of another.[486]

The systemic principle of intepretation is certainly not a new idea to international law. Perennially, there have been questions on how different treaty provisions which receive their force and validity from different sources and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law can be harmonized to make them appear as parts of a coherent and meaningful whole.[487] This gave rise to the reasoning that treaty provisions must be 'applied and interpreted against the background of the general principles of international law', as pointed out by Lord McNair as far back as 1961.[488] Despite the fact that the idea was codified in the 1969 Vienna Convention, it remained in obscurity for an extended period of time.[489] However, this principle has gained increased prominence within the last years following the decision of the International Court of Justice in the *Oil Platform case*.[490]

Expansion of International Law, para 420, UN Doc A/CN.4/L.682 (13 April 2006) (prepared by Martti Koskenniemi). ILC Para. 420

[486] See 2009 Arbitral Award in *Phoenix Action Ltd v Czech Republic*, where it was held that investment protection 'should not be granted to investments made in violation of the most fundamental rules of protection of human rights...'. Phoenix Action Ltd v Czech Republic, ICSID Case No ARB/06/5, April 15, 2009, para 78. See also P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Dupuy, Francioni & Petersmann (eds), *Human Rights in International Investment Arbitration* (OUP 2009)

[487] See ILC, Para. 414.

[488] Lord A.D. McNair, *The Law of Treaties* (2nd ed, Clarendon Press 1961) 466.

[489] For example Thirlway mentioned in 1991 that he doubted '… whether this sub-paragraph will be of any assistance in the task of treaty interpretation' H Thirlway, 'The Law and Procedure of the International Court of Justice 1960 – 1989: Part Three', BYIL 62 (1991): 3, at 58. See also C Mclachlan, 'The Principle Of Systemic Integration and Article 31(3)(C) Of The Vienna Convention' (2005) 54 ICLQ 279 where the author noted that this principle has for so long remained one of the most neglected principles of international law.

[490] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Objections of 12 December 1996, ICJ Rep. 1996 , 803, Separate Opinion of Judge Buergenthal, para. 22.

In that case, the ICJ was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. Specifically, to determine whether actions by Iran which were alleged to imperil neutral commercial shipping in the Iran/Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf, were breaches of the Treaty. Judge Simma identified Article 31(3)(c) as a customary norm that is 'sound and undisputed in principle as far as treaty interpretation is concerned'.[491] The court held *inter alia* that:

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3(c). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by…the 1955 Treaty.[492]

The decision of the Court acknowledged the importance of Article 31 (3) (c) in international law and the idea that treaty obligations are not intended to operate wholly independently of other relevant rules of international law. However, the Court did not give further guidance as to when and how it should be applied. This was one of the issues considered by the International Law Comission Study Group that was established in 2002 to deal with the issue of fragmentation in international law, specifically the question on how best to integrate different regimes of international law to avoid fragmentation and mutiplicity.[493] The final report by Koskenniemi

[491] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Objections of 12 December 1996, ICJ Rep. 1996, 803.
[492] ibid. para. 41.
[493] The debate on fragmentation of international law continues. See J Trachtman, 'Fragmentation and Coherence in International Law' (2011) Tufts University Legal Research Paper Series 2; as Outi Korhonen puts it, it is question on 'how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable

examined a number of related issues including Article 31(3)(c) as a possible response to the issue of fragmentation. The report suggests that all relevant rules of international law must be considered when interpreting treaties. The Report also seems to have laid to rest, the argument on the meaning of 'relevant rules' when it stated that relevant rules within the meaning of this provision cover all sources of international law.[494] The ILC Study Group noted the applicability of all general principles of international law in the intepretation of treaties and points to a need to take into account the normative environment more widely while intepreting treaties.[495]

Despite debates on the legal status and practical application of Article 31(3) (c) as a solution to fragmentation, we align with the views that the principle of systemic integration as enshrined in the 1969 Vienna Convention is part of customary international law that could bring about the harmonization and integration of international law obligations that are scattered in different treaties, to make them appear as part of a coherent and meaningful whole.[496]

---

fragmentation'. See O Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer, 2000) at 42; D Pulkowski, 'Narratives of Fragmentation International Law between Unity and Multiplicity' (2005) <http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF> accessed 21 March 2013.

[494] However, it is still disputed whether Parties relate to all parties to the treaties or specifically to Parties in dispute. TheWTO panel in the *EC – Approval and Marketing of Biotech Products* case stated that it applied to all the parties to the treaties. The main question relate to the lack of congruance in the membership of important international conventions, for example when a counntry is part of the ICCPR but not party to the UNFCCC. One can argue that the intepreataion of this would vary from one context to another. One cannot generalize; hence there is a need to base conclusions on the ontext of the specific issue at stake. For example, eith respect to climate change and human rights, a review of membership shows that over 95 percent of the countries that are Parties to the Kyoto Protocol are also parties to the core international human rights treaties. This congruence reinforces the view that all Parties to the Kyoto Protocol have obligations to respect existing rules internationa human rights law while designing emission reduction obligations under the Kyoto Protocol. See ILC, Fragmentation of International Law: Difficulties arising from the Diversifi cation and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682, at para. 426. See B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 678–707.

[495] Para. 415.

[496] International courts and tribunals have consistently found that Articles 31 of the VCLT is part of customary international law. See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Objections of 12 December 1996, ICJ Rep. 1996, 803, para. 23; *Georges Pinson* case

The next question is whether international human rights falls within the broad meaning of 'relevant rules of international law' that must be considered when interpreting treaties. This is a question that has been exhaustively answered by Simma and Kill. They developed a tripod test on the elements or requirements for a rule or principle to qualify for consideration under Article 31(3)(c): the first is that there must be a rule; the rule must be 'relevant', and the rule must be 'applicable in the relations between the parties'. They subjected international human rights law to these tests and concluded that human rights are part of the relevant rules of international law.[497] We align with the extensive methodology adopted by Simma and Kill in arguing that the 'relevant rules' within the meaning of this provision are norms that have been recognized in core sources of international law, which include international human rights. This would require that the human rights obligations of a country must be harmonized or integrated with its other obligations under any other international law instrument, for example emission reduction obligations under the Kyoto Protocol.

(*France/United Mexican States*) Award of 13 April 1928, UNRIAA, vol. V, p. 422. (holding that a treaty must be deemed 'to refer to such principles of international law, for all questions which it does not itself resolve expressly and in a different way'). See also *Southern Bluefin Tuna* case (2000) (holding that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute … There is frequently a parallelism of treaties … The universal range of international legal obligations benefits from a process of accretion and accumulation); see also Japan – Taxes on Alcoholic Beverages, Appellate Body Report adopted on 1 November 1996, WTO, WT/DS8, 10,11/AB/R (Japan – Alcohol); Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Rep. 1991,53; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 15 February 1995, ICJ Rep. 1995, 18, para. 33; Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, ICJ Rep. 1994, 6, para. 41; *Territorial Dispute case (Libyan Arab Jamahiriya/Chad) I.C.J. Reports 1994* p. 6; *Kasikili/Sedudu Island case (Botswana/Namibia) I.C.J. Reports 1999* p. 1059; *LaGrand case (Germany v. United States of America) I.C.J. Reports 2001* p. 501, para. 99. See also *Golder v. the United Kingdom*, Judgment of 21 February 1975, ECHR Series A (1975) No. 18, p. 14, para. 2+ 9; *Restrictions to the Death Penalty Cases*, Judgment of 8 September 1983, Advisory opinion, Int-Am CHR, OC-3/83, ILR, vol. 70 p. 449 and e.g. *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, DSR 1996:I, p. 16. See V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 Michigan J Int'l L 621; see also H Gellecum, 'Environmental Law in the Context of Article 31(3)(C) of the Vienna Convention on the Law of Treaties: Reconciling Treaty Interpretation and Progressive Environmental Norms: The Pulp Mills Case and Beyond' (January 21, 2012) Hague Working Paper Series 2-3.

[497] B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch, S Wittich (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009) 678–707.

Even though the systemic integration principle is specifically a treaty intepretation principle, it is a principle that could bring about coherence and harmonization of crosscutting international law obligations.[498] Applying this principle to climate change regimes gives us the notion that emission reduction obligations under the Kyoto Protocol are not intended to operate wholly independently of other relevant rules of international law including human rights. Treaty obligations under climate change regimes must be applied and interpreted against the background of the general principles of international law, which include international human rights obligations. As such, measures designed to meet obligations under climate change agreements must not violate obligations under other international law regimes, but rather must operate coherently as part of the international legal order.[499]

Considering the fact that many of the parties to the UNFCCC and the Kyoto Protocol are also parties to the core international human rights treaties that establish human rights that are infringed by mitigation projects, the coherent intepretative approach provides an avenue to understand why developed countries must endeavour to respect human rights while combating climate change. The systemic intepretation and international coherence approach in the Vienna Law of Treaties could provide a basis for countries to understand that human rights obligations are part of the 'relevant rules of international law' that must be taken into consideration or

[498] See H Van Asselt, F Sindico and M Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30 Law and Policy 423; S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law; C Mclachlan, 'The Principle Of Systemic Integration and Article 31(3)(C) Of The Vienna Convention' (2005) 54 ICLQ 279; see also B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, ibid.; see also P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in F Dupuy & E Petersmann, *Human Rights in International Investment Arbitration* (OUP 2009) 45–62.

[499] See S Stephenson, 'Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes' (2010) 42 Ottawa Law Review, 155–180.

mainstreamed into the design of climate change responses under the Kyoto Protocol. This obligation calls for a mutually reinforcing approach that enables a country to meet its obligations under both legally binding international treaties. Human rights mainstreaming, specifically the human rights based approach provides a methodological approach through which human right obligations can be incoporated into climate change agreeements and governance structures.[500]

Human rights mainstreaming would provide an avenue to package a collection of international obligations under both human rights treaties and climate change regimes into one box to enhance implementation. Through a right-based approach to mitigation, parties could meet their obligations to respect, protect and fulfil human rights in efforts to mitigate climate change. Similarly, it would provide an avenue to draw upon human rights obligations to underpin and inform the design and execution of emission reduction goals provided in climate change agreements, for example the aspirations of the COP 16 in Cancun that 'Parties should in all climate change actions respect human rights'. Human rights mainstreaming allows countries to integrate their obligations to respect human rights and to take action with regard to climate change through a holistic framework. It would allow States to respect, protect and fulfil human rights whilst meeting their emission reduction obligations.

4.2 The Legal Transplant Theory/Inter-Doctrinal Legal Transplants

Human rights mainstreaming also involves moving or borrowing human rights rules, norms and principles in the design of climate change actions and responses. It includes forging legal

[500] M Wewerinke & C Doebbler. 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) (10) Chinese Journal of International Law 141–160.

partnerships between two inherently distinct legal communities and treaty bodies: the human rights and climate change communities. Theoretical support for such an endeavour can be found in contemporary notions of legal transplants.

Legal transplants in the traditional sense refer to the transfer of established laws and the borrowing of legal materials from one legal system or jurisdiction to another.[501] While in the traditional models, legal materials are transferred by a law reformer from one country to another, modern conceptions of legal transplants expand the idea of transplants beyond mere transfer of law between jurisdictions to also include the borrowing, transfer or the wholesale adoption systems of law or legal materials between bodies of law. This encompasses the moving of a rule or a system of law between two legal families or areas of law. This is referred to as cross-fertilization/inter-doctrinal model of legal transplants.[502] Modern ideas of cross-fertilization challenge traditional comparative law, which according to Ewald have failed to recognise new possibilities in a globalized world where unification and internationalization of laws are

[501] For an excellent and detailed description of the idea of legal transplants, see D Nelken and J Feest (eds.), *Adapting Legal Cultures* (Hart 2001).

[502] Modern theorists have developed colourful vocabularies to describe the movement of legal models between different genres of law. Concepts such as mobility of law, grafting, implantation, cross-fertilization, cross-pollination, engulfment, emulation, infiltration, infusion, digestion, salad bowl mixture, melting pot and transposition have been used to describe the inter-doctrinal transplant idea. See E Orucu, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in M van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) see chapter 18.

paramount.[503] The cross-fertilization theory of legal transplants propagates the diffusion of formal legal materials and the diffusion of law along legal family lines.[504]

The contemporary idea of legal transplant is a theoretical anchor for the transfer of best practices from two areas of law, for example human rights law and climate change law.[505] It is a basis for moving best practices and ideas from human rights law in the design of climate change responses. This idea is however not without debates.[506] While some scholars accentuate the importance of such legal diffusions, others question whether the diffusion of laws and legal systems between legal families are possible or desirable? Framed simply, it is the question whether it is logical and desirable to contemplate the movement or borrowing of legal materials, practices or norms from human rights law to climate change law. Different schools of thoughts have emerged on the idea of inter-doctrinal legal transplants.[507] As such, there is no

[503] See H Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of Law' (2009) BYU L. Review 18; E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev. 652; W Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat' (1995) 143 Penn. L. Rev. 2111-2112.; see also P Monateri, 'The "Weak" Law: Contaminations and Legal Cultures', in P Monateri, *The Weak Law: Italian National Reports to the XVth International Congress of Comparative Law, Bristol 1998* (Giuffrè 1998) 84; R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)'(1991) 39 Am. J. Comp. L., 1.

[504] See E Orucu, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in M van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) see chapter 18, E Örücü, 'A Theoretical Framework for Transfrontier Mobility of Law' in R Jagtenberg, E Örücü and A. De Roo (eds.), *Transfrontier Mobility of Law* (Kluwer Law International 1995) 5.

[505] See E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev. 652; N Burrows, 'European Community: The Mega Mix', in: E Örücü, E Attwooll and S Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing* (Kluwer Law International 1996) 297-312.

[506] See M Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 62(1) International and Comparative Law Quaterly where the author argued that there is generally no yes or no answer or grand theories to explain the desirability of legal transplants, instead the answer owes to a careful examination of the nature of the transplanted law and the relationship between the formal and informal legal orders of the originating and the recipient systems raised by a particular transplant; see also H Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of Law' (2009) BYU L. Review 18; E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev. 652; N Zhu, 'A Case Study of Legal Transplant: The Possibility of Efficient Breach in China' (2005) 36 Georgetown Journal of International Law 1145.

[507] These school of thoughts can be traced to the initial standpoints on traditional legal transplants. Traditional legal transplant theorists can be divided into three main schools: *Pierre Legrand's School:* which represents the extreme

straightforward answer in the literature to the question whether diffusion of laws between bodies of law are possible or desirable. We do not intend to delve extensively into these debates. Instead, we align with the views that borowing human rights principles, best practices and governance structures to govern climate change responses is desirable and possible. This must however be done with careful attention to context.[508]

While demonstrating the importance of context, Rock and Watcher in their detailed analogy of the dangers of inter-doctrinal legal transplants give the example of transplanting the the idea of 'duty of care' from trusts and agency laws to become the corporate law on 'duty of loyalty'.They note that the toxicity of this transplant lays in the dangers of adopting a market concept in a firm context. It fails to recognise that the market/firm dichotomy is real and critical. The boundaries include the governance structures, the difference between third party enforcements of obligations in markets and the non-legal self-governance structures within firms. According to them, in moving unselfconsciously across these boundaries, the seeds of mischief and confusions were

---

school of thoughts that all forms of legal transplants are impossible; *Alan Watson's School*: which includes scholars that argue that not only are legal transplants possible and desirable; they occur at all times, irrespective of the social, cultural and political differences between the legal systems. This school is influenced by the writings of Alan Watson who was of the view that successful borrowing could be made from a very different legal system to another even when they are both dissimilar in terms of history and development champions this school. and *Otto Kahn-Freund's School;* which includes scholars who do not agree that the diffusions of law can take place between legal systems irrespective of the differences between their nature, history and development. This school is influenced by the writings of Professor Otto Kahn- Freund who argued that even though legal transplants are possible, they are affected by the differences between legal models and systems. Kahn-Freund argues that since law cannot be separated from their context, laws cannot be transferred between two socially and politically dissimilar legal systems, models, bodies or jurisdictions. See P Legrand, 'Impossibility of Legal Transplants' (1997) 4 M.J.E.C.L.111; P Legrand, 'European Legal Systems are not Converging' (1996) International and Comparative Law Quarterly 79.

[508] See E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev 651, where the authors argued that while some transplants are possible, others could be toxic.

> ...When a legal concept is taken from one context and incorporated into a fundamentally different setting, it may carry with it, implications that do not serve anyone's interests…Borrowing concepts and transplanting legal rules is critical to the legal enterprise, but in doing so, one must be extremely sensitive to the differences in the context lest the borrowing becomes toxic.

See also C Harlow, 'Book Review of J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (Hart Publishing 1998)' (1998) 18 LS 558.

sown. Even though this transplants by the Deleware parliament has a happy ending, it is a cautionary tale to the fact that transplanting legal concepts without paying attention to the underlying context can cause great mischief.[509]

It is therefore important to examine issues of compatibility, conflict and the spirit of the law when engaging in inter-doctrinal legal transplants between human rights and climate change. The spirit of the law refers to the circumstances, reasons and context within which a law is made.[510] It is important to pause and ask: what are the intentions of negotiators or lawmakers in making the law or rule that we seek to borrow? It would be counterproductive to borrow a law or rule that would not fit into its new abode. For example could human rights be effectively applied to market-based instruments, are there comparable institutions for implementing borrowed rules or principles and are there normative or epistemic barriers to a successful transplant of the rule or structure. These questions would influence the success or otherwise of the transplant. A law reformer must thus ask whether the contexts within which the transplant is negotiated are similar, mergeable and realistic.[511] According to Obiora, the need to reflect and respect the varying context and diversity while maintaining a universalist claim cannot be overemphasised.[512]

It is also necessary to put in place governance structures or mechanisms for the follow up and review of laws transplanted between two areas of law. Orucu calls it an examination of 'the

[509] E Rock and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev. 652.
[510] See B Montesquieu, *The Spirit of the Laws* (University of California Press 1977). See also E Orucu, 'Mixed and Mixing Systems, A Conceptual Search' in E Örücü, E Attwooll, and S Coyle, (eds) *Studies in Legal Systems: Mixed and Mixing* (1st edn, Kluwer Law International 1996) 344.
[511] See M Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 62(1) International and Comparative Law Quaterly.
[512] L Obiora, 'Toward an Auspicious Reconciliation of International and Comparative Analyses' (1998) 46 *Am. J. Comp. L.*, 669, see also G.P. Fletcher, 'Comparative Law as a Subversive Discipline', (1998) 46 Am. J. Comp. L., 683, who assesses Comparative Law as a form of 'cultural criticism'.

consequences and outcomes of such migration'.[513] Here the basic question is how well are the laws and institutions mixing? Are there institutions in place in the new destination for the practical implementation of these laws and how would the issue of a conflict of laws and institutions be dealt with? If the laws and institutions are not mixing or are not bringing about the desired results, then the transplant has failed and must be aborted.

An effective mainstream would be dependent on three factors: organizational ideology and procedures; appropriate legal frameworks, and the existence and capacity of institutions and structures.[514] The success or failure of any inter-doctrinal legal transfer between human rights and environmental law would depend in most part on the legal and institutional structures put in place to make the transplant successful. There is a need for a radical reform of laws and institutions in preparation for the reception of laws. It is not enough to theorize on transplants, without following up with institutions. If human rights mainstreaming is to be effective, it must spearhead a transformative reform of policy-making procedures and a radical integration and reconfiguration of power relationships. This would also include capacity development and training, the expansion of institutional capacity to reflect the changes and equiping personnel with coping strategies for the implementation of the reforms.

While the inter-doctrinal transplant theory could provide a theoretical basis for transfering human rights principles and institutions into legal regimes on climate change, such transfers must be considered side by side with the question of appropriate structures to make the integration successful. The question of providing the appropriate institutions that would make the transfers

[513] E Orucu, 'Family Trees for Legal Systems: Towards a Contemporary Approach' (2002) A Paper Presented at the Conference of Epistemology, Brussels, 12.
[514] ibid 13.

smooth should not be neglected, as this would go a long way to determine the success or failure integrating or mainstreaming human rights principles into climate change regimes.

The greater part of this thesis will focus on answering these questions; specifically by discussing the strategies and governance structures needed to overcome these problems so as to ensure the effective mainstreaming of human rights into project execution and approval under existing climate change regimes.

4.3 Participatory Development Theory

The Participatory Development theory (PDT) is another pertinent theoretical foundation for the human rights mainstream paradigm.[515] Human rights mainstreaming and the human rights based approach advocate the integration of human rights principles and safeguards in the design of climate change responses. One of the most important international human rights safeguards is the right to participate in decision-making processes. In this thesis, we recognize participation as the right of the public to take part in decision-making processes and to influence the decisions taken. Built on a belief that citizens can be trusted to shape their own future, participatory development uses local decision-making and capacities to steer and define the nature of an intervention or policy responses. This theory provides a basis for mainstreaming human rights rules and structures that allow the public to influence and take part in decision-making processes with respect to climate change projects.

[515] See R Jennings, 'Participatory Development as New Paradigm: The Transition of Development Professionalism'; (October 2000) <http://www.usaid.gov/our_work/crosscutting_programmes/transition_initiatives/pubs/ptdv1000.pdf>accessed 12 May 2012. See also G Pring and S Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in D Zillman, N Donald, A Lucas, & G Pring (eds.), *Human Rights in Natural Resource Development* (OUP 2002) 11.

The idea of participation has its theoretical root in the participatory development theory.[516] The Participatory Development Theory (PDT) is based on the tenets of equity and self-determination. Its fundamental assumption is that local people have a right to determine their own future and to take part in decisions that affect their lives.[517] The right to self-determination is not just about meeting a people's needs, it is about creating an atmosphere whereby people can effectively identify and address their own needs. As Barton notes 'if you are ever going to get to a system of the people, by the people, and for the people then you'd better engage the people as early as you can'.[518]

A. The Emergence of the Participatory Development Theory (PDT)

Even though public participation began to gain attention as early as the 1970s, it gained increased recognition as a potent mechanism for good governance by the early 1990s.[519] PDT emerged as a response to traditional approaches to development that have been blamed for

[516] Many other theories can be brought to bear on participation; these include neo-liberalism, multi-stakeholder theory, liberal democracy, rational elitism, pluralism, civic republicanism, and deliberative democracy, among others. Participatory development theory however is arguably the most important to the environmental and natural resource management discourse. See G Pring and S Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in D Zillman, A Lucas and G Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) at 13; R Chambers, *Rural Appraisal: Rapid, Relaxed and Participatory* (Institute of Development Studies 1992) at 28-29; See also G Mohan and K Stokke, 'Participatory Development and Empowerment: The Dangers of Localism' (2000) 21:2 Third World Quarterly 247-268; A Agrawal and C Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27:4 World Development 629-639; C Kumar, 'Revisiting 'Community' in Community-Based Natural Resource Management' (2005) 40:3 Community Development Journal 275-285; and W Meynen and M Doornbos, 'Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?' (2004) 16:1 European Journal of Development Research 235.

[517] B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in D Zillman *et al.,* ibid 81.

[518] ibid

[519] B Richardson and J Razzaque, 'Public Participation in Environmental Decision-making', in B Richardson & S Woods (eds) *Environmental Law for Sustainability* (Hart 2006) 168. They describe how citizens' protests and activism by NGOs in the black communities in the USA and in indigenous communities in Canada, Australia and New Zealand brought about legal recognition for participatory development.

escalating the development problems in the developing and least developed countries.[520] The top-down development approach of the early 1960s have been criticized for stifling the growth of human rights by neglecting the rights of citizens to be involved in the conduct of public affairs and the rights of individuals to be heard.[521] This approach failed to meet the needs of the poor mainly because 'the decisions were made by experts far removed from the people and their needs, and implemented through structures intended to be more responsive to central direction than local reality'.[522] As a result, outsiders who knew little about and paid little attention to the indigenes formulated projects designed to empower the indigenes. According to Mtandawire, this was a period when development failed to adequately address the processes of social exclusion as large sections of the populations were marginalized.[523]

[520] Many dimensions of participation have been identified in the literature. According to Cohen and Uphoff, when speaking of participation the following questions must be asked: i) what kind of participation? Is it participation in decision-making, participation in implementation, participation in benefits (or harmful consequences), or participation in evaluation; ii) who is participating in it (local residents, local leaders, government personnel, and foreign personnel); and how is participation occurring (basis of participation, form of participation, extent of participation, and effect of participation). The HRBA is mainly concerned with participation in the decision-making process. J Cohen & N Uphoff, 'Participation's Place in Rural Development: Seeking Clarity through Specificity' (1980) 8 World Development 214.

[521] See J Lemmer, 'Cleaning up Development: EIA in Two of the World's Largest and Most Rapidly Developing Countries' (2007) 19 Georgetown International Environmental Law Review 275; Y Atal, 'Involving the Poor: The Many Question Marks' in Y. Atal & D. Ogen, eds., *Poverty and Participation in Civil Society* (UNESCO 1997); D Korten, 'Rural Development Programming: The Learning Process Approach' in D.C. Korten & R. Klauss (eds.), *People-Centered Development: Contributions toward Theory and Planning Framework* (West Hartford 1984)183-184.

[522] See J Hartz-Karp and M Briand, Institutionalizing Deliberative Democracy (2009) 9 Journal of Public Affairs 125.D Korten and F Alfonso (eds), *Bureaucracy and the Poor: Closing the Gap* (Kumarian Press 1983) at 2; Y Atal, 'Involving the Poor: The Many Question Marks' in Y. Atal & D. Ogen, eds., *Poverty and participation in civil society* (UNESCO 1997); D Korten, 'Rural Development Programming: The Learning Process Approach' in D Korten and R Klauss (eds.), *People-Centered Development: Contributions Toward Theory and Planning Framework* (Kumairan 1984) 183-184.

[523] T Mtandawire, 'Bringing Development Back In', Keynote lecture at Dublin City University, 24 March 2006, online: Dublin City University, <http://www.dcu.ie/~cis/Mkandawire.html>accessed 12 March, 2011.

These criticisms led to calls for an approach that respects, recognises and mainstreams the human rights of people to participate in public affairs and in decision-making.[524] According to the United Nations, the international community must support the strengthening and promotion of participatory governance, democracy, development, and respect for human rights and fundamental freedoms in the entire world.[525] The UN General Assembly in 1986 endorsed these views in its Declaration on the Right to Development. Article 1 of that declaration provides that:

> …all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.[526]

What followed was a flurry of views and activities on participatory development. PDT witnessed an exponential growth in recognition as an approach that addresses the flawed assumptions of the traditional approaches. As Barton observes, 'if there is a political evolution going on throughout the world, it is what might be called the participation explosion'[527] PDT condemns top-down approaches to development that treat people as abstract concepts, or as 'statistical figures to be moved up and down in the charts of progress'[528] It recommends the adoption of 'people first' and 'people centred' principles to development and planning.[529] PDT seeks to assign to an individual the role not of subject, but of an actor who participates in defining the goals and directing the

[524] See T Webler, 'Right' Discourse in Citizen Participation: An Evaluative Yardstick' in R Ortwin, T Webler and P Wiedemann (eds), *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Kluwer 1995) 35; J Ebbesson, 'Participatory and Procedural Rights in Environmental Matters: State of Play' (2009) High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward Co-organized by UNEP and OHCHR Nairobi, 30 November-1 December 2009.
[525] Final Document of the World Conference on Human Rights, Vienna (1993), UN Doc. E/1993/22.
[526] Declaration on the Right to Development, adopted 4 Dec. 1986, G.A Res, 41/128, 41 UN GAOR, Supp. (No 53), UN Doc. A/RES/41/128 at186.
[527] B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in D Zillman, N Donald, A Lucas, and G Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 11 (notes that 'to keep calling it an explosion is hardly accurate now').
[528] Y Atal and D Ogen (eds.), *Poverty and Participation in Civil Society* (UNESCO 1997).
[529] K Bottriell and M Cordonier Segger, *The Principle of Public Participation and Access to Information and Justice* (CISDL 2005) 1.

processes of achieving them.[530] Its main thrust is the rejection of 'pre-packaged solutions'that fail to take cognizance of the socio-cultural reality and opinion of members of the society whose interests would be affected by a governmental decision.[531] It can be broadly conceived to embrace the idea that all stakeholders should take part in and influence decision-making processes with respect to climate change mitigation policies and projects.

Participation could play an important role in improving the effectiveness and sustainability of climate change mitigation projects.[532] It has been noted that:

> A people-centered or participatory approach to development planning and management involves people's active participation in decision-making on issues that pertain to their livelihoods and interests. This helps people to realize their potential and play an active role in the social and economic transformation of their different communities. A people-centered development paradigm would help not only to achieve the goals of physical and socio-economic development, but also to empower the local people, who are undoubtedly the most important factor in the development process...[533]

When host communities to mitigation projects play active roles in project design and in the decision-making processes, the potentials or possibilities for oppositions, protests and conflicts

---

[530] B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Zillman *et al., Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 81.

[531] The concept of participation was first used in the late 1950s, and in the context of the Third World. At that time, social activists began to criticize the prevailing technocratic and top-down development approaches and to call for the participation of intended beneficiaries in development projects. By the 1970s, international development agencies, had recognized the failure of pre-packaged solutions to deliver solutions to the problems of poverty. J Richards, *Paradigm for the development of South African prisoners in the post-apartheid dispensation* (thesis submitted to the Department of Development Studies in partial fulfilment of the requirements for the award of D.Litt Et Phil of the Rands Afrikaans University (RAU), South Africa 2003) at 112, RAU, <http://etd.rau.ac.za/theses/available/etd-10062004-104219/> assessed 12 May 2012.
Y Atal, 'Involving the Poor: The Many Question Marks' in Y Atal & D Ogen, eds., *Poverty and Participation in Civil Society* (UNESCO 1997) 16.

[532] See generally R Chambers, *Whose Reality Counts? Putting the First Last* (Intermediate Technology Publications 1997); G Gran, *Development by People: Citizen Construction of a Just World* (Praeger 1983) 154; D C Korten, 'Rural Development Programming: The Learning Process Approach' in D.C. Korten and R. Klauss, eds., *People-Centered Development: Contributions toward Theory and Planning Framework* (Kumairan 1984)183-184.

[533] The World Bank, *The World Bank Participation Sourcebook* (The World Bank 1996) 3.

are grossly reduced. Participation provides policymakers with more complete information about details that might not be known by policymakers. For example the complexity of the problems, how local circumstances, demographics and culture can have an impact on projects. When this information is gathered from individuals who know it best, it allows for high quality decisions to be taken. As Macias notes:

> The main substantive rationale for public participation is that it promotes better outcomes. Environmental decision-making is improved by a range of opinions, concerns, information and types of knowledge. When deliberation takes place, information and technologies will presumably be better applied.[534]

Participation also engenders public trust towards the government. Participation can increase the involvement of people in project design and implementation thereby bringing them closer to the government. When people feel that the process was fair and that their input were taken into consideration, they will be motivated to take part in further decision-making processes.[535] They therefore view governments as partners in progress rather than as an abstract entity or policy overlords.

B. Robert Chamber's Theory on Participation

One of the main proponents of the participatory development theory is Robert Chambers.[536] He critiques modernization theory as stifling and narrow as it does not allow meaningful inclusion of indigenous knowledge and experience in planning.[537] He noted that the problem with modernization lay in its top-down approach that excluded local people from the decision-making

---

[534] R Macias, 'Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation' (2010) Canadian Institute for Resources Law 10.
[535] ibid. See also M Reed, 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 Biological Conservation 2417.
[536] R Chambers, *Whose Reality Counts? Putting the First Last* (Intermediate Technology Publications 1997).
R Chambers, *Challenging the Professions: Frontiers for Rural Development* (Intermediate Technology Publications 1993); R Chambers, *Rural Appraisal: Rapid, Relaxed and Participatory* (Institute of Development Studies 1992) 28-29.

processes. By excluding them, development professionals limit their own knowledge of the needs and problems of the local people. Chambers therefore calls for a reversal of values and methods, to one that puts the last (i.e. local people) first. He calls for a paradigm shift in development theory, a reversal of values and methods so that the rural poor can be put at the centre of development:

> The new professionalism reverses power relations – 'putting the last first' – in choice of clients, professional values, research methods, and roles. Clients are the poorer and the more deprived, and especially those in rural areas. Professional values are turned around…research approaches and methods are more holistic and experimental, and located more in field conditions. Roles are reversed, with poor people as teachers and experimenters. Research priorities are determined not by scientists but by the poor themselves.[538]

In a nutshell, Chambers' participatory development theory recognises the primacy of 'people' in development. It questions the dominant approaches of development that fail to recognize the potential contributions of poor people to development. To do better requires a reversal of this 'normal' trend; to an approach that puts people first. Even though Chambers' theory on participation has been extensively criticized; it remains a holistic summary of the idea of public participation, *i.e.* a people-centred approach to development.[539] One that includes 'a sense of involvement' within a participatory and deliberative democracy where people become the subjects of their own world rather than objects in other people's world.[540] PDT is a theoretical

[538]R Chambers, *Whose Reality Counts? Putting the First Last* (Intermediate Technology Publications 1997).
[539] For detailed and extensive critique of Chambers, see I Kapoor, 'The Devil's in the Theory: A Critical Appraisal of Robert Chambers' work on Participatory Development' (2002) 23:1 Third World Quarterly 107-117; A Agrawal and C Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27:4 World Development 629-639; C Kumar, 'Revisiting 'Community' in Community-Based Natural Resource Management' (2005) 40(3) Community Development Journal 275-285; W Meynen and M Doornbos, 'Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?' (2004) 16(1) European Journal of Development Research 235; G Mohan and K Stokke, 'Participatory Development and Empowerment: the dangers of localism" (2000) 21:2 Third World Quarterly 247-268.
[540] For an excellent overview of the concept of participation in resource management, see C Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54 Journal of African Law 184-211.

anchor for the need to develop appropriate legal and governance structures that promote the full participation of stakeholders in decision-making. The elements of a good participatory process are discussed in greater details in Chapter Five of this thesis.

4.4 The Full Belly Thesis

One of the most important aspects of human rights mainstreaming is the need to respect, protect and fulfil 'all' human rights in project planning and design. Many of the rights infringed by climate change projects are social, economic and cultural rights. Human rights mainstreaming considers all human rights as equally important and necessary, whether they are civil and political or whether they are social, economic and cultural. The full belly thesis is a theoretical anchor for this position that social, economic and cultural rights are important and vital and must be respected and protected with equal vigour.

The full belly thesis was first propounded by Rhonda Howard in her watershed publication in 1983.[541] In it, she argued audaciously that economic rights to basic needs are more important than civil and political human rights; and that 'civil and political rights can wait until basic economic needs are secured'.[542] She argues for the need to think of civil and political rights as means to achieve a stable societal order, which is necessary for the society itself to exist in the first place. She noted that all human beings need a certain sense of dignity and autonomy. To achieve this requires the assurances of supply of human basic needs such as the need for food, freedom from poverty, environmental protection and provision of adequate health resources. A

[541] R Howard, 'The Full Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa' (1983) 5 Human Rights Quarterly 469.
[542] ibid

full belly requires the active participation of people in development and the fulfilment of basic social and economic needs.[543] Summarily, the full belly thesis is that 'a man's belly must be full before he can indulge in the luxury of worrying about his political freedom'.[544] Without a belly full of food and other vital needs, human rights and fundamental freedoms become meaningless.[545] As Acheampong, a former President of Ghana once noted 'one man one vote is meaningless unless accompanied by the principle of one man, one bread'.[546]

Gwam has built on the full belly thesis; he classifies environmental protection as one of the prerequisites of a full belly. Gwam argues that civil and political rights such as the right to life are meaningless in the presence of environmental pollution such as the toxic waste dumping in Koko, Delta State Nigeria and in Abidjan Cote d'Ivoire. Gwam reckons that a clean environment is a sine qua non for the enjoyment of civil and political rights; and that without a clean environment; man may not live to enjoy the other recognized forms of rights such as the right to life and the right to education.[547] Gwam calls for a participatory approach to development, which recognises environmental protection as a prerequisite for the protection and fulfilment of fundamental human rights.[548]

Howard's thesis is particularly striking as it made an early contribution to the debates on the hierarchy of human rights and the place of economic and social rights under international law.

[543] ibid 470.
[544] ibid 469.
[545] ibid
[546] Amnesty International, *Background Paper on Ghana* (Mimeo 1994).
[547] C Gwam, *Toxic Wastes and Human Rights* (AuthorHouse 2010) 105.
[548] ibid105.

These debates have been extensively dealt with elsewhere and I will not go into them here.[549] The full belly thesis takes a functionalist approach on how attempts to respect, promote and fulfil human rights would fail if they do not take into consideration, the basic needs of life, one of which is the need for environmental protection. Howard illustrates this with developments in Nigeria, Kenya and other sub-Saharan African countries where human rights mean nothing to so many people who cannot afford the basic necessities of life. She calls for an approach to development that recognises that subsistence and security for people is a basic human right. According to her, 'in economic terms it means the right to adequate nutrition and a minimum standard of health care'. [550] She calls for an integrated approach to understanding human rights. This is an approach that sees food security, good health, empowerment, participatory development and environmental protection as prerequisites for the protection of human rights.[551]

It is easy to agree with Howard's thesis that human rights are meaningless if they do not act as catalysts for providing the basic needs of individuals to social security and protection. Environmental problems carry serious and far reaching effects which could lead to death, displacements, change in life pattern and loss of ability to meet basic needs, and when these happen, they deprive people the ability to enjoy other recognised human rights. There is thus a need for an approach that recognises the linkages between basic need for environmental protection and the protection and fulfilment of human rights. To achieve a full belly, it is pertinent to develop an understanding of how existing human rights instruments can be

[549] O De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 553; See also H Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edtn, OUP 2008) 280; N Aryeh, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1; R Plant, 'Social and Economic Rights Revisted (2003) 14 Kings College L. J 13.
[550] R Howard, 'The Full Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa' (1983) 5 Human Rights Quarterly 469.
[551] ibid. See also Gwam at 106.

employed to achieve environmental protection. There is a need to focus on a holistic approach that mainstreams human rights norms into environmental planning to avoid situations whereby governmental policies or project, for example in the areas of climate change mitigation impact or threaten social, economic and cultural rights.

As Shelton notes, it is necessary to examine how existing human rights are capable of responding to environmental degradation.[552] The United Nations Environment Programme has also emphasized the need for countries to 'transform current legal systems to incorporate issues of environmental rights within national and international agreements and to establish a legal framework for partnerships between environment and human rights'.[553] The Deputy Secretary General for the United Nations was making this same point when he said :

> It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.[554]

These statements call for the harmonization of environmental policies and actions with fundamental human rights. The full belly thesis underscores the need to adopt an integrated approach that recognises the crosscutting issues in human rights and climate change.[555] A holistic approach to climate change mitigation would strike a partnership between climate change

[552] D Shelton, 'A Rights Based Approach to Climate Change Mitigation' in T Greiber, M Janki, M Orellana, A Savaresi-Hartmann and D Shelton, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009) 5.
[553] UNEP, Declaration of the Fourth Global Civil Society Forum held from 1 to 2 February 2003 at UNEP Headquarters, Nairobi, Kenya. <http://www.unep.org/civil_society/PDF_docs/4thGCSF_Recommendations_GC22_Agenda.pdf > accessed 15 October, 2010.
[554] Statement to the 57th Session of the Commission on Human Rights in 2001, in 'The Right to Water' (WHO 2003) 21.
[555] See C Sunderland, T Greiber and G Oviedo (eds) *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN, 2009); IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN, Gland 2009) 3; S Vanderheiden, *Atmospheric Justice Political Theory of Climate Change* (OUP 2008) 192-202.

governance and human rights.[556] This approach will emphasise mainstreaming human rights norms, standards, and principles into the various stages of mitigation responses, including policy-making, planning, funding, implementation, monitoring and evaluation, so as to ensure that citizens' interests are protected at all times. According to the UN High Commissioner on Human Rights:

> As we face the daunting challenges of climate change, the international community must put human beings at center-stage in addressing this urgent issue that affects all of us… Elements that are crucial to reduce individuals' vulnerability to climate change include for example…local participation in planning and decision-making; accountability; access to information and to the system of administration of justice… Most of the work related to climate change has so far focused on the development and implementation of mitigation and adaptation strategies. In a positive move recently, the promotion of sustainable development and poverty reduction are increasingly being brought into the equation. Today, a much needed step forward in the direction would be to fully integrate human rights when meeting the climate change challenges. A rights-based approach to tackling climate change will bring human beings back to the center of the discussion and enrich international efforts in addressing climate change.[557]

The full belly thesis advocates a shift from a need-based approach to an approach that requires governments and planning agencies to consider the impact of a particular project on the enjoyment of human rights. To achieve a full belly, human rights must be harmonized and integrated into legislation, policies and project activities, thereby giving concerned communities and individuals, a platform to demand enforcement. By mainstreaming human rights principles such as participation, access to justice and access to information into regulations we can best tackle the source of societal injustices and prevent them. As the United Nations Development Programme (UNDP) notes:

---

[556] See S Kas 'Integrated Justice: Human Rights, Climate Change, and Poverty' (2009)18(1) Transnational Law & Contemporary Problems 115- 138; J Carlson 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18 (1) Transnational Law & Contemporary Problems 45-68.

[557] UNHRC, 'Human Rights Impact of Climate Change' United Nations Joint Press Kit for Bali Climate Change Conference 3-14 December 2007, UNDOC/ DPI/2483/2007.

> …we must understand the role of human rights as empowering of individuals and communities. By protecting these rights, we can help prevent the many conflicts based on poverty, discrimination and exclusion (social, economic and political) that continue to plague humanity and destroy decades of development efforts. The vicious circle of human rights violations that lead to conflicts – which in turn lead to more violations – must be broken. I believe we can break it only by ensuring respect for all human rights…A human rights approach will help fulfil UNDP's responsibilities to integrate human rights with its activities. It will also strengthen its ability to implement declarations and agreements reached at UN global conferences, many of which have human rights content.[558]

The full belly thesis is a theoretical foundation for calls for an approach that mainstreams human rights norms into climate change actions and responses. By adopting a holistic approach that integrates all human rights into mitigation policies and projects, social, economic and cultural rights become more visible and meaningful. Without incorporating human rights issues into mitigation strategies and projects, human rights might remain delusional or a merely utopian concept. It is only when human rights are brought to the table in decision and policy making that genuine opportunities would be provided to everyone including the marginalized and vulnerable communities to have a say on the desirability or otherwise of projects that affect their environment or human rights- thereby making it possible to achieve Howard's perceptions of a full belly.

5. Theoretical Critiques of the Human Rights Mainstream Paradigm

Despite the optimism in the literature on the value and potentials of the human rights mainstream paradigm, its scope and content have been criticised by a number of scholars. Most importantly, human rights mainstreaming has been criticized for its 'fuzzy' core.[559] Due to its conceptual ambiguities and vagueness, human rights mainstreaming has been described as an empty

[558] ibid 3-4.

[559] G Oberleitner, *Global Human Rights Institutions* (Polity 2007) 45; P Alston, 'Resisting The Merger And Acquisition of Human Rights By Trade Law: A Reply To Petersmann' (2002) 13 EJIL 815.

concept.[560] It has also been said that human rights mainstreaming does not always move 'beyond rhetoric' with lots of paper and too little action; and that it has limited power to combat market driven inequalities.[561] As Koskenniemi argues:

> Mainstreaming should be understood as a project for seizing institutional power that is profoundly ambiguous in its effects. There is no reason to be either 'for' or 'against' mainstreaming without a clear sense of what priorities it is intended or likely to support and what foreseeable effect it might have on the allocation of resources among human groups.[562]

The ambiguities surrounding human rights mainstreaming are tied to the fact that the key concepts central to the human rights mainstreaming movement have not been effectively communicated.[563] For example, it becomes hard to speak convincingly about mainstreaming human rights norms into climate change regimes without a conceptual clarification of what human rights mainstreaming itself does and does not entail. Consequently, mainstreaming most times emerges as a monologue, rather than a dialogue with policymakers.[564] There is therefore a need to define and clarify key concepts associated with mainstreaming human rights in a specific context.

There is also a need to analyse both the theoretical and practical implications of a commitment to mainstream and by providing a greater understanding of the potential benefits and problems associated with its application within a specific context, for example in the context of climate

[560] C Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric* (Westview Press, 1999) 177-178.
[561] S Seppa¨nen, *Possibilities and Challenges of the Human-Rights Based Approach to Development* (Erik Castre´n Institute, 2005).
[562] M Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47.
[563] G Oberleitner, *Global Human Rights Institutions* (Polity 2007) 2-3; B Fiona, S Nott, and K Stephen 'Mainstreaming: A Case for Optimism and Cynicism' (2002) Feminist Legal Studies 10(3): 299-311
[564] See C Bacchi and J. Eveline 'Mainstreaming and Neoliberalism: A Contested Relationship' (2004) 22(2) Journal of Public, Foreign and Global Policy 118.

change governance.[565] This is because the implications, challenges and strategies for human mainstreaming would vary from one context to another. In this part, I attempt to shed more light on the key contested issues in the human rights mainstreaming literature. Five key debates are examined and discussed: proliferation debates, the novelty or duplication question, neo-liberalism critique, determinacy, and conflict of rights.

5.1 Proliferation debates

In the literature on human rights mainstreaming, one key debate is that applying human rights to broader areas of moral or political discourse could rub the human rights language of its primordial importance. Attempts to apply human rights language to policy making have often been rejected by core traditional human rights theorists as attempts to weaken the concept of human rights. As Tasioulas notes: 'discourse of human rights has acquired in recent times…the status of an ethical *lingua franca*'[566] Galtung and Wirag described this as the failure of mankind to distinguish between human rights and human needs.[567] They point to the geometric rise in the appeals for human rights recognition under international law, even at times for trivial claims. Examples of current proposals waiting for international recognition as human rights include: the right to sexual pleasure;[568] the right to be free from poverty;[569] a right to commit suicide;[570] a

[565] M Wewerinke & C Doebbler. 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) (10) Chinese Journal of International Law 141–160; S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law 1.
[566] J Tasioulas, 'The Moral Reality of Human Rights' in T Pogge *ed., Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 75.
[567] J Galtung and A Wirak, 'On the Relationship between Human Rights and Human Needs' (1978) UNESCO Doc. SS-78/CONF.630/4 at 48; See also J Galtung and A Wirak, 'Human Needs and Human Rights: A Theoretical Approach' (1977) 8 Bull Peace Proposals 251.
[568] *Sexual Rights are Fundamental and Universal Rights* (A Declaration Adopted by the World Association of Sexual Health in Hong Kong at the 14th World Congress on Sexology, August 26, 1999), <http://www.assert.org.au/downloads/DecSexualRights.pdf> accessed 23 March, 2010. According to the declaration 'Sexual rights are universal human rights based on the inherent freedom, dignity, and equality of all human beings. Since health is a fundamental human right, so must sexual health be a basic human right. Para. 5 reads that 'Sexual

right to sleep;[571] the right not to be exposed to excessively and unnecessarily heavy degrading, dirty and boring job;[572] the rights of individuals to permanent peace;[573] and a right to tourism.[574] Scholars have criticised these claims as attempts to further devalue the human rights language, impugn the integrity and credibility of the human rights tradition and erode the legitimacy of existing human rights.[575] The crux of the arguments is that linking every moral claim to human right can lead to human rights proliferation, thereby weakening the meaning of human rights and the resolve of enforcers to respect the entire human rights system.[576] As Wellman puts it:

> Just as inflation gradually reduces the real value of one's savings because one can now purchase fewer goods and services with the same amount of money, so also the rights inflation in political discourse has devalued any and every public appeal to rights…[577]

It is agreeable that the recognition of every moral claim in the human rights lexicon will render the rights language useless and ordinary. However, not all human rights claims are trivial and frivolous. Asserting this will amount to over generalization. There are some genuine aspirations

---

pleasure, including autoeroticism, is a source of physical, psychological, intellectual and spiritual well-being' hence a fundamental right.

[569] See T Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007).

[570] This includes a right to think about suicide and a right to commit suicide. See L Stevens, 'Suicide: A Civil Right' (2006) < http://www.antipsychiatry.org/suicide.htm> accessed 12 March, 2010. This debate was intensified by the US case of *Cruzan v Missouri* 497 U.S. 261 (1990) where the court declared that an individual has a right to die. According to the court, people have a right of self-determination, which includes the right to refuse medical treatment, and a right to choose to die. See L Perl, *Cruzan V Missouri: A Right to Die* (Marshall Cavendish, New York 2007) 11.

[571] See 'Essays on the Right to Sleep'<http://sleepinghumanrights.blogspot.com/> accessed 10 January, 2010.

[572] See Galtung and Wirak, 'On the Relationship between Human Rights and Human Needs' (1978) UNESCO Doc. SS-78/CONF.630/4 at 48.

[573] ibid.

[574] See B George and V Varghese, 'Human Rights in Tourism: Conceptualization and Stakeholder's Perspectives' (2009) < http://ejbo.jyu.fi/pdf/ejbo_vol12_no2_pages_40-48.pdf> accessed 24 March 2010.

[575] Alston notes that the lists of rights are growing as if they are brought up by magic. He argues for an *appellations controlees* system or a quality control system through which the long list of 'would be' rights can be examined and pruned. See P Alston, Conjuring Up Human Rights: A Proposal for Quality Control (1984) 78. Am . J Int Law 615.

[576] See N Ferreira, 'The Expanding Realm of Human Rights' (2008) 14 Res Publica 57. Ferreira notes that the danger in the sudden proliferation of human rights is that 'when a concept is used in so many different circumstances; its meaning might become confused'.

[577] See C Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric* (Westview Press, 1999) 177-178.

that deserve closer attention, particularly because of their relevance and importance to human liberty and freedom.[578] The challenge then is how to balance between protecting the human rights tradition and giving recognition to true and emerging threats to human existence. As Welman puts it, 'the appeal to rights ought to be an invitation to reason with one another…the solution is not to abandon the language of rights in political discourse but to use it with more restraint…'[579]

Climate change represents one such fundamental concern that could benefit from the human language. Overwhelming scientific studies have shown that if climate change is not slowed down or mitigated through drastic cuts in emissions, it will threaten human existence and make living on planet earth impossible.[580] Similarly, recent studies have shown that if efforts aimed at mitigating climate change are not harmonized with human rights, such measures might render the protection and fufilment of human rights delusional.[581] For example, of what use is the right to life to citizens whose health and lives are threatened by extreme weather events caused by climate change, or the right to property to citizens who have been forcefully displaced from their homes due to a mitigation project? These show that climate change poses both direct and indirect threats to human rights. As such, there is a need to harmonize climate change mitigation efforts with human rights in order to achieve a robust and coherent international legal protection.

---

[578] This argument was extensively explored in D Olawuyi, 'Adopting the Language of Rights for Environmental Protection: Legal and Theoretical Justifications' (2012) 3 (1) Canadian Journal of Globalization 35.

[579] See C Welman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric* (Westview Press 1999) 180.

[580] Intergovernmental Panel on Climate Change (IPCC) (2007) *Climate Change 2007: Synthesis Report. A Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge Univ. Press 2007).

[581] See E Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach' (2010) 38 Georgia Journal of International and Comparative Law 699, 673; N Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) (1)(2) Journal of Human Rights and the Environment 211 at 215-219; D Olawuyi, 'Adopting the Language of Rights for Environmental Protection: Legal and Theoretical Justifications' (2012) 3 (1) Canadian Journal of Globalization 35.

Similarly, recognising these linkages has the potential of giving climate change mitigation the moral urgency it deserves; it could also go a long way in emphasizing the seriousness of its direct and indirect threats to human existence and the need to act fast. For example, recognising how many lives are lost due to climate change projects, how many individuals are displaced from their homes, how many jobs are lost and how international human rights are threatened could strike the right cords with human rights gatekeepers and bring these concerns to the attention of the global community. Due to perceptions, human rights violations tend to attract more outrage and condemnation in many developing countries compared to environmental pollution.[582]

Mainstreaming human right norms into decision-making would place additional weight and responsibility on decision makers to examine not only the economic aspects of a project, but also its impact on the people.[583] This paradigm places the people as priorities in decision-making processes; it also empowers citizens to demand enforcement and to play active roles in decision-making processes. We agree with the succinct views of the UN Expert Group that:

> …There are other legal mechanisms utilized to achieve environmental protection that are not rights-based. Economic incentives and disincentives, criminal law, and private liability regimes have all formed part of the framework of international and national environmental law…Rights-based approaches are preferable, however, because human rights are maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will. All legal systems establish a hierarchy of norms. Constitutional guarantees usually are at the apex and "trump" any

[582] A good example is the case of Nigeria where environmental issues are often downplayed and sidelined. Most times, the Federal Government of Nigeria has omitted environmental protection from its priority list. For example there is currently no climate change law or policy in Nigeria. As a Nigerian Government delegate once admitted:

> …climate change is not a priority of our government, the change we are talking about now is as a result of the historic emissions of the developed countries, not Niger Delta's emissions nor China's emissions, therefore the responsibility of tackling the impact rests on the industrialized countries that were responsible for it in the first place...reducing poverty and providing three square meals a day to Nigerians are among the government's top priorities

M Simire, *Climate Change Not Nigeria's Priority* <http://www.climatemediapartnership.org/spip.php?article663 accessed 12 January 2012.

[583] See E Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach' (2010) 38 Georgia Journal of International and Comparative Law 699, 673.

> conflicting norm of lower value. Thus, to include respect for the environment as a constitutional right ensures that it will be given precedence over other legal norms that are not constitutionally-based. In addition, the moral weight afforded by the concept of rights as inherent attributes that must be respected in any well-ordered society exercises an important compliance pull. Finally…at the international level, enforcement of human rights law is more developed than are the procedures of international environmental law. The availability of individual complaints procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.[584]

Adopting human rights norms in climate change regimes would place humans at the center of climate change mitigation. It would also give human rights protection precedence over emission reduction goals. The current approaches to mitigation that tend to place emission reduction, economic benefits and carbon credits ahead of the negative impacts of large emission reduction schemes on host communities need to be replaced with a more transparent, accountable and rights-based framework anchored on the respect for human rights.

Similarly, linking climate change mitigation to human rights would provide a substantive basis for non-governmental organizations (NGOs), media, individuals and other constituencies beyond environmentalists to 'name and shame' projects, policies and governmental actions that do not reflect human rights considerations.[585] Since human rights are considered sacrosanct in many countries, exposing how climate change projects threaten human rights could be an effective way of drawing more attention to the linkages between climate change mitigation and human rights. This would encourage governments to reflect on human rights while designing climate change responses and vice versa. As Posner rightly notes, the effectiveness of human rights for climate

[584] United Nations, 'Outcome Document of the High Level Expert Meeting on the New Future of Human Rights and Environment: An Agenda for Moving Forward (Nairobi, 30 November – 1 December 2009). <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=cTNdmZ_wGK0%3d&tabid=2046&language=en-US> accessed 12 March, 2010.

[585] A Johl & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300; S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law 10.

change issues derives more from its 'political and social power' than from its 'legal enforcement power', human rights can generate press attention, mobilize public interest groups, galvanize ordinary citizens, and, ultimately, gain compensation for victims. At a minimum, it creates pressure that might generate wiser policy, as governments may finally change policy and enter treaties in order to reduce the risk of liability and the public relations costs of litigation. According to him, by drawing public attention to the impact of climate change on marginalized populations, action in the legal arena can help build political pressure to address both social marginalization and climate change simultaneously.[586]

Thirdly, bringing human rights into climate change regimes has the potential of providing individuals a legal framework through which they could directly hold national authorities accountable before international complaints body for the direct and indirect effects of mitigation projects. While a number of core international human rights treaties establish individual complaints mechanisms that allow citizens to challenge governmental decisions, current climate change regimes fail to do so. Both the Kyoto Protocol and the Framework Convention on Climate Change do not provide any recognition or protection for individuals. Mainstreaming human rights standards into climate change regimes could provide opportunities to address this gap. For example, the Aarhus Convention is a major environmental treaty that has leveraged on the experiences of human rights treaty bodies by establishing a complaint mechanism that is accessible and opened to individuals.[587] It establishes procedural human rights such as access to

[586] E Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 University of Pennsylvania Law Review 1925-1945.
[587] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770 <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf> (accessed 19 March, 2012).

information, participation in the decision-making process and access to justice and also provide tools that could empower individuals to demand protection against policies that could affect them. Mainstreaming these procedural human rights into climate change regimes could provide robust platforms for individuals and communities to block or appeal for a review of mitigation projects that infringe on the enjoyment of existing human rights. Mainstreaming human rights norms into climate change mitigation efforts may provide an opportunity to restructure climate change governance institutions and structures such that similar grievance mechanisms that allow individuals to claim their human rights can be established within international climate change regimes.[588]

Fourthly, mainstreaming human rights norms into climate change regimes could provide a holistic and coherent approach for meeting climate change mitigation obligations without creating human rights problems. Current market-based approaches to mitigation tend to resolve the problem of climate change by creating other concerns; making the cure to climate change to appear worse than the problem itself. For example, many industrialized countries have focused on business as usual projects, and 'emission credits at all cost' policies rather than projects that are truly efficient and sustainable in the long term. Such trade-offs have been the main reason for the ineffectiveness of the Kyoto Protocol. Balancing mitigation objectives with human rights obligations would place citizens at the center of mitigation measures and projects. It would place an obligation on governments to ask not only how many CERs a project could generate, but to also check how the project could affect host communities in the long run; how many individuals could be displaced as a result of this project and what are the measures that have been put in

[588] See N Roht-Arriaza, 'First, Do No Harm': Human Rights and Efforts to Combat Climate Change' (2009-2010) 38 Georgia Journal of International and Comparative Law 593, 595; O Padersen, 'The Janus Head of Human Rights and Climate Change: Adaptation and Mitigation' (2011) 80 Nordic Journal of International Law 403.

place to address such concerns. This balanced approach would not only ensure that responses to climate change will conform to existing human rights obligations and principles; they also have the potential to strengthen the effectiveness and long-term success of mitigation measures

Lastly, mainstreaming human rights norms into international climate change regimes would offer a more coordinated, detailed and well-documented approach for dealing with the linkages between climate change and human rights. Currently, these linkages have developed in a fragmented manner across national and regional courts and in a plenitude of declarations and resolutions. This has not fostered a broad understanding of the linkages; it has also resulted in some courts failing to recognise these linkages. A right based reform of current international legal regimes on climate change would codify the linkages, foster a common understanding on the direct and indirect effects of climate change on human rights; clarify how the linkages could be better reflected in mitigation plans and provide clear guidelines on thresholds that mitigation projects must meet before they can be registered or described as sustainable.

5.2 Novelty or Duplication? – Redundancy Debates

Some theorists have argued that human rights mainstreaming would bring nothing new to the processes and institutions of climate change.[589] Some have also noted that mainstreaming human rights might be unnecessary, redundant and duplicative as existing human rights treaties and multilateral environmental agreements are already sufficient for shaping climate change

[589] See E Morgera, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in E Hollo, K Kulovesi and M Mehling (eds.), *Climate Change and the Law: A Global Perspective* (Springer 2012). See also C Gearty, 'Do Human Rights Help or Hinder Environmental Protection?'(2010) 1 Journal of Human Rights and the Environment 7-22.

responses and for dealing with any area of intersection between climate change and human rights. The question then is 'what is new about human rights mainstreaming?'[590]

Human rights mainstreaming is based on the need to fully integrate and harmonize the separate and sometimes, scattered developments in human rights with developments in international climate change in order to develop more coherent, robust and holistic responses.[591] It is true that there are currently over nine hundred international legal instruments that are either primarily directed to international human rights issues or contain important provisions on them. There are also countless international agreements, convention, protocol, decisions and modalities that already speak to the issue of climate change under international law.[592] Despite these, events show that except holistic responses are developed, attempts to address the problem of climate change might result in other problems. Examples include all the case studies discussed earlier in this thesis. As such, human rights mainstreaming takes an integrative look at establishing a legal partnership between human rights and climate change such that obligations under human rights instruments and climate change agreements are harmonized. It is an approach that seeks to recognise the interactions between human rights and climate change and to promote coherence in the design of actions and responses such that an attempt to combat climate change would not

[590] See E Morgera, 'Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law' (2011) 2 Climate Law 85. See also M Doelle, 'Integration among Global Environmental Regimes: Lessons Learned from Climate Change Mitigation' in A Chircop, T McDorman, and S Rolston (eds), *The Future of Regime-Building in the Law of the Sea: Essays in Tribute to Douglas M. Johnston* (Martinus Nijhoff 2008), 63,75; M Young, 'Climate Change and Regime Interaction' (2011) 5 Carbon and Climate Law Review 147; G Conor, 'Do Human Rights Help or Hinder Environmental Protection?'(2010) 1 Journal of Human Rights and the Environment 7-22; E Morgera, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in *E* Hollo, K Kulovesi and M Mehling (eds.), *Climate Change and the Law: A Global Perspective* (Springer 2012).

[591] See H Van Asselt, F Sindico and M Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30 Law and Policy 423; see also E Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 GEO. L. J. 675-84, 702-10.

[592] See for example the Kyoto Protocol to the Framework Convention on Climate Change (Adopted 11 December 1997, entered into force 16 February 2005) U.N Doc. FCCC/CP/1997/L.7/add.1, 37 I.L.M. 22 (1998).

lead to human rights violations and vice versa. The novelty of this approach is that instead of establishing new or conflicting regimes, it seeks to harmonize the existing obligations of project proponents and project host countries under human rights and climate change regimes to ensure compliance with both set of obligations.

Establishing legal partnerships between human rights and climate change would enhance the works of the respective human rights and climate change institutions and legal regimes and provide a chance to maximise resource allocation, avoid duplication of roles and also eliminate counter productive measures. Also where enforcement options are unavailable or missing in one area, the other area might strengthen implementation. By establishing a complaint mechanism under climate change regimes through which members of the public can ask for a review of any project that affects any of these rights, climate change regimes would serve as an alternative window of redress for human rights violations with respect to climate change projects.

5.3 Neo-liberalism and human rights mainstreams

The idea of introducing human rights norms into market or economic instruments has been hugely contested.[593] This debate is centred on the question whether command and control type instruments such as human rights should be applied to market systems.[594] As Beveridge *et al* put

[593] M Childs, 'Privatising the Atmosphere: A Solution or Dangerous Con?' (2012) 12(1/2) Ephemera Journal 12-18; Center of Concern, 'Why is a Human Rights Approach Needed in Financial Regulation?' (Center of Concern 2011); See also the Alston/ Petersmann exchange on this subject, E Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law' (2000) 37 Common Market Law Review 1363-1382; P Alston, 'Resisting The Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann' (2002) 13 EJIL 815; E Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 European Journal of International Law 845-851. See also R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 EJIL 652.

[594] Fletcher has argued that that the growing effort to address anthropogenic climate change through carbon markets and other financial mechanisms constitutes a form of 'disaster capitalism'. See R Fletcher, 'Capitalizing on Chaos:

it, 'one of the greatest concerns regarding mainstreaming is the degree to which mainstreaming can tackle the tendency of markets to replicate and aggravate inequalities in society'.[595] Neoliberalism advocates free trade, open markets and the transfer of market control and economic decision-making from the public sector to the private sector.[596] Also known as the free market ideology, neoliberalism asserts that markets should be free from governmental control, regulations and interests.[597] Underlying the hypothesis is the belief that markets are self-regulating, and as such markets work better when they are free from governmental interference.

As Harvey notes:

> Neoliberalism… proposes that human well being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary… State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly second-guess signals (prices) and because powerful interest groups will inevitably distort and bias state interventions…[598]

Climate Change and Disaster Capitalism' (2012) 12(1/2) Ephemera Journal 97; see also M Dowell-Jones, and D Kinley, 'Minding the Gap: Global Finance and Human Rights', (2011) 25 (2) Ethics & International Affairs, 183–210; L Lohmann and S Böhm, 'Critiquing Carbon Markets: A Conversation' (2012) 12(1/2) Ephemera Journal 81-96; C Bacchi and J Eveline 'Mainstreaming and Neoliberalism: A Contested Relationship' (2004) 22(2) *Journal of Public, Foreign and Global Policy* 118; S Scott, 'Is the Crisis of Climate Change a Crisis for International Law: is International Law too Democratic, too Capitalist and too Fearful to Cope with the Crisis of Climate Change?' (2007) 14 Australian International Law Journal 31-44; T Hayward, 'Human Rights Versus Emissions Rights: Climate Justice and the Equitable Distribution of Ecological Space.' (2007) 21(4) Ethics & International Affairs 431-450. For an older but still pertinent perspective, see J Coleman, *Markets, Morals and the Law* (CUP 1988).

[595] F Beveridge, S Nott, and K. Stephen 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10(3) Feminist Legal Studies 308; see also M Dowell-Jones, and D Kinley, 'Minding the Gap: Global Finance and Human Rights', (2011) 25 (2) Ethics & International Affairs.

[596] See D Thorson, 'What is Neoliberalism' (2009) University of Oslo Working Paper Series available at http://folk.uio.no/daget/neoliberalism2.pdf (accessed 12 January 2011) ; See also R Plant, The Neoliberal State (OUP 2009); J Campbell and O Pedersen (eds.), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2001) 288.

[597] Neoliberalism is said to have developed from the *laissez faire* ideas of Adam Smith that the government should not intervene in economic matters. See J Campbell, ibid.

[598] D Harvey, *A Brief History of Neoliberalism* (OUP 2007) 2.

A central tenet of neoliberalism is competition. Neoliberalism advocates the creation of an open market for competition. Under this model, everyone cannot win; there would inevitably be winners and losers. As George notes:

> …because it separates the sheep from the goats, the men from the boys, the fit from the unfit. It is supposed to allocate all resources, whether physical, natural, human or financial with the greatest possible efficiency… [599]

Neoliberalists are therefore quick to reject the idea of mainstreaming human rights norms to market-based instruments such as the market mechanisms under the Kyoto Protocol.[600] The crux of the arguments is that market-based mechanisms are incentive-based mechanisms that should not be diluted by conduct-based instruments such as human rights. As such, the neo-liberalistic assumption is that mainstreaming human rights norms to incentive-based regimes such as the Kyoto Protocol would reduce their effectiveness, and might in all defeat the entire purpose of the markets. They argue that applying the language of human rights to cooperative mechanisms such as emissions trading and clean development mechanisms would distort the competitive and incentive-based nature of market systems.[601] Matsuo also argues that bringing human rights language into market instruments would be an attempt to bring waters from two ponds that can never merge. He argues that markets already have set rules that are flexible and cooperative. This is in sharp contrasts with the rigidity of human rights language. [602]

---

[599] S George, 'A Short History of Neoliberalism' (1999), A Paper presented at a Conference on Economic Sovereignty in a Globalising World (Bangkok, 24-26 March 1999).

[600] See C Bacchi and J. Eveline 'Mainstreaming and Neoliberalism: A Contested Relationship' (2004) 22(2) Journal of Public, Foreign and Global Policy 118; L Lohmann and S Böhm, 'Critiquing Carbon Markets: A Conversation' (2012) 12(1/2) Ephemera Journal 81-96; See also D Levy, 'Can Capitalism Survive Climate Change' (2012) 12(1/2) Ephemera Journal 253.

[601] See R Fletecher, 'Capitalizing on Chaos: Climate Change and Disaster Capitalism' (2012)12(1/2) Ephemera Journal 97; see also M Childs, 'Privatising the Atmosphere: A Solution or Dangerous Con?' (2012) 12(1/2) Ephemera Journal 12-18.

[602] N Matsuo, 'CDM in the Kyoto Negotiations' (2003) 8 Mitigation and Adaptation Strategies for Global Change 191.

Another neoliberalist argument is that the flexibility of costs cannot be sidelined in an effective regulatory system. As Weiner notes, incentive instruments would be more cost effective than conduct instruments and fixed performance standards such as human rights instruments. This is because market-based instruments serve as incentives for developed countries to achieve steady progress in environmental protection at the least cost and with much flexibility. He maintained that such an incentive approach is cost effective, fair and has the essential attributes of dynamic innovation, low administrative cost and can be morally justified.[603] Portney also argues that the issue of costs cannot be left aside in policymaking. He argues that market mechanisms take into account the issue of costs by allowing for environmental protection at the lowest costs possible, thereby guaranteeing efficiency. For Portney, the question should be efficiency and not fairness. He argues:

> …in one sense it is immoral not to take costs into account in setting environmental standards…Failure to consider costs makes it impossible to get the most from the available resources and ultimately means saving fewer lives, preventing fewer illnesses, and protecting fewer species or areas than one otherwise could…[604]

These arguments are in contrast with the views of human rights mainstreaming theorists that social justice issues such as the environment are far too important to be left to market contortions and manipulations.[605] Petersmann has been one of the most consistent proponents of an approach that mainstreams human rights into world trade and global markets.[606] He argues that human

[603] J Weiner, 'Global Environmental Regulation: Instrument Choice in Legal Context' (1999) 108 Yale L.J. 691-692.
[604] P Portney, 'Counting the Cost: The Growing Role of Economics in Environmental Decision-making'(1998) 2 Environment 14.
[605] See N Roht-Arriaza, 'First, Do No Harm': Human Rights and Efforts to Combat Climate Change' (2009-2010) 38 Georgia Journal of International and Comparative Law 593, 595; S Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 Vermont Journal of Environmental Law 522.
[606] E Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law', 37 Common Market Law Review (2000) 1363-1382; E Petersmann, 'Time for United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide organizations: Lessons from European

rights could enhance the effectiveness of market economies. To him, human rights empower citizens to demand a correction of market injustices; it also limits the strong governmental influences and control on markets. For example, the right to information can act as a basis for citizens to demand market information such as market prices from governments, which would enable them to make more informed decisions. He calls for the transformation of market freedoms into fundamental human rights and the integration of human rights norms into the laws and treaties of worldwide organizations.[607] He calls for a decentralized 'market governance mechanism' which treats citizens as legal subjects rather than mere objects.[608]

According to Khan, the injustices of the market systems are evident in trying to achieve results at all costs. He noted that:

> The world needs a different kind of leadership, a different kind of politics as well as economics – something that works for all and not just for a favoured few…Many experts point to the millions lifted out of poverty by economic growth, but the truth is that many more have been left behind, the gains have been far too fragile – as the recent economic crisis shows – and the human rights costs too high. Human rights were too often relegated to the backseat as the juggernaut of unregulated globalization swept the world into a frenzy of growth in recent years. The consequences are clear: growing inequality, deprivation, marginalization and insecurity; voices of people protesting suppressed with audacity and impunity; and those responsible for the abuses – governments, big business and international financial institutions – largely unrepentant and unaccountable.[609]

Integration' (2002) 13 EJIL 626; E Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) European Journal of International Law 13 845-851; E Petersmann, 'Constitutionalism and WTO Law: From a State-Centered Approach towards a Human Rights Approach in International Economic Law' in: D.L.M.Kennedy/J.D.Southwick (eds), The Political Economy of International Trade Law (CUP 2002) 32-67; E Petersmann, Ernst-Ulrich, 'Human Rights and the Law of the World Trade Organization' (2003) Journal of World Trade 241-281.

[607] E Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration (2002) 13 EJIL 641.

[608] E Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 European Journal of International Law 845-851.

[609] I Khan, 'Foreword: It's not just the economy, it's a human rights crisis' in *Amnesty International Human Rights Report 2009*, <http://report2009.amnesty.org/en/introduction> (accessed 23 April 2012).

Khan notes that markets fail to condemn actors who play outside well accepted rules and norms; so far they meet up with market rules. For example that condoning the purchase and sale of the 'right to pollute' fails to condemn the actor who causes increased pollution and thereby undermines ethical norms. Rees was making this same point when he argued that:

> Despite the obvious ecological conundrum, the world community has scripted a cultural narrative based almost exclusively on continuous material growth and market dynamics. The assumption is that working from this construct will "solve" the problems of landscape degradation, poverty, and social inequity while enhancing human well-being (happiness). Anyone remotely in touch with the state of the world may fairly conclude that this global economic construct isn't working.[610]

Kelman also argues that approving projects that have been carried out against well accepted human rights norms are market injustices that demand for more governmental control. She notes that this removes the moral stigma that is properly associated with conducts such as repressions, land grabs, maiming and killings.[611] Klein calls this the shock doctrine. She argued that free market policies have played a big role in perpetuating massive human rights violations since the mid-1970. She noted that most of these policies are often unwillingly imposed upon people immediately after a major catastrophe since the national psyche is still in a state of shock and hence, unable to mount effective resistance. Klein refers to the idea of market-based instruments as 'disaster capitalism'.[612]

Markets have also been criticised for fostering discriminations and deep-rooted inequities. For example, Silayan has analysed the inequalities in adopting a market-based approach in climate

[610] W Rees, 'Foreword: Global Change and the Social Construction of Human Rights' in L Westra, *Human Rights: The Common and the Collective* (UBC Press 2011) xiv.
[611] B Kelman, 'What Price Incentives? Economists and the Environment' (2011) I. L.J 84-86.
[612] See N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books 2007) 9-10, see also N Klein, 'Disaster Capitalism: The New Economy of Catastrophe' (2007) <http://www.democruptcy.com/disaster-capitalism/> accessed 12 May 2012.

change frameworks.[613] Since investors in the markets seek to pursue an optimal investment portfolio and to maximize profits and minimize cost, they tend to achieve results at all costs, including by fostering inequities in host countries.[614] Apart from the issues of concentrating projects in a few selected countries, host countries are also forced to dance to the tune of the investors or lose out. This has led to issues such as governments repressing and oppressing its own citizens just to retain projects and satisfy investors.[615] In this, the only winners would be those countries that lower sustainability standards, increase investment incentives and turn a blind eye to human rights standards when they stand in the way of economic gain.[616] Countries that fail to do this become the losers in the market, as they would be left behind. As Silayan notes, the end result may be an overall negative effect for developing nations as a whole.[617]

Sokona has also been critical of neoliberalism as emphasised by markets as an unfair approach to environmental protection as it imposes strenuous conditions on developing countries, particularly African countries, it also fosters human rights abuses and social repressions.[618] Haya was also of the view that free-trade mechanisms will lead to further societal injustices in developing countries with already abysmal human rights records.[619] She maintained that most industrialized countries are likely to capitalize on the nature of the markets to propose 'free rider' and 'business as usual projects' that only worsen the environmental and human rights conditions of developing countries. Haya argues that leaving climate change in the hands of markets would be counter-

[613] A Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' 255 HWWA Report 56-57.
[614] ibid.
[615] ibid 56.
[616] ibid. See also R Saner 'Hype or Reality: Can the CDM trigger FDI' (2005) European Climate Platform 2.
[617] A Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' HWWA Report 255, Hamburg 58; see also R Timmons and B Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy* (MIT Press 2007) 11.
[618] Y Sokona (ed.), *CDM- What Prospects For Africa* (ENDA 2005) 1
[619] B Haya, *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism* (International Rivers Network 2002) 1

productive in the long run.[620] Shestack argues that markets have a sinister side in which the well-being of the individual may be sacrificed for aggregate market interests; this would have the effect of leaving liberty and rights vulnerable to contingencies and risks.[621]

Despite the critiques of the markets, Weiner insists that market mechanisms do not in any way represent immoral means of achieving environmental protection. He opined:

> …while the critics of incentives may feel the environment is too important to leave to markets, the better view is that environmental protection is too important to leave out of markets…if the moralist's claim is that the person who causes more pollution is blameworthy and should be condemned, then ironically the person who causes more pollution is the moralist who opposes the more effective instruments.[622]

The cases put forward by Weiner and other market enthusiasts are not strengthened by the human rights petitions and protests that have trailed current market systems. From issues such as the transfer of out dated and inefficient technologies for emission credits, to massive governmental repressions, killing and maiming of citizens to force through climate change projects; the lack of fair and transparent opportunities for participation by citizens in project planning and implementation; the citing of projects in poor and vulnerable communities; lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above mentioned problems. The international community would have failed in its role as gatekeeper and protector of human rights and dignity if nothing is done to curtail the excesses of the current carbon markets. The loss of human lives cannot be quantified in terms of costs, be they monetary or in the form of emission credits. It would be difficult to appraise the

[620] ibid 2-3.
[621] J Shestack, 'The Philosophical Foundations of Human Rights' in J Symonides (ed.) , *Human Rights Concepts and Standards* (Ashgate, 2000) 44-45.
[622] J Wiener, 'Global Environmental Regulation: Instrument Choice in Legal Context' (1999) 108 Yale L.J. 677 at 691-692.

cost effectiveness of markets if individuals continue to pay the higher prices of displacements from homes and at times death.

Generally, markets are not the biggest problems. Arguably, the biggest problem is an unregulated market, *i.e* a market without adequate rules that prevent oppressions and injustice. For example, in terms of climate change, the adoption of market mechanisms is not by any stretch the main problem. In fact the history of the process that led to the Kyoto Protocol shows that but for the market mechanisms, a global agreement on climate change could not have been reached.[623] This is because the flexibility and cost abatement offered by markets are great incentives for industrialized countries to take part in GHG mitigation. Markets also allow developing countries to gain in terms of access to newer technologies, more job opportunities and solutions to long-term environmental problems.

As such, the question is not to throw away the markets, but to ask how new policy measures can be designed to achieve two pronged goals of: maintaining the market outlook of the Kyoto Protocol and secondly laying down stricter regulations that respond to the injustices of the current climate change regimes. Thinkers in the field have failed to address the possibility of

[623] Throughout the Kyoto negotiation, the United States and many other OECD clamoured for a flexible agreement that would allow countries to lessen domestic pressures in GHG emission reduction. Against EU and G77's proposal on flat rate emission reductions for all, The US and most OECD countries argued for international flexibility. According to the US Chief Negotiator 'the American target is contingent on the acceptance of a comprehensive package that includes the trading of emissions amongst countries and regions'. Thus, while the EU and G77 called for *binding* commitments, the US clamoured for *binding but flexible* commitments. The US had insisted that emission reductions could be achieved most cheaply in the economies perceived to be less efficient *i.e.* the Economies in Transition (EITs) and developing countries. For an excellent and detailed account of the origin of the flexible mechanisms, see J Depledge, 'Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History' UNFCCC, <http://unfccc.int/resource/docs/tp/tp0200.pdf> accessed 19 January, 2011; See also T Jackson, 'The Language of Flexibility and the Flexibility of Language' (1998) 10 (3) International Journal of Environment and Pollution; M Grubb, *The Kyoto Protocol, A Guide and Assessment* (Earthscan 1999) 29.

such a win-win scenario.[624] A win-win scenario of this sort can be achieved by restructuring extant climate change regimes to include flexible but binding obligations on market participants to respect international human rights. Such a mechanism would impose penalties on countries that fail to respect human rights in project execution and implementation. Such a mechanism would represent a justifiable mix of mitigation, respect for human rights, equity and development.

Human rights mainstreaming presents an opportunity to achieve a win-win scenario.[625] It provides an opportunity to achieve an instrument that is both incentive-based and command-based. Mainstreaming allows for the strengthening of existing climate change regimes by the integration of processes, standards and institutions that protect the interests of individuals from market inequalities. By putting individuals and stakeholders at the centre through participation, accountability and access to justice, human rights mainstreaming provides the opportunities to address the human rights issues associated with projects and to change the negative perceptions of the market systems. Without this, it might amount to attempting to solve the problem of climate change by creating many other problems.[626]

---

[624] See S Jodoin, 'Human Rights and the Environment: Key Challenges and Best Practices' (2011) CISDL Brief presented to the United Nations Office of the High Commissioner for Human Rights, 10-11. Available at < http://www.cisdl.org/publications/collaborative005.html> accessed 03 August 2011. Jodoin notes that scholars have not been creative enough to explore the possibilities of a win-win scenario of this nature.

[625] See M Dowell-Jones, 'International Finance and Human Rights: Scope for a Mutually Beneficial Relationship' (2012) 4(3) Global Policy 467.

[626] See E Meijer and J Werksman, 'Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201; E Cameron, 'Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach' (2009-2010) Georgia Journal of International and Comparative Law 673, 699, The World Bank, *Development and Climate Change*: *World Development Report 2010* (The World Bank, 2010); Oxfam International, *Climate Wrongs and Human Rights*: *Putting People at the Heart of Climate-Change Policy*, Oxfam Briefing Paper 117 (Oxfam International, 2008); P Baer, T Athanasiou, and S Kartha, *The Right to Development in a Climate Constrained World*: *The Greenhouse Development Rights Framework* (Heinrich Böll Foundation 2007); E Page, *Climate Change,Justice and Future Generations* (Edward Elgar 2006) 132-60.

5.4 Conflicts of Human Rights

The human rights mainstream paradigm has also been criticised for neglecting the issue of how applying human rights principles in one context might lead to conflict in another context. As Steiner notes, 'only a theory of rights that avoids conflict is rational'.[627] Advocates of human rights mainstreaming have not paid sufficient attention to this question, leading to the charge that the human rights mainstream paradigm is irrational and ambiguous.[628]

Human rights conflicts can manifest in two ways.[629] Firstly, the human rights of a person might conflict with the right of another person.[630] Conflicts here are manifested when individuals are faced with the dilemma of having the right to perform incompatible actions. The question becomes, whose rights should prevail? For example, my right to health might conflict with the property rights of my neighbour. Preventing my neighbour from building a hydroelectric power plant on his/her land, in order to avoid the noise and pollution that could arise from the project and to protect my health results in an affront to my neighbour's right to property. It results in a dilemma as to if and how both interests could be balanced in policy-making.[631]

[627] H Steiner, *An Essay on Rights* (Blackwell 1997) 59.
[628] See M Koskieniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47; see also P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 EJIL 815.
[629] For an excellent discussion of this, see M Freeman, *Human Rights* (2nd edtn. Polity 2011) 82-84; see also J Thomson, *The Realm of Rights* (Harvard University Press 1990); J Feinberg, 'The Nature and Value of Rights' (1970) 4 J. Value Inquiry 249 reprinted in J Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton University Press 1980) 143–158.
[630] According to Jeremy Waldron, conflicts of rights are conflicts of their corresponding duties. See J Waldron, 'Rights in Conflict' *in Liberal Rights* (CUP 1993).
[631] P Montague, 'When Rights Conflict' (2001) 7 Legal Theory 257.

Secondly, human rights may conflict with another human right of the same person.[632] For example my right to health might conflict with my right to liberty. A classic illustration is the right of a patient brought to the hospital by ambulance with no time to sign consent forms for treatment. In an attempt by authorities to protect, respect and fulfil the patient's right to health and right to life, the patient's right to liberty and right to privacy might be infringed. The dilemma here is which of these different rights possessed by the same person should be respected or upheld? Which should be accorded precedence? Or should we simply go with the simplistic notions that the right to life is more sacrosanct than the right to privacy, even though the patient might personally think otherwise?

It would be difficult if not impossible to conceive of ways of resolving all the different instances of human rights conflict. I agree with Freeman's observation that '…it may be that no theory of human rights can resolve all conflicts of rights. Life presents us with tragic dilemmas and human rights theory cannot change this'.[633] Eide also notes that conflict between different human rights is sometimes unavoidable, but it can be mitigated by careful balancing between the different sets of concerns.[634]

Since conflicts are somehow intricately intertwined with the idea of human rights, the way out is to fashion out how such conflicts can be balanced whenever they arise. For example, Freeman discussed the idea of assigning human rights different priorities and differential importance.[635] This idea is not without fault as it neglects the inter-connectedness and the universal nature of

[632] See M Freeman, *Human Rights* (2nd edtn. Polity 2011) 82-84.
[633] ibid 84.
[634] A Eide, 'The Sub-commission on Prevention of Discrimination and Protection of Minorities' in P Alston, *United Nations and Human Rights: A Critical Appraisal* (OUP 1992) 211.
[635] M Freeman, *Human Rights* (2nd edn, Polity 2011) 82.

rights. The idea of assigning rights an order of priority runs contrary to the interdependent nature of rights.[636]

Montague on his part discusses specification as way of avoiding such conflicts. To him, conflicts can be avoided by demonstrating that situations cannot arise in which individuals have the right to perform incompatible actions and by demonstrating that rights cannot conflict in particular situations. He discusses specification as an approach to achieving this. According to Montague, specification refers to the laying down of conditions that are necessary for individuals to possess rights in particular cases. It rejects a general assumption that everyone is entitled to the enjoyment of rights at all times and lays down specific requirements that must be met at any given time for human rights to be triggered. It allows rights-principles to contain grounds for concluding that in putative conflict situations, at least one party to the 'conflict' does not actually have a right. Specification implies that no one has highly generic rights such as the right to good health or the right to use one's property as one wishes. Rather, individuals have rights to... only if...[637] Thus, specification seeks to guarantee that situations will not arise in which individuals have rights to perform incompatible actions.

This idea of specification is arguably too ambiguous and indeterminate. How do we ascertain the conditions necessary for the enjoyment of specific rights? To do this might involve examining rights-principles one by one and adding pre-conditions to each. Such an exercise would only be speculative as it would be difficult to establish the potential conflict situations that could be

[636] See O De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 553; See also H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edtn, OUP 2008) 280; N Aryeh, 'Social and Economic Rights: A Critique (2006) 13(2) Human Rights Brief 1; R Plant, 'Social and Economic Rights Revisited (2003) 14 Kings College L. J 13.
[637] P Montague, 'When Rights Conflict' (2001) 7 Legal Theory 274-278.

encountered in the interpretation of rights. Specification also bears close resemblance to the well rejected assumptions that human rights could be forfeited.[638] By stating pre-conditions for the enjoyment of rights, there is an inherent assumption that when such pre-conditions necessary for possessing rights are not met, the particular right is forfeited. Specifying conditions for enjoying rights in conflict situations make human rights enjoyment indeterminate, it also obscures the idea of rights in general.

Another proposal is the utilitarian approach, which suggests that conflicts of rights should be resolved in whichever way, maximizes the protection of rights.[639] This approach flows from Bentham's theory that every human decision is motivated by some calculation of pleasure and pain and that every political decision should be made on the same calculation to maximize the net produce of pleasure over pain. This approach however reduces human rights to a felicific calculus that is impracticable and practically impossible to follow.[640] I agree with Shestack that adding and subtracting the benefits of one right against the other to determine what would produce the greatest net balance of happiness is a calculation that would be very difficult to make.

Jones however fine-tunes this approach with what he calls a rule-utilitarianism approach, which suggests that we ought to live by those rules that best promote the common good.[641] This is by

[638] Even though Montague tries to distinguish specification from forfeiture, the distinction drawn seems obscured. Forfeiture approach claims that in certain situations people *forfeit* their rights by what they do—which is to say that by their actions, they violate conditions that are necessary for possessing rights. P Montague,'When Rights Conflict' (2001) 7 Legal Theory 257. For a discussion on forfeiture as relied upon by Montague, see S Uniacke, *Permissible Killing* (CUP 1994) 196.
[639] See J Shestack, 'The Philosophical Foundations of Human Rights' in J Symonides (ed.), *Human Rights Concepts and Standards* (Ashgate 2000) 44-45; see also M Freeman, *Human Rights* (2nd edtn. Polity 2011) 82.
[640] J Shestack, ibid
[641] P Jones, *Rights* (Macmillan 1994) 203.

taking decisions that favour the society as a whole. Freeman also suggests that a better approach is to respect all rights but when some sacrifice is unavoidable it is pertinent to distribute the sacrifice fairly amongst the society. As he notes, the society can distribute the sacrifice such that the no individual bears all the sacrifice of human rights violation.[642] Freeman's idea could be potentially useful to resolve the dilemma of rights. By distributing the sacrifice, we can avoid inequalities arising from governmental policies that cite toxic factories and projects in poor and desperate neighbourhoods. The common good approach sees that it is unjust to protect the rights of some individuals by infringing on the rights of others.

Even though this approach is theoretically sound, it could also prove indeterminate. This approach leaves open a very important question, which is: who is the judge of what is the common good? At the end, we face a greater dilemma of leaving in the hands of the State, the discretion to violate the rights of some people for the 'common good'. In a number of the 'not in my backyard' injustices of the past, and the massive governmental land grabs as presented in some of our case studies, governments have argued that these decisions to violate rights were taken for the common good or for public purposes.[643] The idea of violating some rights for the common good would be controversial and may even open a flood gate of many more injustices.

Arguably, the better approach would be one of due process. When there is a dilemma in decision-making on the need to balance human rights, it might be better to initiate a fair, equal and transparent process which allows every member of the society whose rights and interests might be affected to decide on what is the common course of action. A due process approach

[642] M Freeman, *Human Rights* (2nd edtn. Polity 2011) 82.
[643] See Chapter 2 of this thesis for these examples.

allows for a fair and opened process of negotiations and discussions between different right-bearers, right-holders, stakeholders and governments to decide and determine amongst themselves, what is good for society as a whole. Through such an invitation to dialogue, a fair and balanced decision could be reached on how to distribute the pain and pleasure of a particular decision or project equally amongst society. Using our initial conflict situation as an example, if building a dam conflicts with my neighbour's right to health, a practical approach would be to initiate dialogue amongst holders of incompatible rights to discuss the conflict, explore options to mitigate or avoid conflict and arrive at a solution which both parties would consider fair and conclusive. This is the due process approach for resolving a conflict of rights. By allowing holders of rights an open and transparent opportunity for dialogue, arguably conflict situations could be avoided.

The human rights mainstream paradigm represents a due process approach that could avoid some of the conflicts generated by different human rights. It allows for a deliberative process through which potential dilemmas in policymaking are confronted head on, examined practically and resolved in the process of planning. It presents a practical chance for policymakers to reduce the gaps between policy intentions and actual results. By initiating an authentic deliberative process for balancing rights and other social considerations, human rights mainstreaming presents an integrated solution that avoids the conflicts between human rights and the human rights versus development arguments. It also provides a long-term, strategic process through which conflict resolution is systematically integrated into all systems, structures and practices reducing the chances of conflicts resurfacing.

6. Conclusion

This chapter has offered an exploration of the meaning, nature and value of human rights mainstreaming. The purpose of human rights mainstreaming is to prompt changes in institutional practices and to promote progress towards the goals of protecting human rights guarantees in climate change governance. As such human rights mainstreaming is about collaboration and partnership-integration of human rights and climate change responses, as opposed to human rights being 'forced into' climate change regimes. I have also laid down theoretical justifications for such legal partnerships. The principle of systemic interpretation in international law, the inter-doctrinal legal transplant theory, the participatory development theory and the full belly thesis all provide support for the fact that a robust, holistic and integrated understanding of legal problems such as the problems of climate change would provide harmonized solutions *i.e.* solutions that do not create new problems in an attempt to solve one.

The human rights mainstream paradigm enables the development of a human rights culture in climate change governance, such that human rights protection would not only come to the table in the face of protests and petitions; rather human rights considerations form part of the rules of the game in the design, approval and execution of climate change mitigation projects. It provides a coordinated and coherent approach through which human rights principles could be integrated into the operational guidelines and frameworks on climate change. It also promotes cooperation and legal partnerships among international organizations and agencies on human rights and climate change, such that human rights standards are coordinated and reflected in their specific programs and mandates. It presents an integrated solution that avoids the human rights versus environment arguments; a platform to navigate through conflicting rights; and a preventive

framework through which human rights are systematically integrated into all processes, actions, structures and policies on climate change.

Theoretical issues aside, another knotty debate in the human rights mainstream literature is the question of approach: if we were to agree that human rights mainstreaming is important and necessary, how should it be done? What is the best framework or approach for achieving the goal of human rights mainstreaming: should it be through a substantive human rights approach or through a procedural approach? This question is the focus of the next chapter.

CHAPTER FOUR:

THE HUMAN RIGHTS MAINSTREAM PARADIGM AND THE QUESTION OF APPROACH

1. Introduction

One of the most contentious questions in the human rights mainstream literature is the question of approach. Scholars have yet to agree on the appropriate legal and policy framework for achieving the linkages and legal partnerships between human rights and climate change under international law. As McCrudden suggests:

> …mainstreaming human rights is a desirable policy but there is a need for considerably more discussion as to the most effective practical means of achieving this…some methods that have been suggested might be counter-productive.[644]

In this chapter, we shall unpack the legal debates on the question of approaches for mainstreaming human rights into international climate change regimes. This chapter explores the two main strategies that have been proposed in the literature: the substantive rights approach and the procedural rights approach (human rights based approach). It provides justifications for the choice of the procedural rights approach as illustrated by the UN Human Rights Based Approach (HRBA), as a holistic policy framework for mainstreaming human rights norms into international climate change regimes. It shows that a process-based approach as typified by the HRBA provides preventive, transformative and long term solutions for dealing with some of the tensions and conflicts generated by climate change mitigation. It avoids the human rights versus environment arguments; prompts changes in institutional practices and also provides a

[644] J McCrudden, 'Mainstreaming Human Rights' in C Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005), also available at <http://ssrn.com/abstract=568642>. See also J Ruhl, 'The International Right to Equitable Climate Change Adaptation—Substance or Procedure?' (2012) 37 (2) Yale Law Journal; S Jodoin, 'Lost in Translation: Human Rights in the Climate Change Negotiations' (January 2010) CISDL Legal Working Paper, available at <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf> accessed 02 June, 2012.

preventive/long-term process through which human rights are systematically integrated into climate change policies, regimes and governance structures.

2. Linking Human Rights and Climate Change: Suggested Approaches

The debates on the best approach to recognize the linkages between human rights and climate change under international law can be traced back to older debates on the linkages between human rights and the environment.[645] Scholars have over the years suggested different approaches for recognizing the linkages between human rights and the environment.[646] The first approach understands environmental protection as a pre-condition to the enjoyment of internationally guaranteed human rights, especially the rights to life and health. This indirect approach draws closely from the Stockholm Declaration, which discusses environmental protection as a pre-requisite for enjoying existing human rights. The second approach calls for a direct recognition of a substantive human right to environment under international law.[647] The third approach calls for re-interpretation of existing procedural human rights to cater for the environment.[648] This expansionist approach tries to formulate a link between human rights and

[645] A Boyle 'The Role of International Human Rights Law in the Protection of the Environment ' in A Boyle and M Anderson (eds.) *Human Right Approaches to Environmental Protection* (OUP 1996) at 43.

[646] J Knox 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 (2) Harvard Environmental Law Review 477-498; L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) Journal of Environmental Law 22:3; A Parsons 'Human Rights and Climate Change: Shifting the Burden to the State?' (2009) 9(2) Sustainable Development Law & Policy 22-23; M Stallworthy 'Environmental Justice Imperatives for an Era of Climate Change' (2009) 36(1) Journal of Law and Society 55-74; J Hohman, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18(2) Transnational Law & Contemporary Problems 296-316; E Posner and C Sunstein 'Climate Change Justice' (2008) 96 Georgetown Law Journal 1565-1597.

[647] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment, 89-120; S Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International 2009); M Paellemarts, 'The Human Right to a Healthy Environment as a Substantive Right' in M Dejeant-Pons and M Paellemarts (eds), *Human Rights and the Environment* (Council of Europe 2002) 11-15.

[648] L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) Journal of Environmental Law 22:3; M Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar 2009) 170; A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) XVIII Fordham Environmental L Rev 471 at 497; S Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 Vermont Journal of Environmental Law 513-547.

environmental protection in procedural terms. This approach is well-illustrated by Principle 10 of the Rio Declaration on Environment and Development and the Aarhus Convention which both provide that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens. This thesis develops on and argues for this third approach. The approach builds on procedural human rights such access to information, participation, access to justice as the necessary foundation for integrating climate change responses with human rights standards that have been well recognised in the Aarhus Convention. This approach also forms the cornerstone of the United Nations Human Rights Based Approach- a policy frame that has been promoted by the UN since 1997 that builds on five human rights: access to information (ATI), participation, accountability, equality and non-discrimination; and access to justice.

Though not legally binding, the UNHRBA has been adopted by a number of UN agencies as a policy frame for mainstreaming human rights norms into areas of their mandate. In 2012, the United Nations Development Group (UNDG) launched the UN Human Rights Mainstreaming Program, which called on all agencies of the UN to adopt the HRBA as a policy frame for mainstreaming human rights principles into their areas of work. Despite the fact that UNEP and the UNFCCC are part of the United Nations Development Group, not much has been done to mainstream human rights principles into climate change regimes using the HRBA frame. One identified reason is the absence of a theoretical framework and guidelines on how to apply the HRBA in the area of climate change.

Considering the confusions that surround the different approaches that link human rights discussions to climate change, I shall at this stage clarify how the human rights based approach differs from the other approaches. Similarly, as we seek innovative solutions on how best to mainstream human rights norms into international climate change regimes, particularly in the light of the two dimensional threats posed by climate change to human rights, it is pertinent to examine how each of the previously suggested approaches have been implemented, the successes, pitfalls and the lessons we can draw on why one approach might best guide us with respect to climate change. This thesis proceeds from the notion that previous prescriptions and approaches can guide us towards addressing the indirect threats posed by climate change mitigation projects to human rights if appropriate lessons are drawn from their respective strengths and weaknesses. The question therefore is, what is the value of one approach over the other? The different approaches are discussed under two broad headings: the substantive rights approach consisting of the substantive rights approach, (consisting of both the direct (new human rights approach; and the re-interpretation approach); and secondly the procedural rights approach consisting mainly of the human rights based approach.

2.1 Substantive Human Rights Approach

Since the publication of the path-breaking treatise edited by Boyle and Anderson, scholars have increasingly argued in favour of an approach that protects the environment using substantive human rights instruments.[649] The crux of the argument here is that environmental protection can best be achieved when it is recognised as a human right and defined in core international human

[649] A Boyle and M Anderson (eds.) *Human Right Approaches to Environmental Protection* (OUP 1996).

rights instruments.[650] Scholars propose that environmental protection can be recognised in the body of international human rights law either by: establishing a new human right to environment under international law; or re-interpreting existing human rights such as the right to life or the right to health to include environmental protection as an element.[651] Boyle called this the 'greening' of already existing rights and remedies to cater for environmental protection.[652] This indirect approach calls for states, courts and international organizations to derive environmental protection from existing human rights instruments.

A) Reinterpreting existing rights: The Indirect Approach

This approach focuses on the expansive re-interpretation of existing human rights to cover environmental protection. As Anderson argued 'existing rights must be re-interpreted with imagination and vigour in the context of environmental concerns which were not prevalent at the time existing rights were first formulated'[653] Harding also argued that existing human rights such as the right to life, right to health and right to information are already robust in themselves to protect the environment and that proposals for new environmental rights are at best superfluous.[654] He argues that environmental rights can be incorporated silently and less dramatically into existing human rights by amending or greening these rights, making it

[650] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89-120; S Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International 2009); M Paellemarts, 'The Human Right to a Healthy Environment as a Substantive Right' in M Dejeant-Pons and M Paellemarts (eds), *Human Rights and the Environment* (Council of Europe 2002) 11, 15; S Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tul. Envtl. L.J. 65; J May, 'Constitutionalizing Environmental Rights Worldwide' (2006) 23 Pace Envt. Law Rev. 113; K Ebeku, 'The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited' (2007) 16(3) Rev. Eur. Community & Int'l Envtl L. 312

[651] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89-120.

[652] A Boyle 'The Role of International Human Rights Law in the Protection of the Environment ' in A Boyle and M Anderson (eds.) *Human Right Approaches to Environmental Protection* (OUP 1996) 43.

[653] M Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A Boyle and M Anderson (eds) *Human Right Approaches to Environmental Protection* (OUP 1996) 7-8.

[654] A Harding, 'Practical Human Rights, NGOs and the Environment in Malaysia' in A Boyle and M Anderson (eds) *Human Right Approaches to Environmental Protection* (OUP 1996) 227.

unnecessary to create a new right.[655] Anderson seemed to be in agreement with this when he argued that:

> existing rights, if fully realized are so robust in themselves that proposals for new environmental rights are at best superfluous and at worst counter-productive. The body of existing rights at the international level is detailed and comprehensive. An argument may be made out that if activists devoted their attentions to securing additional ratifications and campaigning for effective implementation of existing international instruments, rather than dreaming up and promoting new standards then environmental protection will follow automatically…[656]

Boyle also argued that the right to life, personal liberty, political information and the freedom of association can be utilized to provide remedies for environmental concerns without the need for creating another right.[657]

Arguably, lessons can be drawn from the success or otherwise of these older approaches that sought to litigate environmental matters by placing them under existing human rights.[658] In a number of cases, this approach has yielded favourable responses and jurisprudence. For example, in the *Gabcikovo Nagymoros Case*, Judge Weeramantry of the International Court of Justice (ICJ) recognised the protection of the environment as a '*sine qua non* for numerous human rights such as right to health and the right to life itself'.[659] The African commission also adopted this approach in the recent case of *Endorois Welfare Coucil v Kenya*. The Commission linked environmental protection to other human rights when it found the Government of Kenya in violation of the rights to freedom of religion, property, culture, religion, environment, natural

[655] ibid 229. See also D Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denv J Int'l L & Pol'y 129.
[656] M Anderson, 'Human Rights Approaches to Environmental Protection' in A Boyle & M Anderson, *Human Rights Approaches to Environmental Protection* (OUP 1996) 4.
[657] A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle & M Anderson (eds) *Human Rights Approaches to Environmental Protection* (OUP 1996) 43-46.
[658] See H Post, 'Hatton and Others: Further Clarification of the 'Indirect' Individual Right to a Healthy Environment' (2000) Colum. J. Envt. 25.
[659] Gabcikovo Nagymoros (Hungary/Slovakia) (1998) 37 ILM 162, 206 (Separate Opinion of JudgeWeeramantry).

resources and the right to development of the indigenous people of Endrois.[660] In *SERAC v Nigeria* the African Commission on Human and People's Rights also linked environmental protection to the right to life, health, food, and property.[661]

The recent case of *Mossville Environmental Action Now v United States*- an environmental pollution petition brought before the Inter-American Commission against the US Government is another example.[662] In this case, the US Government had opposed the admissibility of the petition on the grounds that 'there is no such right as the right to a healthy environment either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination'.[663] The court however held that while the US may not recognise the right to environment as alleged in the petition, the Commission finds the petition admissible based on a broad interpretation of international and Inter-American human rights systems.

The European Court of Human Rights has also recognised this linkage approach in a number of cases.[664] For example in the *Lopez Estra case*, the court held that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as

[660] Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council vs. Kenya, African Court for Human and Peoples' Rights, Case No. 276/2003 (hereinafter, Endorois Welfare Council vs. Kenya).
[661] (2001) AHRLR 60 (ACHPR 2001). Communication 155/96.
[662] Organization of American States, Inter-Am. Commission on HR, *Mossville Environmental Action Now v United States*, Report no 43/10, Petition no 242/05, Admissibility, OEA/Ser LV/II 138 (17 March 2010) 5.
[663] Response of the Government of the United States, <http://www.ehumanrights.org/docs/US-Response-to-Mossville-Petition-09-06.pdf> accessed 12 May, 2012.
[664] See also Guerra v Italy, 4 BHRC 63 (1999); *Hatton v. United Kingdom* (2002) 34 E.H.R.R. 1; Kyrtatos v Greece (2003) 36 EHRR 242 [52]; *Taskin v Turkey* (2006) 42 EHHR 50; *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Fadeyeva v Russia* (2007) 45 EHRR 10; *Tatar v Romania* (App no 67021/01) 27 January 2009; *Leon and Agnieszka Kania v Poland* (App no 12605/03) 21 July 2009; *Olujic v Croatia* (App no 22330/05) 5 February 2009.

to affect their private and family life adversely.[665] The Inter-American Commission on Human Rights also recognized the linkages in *Yanomani Indians v Brazil,* where it held that Brazil had violated the Yanomani Indians' right to life, liberty and personal security by not taking measures to prevent the environmental damage that resulted in the loss of life and cultural identity among the Yanomani.[666]

However, this approach could at times be faced with the problem of uncertainty and indeterminacy. In the absence of an express recogntion of a right to environment in any of the core international human rights treaties or an express recognition in the specific treaty relied upon before an international tribunal, the success or otherwise of this approach depends on the liberality of the treaty body or court concerned. As such, some courts have insisted that laws should be interpreted as they are, as opposed to a whimsical expansion of a rights instrument to include a right to environment. For example in *Hatton v. United Kingdom,* a Grand Chamber of the European Court of Human Rights overruled an earlier decision by one of its smaller sections on a complaint about noise pollution arising from night flights at London's Heathrow Airport. In that case, eight applicants, all British citizens, argued that night-time noise from the airport, especially in the early morning, interfered with their right to private and family lives, right to peaceful enjoyment of their homes, and their environmental rights. The Chamber held that failure of the government to reduce night flights from Heathrow Airport in the interests of the economic well being of the country did not breach the human rights of those living beneath the flight path. It held that considering the small number of people afflicted by sleep disturbance, the interference could not be regarded as disproportionate and that a fair balance had been struck,

[665] ECHR (16798/1994).
[666] Inter-Am. C.H.R. 7615, OEA/Ser.L.V/II/66 doc. 10 rev. 1 (1985).

taking into account the economic well-being of the country and the economic significance of the airport.[667] According to the Chamber:

> Environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.[668]

The Chambers refused to ascribe any special recognition or status to environmental human rights. Similarly, United States Courts have consistently held that there is no such right as a right to environment under the US constitution or under international law.[669] Previous attempts to seek redress for international environmental pollution under the US Aliens Torts Act (ATCA) have recorded little success.[670] One of the challenges is that the courts have not recognised environmental pollution to constitute a violation of the law of Nations. The US Supreme Court has held in *Sosa v Alvarez-Machain* that the ATCA only provides a cause of action for violations of international norms that are as 'specific, universal, and obligatory'.[671] As such in *Amlon Metals Inc. v FMC Corp* the US Court held that the Stockholm Declaration on Human Environment does not form part of the law of Nations.[672] Similarly in *Beanal v Freeport McMoran, Inc.*, the US Court held that the Polluter Pays Principle (PPP), the precautionary

[667] 2003 (Application no. 36022/97) 003-VIII Eur. Ct. H.R. 189, 37 Eur. H.R.
[668] ibid.
[669] See the decision in *Tanner v Armco Steel* (1972) 340 F. Supp 532, 537 where the court held that 'no legally enforceable right to a healthful environment…is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution'. See also *De Shaney V Winnebago County Dept. of. Soc. Serv*., (1989) 489 U.S 1189, 195-96, decision affirmed in 556 F.2d 576 (4th Cir. 1977); *Upper W. Fork River Watershed Association V Corps of Engineers* (1977) 414 F. Supp. 908 (N.D.W.Va*); Lindsey V Normet* (1972) U.S 405 U.S 56. In these cases, the courts refused to recognise a right to environment.
[670] Section 1350 of Alien Torts Act 28 U.S.C. § 1350 ('ATCA') allows non-citizens of the United States to sue in U.S. federal courts for violations of the law of nations committed outside the United States. This statute has been employed by victims of human rights abuses to seek redress in US courts. For example in *Filartiga v Pena-Irala*, the US court allowed a case of torture brought by two Paraguayan citizens resident in the United States, against a Paraguayan former police chief who was also living in the United States, the court held that torture constituted a violation of the law of Nations.
[671] 542 U.S. 692 (2004). See also *Flores v Southern Peru Copper Corporation* 343 F.3d 140, 143-44 (2d Cir. 2003) *Sarei v Rio Tinto* 550 F.3d 822 (9th Cir. 2008).
[672] 775 F. Supp. 668, 674 (S.D.N.Y. 1991).

principle and the proximity principles of international environmental law, have not been sufficiently defined to constitute part of the 'Law of Nations'.[673] In *Aguinda v Texaco* the court held that allegations of oil spillage do not fit neatly enough into existing categories of international law to constitute a violation of the Law of Nations under ATCA. The court therefore dismissed the case. [674]

These cases show the shortcomings of seeking environmental protection through an indirect human rights approach; or an approach that seeks to derive these linkages through litigation. Specifically, they are instructive on the potentials and pitfalls of trying to establish or derive the linkages between human rights and climate change through litigation.[675] There have been more arguments now than ever that climate change is a human rights issue.[676] The United Nations has in three different resolutions identified that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[677] Though not legally binding, these declarations emphasise that human rights can

[673] 969 F.Supp. 362 (E.D.La. 1997).
[674] 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
[675] See see S Hsu, 'A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit' (2008) 79 (3) University of Colorado Law Review 701–766; D Adam, 'Climate Change in Court' (2011) 1 (3) Nature Climate Change 127–130; M Averill, 'Linking Climate Litigation and Human Rights' (2009) 18 Review of European Community and International Law; E Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 University of Pennsylvania Law Review 1925; M Averill, 'Linking Climate Litigation and Human Rights' (2009) 18 Review of European Community and International Environmental Law 139; H Osofsky, 'The Inuit Petition as a Bridge: Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 American Indian L. Review 675; H Post, 'Hatton and Others: Further Clarification of the 'Indirect' Individual Right to a Healthy Environment' (2000) Colum. J. Envt. 25.; H Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 WASH. U. L.Q. 1789, E Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 University of Pennsylvania Law Review 1925.
[676] See M Robinson, Climate Change is an Issue of Human Rights, (2012) <http://www.independent.co.uk/voices/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html> These principles must be put at the heart of any deal on global warming.
[677] U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, Report of the Human Rights Council on Its Seventh Session, at 65, U.N. Doc. A/HRC/7/78 (July 14, 2008); U.N. Human Rights Council Res. 10/4, in U.N. Human Rights Council, Report of the Human Rights Council on its Tenth Session 13, at 15, U.N. Doc.

influence developments with respect to climate change mitigation and adaptation. In essence, that climate change is a human rights issue, and that failure to mitigate climate change could result in a violation of several existing human rights. The search for a more robust recognition of these linkages in climate change regimes and more specifically laying down mandatory threshold and guidelines to prevent the indirect impacts of climate change measures on human rights however continues.[678]

Some scholars have therefore suggested the potentials of deriving these linkages through litigation.[679] More than ever, there have been calls that the human rights affected by climate change could be protected through litigation. This goes back to the question whether such indirect linkage approach and enforcement through litigation could provide robust solutions to both the direct and indirect impacts of climate change on human rights. If lessons from previous experiences of deriving environmental rights through litigation are anything to go by, the strengths and pitfalls of the climate change litigation or indirect approach becomes very evident.

A/HRC/10/L.11 (Mar. 31, 2009); U.N. Human Rights Council Res. 18/22, in U.N. Human Rights Council, Report of the Human Rights Council on Its eighteenth Session, at A/HRC/RES/18/22 (30 September 2011).

[678] Interestingly, this approach succeeded in *Massachusetts V EPA* (2007) 127 S. Ct. 1438, where the US Supreme Court held that green house gas emissions from motor vehicles, including carbon dioxide, count as "pollutants" under the Clean Air Act. For a discussion of the ability of litigation to encourage federal responses to climate change, see H Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 Wash. U. L.Q. 1789, 1855; see also C Carlarne, 'Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared' (2006) 14 Penn St. Envtl. Rev. 435, 453-57; H McGee, Jr., 'Litigating Global Warming: Substantive Law in Search of a Forum' (2005) 16 Fordham Envtl. L.Rev. 371, 372-77; D Goldberg & M Wagner, 'Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System' in V Grover (ed.), *Climate Change: Five Years After Kyoto* (Science Publishers 2004) 191.

[679] See E Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 U. Pa. L. Rev. 1925; D Markell & J B Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(1) Florida Law Review 15–86; M Gerrard, 'What Litigation of a Climate Nuisance Suit Might Look Like' (2011) 121 *Yale L.J Online* 135–177; W Burns & H Osofsky (ed.), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009); L Case, 'Climate Change: A New Realm of Tort Litigation, and How to Recover When the Litigation Heats Up' (2011) 51 Santa Clara Law Review 265–298; J Cofre, et al.,' Climate Change Litigation' in P Watchman, Q Paul (ed.), *Climate Change: A Guide to Carbon Law and Practice* (Globe Business Publishing Ltd 2008).

While this is an ingenious approach as it could raise awareness on the importance of thinking of the direct and indirect effects of climate change as human rights violations; the greatest danger in this 'pigeonhole' approach is that claimants would have to be as imaginative as possible in fitting violations arising directly and indirectly from climate change into any of the recognised human rights in order to bring their claims under the jurisdiction of an existing international human rights body. Such efforts have not been the most straighfoward, particularly when brought before a conservative judicial forum. This approach could fail where the court is unwilling to expand existing rights to cover climate change. For example in December 2005, the Inuit Circumpolar Conference (ICC) filed a petition with the Inter-American Commission on Human Rights, against the United States for its acts and omissions with respect to climate change. It alleged that the United States, as the world's largest emitter of greenhouse gases, was violating the human rights of the Inuit residents of the Arctic through its climate change policies, including its decision not to ratify Kyoto Protocol. The petition alleged that the rights to property, physical well- being, and cultural life of the Inuits had been adversely affected by the acts and omissions of the United States. In its response, the Commission held that 'information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of right protected by the American Declaration.[680]

Considering that claims brought before any international human rights review committee or court must disclose a *prima facie* case for the complaint to scale the initial hurdle of admissibility

[680] J George, 'ICC Climate Change Petition Rejected' (Nunatsiaq News, Dec. 15, 2006) <http://www.nunatsiaq.com/archives/61215/news/nunavut/ 61215_02.html>; *See also* Andrew C. Revkin, 'World Briefing Americas: Inuit Climate Change Petition Rejected' (N.Y. TIMES, Dec. 16, 2006) A9**;** D Zabarenko, 'Climate Ills, Rights Linked; Global Warming Endangering Inuit "Sentinels,'Nobel Nominee Argues' (Toronto Star, Mar. 5, 2007) at A7. Even though the petition was rejected, the Commission later invited and heard testimony on the relationship between human rights and climate change from representatives for the Inuit in 2007.

before a consideration of the merits, the chances of admissibility for claims linking climate change actions and omissions to human rights may be speculative and largely derivative.[681] Arguing that climate change mitigation projects violate human rights might work in some cases where it is easy to establish direct link to a recognised human rights, while it might not in other cases where such projects have not resulted in a violation of any recognised right, for example if it has not brought about any loss of life, or has not violated other rights such as personal liberty, political participation and the freedom of association. [682] In such cases, it will be difficult to bring claims under any of these rights. Communities may suffer from huge human rights impact from a project but remain unable to seek redress if for example it does not lead to death (thus the right to life is still intact) or does not impair their movements in any way (the right to free movement is still intact).[683] As Francioni notes with respect to environmental protection generally:

> …it does not make much sense to engage human rights language to combat environmental degradation only when such degradation affects the rights to life, property, and the privacy of certain directly affected individuals. This reductionist use of human rights may even be counter-productive in that it tends to reduce environmental values to the very limited sphere of individual interest, thus adulterating their inherent nature of public goods indispensable for the life and welfare of society as a whole. This does not mean that the human rights approach to environmental protection considered above should be discontinued. On the contrary, my plea is for a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and

[681] For example, since the Right to Property is not recognized in the ICCPR and the ICESCR, the HRC has refused to comment on or declare a violation of the right to property in cases where displacements from homes were part of the claims brought before it. See for example *Oló Bahamonde v. Equatorial Guinea*; *Ackla v. Togo and Diergaardt of Rehoboth Baster Community et al. v. Namibia*, in these cases even though the claims brought before the HRC showed prima facie, evidence of unjustifiable interference with property rights, the HRC only commented on the right against discrimination. See R Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in International Court of Justice' (2005) 14 Pac. Rim. L. & Pol'y J. 103.

[682] See J Marshall, 'The Human Right to a Clean Environment, Phantom or Reality? The European Court of Human Rights and English Courts Perspectives on Balancing Rights in Environmental Cases (2007) 76(2) Nordic J Intl. Law 103.

[683] D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 134.

> technique of human right discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole.[684]

Francioni's logic arguably applies to the reductionist use of human rights to protect rights affected by climate change projects. Whether a claim would succeed before the complaint mechanism of a human rights treaty would depend on how imaginative an applicant might be in linking the violations by a project under any of the rights covered by that treaty. Success would therefore vary on a case-by-case basis. Such might also depend on how liberal the court or review body is in agreeing to expand the application of such rights. This reduces the chances of obtaining remedies to the standard or understanding of whichever international committee that is adjudicating.

This aside, climate change litigation as an approach would arguably not provide an opportunity to address the root causes of the indirect impacts of climate change projects on the public, neither would it provide an opportunity to prevent these concerns in the first place, without a need for recourse to remedial measures. There is a need for an approach that is preventive and anticipatory in nature, such that these concerns are dealt with as part of climate change governance; rather than a reductionist approach that tries to bring in human rights when there is already a violation or problem.[685]

---

[684] F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) European Journal of International Law 55; see also S Hsu,'A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit' (2008) 79 (3) University of Colorado Law Review 701–766.

[685] R Gainza-Carmenates, *et al*., 'Stakeholder-based Scenarios for Post-2012 Climate Policy: A Participatory Approach' (2009) 3 Carbon & Climate L. Rev. 248; K Engel, 'Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies' (2007) 155 U. Pa. L. Rev. 1563; A Spain, 'Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change' (2011) 30 (2) Stanford Environmental Law Journal 343–390; M Gerrard, 'What the Law and Lawyers Can and Cannot Do About Global Warming' (2007) 16 Se. Envtl. L. J. 33.

A direct recognition of a substantive climate change right under international law has been identified as a possible way to prevent such situations.[686] Some have argued that the linkages could be easily established as part of substantive right to environment under international law, while most recently there have been calls for a separate human right to be cold.

B) The New Human Rights Approach

There have been unprecedented demands within the last decade on the need to link environmental protection and human rights through the creation of a substantive human right. While some scholars argue that an international recognition of a substantive right to environment would easily cover climate change, since climate change is an element of the environment.[687] Some have also argued for a direct recognition of the human rights against the direct and indirect effects of climate change, also known as the right to be cold.[688] The substantive right approach to environmental protection has been described as the most debated approach to mainstreaming human rights norms into environmental protection.[689]

---

[686] C Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 Journal of *Human Rights* and the Environment 7-22. As Gearty notes, environmental protection needs a more direct guarantee in human rights law than can be provided by the right to privacy or by civil and political rights generally.

[687] J Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477-498; J Von Doussa, 'Human Rights and Climate Change: A Tragedy in the Making' (2008) 31(3) The University of New South Wales Law Journal 953-964; see also A Postiglione, 'Human Rights and the Environment' (2010) 14(4) The International Journal of Human Rights, 524-541; B Lewis. 'Climate Change and Human Rights: Perspectives of Environmental and Indigenous Rights' (2008) 1(1) Journal of the Australasian Law Teachers Association 153-161.

[688] See S Watt-Cloutier, 'A New Legal Frontier in the Fight against Global Warming' (2005) Fordham Envt. Law Rev .292. See also S Watt-Clouttier, 'The Right to be Cold' (Evidence provided for the Humanity on Trial 2009)<http://humanityontrial.wordpress.com/2009/09/28/sheila-watt-clouiter-on-the-right-to-be-cold/> accessed 12 January 2013. Watt-Cloutier where explored the parallels between safeguarding the Arctic and the survival of Inuit culture from climate change and argued that the issue of climate change had to do with their "right to be cold' in Inuit communities. Watt–Cloutier argues that climate change is a human rights issue and one to which all of us on the planet are inextricably linked. See also J Harrington, 'Climate Change, Human Rights, and the Right to Be Cold' (2006-2007) 18 Fordham Envtl. L. Rev. 513.

[689] United Nations, 'Outcome Document of the High Level Expert Meeting on the New Future of Human Rights and Environment: An Agenda for Moving Forward (Nairobi, 30 November – 1 December 2009). <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=cTNdmZ_wGK0%3d&tabid=2046&language=en-US> accessed 12 March, 2010.

Calls for a substantive human right to environment under international law has been extensively developed by scholars such as Shelton,[690] Turner,[691] Paellemarts[692] and Atapattu[693] who have developed some of the strongest arguments in favour of the new right approach. Proponents of such a right call for its adoption under international law as the best approach to protect the environment from pollution caused by climate change; transboundary movement of hazardous wastes; depletion of the ozone layer and other environmental concerns.[694] The crux of the argument here is that environmental protection is fundamental enough to be accorded human rights status under international law.[695]

The right to environment has been defined and recognised in a number of countries. Currently, at least 177 countries have granted constitutional recognitions to a right to environment. European countries such as France,[696] Spain,[697] Portugal,[698] Hungary,[699] Norway,[700] Bulgaria,[701] Croatia,[702]

[690] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89-120.
[691] S Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International 2009).
[692] M Paellemarts, 'The Human Right to a Healthy Environment as a Substantive Right' in M Dejeant-Pons and M Paellemarts (eds), Human Rights and the Environment (Council of Europe 2002) 11, 15.
[693] S Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tul. Envtl. L.J. 65.
[694] J May, 'Constitutionalizing Environmental Rights Worldwide' (2006) 23 Pace Envt. Law Rev. 113; K Ebeku, 'The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited' (2007) 16(3) Rev. Eur. Community & Int'l Envtl L. 312.
[695] See J Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 Columbia Journal of Environmental Law 305.
[696] Charter of the Environment of 2004 (France) Art.1 ('Everyone has the right to live in a balanced and health-friendly environment')
[697] Art. 45 ('Everyone has the right to enjoy an environment suitable for the development of the person')
[698] Art 66(1) of the 1982 Constitution, ('Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it')
[699] Ch.I, & 18 of the Revised Constitution of 1990 recognizes and enforces everyone's right to a healthy environment.
[700] Pt. E, Art. 110 b ('Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved')
[701] Art. 55 ('Citizens have the right to a healthy and favorable environment')
[702] CROAT. CONST. Ch. II, Sec. III, Pt. III, Art. 69, ('Everyone shall have a right to a healthy life…the State shall ensure conditions for a healthy environment…')

Russia,[703] Poland,[704] Turkey,[705] and Ukraine,[706] have constitutional provisions on the environment. In the American region, Argentina,[707] Chile,[708] Brazil,[709] Columbia,[710] Costa Rica,[711] Ecuador,[712] Paraguay,[713] and Venezuela,[714] have also constitutionalized environmental rights. African countries such as Benin,[715] Ethiopia,[716] Niger,[717] Mali,[718] Cameroon,[719] South Africa,[720] Togo,[721] Burkina Faso,[722] Nigeria[723] and most recently Kenya[724] have also provided for

[703] RUSS. CONST., sec. I, ch. II, art. 42 ('Everyone shall have the right to a favorable environment')
[704] POL. CONST. ch.II, art 86 : 1) Public authorities shall pursue policies ensuring ecological safety of current and future generations. 2.) The protection of the environment is the duty of public authorities. 3.) Everyone has the right to be informed of the condition and protection of the environment. 4.) Public authorities shall support the activities of citizens to improve the quality of the environment.
[705] TURK. CONST. Ch. VIII (A)., Art. 56 (1982) ('Everyone has the right to a healthy, balanced environment…')
[706] UKR. CONST., ch. II, art 50 ('Everyone has the right to an environment that is safe for life and health…')
[707] ARG. CONST. first pt., ch. II, art. 41 ('All inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations…')
[708] CHILE CONST. ch. III, art. 19 (The right to live in an environment free from contamination")
[709] BRAZ, CONST. tit. II, ch.I, art.5, para. LXXIII ('Any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or the patrimony of an entity in which State participates…to the environment…')
[710] COLOM. CONST. tit. II, ch.III, art. 79, ('Every individual has the right to enjoy a healthy environment')
[711] COSTA RICA CONST. tit. V, art. 50 (as amended on June 10, 1994) ('Every person has the right to a healthy and ecologically balanced environment…')
[712] ECUADOR CONST. tit. II, ch. 5, sec.2, art. 86 ('The State shall protect the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainable development…')
[713] PARA. CONST., pt. I, tit. II, ch,I , sec. I, art. 7 (" Everyone has the right to live in a healthy, ecologically balanced environment.")
[714] VENEZ. CONST. tit.III, cha.IX, art. 127, ('Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment')
[715] BENIN CONST., Art. 27 (Every person has the right to a healthy, satisfying and lasting environment)
[716] ETH. CONST. ch.III, pt.II, art. 44(1) ('All persons have the right to a clean and healthy environment..')
[717] NIGER CONST. tit. II, art. 27 (currently suspended by the military junta on the … of Februrary, 2010) ('Each person has a right to a healthy environment')
[718] MALI CONST. tit. I,a rt. 15 ('Every person has the right to a healthy environment')
[719] CAMEROON CONST., Preamble ('Every person shall have a right to a healthy environment…') Note that para.65 of the Constitution provides that the 'Preamble shall be part and parcel of this Constitution')
[720] SOUTH AFR. CONST. ch.2, art. 24 ('Everyone has the right to (a) an environment that is not harmful to their health and well being; and (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures …')
[721] TOGO CONST. tit. II, subsec. I, art. 41 ('Anyone has a right to a healthy environment')
[722] BURK. FASO CONST. tit. I, ch. IV, art. 29 ('The right to a healthy environment is recognized; the protection, the defense and the promotion of the environment are a duty for all') ; Art. 30 ('Every citizen has the right to initiate an action or to join a collective action under the form of a petition against the act…affecting the environment…')
[723]1999 CONST. OF NIGERIA, Sect.209 ('The State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria')
[724] Section 42 of Kenya's 2010 Constitution states that:
Every person has the right to a clean and healthy environment, which includes the right a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and b) to have obligations relating to the environment fulfilled under Article 70.

environmental rights in their constitutions. Same for Asian countries such as India,[725] East Timor [726] and South Korea.[727] This wide recogntion shows that philosophical questions on whether or not the right to environment can be precisely defined may have been conclusively put to rest.[728] Regionally, Article 24 of the African Charter on Human and Peoples' Rights also provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development'. Article 11 of the 1988 San Salvador Protocol to the 1969 Inter-American Convention on Human Rights also provides that everyone shall have the right to live in a healthy environment and to have access to basic public services.[729]

Even though there is no recognition or mention of a right to environment in any of the core international human rights treaties, it has gained increased recognition in a number of international instruments, for example the Aarhus Convention.[730] This increased recognition

---

2010 Constitution of Kenya, available at <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/l8do0kz/-/published+draft.pdf>

[725] INDIAN CONST. Art. 48-A states, 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'. Also, Part 4-A of the Constitution, Article 51 A (G) states that, 'It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures'.

[726] E. TIMOR CONST. pt II, tit. III, art. 61(1) ('All have the right to a human, healthy and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generation')

[727] REP. KOREA. CONST. ch. II, art. 35(1) ('All citizens shall have the right to a healthy and pleasant environment')

[728] The question on the extent to which these spate of constitutionalization of environmental rights have resulted in concrete implementation or environmental protection is however a different and difficult one. Many of the referenced constitutional rights are placed in the non-justiciable sections of the Constitution, making them unenforceable in courts. Apart from Ecuador, Bolivia and Kenya, which have new constitutions that establish justiciable environmental rights, many of the other referenced constitutions establish non-enforceable environmental rights. This continues to raise questions on how environmental rights can be better recognised, protected and fulfilled at the national level.

[729] Art. 24, African Charter Human and Peoples Rights (Adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982) (providing a 'right to a general satisfactory environment favorable to…development'); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art. 11.(Adopted Nov. 17, 1988, entered into force Nov. 16, 1999) O.A.S.T.S. No. 69, 28 I.L.M. 161 ('Everyone shall have the right to live in a healthy environment and to have access to basic public services').

[730] See the preamble to the Aarhus Convention ('every person has the right to live in an environment adequate to his or her health and well-being'). See also Article 1 of the Aarhus Convention. There are also other non-binding declarations and instruments that recognize the linkages between human rights and the environment. See United

provides an opportunity to evoke human rights language for environmental protection. Despite these recognitions however, the absence of a direct recognition of the right to environment in any of the core international human rights instruments continues to generate scholarly interests on the status of a right to environment under international law and the available mechanisms for its enforcement.[731] Even though the Aarhus Convention is by design an open global Convention, as it provides opportunities for ratification by countries outside the Economic Commission for Europe, the ratification and membership of the Convention remains concentrated in Europe.[732] This underscores the importance of reflecting the procedural human rights provisions of the Aarhus Convention in climate change regimes to address the specific linkages between human rights and climate change. There is a need for a direct recognition and clarification of the

---

Nations' Conference on the Human Environment (Stockholm Declaration) U.*N. Doc*. A/CONF.48/PC.13 (1971). <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> accessed 10 March 2012. ('Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being…) ; World Charter for Nature , G. A Res. 37/7, Annex, 123, U.N Doc. A./RES/37/7/Annex (Oct. 38, 1982) (Providing the right for all persons to access 'redress when their environment has suffered damage'); Hague Declaration on the Environment (Adopted Mar. 11, 1989, 28 I.L.M. 1308 (' [R] emedies to be sought involve.., the right to live in dignity in a viable global environment…'); United Nations Conference on Environment and Development June 3-14, 1992, Rio Declaration on Environment and Development, Princip1e 1, U.N. Doc. A/CONF. 151/5/Rev.1 (June 13, 1992), *reprinted in* 31 I.L.M. 874 ('Human beings are entitled to a healthy and productive life in harmony with nature').

[731] See M Salomon, 'The Future of Human Rights' (2012) 3 (4) Global Policy, L Collins, 'Are we There Yet? The Right to Environment in International and European Law' (2007) McGill Int'l J. Sustainable Development L. & Pol'y 119; M Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007); see also D Cassel, Commentary, 'Do We Have a Human Right to a Healthy Environment under International Law?' (2009) <http://www.internationallawobserver.eu/2009/10/12/right-to-a-healthy-environment/> accesed 12 January 2013 (where the author critiques the existence of a right to environment under international law. He argues that there are still many complex underlying legal challenges that have to be fully comprehended before we can lay claim to the existence of this right under international law). Despite these debates, we align with the views that a right to environment has gained sufficient recognition in international law and has now become applicable in more countries, than ever before. However, as it will be demonstrated in this chapter, there is still a need for a direct recognition and clarification of the specific linkages between human rights and climate change in climate change regimes. Climate change mitigation projects produce indirect human rights consequences that must be specifically clarified and addressed as part of climate change regimes. Arguably these concerns would be better addressed and enforced through an anticipatory and process-based framework that sets mandatory threshold for the design and implementation of mitigation projects.

[732] As of 2 April 2013, there are 47 Parties to the Convention. Currently, no African country has ratified the Aarhus Convention. All the developing countries discussed in this thesis (Honduras, Panama and Nigeria) are also not Parties to the Aarhus Convention. Similarly, CDM giants such as India, China, Indonesia, and Brazil are not Parties to the Aarhus Convention; this limits the prospects of evoking the Aarhus provisions and processes to address some of the procedural and human rights questions in CDM projects in developing countries.

linkages between human rights and climate change in climate change regimes to provide a clear human right threshold that would be tailored to meet the gaps in current climate change regimes.

Climate Change and Human Rights

The impetus to combat global climate change has brought about specific debates and proposals for substantive human rights to 'climate change mitigation' or a substantive 'human right to be cold'.[733] Some scholars have argued for the recogntion of the fact that failure to mitigate climate change in one country is a threat to human rights in another country.[734] Sheila Watt-Cloutier, one of the most consistent advocates of this right argues that failure to mitigate climate change violates the right to be cold in Inuit communities. She notes that greenhouse gas emissions are a major cause of Arctic warming and loss of ice, which is destroying the environment that has both formed and nurtured the traditional Inuit way of life.[735] She notes that the right to be cold would impose obligations on industrialized countries particularly Canada and the United States where a majority of the Inuits live, to address the impacts of human-induced climate change on livelihood, particularly in the Artic communities.[736] Hall and Weiss also develop a

[733] S Watt-Cloutier, *The Right to be Cold* (Penguin Canada 2013), J Harrington, 'Climate Change, Human Rights, and the Right to Be Cold' (2006-2007) 18 Fordham Envtl. L. Rev. 513; J Ruhl, 'The International Right to Equitable Climate Change Adaptation—Substance or Procedure?' (2012) 37 (2) Yale Law Journal 1-2; see also Africa Initiative Congress on Climate Change, 'Mitigating Climate Change is a Human Right' (2009) <http://www.cigionline.org/blogs/2009/11/mitigating-climate-change-basic-human-right> accessed 21 January 2013, see also S Watt-Cloutier, *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*,http://www.earthjustice.org/library/legal-docs/petition-to-the-inter-american- commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf [hereinafter *ICC Petition]* .

[734] See I Burton, S Huq, B Lim, O Pilifosova, and S Schipper, 'From Impacts Assessment to Adaptation Priorities: The Shaping of Adaptation Policy. (2002) Climate Policy 2:145-159; see also D Hunter, *Human Rights Implications for Climate Change Negotiations* (2009) 11 Or. Rev. Int'L L. 331, 332; J Knox, 'Climate Change and Human Rights Law' (2009) 164 VA. J. INT'L L. 163, 168.

[735] See *ICC Petition*, *supra* note 733.

[736] See The Utqiaġvik Declaration, Inuit Circumpolar Conference (2006); see also Arctic Climate Impact Assessment (ACIA), Impacts of a Warming Arctic 2004 Overview, 8: Sheila Watt Cloutier, Remarks upon receiving the Canadian Environment Awards Citation of a Lifetime Achievement, Vancouver, BC, June 5, 2006. The Arctic Climate Impact Assessment (ACIA) supports these claims. It warns that 'reductions in sea ice will drastically shrink marine habitat for polar bears, ice-inhabiting seals and some seabirds, pushing some species toward extinction. It notes that species that the Innuits rely on for feeding are disappearing and that hunting routes near shorelines have

comprehensive argument for viewing climate change adaptation on the international level as a substantive human right.[737]

The scope and content of substantive climate change rights are yet to be fully explored and developed.[738] Similarly, most of the discussions with respect to substantive climate change rights continue to neglect the secondary human rights impacts of measures aimed at addressing climate change, particularly in developing countries.[739] For example, the right to be cold as it is currently framed does not speak to the reverse impacts of climate change mitigation efforts or projects on human rights. Will the right to be cold or right to climate change mitigation cover concerns generated by climate change mitigation projects, or would violations include financing mitigation projects that violate human rights. They fail to provide an elaborate understanding of how this right might influence the impact of climate change policies, programmes, projects and interventions on human rights. They also fail to evolve an anticipatory, preventive and

---

disappeared due to erosion brought on by the thawing of permafrost. Villages have experienced increased flooding in winter due to lessened or disappearing pack ice that normally protects shorelines from surging water'. See ACIA,'Impacts of a Warming Arctic: Arctic Climate Impact Assessment (CUP 2004) 10.

[737] M Hall & D Weiss, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37 (2) Yale Journal of International Law 309. The authors frame equitable climate change adaptation as a human right. They argue that adaptation-related human rights claims—together with analyses of diagonally conceived human rights—can help afford global citizens a more robust international legal framework within which to address climate change. For a critique of this paper see J Ruhl, 'The International Right to Equitable Climate Change Adaptation—Substance or Procedure?' (2012) 37 (2) Yale Law Journal, Ruhl asked whether there is anything new about climate change adaptation, even when viewed through the human rights lens, that calls for the evolution of substantive international law doctrine, or even further, for the creation of a distinct realm of international law?; or whether climate change adaptation simply present more of the same human rights issues that have been in play for decades, albeit with more quantity and intensity—more frequent and intense floods, droughts, heat waves, and population dislocations? He asks, if there is something new and exceptional about climate change adaptation for international human rights law, what is it and what new substantive doctrine is required?.

[738] See J Carlson, 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18(1) Transnational Law & Contemporary Problems 45-68; E Burleson, 'Climate Change Consensus: Emerging International Law' (2010) 34 (2) William and Mary Environmental Law and Policy Review 543–588; B Ackerly & M Vandenbergh, 'Climate Change Justice: The Challenge for Global Governance' (2008) 20 Geo. Int'l Envtl. L. Rev. 553.

[739] See S McInerney-Lankford, M Darrow, L Rajamani, *Human Rights and Climate Change* (World Bank 2011); E Burleson, 'Climate Change Consensus: Emerging International Law' (2010) 34 (2) William and Mary Environmental Law and Policy Review 543–588; B Ackerly & M Vandenbergh, 'Climate Change Justice: The Challenge for Global Governance' (2008) 20 Geo. Int'l Envtl. L. Rev. 553

harmonized approach that could help protect and fulfil other human rights impacted by climate change.[740] These questions would have to be addressed to provide a more robust examination of the cross cutting linkages between the direct and indirect impacts of climate change on human rights.[741] There is a need to examine how human rights principles can guide efforts to combat climate change such that the indirect impacts of mitigation projects are anticipated and addressed within climate change regimes. Arguably, a better approach is a process-based approach as it provides opportunities to coherently integrate human rights processes and guidelines as part of climate change regimes, such that the secondary impacts of climate change actions and projects are anticipated and prevented in the first place.[742]

Similarly, calls for a new climate change right will undoubtedly re-awaken debates on whether this is not another attempt to proliferate rights, and whether such a right will not be redundant as such claims could easily fit within environmental rights.[743] Arguably, a better approach is an approach that examines how existing human rights instruments can be employed to protect rights

[740] See S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law; stating that there is a need for an approach that draws upon human rights obligations to inform the design and implementation of goals set forth in climate agreements. Lankford notes that exploiting the legally binding structure of human rights law obligations to respect, protect and fulfill can result in enhanced accountability in climate policy.

[741] See S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law.

[742] J Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18 (2) Transnational Law and Contemporary Problems 295, where the author explores what a human rights approach to climate change can offer Inuit communities whose right to housing are being threatened by the direct impacts of climate change.

[743] Ruhl raised the question whether there is anything new about a substantive approach to climate change or whether is is just part of efforts to proliferate human rights. Ruhl also doubts whether the right of equitable climate adaptation would bring anything new to international law or international instituions in terms of implementation and combating climate change. Ruhl asks that if there is something new and exceptional about climate change adaptation for international human rights law, what is it and what new substantive doctrine is required? Ruhl argues that a better approach is to leverage procedural rights to achieve the goals of protecting human rights affected by climate change. See J Ruhl, The International Right to Equitable Climate Change Adaptation—Substance or Procedure? (2012) 37 (2) Yale Law Journal; see also S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law.

violated by climate change projects.[744] There is a need to focus on an approach that mainstreams already recognised human rights safeguards into climate change regimes. For example how the robust procedural environmental human rights in the Aarhus Convention could be leveraged to inform the design and implementation of climate change mitigation projects. Existing human rights provide ready-made foundations on which we can build in an attempt to highlight the crosscutting issues in climate change mitigation and international human rights law. It is also a more practicable approach as it allows us to effectively link climate change responses with exsiting human rights obligations, by providing human rights threshold or standards that must be respected and protected in all mitigation efforts. This approach avoids questions and debates on whether a new human right to climate change could be recognised under international law and the scope of such a right.

2.2 Procedural Rights Approach: The Human Rights Based Approach

A) Justifications

The debates surrounding the scope of a substantive climate change right have put more emphases on the need to develop more innovative proposals for recognising the cross cutting issues in human rights and climate change. The participatory or due process approach is arguably a less contentious approach that offers significant promise for the quest to mainstream human rights into international climate change regimes. This approach emphasises mainstreaming existing

[744] J Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18 (2) Transnational Law and Contemporary Problems 295, where the author explores what a human rights approach to climate change can offer Inuit communities whose right to housing are being threatened by the direct impacts of climate change. See also A Johl, & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300; M Wewerinke, F Curtis & J Doebbler. 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' 2011 (10) *Chinese Journal of International Law* 141–160; R Bronen, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine' (2011) 35 New York University Review of Law & Social Change 357.

human rights norms, standards, and principles into legal regimes, policies, and action plans on climate change mitigation, so as to ensure that the interests of the public are protected at all times. The procedural rights approach calls for an interpretation and mainstreaming of the rights of members of the public to information, participation in environmental decision-making and access to review procedures.[745] As Anderson noted while commenting on the importance of procedural rights to environmental protection, 'the more flexible, honest and context-sensitive approach is to endow people with robust procedural rights that will foster open and thoroughgoing debate on environmental matters'.[746] Rajamani also notes:

> …rights cannot simply be layered on, as yet another preambular recital; they would need to be integrated and mainstreamed. Existing treaties would need to be reinterpreted in a fashion not envisaged at the time when they were negotiated, and the post-2012 negotiations would need to take these into account. The existing treaties are primarily concerned with inter-state burden sharing for a global environmental problem. They are not rights-focused…The role that human rights approaches could play in this context would have to be carefully tailored to the needs and constraints of the climate regime.[747]

I agree with Rajamani that to think that the mere recognition of a substantive right to environment or a right to be cold; or the addition of new paragraphs of human rights commitments to climate change regimes will be enough to address the indirect concerns associated with climate change simply misses the point. Human rights mainstreaming must spearhead a reform of current climate change regimes and governance institutions to reflect

[745] See Common Wealth, 'Human Rights and Climate Change: An Approach That Puts People in the Forefront of the Debate' Commonwealth Secretariat Discussion Paper 5 (July 2009); see also J Ebbesson, 'Information, Participation and Access to Justice: the Model of the Aarhus Convention' (2009) United Nations Expert Meeting, Back ground Paper No. 5; J Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18 (2) Transnational Law and Contemporary Problems 295.

[746] M Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in *Human Rights Approaches to Environmental Protection* (OUP 1996) at 10-11; see also L Collins, 'Are we There Yet? The Right to Environment in International and European Law' (2007) McGill Int'l J. Sustainable Development L. & Pol'y 130-131.

[747] L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22(3) Journal of Environmental Law 406; see also K Engel, 'Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies' (2007) 155 U. Pa. L. Rev. 1563.

human rights considerations at all levels of decison making. This point brings us back to the question of why human rights are seen as relevant to climate change. Should human rights come to the table only when there is an act or omission or should human rights be respected and protected at all stages of decison making with respect to climate change? Should we continue to think of human rights as relevant only to address the consequences of climate change or should we recognise the more pressing need to restructure climate change regimes such that human rights become part of the rules of the game when it comes to climate change mitigation. Arguably, the latter is the more sustainable approach that emphasises the need to reflect human rights safeguards in climate change mitigation efforts. A procedural rights approach would prompt changes in governance structures and institutional practices such that right holders are incorporated in the decision-making processes, prior to the approval and registration of a project. This could help prevent violations and could equally reduce the need for litigation or resistance of climate change projects by the public.

A procedural rights approach anticipates the sources of human rights violations and mainstreams opportunities to address them at the stage of project planning and execution. This approach could also help to reduce litigation arising from climate change mitigation efforts as it allows citizens to take part in the process for planning and designing responses and projects.[748] Through participatory rights, the design of climate actions could be strengthened so that their execution and approval would be dependent on the consent and cooperation of stakeholders, individuals and communities. This way, human rights infringements due to climate change projects may be

[748] See S Kas 'Integrated Justice: Human Rights, Climate Change, and Poverty' (2009) 18(1) Transnational Law & Contemporary Problems 115- 138; J Carlson 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18 (1) Transnational Law & Contemporary Problems 45-68.

avoided. Procedural rights provide preventive/long-term processes through which human rights are systematically integrated into climate change governance structures so as to avoid the source of the problems in the first place.[749]

This approach is in tandem with the precautionary principle, which requires States to anticipate and avoid environmental damage before it occurs, especially where failure to do so would result not only in environmental degradation, but in human rights violations as well.[750] Article 3(3) of the UNFCCC urges states to take 'precautionary measures to anticipate prevent or minimize the causes of climate change and mitigate its adverse effects'.[751] According to the principle, where there are threats of serious or irreversible damage, governments should take all effective measures to prevent the adverse effects of climate change; and that the lack of full scientific certainty should not be used as a reason for postponing such preventive measures. This approach calls on governments to anticipate and respond to the adverse effects of climate change. This would arguably include not only the direct adverse effects of climate change on human rights but also the adverse effects of climate change measures on human rights. By providing opportunities for the public to raise genuine environmental and human rights concerns about a project, such concerns could be effectively addressed and prevented at the earliest opportunity.

Stakeholders who would most likely be affected by a project are the most credible sources of information when it comes to its environmental and human rights threats. By providing them

[749] J Ruhl, 'The International Right to Equitable Climate Change Adaptation—Substance or Procedure?' (2012) 37 (2) Yale Law Journal; A Johl, & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300.

[750] See Principle 15 of the Rio Declaration, which states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation'.

[751] The United Nations Framework Convention on Climate Change, <http://unfccc.int/resource/docs/convkp/kpeng.html.> accessed 10 January 2011.

with the opportunity to bring forward the existence of such threats, governments can better anticipate and respond to these threats and take necessary precautions to avoid them. The precautionary principle includes elements of risk assessment, risk management and risk communication.[752] Environmental risks can be avoided when information on such risks are gathered transparently, disseminated efficiently and dealt with collectively with the participation of those citizens concerned. As noted in Principle 10 of the Rio Declaration:

> …Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Though not legally binding, Principle 10 recognises public access to information, public participation in decision-making proceedings, and access to review procedures and remedies (access to justice) as prerequites of a procedural rights approach. These three elements have also been recognised in many international environmental treaties as pillars of a procedural approach.[753] For example, the Aarhus Convention is a legally binding Convention that provides a suite of procedural safeguards such as the right to information, to participate in decision-making and to seek remedies for violations.[754] Despite some of the implementation challenges posed by

[752] See Communication from the Commission on the Precautionary Principle, COM (2000) 1, 02/02/ 2000. The Council adopted a resolution endorsing the broad lines of the Commission's communication in December 2000.
[753] See D Shelton, 'Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001' (2002) Paper presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (Geneva 14-16 January 2002).
[754] The Aarhus Convention is legally binding on all States that have ratified it. Currently, there are 47 Parties to the Convention primarily European and Central Asian countries and the European Union. Article 19 (3) of the Aarhus Convention opens the door to accession by any other State, outside the Economic Commission for Europe (ECE) provided they are members of the UN and that the Meeting of the Parties of the Aarhus Convention approves the accession. The extent to which countries outside the ECE, particularly countries in Africa, Asia and in the Caribbean will ratify and become Parties to the Aarhus Convention however remains unclear.

the procedural rights guaranteed by the Aarhus Convention, it remains a good example of how environmental agreements can mainstream human rights safeguards that anticipates and prevents violations, ensures due process, deliberative democracy, accountability and access to justice into decision making processes. This process-based approach provides opportunities to ensure that members of the public are given adequate oppotunities to prevent projects that could violate human rights. McCrudden made a similar point when he noted that:

> Mainstreaming approaches are intended to be anticipatory, rather than essentially remedial, to be extensively participatory in the definition of the issue and how it might be addressed, and to be integrated into the activities of those primarily involved in policymaking. It aims to complement existing approaches to compliance, rather than replace them. It emphasises compliance rather than enforcement. It does not see litigation as central to achieving compliance… Mainstreaming should, thereby, encourage greater resort to evidence based policymaking and greater transparency in decision-making, since it necessitates defining what the impact of policies is at an earlier stage of policymaking, more systematically and to a greater extent than is currently usually contemplated. And, to the extent that mainstreaming initiatives can develop criteria for alerting policymakers to potential problems before they happen, it is more likely that a generally reactive approach to problems of inequality can be replaced by proactive early-warning approaches.[755]

To effectively mainstream human rights into international climate change regimes, specifically regimes and rules governing mitigation projects, the better approach is an approach that identifies the underlying, structural and institutional causes of rights violations and societal exclusions in project approval processes, and then provides tailored procedures and governance structures to address and prevent such causes. This arguably is what a procedural human rights approach does. In the table below, I summarize how a procedural rights approach differs from a substantive rights approach to human rights mainstreaming.

[755] J McCrudden, 'Mainstreaming and Human Rights' in C Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (Hart, 2005) 7.

Table 4.1 Procedural v Substantive Rights Approaches

Substantive Rights Approach	**Procedural Rights Approach**
Focus on immediate causes of human rights violations	Focus on underlying, structural and institutional causes of rights violations
Individuals are objects and recipients of human rights	Individuals are subjects and are empowered to protect and claim their rights
Emphasis on protecting human rights	Emphasis on realizing human rights
Focus on inputs and outcome	Focus on process and outcomes
Are focused and sector based	Emphasis on holistic, integrated and multidimensional approach to issues
Corrective, remedial and reactive Approach to human rights	Preventive, precautionary and anticipatory approach
Offer universal protection of fundamental rights and freedoms	Target selection and focus on marginalized members of the society
Focus on top down approaches for rights protection	Focus on bottom up and locally owned approaches to rights protection

B) The United Nations Human Rights Based Approach

The United Nations Human Rights Based Approach (HRBA) framework has been identified as a policy framework founded on a procedural rights approach.[756] The HRBA provides a procedural framework that focuses on the institutionalization of human rights into existing climate change regimes. The HRBA seeks to mainstream five inter-connected human rights norms and principles into decision-making, they are: participation and inclusion; accountability and rule of law; equality and non-discrimination; empowerment; and access to justice. [757] Through the

[756] See D Shelton, 'Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change' in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2010) 91-126; G Castillo and M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (2007) <http://cmsdata.iucn.org/downloads/pm15.pdf> accessed 12 October, 2010.

[757] According to the United Nations, Other elements of good programming practices that are also essential under an HRBA include:

i) People are recognized as key actors in their own development, rather than passive recipients of commodities and services; (ii) Participation is both a means and a goal; iii) Strategies are empowering, not disempowering; iv) Both outcomes and processes are monitored and evaluated; v) analysis includes all stakeholders; vi) Programmes focus on

HRBA, procedural human rights are harmonized and integrated into policies and project activities, thereby giving citizens a basis to demand enforcement. The HRBA represents a shift from a needs-based approach to an approach that requires governments and project proponents to consider the impact of a particular project on the enjoyment of existing human rights. It integrates human rights safeguards into project plans and implementation.[758]

The HRBA identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations. According to the UN, the following elements are necessary, specific, and unique to a human rights based approach:

> a) Assessment and analysis of the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights;
> b) Programmes assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities;
> c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles;
> d) Programming is informed by the recommendations of international human rights bodies and mechanisms.[759]

---

marginalized, disadvantaged, and excluded groups; vii) The development process is locally owned; viii) Programmes aim to reduce disparity; ix) Both top-down and bottom-up approaches are used in synergy; x) situation analysis is used to identity immediate, underlying, and basic causes of development problems; xi) Measurable goals and targets are important in programming; xii) strategic partnerships are developed and sustained; xiii) programmes support accountability to all stakeholders. See United Nations, The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

[758] A Cheria, E Sriprapha Petcharamesree, *A Human Rights Approach to Development: Resource Book* (ActionAid 2004) 2-4.

[759] See United Nations, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

The HRBA is a potentially less contentious and less problematic approach to mainstreaming human rights norms into climate change regimes.[760] Since it builds on existing human rights, and already recognised standards, principles and methods of human rights, it avoids debates such as the proliferation, definition and legitimacy that have trailed substantive rights proposals. By focusing on due process and an opportunity for stakeholders to iron out grievances, it also avoids some of the problems of human rights conflicts that are difficult to avoid under substantive approaches. As Petersmann notes:

> The human rights approach advocated by the UN Development Programme insights that rights make human beings not only better democratic citizens but also better economic actors should be accepted as a common legal framework by all international organizations. Human rights not only constitute moral and legal rights and the corresponding obligations of governments, they also serve instrumental functions for solving social problems confronting all societies.[761]

It is also less problematic because most of the parties to major human rights treaties are also parties to the climate change regimes.[762] As such these countries have obligations under international law to respect human rights and to take action in terms of climate change. The HRBA provides a holistic framework though which parties can meet their obligations under both instruments. It allows States to respect, protect and fulfil human rights in the process of meeting their climate change obligations. As such, the HRBA does not seek to impose any new obligation

[760] See S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law; D Shelton, 'Equitable Utilization of the Atmosphere: A Rights-based Approach to Climate Change' in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2010) 91-126; G Castillo and M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (2007) IUCN, available at http://cmsdata.iucn.org/downloads/pm15.pdf accessed 12 October, 2010.

[761] E Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration (2002) 13 EJIL 626; see also E Petersmann, The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy? (2004) Journal of International Economic Law 2004, 605-628.

[762] As Rajamani rightly observed, there are 166 Parties to the ICCPR, 160 to the ICESCR. Majority of these parties have signed the UN Framework Convention on Climate Change and the Kyoto Protocol.See L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22(3) Journal of Environmental Law 391.

other than those, which parties have already agreed to under international human rights law. As Offenheiser and Holcombe note:

> Perhaps the most significant advantage of the paradigm shift is to anchor the debate about equity and justice, in international principles already endorsed by the international community and that have some legitimacy in international law.[763]

This approach has also been identified as an approach that could bring about conservation with justice.[764] In its 2004 declaration, the International Union for the Conservation of Nature (IUCN) emphasised the need for states to assess the implications of the 'use of human rights-related legal resources and actions to protect the environment and the rights of those who defend it, especially through existing international human-rights protection systems'.[765] The IUCN went a step further in its 2008 World Conservation Congress when it put forward a comprehensive declaration on human rights based approaches to conservation.[766] This declaration calls on governments to develop and work towards the application of human rights-based approaches in conservation and environmental protection.[767] According to the IUCN:

> …while linking environment and human rights issues is not a revolutionary suggestion, the RBA is a relatively new and evolving way of thinking about how to adjust legal and policy instruments in order to acknowledge and strengthen this interrelationship so that sustainable development can be achieved. The harmonization of the two dimensions …and their integration through an RBA in all relevant policies, legislation, and project activities could even be perceived as concretizing or 'simplifying' the concept of sustainable development, which

[763] R Offenheiser and S Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 Non Profit and Voluntary Sector Quarterly 300.
[764] The IUCN defines Conservation with justice to mean a situation where all State and non-State actors planning or engaged in policies, projects, programmes, and activities with potential impact on nature conservation secure to all potentially affected persons the substantive and procedural rights that are guaranteed by national and international law. See T Greiber (ed.) *Conservation with Justice* (IUCN 2009) 6.
[765] See Resolution 3.015, 'Conserving Nature and Reducing Poverty by Linking Human Rights and the Environment' (IUCN 2004) <https://community.iucn.org/rba1/RBA> accessed 12 October, 2010.
[766] Resolution 4.056, Rights-Based Approaches to Conservation (IUCN 2008) <https://community.iucn.org/rba1/RBA%20Wiki/Resolution%204.056%20Rights-based%20approaches%20to%20conservation.aspx> accessed 12 October, 2010.
[767] The IUCN called for the need to 'develop greater understanding and capacity for rights-based approaches', ibid

> covers a range of ideas that bring together environmental, social, and economic development.[768]

Speaking of climate change for instance, applying the HRBA will mean integrating procedural human rights safeguards such as access to justice, public participation in decision-making, equality and non-discrimination, access to information, and accountability in international climate change regimes such that climate change actions are designed and implemented with the full participation and involvements of the public.[769]

The HRBA also empowers the public to play more active roles in the design, approval and execution of climate change mitigation actions and projects.[770] It supports rights holders to demand their rights and to be involved in climate change mitigation efforts. This addresses the root causes of human rights violations and well enthrenched power imbalances that tend to exclude members of the public from playing active roles in climate change mitigation.[771] Through the HRBA, human rights could be harmonized and integrated into international climate change regimes so as to give the public a legal basis to freely air their views about a project and

[768] See IUCN, *The Future of Sustainability – Re-thinking Environment and Development in the Twenty-first Century*, Report of the IUCN Renowned Thinkers Meeting, 29–31 January 2006 <msdata.iucn.org/downloads/iucn_future_of_sustanability.pdf.> accessed 12 September, 2010. See also C Sunderland, T Greiber and G Oviedo (eds) *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN 2009); IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN, Gland 2009) 3; S Vanderheiden, *Atmospheric Justice Political Theory of Climate Change* (OUP 2008) 192-202.

[769] See J Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18 (2) Transnational law & Contemporary Problems 296-316.

[769] B Lewis, 'Climate Change and Human Rights: Perspectives on Environmental and Indigenous Rights (2008) 1(1) Journal of The Australasian Law Teachers Association 158.

[770] J Theis, 'Promoting Rights Based Approaches: Experiences and Ideas from Asia and the Pacific' (Keen Publishing 2004) 2-10; R Eyben, 'The Rise of Rights: Rights-Based Approaches to International Development' (2005) 17 IDS Policy Briefing.

[771] F Nguyen, *Emerging Features of a Rights-Based Development Policy of UN, Development Cooperation & NGO Agencies* (2002) Discussion paper, OHCHR Asia- Pacific Regional Office. <http://www.un.or.th/ohchr/issues/rba/Pdf/discussrba.pdf> accessed 12 December, 2010.

to demand a review when such views are not taken into consideration in project design and implementation.[772] As Offenheiser and Halcombe note:

> the rights-based approach seeks to identify the key systemic obstacles that keep people from accessing opportunity and improving their own lives. From the very outset, the focus is on structural barriers that impede communities from exercising rights, building capabilities, and having the capacity to choose.[773]

Mary Robinson, The former Human Right Commissioner also notes that:

> In each situation we confront, a rights-based approach requires us to ask: what is the content of the right? Who are the human rights claim-holders? Who are the corresponding duty-bearers? Are claim-holders and duty-bearers able to claim their rights and fulfil their responsibilities? If not, how can we help them to do so? This is the heart of a human rights based approach.[774]

The HRBA places emphasis on identifying human rights obligations that are relevant to a project; using human rights standards to guide project planning and implementation; engaging with the rights implications as a matter of obligation; supporting efforts to address the underlying causes of rights violations. This is achieved by addressing inequitable power relations that prevent the public from playing active roles in project design and implementation; building the capacity of both rights holders and duty-bearers to claim their rights and meet their respective responsibilities; taking all available measures to respect rights in all cases and supporting their protection and further fulfillment wherever possible, particularly for the most vulnerable; and

---

[772] See United Nations, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf > accessed 12 October, 2010.

[773] R Offenheiser and S Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 Non Profit and Voluntary Sector Quarterly 271.

[774] M Robinson, 'Comments at 2nd Interagency Workshop on Implementing a Rights-based Approach in the Context of UN Reform' (2003) <http://www.humanrights.se/upload/files/2/R%C3%A4ttighetsperspektivet/Common%20Understanding%20FN%202003.pdf> accessed 12 January, 2011.

supporting efforts to provide access to justice and redress for violations.[775] For example with respect to mitigation projects such as the CDM, the HRBA would enable us to identify the public as rights-holders and to emphasise their entitlements to play active roles in project design and execution. It identifies project proponents, host countries, the CDM EB and the Conference of the Parties to the UNFCCC as the corresponding duty-bearers and emphasises their obligations to work towards strengthening the capacities of rights-holders to make their claims.[776]

The HRBA also stresses the indivisibility of rights.[777] The HRBA stresses respect for all huamn rights whether civil and political; or economic social and cultural rights. Under the HRBA all rights are considered one and the same and as important. As such, projects that violate any category of human rights would be considered as incompartible with international huamn rights obligations. Members of the public are provided ample opportunities to demonstrate how a particular mitigation project could affect their human rights. This supports the development of the capacities of duty-bearers to meet their obligations and of 'rights-holders' to claim their rights.[778] According to Offenheiser and Holcombe, a rights-based approach bridges theoretical gaps between political, civil, social, and economic rights by understanding how they are interconnected in practice.[779] The UNDP also notes that:

---

[775] See IUCN, 'Resolution 4.056, Rights-Based Approaches to Conservation' (IUCN 2008) <https://community.iucn.org/rba1/RBA%20Wiki/Resolution%204.056%20Rights-based%20approaches%20to%20conservation.aspx> accessed 12 October, 2010.

[776] See also United Nations, 'Claiming the Millennium Development Goals: A Human Rights Approach' (2008) UN/ HR/PUB/08/3.

[777] UNDP, 'Integrating Human Rights with Sustainable Development: A UNDP Policy Document' (UNDP 1998); H Quane, 'Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous People' (2012) 25 Harvard Human Rights Journal.

[778] United Nations, The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf > accessed 12 October, 2010.

[779] R Offenheiser and S Holcombe, *Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective* (2003) 32 Non Profit and Voluntary Sector Quarterly 286.

> …we must understand the role of human rights as empowering of individuals and communities. By protecting these rights, we can help prevent the many conflicts based on poverty, discrimination and exclusion (social, economic and political) that continue to plague humanity and destroy decades of development efforts. The vicious circle of human rights violations that lead to conflicts – which in turn lead to more violations – must be broken. I believe we can break it only by ensuring respect for all human rights…A human rights approach will help fulfil UNDP's responsibilities to integrate human rights with its activities. It will also strengthen its ability to implement declarations and agreements reached at UN global conferences, many of which have human rights content.[780]

The aim of the HRBA is to integrate and harmonize all human rights norms and obligations into the processes of planning and executing mitigation projects. HRBA therefore deemphasises the unneccessary and artifical bifurcations of rights that have often resulted in the infringements of certains rights in order to uphold the other. When stakeholders are given a chance to play active roles in decision-making, conflicts between human rights are better addressed in a balanced way.

Thus, the HRBA is not necessarily irreconcilable with substantive human rights. The aim of the HRBA is to establish and institutionalize due procedures and processes that can contribute directly to the coherent realization of all human rights. The HRBA provides a due process approach that focuses on identifying and using indicators for ensuring the incorporation of human rights into the design, implementation and monitoring of climate change mitigation efforts and projects. As such, the HRBA goes hand in hand with the substantive approach as it seeks to provide an institutional framework through which all human rights can be protected and enforced. The HRBA could be a useful approach to eliminate human rights issues facing climate change mitigation efforts. By mainstreaming human rights principles such as participation,

[780] ibid 3-4; H Quane, 'Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous People' (2012) 25 Harvard Human Rights Journal.

access to justice and access to information into regulations for climate change mitigation projects, the HRBA approach could be a preventive approach to human rights repressions occasioned by such projects.

The HRBA also provides a legal framework for citizens to hold non-state actors such as project proponents or multinational corporations that fund climate change projects accountable for human rights violations. The increasing roles of influential non-state actors such as multinational corporations, financial institutions, and development agencies in the subversion of human rights have been documented.[781] The HRBA provides the public with the opportunity to demand transparency and accountability from corporations that sponsor and benefit from mitigation projects that violate human right. As Jochnick argues, the 'narrow focus of human rights law on state responsibility is not only out of step with current power relations but tends to obscure them'.[782] Focusing on the state in a globalizing world may shield other actors (the private sector and international institutions) from responsibility and leave the poor with both hands tied behind their backs. He noted that by demanding explanations and accountability, human rights expose the hidden priorities and structures behind violations. For example, the roles played by a German development bank in the Barro Blanco project in Panama attracted so much concerns, and put enormous pressure on the CDM EB to condemn and delist the bank from funding CDM projects.[783] There is a need to recognise the increasing roles played by such organisations by empowering the CDM EB to investigate and block projects that entrench human rights

[781] See J Ruggie, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Document A/HRC/17/31 (21 March 2011) paras 8-12; see also D Korten, *When Corporations Rule the World* (Berrett-Koehler 2001).
[782] C Jochnick, *The Human Rights Challenge to Global Poverty* (Center for Economic and Social Rights, 1999) < http://www.cesr.org/publications.htm> accessed 23 December, 2011.
[783] See S Jodoin, 'Rights-Based Frameworks for Climate Finance' (CISDL 2010) 6-7.

violations. Through the HRBA, procedural safeguards that allow the public to expose such collusions by international agencies would be incorporated into climate change regimes.

Practically, what this approach means is that existing climate change regimes would be reformed to establish project-approval guidelines that would include elements of participation; accountability; equality and non-discrimination; access to information; and access to justice. It would provide a threshold that would require governments and project proponents to demonstrate that these elements have been complied with and guaranteed to citizens in project planning and execution. Any project that does not satisfy the elements would either be referred back or refused approval by supervisory bodies of climate change mitigation projects, for example CDM EB and DOEs. It would also include establishing complaint mechanisms and procedures for stakeholders or private individuals whose human rights have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects.

3. Epistemic Debates on the Human Rights Based Approach

Despite the huge promise of the HRBA as a holistic and less contested policy framework for mainstreaming human rights safeguards into international climate change regimes, the HRBA is not without opposition. A number of scholars have expressed pessimism about the practicality of applying the HRBA framework with respect to climate change. Epsitemic concerns incude questions on whether outsiders to human rights have capacity to fully mainstream human rights; whether there is an operational framework that will guide climate change adminsitrators through such a radical reform process; whether the existing governance structures on climate change have the resources to cope with the nature of responsibilities associated with a HRBA. These

questions have not been considered in sufficient detail in the emerging literature. In this part, I raise and discuss these debates with the aim of providing conceptual clarifications on the pratical aspects of implementing a HRBA to climate change mitigation.

3.1 Can outsiders interpret and mainstream human rights?

The HRBA framework advocates a legal partnership between human rights and climate change regimes and the reflection of human rights norms in climate change regimes. This could include the expansion of the UNFCCC and the Kyoto Protocol to include human rights provisions, the enlargement of climate change governance structures to provide for a human rights assessment and review of mitigation projects. These are radical transformations that could expand the scope of activities of an environmental entity into uncharted areas such as interpreting human rights and making decisions on the human right impacts of a project. Offenheiser and Holcombe posed this question when they wrote that:

> Mainstreaming a rights-based approach into our organizations is a complex transition. It cannot simply be decreed and implemented. If sound blueprints are to be drawn from this vision, an organization needs to deepen its understanding of the philosophical principles involved and how they apply on the ground in local development contexts.[784]

The question has therefore been raised whether entities such as the UNFCCC Secretariat, CDM EB, and DOEs, which comprise mainly environmental practitioners, have the capacity to accommodate such a complex reform. Put simply, do environmentalists, scientists and outsiders to human rights have the capacity to mainstream human rights?[785] The UNDP defines capacity as

[784] R Offenheiser and S Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 Non Profit and Voluntary Sector Quarterly 274.
[785] J Tallant, 'Forging Stronger Cooperation between Human Rights and Climate Change Communities' (February 2012) United Nations Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights 23-24 February 2012 – Palais des Nations, Salle XII – Geneva, Switzerland, <http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant_24Feb2012.pdf> accessed 12 April 2012.

the ability of individuals, institutions, and societies to perform functions, solve problems, and set and achieve objectives in a sustainable manner.[786] Adopting this definition, the question is whether these bodies have the abilities and resources to perform human rights-related functions.

McCrudden has extensively discussed this question. According to him, these debates arise from epistemic communities and human rights advocates who see human rights interpretation as a task and function for human rights experts only.[787] He defines an epistemic community as a network of professionals with recognised expertise in a particular domain, and an authoritative claim to knowledge within that domain. They have a shared set of normative beliefs, shared causal beliefs, shared notions of validity, and a common policy enterprise.[788] The crux of the argument is that the interpretation of human rights instruments should be concentrated in bodies whose primary function is human rights interpretation; otherwise human rights will become domesticated, stripped of their radical promise.[789] Human rights advocates often regard it as dangerous to place the function of interpreting human rights in the hands of professional administrators. McCrudden notes that:

> The argument runs as follows: the epistemic community that consists of public administration professionals with a predominant non-human rights orientation will have a dominant position of interpretation of their functions. To the extent that human rights values are exogenous to that epistemic community, but are given to such administrators for their interpretation, such values may be underestimated in importance in

[786] C Lopes and T Theisohn, *Ownership, Leadership, and Transformation: Can We Do Better For Capacity Development*? (UNDP 2003).

[787] J McCrudden, 'Mainstreaming Human Rights' in C Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005), also available at <http://ssrn.com/abstract=568642>; see also P Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1-35.

[788] ibid, see also J Tallant, 'Forging Stronger Cooperation between Human Rights and Climate Change Communities' (February 2012) United Nations Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights 23-24 February 2012 – Palais des Nations, Salle XII – Geneva, Switzerland, <http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant_24Feb2012.pdf> accessed 12 April 2012.

[789] J McCrudden, ibid. See also J McCrudden, 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' in E McLaughlin and N Faris (eds), *Section 75 Equality Duty: An Operational Review* (Northern Ireland Office 2004).

> interpretation, or given an interpretation different to what a human rights body would give them. It is, therefore, better not to try to integrate human rights into governmental decision-making in the way that mainstreaming envisages, because the human rights dimension will lose out. The interpretation of human rights instruments should be concentrated in bodies whose primary function is human rights interpretation, otherwise human rights will become domesticated, stripped of their radical promise.[790]

In essence, McCrudden considers as dangerous, proposals to place the task of interpreting and applying human rights norms in the hands of organizations such as the CDM EB and DOEs which are composed mainly of professional administrators and scientists who do not belong to the epistemic community of human rights law and who arguably know little or nothing about international human rights. This is based on the notion that since such administrators are not particularly trained or educated in human rights law, their attempt to mainstream human rights might be counterproductive and could lead to the erosion of human rights principles.

Koskenniemi takes these arguments further when he notes that entrusting human rights interpretation to outsiders would further blur the already thinning line between human rights experts and outsiders.[791] He considers that this may lead to a situation whereby any group may present itself as a human rights group by articulating its agenda as a human rights agenda. This may lead to a further devaluation of the human rights currency and the dilution of human rights concepts. Alston also raised this view in his vehement rebuttal of proposals by Petersmann that the World Trade Organization (WTO) administrators should be granted the authority to mainstream human rights into the WTO.[792] According to Alston, the result of following such an

[790] ibid.
[791] M Koskenniemi , 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47.
[792] E Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law' (2000) 37 Common Market Law Review 1363-1382; see E Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide organizations: Lessons from European Integration (2002) 13 EJIL 621..

approach would be to hijack international human rights law in a way that would fundamentally redefine its contours and make it subject to libertarian principles.[793] This he noted could lead to the 'economization' of human rights principles.[794] Petersmann however responded that such an approach can be enhanced by a radical restructuring of UN organizations to foster global integration.[795] This would be by proper staffing of institutions with human rights experts who can assist with the human rights mainstreaming process.

Alston's views that outsiders to human rights may find it difficult to properly interpret and mainstream human rights as intended by the HRBA are pertinent and agreeable. They however would not constitute enough reasons for intellectual surrender. As Tallant notes, this epistemic distinction is fuelled by the tendency of actors to remain within the formal confines of their areas of mandate, *i.e.* of human rights institutions/or within the negotiation circles of the UNFCCC process.[796] This is due to the absence of a formal agenda or obligations to collaborate between actors; the lack of fluid programmatic activity between intergovernmental agencies for example the United Nations Environment Programme (UNEP) and the Office of the High Commissioner for Human Rights (OHCHR); or between civil society groups where human rights and environmental groups are also divided by agenda differences); there is also the personal unwillingness by actors to collaborate across sectors/agendas spurred by the absence of a formal

[793] P Alston, Resisting The Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann, (2002) 13 EJIL 815.
[794] ibid.
[795] For the Alston/ Petersmann debate, see E Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration (2002) 13 EJIL 621; P Alston, 'Resisting The Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann' (2002) 13 EJIL 815; E Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 European Journal of International Law 845-851.
[796] J Tallant, 'Forging Stronger Cooperation between Human Rights and Climate Change Communities' (February 2012) United Nations Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights 23-24 February 2012 – Palais des Nations, Salle XII – Geneva, Switzerland, <http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant_24Feb2012.pdf> accessed 12 April 2012.

mandate to do so. As such human rights have no place, visibility, or political support in climate change discussions, while climate change is not a priority issue in the everyday affairs of human rights institutions. According to Tallant, this explains why the Human Right and Climate Change communities presently do not overlap or communicate. He calls for a more conducive policy, economic, and institutional space that would bring about a collaboration and constructive engagement between the two epistemic communities. A space in which actual programmes and projects to address climate vulnerability are designed, financed and implemented together by both communities.[797]

I share the views and optimism expressed by Tallant and Petersmann that the chances to achieve a harmonized international legal order whereby all UN organizations mainstream human rights into their activities, could be boosted by a structural restructuring which would include appointing human rights experts into such organizations. For example, for the UNFCCC to properly integrate human rights issues into its scope and mandate there would be a need to appoint experts and administrators with training and experience in human rights into the Secretariat. This could either be by establishing a separate Human Rights Unit within the secretariat or by expanding the membership of existing committees and Boards to include human rights experts. This would ensure that human rights and human rights instruments are sufficiently understood, internalized, implemented, and enforced.[798]

Human Rights Education (HRE) could also be beneficial to policymakers and regulators in the areas of climate change. Though not legally binding, the new United Nations Declaration on

[797] ibid.
[798] See J Knox 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 (2) Harvard Environmental Law Review 477-498.

Human Rights Education and Training encourages all UN agencies to ensure human rights training for all officers within their areas of mandate. The Declaration emphasises that human rights education and training is essential for the 'promotion of universal respect for and observance of all human rights and fundamental freedoms for all'.[799] Article 11 also provides that the United Nations and international and regional organizations should provide human rights education and training for their civilian personnel, and military and police personnel serving under their mandates.[800] This Declaration could serve as a basis for UNEP and the UNFCCC secretariat to provide adequate HRE for officers and staffs in order to prepare them for applying human rights.

HRE is essential so that administrators can be acquainted with human rights standards, including human rights regimes and their monitoring and implementation mechanisms.[801] For example, climate change administrators that have not acquired direct and extensive training on human rights could be enlisted for short courses and advanced training on human rights norms. This would provide some basic knowledge necessary to understand and handle mundane human rights issues arising within the secretariat. For example, there is currently an advanced international certificate course on 'Mainstreaming Human Rights'.[802] Such a course could provide some level of training and general education on human rights and on how to apply human rights norms. Such training might provide a general understanding of human rights concepts and human rights

[799] United Nations Declaration on Human Rights Education and Training, U.N. Human Rights Council Res. 16/1, in U.N. Human Rights Council, Report of the Human Rights Council on its Sixteenth Session U.N. Doc. A/HRC/RES/16/1 (19 December 2011).
[800] ibid
[801] Hamm illustrates this with the example of an expert from the German Ministry of Economic Cooperation and Development (BMZ), who notes that development experts in his ministry lack knowledge of human rights and thus they are not in a position to implement the HRBA. See B Hamm, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005-31.
[802] Human Rights Education, Course 1T09: Mainstreaming Human Rights, <http://www.hrea.org/index.php?doc_id=676> accessed 12 March 2012.

mainstreaming which could prove sufficient to handle human rights issues such as reporting, verifications and project assessments. It could also reduce the wide gap in knowledge between the human rights epistemic communities and the perceived outsiders.[803]

3.2 The question of resources

Similar to the question of expertise and institutional transformation is the question of resources. The nature of transformation in governance structures advocated under the HRBA comes with high resource implications, for example the expansion of the current institutions, cost of staffing, training, and programme funding.[804] According to McCrudden, due to limited resources and competing budget priorities, the rights based approach, which requires a radical transformation may run into implementation problems.[805] Unlike traditional human rights enforcement approaches, the HRBA requires the expansion of existing structures and institutions and the building of new ones.

To reduce the cost of a human rights based approach, the UNDP emphasizes an approach that builds on existing capacities and resources.[806] According to the UNDP, there are always considerable strengths present in terms of human resourcefulness in all organizations, often these

[803] UNDP, *Capacity Development (Practice Note)* (UNDP 2005) 4.
[804] See IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009); J Theis, 'Promoting Rights-based Approaches: Experiences and Ideas from Asia and the Pacific' (Save the Children 2004) <www.crin.org/docs/resources/publications/hrbap/promoting.pdf> accessed 15 July, 2010; I Hamm and Brigitte, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005-31, see also S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), where Fredman emphasises the fact that realizing and enforcing human rights come with considerable costs.
[805] J McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005), also available at <http://ssrn.com/abstract=568642> accessed 12 May 2012.
[806] United Nations, The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies (2003) http://www.undg.org/archive_docs/6959-<The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

can be uncovered and given new life by enlightened management and improved incentives. Implementation should coordinate and integrate linkages with other efforts and reform programmes. Linking new institutions to already existing ones would save some costs and provide free infrastructures to work with. For example, to mainstream human rights norms into existing climate change regimes, there would be a need to leverage on the resources of both the UNFCCC and UN human rights bodies. One of the missions of the Office of the High Commissioner for Human Rights (OHCHR) is to offer the best expertise and support to the different human rights monitoring mechanisms in the United Nations system.[807] The OHCHR supports the work of treaty bodies and assists them in harmonizing their working methods and reporting requirements. OHCHR aims to improve the integration of human rights standards and principles within the UN entities.[808] A HRBA to climate change would benefit from leveraging some of the resources, facilities and best practices available from the OHCHR to bolster implementation. The emphasis here is on strong inter-agency linkages and partnerships to reduce the cost of mainstreaming and to coordinate efforts. Human rights experts from the OHCHR could be consulted to better assist the UNFCCC in designing its human rights mainstreaming programs and governance structures.

Within the existing climate change regimes, the cost of mainstreaming could also be reduced by appointing a lead committee or creating a specialised office on human rights and climate change, to spearhead the mainstreaming effort. This office would bring together key committees and avoid duplication of roles. It would identify areas of priorities and distribute resources in accordance with the priorities identified. It would also iidentify institutions or offices that could

[807] See UNHCR, *Frequently Asked Questions on the Human Rights Based Approach* (2005) <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> accessed 12 December 2011.
[808] ibid.

be compressed and condensed to make room for only necessary offices. Offices that duplicate roles could be merged or scrapped.

3.3 Lack of an operational framework or precedence

Another criticism of the HRBA is the lack of an operational framework or precedence that could provide guidance on how to go about its implementation in the context of climate change regulations.[809] Despite the rapid ascendancy of the HRBA, its application in the area of climate change has not been given scholarly attention. As of today, little exists in the literature on the idea of applying the HRBA to climate change mitigation.[810] As such the practical implications of applying the HRBA framework to climate change has not been tested. Question such as what is the legal and institutional framework for its implementation have been rarely posed let alone answered in existing literature. This is the gap this thesis set out to fill. As the IUCN notes:

> One reason for only limited implementation of an RBA in the conservation field is the current lack of an operational framework that would guide participants through such an approach. This gap is closely related to different interpretations of the concept among different actors and the absence of a common language that could be used to achieve consensus on what needs to be done and how. Thus further conceptual development and rigorous testing is required to determine how an RBA to conservation would look and how it could most effectively be applied. For this, it is important to start by creating a common understanding of affected people's rights and visualizing their vulnerabilities in different contexts.[811]

[809] See C Sunderland, T Greiber and G Oviedo (eds) *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN 2009); IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009).

[810] Current discussions on climate change and human rights have focused on the impacts of climate change itself on the enjoyment of human rights and not on how human rights norms can be utilized to respond to the impacts of climate change mitigation and adaptation projects. See S Caney, 'Climate Change, Human Rights and Moral Thresholds' in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2009), 69-90; E Page, *Climate Change, Justice and Future Generations* (Edward Elgar 2006), 132-60; S Vanderheiden, *Atmospheric Justice Political Theory of Climate Change* (OUP 2008) 192-202.

[811] IUCN, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009) 3; S McInerney-Lankford, 'Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law' (2012) 37 (2) Yale Journal of International Law; M Wewerinke, & C Doebbler, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' 2011 (10) Chinese Journal of International Law 141–160.

This thesis attempts to answer this question on 'how'. It will develop and propose legal and institutional guidelines or frameworks for mainstreaming and applying a human rights based approach to climate change mitigation, in extant and emerging climate change regimes. For a policy framework at its early stage of development, the lack of an operational guideline or precedence is understandable and perhaps inevitable. As such, it is not enough reason to question the potentials of adopting a human rights based approach to international legal regimes on climate change. In subsequent parts of this thesis, I discuss the pertinent legal reforms, in addition to the 'web' of institutionalization necessary to translate the idea of mainstreaming human rights norms into international climate change regimes from theory to practice.

There could be no better time to think of such a framework. As negotiators continue to chart new directions for the future of international climate change governance, it is important that human rights issues facing the current regimes are brought to the fore and addressed to restore the integrity of market-based mechanisms and international climate change regimes generally.[812] This thesis will serve as a compendium of ideas on the nature of legal and institutional reforms that are pertinent to reflect human right principles in climate change regimes.

[812] At the 17th Conference of the Parties (COP) to the Framework Convention on Climate Change in Durban, South Africa, Parties agreed to establish an Ad Hoc Working Group on a Durban Platform for Enhanced Action (AWG-DP). The AWG-DP has the mandate to develop 'a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties', that would be ready for signing by 2015. This is expected to give parties enough time negotiate a new climate change agreement, address some of the knotty issues in the current regimes and ratify a new agreement such that it could come into effect by 2020. At COP 18 in Doha, Qatar, it was agreed that negotiations on the future of international climate change agreeements will continue under the Durban Platform and that the second commitment period under the Kyoto Protocol would run from 1 January 2013 until the end of 2020 (2013-2020). See Doha Climate Gateway, Specific Outcomes of teh COP 18 in Doha, <http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php#Specific_Outcomes> accessed 23 January 2013.

4. Conclusion

Of the two main approaches proposed for exploring and recognising the intersections between human rights and climate change, the procedural rights approach stands out as a promising approach through which human rights norms could be integrated and mainstreamed into existing climate change regimes. Through procedural rights, the design of climate change regimes could be strengthened to anticipate, avoid and prevent some of the human rights issues unlike traditional approaches that are reactive in nature. By ensuring that the execution and approval of projects are dependent on the consent and cooperation of stakeholders, individuals and communities, human rights infringements due to climate change projects may be avoided.

The United Nations Human Rights Based Approach (HRBA) is a transformative policy framework built on procedural human rights such as access to information, participation, equality, accountability and access to justice. The HRBA avoids the heirarchy of rights debates; prompts changes in institutional practices and also provides a preventive/long-term process through which human rights are systematically integrated into environmental systems, structures and practices. Its adoption by international development organizations such as the United Nations, governments at regional and national levels coupled with its rapid ascendancy in scholarly works demonstrate its potentials to gain acceptability as a practical framework for mainstreaming human rights safeguards into international climate change regimes, specifically the procedures and structures for approving mitigation projects.

However, in order to make a compelling case on its practical implications, there is a need for a proper and detailed understanding of the normative contents of the HRBA. This is the question as to what the HRBA entails in practice, *i.e* what are the elements and contents of a human rights

based approach. In the next chapter, I shall begin the transition from theory to practice. I discuss and examine the normative contents and elements of the United Nations human rights based approach. I explore the essential prerequisites of the HRBA.

CHAPTER FIVE:

NORMATIVE CONTENTS/ELEMENTS OF THE HUMAN RIGHTS BASED APPROACH

1. Introduction

The United Nations Human Rights Based Approach advocates the need to mainstream five inter-connected procedural human rights norms into the design and execution of development programs. The five procedural human rights that have been recognised as forming the core of the HRBA are: access to information (ATI); participation; accountability; equality and non-discrimination; and access to justice.[813] According to the United Nations, any programming that

[813] Since the emergence of the HRBA, different organizations and UN agencies have implemented the policy in diverse manners. As such HRBA began to acquire diverse contextual meanings and approaches as framed by each of the UN agencies applying it. It therefore became increasingly difficult to identify a common meaning or framework of HRBA under the UN systems. It was also easy to confuse HRBA with other approaches adopted by scholars and institutions to introduce human rights norms to social discourse. In order to resolve these ambiguities, a group of UN agencies came together in 2003 where they adopted the *Common Understanding on HRBAs* as a framework that spells out the meaning, nature, design and implementation of the HRBA framework. The *Common Understanding* is based on three essential principles: that all programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments; that human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process; and that programmes contribute to the development of the capacities of duty-bearers to meet their obligations and of 'rights-holders' to claim their rights. It was also this *Common Understanding* that identified the five elements of the HRBA to include access to information (ATI); participation and inclusion; accountability; equality and non-discrimination; and access to justice. These categorizations have been widely accepted by scholars and practitioners as constituting the elements of the HRBA. See United Nations (UN), 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies' (United Nations 2003); see also C Nyamu-Musembi and A Cornwall, 'What is the "Rights-Based Approach" all about? Perspectives from International Development Agencies' (2004) IDS Working Paper 234 <http://www.ids.ac.uk/ ids/bookshop/wp/wp234.pdf> accessed 02 March 2011; J Ackerman, 'Human Rights and Social Accountability' (Paper No 86, World Bank 2005); J Theis, 'Evolution and Future of Rights-Based Approaches' (Save the Children Sweden, 2003); F Nguyen, 'Emerging Features of a Rights-Based Development Policy of UN, Development Cooperation & NGO Agencies' (2002) Discussion Paper, OHCHR Asia- Pacific Regional Office. <http://www.un.or.th/ohchr/issues/rba/Pdf/discussrba.pdf> accessed 12 October, 2011; B Hamm, 'A Human Rights Approach to Development' (2001) Human Rights Quarterly 23: 1005-31; G Castillo and M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (IUCN 2007); UNFPA, 'Core Concepts of a Human Rights Based Approach' (2010) <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/introduction.pdf> accessed 15 October, 2010; Rights and Humanity Interaction, 'Definitions of Rights Based Approaches to Development: By Perspective' (2004) <www.interaction.org/rba/documents.html#intro> accessed December 8, 2011.

does not contain these elements is not an HRBA.[814] Adopting the HRBA to climate change projects would mean that any project proposal that does not guarantee or satisfy these requirements would not be approved no matter how many tones of emissions it could generate. In this chapter, I endeavor to expatiate on the core contents of each of these elements. I examine the normative contents and elements of the United Nations human rights based approach.

2. Elements of the Human Rights Based Approach

The five elements that are necessary, specific, and unique to a human rights based approach (HRBA): access to information (ATI); participation; accountability; equality and non-discrimination; and access to justice are analysed and discussed in this part. [815] Earlier on, we discussed the core international human rights insturments that recognise these elements as human rights. In this part, we will expatiate on the normative contents of the five elements of the HRBA in order to fully understand the requirements for their implementation.

2.1 Access to information (ATI)

Contents of the Right to Information

In this thesis, we have defined (ATI) as the right to 'seek, receive and impart' information.[816] The question then is what are the elements of the right to seek recieve and impart information? Different scholars and studies have extensively elaborated the content of ATI as a human

[814] According to the UN, the following elements are necessary, specific, and unique to a human rights based approach: a) Assessment and analysis of the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights; b) Programmes assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities; c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles; d) Programming is informed by the recommendations of international human rights bodies and mechanisms. See United Nations, The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.

[815] United Nations (UN), 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies' (United Nations 2003).

[816] See Chapter two above.

right.[817] What is arguably the most exhaustive description of this right is contained in The Public's Right to Know: Principles on Freedom of Expression Legislation, a report packaged by the Article 19 group and endorsed by the UN Special Rapporteur.[818] This document clarifies the content of the right to information and sets out the important elements that underpin it.[819] Though not legally binding, these principles have been recognised as representing the normative contents of the right to information under international law; and as representing 'the fundamental basis and criteria to secure effective access to information'.[820] We adopt these principles as the framework for our analysis here.

Summarily, the contents of ATI as a human right include: maximum disclosure of information, limited scope of exceptions, obligation to publish; process to facilitate timely access; affordable cost of access; and public education and awareness. A good example of an international public disclosure programme that reflects all these elements is the UNECE Kiev Protocol on Pollutant

[817] See P Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 Admin. L. Rev. 177 at 210; J Echeveria and J Kaplan, *Poisonous Procedural Reforms: In Defense of Environmental Right to Know* (Georgetown University 2002); S Jagwanth, 'The Right to Information as a Leverage Right' in R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre 2002) 3-16; M Fitzmaurice, 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' (2002) 2 *Non-State Actors and International Law*; S Kuhn, 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision-making Process' (1999) 25(4) Ecology Law Quarterly 647; S Paul, *Holding the State to Account: Citizen Monitoring in Action*, (Books for Change 2002).

[818] ARTICLE 19 is a London based international human rights non-governmental organization that focuses on promoting the enforcement and realization of the right to information and expression. According to the group they take their name from Article 19 of the UDHR which states that *'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers'*. The group monitors, researches, publishes, advocates, campaigns, sets standards and litigates on behalf of freedom of expression wherever it is threatened. See ARTICLE 19 <http://www.article19.org/pages/en/who-we-are.html> accessed 12 May 2012.

[819] ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999) <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.

[820] See Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para.42; see also See IACHR Press Release No. 2/98, 6 March 1998, paras. 14-15.

Release and Transfer Registers (PRTR Protocol).[821] This Protocol was established to implement ATI rights provided in the Aarhus Convention.[822] The Protocol mandates the frequent release of pertinent information on hazardous chemicals based on the right of the people to know and whether or not the information is requested. It is the first legally binding international instrument that mandates a disclosure of information on pollutant release and transfer registers. Its international importance as an 'open' global protocol is underscored by the fact that it is opened for ratification by non ECE members and members of the UN. The PRTR Protocol offers a good example of the elements of ATI and how ATI can be implemented within the context of an international environmental agreement such as the Kyoto Protocol.[823]

Article 4 (g-j) and Article 11 of the PRTR Protocol define the core elements of information disclosure. Both Articles require each Party to establish an information register that is: 'publicly accessible' through the internet; 'free' of charge; 'searchable' according to separate parameters; 'user-friendly' in its structure and provide links to other relevant registers; presents standardized and 'timely data' on a structured, computerized database; provide 'detailed information' on releases and transfers of pollutants covered by the Protocol, such as greenhouse gases, acid rain pollutants, ozone-depleting substances, heavy metals, and certain carcinogens, such as dioxins. The Protocol also includes 'limited confidentiality' provisions; and allows for 'public participation' in its development and modification of registers. The Protocol provides detailed

[821] The Protocol became binding on its Parties on 8 October 2009, see United Nations Economic Commission for Europe (UNECE), <http://www.unece.org/env/pp/prtr.html> accessed 15 December 2011.
[822] See Article 4, Art. 5(9), Aarhus Convention.
[823] There are currently 30 countries that have become Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) mostly European countries. See UNECE, <http://www.unece.org/env/pp/prtr.html> accessed 15 December 2011.

guidelines on how best to design and structure a public disclosure program in order to implement ATI.

Each of the elements established in the PRTR protocol could serve as parameters or templates on how to enhance ATI with respect to climate change mitigation projects. Information on climate change mitigation projects must be fully disclosed, made publicly accessible, searchable and proactively disclosed to ensure transparency and to ensure that the public are aware of the relevant details of such projects. We will examine and discuss these elements of information disclosure as necessary requirements for designing public disclosure programs for climate change projects.

i) ***Maximum disclosure***

This would require that all information held by public bodies and project proponents must be subject to disclosure. Information on mitigation projects must be completely disclosed including the potential social, financial, political, cultural, and environmental impacts of the project. For example, Article 4 of the PRTR Protocol requires that registers should be designed to provide detailed information on all releases and transfers of pollutants covered by the Protocol. Providing detailed information in the context of climate change projects will mean that all project information are released to the public as they become available. To further widen ATI, 'information' should be broadly defined to include all information pertaining to a mitigation project except when confidentiality applies. This will include reports on environmental impact assessments and human rights impact assessments; the emission reduction potentials of a project, project completion time scale, the social and economic benefits of the project, geographical information on communities that would be affected by the project and other relevant information

that would assist the public to make informed decisions on the potentials and pitfalls of a project These information must be subject to complete disclosure and exceptions should only apply in very limited circumstances. This requirement places an onus on the public authority to justify any denials of ATI requests by citizens.

It is not enough for governments to claim confidentiality or to declare that disclosing project information would jeopardize public interest.[824] Denial of ATI must be clearly demonstrated and justified by public authorities; this would prevent arbitrary denial of legitimate information requests. Refusal should not be based on the aim to protect governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.[825]

ii) Limited scope of exceptions

As stated earlier, requests for project information should be denied only when they fall under legitimate exceptions. This second criteria requires that such exceptions should be limited. Exceptions to disclosure should not unnecessarily overshadow the principle of disclosure. Requests for information should be met unless the public body shows that the information falls within a narrow category of exceptions. This has been a major threat to information access in many developing countries.[826]

---

[824] See K Dingwerth & M Eichinger, 'Tamed Transparency: How Information Disclosure Under the Global Reporting Initiative Fails to Empower' (2010) 10 (3) *Global Environmental Politics* 10 (3): 74–96; A Florini, 'Introduction: The Battle Over Transparency. In A Florini (ed.), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 1-2.

[825] ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999): <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.

[826] For example the Nigerian FOI Act is replete with more exception sections and clauses that tend to deny access to information than those that grant it, a situation which allows government agencies to deny information access. For

The question of what constitutes the legitimate scope of exceptions seems to have been laid to rest by a comprehensive tripod test laid down by the UN Special Rapporteur.[827] Though it does not have any legally binding status, it has been recognised as providing normative clarifications on what constitutes legitimate exceptions.[828] The first test is that the information must relate to a legitimate aim listed in the law. Denial of information must be primarily for the purpose of protecting and keeping in line with an existing law or regulation. When information is withheld as part of compliance with an existing law or regulation, such denial would fall under the legitimate exceptions. Secondly, disclosure must threaten substantial harm to that aim. Information denial can be justified if disclosure threatens to cause substantial harm to a legitimate aim protected by law. It is not enough to quote or cite laws that could be affected by a disclosure; public officials must demonstrate how the requested information might lead to a substantial violation of an existing law or treaty obligation. This exception is triggered for

example, while only two sections (sections 1&3) deal with access to information, ten sections (sections 7, 11,12,14,15,16,17,18, 19, and 28) deny the public access to information. Also, the time limit provided in the law, for for granting or refusing requests as provided for in section 4 of the Act is very short. See the recent case of *Nigerian Contract Monitoring Coalition V The Power Holding Company of Nigeria (PHCN)* (2012) FHC/ABJ. A suit intiated to challenge the refusal of PHCN to release details of a World Bank- funded PHCN contract for the supply and installation of High Voltage Distribution systems in its facilities in Abuja, Lagos, and Ibadan.Information requested by the coalition included the report of the needs assessment that preceded the contract, documentation on the design and specification requirements, bidding documents issued to all bidders, a list of all the contractors that submitted bids, copies of the letters of award, as well as the names and addresses of all distribution companies on whose behalf the procurement was undertaken. The request was turned down by both PHCN Abuja and Electricity Distribution Company Plc. The applicant filed a motion exparte seeking the court's order granting it leave to apply for the prerogative order of mandamus to compel PHCN, its general manager and the Attorney General of the Federation to provide it with details of the contract. In a significant ruling on access to information in Nigeria, Justice Ademola granted the coalition's application condeming the decision of PHCN to ignore the request for such vital public information. The court noted that open and transparent governance is not enhanced when citizens feel that they need to resort to the long and arduous path of litigation before they are able to obtain information from public institutions. Apart from the length of time it would take for litigations and appeals, there is also the considerable expense of the entire legal process, beyond the reach of many Nigerians. This case demonstrates culture of impunity in many developing countries in which access to public information are denied to the public on the grounds of confidentiality. It emphasises the need for mandatory international standards if access to information on mitigation projects are to be protected form governemntal secrecy.

[827] See Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000.

[828] See Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

instance when releasing public information might bring about an inconsistent situation where the release of such information would amount to a violation of another public law. The law would not command the doing of the impossible; neither should the law contradict itself at any given time. Thirdly, the harm to the aim must be greater than the public interest in disclosure.[829] It must be demonstrated that denying access to such information would be more beneficial to the public than releasing the information. This test includes the weighing and balancing of the loss or harm that the release of publicly held information might bring. When the harm outweighs the gain, then the third exception is triggered.

A good application of this test is found in Article 12 of the PRTR Protocol which provides that disclosure registers must have limited confidentiality provisions and that the grounds for confidentiality shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to releases into the environment. Article 12(1) provides what constitutes legitimate exception to disclosure and when confidentiality should apply. Confidentiality will arise when such information would adversely affect: international relations, national defence or public security; the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest; intellectual property rights; or the confidentiality of personal data and/or files relating to a natural person if that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law.

[829] 'The Public's Right to Know, Principles on Freedom of Information Legislation' Article XIX. IAHCR, Annual Report 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106

These requirements describe the nature of legitimate exceptions to disclosure. Even though governments can develop other exceptions for context specific purposes it is pertinent to bear in mind that the aim must always be to ensure that exceptions to disclosure do not unnecessarily overshadow the principle of disclosure. Public authorities must also exercise caution is applying the discretion to withhold information. Improper uses of such discretion have been the subject of much litigation.[830] Applying the legitimate exceptions test to climate change projects would mean that project information must be proactively disclosed except when such information would fall under the legitimate exceptions, which are broadly put non-disclosure for international and national security reasons. The discretion to withhold project information should involve two steps. First, public authorities must determine whether the confidentiality exemptions apply. If they do, the reviewer must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure; disclosure should be made or whether information should be withheld.[831] All project information outside these categories must be proactively released.

iii) Obligation to publish

The third content of the right to information requires public bodies to do more than accede to requests for information; there should be proactive disclosure of information even where there is no request.[832] For example, the PRTR Protocol provides that information must be made 'publically available' regardless of specific requests. Project developers and public bodies must

[830] For excellent examples of how the doctrine of legitimate exception has been interpreted domestically see, Maranda *v. Richer* (2003) SCC 67, [2003] 3 S.C.R. 193; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Lank v. Canada (Minister of Justice)* 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

[831] See *Maranda v Richer* 2003 SCC 67, [2003] 3 S.C.R. 193

[832] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999); availale at <http://www.article19.org/pdfs/standards/righttoknow.pdf> assessed 10 May 2012.

actively publish and disseminate key categories of information that are of significant public interest as soon as such information is available. What this means is that the right to information should not only be reactive, it should also be proactive. The right to information includes the right to such information that must be published and disseminated *suo motu* (proactively) by public authorities on their own volition. Public bodies are to publish and disseminate widely, documents that are of significant public value and interest, for example, information about how the public body functions and the content of any decision or policy affecting the public.[833] This places a duty on governments to run disclosure programmes that allow individuals to gain regular access to publicly held information. This could be by keeping a public database or by releasing periodic documents on governmental affairs. The aim is to reduce the culture of secrecy in governance and to foster transparency at all times.

Examples of information that should be released through public disclosure programmes include operational information about a project, budgeting and costs, information on project complaints, procedures for public participation and input, and the content of decisions taken on issues affecting the public.[834] Implementing this element of the right to information requires governments to establish comprehensive public disclosure programmes on projects and policies. An example is the disclosure policy contained in the US Safe Drinking Water Act, which requires public water companies to inform their customers when they violate contamination standards, fail to follow a treatment requirement or mandatory testing procedure, or neglect to

[833] See Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000.
[834] See ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999): <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.

perform required monitoring.[835] Under the Act, when a violation 'has the potential to have serious adverse effects on human health as a result of short-term exposure' companies must follow detailed procedures for alerting citizens about the dangers and the remedial steps being taken.[836] The Act stipulates a dual notification system for customers. It provides that the water company should report a contamination first locally and directly; and then nationally and electronically in newspapers and media houses.[837] This proactive public disclosure program brings relevant information to stakeholders. It is pertinent for climate change regimes to mandate project proponents to establish such public disclosure programs for mitigation projects. The requirement would be to publish and inform citizens about known hazards about a project as soon as such information is available even when no request has been made. This requirement to disclose constitutes a fundamental element of the right to know which takes the right beyond information requests. It places an obligation on custodians of publicly held information that is vital and important to the people, to publish it *suo motu.*

The nature of project information to be disclosed to the public will include information on the proposed activity such as a description of physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions; a description of the significant effects of the proposed activity on the environment; a description of the measures envisaged to prevent and/or reduce the effects, including emissions; a non-technical summary of the foregoing information and an outline of the main alternatives studied by the applicant; and

[835] 42 U.S.C. § 7412 (7) (H) (I) (III).
[836] 42 U.S.C. § 300g-3(c)(20 (C).
[837] ibid

the main reports and advice issued to the public authority at the time when the public concerned shall be informed of the proposed activity.[838]

Information disclosure should not stop at the project design stage. For example the PRTR Protocol provides that the information on the register should be continuously and immediately available through electronic means.[839] Continuous information is needed to provide important updates that might change the sustainability of a project over time. The effects of projects change from time to time, so what was environmentally viable at the stage of design might become a threat post-registration. As such, the public should be carried along and updated with new project information from stage to stage, as they become available. It should include reasonable time frames for the different phases, allowing sufficient time for informing the public as new information become available.[840] Lack of updated information should be a ground for project review and complaint by the public.

iv) Process to facilitate timely access

The requirement here is that project information must be disclosed as soon as they become available; also public authorities must facilitate access to information and not delay or frustrate request for information. The first requirement speaks to timely release of information. Article 6 of the Aarhus Convention can serve as a guide on what timely information means. Article 6 (2) of the Aarhus Convention provides that the public concerned shall be informed, either by public notice or individually as appropriate, 'early' in an environmental decision-making procedure, and

[838] Article 6(6) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.
[839] See Art. 5(4).
[840] See Art 6(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.

in an adequate, timely and effective manner. Article 6(3) also provides that the public participation procedures shall include reasonable time frames for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making. This emphasises the need to release project information as soon as possible in order to allow the public adequate time to understand and process the information. This also emphasises that that timely access to project information is an important pre-requisite for an effective participatory process.

The second requirement is that public bodies must facilitate access. The process of obtaining information should not be so tedious and complex; neither should it be designed to frustrate and discourage individuals from seeking publicly held information. As Article 5(4) of the PRTR Protocol suggests, information disclosure register shall be designed for 'maximum ease' of public access through electronic means, such as the Internet'. The Protocol states that registers must be user-friendly in structure and should provide links to other relevant registers; it should also presents standardized and timely data on a structured, computerized database. This requires that appropriate systems should be put in place to ensure that information is easily accessible. Governments can facilitate access by utilizing electronic options for gathering and disseminating information. This could be by creating a publicly accessible database or information-sharing portal through which interested members of the public can access information without protocol or delay. The Protocol also provides that where the information is not easily publicly accessible by direct electronic means, each Party shall 'facilitate electronic access' to its register in publicly accessible locations, for example in public libraries, offices of local authorities or other

appropriate places. In all the Protocol places an overall duty on public authorities to facilitate access either through electronic means or through other public places.

With respect to mitigation projects, international climate change regimes must establish information disclosure requirements that require DNAs and national governments to facilitate access by making it easy for people to obtain project information at their disposal either through electronic means, or by publishing such information in newspapers or other public medium. Information must also be made public as soon as they are available and in a timely manner. For information to be considered timely, it must be provided at the design stage and before the projects are approved. Project information must also be released continuously after approval and during execution. Similarly, the DNA or other national bodies responsible for handling requests should process all requests for information quickly and fairly. Unnecessary and duplicative procedures and administrative bottlenecks that complicate the process of seeking and obtaining project information must be removed to make access easier and less demanding. ATI includes putting in place institutions and procedures that facilitate and simplify the process of obtaining project information.

Facilitating access also includes delivering project information in an appropriate language and format understood by locals. It includes providing interpretation when necessary, providing several modes of information including radio, video, graphics, documentaries, photos so as to cover people with all sorts of peculiarities and designing disclosure programmes that allow information to reach the most remote and rural communities.

iv) Costs

The principle here is that the cost of access to information should never be so high as to deter requests.[841] Public interest requests should be subject to no fees or at most a highly reduced fee.[842] ATI includes seeking and obtaining information at a negligible cost. By establishing effective and yet cost free disclosure programme citizens are encouraged to seek and obtain publicly held information. For example, Article 11(3) and (4) of the PRTR Protocol provide that each Party shall ensure that access to information contained in its register is free of charge, and that competent authority may make a charge for reproducing and mailing the information, but such charge shall not exceed a reasonable amount.[843]

A disincentive to public information requests in many developing countries is the administrative cost of 'buying' project information.[844] Individuals and communities with genuine interests are unable to access project information because they cannot afford to pay the costs. To remove the cost barrier to information access and to further protect ATI rights with respect to climate change projects, international climate change regimes must establish a public disclosure requirement, which like the PRTR Protocol, will mandate national authorities to disclose project information free of charge or at a very negligible cost. To reduce the costs of implementation on DNAs and national governments, such information could easily be disclosed and updated on a government website which anyone could access and download relevant information free of charge. The context in which each DNA will implement such a requirement will vary based on local realities, for

[841] ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999): <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.
[842] See Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000.
[843] See also the Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Art. 14(1) provides that parties may make a charge for supplying environmental information, but such a charge may not exceed a reasonable cost. CETS No.: 150 opened for signature on 21/6/1993.
[844] See 'Nigeria's Access to Information Law is Not Working' <http://www.icirnigeria.org/index.php?id=28> accessed 12 January 2013.

example in developing countries such as Nigeria where internet access might be a challenge especially in rural areas, such project information could easily be made readily available through the DNA office or local government offices, while project proponent could also be required to publicize project information in local newspapers. The most important aspect of implementation is for international supervisory bodies such as the CDM EB to require host countries and project proponents to demonstrate before project approval and registration, the extents to which project information have been made freely or easily accessible.

vi) Public education and awareness

Another element of the right to information is that governments and public authorities must promote a culture of openness by informing the public about their ATI rights.[845] This is by providing for public education and dissemination of information regarding the right to access information, the scope of information available, and the manner in which the right can be exercised. This is different from the requirement to publish as it lays down a requirement to promote public awareness on the existence of the right to information and how it can be enforced.

ATI would be meaningless and impossible if people are not aware of their rights, and of on-going projects and policies and how to access more information about them. This can be achieved by raising the awareness of institutions and processes through which information could be obtained. This element would impose an obligation on states to provide relevant information

[845] ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (June 1999): <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.
[845] See Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000.

and awareness of the institutions that are in charge of public information and the process for accessing such information. To fulfil this element, governments and DNAs must be encouraged to design public awareness programmes on the existence of this right and on the institutions through which project information can be accessed. Details of public awareness programs should also be included as part of the mitigation master plans and project guidelines designed and released by DNAs and national governments.

The foregoing elements are crucial for the effective protection, realization and fulfillment of the right to seek, receive and impart information as guaranteed under international human rights law. ATI as an element of the HRBA requires the mainstreaming of the right to information to project planning and executions. To implement ATI, international climate change regimes would require Parties to establish public disclosure programs that allow easy and cost effective dissemination of project information. Public disclosure programs must be designed in line with the requirements of this right and provide a detailed, easy and cost free procedure through which members of the public can access such information.

National Authorities must demonstrate that the above ATI requirements have been put in place pre-registration and are sustained post-registration. This would place mandatory public disclosure requirements on project proponents and on national governments in host countries to publish on a regular basis, all information related to a project including new risks and challenges; even when citizens do not specifically make requests for such information. Important categories of information relevant to climate change projects include project description documents, which contain details about the project activity, the proposed monitoring methodology and baseline, the

crediting period of the project, the project participants and the method by which the participants will communicate with the CDM Executive Board. Other relevant information includes environmental impact assessment results, outcomes of human rights impact assessments, operational information, duration of projects, budgeting and costs, analysis of the stakeholders' comments, information on complaints procedures and procedures for public input, and the content of decisions taken on issues affecting the public.

One practical challenge to administering public disclosure programs based on these standards is the cost and resources involved. To reduce the costs and resources required to establish and maintain public disclosure programs, it is pertinent for national authorities to progressively leverage on already existing structures and resources of different government programs and institutions. For example, as discussed, many countries already have Freedom of Information Laws, which establish information access offices and programs. There is a need to reflect on the flaws of these national programs and how to improve them, such that ATI rights can be protected during the execution of mitigation projects. This will include strengthening or reforming inefficient institutions in line with the discussed ATI standards to make them better prepared to administer public disclosure programs. Designated National Authorities would also serve as the focal point to coordinate information disclosure for mitigation projects from different overlapping national institutions that are custodians of pertinent project information. For example the different Ministries and departments involved in a CDM project.

2.2 Participation

Apart from the lack of timely and adequate information on climate change projects, another main criticism of current climate change regimes is that key stakeholders are not given sufficient

chance to participate in project planning. As illustrated by some of the CDM projects discussed earlier on, there have been projects designed, planned and approved by DNAs without adequate input or contribution by citizens and stakeholders. In this thesis, we have defined participation as the right to ‘take part’, and 'to influence' decision making processes on climate change mitigation projects. As discussed earlier on, participatory rights have been recognised in a number of core international human rights instruments.[846] Environmental treaties such as the Aarhus Convention also provide robust illustrations of the scope and content of an effective participatory process. Article 7 of the Aarhus Convention provides that each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. It also provides that each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Using Aarhus as a template, it is clear that the in order to fulfil and protect the right to participation, a free, transparent and fair framework that allows the public to take part and influence the decision making process must be put in place. This goes beyond mere consultation.[847] Generally, participation as an element of the HRBA requires that members of the public are entitled to active, free and meaningful participation in any decision-making process on any mitigation project that could affect the enjoyment of their civil, economic, social, cultural

[846] See Chapter two above.
[847] The question of what constitutes 'stakeholders' and 'public' is addressed later in this chapter. The World Bank, *The World Bank Participation Sourcebook* (The World Bank 1996) 3.

and political rights. This means such projects or activities would not be carried out without allowing the public to have a say in an authentic deliberative process.[848]

The next question is what constitutes participation, what are the elements of participation, what is an authentic deliberative process and when can it be said that a person's right to participate has been fulfilled. This is a question that does no lend itself to a straightforward answer. Some have pointed to this as the reason why participation is difficult to conceptualize in real life. Here, we explore the contents of the right to participation following our definition of participation, which is the right to 'take part', and 'to influence' decision making processes. After analysing these two concepts, we will also address the question who should take part in decision making processes?

A Elements of Participation

The right to participate in decision-making processes connotes the right to take part in and to influence decision-making processes. This definition includes two vital elements that will be explored in this part: 'Taking part' and 'Influencing'.

I. Taking Part

[848] As shown earlier in this thesis, the idea of participation has its theoretical root in the participatory development theory of international law. Many other theories can be brought to bear on participation; these include neo-liberalism, multi-stakeholder theory, liberal democracy, rational elitism, pluralism, civic republicanism, and deliberative democracy, among others. Participatory development theory, however, is remarkably important to the environmental and natural resource management discourse. See G Pring and S Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development' in D Zillman, A Lucas & G Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) at 13; R Chambers, *Rural Appraisal: Rapid, Relaxed and Participatory* (Brighton, England: Institute of Development Studies, 1992) at 28-29; See, e.g., G Mohan and K Stokke, 'Participatory Development and Empowerment: The Dangers of Localism' (2000) 21(2) Third World Quarterly 247-268; I Kapoor, 'The Devil's in the Theory: A Critical Appraisal of Robert Chambers' work on participatory development' (2002) 23:1 Third World Quarterly 107-117; A Agrawal and C Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27:4 World Development 629-639; C Kumar, 'Revisiting 'Community' in Community-Based Natural Resource Management' (2005) 40:3 Community Development Journal 275-285; and W Meynen and M Doornbos, 'Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?' (2004) 16(1) European Journal of Development Research 235.

Taking part simply means having the chance to freely express one's views without pressure and manipulation in an authentic deliberative process. The idea of taking part is rooted in the theory of deliberative democracy, which calls for a free and transparent deliberative process.[849] The fundamental tenet of deliberative democracy is that democracy should give all citizens fair and equal opportunities to take part in decision-making.[850] It offers a space and an opportunity whereby stakeholders can contribute to the process of policy transformations. As Dahl argues, the people are the best judges of what is good for them and are therefore the safest guardians of their rights.[851] The concept of deliberative democracy emphasizes that, for a governmental decision to be legitimate, it must be preceded by authentic and ideal deliberations.[852] For example, Articles 6 and 8 of the Aarhus Convention define the elements of an effective public participation. Article 8 notes that steps to ensure effective public participation includes: that time-frames that are sufficient for effective participation should be fixed; draft rules should be published or otherwise made publicly available; the public should be given the opportunity to comment, directly or through representative consultative bodies; and the result of the public participation shall be taken into account as far as possible.

[849] The term 'deliberative democracy' was originally coined by Joseph Bessette in his 1980 work 'Deliberative Democracy: The Majority Principle in Republican Government' in *How Democratic is the Constitution?*, Washington, D.C., AEI Press. pp. 102–116. Barton has identified three inter related concepts of participatory development: participatory democracy, deliberative democracy and civic republicanism. These three concepts have been constantly formulated as key participatory responses Of these three, it is the concept of deliberative democracy that is the most relevant to this thesis and it would be the focal point of our discussions. See B Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in Donald N Zillman, Alastair R Lucas and G Pring eds., *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resourc*es (OUP 2002) 82.

[850] J Elster, *Deliberative Democracy* (Cambridge Studies in the Theory of Democracy 1998).

[851] R Dahl, *Democracy and its Critics* (Yale University Press 1989). See also J Waldron, 'A Rights Based Critique of Constitutional Rights' (1993) 13(1) Oxford Journal of Legal Studies 18-51.

[852] J Fiskin, 'When the People Speak Deliberative Democracy: The Majority Principle in Republican Government' in *How Democratic is the Constitution?* (AEI Press 2011) 102–116. See also Cohen's typology on an ideal deliberation, J Cohen, 'Deliberative Democracy and Democratic Legitimacy' from A Hamlin and P Pettit (eds), *The Good Polity* (Blackwell 1989) 17–34.

The next question is what constitutes an effective or authentic deliberation? The concept of Free Prior Informed Consent (FPIC), has emerged in a number of international human rights and environmental instruments as one of the most consistent elaborations of an authentic participatory process.[853] FPIC is identified as a broader elucidation of the right to self determination which is clearly provided in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: '[a]ll peoples have the right of self-determination. By virtue of that right they *freely* determine their political status and *freely* pursue their economic, social and cultural development'.[854] We align with the views that the FPIC concept provides a normative guideline through which the right to participate can be implemented. It is a template for ensuring that the public meaningfully participate in decisions directly impacting their lands, territories, and resources and for ensuring that the right to self-determination is respected and protected by States.[855]

FPIC suggests that consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: free, prior and informed consent.[856] It has been

[853] T Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10 Nw. U. J. Int'l Hum. Rts. 54; B Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22 Ariz. J. Int'l. 7 Comp. L. 41, 42; K Masaki, 'Recognition or Misrecognition? Pitfalls of Indigenous Peoples Free, Prior, and Informed Consent (FPIC)' (2009) U.N. Comm'n. on Human Rights.

[854] Emphasis mine, S Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Ariz. J. Int'l. 7 Comp. L. 7.

[855] Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 48, UN Doc. A/HRC/12/34 (July 15, 2009).

[856] See UN-REDD Programme Guidelines on Free Prior Informed Consent (UNEP 2012) 7. See also M Colchester and F MacKay, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free,*

described as the right of indigenous peoples, as land and resource owners, to say 'no' to proposed development projects at any point during negotiations with governments and/or extractive industries.[857] According to Colhester and MacKay:

> In contemporary international law, indigenous peoples have the right to participate in decision-making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: free, prior and informed consent.[858]

The FPIC concept has also been recognised and elaborated in the UN REDD Programme Guidelines.[859] It builds on the extensive definitions of FPIC provided by the United Nations Permanent Forum. It defines 'Free' as implying no coercion, intimidation or manipulation. 'Free' refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.[860] It requires that representatives are free to express themselves in the way that is customary and comfortable for them. 'Prior' implies that consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes. It is a requirement that information be provided before

---

Prior and Informed Consent (Forest Peoples Programme 2004) 8-14; A Perrault, K Herbertson and O Lynch, 'Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)' (2007) 19 (3) Georgetown International Environmental Law Review 477.

[857] The UN Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5-7 Dec. 2001. (E/CN.4/Sub.2/AC.4/ 2002/3, para. 52). The duty to obtain their free, prior and informed consent is a corollary of a myriad of universally accepted human rights, including the right to self-determination, right to participation, right to property, right to cultural integrity and right to equality, that are contained in numerous international human rights instruments.

[858] M Colchester and F MacKay, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent* (Forest Peoples Programme 2004) 8-14.

[859] United Nations, *UN-REDD Programme Guidelines on Free Prior Informed Consent* (UNEP 2012),

[860] It is free when information is transparently and objectively offered at stakeholders' request; process is free from coercion, bias, conditions, bribery or rewards; meetings and decisions take place at locations and times and in languages and formats determined by the stakeholders; and all community members are free to participate regardless of gender, age or standing. See Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the *United Nations Permanent Forum on Indigenous Issues* (UNPFII) at its Fourth Session in 2005.

activities can be initiated, at the beginning or initiation of an activity, process or phase of implementation, including conceptualization, design, proposal, information, execution, and following evaluation.[861] Information should be given well in advance to provide time for stakeholders to understand, access, and analyse information on the proposed activity.

'Informed' refers to the full disclosure of the intent and scope of the projects and policies. This element focuses on the type of information that should be provided prior to seeking consent and also as part of the on-going consent process. Information should be accessible, clear, consistent, accurate, and transparent and should be delivered in appropriate language and format.[862] 'Consent' refers to the decision made by indigenous peoples and other local communities reached through their customary decision-making process. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. Such consent must be freely and collectively given. Decision-making must be by consensus and must be transparently made. There should be the absence of coercion, bribery or manipulation in the decision-making process.

The FPIC principle was first introduced in 1989 by the International Labour Organisation (ILO), to protect the rights of indigenous peoples in developing economies that were subject to involuntary resettlement. ILO's *Convention on Indigenous and Tribal Peoples in Independent Countries - 169/1989* provides that before indigenous peoples can be relocated from their lands,

[861] United Nations, *UN-REDD Programme Guidelines on Free Prior Informed Consent* (UNEP 2012), see also Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the *United Nations Permanent Forum on Indigenous Issues (*UNPFII) at its Fourth Session in 2005).

[862] Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the *United Nations Permanent Forum on Indigenous Issues (*UNPFII) at its Fourth Session in 2005).

they are entitled to free and informed consent.[863] The Convention aims at ensuring that every effort is made by the States to fully consult with indigenous communities in the context of development, land and resources. Articles 6, 7, 16, 16 and 22 of the convention provide that the government shall consult the people concerned, through appropriate procedures in particular through their representative institutions and establish means by which these peoples can freely participate in the decision-making process. In general, the Convention specifies that consultation should take place when: considering legislative or administrative measures that are likely to affect indigenous and tribal peoples;[864] prior to exploration or exploitation of sub-surface resources;[865] when any consideration is being given to indigenous and tribal peoples' capacity to alienate their lands or to transmit them outside their own communities;[866] prior to relocation, which should take place only with FPIC;[867] and on the organization and operation of special vocational training programmes.[868]

Perhaps what is the most comprehensive elaboration of the FPIC is contained in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Though not legally binding, it articulates the free, prior, and informed consent (FPIC) and provides normative guidance on the need for States to obtain the consents of indigenous communities on development activities that might t affect them, as opposed to mere consultation. Article 19 of the Declaration provides that

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and

[863] (ILO No. 169) (1989), 72 ILO OFFICIAL BULL. 59, reprinted in 28 ILM 1382.
[864] Article 6.1 (a), (ILO No. 169) (1989), 72 ILO OFFICIAL BULL. 59, reprinted in 28 I.L.M 1382.
[865] Article 15.2.
[866] Article 17.
[867] Article 16.
[868] Article 22.

> informed consent before adopting and implementing legislative or administrative measures that may affect them...[869]

FPIC was also referred to in Articles 1, 12, 20, 27 and 30. Article 32 answers the question on when FPIC is required. It provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources…[870]

As such, the principle of FPIC must be applied to decisions on proposed activity/policy that would include the removal of indigenous peoples and/or other relevant rightsholders from traditional or customary lands/territories;[871] and from cultural, intellectual, religious, and spiritual property.[872] FPIC is also required for proposed activity/policy that would include confiscation, occupation or damage of the lands, territories and/or resources of indigenous peoples and/or other relevant rights-holders.[873]

Similarly the UN Committee on the Elimination of Racial Discrimination (CERD) encouraged States to 'ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'[874] In 2001, the UN Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body of the ICESCR, in its report of Columbia in relation to traditional lands specifically urged States 'to consult and seek the consent of indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining

[869] United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007).
[870] ibid.
[871] Article 10.
[872] Article 12.
[873] See United Nations, *UN-REDD Programme Guidelines on Free Prior Informed Consent* (UNEP 2012) 12.
[874] GR XXIII 51 concerning IPs adopted at the Committee's 1235th Meeting, 1997).

projects and on any public policy affecting them'.[875] The CESCR has further expanded on the right of indigenous peoples to FPIC in its General Comment No. 21. It calls on States Parties to the Convention to respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights. Though not legally binding, this general comment provides normative interpretations of how a State should implement Article 15 of ICESCR, which outlines the right to participate in cultural life, it concludes that the right to participate cannot be fulfilled if decisions on indigenous lands and resources are taken without the prior and informed consent of the affected peoples.[876]

The FPIC principle has also been recognised in the American Declaration on the Rights of Indigenous Peoples (Draft) of the Organization of American States (OAS).[877] Article XVII and XXIII of the declaration provides that no decisions directly relating to the rights and interests of indigenous peoples are to be taken without their free and informed consent. Accordingly, states shall obtain FPIC prior to the approval of any project affecting indigenous people's lands, territories and resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources. In the *Awas Tingni case* the IACHR stated that FPIC is generally applicable 'to decisions by the state that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources

[875] Committee on Economic, Social and Cultural Rights [CESCR], *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, 12 and 33, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2007); CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, 12 and 35, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004).

[876] CESCR, *General comment No. 21 Right of everyone to take part in cultural life (art. 15, 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009). On the importance of general comments, see M Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 HUM. RTS. L. REV. 27, 33.

[877] Adopted by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc.6 (1997).

of indigenous territories'.[878] As the Inter American Court on Human Rights noted in *Saramaka People v Suriname,* large scale development projects that would have a major impact within an indigenous people's territory should only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.[879]

Though not legally binding, the Ruggie Guiding Principles on Business and Human Rights also enjoins business enterprises to respect the rights of local communities affected by their activities, in accordance with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). In its commentary, it calls on business enterprises to respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their activities and projects.[880] Incorporating FPIC principles into project planning would allow corporations and organizations to better discuss anticipated project risks with the public, such that harmful projects are either redisgned to mitigate the harm or are totally avoided if the harm cannot be efficiently mitigated. These human right understanding of FPIC would be useful for addressing human rights problems associated with climate change mitigation projects.

In 2011, the International Finance Corporation (IFC), the lending arm of the World Bank, incorporated FPIC as a component of its Sustainability Framework (Performance Standard).[881]

---

[878] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Inter-Am. Ct. Hum. Rts. (Ser. C) Case No. 79, para. 103(k) (Judgment of Aug. 31, 2001) <http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc> accessed 12 December 2011.

[879] *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs,* Judgment of November 28, 2007. Series C No. 172.

[880] J Ruggie, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'' (2011) UN Document A/HRC/17/31 (21 March 2011) paras 8-12.

[881] The IFC's Performance Standards define clients' responsibilities for managing their environmental and social risks before projects can be financed by the IFC. See Performance Standard 7 of the International Financial Corporation <http://www.ifc.org/ifcext/policyreview.nsf/Content/2012-Edition> accesed 12 March 2013.

The IFC Performance Standards bulds on the Equator Principles, a voluntary set of standards developed by international development banks and private sector financial institutions to reduce the social and environmental impacts in project financing.[882] The IFC Framework identified FPIC of local communities in development projects promotes sound environmental and social practices, encourages transparency and accountability, and contributes to positive development impacts. In the case of projects that may affect indigenous peoples' lands, clients are required to document indigenous peoples' 'informed participation and the successful outcome of the negotiation'.[883] It provides that

> FPIC . . . will be established through good faith negotiations between the client and the Affected Communities of Indigenous Peoples. The client will document (i) the mutually accepted process between the client and the Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.[884]

Though the IFC Guidelines are not human rights instruments, the adoption of FPIC into international lending and investment standards is very important, considering the fact that international lending institutions such as the IFC directly fund many large-scale mitigation projects, including CDM projects that have been the subjects of human right violations. Also, even though the application of the IFC Guidelines are limited to those projects financed by the IFC, it sets a standard for other financial institutions involved in project financing for mitigation projects on why and how to mandate free and prior consultation with local communities as a compulsory requirement for project financing, to avoid unintended consequences of funded

[882] See the Equator Principles, June 2006. <www.equator- principles.com/resources/equator_principles.pdf> accessed 21 January 2013.
[883] See Performance Standard 7 of the International Financial Corporation. http://www.ifc.org/ifcext/policyreview.nsf/Content/2012-Edition
[884] Guidance Note 7, January 1, 2012, paragraph 12, p. 7, ibid.

projects. The CDM EB could also integrate this standard into project approval guidelines, to mandate project proponents and development banks that fund CDM projects to demonstrate full compliance with FPIC standards prior to financing the project.

At a minimum, the FPIC concept would require that climate change mitigation projects should only proceed with the free, prior, and informed consent of the people or the public in the country where the project would be located. FPIC as elaborated in both human rights and environmental instruments requires more than mere consultation; rather it involves allowing stakeholders to raise different proposals, consider them without force or fear and to make free choices from available options. However, as the FPIC concept continues to evolve, much thought must go into the practical aspects of implementing it. What FPIC would mean varies from one context to another, and from one country to another. While in some countries particpatory safeguards are well developed and legally protected, in other countries there are weak structures for making FPIC work. There is also a low level of understanding on how to implement FPIC in autocratic countries with little or no mechanisms to ensure due process.

As such, to guarantee participation in mitigation projects, it is not enough to include paragraphs in the Kyoto Protocol or the CDM Rules to the effect that states must ensure FPIC in planning a CDM project for example. It is important to adopt a mandatory project requirement or threshold, which would make effective participation and the FPIC of the public, a criterion for project approval.[885] It is also improtant to provide clear guidelines on the threshold that must be met and

[885] The International Fund for Agricultural Development (IFAD) adopted this stringent FPIC requirement by making respect for FPIC a criterion for approval of agricultural projects.

demonstrated by project proponents during a participatory process as part of the FPIC requirement.

Implementing FPIC

When we say Free Prior Informed Consent, some questions arise. Free for whom? Consent by who and how do you ensure FPIC. We turn to the question of how to implement FPIC with respect to climate change mitigation projects. Four essential elements are important for a process to enable the public to take part in decision-making processes: broad based participation, fairness and inclusivity, rationality, and agreement.[886] We will analyse each of these elements important aspects of realizing FPIC during a participatory processs within the context of climate change mitigation projects.

i) Who should participate: Broad based participation

This element would require that every member of the public affected by a decision irrespective of social status or societal strata must be able to take part in decision-making processes. Broad based participation calls for the representation of all significant sectors of the society at the decision table.[887] Every member of the public should be able to raise proposals, criticize, and support measures, without any substantive hierarchy.[888]Emphasis here is on the establishment of a system of free deliberation among all individuals in society, particularly individuals that would be affected by the outcome of the deliberative process. As such, rules that exclude a section of

[886] Our analysis here is influenced by some of the elements of deliberative democracy identified by L Jacobs, F Cook and M Carpini, *Talking Together: Public Deliberation and Political Participation in America* (University of Chicago Press 2009) 9.
[887] See J Hartz-Karp & M Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 Journal of Public Affairs 127; J Poiser, "A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation (1996) 26 Envtl. L. 53 at 83.
[888] J Cohen, 'Deliberative Democracy and Democratic Legitimacy' from A Hamlin and P Pettit (eds), *The Good Polity* (Blackwell 1989) 17–34.

the society hinder the ability of any and very person affected by a project to take part in decision-making processes. The Aarhus Convention arguably provides best practices in this regard. For example, Article 2(4) of the Aarhus Convention defines 'the public' as 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups'. It also defines public concerned as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. This definition of the public includes individuals, NGOs, grassroots organizations, youth, women groups, and corporations and other business organizations.[889] As Rodenhoff points out, the term 'public' is used in Aarhus to mean as 'the sum total of all of society's potential actors'.[890]

This expansive notion of participation in Aarhus allows a larger section of the society to take part in decision-making processes. By carrying along as many members of the public as possible, we could avoid the negative publicity, protests and pitfalls caused by the ignorance or lack of knowledge by the public on the details of a project. This thesis therefore posits that members of the public that should take part in and influence decision-making processes on the design and approval of mitigation projects include individuals, landowners, community leaders, corporations and business organizations, and representatives from non-governmental organizations and interests groups. These categories must be recognized as important 'key stakeholders' and the public concerned with respect to any mitigation project.

[889] See Article 2 and 4 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.
[890] V Rodenhoff, 'The Aarhus Convention and its Implications for the "Institutions" of the European Community' (2002) 11(3) RECIEL 344.

This definition of the public assigns a prominent role to NGOs to take part in decision-making processes. It is important to include NGOs as members of the public that can participate in environmental decision-making processes from the outset. As noted earlier, despite genuine concerns on the difficulties inherent in an overly expansive and untempered participation, especially the tendency of NGOs and interest groups to slow down negotiation processes due to pre-conceived standpoints,[891] broad based participation by NGOs and interests groups are very useful in monitoring decision making processes and in raising awareness. An effective participatory process tries to involve important players from the outset. In many countries where CDM projects are resisted or opposed, these oppositions are often spearheaded by NGOs, for example the Environmental Rights Action (ERA) in Nigeria. As such, to gain the support and understanding of all stakeholders for a project, it is important that such stakeholders are part of the planning process from the beginning.

Similarly, NGOs are most times closer to the local communities and as such are able to understand and better frame local concerns and priorities. This is especially true in many developing countries where a large percentage of the society is either uneducated or uninterested. NGOs could help source for local knowledge that could further improve and enrich the decision-making processes. As such, the aim is not for NGOs to act as stumbling blocks or opponents of viable projects, rather NGOs would provide the appropriate check and balances that could help improve the design and implementation of projects to reduce human rights problems.

[891] See M Lee, C Armeni, J De Cendra, S Chaytor, S Lock, M Maslin, C Redgwell and Y Rydin, 'Public Participation and Climate Change Infrastructure' (2012) Journal of Environmental Law where the authors demonstrate how participation might become a 'simple bureaucratic hurdle, 'frustrating for all concerned'. See also M Lee and C Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80; C Sunstein, 'Deliberative Trouble? Why Groups Go To Extremes' (2000) 110 Yale Law Journal 71; J Black,'Proceduralizing Regulation: Part I' (2000) 20 Oxford Journal of Legal Studies 597, and 'Proceduralizing Regulation: Part II' (2001) 21 Oxford Journal of Legal Studies 33.

Considering the importance of participation in protecting human rights, the goal should not be to avoid participation or draw down its influence in order to allow projects to move on without delay. Rather, the aim should be to set appropriate guidelines and rules that could tackle unnecessary hurdles. It is true that one determined group or individual can frustrate the entire deliberative process if not properly checked. Handling this sort of situation would require proper planning. For example, setting common rules of deliberation and an agenda prior to the deliberative process and keeping strictly to the terms of the set agenda and rules can enhance a participatory process. This will reduce the tendencies for unnecessary deviations and hard stances. For example a questionnaire could be sent out prior to the discussions to sample general opinion on issues to be discussed. The results of the opinion poll will form the agenda while public authorities such as DNAs would also adopt transparent guidelines on the deliberative process itself.

ii) Fairness and Inclusivity

Here, focus is on the need to provide a fair opportunity for key stakeholders to attend decision-making meetings. An effective decision making process must not exclude vulnerable members of the society who are interested in a project from taking part in decision making.[892] Inclusivity means members of the public must have the same chance to have an input during project planning and approval. Inclusivity includes the notion of fairness, which stipulates that all those having an interest in or affected by a decision should have a say in that decision.[893] For example under the Aarhus Convention, once an interest is established, it does not matter whether the

[892] See T Dietz, 'What is a Good Decision? Criteria for Environmental Decision-Making' (2003) 10(1) Human Ecology Review 33 at 35.
[893] T Webbler & S Tuler, 'Fairness and Competence in Citizen Participation: Theoretical reflections from a Case Study' (2000) 32; 5 Administration & Society 570.

concerned party is a citizen or not. Article 3(9) of the Convention adds that 'the public' shall have the opportunity to participate in decision-making 'without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities'. Thus, the members of the public need not be nationals of the member state in question nor need they be permanently resident in the state concerned. Processes that exclude the public based on citizenship, nationality, domicile or status tend to shut the door of participation against some members of the public that could be affected by a project.

Fairness also includes providing means for stakeholders to take part in decision-making. To enable the public to take part in decision-making processes, barriers to access must be removed. In developing countries for example, barriers range from simple issues such as distance of the meetings, fear of persecution by agents of the government and also language and technological barriers. For example holding meetings in English language in communities where local indigenes can only speak their traditional languages. This denies them the chance to participate. Another example is when the lack of knowledge of technical jargon prevents participants from being able to make real contributions to project plans and designs.[894]

To remove barriers to participation during project planning, national authorities must actively facilitate participation. It is not enough to send out invitations to attend, DNAs must also facilitate attendance by choosing central and easily accessible venues for meetings and by providing means of ensuring participation, for example providing free transportation for the

[894] See F Onojiribholo, 'Kwale Chief Laments Plight of Communities', (*Daily Independent* 16 August 2011). S Foster, 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance and the Transformative Politics of the Environmental Justice Movement' (1998) 85 Cal. L. Rev. 775, 812.

poor. Inclusion requires the pulling down of all sorts of artificial barriers to participation.[895] For example, to achieve broad based participation during the approval process for a CDM project, DNAs would have to play more facilitative roles by reducing any advantage due to class that allows some individuals to influence the outcome of a deliberative process while excluding the poor and the illiterates. DNAs could create a level field by hiring language interpreters for locals, and by reducing technicalities in discussions. Technological advancements could also be utilised by providing opportunities for online participation through online surveys and questionnaires.[896]

iii) Rationality and Freedom to make choices:

There is a need to provide participants with a chance to explore different options and to provide logical reasons for their choices. A rational process allows the public to freely consider and explore different options during the deliberative process and to make an informed choice without fear or force. This involves identifying multiple options that reflect different sets of values held by different sectors of the society and weighing arguments for and against each option through an indefinite period of extensive and continuing discussions.[897] As such, a rational process provides participants with the opportunity to consider and give opinion on the strengths and weaknesses of the various options and project scenarios. The public should be able to consider the strenghts and weakenesses of a project proposal and then decide whether the proposal should stand as it is or whether extensive resvisions should be made to its design. Participation should

[895] I agree with Macias that it is hard to speak of fairness when some members of the public cannot afford to attend important decision making meetings. See R Macias, 'Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation' (CIRL 2010) 20.

[896] For detailed discussions on the value of e-rulemaking, see S Novek, Electronic Revolution in Rule Making (2004) 53 Emory L. J 434; see also C Coglianese, 'Citizen Participation in Rule Making: Past, Present and Future' (2006) 55 Duke L.J 943; A Fung & E olin Wrights (eds) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Sage Publications 2001).

[897] This point was elaborated extensively by J Hartz-Karp and M. Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 Journal of Public Affairs 127.

not be framed as a winner takes all or loser losses all scenario. For example, the Aarhus Convention provides that the public should be informed of the nature of possible decisions.[898] It also provides that procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.[899] Allowing the public to consider a wide range of options on how to proceed with a project proposal and to give opinion on the strenghts and weakeneses of a project proposal maximizes the potentials of a deliberative process.

Generally, DNAs should be required to demonstrate the extent of proposals received and considered before taking a decision to approve a CDM project or a mitigation project. It is not enough to tick a box to the effect that a particpatory process has been conducted. Compliance with the requirement of particpation must be anchored on demostrating the extent of consultation carried out before reaching a decison to execute a project.

iv) Agreement

An effective deliberative process should produce a 'final agreed upon' outcome that reflects the freely expressed consents of the public. This is what distinguishes participation from mere consultation. In the absence of an agreed outcome, the process becomes a one-way formality in which citizens are merely informed of a policy without any real opportunity to influence the decision-making process. There must be a measure of agreement that ideally most participants

[898] Article 6 (2) (b).
[899] Article 6 (7).

can accept as a 'decision'.[900] The finality of the process rests in adopting a binding decision stating clearly whether consent has been freely given for a project to go ahead or not. For example Article 6 (9) of the Aarhus Convention provides that each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based. This element illustrates the requirement for conclusiveness in a deliberative process. In an authentic deliberative process, not only are matters brought to the fore and discussed, it should culminate in a final, agreed upon outcome, which will resolve all conflicts and leave a majority if not all the participants satisfied that they took part in reaching that final outcome.

B. Influence

Following our definition of participation *i.e* the right to take part and influence decison making process, the second aspect is influencing a decision making process. This is a more straightforward element of the definition. Here, we follow the often-cited definition of influence provided by Corell and Betsill that influence occurs 'when one actor intentionally communicates to another so as to alter the latter's behavior from what would have occurred otherwise'.[901] Influencing a decision means to have an effect on the final outcome. As such, expressing an opinion and taking a final decison is not the end; it is the ability of the public to have an effect on the final decision that differentiates mere consultation from participation.

[900] See J Hartz-Karp and M. Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 Journal of Public Affairs 127.

[901] See M Betsill & E Corell, 'Analytical Framework: Assessing the Influence of NGO Diplomats' in M Betsill & E Corell (eds.), *NGO Diplomacy: The Influence of Nongovernmental Organization in International Environmental Agreements* (MIT Press 2008) 19; see also M Betsill, 'Environmental NGOs and the Kyoto Protocol Negotiations: 1995 to 1997', in M Betsill & E Corell (eds.), *NGO Diplomacy: The Influence of Nongovernmental Organization in International Environmental Agreements* (MIT Press 2008) 177-206.

Agreements emanating from a deliberative process must be reflected in governmental actions with respect to granting a project host country approval. Reflecting public opinion in decision-making engenders public trust in the entire deliberative process. For example Article 6 (8) of the Aarhus Convention provides that Each Party shall ensure that in the decision, due account is taken of the outcome of the public participation. The outcome must reflect the final agreed outcome such that citizens will be encouraged when next they are called upon to give an opinion on a project proposal. The final decision should be easily traceable to the deliberative process.[902] For example, if the public vote against a project, an effective participatory process must mean that such project would not go on as designed, except modified to satisfy and address the concerns raised during the participatory process.

In essence, not all consultative processes can be classified as meeting the threshold of an effective participatory process. The two elements of 'taking part' and 'influence' are aspects of participation that should be demonstrated and met during the design and approval of mitigation projects. When these two elements are reflected in decison making processes, the will of the people is protected and the fundamental human rights of citizens to participate in public affairs are better preserved. Similarly, since such decisions are collectively taken, it could reduce the level of opposition and resistance facing CDM projects and other potential emission reduction projects. There is a need to place the responsibility on national governments and project proponents to demonstrate that the public have been given adequate oppotunities to take part and influence decision making processes on whether or how a mitigation project should be designed

[902] See J Hartz-Karp and M. Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 Journal of Public Affairs 127.

and executed. This should be mainstreamed as a compulsory criterion for project approval and registration.

2.3 Non-discrimination, equality and prioritization of vulnerable groups

One of the main concerns identified in the execution of CDM projects is the issue of siting and concentrating projects in poor communities.[903] These communities are particularly vulnerable because they are perceived as weak and passive citizens who will not fight back against the poisoning of their neighbourhoods in fear that it may jeopardize jobs and economic survival.[904] In Nigeria for example, CDM projects have been cited in poor and disadvantaged communities where citizens do not have the means and resources to demand accountability or resist such projects.[905] Earlier on, we have described the core international human rights instruments that show that such target seclection in project siting violate human rights safeguards on equality and non-discrimination. Here, we will describe the contents of the human rights to equality and non-dsicrimination and how it can be reflect in planning climate change mitigation projects.

The HRBA underscores the need for the equal treatment of people in planning. It rejects policies that marginalize people based on income, sex, ethnicity or race, age or nationality. According to

[903] International Rivers, 'Submission Regarding Human Rights to the CDM' (March 25 2013) <http://www.internationalrivers.org/resources/submission-regarding-human-rights-to-the-cdm-7899> accessed 01 April 2013; see also Inter-American Commission on Human Rights (IACHR), Hearings and other public events, 'Human Rights Situation in the Bajo Aguán Honduras' Oct. 24, 2011; see also IACHR, 2011 Annual Report, ch. IV, 297-302; IACHR, 2010, Country Report, Honduras, 118-121; International Rivers, 'Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project' (Feb. 9, 2011).

[904] See generally S Owens, 'Siting, Sustainable Development and Social Priorities' (2004) 7 Journal of Risk Research 101.

[905] N Bassey, 'Foreword', in *Mired in a Fossil Trap, the Nigerian CDM Report*, (Environmental Rights Action/Friends of the Earth May 2011); Carbon Trade Watch, 'Groups slam Nigeria's submission of gas flare reductions for carbon credits', Amsterdam, 29 March 2006; F Onojiribholo, 'Kwale Chief Laments Plight of Communities', (*Daily Independent* 16 August 2011).

the common understanding on HRBA, all people are equal as human beings and by virtue of their inherent dignity. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies.[906] This element of the HRBA, if applied to climate change projects, would seek to remedy the current situation where CDM projects are sited in poor and vulnerable communities. Generally, under this element, DNAs and project proponents would be required to demonstrate that extensive data segregation and impact assessement have been carried out and that a particular locality or section of society is not targeted for projects.

B) Elements of equality and non-discrimination

i) Equality of opportunity and treatment

In fulfilment of the non-discrimination norm of the international human rights law, states are required to ensure that marginalized groups, particularly women and youths, have equal rights to participate effectively in public life and that no decisions directly affecting their rights and interests are taken without their informed consent.[907] This is by ensuring the inclusion of all relevant stakeholders including the vulnerable members of the society in decision-making and by providing equal opportunity to them to oppose or support a policy or project. Inclusivity as discussed earlier focuses on the need to provide a fair opportunity for stakeholders and representatives of diverse societal groups or interests to attend decision-making meetings. Inclusivity abhors discriminatory policies or policies that exclude vulnerable members of the society.

[906] United Nations, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010.
[907] ibid.para 4(d).

Equality of opportunity entails the idea of inclusivity, which makes clear the need to provide fair and equal access to every member of the society in the decision-making process irrespective of status. Inclusivity includes the notion of fairness, which emphasises the need to provide means for marginalized and vulnerable stakeholders to take part in decision-making. They should be given fair access to attend decision-making meetings, to express their thoughts and to participate in the final decision-making. Inclusion requires the pulling down of all sort of artificial barriers to participation. It would also reduce any advantage due to class or race that allows some individuals to influence the outcome of a deliberative process. This would require the government to assist in bridging these gaps and in creating a level playing field. Either by choosing accessible venues for meetings or scheduling meeting in different areas of the community that are close to main centres, providing free transportation, hiring language interpreters for locals, and by reducing technicalities in discussions. It will include utilising technology to provide an opportunity for online participation through webinars, online surveys and questionnaires.[908]

ii) Burden sharing

This element emphasises the need to avoid governmental decisions or projects that tend to imperil the life, safety and health of a section of the society. No person or group should suffer more societal harm from the project as a result of status or gender. For example, targeting poor communities as locations for climate change mitigation projects is a discriminatory practice as it

[908] For detailed discussions on the value of e-rulemaking, see S Novek, 'Electronic Revolution in Rule Making' (2004) 53 Emory L. J 434; see also C Coglianese, 'Citizen Participation in rule Making: Past, Present and Future' (2006) 55 Duke L.J 943; A Fung and E olin Wrights (eds) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso 2003).

subjects the poor to greater harm due to their societal status.[909] What the HRBA seeks to do is to ensure that the burden of a climate change project are spread across every segment of the society and shared equally.

As such the Not-in-My-Backyard (NIMBY) syndrome must be eradicated from decision-making on mitigation projects.[910] For example, the UN Commentary on the Norms and Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights notes that 'transnational corporations and other business enterprises shall ensure that the burden of negative environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups'.[911] Para. 2(c) also stipulates that 'Particular attention should be devoted to the consequences of business activities that may affect the rights of women'.[912] Though not legally binding, these norms accentuate the importance of sharing the burden of climate change mitigation projects accross the society.

[909] A good example of discrimination in environmental planning was the alleged and highly litigated incidents of environmental racism in the US in the late 1990s. It included the intentional siting of hazardous waste sites, landfills, incinerators, and polluting industries in communities inhabited mainly by African-American, Hispanics, Native Americans, Asians, migrant farm workers, and the working poor. For example the largest hazardous waste landfill in the United States is located in Emelle, Alabama, a poor, predominantly African-American community. It receives toxic materials from forty-five states and several foreign countries, also the South Side of Chicago, which is predominantly African-American and Hispanic, has the greatest concentration of hazardous waste sites in the nation. See C Beasley 'Of Pollution and Poverty' (1990) 2 (4) The Environmental Journal 38-45; R Bullard, *Confronting Environmental Racism: Voices from the Grassroots* (South End Press 1993); K Colquette, K Michele and A Elizabeth, H Robertson 'Environmental Racism: The Causes, Consequences, and Commendations' (1991) 5 (1) Tulane Environmental Law Journal 153- 207.

[910] NIMBY or Nimbyism is a term coined and made popular to describe the injustices of the early 1980s in the United States where poor and black neighbourhoods were selected for toxic and dangerous wastes and projects. Opposing residents are sometimes called Nimbies. See R Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality.* (3rd Edition, Westview Press 2002). According to Bullard because low-income and minority communities in the US have had few advocates and lobbyists at the national level, social equity and distributive impacts of pollution have not been met hence the disproportionate amount of pollution and other environmental stressors in black neighbourhoods in the South.

[911] See para 14 (c) of Commentary, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See also J Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (A/HRC/17/31).

[912] E/CN.4/Sub.2/2003/38/Rev.2

Implementing non-discriminatory policies would include laying down clear criteria for selecting project locations, conducting environmental impact assessment on the effects of a project at that location and providing public information on the outcome of the assessment. This is in line with the international environmental law principle of prevention which enjoins a state to exercise due diligence by developing anticipatory policies which regulate activities within its jurisdiction that are harmful to any part of the environment.[913] If the EIA shows that the inhabitants of the specific location would be affected by that project, then the project should be discontinued irrespective of the amount of emission reduction the project would generate.

iii) Data segregation and vulnerability proofing

To prevent policies that discriminate based on status or gender, there is the need to establish and maintain an effective database for assessing risks on the basis of income, gender roles, and the constraints operating against their participation in decision-making processes.[914] Policymakers can address the issue of non-discrimination by ensuring that official data is disaggregated, by religion, ethnicity, language, sex, migrant status, age and any other category of human rights concerns discussed above. This also includes incorporating proofing as part of the wider human rights – proofing of all mitigation plans and measures. Gender and income-proofing will help to assess the implications for low income people and women of any planned project, the representation afforded to such categories in decision-making and ways to protect the interests of

[913] See Article 2(1) of The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, UNECE, <http://www.unece.org/env/eia/> accessed 02 April, 2011, See also Article 206 of the UNCLOS Convention, United Nations Convention on the Law of the Sea, 1982, 21 ILM (1982), 1261 (Adopted on 10 December 1982, and entered into force on November 16 1994).

[914] *See* F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729, <http://ejil.oxfordjournals.org/cgi/reprint/20/3/729> accessed 02 April, 2011; Cappelletti & Garth (eds), Access to Justice: The Worldwide Movement to Make Rights Effective; J Paulsson, *Denial of Justice in International Law* (CUP 2005) 134; L Curran, M Anne Noone 'Access to Justice: A New Approach using Human Rights Standards' (2008) 15 (3) International Journal of the Legal Profession 195 – 229.

the marginalized either by re-designing the project to avoid harmful impacts or refusing to proceed with it if such impacts cannot be effectively addressed.

International climate change regimes should require project proponents to demonstrate that a particular section of the society is not disadvantaged by a project before such project could be approved. This would be achieved by developing concrete risk assessment procedures to ensure better characterization of risk across populations, communities, or geographic areas. Measures would then be put in place to reduce high concentrations of risk among specific population groups. When making project decisions, project proponents would be required to demonstrate the distribution of projected risks.

2.4 Accountability

Another concern in the execution of CDM projects under the Kyoto Protocol is the lack of accountability and transparency in the process of approving and registering projects. The Kyoto Protocol does not provide guidelines on the need for accountability by states in project execution, especially the need to demonstrate that all the short and long term human rights impacts of a project have been considered before embarking on the project. Generally, accountability has been described as the obligation to demonstrate that a project has been conducted in accordance with agreed rules and standards and to report fairly and accurately on performance results vis-à-vis mandated roles and/or plans.[915] Here, we define accountability as the obligation of international climate change regimes to review, monitor and enforce compliance with human rights standards and obligations in the design and execution of

[915] OECD, "Public Sector Transparency and Accountability: Making it Happen" OECD (2002) 7.

mitigation projects.[916] It encompasses the structural conditions, the processes and the indicators/outcomes through which climate change governance systems review and monitor the practical impacts of a project on the human rights of the public. As such an accountable organization measures, reviews and monitors the level at which human rights are respected and fulfilled in the implementation of its programs and mandates.

Accountability in human rights terms is measured by a set of indicators which include identifying the unintended impact of laws, policies and practices on human rights; identifying which actors are having an impact on the realization of rights; revealing whether the obligations of these actors are being met; giving early warning of potential violations, prompting preventive action; enhancing social consensus on difficult trade-offs to be made in the face of resource constraints; exposing issues that had been neglected or silenced.[917] Virtually every human right instrument creates mechanisms for monitoring compliance and for reporting violations. The Aarhus Convention is an example of an environmental agreement that also establishes compliance mechanisms that monitor the protection and fulfillment of procedural human rights.[918]

[916] See One World Trust, *2011 Pathways to Accountability II, The Revised Global Accountability Framework*, <http://oneworldtrust.org/publications/doc_download/470-pathways-to-accountability-ii> accessed 12 March 2012.
[917] S Lankford and H Sano, *Human Rights Indicators in Development: An Introduction* (World Bank 2010); see also UNDP, 'Using Indicators for Human Rights Accountability' <http://hdr.undp.org/en/media/hdr_2000_ch5.pdf> accessed 12 March 2012.
[918] For example Art. 15 of the Aarhus Convention provides that he Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Many human rights treaty bodies monitor implementation through the creation of additional reporting requirements for states.[919] The Commission on Human Rights also establishes special rapporteurs, or expert committees and working groups to gather human rights compliance information and to recommend actions for non-compliance. Though such recommended actions and reports are often not legally binding, they provide guidance and reference points on the mechanisms for ensuring greater accountability in the performace of human rights obligations. Similarly, the United Nations has in different non-binding resolutions identified accountability as part of the founding principles of transparency and effective public administration.[920] The UN General Assembly, for instance, has adopted Resolution 60/260 on Accountability.[921] This resolution emphasized the importance of strengthened accountability within the United Nations and the need for all UN agencies to ensure greater accountability within their spheres of operation for the effective and efficient implementation of legislative mandates and the best use of human and financial resources.

Despite these however, the lack of accountability within the UN systems and within international development agencies has received scholarly attention over the last decade.[922] Accountability concerns include the prevalent development paradigm that fails to hold corporations liable for

[919] See United Nations, 'Delegation of Authority and Accountability' (2004) Report of the UN Joint Inspection Unit, JIU/REP/2004/7, 13.
[920] See A/RES/49/136 of 1994, A/RES/50/225 of 1996, A/RES/53/201 of 1999, A/RES/56/213 of 2002, A/RES/57/277 of 2002 and A/RES/58/231 of 2004.
[921] United Nations, *Investing in the United Nations: For a Stronger Organization Worldwide*, Resolution of the United Nations General Assembly, 16 May 2006, A/RES/60/260.
[922] See E Brown Weiss, 'Accountability and International Law: Reflections from Water Projects' A lecture delivered at the University of Oxford on 23 February, 2012; see also O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 11(8) Yale Law Journal.S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (United Nations University Press 2009) 5-8.

human rights violations in project constructions.[923] There is also the failure by UN organs and agencies to establish clear and compulsory human rights benchmarks that must be met before projects are approved or funded.[924] For example the CDM EB has been variously condemned for its lack of accountability and transparency, in registering and failing to hold countries to account for projects that produce human rights impacts.[925] This has led to an increased call for an approach that hinges climate change mitigation on the respect for the human rights requirements on accountability.[926]

There is a need to mainstream human rights based benchmarks or indicators into the rules and procedures governing the approval and execution of mitigation projects, such that compliance with human rights obligations would be measured side by side with emission reductions. This would also include establishing reward and sanctions for success and failures in complying with established benchmarks.[927] Accountability benchmarks would provide stakeholders an opportunity to understand how national governments, project proponents and DNAs have discharged, or failed to discharge, their human rights obligations; and an opportunity for these

[923] See E Brown Weiss, 'On Being Accountable in a Kaleidoscopic World' (2011) 1 Asian J. Int'l L. 21–32; see also E Brown Weiss, P Lallas and A Herken, 'The World Bank Inspection Panel: Participation and Accountability' in S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (United Nations University Press 2009) 271.

[924] See R Keohane, 'Global Governance and Democratic Accountability', in D Held and M Koenig-Archibugi (eds) *Global Governance and Public Accountability* (Blackwell 2005), see also S Nanwani, 'Improving Accountability at the Asian Development Bank' in S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century* (United Nations University Press 2009) 271

[925] See A Filmozer, 'CDM Projects Affect Human Rights' (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/> accessed 2 August, 2011; see also Climate Connections, 'Carbon Trade Group Backs Call to check Credits on Human Rights' available at <http://climate-connections.org/2011/04/18/carbon-trade-group-backs-call-to-check-credits-on-human-rights/> accessed 02 August, 2012.

[926] See E Brown Weiss, 'Accountability and International Law: Reflections from Water Projects' A lecture delivered at the University of Oxford on 23 February, 2012, see also O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 11(8) Yale Law Journal; A Johl, & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300; D Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 2(2) Nordic Environmental Law Journal 33-52.

[927] B Andreassen and H Otto Sano, *Human Rights Based Approaches Indicators* (Norwegian Centre for Human Rights, 2004) 1.

public bodies to demonstrate their human rights compliance through mandatory compliance/ implementation reports.[928]

B) Elements/Indicators of accountability

Human rights indicators aim to measure human rights realization, both qualitatively and quantitatively.[929] They help to assess the state of human rights implementation and enjoyment by public bodies. Measuring human rights can also help to allocate responsibility for human rights outcomes, *i.e.* naming and shaming who is responsible for what.[930] Human rights measurements therefore provide clear and precise indication of areas of progress and areas where progress is lacking.

While scholars agree on the importance of measuring accountability using a set of clearly identified indicators, creating such human rights-based indicators has remained a major theoretical and practical challenge.[931] The UN Special Rapporteur on the right to health, Paul Hunt, has however provided a framework, which though not legally binding, could serve as a

[928] See A Kuper (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005).

[929] S Lankford and H Sano, *Human Rights Indicators in Development: An Introduction* (World Bank 2010); Department for International Development, 'How to Note: A Practical Guide to Assessing and Monitoring Human Rights in Country Programmes' (DFID 2009); M Malhotra, and N Fasel, 'Quantitative Human Rights Indicators: A Survey of Major Initiatives' (2005) Background paper for the UN Expert Meeting on Human Rights Indicators, Turku; Norwegian Agency for Development Cooperation (NORAD), *Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment* (NORAD 2001).

[930] Transparency International's *Corruption Perceptions Index* has also had 'naming and shaming' success in Nigeria, see M Besançon, 'Good Governance Rankings: The Art of Measurement' (2003) World Peace Foundation Report #36, 2.

[931] Limited progress has been made towards developing commonly accepted systems of measuring human rights promotion. For example there is an ongoing debate on whether the same set of indicators could be used to assess both civil and political and the economic and social rights. This research will not assess the nature and extent of these debates because it is not directly relevant to our scope. For more readings see J Ackerman, 'Social Accountability for the Public Sector: A Conceptual Discussion' (Paper No 82, The World Bank 2005); M Besançon, 'Good Governance Rankings: The Art of Measurement' (2003) 36(2) World Peace Foundation Report; P Ball, 'Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis' (2001) 18(3) Statistical Journal of the United Nations Economic Commission for Europe 163-174; T Landman, 'Measuring Human Rights: Principle, Practice, and Policy' in (2004) 26 Human Rights Quarterly 906; UNDP, *The Concept and Measurement of Human Development: UNDP, Human Development Report 2002* (OUP 2002).

normative guide on how human rights accountability can be measured. He argues that human rights accountability should be measured in terms of structural conditions, processes, and outcomes.[932] I will examine and analyse Hunt's framework.

i) Structural conditions

This measures the availability of relevant legal and institutional frameworks that make it possible to monitor compliance with human rights standards. It includes the availability of rules and safeguards that prevent human rights violations, and the establishment of relevant institutions to monitor and enforce such rules. At the international level, this speaks to the need to establish and empower compliance committees and review teams that would be responsible for monitoring compliance with human rights. Such institutions must be independent and should not be easily influenced by governmental interests or pressure. There is a need for independent bodies that review project implementation to ensure that established guidelines and threshold are complied with. For example through a monitoring committee or expert review team that would inspect project locations to ensure that projects are being executed based on approved guidelines and methodologies.

For example Article 15 of the Aarhus Convention establishes a vanguard and unique Compliance Committee that is structured as a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. The Aarhus compliance mechanism aims to facilitate compliance by Parties with the procedural rights established under the treaty. The uniqueness of the Aarhus compliance mechanism is that it allows members of the

[932] P Hunt, Interim report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, United Nations General Assembly, Fifty-eighth session, Agenda item 117 (c), 10 October 2003, United Nations General Assembly, paras. 14-29.

public to communicate concerns about a Party's compliance directly to an international committee.[933] A complaint before the Compliance Review Mechanism, can be triggered by one or more members of the public concerning any Party's compliance with the Convention.[934] A communication may concern: a general failure by a Party to take the necessary legislative, regulatory or other (e.g. institutional, budgetary) measures necessary to implement the Convention; a failure of specific legislation, regulations or other measures implementing the Convention to meet specific requirements of its provisions; Specific events, acts, omissions or situations that demonstrate a failure of the public authorities to comply with or enforce the Convention. The Committee also protects the confidentiality of the complainants when requested, if the communicant is concerned that the disclosure of information submitted to the Committee could result in his or her being penalized, persecuted or harassed, he or she is entitled to request that such information, including any information relating to his or her identity, be kept confidential. As of August 2012, the Convention's Compliance Committee has received over 40 communications from the public – mostly from with non-governmental organizations. However, a major shortcoming of the Aarhus Compliance Committee is that it cannot issue binding decisions; rather it makes recommendations to the full Meeting of the Parties (MoP). This is problematic because in practice, MoPs occur infrequently. The independence and effectiveness of a compliance or review body would be better improved if it could implement its findings through a binding decision, such as a stop order on projects or an order for project proponents to redesign a problematic project. Despite this, the Aarhus Compliance Committee still provides a

[933] Any member of the public, i.e. any natural or legal person, may submit a communication to the Committee. The person filing a communication is not required to be a citizen of the State Party concerned, or, in the case of an organization, to be based in the Party concerned. See Paragraph 20 of the annex to decision I/7.

[934] Pursuant to paragraphs 18 to 24 of the annex to decision I/7 of the first session of the Meeting of the Parties to the Aarhus Convention, communications may be brought before the Committee by one or more members of the public concerning any Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee

good example of how a review system could be mainstreamed into climate change regimes to provide opportunities for receiving feedbacks from the public about the human rights impacts of projects.[935]

Unlike the Aarhus Convention, the current compliance mechanism established in the Kyoto Protocol does not consider human rights compliance neither do they establish human rights indicators.[936] The Kyoto Compliance Committee mainly examines questions of implementation with obligations under the Kyoto Protocol, mainly issues relating to estimation, reporting, and verification of emissions and credits of Annex I parties and overall compliance by parties with their emission reduction obligations.[937] Since the Kyoto Protocol itself does not expressly

[935] See M Mason, 'Information Disclosure and Environmental Rights: the Aarhus Convention' (2010) Global Environmental Politics 10-31.

[936] The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. The facilitative branch provides advice and assistance to parties to promote their compliance and implementation of The Protocol. It provides parties with guidelines, information on new technologies and procedures on how to attain emission reduction targets. It also provides 'early warning' of potential non-compliance with emissions targets, methodological and reporting commitments relating to greenhouse gas inventories. The enforcement branch is responsible for determining the consequences for parties not meeting their commitments. The enforcement branch is responsible for determining whether a party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanism. It is simply the 'watch dog' for non-compliance. It is also vested with oversight functions for ensuring that parties comply with the methodological requirements and procedures of the CDM.
See UNFCCC, 'An Introduction to the Kyoto Protocol Compliance Committee', <http://unfccc.int/kyoto_protocol/compliance/items/3024.php> accessed 21 April 2012. See also Article 18 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNFCCCOR, 3rd Sess., Annex, UN Doc. FCCC/CP/7/Add.1 (1998) at 7, 37 I.L.M. 22, online: UNFCCC<http://unfccc.int/resource/docs/cop3/07a01.pdf> [Kyoto Protocol or Protocol], Article 18 Annex to Decision 27/CMP.1 on Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, 92, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006) (hereinafter "Compliance Procedures").

[937] Some of the overall weaknesses of the Kyoto Compliance Mechanisms and Procedures as it currently is with respect to monitoring and verifying emission reductions have been exhaustively identified elsewhere. See M Doelle, 'Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design' < http://law.dal.ca/Files/MEL_Institute/Doelle_Kyoto_Compliance_Final_Draft.pdf>; S Oberthür and R Lefeber, 'Holding Ccountries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience" (2010) 1 Climate Law 133-158. J Brunnée, 'A Fine Balance: Facilitation and Enforcement in the Design of a Compliance for the Kyoto Protocol' (2000) 13 Tul. Envtl. L.J. 223. See also Meinhard Doelle, From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law (Toronto: Carswell, 2005), Clare Breidenich, Daniel Bodansky "Measurement, Reporting and Verification in a Post-2012 Climate Agreement" (2009 Pew Centeron Global Climate Change), available at: <http://www.pewclimate.org/docUploads/mrv-report.pdf> (accessed 12 January 2013); P Rodgers Kalas and A Herwig, 'Dispute Resolution under the Kyoto Protocol' (2000) 27 Ecology L.Q. 53; and David G. Victor, "Enforcing

include human rights obligations or respect for human rights in design and execution of climate chang responses, the Kyoto Compliance committee does not have the mandate to consider compliance with human rights obligations. As such issues relating to how policy measures aimed at achieving emission reductions affect human rights fall outside the mandate and expertise of the enforcement or facilitative branches of the compliance committee. This gap must be addressed if the COP is truly serious about its Cancun Decision that Parties must in all climate change actions respect human rights. It is not enough to simply include human rights paragraphs or safeguards in climate change regimes. It must be accompanied by a reform in governance structures to establish robust systems to monitor and enforce complaice with human rights.

Similarly as noted earlier, the current Compliance Committee does not have powers to receive compliance complaints from the public. Compliance issues can only be referred either by a party to the Kyoto Protocol or by an Expert Review Team (ERT).[938] Private individuals or members of the public do not have access to request a review or a question of implementation under the current Compliance Rules.[939] This further narrows the scope of the committee and reduces the impacts it could make with respect to investigating questions of implementation or complaints by members of the public.

Apart from the Compliance Committee, the CDM Executive Board does not have the mandate to consider projects from a human rights standpoint.[940] Rather, the body examines the technical

---

International Law: Implications for an Effective Global Warming Regime" (1999) 10 Duke Envtl. L. and Pol'y F. 147.

[938] See Annexes to Decisions 4/CMP.2 and 4/CMP.4 on the Compliance Committee, FCCC/KP/CMP/2006/Add.1 (2 March 2007), 17, and FCCC/KP/CMP/2008/11/Add.1 (19 March 2009), 14.

[939] ibid.

[940] See The CDM Executive Board, <http://cdm.unfccc.int/EB/index.html > (accessed 12 February, 2011).

requirements of projects and whether such projects have met national requirements of the host country. Similarly, the CDM Executive Board is mainly accountable to member states in the discharge of its duties and not to the public. As such, it does have the mandate to take complaints from the public. This gap makes it impossible for individuals to approach the executive board for any projects that affect their human rights, leaving states as the only option for redress. This is a major reason why members of the public have no avenue to bring forward human rights violations linked to CDM projects.

There is a need to establish formal compliance mechanisms under international climate change regimes to measure and monitor human rights compliance in the execution of mitigation projects. This might be by expanding the current mandates of current climate change regimes to empower them to monitor human rights compliance or by establishing a separate project review panel or a public complaint branch as a third branch of the Compliance Committee. However such effort must at first be preceeded by identifying human rights safeguards as part of the climate change regimes. Before we speak of compliance, current climate change regimes must first mainstream the obligation to protect and respect human rights as part of efforts to combat climate change. This would then provide a legal basis to expand and reform climate change governance structures. When such structures are established, they can then monitor hwo countries are respecting human rights in climate change actions. Such governance structures would also create synergy with national efforts by encouraging member states to monitor approved projects and report human rights compliance as part of the periodic reporting requirements which parties currently have under the Kyoto Protocol.[941]

[941] See The UNFCCC Reporting Guidelines on Annual Inventories require Annex I Parties, to provide by 15 April each year, annual national GHG inventories, including a National Inventory Report (NIR) on the institutional

ii) Process

Process measures how established regimes and structures are functioning in practice, whether they merely exist on paper or they actually possess the tools and capacity to ensure the enforcement of human rights. International treaties might condemn lack of participation or gender discrimination and even appoint a committee to monitor the situation, but unless such committee is accessible, independent and functional, such arrangements would mean nothing. As such, it is not enough to include paragraphs into a treaty to establish a compliance mechanism; 'process' measures how effective the existing compliance structures and institutions are in the enforcement of human rights. For example it would include how functional a project monitoring committee or review team is and how transparent it is in performing its fact-finding and monitoring roles. Part of the task while establishing such review structures is to ensure their accessibility and independence. Such review teams should also be equipped with the resources to perform spot assessments, fact-findings and investigations, such that they could gather first-hand information on the true impacts of a project on the human rights of host communities.

iii) Outcomes

This measures the progress made in human rights enforcement, it asks whether and to what extent human rights are realized. It tests whether the structural conditions and processes are actually bringing about results in preserving the human rights of the public in project planning and execution. While the outcome may tell us whether human rights are enforced, structural conditions and processes tell us how they are enforced. Outcome indicators assess, for example, the extents to which States are complying with approved project threshold and methodologies.

---

structures and quality assurance and control procedures adopted by Parties in meeting emission eduction commitments. See Articles 4 and 12 of the Convention; see also The UNFCCC Reporting Guidelines on Annual Inventories FCCC/SBSTA/2006/9 (18 August 2006).

Through site assessments, compliance reviews and mandatory reporting obligations, climate change regimes would be able to monitor and ensure that approved mitigation projects are executed in line with mandated guidelines. The role of a review panel in measuring outcomes cannot be overemphasized. It is easy for national governments and project proponents to lay claim to transparency and human right protection during the design and execution of a mitigation project. However, there is a need for the review team to perform oversight functions of gathering on-the-ground facts and to investigate if projects are proceeding as approved.

The three elements of accountability should be implemented to include both compliance review and problem-solving avenues, such that they can deliver redress for human rights violations resulting from projects. Accountability moves beyond examining if a party has complied with its obligations, it also includes reviewing and monitoring the methodology and approaches adopted in doing so. An effective accountability mechanism will also be interested in resolving tensions or concerns arising from the approaches adopted by a country in meeting its emission reduction obligations, particularly in developing countries. For example, the review structure in the Kyoto Protocol is only interested in reviewing inventory of emission reduction and not necessarily the problems arising from emission reduction activities. The mandate of the Expert Review Team (ERT)-an international team of review experts established by the Kyoto Protocol is to review and check the annual inventories submitted by Parties to the Kyoto Protocol, to make sure they are complete, accurate and conform to the guidelines.[942] Each Annex I Party is subject to at least one in-country visit during the commitment period. The ERT reviews compliance with emission reductions by industrialized countries through desk and centralized review and at least one visit

[942] The Annual review of individual inventories of each Annex I Party became mandatory in 2003 . See UNFCCC Decision 19/CP.8 which empowers the UNFCCC Secretariat to select members of expert review teams from experts nominated by Parties.

over five years. It then raises any apparent implementation problems with the Compliance Committee. Clearly, the ERT reviews emission reduction inventories; it is not set up to investigate human rights or other on-the-ground issues relating to emission reduction activities.

It is imperative to examine how the scope and mandate of the ERT could be expanded to become a full review and inspection panel with powers to examine not only inventories but also problems arising from emission reduction projects and actions. In the light of the current developments and instances where emission reduction efforts conflict with local circumstances and human rights, robust mechanisms must be put in place to inspect and gather facts from such trouble spots and apply appropriate sanctions to a defaulting Party as necessary.

A good example is the problem-solving approach adopted by the World Bank Inspection Panel (WBIP). Despite the conflicting opinion on the efficiency and legacy of the WBIP with respect to transparency and accountability, the Panel is an example of how an international accountability mechanism can detect and check the excesses that arise when large-scale infrastructural projects sponsored by developed countries or international development agencies are implemented in developing countries.[943] I align with the views that the WBIP example, if improved upon could provide a good example on how an international organization can monitor projects carried out in developing countries and funded by international agencies and developed countries to ensure transparency, accountability and compliance with international best practices

[943] D Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 Harvard Human Rights Journal 205–26.

and law.[944] We examine the structural conditions, processes, and outcomes of the WBIP to draw lessons on the practical aspects of monitoring project threshold and human rights safeguards.

C) Monitoring Project Threshold: The Example of the World Bank Inspection Panel

The monitoring procedure of the WBIP demonstrates how an international organization can establish rules and procedures to monitor and ensure that projects carried out under any of its mandates do not conflict with approved rules and policies. Without proper montoring a project designed to achieve laudable goals can produce monstrous repercussions for the public.

In the 1980s, similar concerns began to emerge on how development projects sponsored by the International Bank for Reconstruction and Development (The World Bank) were producing negative environmental and social impacts in developing countries.[945] These included environmental pollution, unsafe dams and projects, mass displacement of citizens from their homes to allow for projects, concentration of projects in poor and vulnerable communities, and

[944] E Carrasco & A Guernsey, 'The World Bank's Inspection Panel: Promoting True Accountability Through Arbitration (2008) 41:3 Cornell Int'l L. J.; A Ninio, 'Environmental Audit in the International Context: The Experience of the World Bank Inspection Panel' In *Ten Years after Rio 92: Sustainable Development and Law,* Proceedings of the 6th International Conference on Environmental Law, São Paulo, Brazil, June 2002); L Boisson de Chazournes, 'Compliance with International Standards—The Contribution of the World Bank Inspection Panel', in G. Alfredsson and Rolf Ring, eds., *The Inspection Panel of the World Bank: A Different Complaints Procedure.* (Martinus Nijoff Publishers 2001); A Rigo Sureda, 'Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank' in L Boisson de Chazournes, Cesare P. R. Romano, and Ruth Mackenzie, eds., *International Organizations and International Dispute Settlement* (Transnational Publishers 2002); D Hunter, 'Using the World Bank Inspection Panel to Defend the Interests of Project- Affected People' (2003) 4 (1) Chicago Journal of International Law 201-211.

[945] The International Bank for Reconstruction and Development (The World Bank) was established in 1944 to promote the recovery and development of countries heavily affected by the impact of the Second World War. Ever since then, the World Bank has been at the forefront of providing funds for projects that assist countries to attain growth and development. It provided interest free loans and funding of over $20 billion per year to the least developed countries (LDCs) to support different development projects ranging from water dams, power stations, municipal transport systems, road infrastructures and waste disposal systems. In 2004 the World Bank provided $20.1 billion for 245 projects in developing countries worldwide. See *World Bank, About us, available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html> accessed 21 March 2012.

the lack of participation by citizens in project planning and implementation.[946] For example the Bank came under heavy criticism for financing the Sardar Sarovar Dam in India despite heavy opposition by villagers and community leaders.[947] The concerns raised by this project were publicized by locally affected communities, non-governmental organizations and interest groups to highlight the need for accountability in the operations and activities of the World Bank and that international funds should not be used for projects that harm the environment or externalize development costs to the poorest members of society.[948]

The World Bank responded in September 1993 by establishing the World Bank Inspection Panel (WBIP) to serve as an independent investigative forum through which individuals or communities who believe that they are or are likely to be harmed by a World Bank funded project to bring their concerns directly before the Board of Executive Directors of the World Bank.[949] The Panel serves as a fact-finding body with the power to review Bank funded projects and to determine whether the World Bank management is following its own operational policies

[946] See for example Witness for Peace, *A People Dammed: The Impact of the World Bank Chixoy Hydroelectric Project in Guatemala* <http://www.witnessforpeace.org/apd.html> accessed 23 March 2012. See also D Clark, 'Resettlement: The World Bank's Assault on the Poor' (CIEL Brief May 2000); F Seymour, 'The World Bank and Environmental Sustainability' in P Bosshard, *Lending Credibility: New Mandates and Partnerships for the World Bank* 43, 43–44 (World Bank 1996); K Horta, 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 Harv. Hum. Rts. J. 227.

[947] See K Ramachandra, 'Sardar Sarovar: An Experience Retained' (2006) 19 Harvard Human Rights Journal 275-281; see also P Mehta, 'Internally-Displaced Persons and the Sardar Sarovar Project: A Case for Rehabilitative Reform in Rural Media' (2005) 20(3) American University International Law Review 613-647; D Clark, *The Impact of the 2002 Submergence on Housing and Land Rights in the Narmada Valley* (Habitat International Coalition 2003).

[948] See D Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 Harvard Human Rights Journal 205-226; D Bradlow, 'The World Bank, the IMF and Human Rights' (1996) 6 Transnat'l L. & Contemp. Probs. 47, 59.

[949] World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993), *available at* <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.

and procedures in the design, appraisal and implementation of projects.[950] According to the Panel Operating Procedures:

> The Panel has been established for the purpose of providing people directly and adversely affected by a Bank financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures.[951]

The Panel has the mandate of ensuring that projects funded by the Bank are not leading to social and environmental consequences to the people in countries or communities where the projects are situated. The Inspection Panel operates as a bottom-up accountability and recourse mechanism that investigates IBRD/IDA financed projects to determine whether the Bank has complied with its operational policies and procedures (including social and environmental safeguards), and to address related issues of harm.[952] There are lessons that can be drawn in the structural set up, process and outcomes of the Panel.

i) Structural conditions of the World Bank Inspection Panel

Structurally, the enabling resolution of this panel provides for independence in the appointment of members of the Panel.[953] The Panel comprises three members of different nationalities that are nominated by the President after consultation with the Board of Executive Directors. Similalrly, no panel member may serve for more than one term; as such vacancies in the Panel are filled

[950] ibid.
[951] IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.
[952] See World Bank Inspection Panel, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html> accessed 23 March 2012. See also D Clark, *A Citizen's Guide to the World Bank Inspection Panel (2nd Ed.)* (Center for International Environmental Law 1999) <http://www.unece.org/fileadmin/DAM/env/pp/ppif/WB%20Inspection%20Panel%20Citizens%20Guide%201999.pdf> accessed 23 March 2012.
[953] ibid.

every five years.[954] The procedure also grants members of the Panel the security of tenure by providing that members can be removed only for cause and by a decision of the Executive Directors.[955] The manner of appointment of the Board members and tenure is very important to ensure that members maintain their neutrality and independence, and do not represent country or regional interests. Another striking provision is that the Procedure provides that a Panel member shall be disqualified from participation in the hearing and investigation of any request related to a matter in which he/she has a personal interest or had significant involvement in any capacity, equally staff members of the Bank are nto eligble to serve on the Panel.[956]

These provisions are to instill some measure of structural independence, fairness and impartiality in its operations.[957] They also provide examples on how to take care of conflict of interest issues that often raise questions of accountability in current international climate change regimes.[958] For example the current situation in the CDM governance where EB members also hold positions as UNFCCC and Kyoto Protocol negotiators for their countries creates conflicts of interests and reduces the transparency of the EB.[959] Similarly for the ERT, members are currently selected by the UNFCCC Secretariat from a list of experts nominated by Parties.[960] This gives Parties the chance to influence the constitution and membership of ERTs. To ensure transparency, individuals with no direct link to climate change negotiations either as country representatives,

[954] Para.4, World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993), <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.
[955] IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.
[956] ibid.
[957] Para.4, World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993), <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.
[958] C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) (19 (2) Eur J Int Law 409-442. Where Streck and Lin question the transparency and accountability of the CDM governance structure.
[959] See C Streck and J Lin, ibid at 420. See also the CDM Policy Dialogue
[960] See UNFCCC Decision 19/CP.8.

nominees of Parties or staffs of the UNFCCC Secretariat should be appointed to the ERT and also to the CDM EB. Similarly, an EB member should be disqualified from participation in the hearing and investigation of any project in which they have personal interest or significant involvement in any capacity with the project proponents or state. Overall, the aim should be to establish an independent investigative body where members can serve without conflict of interest.

ii) Processes of the World Bank Panel

Despite the structures of the WBIP, some scholars have questioned whether the Panel is truly independent and transparent in practice, particlularly its processes and procedures for admitting complaints.[961]

The World Bank Panel adopts a procedure that allows any group of individuals or community affected by a project including NGOs can approach it for investigations. The process of investigation is triggered by the submission of a request for inspection. According to the Resolution, two or more affected people may submit a request; similarly a local organization or other duly appointed representative on behalf of the affected people; a foreign organization in exceptional circumstances if no local representative is available; or an executive director of the World Bank may submit a review request. A request may be submitted in any language and in any format, including by a mere letter, except that they must be in writing, dated and signed by the requesters.[962] The Panel also respects the confidentiality of requesters who ask that their names should not be published.

[961] IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.
[962] ibid Para.6-15.

According to the Panel's procedures, a request would be registered for further processing unless the Chairperson determines that it is 'without doubt manifestly outside the Panel's mandate'.[963] The Panel also maintains a publicly accessible register of registered requests that is available on its website.[964] This way requesters and the general public can follow the status of any project and the issues surrounding it. Other key documents such as the initial management response and the Panel eligibility reports are also posted on the website while official copies can be requested from the Panel's secretariat. Once the Panel has received and registered a Request for Inspection, the eligibility Phase of the Inspection Process commences.

However, an investigation is not automatic; the Panel is required under the Operating Procedure to make a recommendation to the Board of Executive Directors of the Bank, requesting 'whether the matter should be investigated' more thoroughly. This is referred to as the Eligibility Report. Only the Board has the power to officially authorize the Panel to proceed with an investigation.[965] If the Board approves the investigation, the Panel is then able to commence the inspection process. This requirement by the Panel to seek the approval of the Board has been highly criticized as detracting the true independence of the Board.[966] For example, there have been instances where the Board has failed to recommend investigations in cases where it was needed.[967] This limits the Panel's ability to control what it investigates, thereby diminishing its

[963] ibid.
[964] See World Bank Inspection Panel, <www.inspectionpanel.org> accessed 23 February 2012.
[965] World Bank, Inspection Panel, Operating Procedures, at V.A.31 (a)–(d).
[966] R Bisell, 'Institutional and Procedural Aspects of the Inspection Panel', in G. Alfredson & Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure*
(Kluwer Law International 2001) 107.
[967] See D Clark, 'The Rise and Fall of Accountability' (2001) 6 (3) Watershed 52-55; R Bisell, 'Recent Practice of the Inspection Panel of the World Bank' (1997) 91 American Journal of International Law; D Bradlow, 'The World Bank, the IMF and Human Rights' (1996) Transnational Law and Contemporary Problems 47-90.

independence.[968] To guarantee independence, a review panel should have full control over what it wishes to investigate in accordance with its own procedures after receiving a public request, without having to wait for the approval of a higher authotity. The power to investigate all eligible complaint should be inherent and granted as part of the mandate of such a fact finding body, this will ensure that the independence of the body is not eroded by official or adminsitative bureacracy.

Another criticism of the WBIP is that after investigating a complaint, the Panel is required to submit its findings and resolutions to the management of the Bank. The Panel does not have the power to issue an injunction, stop a project, or award financial compensation for harm suffered. The Management of the Bank reviews the Panel's findings and if it chooses to do so, the management is able to make remedial recommendations. There have been instances whereby the Management has either failed or excessively delayed implementing the recommednations of the Panel to stop a project many years after the Panel concludes its finding. This is a defect that also limits the transparency of the panel and the level of contributions it could make.[969] The lack of mandate or power by the Panel to follow through on its own investgations and findings, limits the level of contribution the panel can make towards ensuring timely relief to victims of bank projects. To ensure transparency and accountability, it is important for a supervisory body of this nature to have powers to provide relief and monitor the implementation the report of its

[968] In the 1999 Clarifications, the Board agreed to authorize investigations on a 'no-objection' basis except for in limited circumstances. Many other concerns on the lack of Bank independence were addressed in the Clarifications. See D Bradlow, ' Lessons from the NGO Campaign against the Second Review of the World Bank Inspection Panel: A Participant's Perspective (2001) ILSA Journal of International & Comparative Law 247-257.
S Suzuki & Suresh Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27 MICH. J. INT'L L. 177, 207;

[969] As Clark notes, most times the World Bank Board is overwhelmed with information and does not have a standing committee to track the implementation of action plans or to evaluate the effectiveness of remedial measures suggested by the Panel. D Clark, 'The World Bank and Human Rights: The Need for Greater Accountability (2002) 15 Harvard Human Rights Journal 220.

assessment and investigation. For example, a reformed Expert Review Team of the Kyoto Protocol or any new body set up within the CDM EB to investigate projects, should have automatic powers to stop such a project without waiting for approvals by the CDMEB, COP to the Kyoto Protocol or the UNFCCC secretariat. To further strengthen the transparency and accountability of an investigative panel, its recommendation or findings should be automatically binding on the CDM EB.

iii) Outcomes of the World Bank Panel

Since 1994, the Panel has received over 52 requests from individuals and NGOs in 31 countries on a wide variety of projects.[970] The Panel has recorded some progress in dealing with project requests and has recommended the suspension of projects that fail to comply with the World Bank's polices and procedures especially projects that involve inadequate levels of local involvement, community consultations and social and environmental impact assessments. One main strength of the WBIP is that its procedures for initating review are simplified enough to allow two or more members of the public or representatives of a community who have concerns about a project to request a review. This opens a window of opportunities for the public to seek a review of projects that violate the rules and policies of the bank concerning development projects. A great number of such projects have been stopped by the Management of the World Bank based on the recommendations of the Panel.[971]

[970] See Communities from Albania, Argentina, Bangladesh, Brazil, Burundi, Cambodia, Cameroun, Chad, Chile, China, Columbia, Congo Democratic Republic, Ecuador, Ethiopia, Ghana, Honduras, India, Kenya, Lesotho, Mexico, Nepal, Nigeria, Pakistan, Papua New Guinea, Paraguay, The Philippines, Romania, South Africa, Tanzania and Uganda have submitted project requests to the Panel. World Bank Inspection Panel, *Cases and Reports*, ibid.
[971] A Gowlland Gualtieri, *The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel* (Clarendon Press 2002) 213.

The level of progress recorded by the WBIP success shows that if the processes can be improved upon, it could serve as a guide for an international organization to monitor the implementation of projects approved under any of its programs. The Panel has been variously described as a positive move in international law to recognise individuals and non-state actors in policy and decision-making processes and to create a 'public space' where people, states and large institutions can better interact.[972] It has also been hailed for broadening of the range of actors in international law and policymaking – a stage once restricted to national governments and the bureaucracies of international organizations.[973] In 2006, the *Global Accountability Report* recommended the Panel as the 'best practice' for accountability especially for keeping its commitments of responding to all complaints brought before it.[974] Despite its shortcomings and criticisms, the framework of the Panel can serve as a guide and template on how to mainstream accountability within current climate change regimes.

There is a need to develop an innovative framework that builds on the structure of the World Bank Panel and corrects some of its flaws, by providing additional safeguards to ensure more accountability. For example for such a project review panel to be truly independent, it should have inherent powers to accept petitions and conduct an independent investigation without having to seek the approval of a supervisory board or 'management', in this case the CDM EB,

[972] See L Boisson De Chazournes, 'The World Bank Inspection Panel; About Participation and Dispute Settlement' in T Treves et Al (eds) Civil Society, International Courts and Compliance Bodies 9 Asser Press 2005) 187-203; see also K Kingsbury and Stewart, ' The Emergence of Global Administrative Law' (2005) 68 Law & Contemporary Problems 15, at 17; A Bradlow 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 Georgia J Int'l L 403, at 419. See also E Brown Weiss, 'New Directions in International Environmental Law' Address Before the United Nations Congress on Public International Law (15 March 2001); L Sohn ' The New International Law: Protection of the Rights of Individual Rather than States (1982) 32(1) American University Law Review 1-64.

[973] E Brown Weiss, The World Bank Inspection Panel: Participation and Accountability' in S Kuyama & M Fowler (eds) *Envisioning Reform: Enhancing UN Accountability in the Twenty –First Century* (United Nations University Press 2009) 271.

[974] One World Trust, *2006 Global Accountability Report: Holding Power to Account* (One World Trust 2005) 25-46.

the COP or the UNFCCC secretariat. Such requirements could reduce the independence of a review panel and its abilities to carry out its oversight and investigative funtions. The enabling rules and procedures establishing such a review panel should include automatic powers to carry out investigations on project review request or complaints from the public. Similarly, it is not enough to produce reports on the results of investigations, the Panel should be able to resolve the violations uncovered during its fact-finding and investigation by having the mandate to issue a stop order for a project that volates projects thresholds and rules.

It is imperative for international climate change regimes to establish robust guidelines and rules that would provide opportunities to monitor and investigate the human rights impacts of mitigation projects. These guidelines should include human rights indicators and a requirement for host countries and project proponents to demonstrate human rights compliance prior to project approval and during the lifecyle of a project. Guidelines alone will not be enough. Climate change regimes must also comprise governance structures through which compliance would be substantively measured. A follow up would be to expand the mandate of the Expert Review Team of the Kyoto Protocol or to establish an Inspection Panel that builds on the strength of the World Bank Inspection Panel as an independent and investigative arm within the UNFCCC for the purpose of providing people directly and adversely affected by an emission reduction project with an independent forum through which they can request a review of such projects.

2.5 Access to Justice

Access to justice refers to the availability of mechanisms, either formal or informal through which the public can seek remedies or redress for human rights violations.[975] Access to justice is one of the most important elements of an effective HRBA framework. In this thesis, we define it as the availability and effectiveness of complaint mechanisms through which the public may seek redress for human rights violation resulting from a climate change mitigation project. While accountability mechanisms deal with monitoring and inspecting projects to determine if and how they fail to comply with laid down rules, access to justice refers to available opportunities for the public to appeal against project approvals or procedures adopted in the planning and execution of a project. The relationship between both is that accountability mechanisms are also important to monitor the implementation of any decision handed out by a quasi-judicial body, project appeal board or review committee.

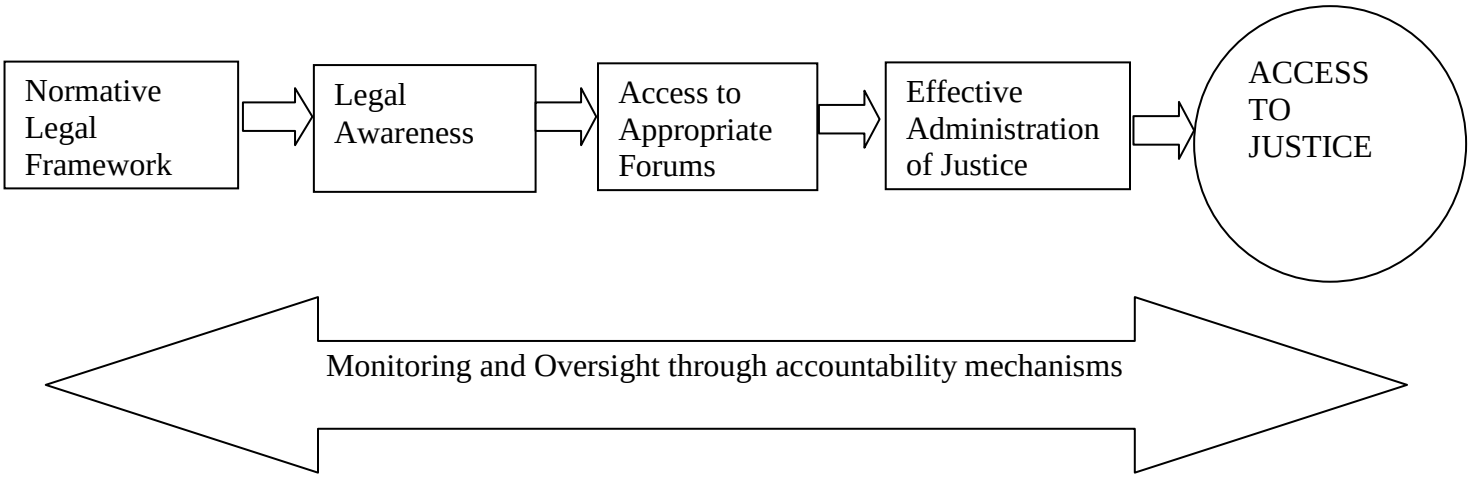
A) Elements of access

For the right to access to justice to be fulfilled, four essential elements are important: a normative legal framework; legal awareness; access to appropriate forums; the effective administration of justice. There is also a need for an efficient monitoring and oversight system for the four elements.[976] A diagrammatic representation of these elements is produced below:

[975] UNDP reckons that access to justice encompasses not only formal institutions, such as courts and administrative tribunals, but also traditional or customary ones, such as village-level dispute resolution, and coordination mechanisms among the different components in the system. UNDP, 'A Human Rights-based Approach to Development Programming' in *UNDP- Adding the Missing Link* (2002) <http://www.undp.org.fj/gold/docs/MISSINGL.PDF> accessed 10 October 2010.

[976] R Smith, 'Human Rights and Access to Justice' (2007) 14(3) International Journal of the Legal Profession 261-262; see also C Harlow, 'Access to Justice as a Human Right,' in: P Alston *et al*. (ed) *The EU and Human Rights* (OUP 1999); S Golub 'Access to Human Rights: Obstacles and Issues' (2003) International Council on Human Rights Policy 3-5.

Table 5.1: Elements of Access to Justice



Source: Chart drawn based on information contained in UNDP: A Practitioner's Guide to a Human Rights Based Approach to Access to Justice.[977]

These elements are discussed below.

i) Normative legal framework

This refers to the set of rules, procedures, and institutions that promote access to justice. It involves the development of frameworks and governance structures to ensure that people's rights are enforced and that remedies are provided in case of violations. [978] While access to justice at the national level is often tied to courts and quasi-judicial mechanisms through which citizens can seek redress for violations, access to justice at the international level is often not as straightforward. As Francioni rightly notes, there are several hinderances to individual access to international justice.[979] Primarily, access to international justice is based on specific treaty arrangements. As such, when a treaty does not include robust frameworks on access to justice,

[977] UNDP, *Programming for All*: *A Practitioner's Guide to a Human Rights Based Approach to Access to Justice* (UNDP 2005) 4-5.
[978] See J Cavallaro,'The Urban Poor: Problems of Access to Human Rights' (2003) International Council on Human Rights Policy 12; M Garling, 'Enhancing Access to Human Rights: Draft Report' International Council on Human Rights Policy (ICHRP 2003).
[979] F Francioni, 'The Rights of Access to Justice under Customary International Law' in *Access to Justice as a Human Right* (OUP 2007).

opportunities or mechanisms for individuals to seek redress under it become largely absent. This is the case with current climate change regimes, which do not establish complaint mechanisms that are accessible to individuals. Without specific provisions that allow individuals and non-state actors to file petitions or complaints before established complaints mechanisms, there would be no legal basis for the public to bring forward complaints on the local impacts of mitigation projects on human rights.

Secondly, even when access to justice is guaranteed as a matter of treaty obligation, other norms or doctrines of international law such as exhaustion of local remedies, requirments for standing, may effectively impede the exercise of such rights.[980] However, States may reduce the effects of these principles by establishing mechanisms that reduce their impacts on access to justice. For example a treaty might water down the application of the exhaustion principle by granting the complaint resolution body the discretion to determine whether the available domestic remedies provide an effective or sufficient means of redress. For example, the requirement of exhaustion of domestic remedies does not constitute a strict requirement under Aarhus.[981] The Committee is

[980] The obligation to exhaust domestic remedies has been recognized as part of customary international law. The rationale for the exhaustion rule is to afford national authorities the opportunity to prevent or put right the alleged violations. It is found in core international human rights treaties. See Art. 41. 1 (c) of the ICCPR ‘ The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter in conformity with the generally recognized principles of international law. This shall not be the rule where the application of remedies is unreasonably prolonged. The Aarhus Compliance Committee also states that any communication must specify whether steps have been taken to use the remedies available in the country in question to obtain redress in the case which is the subject of the communication (e.g. administrative or judicial review or appeals procedures operated by public authorities, courts, tribunals, ombudsperson, etc.) and if so, which steps were taken, when they were taken and what the results were. If no steps have been taken, it should be explained why not (e.g. because no remedies were available or because they were too expensive). If remedies were sought in connection with the matter, which is the subject of the communication, or in a closely related case, by a person other than the communicant, this should also be mentioned in the communication. Similarly, the communication should include information on whether the matter has been submitted to other international procedures (the steps taken, when they were taken and what were the results were).

[981] See Guidance Document on the Aarhus Convention Compliance Mechanism, <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf> accessed 12 January 2013.

empowered to consider whether the application of the remedy is unreasonably prolonged or does not provide an effective or sufficient means of redress. Also, even if a domestic remedy has not been utilised, the Committee is not precluded from considering the communication. This discretionary power under Aarhus could be a fitting template under climate change regimes to allow the public to seek remedies before an international grievance mechanism, in cases where domestic remedies are lopsided, insufficient or unnecessarily prolonged.

Requirements for standing might also be liberally established to widen access. For example traditional standing requirements that insist that the complainant must establish that the challenged action will cause him/her an actual or threatened injury-in-fact act as a normative hinderance to access.[982]. These requirements are often hard if not impossible to meet especially in cases brought by environmental groups or NGOs. Such stringent requirements limit access to justice. A better approach is an expansive approach that widens standing to allow environmental advocates and non governmental organizations (NGOs) to bring actions against activities or projects that harm the environment; not only direct harm but also indirect harm or the loss of the aesthetic or recreational value of the environment. This is the approach endorsed by the Aarhus Convention.

[982] See *Society of Plastics Industry, Inc. v County of Suffolk*, (1991) 77 N.Y.2d 761. The court held that '[i]n land use matters . . . the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large' (77 NY2d at 774). More specifically, in cases involving environmental harm, the standing of an organization could be 'established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources…' According to the court, in order to have standing, a party must demonstrate an 'injury in fact' - - an actual legal stake in the matter being adjudicated - - which falls within the 'zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted'. See also *Friends of the Earth, Inc. v Laidlaw Envtl. Servs*. (TOC), Inc., [2000]528 US 167.

Article 9 of Aarhus provides guidelines on what can be reviewed. Under this Article, the trigger for the review process is a complaint by any person who considers that his or her request for information and participation in environmental decision-making has been ignored, wrongfully refused, inadequately answered, or otherwise not dealt with. Article 9 places an obligation on parties to provide review procedures for any person who believes that his or her information request has not been properly dealt with. Parties must make a review procedure available when a person contends that his or her request for information has been ignored or wrongfully refused or the response is inadequate; or when he or she believes that the request was otherwise not dealt with in accordance with the provisions of Article 4. It also provides that states should ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive. It provides that final decisions shall be binding on the public authority holding the information.[983] These provisions seek to provide an inexpensive and accessible means for the public concerned to seek and obtain a remedy that is final and binding in nature.

Article 9 (1) also answers the contentious question of standing, i.e question on who can ask for a review. It provides that 'any person' who has requested information under Article 4 can challenge decisions. Article 4 allows ‘any member of the public’ to request information, while Article 4(2) defines the 'public' as natural or legal persons, and their associations, organizations or groups. This grants standing to a wide variety of the society falling within the definitions of the public. One of the legacies of Article 9(3) is that it provides that members of the public can file a complaint if they meet the criteria, if any laid down in national law. This encourages a broad

[983] UNECE, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.

interpretation by parties to the convention on the question of who has 'standing' to bring a challenge.

One of the strongest criticisms against Aarhus Convention is the discretion and flexibility it grants to Parties to apply and interpret its access to justice provisions as well as other provisions 'within the framework of/in accordance with national legislation'.[984] Even though this flexible approach seems understandable in view of the different legal systems and peculiarities of the various Aarhus Parties, it has not fostered a common understanding and uniform implementation of a number of the Aahus provisions.[985] For example, the implementation of Article 9 (3) has vaired from one country to another. Generally, the standing requirement in the Aarhus Convention has been applied and interpreted by Parties in three different ways.[986] First is a protective norm interpretation, which requires that in order to seek and obtain remedy before a judicial or quasi-judicial body, the applicant must show that the decision or omission affects their individual or subjective right.[987] This approach is based on the requirement of standing which requires applicants to show how that their individual rights have been affected. Under this category, an NGO must demonstrate that an action results in a breach of one of its own rights or a direct injury to its financial assets or its property. For example when an NGO's office is

[984] The term "within the framework of national legislation" also appears in Articles 4(1) and 5(2) on Access to Information. See M Mason, 'Information Disclosure and Environmental Rights: the Aarhus Convention' (2010) Global Environmental Politics 10-31.

[985] See M Lee & C Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 (1) Modern Law Review 80–108.

[986] See J Darpo, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (2012) available at < http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf> accessed 23 January 2013.

[987] Popularly known as *Schutznormtheorie* in Germany where this strict form of interpretation to Article 9 of Aarhus is popular and commonly applied. According to this theory, the State is only liable when in addition to causing an injury, it also breaches a *Schutznorm* which is a legal norm protecting a subjective public right of the injured party, and which is intended not only to protect individuals generally, but also to protect a specific section of individuals to which the injured party belongs. This theory was laid down for the first time in the case of *Vloebergh V High Authority of the ECSC* [1961] E. C.R 197. For an historical account, see H Schermers, T Heukels and P Mead (ed) *Non-Contractual Liability of the European Communities* (BRILL 1988) 6-7.

demolished to allow for a project. Under this protective interpretation, where an administrative decision with adverse effects on the environment does not directly affect the property or the assets of the NGOs, no judicial review will take place.

A second approach is the more expansive approach (*actio popularis*), which allows every individual and organizations to challenge administrative decisions and omissions without the need to prove legal standing or individual interest in the action.[988] This provides automatic standing to every member of the public to use in the interest of the public.[989] This approach has been criticized for its tendency to open a floodgate of litigation that could frustrate every governmental policy or project.[990] The third is an intermediate/ interest-based approach, which allows members of the public to demonstrate a sufficient interest and be able to challenge a decision that could result in a destruction of a resource or object to which they put to general use. A judicial review will take place where an administrative decision produces adverse effects on

[988] For example, (Art. 52(3)(a) of the Portuguese Constitution provides broad access for NGOs to review decisions and to claim compensation on behalf of the aggrieved party in order to preserve the environment. This approach is also common in Latvia, Ireland, Sweden and Belgium. See J Darpo, 'Effective Justice?: Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union (2012) <http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf> accessed 23 January 2013.

[989] This approach has received some level of judicial recognition and application in India. Public Interest Litigation (PIL) has been used to guarantee several human rights in India, including the right to unpolluted environment, health, livelihood, free and compulsory primary education, shelter, clean drinking water, privacy, legal aid, speedy trial, and access to information. See S Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 (1) Civil Justice Quarterly.

[990] A recent empirical study conducted on the impact of Articles 9 (3) and (4) of the Aarhus Convention however concludes that the availability of litigation rights for environmental NGOs contributes to the effective enforcement of environmental law under Aarhus and has not necessarily resulted in a floodgate or rise in the number of litigations in countries that have adopted the expansive approach of *actio popularis*. See *Summary Report on the Inventory on the EU Member States' Measures on Access to Justice in Environmental Matters* (Milieu Environmental Law and Policy, Brussels 2007-) available at <http://ec.europa.eu/environment/aarhus/study_access.htm.> accessed 23 January 2013.

the environment, even though it does not directly affect the property or the assets of the individual.[991]

This intermediate approach is arguably the least restrictive, yet balanced approach to standing. While it allays concerns on the likelihood of opening a floodgate of litigation under the *actio popularis* approach which grants standing to any member of the public; it also recognizes and protects instances where interests in the subject matter might go beyond direct or personal injury. For example, if a CDM project results in the destruction of a local park where I often relax every evening to gaze at nature and to meditate, even though I do not have direct interest in the park since I am not the owner, I have an indirect interest in its recreational or aesthetic use. The loss of the park could affect me emotionally and culturally; hence I should be able to challenge the continuation of such a project. This is an approach that would practically widen standing to enable individuals and NGOs to challenge a project that could violate human rights or affect the environment, even where there is no actual personal injury.

ii) Access to appropriate forums

[991] This approach has been adopted in several cases in the United States. See the case of *Sierra Club v EPA* (1972) 405 U.S. 727, at 974 (where the United States Supreme Court held that a generalized 'interest' in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's '[a]esthetic and environmental well-being' would be enough. See *Friends of the Earth v. Laidlaw* 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610, 200. In this case a FOE member averred in affidavits that he lived a half-mile from Laidlaw's facility which has now polluted the river; he noted that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned the water was polluted. The majority held that FOE had standing to sue based on the purely aesthetic values of the river. See *Massachusetts v EPA* (2007) 549 U.S. 497 in which the US Supreme Court held that State of Massachusetts has a quasi-sovereign interest and standing to sue the environmental regulatory agency for failing to prevent the emission of GHGs and climate change. See also *Environmental Services United States v Students Challenging Regulatory Agency Proceedings*, 412 U.S. 669 (1973) (*SCRAP*), In SCRAP a student group was permitted to obtain standing based on the fact that an action involved real harm to the environment, even if there might was no personal or direct harm directly traceable to the defendant's proposed action; see also *Save the Pine Bush v Common Council of the City of Albany ('Pine Bush')* [2009] NY Slip Op 07667, *Bennett v Spear* (1997) 520 U.S. 154; *Lujan v Defenders of Wildlife* (1990) 497 U.S. 871 983.

Access to justice does not stop at establishing a framework that allows for it, there is also the need to provide mechanisms aimed at aiding or assisting members of the society that cannot afford the cost of administrative review. Article 9(4) of Aarhus provides detailed guidelines on the minimum requirements and standards to ensure adequate access to justice. These include: equity, fairness, timeliness, cost effectiveness, requirements to record decisions in writing and to make decisions publicly accessible.[992] According to Article. 9(4), lack of cost-friendly access to justice is a major hindrance to adequate access. An effective justice system is that which provides access to justice even for the poor such that everyone can hold their government accountable and redress power imbalances. For example in many developing countries, even in the face of pollution, most citizens are either unable to afford a court case or are denied standing to bring such cases. This produces a multiple effect of denying justice to the oppressed members of the society. It also leads to a continuation of societal oppression and a loss of interest in the judiciary as the home for justice. An accessible grievance mechanism can enable the public to hold governments accountable where domestic remedies are insufficient or unavailable.

Though not legally binding, the Ruggie Guiding Principles on Business and Human Rights Framework also provides comprehensive definitions of an 'effective grievance mechanism'.[993] The framework advocates greater access to effective remedy, both judicial and non-judicial for victims of human rights violations arisng from businesses. According to the Framework, in order to ensure effectiveness, non-judicial grievance mechanisms, both State-based and non-State-

[992] ibid.
[993] J Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) A/HRC/17/31.

based, should be: legitimate, accessible, predictable, equitable, transparent, rights compatible, a source of continuous learning and should be based on engagement and dialogue.

The Commentaries to the Framework provide exhaustive definitions for these terms, which we shall adopt for our discussions here. For it to be rights-compatible, the mechanism must ensure that outcomes and remedies accord with internationally recognized human rights. Human rights principles must be well reflected in the procedures and modalities of a grievance mechanism such that it could effectively admit and address human rights complaints from the public. Accessibility is defined in the framework in terms of being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access. Factors that hinder access such as standing, prohibitive cost, language barriers and other procedural hinderances and must be addressed in order to provide the public adequate opportunities to come before the body. Legitimacy means it should enable trust from the stakeholder groups for whose use they are intended, and should be accountable for the fair conduct of grievance processes. Predictable relates to providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation. Equitable refers to seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms; while transparency refers to keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake. It should also be a source of continuous learning by drawing on relevant measures to identify lessons for improving the mechanism and

preventing future grievances and harms; and it should foster engagement and dialogue by consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.[994]

Most recently, scholars have suggested international investment arbitration as the 'most appropriate mode of settlement' that can provide a fair, timely, cost effective and adequate access to the public to challenge foreign investments or development projects that violate human rights.[995] Arbitration could provide non-confrontational opportunities for communities, civil societies and governments to sit together to address the intersections between an investment or project and human rights of the community. Simma argues that international investment protection and human rights are not 'separate worlds' and that investment arbitrators can be empowered to consider human rights issues arising from inyternational investments by foreign corporations. However, there are problems associated with applying human rights within foreign investment arbitration, which are not sufficently addresed by the present architecture of international investment arbitration. Problems could arise when a government refuses to submit itself to arbitration, which could be the dead end for victims. There are also problems related to the fact that most times, arbitral awards are compensatory in nature, they do not anticipate problems or provide opportunities to prevent disputes from arising or to solve future problems. An anticipatory approach would provide in-built mechanisms that would enable the public to block a project that could violate human rights even before it produces any harm.

[994] ibid.
[995] B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 584, A Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector' (2012) 11 (47) The Law and Practice of International Courts and Tribunals.

There are also epistemic concerns which Simma describes as the genetic problems associated with the fact that, the large majority of investment arbitrators have private or commercial law rather than a public law or public international law background and might thus tend to see international human rights as a potential, or probable, cause of political disturbances, intruding in their 'purely legal', autonomous field.[996] As Simma notes, one way to avoid such difficulties is through a robust framework that systematically harmonises human rights obligations into treaties to address areas of overlap. Such treaty process must also be supported by concrete institutional reforms that provide adequate human resources and capacity development for investment arbirators or non human rights experts to be able to intepret and enforce human rights obligations in cases brought before them. Through such harmonization, the problems of treating investment and human rights as two seperate worlds can be addressed, it would also help provide opportunities for access to justice and the availability of remedies for civil society in the host State of foreign investments that affect human rights.[997] This is the nature of reform proposed by this thesis. There is a need to integrate human rights and climate change regimes through a robust and holistic framework that harmonises human rights obligations into climate change regimes to address areas of overlap; allows both communities to share resourses and expertise, establish legal partnerships between both communities and also equip administrators with the requiste skills to interpret and enforce human rights standards.

There is a need to establish appropriate governance structures to implement such harmonization. Arguably, establishing public complaint mechanisms as part of international climate change

[996] B Simma, 'Foreign Investment Arbitration. A Place for Human Rights?' ibid. 584,
[997] See also F Francioni, 'Access to Justice, Denial of Justice, and International Investment Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), Human Rights in International Investment Arbitration (OUP 2009);

regimes could allow the public to seek remedies or redress for human rights violations. Such a body could be created within the UNFCCC to allow stakeholders to request review of a CDM project prior to registration (currently, only governments can request for such a review). Providing the opportunity for individuals to request a review of projects before a panel prior to approval would provide an opportunity for individuals to raise and highlight the human rights issues arising from a specific project. It would provide a preventive medium through which issues can be addressed before they produce negative effects.

There is equally the need for a project appeal boards within the UNFCCC through which individuals can appeal against the decisions to continue on-going projects. Some projects might meet all the requirements and the threshold for registration during the pre-approval stages, while the processes of their execution might turn out to produce negative environmental and human rights effects. This raises the need for post approval appeal panels, which could consider such unforeseen effects of projects. Such a panel would provide an opportunity for victims of these projects to seek their status review. The appeal panel should be created to consider such petitions arising from the continued existence of approved projects.

iii) Legal awareness

This refers to knowing the law, rights, obligations and how to access channels to resolve grievances. The UNDP describes it as the degree of people's knowledge of the opportunity to seek redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process.[998] Without the basic knowledge of the laws and the legal system,

[998] UNDP, Programming for All: *A Practitioner's Guide to a Human Rights Based Approach to Access to Justice* (UNDP 2005) 4-5.

citizens cannot demand justice even in the face of brazen and brutal injustice. As Butegwa notes, 'education and training are needed in the HRBA business as people have to know their rights so as to be able to hold duty-bearers to account'[999] The preamble to the UDHR, also declares that 'every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these right and freedoms.'

When citizens know their rights and the level of protection they can get under the human rights framework, it will provide the critical mass to fight violations. If people do not know about their rights and cannot exercise them, the fact that the human rights treaties have enshrined them will be of little practical importance. Legal awareness provides people with the knowledge and understanding of rights and legal issues, together with the skills they need to gain access to the justice systems.

There is thus a need for the design of a Human Rights Education (HRE) programme primarily aimed at citizens especially the ones at village level, to increase legal awareness, improve understanding of the judicial system and inform them of the process of seeking justice. The HRE should provide citizens with free and accessible information on the laws, legal systems and the methods for seeking help when their human rights are violated. HRE as an element of an HRBA system will assist in spreading basic information that can equip a critical mass of the population with knowledge of their human rights and how to demand government action when such rights are violated.

[999] C Butegwa, 'Enterprise Development and Poverty Reduction: The Case for a Rights-based Approach in Non-Governmental Organizations and Business' (ENDA 2005) 2.

Under the human rights based approach to climate change mitigation, the focus would not only be on informing people about their rights but would also be on sensitizing people on the nature and causes of environmental problems, how such problems violate their human rights and the options available to them for redress. As of today, a number of people (especially in developing countries) do not know the nature and causes of a number of environmental problems. For example in Nigeria, a number of citizens are not pressing for governmental policies that can enhance climate change mitigation and adaptation because they believe climate change is an act of God.[1000] A whole section of the community does not know which Ministry to hold responsible for what. Such ignorance and lack of awareness can only deny citizens the opportunities to explore institutions designed to empower them.

Human rights education could also be beneficial to policymakers and administrators. In order to effectively adopt the HRBA, HRE is essential so that staffs can be familiar with human rights standards, including human right laws and their monitoring and implementation mechanisms.[1001] For example, climate change administrators within the UNFCCC that have little or no experience or training on human rights would need a high level degree of training and education on human rights in order to understand how to apply and implement human rights in their areas of work.

iv) Effective administration of justice

[1000] A great number of Nigerians also understand climate change in terms of change in weather pattern, thus they complain of 'climate change' when rain does not fall or when they get too much rainfall. See This Day, 'Nigeria: Citizens See Climate Change as an Act of God' < http://allafrica.com/stories/200903120056.html> accessed 11 March, 2010.

[1001] Hamm illustrates this with the example of an expert from the German Ministry of Economic Cooperation and Development (BMZ), who notes that development experts in his ministry lack knowledge of human rights and thus they are not in a position to implement the HRBA. See B Hamm, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005-31.

For the public to feel protected, there is a need to establish a process that guarantees access to justice.[1002] Effective administration of justice relates to removing every identifiable barrier to justice when projects clearly violate human rights, and providing remedies or compensations for victims of such violations. The UNDP notes that the HRBA would aim to remove barriers that have been observed to hinder the enjoyment of human rights.[1003] These barriers include long delays; prohibitive costs of using the system; lack of available and affordable legal representation that is reliable and has integrity; formalistic and expensive legal procedures; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees. It also includes the severe limitations in existing remedies provided either by law or in practice as most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.

To ensure the effectiveness of established complaint mechanisms, they must be accessible to everyone including the poor and marginalized in the society including women, children, poor and uneducated people who are often marginalized in decision making processes for mitigation projects that could affect them. Emerging regimes could place an obligation on parties to demonstrate that adequate legal assistance is readily available to members of the public that cannot afford the cost of enforcing their rights before the public complaint boards. Emerging regimes could also allow non-governmental organizations to bring joint actions on behalf of the affected communities. Finally, there is need for the creation of an international monitoring group

[1002] See S Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) Carnegie Endowment for International Peace 2-3.
[1003] UNDP, *Programming for All*: *A Practitioner's Guide to a Human Rights Based Approach to Access to Justice* (UNDP 2005) 4-5.

to ensure that after registration and approval, the execution of projects are in line with approved standards and do not create unanticipated problems.

3. Conclusion

This chapter examined the normative contents of the five inter-connected human rights norms and principles, which form the core of the HRBA framework: access to information (ATI); participation; accountability; equality and non-discrimination; and access to justice. These elements form the crux of an approach that could help anticipate, prevent and avoid the human rights consequences produced by current and future climate change projects.

Mainstreaming these human rights norms into extant climate change regimes could arguably reduce the level of oppositions that climate change projects face from the public as it would afford them an opportunity to be involved at every stage of the project cycle from planning to execution. It would also allow for transparency in the process of approving and implementing mitigation projects. Adopting the HRBA to climate change projects would mean providing project approval guidelines and threshold that would stipulate that any project proposal that does not guarantee or satisfy these requirements would not be approved no matter how many tonnes of emission reductions it could generate. This could ensure that climate change mitigation is done without violating the rights of the public. To mainstream these norms into existing climate change regimes, there is a need for legal and institutional reforms that allow for an easy and effective human rights mainstream process.

In the next chapter I examine the question of 'how', *i.e.* how can these human rights norms be mainstreamed into current international climate change regimes, what are the legal and institutional frameworks required? I discuss the 'web' of institutionalisation necessary to

translate human rights mainstreaming into practice. I examine and discuss a legal and institutional framework that could assist in moving the idea from theory to practice.

CHAPTER SIX:

IMPLEMENTING THE HUMAN RIGHTS BASED APPROACH TO CLIMATE CHANGE MITIGATION: LEGAL AND INSTITUTIONAL FRAMEWORK

6.1. Introduction

Developing these conceptual formulations and standards on human rights mainstreaming is only a part of the task. Other essential questions relate to the mechanisms to be put in place to carry through those standards. How the concepts would be operationalized and translated into concrete action plans; how progress would be monitored and evaluated; and what further action would be taken in the case of unsatisfactory progress are the questions that must be answered. This is the focus of this chapter. This chapter discusses the legal and institutional frameworks required to implement the HRBA to mitigation as discussed in this thesis.

6.2. A legal framework for implementation: a minimum legal threshold for projects approval

To mainstream human rights norms into climate change regimes, there is the need for a project approval framework that would ensure that actions, measures or projects that do not guarantee or satisfy the requirements of accountability, access to information, participation, equality and access to justice would not be approved no matter how many tons of emissions reductions could result from such measures or projects. Therefore, there is a need for a legal framework that sets out the modalities for enforcing the linkages between climate change and human rights. This framework would provide in concrete terms, rights based modalities for project approval and the human rights conditions that must be met before projects can be approved. This would be by establishing a minimum human rights threshold for project approval and registration. This legal threshold would lay down the levels of protection for individual human rights, which would be

regarded as the minimum acceptable outcome under a given project or policy scenario.[1004] The framework would also set out modalities that contain this threshold levels that should not be breached either directly by the climate change itself or as a result of policy measures or emission reduction projects. The framework would also be the basis to grant supervisory bodies such as the CDM Executive Board, the Kyoto Compliance Mechanisms and the UNFCCC Secretariat, the powers and mandate to consider human rights issues and to enforce this threshold.

For a rights based reform of existing climate change regimes, there is a need to establish a clear legal threshold or performance standards that project proponents must meet before project approval and registration. Such performance standards (threshold) would emphasise the importance of an integrated assessment to identify the human rights impacts, the impact on social and environmental issues and the overall risks of projects; the importance of effective community engagement through disclosure of project-related information; consultation with local communities on matters that directly affect them; and the need for project proponents to manage and disclose the human rights concerns and social and environmental performance of a project throughout the life of the project.[1005] Establishing a legal threshold under international climate change regimes would provide clear guidelines that projects are required to meet before they could be approved, registered and recognised for the purpose of gaining emission credits under the flexible mechanisms. A clear legal threshold at the international level could also spur reform at the national level as it could serve as guidance on what policymakers should look out

[1004] On the importance of a legal threshold, see S Caney, 'Climate Change and Injustice: A Human Rights Perspective' (2008) Journal of Global Ethics. See also S Caney, 'Cosmopolitan Justice, Responsibility and Global Climate Change' (2005) 18 Leiden Journal of International Law 747–775; S Caney, 'Global Justice, Rights and Climate Change' (2006)18(2) Canadian Journal of Law and Jurisprudence 255-278; See also ICHRP, *Climate Change and Human Rights: A Rough Guide* (International Council on Human Rights Policy 2008) 18.

[1005] See International Finance Corporation, 'Performance Standards on Social and Environmental Sustainability' 30 April 2006, Performance Standard 1, Social and Environmental Assessment and Management Systems. Para. 2. 24.

for in order to design a balanced and rights based policy response and when designing projects for climate change adaptation and mitigation.

In this part I propose a six-part legal threshold that should serve as the minimum core content of a reformed rights based climate change regime: The project eligibility screen, sustainable development screen, human rights impact assessment, stakeholder identification and consultation, information disclosure system and project review mechanism. The threshold addresses the need for a pre-project analysis of any mitigation project to ascertain its nature and the manner in which it would be planned and executed.

6.2.1 Pre-project eligibility screen

This test illustrates the need for a detailed description and analysis of a project proposal to ascertain the nature, objectives and likely impact of the project. Preliminary questions here would include whether the nature and scope of the proposed project raises any conflict with local priorities, the nature of technology involved in the proposal, the proposed location of the project including the criteria for site selection; and whether it could potentially affect the quality of the environment of the proposed location. To effectively answer these questions there is a need for a detailed environmental impact assessment early on in the project planning stages. For example, current CDM Rules do not provide for a compulsory EIA if the host country does not have specified requirements for them.[1006] It also makes EIA imperative 'if the project has the potential for a negative environmental impact'. This requirement leaves a gap for project proponents to exploit, particularly as it leaves the definition of a project that has a potential negative impact in

[1006] See CDM Modalities & Procedures, 3/CMP.1 (2005) <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf> accessed 12 July, 2011.

the hands of national authorities. This has resulted in a situtation whereby once the DNA says the project does not have any negative environmental impact, it would go ahead. There is a need for mandatory EIA for all projects at the planning stages. This would help shed light on the nature of the project and its likely social and environmental effects.

The results of the pre-project analysis should be included in a comprehensive project description document (PDD), which would amongst other things detail the purpose and nature of the project; the likely short and long-term environmental impact, and alternative measures to reduce the impact. The nature of information to be disclosed will include a detailed description of physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions; the size, pace, reversibility, and scope of any proposed project or activity; the duration of the project and/or activity; the locality of areas that will be affected; a preliminary assessment of the likely economic, social, cultural, and environmental impact, including potential risks; a description of the measures envisaged to prevent and/or reduce the effects, including emissions in line with the precautionary principle; a description of personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees, and others); and procedures that the project may entail; information as to whether that the activity is subject to a national or transboundary environmental impact; a non-technical summary of the foregoing information and an outline of the main alternatives studied by the applicant; the main report and advice issued to the public authority at the time when the public concerned shall be informed of the proposed activity.[1007] Information on projects and policies would also need to be completely disclosed.

[1007] See Article 6(6) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October, 2001) No.

The pre-project analysis of project location would also help identify with precision the various stakeholders who may be affected by a project. This would help to identify options for a project location with the least impact. For example, if this analysis is done early on at the planning stage, we can then find out, how many people would lose their homes due to this project? This data would help with the decision as to whether there is a need for an alternative site location for the project and how to re-settle or compensate those who would be inevitably affected.

6.2.2 Sustainable development screen

Under this requirement, the goal would be to balance the two objectives of the Kyoto Protocol so as to avoid projects that lead to trade-offs and the sacrifice of sustainable development for emission reduction. The Kyoto Protocol set out to achieve two main objectives with the project based mechanisms: emission reduction and sustainable development (SD). For example Article 12(2) of the Kyoto Protocol identifies two specific goals for the CDM: (a) to assist developing countries in achieving sustainable development, (b) to assist industrialized countries in complying with their emissions reduction commitments, and to contribute to the attainment of the environmental goals of the Framework Convention.[1008] The question here is, to what extent has the CDM led to emission reductions and the attainment of sustainable development as promised by the Kyoto Protocol? According to Olsen, there is no consensus on whether one

37770; see also Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the *United Nations Permanent Forum on Indigenous Issues (*UNPFII) at its Fourth Session in 2005.

[1008] Conference of the Parties to the Framework Convention on Climate Change, *Kyoto Protocol*, 10 December 1997, U.N Doc. FCCC/CP/1997/L.7/add.1, 37 I.L.M. 22 (1998).

instrument can achieve both GHG emission reduction and sustainable development.[1009] The CDM has not, and may not be able to guarantee both emissions reductions and sustainable development because of the many trade-offs between achieving emission targets at all cost and real sustainable development that have become noticeable in many of the approved CDM projects. Examples include the cases highlighted in this thesis. State efforts and policy measures aimed at achieving progress in climate change mitigation should not conflict with respect for human rights.[1010] For example the protests and petitions surrounding the current implementation of Kyoto's project based mechanisms suggest that they have not guaranteed both emission reduction and sustainable development as promised in the Kyoto Protocol. Most sustainable solutions are not necessarily the most cost-effective as they often require new and more expensive technologies. Thus, projects that may lead to cleaner air, fewer emissions, and better health require new and costly technologies, while the affordable and less costly projects may not have meaningful and sustainable impacts on the host country of the project.[1011]

Consequently, developed countries have so far had to choose, between investing in projects involving expensive and new technologies which could lead to greater sustainability; or settling for cost effective projects that lead to emission reductions but that do not lead to real and lasting sustainable development for the host country. Many developed countries have settled for the

[1009] See K Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development-A Review of the Literature' <http://www.cd4cdm.org/Publications/CDM&SustainDevelop_literature.pdf.>(accessed 12 March 2011).

[1010] See C Figueres, 'Sectoral CDM: Opening the CDM to the Yet Unrealized Goal of Sustainable Development' (2006) 2(1) McGill International Journal of Sustainable Development Law & Policy; see also C Streck and J Lin, "Making Markets Work: A Review of CDM Performance and the Need for Reform" (2008) 9 (2) European Journal of International Law 409-42. See also S.D Cohen, `Climate Change and Sustainable Development: Towards a Dialogue` (1999) Global Environmental Change 341.

[1011] The term 'Host Country' refers to the country where a project is located or carried out while the industrialized country carrying out such a project is described as the project proponent. See M Lee, ed., *CDM Information and Guide Book* (UNEP 2004).

latter.[1012] For example, wind power, although more expensive, has no significant environmental side effects and is as such more attractive in terms of sustainable development. However it is not often pursued because of its cost.[1013]

As Seroa da Motta noted, when a cleaner technology, with more cost and more sustainable development prospects will result in the same level of emission reduction as a dirtier and cheaper technology that has adverse environmental effects and lesser sustainability, there is a tendency for most developed countries to settle for the most cost effective project, irrespective of its sustainable development prospects and its long-term effect to the host country.[1014] Commenting on this trade-off, Sutter notes that no registered CDM project is likely to fulfil the Kyoto Protocol's two-fold objectives of delivering GHG emission reduction and contributing to sustainable development at the same time.[1015] According to Sutter:

> …we see a clear tendency of the CDM, to deliver likely emission reductions but not to contribute towards host country's sustainable development. The portfolio is dominated by a few large projects with a high likelihood to reduce emissions but no relevant contribution to host countries' sustainable development. This is evidence that the trade-off in the current CDM between the two objectives is done strongly in favour of the cost-efficient emission reduction objective, resulting in neglecting the sustainable development objective...[1016]

The current trade-offs are attributable to the fact that a number of developed countries are attempting to generate cheap credits without being mindful of the sustainable development and human rights implications. Taking the Panama project as an example, while the project is

[1012] See A Olhoff, *CDM Sustainable Development Impacts* (UNEP Risoe Center on Energy, Climate and Sustainable Development undated) 10.
[1013] ibid.
[1014] R Seroa de Motta, 'Brazil: CDM Opportunities and Benefits' in D Austin and P Faeth, *Financing Sustainable Development with the Clean Development Mechanism* (World Resource Institute 2000) 2-4.
[1015] C Sutter, `Does the Current Clean Development Mechanisms Deliver its Sustainable Development Claims` (2005) HWWA Report 1.
[1016] ibid. at 13.

appealing from a cost-benefit perspective; it is not as appealing from an environmental and human rights perspective. The negative environmental impacts of the project, coupled with the attendant human right impacts, make this project the least attractive in terms of sustainable development. These trade-offs are also manifest in the other examples described in this thesis.

Similarly, failure to enforce sustainability in CDM projects can be attributed to the lack of capacity and technical knowledge in some countries on how to effectively set standards for SD and how to measure progress. As Kimura *et al* rightly note:

> there is a strong concern that many projects in the region without many SD benefits are getting registered, and that the application of SD criteria has been lax at both national and international levels. It is widely felt that DNAs in some countries still lack the capacity to set appropriate SD criteria, and that the national governments fail to recognise the opportunity to integrate the CDM into the national SD agenda and engage the private sector in the CDM.[1017]

So far, the CDM Executive Board has not developed or utilised sustainable development criteria and frameworks that would guide countries through the process of setting SD standards for projects. Instead, the Board relies on the decision and determination by the host country that the project meets its sustainable development standards. This has led to a situation whereby states in a bid to attract projects lower sustainable development standards and approve all manner of projects as meeting their sustainable development standards, including projects that produce adverse environmental and human rights effects. The need for avoiding this sort of trade-off in future climate change regimes cannot be over emphasised. Generating credits through projects that harm the environment and violate fundamental human rights, would be tantamount to transferring problems from one sector to another.

[1017] H Kimura, A Srinivasan & K Iyadomi, 'Clean Development Mechanism' in A Srinivasan *et al, Asian Aspirations for Climate Regime beyond 2012* (Institute for Global Environmental Strategies 2006) 36.

There is therefore a need for the CDM EB to carry out a thorough analysis of current experiences gained with CDM projects to inform and establish detailed sustainable development criteria that would serve as common guidelines on how to measure the SD impact of a project. This unified standard would impose a form of quality control on all market-based projects to avoid the current situation whereby such decisions are taken solely by the host governments. A common sustainability standard must be placed at the heart of a new climate change regime as a condition that must be met before projects can be registered for credits.

The indicators for assessing sustainability as discussed in this thesis embody the balancing of the two complementary pursuits that are often portrayed as opposing: emission reduction and respect for human rights. It is necessary to expound these indicators as necessary criteria that a project must meet before it can be approved under the sustainable development threshold. By exploring the main linkages between projects and their impact on the economic, environmental and social pillars of SD (which includes respect for human rights), countries can design and select projects that are associated with the largest development benefits.[1018] Examples of factors to be demonstrated under each indicator include:

i) *The economic criteria*: For a project to be considered sustainable, it must lead to financial returns and profits to local entities, increased investments in priority sectors, generation of local employment opportunities, a positive balance of payments and technology transfer.[1019] A project must lead to an improvement in economic activities in the host country and should add to the

[1018] See UNFCCC, 'Benefits of the Clean Development Mechanism 2012' available at <http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf>; A Olhoff, *CDM Sustainable Development Impacts*, (UNEP Risoe undated) 17.

[1019] See K Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development-A Review of the Literature'2 < http://www.cd4cdm.org/Publications/CDM&SustainDevelop_literature.pdf>assessed 12 March 2011.

economic development of the host country. As Olhoff notes, projects that do not encourage positive economic returns in the host country are unsustainable.[1020] A project should also result in the transfer of clean and cost-effective technologies that replace dirty technologies in the host country.[1021]

ii) *The social criteria*: A mitigation project should produce increased social benefits, equity and improved quality of life in the host country. Climate change projects must encourage investments in projects that alleviate the sufferings of the host country by providing social infrastuctures that were non-existent or inefficient in the host country. Examples include improved access to clean, affordable and sustainable water supply; improved transportation through projects that emphasise efficient transportation and less reliance on fossil fuels; improved health facilities and services through transfer of up to date and energy efficient technologies; and improved power supply through the transfer of alternative energy sources such as solar panels, wind projects, clean cook stoves and hydro electric power projects. It must also foster greater community participation, reduction of wealth disparities and increased capacity building and trainings.

Similarly, the UNFCCC has recently identified respect for human rights as part of social criteria of development. The UNFCCC takes an expansive view of sustainable development by classifying: respect and consideration of the rights of local/indigenous people and community or local/regional involvement in decision-making, as part of the social indicators of sustainable

[1020] A Olhoff, *CDM Sustainable Development Impacts* (UNEP Risoe undated) 17-18.
[1021] R Bruneau, 'Maximizing Benefits from the Clean Development Mechanism: Developing Country Supply of Carbon Sinks and Technological Transfer Projects' (2006) International Environmental Affairs, 6.

development.[1022] It attempts to merge the long recognised linkages between the right to development and respect for human rights. This interpretation which embeds the respect for human rights as part of social development must be reflected in emerging climate change regimes.[1023] Under this test, mitigation efforts must not result in the violation of human rights of the public. As such, any project that produces human rights impacts or does not positively improve the quality of life for the citizens of the host country cannot be adjudged as leading to sustainable development.[1024]

iii) *The environmental criteria*: This is arguably the most important criteria of all. Projects should lead to progress in environmental issues, including reduction of GHGs and the use of fossil fuels, reduced air and water pollution, conservation of local resources, reduced soil erosion from deforestation, improved health and reduced pressure on local environments.[1025] Emission reduction projects must result in genuine emission reductions and an improvement in the quality of the environment in the host country.[1026]

[1022] UNFCCC, 'Benefits of the Clean Development Mechanism 2012' <http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf> accessed 21 March 2013.

[1023] See the 2009 United General Assembly Resolution (A/RES/64/236 which also describes economic development, social development and environmental protection as interdependent and mutually reinforcing pillars of sustainable development,http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/475/99/IMG/N0947599.pdf?OpenElement

[1024] ibid. On how CDM cook stoves can help housholds in Nigeria, see UNFCCC, **'**New Proposed Methodology: Switching to Biomass Residues as the Fuel Source for Individual Stoves' (2009) <http://cdm.unfccc.int/methodologies/PAmethodologies/publicview.html?meth_ref=NM0307> (accessed 12 August 2012). See also UNFCCC, 'Improved Cooking Stove for Nigeria' <http://cdm.unfccc.int/ProgrammeOfActivities/poa_db/7R1B09HSJV3FKIZYCA4D6XQOETP5GN/view> (accessed 12 August 2012).

[1025] K Olsen, The Clean Development Mechanism's Contribution to Sustainable Development-A Review of the Literature 6-7 <http://www.cd4cdm.org/Publications/CDM&SustainDevelop_literature.pdf> accessed 12 March 2011.

[1026] ibid. See also L Schneider, 'Is the CDM fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for improvement' (2007) Report prepared for WWF. Berlin: Öko-Institut.

A number of organizations and project verification agencies have also developed the sustainability standard on voluntary basis to provide guidelines on what project proponents must demonstrate under each indicator. For example the Gold Standard Foundation – an internationally recognised project verification agency has developed a comprehensive set of indicators for a sustainable development screen.[1027] To obtain a Gold Standard Certificate, all project proponents are 'required to demonstrate that their project activities will have clear sustainable development benefits through a Detailed Impact Assessment'. All project proponents are required to assess the risk that their project activities will have a severe negative environmental, social and/or economic impact through a 'Do No Harm' Assessment.[1028] Projects that fail to satisfy the Gold Standard requirements on sustainability are rejected by the Foundation. The Gold Standard achieves a high quality standard by using the three sustainable development indicators for assessing projects in what it calls a 'sustainable development matrix'.[1029]

It is pertinent for emerging climate change regimes to incorporate the sustainable development screen as a mandatory threshold to be met by project proponents. Any project that does not lead to the above benefits in a developing country cannot be rightly described as leading to

[1027] The Gold Standard Foundation was established in 2003 by the World Wildlife Fund (WWF), it provides certification standards for carbon mitigation projects and is recognized internationally as the benchmark for quality and rigour in both the compliance and voluntary carbon markets. The Foundation certifies renewable energy and energy efficiency carbon offset projects to ensure that they all demonstrate real and permanent greenhouse gas (GHG) reductions and sustainable development benefits in local communities that are measured, reported and verified. The Gold Standard certification has been endorsed by more than 80 NGOs worldwide, including the United Nations. To be eligible for Gold Standard certification, projects must: employ renewable energy and/or energy efficiency technologies; adhere to the strictest standards on additionality and positively impact the economy, health, welfare and environment of the local community hosting the project. See the Gold Standard Foundation, <http://www.cdmgoldstandard.org/about-us/who-we-are> accessed 12 March 2012.

[1028] The Gold Standard Foundation, *Gold Standard Eligibility Requirements* (2009) <http://www.cdmgoldstandard.org/wp-content/uploads/2011/10/GSv2.1_Requirements-11.pdf> accessed 12 March 2012).

[1029] ibid.

sustainable development and should not be approved.[1030] The criteria for sustainable development interact with human rights. The linkages between human rights and sustainable development have been increasingly recognized.[1031] As such, most of the current inequities generated by current projects often point to the fact that they are not sustainable projects and do not meet these sustainable development threshold set out in the foregoing. It can be argued that if a project satisfies the entire elements of the sustainable development threshold, there would be a diminished probability for such a project to generate human rights concerns.

Table 6.1 ***Sustainable Development Criteria***

SOCIAL DIMENSIONS	**ECONOMIC DIMENSIONS**	**ENVIRONMENTAL DIMENSIONS**
Improvement of quality of life	Provision of financial returns to local entities, employment	Reduction of GHG emissions and the use of fossil fuels; reduced air and water pollution
Poverty reduction	Positive impact on balance of payments	Conservation of local resources and reduced pressure on local environments
Improvement in community participation and equity issues, capacity building, health access.	Transfer of environmentally sound technologies (ESTs)	Meeting local renewable energy portfolio standards and other environmental standards

[1030] See A Olhoff, *CDM Sustainable Development Impacts* (UNEP Risoe undated) 17-18.

[1031] For a most recent attempt to link human rights and sustainable development, see the Statement of the UN High Commissioner where she notes that `Strategies based on the narrow pursuit of economic growth without due regard for equity and related environmental, social and human rights considerations, will both fail in their economic objectives, and risk damaging the planet and the fundamental rights of people` See OHCHR, `Pillay urges states to inject human rights into Rio+20`(18 April 2012) http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12070&LangID=E (accessed 21 April 2012). See also N Pillay, `Open Letter by the United Nations Human Rights Commissioner` (30 March 2012), available at http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf accessed 14 April 2012, 2; UNFCCC, 'Benefits of the Clean Development Mechanism 2012' <http://cdm.unfccc.int/about/dev_ben/ABC_2012.pdf> accessed 21 March 2013.

The sustainable development screen would ensure that projects that potentially could have an adverse social, economic and/or environmental impact are not approved or registered for emission reduction credits under the climate change regimes.

6.2.3 Human Rights Impact Assessment (HRIA)

This threshold would require project proponents to flag the likely impact of a project on fundamental human rights and to demonstrate or describe the efforts put in place to mitigate or avoid these results. The Ruggie Framework calls it the need for business enterprises to carry out 'human rights due diligence' or a 'human rights risk assessment' before executing projects.[1032] This would include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Different mitigation projects are likely to affect certain rights more than others and in different ways. For example hydropower projects may result in flooding of farmlands and neighbouring houses. This would violate several human rights including subsistence rights where crops are destroyed, a violation of the right to property where the reservoir floods homes or the right to health where the flooding causes transfer of diseases. A REDD+ project may not necessarily produce the same human rights consequences. A REDD+ project is more likely to violate the rights of indigenous communities to use lands for cultural and religious purposes and the right to

[1032] According to the Framework, in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence which: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve. J Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Res/ A/HRC/17/31, para. 17.

food. It is therefore important to identify with precision through a self-reporting system the human rights that would likely be affected by a project and the measures that would be taken to avoid these impacts.

Through a Human Rights Impact Assessment (HRIA) project proponents could systematically identify, predict and respond to the potential human rights impact of a climate change project or policy.[1033] The HRIA is different and more comprehensive than 'human rights auditing' that has been suggested in the literature.[1034] The key questions under a HRIA are: what human rights concern does this project raise or could it raise, what groups are likely to be affected by these human rights concerns; what specific rights are affected by this project or policy and what efforts would be taken to address these issues in the process of project design and implementation. An HRIA would provide clear and comprehensive answers to these questions to avoid any element of surprise or secrecy in project implementation. The HRIA goes beyond only evaluations or human rights auditing in that, it identifies the areas of overlap between human rights and a project, and also identifies holistic solutions and methods for avoiding the identified human rights impacts.

[1033] S Walker, 'Human Rights Impact Assessments of Trade-Related Policies', in M Gehring and M Claire Cordonier-Segger, *Sustainable Development in World Trade Law* (Kluwer Law 2005) 217–256.

[1034] Simma suggests a system of Human Rights Audit, that would be a joint undertaking of foreign investors and host States, to survey the host State's human rights treaty commitments especially in the field of economic and social rights and methods for implementing such commitments (such as doctrines of incorporation or transformation. According to Simma, the ultimate result of conducting a 'human rights audit' would be a better definition of the landscape of the foreign investor's 'legitimate expectations' in a way that would not leave excessive *ex post* discretion to arbitrators, should investor–host State disputes arise in the future. On the one hand, foreign investors would be able to better estimate and prepare for alternative scenarios of regulatory measures which the host State might take to vindicate its economic and social human rights obligations, and on the other, host States would not be unduly constrained from defining their public policy agenda as a result of investment protection guarantees within foreign investment contracts and their corresponding treaties. As Simma notes, " human rights audit would not be the same as'human rights impact assessments'which is of a much broader scope, very detailed and fact-intensive and spanning inter-disciplinary approaches". HRIA goes beyond evaluating human rights instruments or measuring compliance, it includes on-the-ground assessments of human rights issues in a project and providing holistic solutions on how to avoid unintendeded impacts. B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 595-596.

The earliest call for HRIA emerged in 2001 in respect of trade agreements. In its resolution 2000/7, the Sub-Commission for the Promotion and Protection of Human Rights requested the High Commissioner for Human Rights to undertake an analysis of the human rights impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) of the World Trade Organization (WTO).[1035] The High Commissioner was called upon to examine how TRIPS Agreement could affect the enjoyment of several rights – in particular the right to health, food, development, and the human rights of indigenous peoples. The report of the High Commissioner demonstrated how the TRIPs agreement could affect human rights especially the right to health and discussed the need for HRIA mechanisms to be mainstreamed into the TRIPs and into national trade policies. In 2011, the UN adopted the Ruggie Framework, which amongst other things gives a mandate to business enterprises and multinational corporations to ensure non-infringement of human rights principles by conducting human rights 'due diligence'.[1036] This due diligence approach has been developed to include the conduct of a compulsory HRIA for project proponents to 'know and show' that they respect human rights.

In March 2012, the United Nations Special Rapporteur on the right to food, Olivier De Schutter, unveiled a set of seven guiding principles on human rights impact assessments in relation to trade and investment agreements.[1037] According to the Special Rapporteur, these guiding principles are intended to provide States with guidance on how best to prepare an HRIA and how

[1035] United Nations, 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' Report of the High Commissioner E/CN.4/Sub.2/2001/13.
[1036] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Res/ A/HRC/17/31, para. 17.
[1037] OHCHR, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' <http://www2.ohchr.org/english/issues/food/docs/20110701Draft_Guiding_Principles_on_HRIA.pdf> accessed 23 February 2012.

best to ensure that the trade and investment agreements are consistent with their obligations under international human rights instruments.[1038] He notes:

> States have been provided with little guidance as to how such human rights impact assessments should be prepared, what is specific to a human rights impact assessment (as distinct, for instance, from sustainability impact assessments or social impact assessments), and how the conduct of human rights assessments relates to the undertakings of States under human rights treaties…The guiding principles are intended to provide such advice, they are also intended as an operational tool that may be useful for human rights treaty bodies and the special procedures of the Human Rights Council, to the extent that their mandate includes assessing the consistency of trade and investment agreements with the human rights undertakings of States. Since the preparation of human rights impact assessments is a way for the State to discharge its human rights obligations, by ensuring that it does not conclude agreements that make it more difficult or impossible for the State to comply with such obligations, it is recommended that the process of preparing human rights impact assessments be stipulated in legislation, rather than left to the ad hoc choices of the Executive.[1039]

HRIAs would help assess the impact of policies and projects, which are not specifically designed with human rights in mind, so they can improve the proposal to reduce potential negative human rights effects and increase the positive ones.[1040] HRIA would complement other impact assessments such as the EIA and the sustainability screen. Its main difference is that it would be framed by appropriate international human rights principles and conventions to demonstrate how a project could affect the recognised human rights of stakeholders and how best to directly provide a leeway to those peoples whose rights may be at risk. A HRIA would help to produce comprehensive analyses that show a direct link between a project activity and how it might affect human rights. It takes a project-by-project approach to aid a quick understanding of the current

[1038]See Human Rights Impact of Trade and Investment Pacts (27 February 2012) <http://www.twnside.org.sg/title2/wto.info/2012/twninfo120211.htm> accessed 23 March 2012.
[1039] OHCHR, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' <http://www2.ohchr.org/english/issues/food/docs/20110701Draft_Guiding_Principles_on_HRIA.pdf> accessed 23 February 2012.
[1040] ibid

situation and issues and the human rights impact both now and in the future. It also helps to shed light on measures that could be taken to avoid any anticipated impact.

HRIA would also require project proponents to demonstrate the fair distribution of projected risks. It would help to assess the implications of projects for low income people, the representation afforded to such categories in decision-making and ways to protect the interests of the marginalized through project re-design or alternative mitigation plans. It would make it compulsory for project proponents to demonstrate that a particular section of the society is not exceptionally disadvantaged by a project before saidproject could be approved. By developing concrete risk assessment procedures to ensure better characterization of risk across populations, communities, or geographic areas Measures would then be put in place to reduce high concentrations of risk among specific population groups.

Table 6.2 ***HUMAN RIGHTS IMPACT ASSESSMENT***

What human rights concern does this project raise or could it raise?	Example: Are there possibilities of: flooding, air and water pollution, some levels of noise in the project construction and operational phase, mass displacements of people from their homes, loss of access to drinking water, loss of arable farmlands, risks of spillage or explosions?
What groups are likely to be affected by these human rights concerns	What municipality, town or local government would feel these impacts the most?; Which members of this locality stand to suffer the most consequences from this project e.g. farmers, fishermen, traders or school teachers? State specifically that if (i) above occurs, the following rights could be affected in the process, for example, 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 of indigenous

	peoples to the conservation and protection of the environment of their lands and resources, the right to self-determination, the right to safe drinking water and sanitation, and the right to subsistence
What specific rights are affected by this project or policy	Have the public concerned been consulted through the FPIC process
What efforts would be taken to address these issues in the process of project design and implementation?	Have alternative routes or designs that avoid some of these problems been considered for the project What procedures have been put in place to provide redress or compensations for the victims of the inevitable effects of the project

To be effective, a HRIA should be initiated as early as possible, at the project planning and design stages. Conducting a HRIA should be incoporated as a pre-condition for project approvals. This would ensure that any human rights impact would be put into consideration in planning and designing a project. It would also provide sufficient time for policymakers and project proponents to avoid the known consequences of a project. Where the impact assessment indicates the possibility of potential human rights violations, it provides time for the project design to be revised to remove any incompatibility that has been found with pre-existing human rights obligations of the State concerned. This will prevent a situation whereby violations are detected only after a project has been commenced or completed. It provides an opportunity to anticipate and respond to the likely impact of a project on the human rights of citizens and stakeholders.

Not every possible impact of a project can be anticipated at the planning stage. As such, *ex ante* human rights impact assessments should be complemented by human rights impact assessments performed *ex post*, once the effects can be quantified. Human rights impact assessment should be

regarded as an iterative process, taking place on a regular basis, for instance, every three or five years. Safeguarding clauses should be included to ensure that, should such *ex post* assessments lead to the conclusion that the State is unable to comply with its human rights obligations under the project scenario, registration for such projects would be re-appraised and if necessary withdrawn.[1041]

It is pertinent for climate change regimes to establish HRIA as a mandatory requirement for the approval and registration of climate change mitigation projects. HRIA would enable project proponents to identify who may be affected; to catalogue the relevant human rights issues; to project how the proposed mitigation project and activity could have adverse human rights impacts on those identified and to develop alternative approaches to avoid such problems. An effective HRIA would also enable project proponents to pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and to bear in mind the different risks that may be faced by the poor and marginalized communities, women and other vulnerable groups.

6.2.4 Information disclosure system

This threshold would make it mandatory for project developers and national authorities to establish public disclosure programmes that allow for easy and cost effective dissemination of project information. This would include the need to place mandatory public disclosure requirements on project proponents and on national governments to publish on a regular basis, all information related to a project including new risks and challenges; even when citizens do not

[1041] See OHCHR, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' <http://www2.ohchr.org/english/issues/food/docs/20110701Draft_Guiding_Principles_on_HRIA.pdf> accessed 23 February 2012.

specifically make requests for such information. Information disclosure does not end at the planning stages, as mitigation projects move from one stage of development to the other, information is most likely to change with new facts emerging and some previous project information becoming outdated. There is thus a need to establish a comprehensive information management system that allows the public to receive the latest and most up to date information about approved projects. This information would enable the public to assess if projects are environmentally sound or if they have become harmful at some point along the line.

Disclosure of relevant project information on an ongoing basis helps affected communities understand the risks, impact and opportunities of the project. As such, this threshold would require public bodies to do more than accede to requests for information. They must also actively publish and disseminate key categories of information that are of significant public interest. Public bodies are to publish and disseminate widely, documents that are of significant public value and interest, for example, information about how the public body functions and the content of any decision or policy affecting the public.[1042] This places a duty on governments and project developers to run disclosure programmes that allow individuals to gain regular access to publicly held information. This could be by keeping a public database or by releasing periodic documents on governmental affairs. The aim is to reduce the culture of secrecy in governance and to ensure that the right to information is not only reactive, but also proactive. Project developers must demonstrate that they have established a system of publishing information *suo motu* (proactively) on their own volition. The requirement here is to publish and inform citizens about known hazards relating to a project as soon as such information is available even when members of the

[1042] See Report of the Special Rapporteur, 'Promotion and Protection of the Right to Freedom of Opinion and Expression' UN Doc. E/CN.4/2000/63, 18 January 2000.

public have made no request. It takes access to information one step further by placing an obligation on custodians of publicly held information which is vital and important to the people, to publish it *suo motu.* Examples of project information that should be constantly released through public disclosure programmes include operational information, budgeting and costs, information on complaints, procedures for public input, and the details of decisions taken regarding issues affecting the public.[1043]

Emerging climate regimes must place obligations on parties to promote and facilitate the provision of all available information on mitigation projects to the public; and to ensure that the public have access to up-to-date information. The process of obtaining information should not be so tedious and complex; neither should it be designed to frustrate and discourage individuals from seeking publicly held information. As such, public bodies responsible for handling requests must process all requests for information quickly and fairly. Unnecessary and duplicative procedures and administrative bottlenecks that complicate the process must therefore by removed to make access easier and less demanding. Similarly, the cost of access to information should not be so high as to deter requests. By establishing cost effective disclosure programmes, the public are encouraged to seek and obtain publicly held information. Generally, parties must also put in place institutions and procedures that facilitate and simplify the processes of obtaining public information. This can be done by publishing project updates on dedicated websites, sending periodic emails and newsletters to subscribing members of the public concerned, through radio, television documentaries and photos. It also includes delivering project

[1043] ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (1999): <http://www.article19.org/pdfs/standards/righttoknow.pdf> accessed 12 May 2012.

information in the appropriate language and format understood by locals and in a way that such information reaches the most remote and rural communities.

Part of the information management system is for project developers to promote a culture of openness by providing for public education and dissemination of information regarding their rights to access project information, the scope of information available, and the manner in which the right can be exercised. This is different from the requirement to publish as it makes clear the need to promote public awareness on the existence of this right and how it can be enforced. Establishing an information system would be meaningless if people are not aware of their rights, and of the existence of on-going projects and policies and how to access more information about them. This element imposes an obligation on national governments to provide relevant information and awareness on the institutions that are in charge of public information and the processes for accessing such information. To meet this requirement, it is pertinent for governments to design public awareness programmes about the existence of the project information system and the institutions through which this right can be accessed. Educational and public awareness programmes are to be developed especially for women, children and the least educated so as to provide them an equal opportunity to be aware of important issues concerning projects and measures that might affect them.

As discussed earlier, one practical challenge to administering public disclosure programs based on these standards is the cost and resources involved. To reduce the costs and resources required to establish and maintain public disclosure programs, it is pertinent for national authorities to leverage on already existing structures and resources of different government programs and

institutions. For example, many countries already have Freedom of Information Laws, which establish information access offices and programs. There is a need to reflect on the flaws of these national programs and how to improve them, such that ATI rights can be protected during the execution of mitigation projects. This will include strengthening or reforming inefficient institutions in line with the discussed ATI standards to make them better prepared to administer public disclosure programs. Designated National Authorities would also serve as the focal point to coordinate information disclosure for mitigation projects from different overlapping national institutions that are custodians of pertinent project information.

6.2.5 Stakeholder identification and consultation

The question that project proponents must answer under this threshold is 'have all key stakeholders been identified and consulted?' The first part of this test highlights the need for project proponents to demonstrate that all key stakeholders have been identified during the project analysis stage. This goes back to the question of expanding the definition of the public in the current CDM Rules to include two categories of the public who should be considered as key stakeholders and who should participate in decision-making, project planning and implementation.[1044] They are: the specific public concerned (individuals, landowners, community leaders, historically marginalized groups of women; and youths, corporations and other business organizations); and interested stakeholders (representatives from non-governmental organizations and interests groups).[1045] For example, the Aarhus convention defines the public as 'one or more natural or legal persons and, in accordance with national

[1044] See C Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) Journal of African Law 184-211.

[1045] See Article 2 and 4 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770. See also See C Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) Journal of African Law 184-211.

legislation or practice, their associations, organizations or groups'.[1046] Article 2(5) of Aarhus also states that the public concerned means 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.[1047] This thesis argues for an expansive definition of the public to include both: the 'specific public concerned' by a project and 'interested stakeholders'. This will comprise individuals, landowners, community leaders, corporations and other business organizations, and representatives from non-governmental organizations and interests groups. This thesis posits that these are members of the public that should take part in and influence decision-making processes on the design and approval of mitigation projects such as CDM projects.

Project proponents must demonstrate that they have identified the 'public' i.e. specific public concerned that will be affected by the impact of a project, and 'interested stakeholders' who have interests in or are concerned about the project or activity in question. The need to properly identify the key stakeholders cannot be over emphasised. Some of the complaints in current CDM projects are that project proponents only liaise and discuss with some stakeholders, leaving out others. There is also the issue that project proponents and governments at times liaise with people who are not considered representatives of the community or who do not have the mandate of the community in decision-making. When dealing with representatives of the community, it is pertinent to verify their status and mandate as elected representatives of the public. This test also requires the participation of all members of the public affected by a decision irrespective of social status or societal strata. It would mandate the representation of all significant sectors of the

[1046] See Article 2(4) of Aarhus Convention. ibid.
[1047] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.

society at the decision table.[1048] It requires that citizens collectively and cooperatively analyse and discuss a problem with the view of proposing solutions.[1049]

The second test here is whether the identified members of the public have been duly consulted and whether their free prior and informed consent (FPIC) has been obtained?. This should constitute a minimum legal threshold that must be demonstrated before a project is approved or registered. The FPIC standard on participation must be fully adopted as the requirement for good participation as opposed to mere ticking of a box or consultation. The FPIC would require that consent be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question.[1050]

For FPIC to be effective, the affected public must be given timely information about the project description and must be provided adequate opportunities to take part in and to influence the decision-making process. This would include: providing a common platform for everyone to participate, either by choosing a suitable venue or strategic locations for meetings; by providing free mass transportation for the poor; ensuring participation by members of vulnerable groups such as women and minorities; hiring language interpreters for locals who cannot speak the common language, and by reducing technicalities in discussions. Technological advancements

[1048] See J Poiser, 'A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation' (1996) 26 Envtl. L. 53 at 83.
[1049] See J Hartz-Karp and M. Briand, 'Institutionalizing Deliberative Democracy' (2009) 9 Journal of Public Affairs 127.
[1050] See UNEP, *UN-REDD Programme Guidelines on Free Prior Informed Consent* (UNEP 2012) 7. See also M Colchester & F MacKay, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent* (Forest Peoples Programme 2004) 8-14; A Perrault, K Herbertson and O Lynch, 'Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)' (2007) 19 (3) Georgetown International Environmental Law Review 477.

could also be used to provide opportunities for online participation through webinars, online surveys and questionnaires.[1051]

To avoid practical challenges to implementing a genuine participatory process, national authorities must streamline the processes in line with national peculiarities. For example, to avoid a stuation whereby powerful NGOs and interest groups hijack or frustrate a consultative process, a way forward is to carry out an initial survey of the relevant questions and information that are to be discussed and to arrive at an agenda for consultative sessions as early as possible in the process. This could be by identifying key members within the community to assist with collecting information. The criteria decided by the community would form an agenda for a participatory process. The agenda will provide a template for focused discussions and would lay down fair and transparent rules on the processes and voting methods to be adopted for decision-making. This would guide against deviations or unneccessary bickering. Selecting the appropriate facilitative role for the DNA, in line with local circumstances would also be important. It must be decided whether the DNA should play an interactive, inclusive or interpretive role.[1052] Selecting the appropriate role for the DNA would go a long way to reduce

[1051] For detailed discussions on the value of e-rulemaking, see S Novek, 'Electronic Revolution in Rule Making' (2004) 53 Emory L. J 434; see also C Coglianese, 'Citizen Participation in Rule Making: Past, Present and Future' (2006) 55 Duke L.J 943; A Fung and E Olin Wrights (eds) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso 2003).

[1052] A participatory session is *interactive* if the facilitator plays only the role of gathering the stakeholders to a neutral venue and observing the decisions taken. In this approach, the facilitator is not involved in the process, it only listens, gathers facts and takes note of the final outcome and the decisions taken. It is *inclusive* if the facilitator becomes a member of the group and provides options and inputs on outcomes that could be adopted by the group. The interpretive mode is the middle ground where the facilitator presents its idea to the group and then becomes an outsider in order to allow the group to explore it, review other options and then make up its own mind on how to proceed. Each of these approaches has its peculiar strengths and suitability. It is important for the DNA to select its roles in deliberative sessions in line with local circumstances. Over the course of a deliberative process, different approaches could also be adopted at different stages. For example at the beginning, the DNA might play an inclusive role and then step aside at the decision making stage to reduce pressures on local communities with respect to the final outcome and decisions to be taken. See generally, N Sen, *Beyond Participatory Rituals: Strengthening Citizen Monitoring in Dharali* (UNESCO 2012) 11-12.

tensions with NGOs who due to previous experiences and mistrusts, might also have mutual suspicions that the DNA might hijack and frustrate the process. Generally the most important point is that the decision to go ahead with the project or not to, must reflect the popular opinion as expressed in the deliberative process.

6.2.6 Project Review Mechanisms

Under this threshold, adequate mechanisms for project review and grievance redress must be in place both by international supervisory bodies for mitigation projects, and through internal redress mechanisms established by project proponents and host countries. This will include access to a project review committee or panel prior to project approval and registration; and the establishment of a project appeal committee or Board to address emerging complaints about approved or registered projects. A project review mechanism is necessary to provide a chance for stakeholders who have legitimate concerns or whose rights might be affected by a project to raise their concerns and have them addressed prior to registration. It would enable project proponents to address any claims that affected persons may have early in the project planning stages. This would provide an opportunity for a remedy before disputes become inflamed. A review mechanism would make it possible for grievances to be identified, addressed and remediated early before they result in human rights violations.

Since it is impossible to precisely anticipate all the likely human rghts impacts of a project, there is a need to establish redress or grievance mechanisms that could provide remedies for impacts that appear after approval or registration. Grievance mechanisms would also provide redress for members of the public who have been denied access to project information, participatory

opportunities, or whose other human rights have been violated by project proponents. Once grievances are identified, grievance mechanisms make it possible for such complaints to be addressed at the earliest opportunity before it escalates.

Generally, as new project information emerges, new human rights issues could crop up too. As such, it is not enough to only provide updated information on projects; it is pertinent for project proponents to provide a project complaint and review platform for stakeholders to establish complaints that have arisen especially after the initial consultations. Currently, the CDM Rules contain no requirements that provide key stakeholders the opportunity to request a review of projects before or after registration. This has created a culture of 'approvals' whereby different projects that evidently touch on the human rights of host communities still inexplicably get approved and registered by the CDM EB. This gap underscores the need for a right-based reform of current climate change regimes.

A practical approach would be to establish project review panels that would get feedback from stakeholders on projects and to consider if and how these projects could affect them. For example the mandate of the current Expert Review Teams (ERTs) of the UNFCCC can be expanded to investigate complaints about projects. Currently the ERT only investigates emission reduction reports, inventories and methodologies submitted to Parties to ensure accuracy. A reformed ERT or a new investigative arm would be at the forefront of examining how projects designed to attain emission reductions are affecting the host communities. Such assessments can be through household perceptions, opinion surveys or a simple questionnaire, for example 'do you think the Kwale Project violates or could violate human rights?' Such feedback would allow

the UNFCCC to monitor climate change actions and projects designed by Parties to ensure they do not result in human rights consequences. It would also provide a chance to demand human rights enforcements from Parties and to prevent human rights violations.

Apart from reforms to governance stuctures within current climate change regimes, project proponents and host countries should also establish their independent grievance mechanisms that would allow them to assess and understand the concerns of host communities and to provide adequate compensations as soon as such complaints occur. For example the World Bank introduced a requirement for project proponents and clients to establish a grievance mechanism as an element of community engagement by the project sponsor.[1053] This mechanism is part of the requirements of the Performance Standards on Social and Environmental Sustainability. According to this standard, if the project proponents anticipate ongoing risks to or adverse impacts on affected communities, the client will establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about the client's environmental and social performance. According to the World Bank, the grievance mechanism should be scaled to the risks and adverse impact of the project. It should address concerns promptly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, and at no cost and without retribution. The mechanism should not impede access to judicial or administrative remedies and the project proponents are to inform the affected communities about the mechanism in the course

[1053] International Finance Corporation, 'Performance Standards on Social and Environmental Sustainability' 30 April 2006, Performance Standard 1, Social and Environmental Assessment and Management Systems, para 23., <http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf > accessed 12 March 2012.

of its community engagement process.[1054] This standard established by the World Bank is a good example of how projects proponents and host countries can establish internal control mechanisms to address human rights impacts of projects. Climate change regimes could make such internal control mechanisms part of the threshold to be met or demonstrated by project proponents before project registration and approval.

The above six-part legal threshold sets the levels of protection for individual human rights that should be regarded as the minimum acceptable outcome to be demonstrated by project proponents under any given project or policy scenario. Taking human rights seriously in climate change regimes would mean that any project that does not meet this threshold should not be approved or registered under the international climate change regimes. In addition to meeting the requirements of this threshold, project proponents should be strongly encouraged to comply with applicable national laws, including those laws that implement host country obligations under international law. It is important for emerging regimes to adopt these requirements in order to effectively harmonize human rights obligations as part of climate change responses.

This threshold would represent a move from the current needs-based approach to climate mitigation where human rights only come to the table when there is a problem; to a transformative, empowering and process-oriented approach. It also presents a holistic, long-term and anticipatory process through which human rights are systemically integrated into all measures and projects aimed at combating climate change. By requiring project proponents to demonstrate that this threshold has been met, a far-reaching obligation is placed on project proponents to consider the direct and indirect impacts of a particular project on the enjoyment of

[1054] ibid

existing human rights. Project proponents are placed under the spotlight to demonstrate how they have anticipated and avoided the likely human rights, social, economic and environmental impacts of a given project. This threshold also provides a platform for stakeholders to demand their rights and to be involved in project planning and decision-making. This is the heart of a human rights based approach; an opportunity to redress inequitable power relations by reconciling human rights and development. It provides a chance to identify at every stage of project planning the human rights claim-holders, the corresponding duty-bearers and the process through which right holders are able to claim their rights and through which duty-bearers are compelled to fulfil their responsibilities.

6.3. Mobilizing Structures: Institutional Framework

Identifying an operational framework through human rights principles that may be mainstreamed into the processes for designing and approving climate change mitigation projects is only a part of the mainstreaming process. There is also a need to examine the institutional requirements and governance structures needed to implement these human rights mandates. Article 7(2) (i) of the FCCC empowers the COP to establish such subsidiary bodies as are deemed necessary for the implementation of the Convention.[1055] Similarly, Article 13 (4) of the Kyoto Protocol empowers the CMP to establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol. Arguably, these powers can be evoked by the COP/CMP to establish bodies or

[1055] Other bodies have been set up by the COP to undertake specific tasks. These bodies report back to the COP when they complete their work. For example, the COP 1 established two ad hoc groups: the Ad hoc Group on the Berlin Mandate (AGBM) and the Ad hoc Group on Article 13 (AG13) (1/CP.1 and 20/CP.1). Other specialized bodies with a limited membership have been established to address specific areas, namely: the Expert Group on Technology Transfer (EGTT), the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (Consultative Group of Experts, or CGE); and the Least Developed Countries Expert Group (LEG). Other constituted bodies include the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) which are two permanent subsidiary bodies established under the Convention and also serve the CMP; the Clean Development Mechanism (CDM) Executive Board; Supervisory Committee to verify emission reduction units (ERUs) that are to be transferred and acquired according to Article 6 of the Kyoto Protocol and the Compliance Committee.

structures that would respond to and deal with human rights issues arising from mitigation projects. In this part, I identify and discuss the institutions or bodies that are required to implement the rights-based reforms proposed in this thesis.

The UNFCCC, Kyoto Protocol, as well as the CDM Rules all fail to establish complaint mechanisms and procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed, to seek redress, to block the approval of such projects or to seek the review of already approved projects. Currently, only governments or three CDM Executive Board members can request a review of projects under the CDM rules.[1056] As expected, States that have approved projects would be unlikely to instigate such a review. The result is that stakeholders whose rights are violated do not have any way to request review of a CDM project prior to registration. This creates a one-way mechanism in which the decision of the State is final and most often rubber stamped by the international supervisory body. It freezes out the common citizen whose fundamental human rights might be repressed by the home state and the repression endorsed by the UNFCCC. The lack of participation by citizens and stakeholders in project implementation is a violation of one of the most important international human rights standards and principles.

For a rights based reform of these loopholes, I identify and discuss four complementary institutional reforms that are required to move the idea of mainstreaming within the context of international climate change regimes from theory to practice: establishing a new human rights and climate change unit (HRCU), reformed CDM Executive Board; project review panel; a reformed compliance committee.

[1056] CDM Modalities & Procedures, 3/CMP.1 (2005).

6.3.1 Human rights and climate change unit (HRCU)

One of the very first institutional prerequisites for effective mainstreaming is the need to appoint and mandate a lead agency that will be the focus for identifying and safeguarding human rights issues in climate change mitigation measures or projects.[1057] The lead agency would serve as the institutional focal point within the UNFCCC that would spearhead the essential reforms necessary for integrating human rights norms with climate change action plans and measures.

To forge a stronger alliance between human rights and climate change epistemic communities and to enhance cooperation between human rights and climate change institutions, there is a need for a body at the international level that would bring together the approaches and issues from the two spheres. Article (7) (2) (l) of the Convention provides that the COP shall seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies. This provision is also contained in Article 13 (4) (i) of the Kyoto Protocol, which empowers the CMP to seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies. These provisions empower the COP and CMP to coordinate with and leverage on the robust institutional support, services and guidelines from international human right organizations and inter-governmental bodies such as the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Human Rights Council (UNHRC).

[1057] See United Nations, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf> accessed 12 October, 2010; UNESCO, 'Guidelines for Human Rights-Based Programming Approach' Executive Directive 1998-004; UNFPA, 'Core Concepts of a Human Rights Based Approach' (2010) <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/introduction.pdf> accessed 15 July, 2011.

There is a need to trigger these provisions by establishing the HRCU to serve as a linking point to reinforce the linkages between climate change and human right regimes and to create a platform that allows for the easy and coordinated sharing of good practices with these bodies. We agree with the observations of the UN Secretary General that:

> …There still remains a need for a body that brings together the key developed and developing countries to address the critical inter linkages between human rights and the environment, trade, finance, the handling of pandemic diseases and economic and social development. To be effective, such a body must operate at the level of national leaders…[1058]

Similarly, Shue has argued that any institutions to protect the rights threatened by climate change must be international. Such that when a national government fails to carry out its duty to protect human rights, international supervisory bodies can provide remedies for individuals.[1059] In the light of the emerging evidence that a number of developing countries have either failed to address the impacts of mitigation projects on the human rights of their citizens, or worse still have sometimes cooperated with project proponents to entrech such violations, then the responsibility to address these concerns and to protect the rights violated by climate change mitigation projects must fall to the international institutions on climate change.[1060]

[1058] Report of the UN Secretary General's High-Level Panel on Threats, Challenges and Climate Change (2004) <http://www.un.org/secureworld/report2.pdf> accessed 12 July 2012.

[1059] H Shue, 'Human Rights, Climate Change, and the Trillionth Ton' in Denis G. Arnold (ed.), *The Ethics of Global Climate Change* (CUP 2011) 292.

[1060] Shue's argument is premised on the emerging Responsibility to Protect (R2P) framework that has been popularised by the United Nations since 2005. It consists of an emerging norm, or set of principles, based on the idea that sovereignty is not a right, but a responsibility and that if a state fails to protect its citizens from human rights violations and mass atrocities, and peaceful measures have failed, the international community has the responsibility to intervene through coercive measures. Even though the R2P focuses on preventing and halting four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing, its underpinning notion of international intervention when national governments fail to protect their citizens from human rights violations may provide support for the need to incorporate protective measures and mandatory threshold into international climate change regimes to prevent human rights violations and repressions by national governments.

It is therefore pertinent for a special human rights and climate change unit (HRCU) to be established within the UNFCCC as the focal point or lead agency that will spearhead and implement rights based reforms under the climate change regimes. The HRCU would be an international focal point that would spearhead the necessary reforms aimed at bringing human rights and climate change issues to the fore. It would lead efforts to ensure that policy measures and projects aimed at mitigating climate change do not violate fundamental human rights. The HRCU would serve as the bridge that would bring together key stakeholders from the different international organizations, non-governmental organizations and human rights groups relevant to climate change mitigation and adaptation. Mainstreaming human rights to international climate change regimes would require coordination between the OHCHR, the Human Rights Council on the one hand and UNDP, UNEP, UNFCCC and the COP/MOP to the Kyoto Protocol (CMP) on the other hand. This coordination is important to maximize the available resources, expertise and experience of these specific agencies and to avoid duplication of roles. The HRCU would bring together these key agencies, identify areas of priorities and distribute resources accordingly. It would also identify the key structures or resources that can be tapped from existing institutions and ways to avoid an institutional overlap in the areas covered by these agencies.

The HRCU would also design and establish an evaluation procedure that adopts the minimum legal threshold to assess the contribution of the prospective projects to the overall goals of the climate change regimes and to international human rights. It would ensure that all the relevant impact assessments are carried out for all projects designed and implemented for emissions reduction credits. It would spearhead further and continuous research on how climate change

policies intersect with human rights and how these intersections can be recognised and managed within the UNFCCC regimes.

The HRCU would be positioned to provide the capacity development and training required for the human rights mainstreaming process. It would provide means for the dissemination of information and building the essential constituency of support for the mainstreaming effort. The HRCU would provide information and advice for national governments and project proponents on how to mainstream human rights norms to project and policy design at the national level. It would be responsible for communicating the process required for a right-based approach to national authorities and project proponents and other stakeholders responsible for designing climate change policies and projects.

To achieve these, the HRCU would create special reporting mechanisms such that parties can demonstrate in their climate change reports that the policy measures adopted by them do not violate human rights. The HRCU would also serve as the monitoring agency that would oversee the works of the main supervisory bodies under the climate change regimes such as the CDM Executive Board and the compliance committee to ensure that human rights are respected and enforced within their scope of activities. The HRCU would ensure that only policy measures and projects that respect, protect and fulfil human rights are approved and registered under climate change regimes.

For the HRCU to function effectively there is a need for proper staffing and capacity development. Since the mandate of the HRCU would include evaluating human rights impacts of

climate change responses and designing policies on human rights and climate change, there is a need to appoint international human rights experts and individuals who have experience and training in human rights compliance and enforcement into the agency. The UNFCCC secretariat as it currently stands largely comprises environmental scientists and international development experts who cannot (for the purpose of accuracy) be described as human rights experts or members of the human rights epistemic community. It is therefore doubtful if the current UNFCCC secretariat has the capacity to accommodate such a complex transformation that requires deliberating on human rights issues. As such, for the UNFCCC to properly integrate human rights issues into its scope and mandate there would be a need to appoint people with training and experience in human rights into the secretariat. This would ensure that human rights and human rights instruments are understood, internalized, implemented, and enforced.[1061]

There is also a need for continuous human rights education (HRE) for administrators within the UNFCCC. As the UN General Assembly recognises, if human rights norms are to be reflected in the works of all UN entities, then HRE is needed to serve as a bridge in knowledge for all UN staffs and development practitioners in general.[1062] In line with the newly minted United Nations Declaration on Human Rights Education and Training which emphasises that human rights education and training is essential for the 'promotion of universal respect for and observance of all human rights and fundamental freedoms for all', it is pertinent for HRE to be emphasised as part of the overall human rights mainstreaming strategy.[1063] Article 7 (4) of the declaration provides that States, and where applicable relevant governmental authorities, should ensure

[1061] See J Knox 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 (2) Harvard Environmental Law Review 477-498.
[1062] A/HRC/RES/16/1
[1063] ibid.

adequate training in human rights and, where appropriate, international humanitarian law and international criminal law, of State officials, civil servants, judges, and law enforcement officials, as well as promote adequate training in human rights for teachers, trainers and other educators and private personnel acting on behalf of the State. Article 11 also provides that:

> The United Nations and international and regional organizations should provide human rights education and training for their civilian personnel, and military and police personnel serving under their mandates.[1064]

In order to effectively adopt the HRBA, HRE is essential so that UNFCCC staff can be familiar with human rights standards, including human right laws and their monitoring and implementation mechanisms.[1065] Through a high-level 'Training-the-Trainers Program' staffs of the secretariat that have not acquired direct and specific training on human rights could be enlisted for short courses and advanced training on human rights instruments. This would provide some basic knowledge necessary to understand and handle mundane human rights issues arising within the secretariat; and also equip them with the knowledge to train national authorities on human rights mainstreaming. For example, the advanced international certificate course on 'Mainstreaming Human Rights', which has gained increased recognition in recent years, could be a good background course for such practitioners.[1066] It could provide some level of training and general education on human rights and on how to apply human rights norms. It would help to prepare 'outsiders' within the UNFCCC for the tasks and challenges of mainstreaming human rights. Other short courses, in-house training, workshops and webinars can equally help foster a deeper understanding of the contours of human rights mainstreaming

[1064] ibid.
[1065] Hamm illustrates this with the example of an expert from the German Ministry of Economic Cooperation and Development (BMZ), who notes that development experts in his ministry lack knowledge of human rights and thus they are not in a position to implement the HRBA. See B Hamm, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005-31.
[1066] Course 1T09: Mainstreaming Human Rights, See < http://www.hrea.org/index.php?doc_id=676> accessed 12 May 2012.

thereby reducing the gap in knowledge between the human rights epistemic communities and the perceived outsiders.

Generally, a lead agency in the mould of the HRCU would be important for mainstreaming to be effective. Without establishing a lead agency with the specific mandate of coordinating climate change programmes and policies in a way that identifies the striking linkages between human rights and climate change; there is the risk that efforts aimed at recognising these linkages could remain uncoordinated, overlapping and conflicting. By establishing this lead agency, the UNFCCC would be sending a strong message to countries to equally address the possibilities of achieving strong inter-governmental linkages and ministerial cordinations between agencies, departments, ministries and parastatals that are responsible for designing climate change response measures and projects, so as to ensure a legal partnership between human rights and climate change communities.

6.3.2 Reformed CDM Executive Board

The Durban Mandate has given an early signal that the CDM would continue to be part of future climate change regimes.[1067] The CDM is therefore poised to remain a major mechanism for carbon offsets and for project-based mitigation. It is therefore pertinent to address many of the current problems facing the current CDM to enhance its efficiency and to reduce the tensions surrounding it. To achieve this, the starting point would be to reform the CDM Executive

[1067] See the Durban Mandate for Enhanced Action, Conference of the Parties, Seventeenth Session (Durban, 28 November to 9 December 2011) FCCC/CP/2011/L.10; see also EAEM, 'Historic or Hollow: These are the Durban Outcomes' (2011) <http://www.eaem.co.uk/news/historic-or-hollow-these-are-durban-outcomes> accessed 12 May 2012.

Board.[1068] The CDM reforms described here would also be useful in shaping other supervisory bodies responsible for overseeing and registering emission reduction projects under current or emerging international climate change regimes.[1069]

For example, the current CDM Board has no mandate to investigate human rights abuses and to reject a project on the basis that it violates human rights. Current CDM Rules place the responsibility to address human rights and sustainable development issues on the host government of the project.[1070] Placing such a crucial decision in the hands of a country that is interested in such projects has led to the approval of all sorts of projects, even the ones that lead to loss of life and the violation of human rights. States have been more concerned with hosting climate change projects at all costs, irrespective of the human rights consequences of such projects.[1071] As such, there have been increased tendencies to lower sustainability standards and to encourage foreign CDM projects despite their potential short and long term effects on human rights enjoyment.[1072]

The crux of the rights based approach is to prevent human rights violations in project implementation. As such, the most effective entry point would be through the body that registers

[1068] The CDM Executive Board (EB) is vested with the responsibility of approving and registering CDM projects. See The CDM Modalities and Procedures, para.5, and para. 36, see also UNFCCC, 'The CDM Executive Board' <http://cdm.unfccc.int/EB/background.html> accessed 10 April 2011.

[1069] For example the Joint Implementation Supervisory Committee (JISC), which is responsible for supervising that emission reductions projects and activities under Joint Implementation (JI), meet the relevant requirements of Article 6 of the Kyoto Protocol and the Joint Implementation Guidelines.

[1070] See The Response of the CDM Executive Board to the Petition, <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf > accessed 02 August, 2011.

[1071] See CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> accessed 23 July, 2011.

[1072] M Jung, 'Host Country Attractiveness for CDM non-sink projects', *Energy Policy* (2006): 2174; A. Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' *HWWAReport* 255 at 1; K. Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature', <http://cd4cdm.org/Publication/> accessed 21 January 2011.

these projects in the first place. A preventive approach is to empower the CDM Executive Board to reject projects that do not demonstrate compliance with international human rights law irrespective of the demonstrated emission reduction potentials of the project. This would require the Executive Board to play an important role in providing avenues for challenging projects that do not adequately fulfil the requirements of the identified minimum legal threshold.

A starting point therefore would be for the COP to expand the mandate of the CDM Executive Board by vesting the Board with powers to refuse registration for projects that violate human rights. The CDM Executive Board should be empowered to exclude projects that fund human rights abuses from the CDM. This role could be performed by adopting the six-part legal threshold identified in this thesis into the CDM Rules. One of the elements of the discussed legal threshold is the need for a compulsory human rights impact assessment without which a project would not be registered. A reformed CDM Executive Board should have the mandate and powers to reject projects that fail to meet any of the identified criteria under the HRIA.

Similarly, the grounds for review under the current CDM Rules would have to be modified to include human rights impacts as part of the validation requirements. Currently, the CDM Rules provide that the review by the Executive Board shall be made when the review request is related to issues associated with the validation requirements.[1073] However, human rights impact assessment is not listed as one of the validation requirements. The CDM Executive Board (EB) could include the threshold identified in this thesis as a core element of the validation requirements.

[1073] Para. 41, CDM Modalities and Procedures.

The EB would also need to expand the terms of reference of the Designated Operational Entities (DOEs), such that only projects that meet the human rights criteria are validated and brought before the EB for registration. It is important for the CDM Executive Board to mandate DOEs to ensure compliance with human rights requirements in the process of validating projects. As DOEs are more involved in the details of the projects, they would be best placed to ensure that validated projects comply with the legal threshold described here. This would consequently require DOEs to also include HRIA as one of the indicators to assess while validating projects. The CDM EB would have to ensure as part of its oversight functions that accredited DOEs have the capacity and human resources to perform this function.

There is also the need to provide elaborate rules on the constitution and membership of the EB to safeguard and ensure impartiality, transparency and accountability. The current rules have led to a situation whereby certain EB members also hold positions as UNFCCC and Kyoto Protocol negotiators for their countries.[1074] This creates conflicts of interests and reduces the transparency of the EB. To ensure transparency, individuals with no link to member states should be appointed to the EB. It is especially important for CDM EB members to be appointed and remunerated as officials of the UNFCCC during the term of their membership of the board.[1075] Similarly, an EB member should be disqualified from participation in the hearing and investigation of any project in which they have a personal interest or a significant involvement in any capacity with the project proponents or state.

[1074] See C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) (19 (2) Eur J Int Law 409-442.
[1075] See for example, the World Bank Inspectional Panel, para. 10 of the Operating Resolution. See Resolution No. IBRD 93-10, Resolution No. IDA 93-6 "The World Bank Inspection Panel"

There is also the need to create a balanced mix in environmental and human rights expertise in the membership of the EB. The current CDM Rules simply provides that members of the EB shall possess 'appropriate technical and/or policy expertise'.[1076] For the EB to effectively mainstream human rights principles into its project registration and eligibility requirements, there is a need for it to be properly constituted to include human rights experts not only technical or policy experts. It would be helpful to clarify what the exact constitution of the panel would be in terms of expertise, how many human rights experts, how many policy and technical experts. This would ensure that at every sitting of the Board, all the areas of expertise would be represented.

Crucial to the reform of the CDM Executive Board is the need for the board to establish a grievance mechanism or procedure for receiving and dealing with requests for project review prior to registration and approval. This would enable the EB to receive and facilitate the resolution of the affected stakeholders or communities' concerns and grievances about the human rights, environmental and social impacts of a project prior to the registration of the project. This could be by appointing members of the EB into an ad-hoc project review committee to deal with and make decisions on a project review request. The nature and role of the panel are discussed in what follows.

3.3 Project Review Panel

The current CDM Rules fail to establish complaint mechanisms and procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects. Currently, only governments or three CDM Executive Board members can request a

[1076] Para. 8 (c) of the CDM Modalities & Procedures.

review of projects under the CDM rules.[1077] As expected, States that have approved projects would be unlikely to instigate such review processes. The Kyoto Protocol does not also confer the CDM Board with the authority to hear appeals from members of the public whose rights might be affected by a project, even in cases such as the Aguan gas project where several petitions were received which indicated significant infringements of human rights. This creates a one-way mechanism under which the decision of the State is final and most often rubber stamped by the international supervisory body. It freezes out the common citizen whose fundamental human rights might be repressed by the home state and the repression endorsed by the UNFCCC. The lack of participation by citizens and stakeholders in project planning and implementation is a violation of one of the most important international human rights standards and principles. The CDM Rules should be modified to allow stakeholders to request a review of a CDM project after the receipt of the request for registration and prior to registration.

Apart from the COP establishing a project review committee or panel, it is equally important that the rules of procdure for such body must be as simplified as possible to allow for easy access. Pursuant to Article 7.2(k) of the Convention, the COP shall 'agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies'. The Rules of Procedure to be established for the review panel must be simple and expansive so as to ensure that any group of individuals or community affected by a project (including NGOs) can approach it for investigation simply by submitting a request or complaint. To simply the procedure of the project review panel, its rules should avoid any technicality or excessive requirements on the

[1077] Para 41 of the CDM Modalities and Procedures provides that: 'The registration by the Executive Board shall be deemed final eight weeks after the date of receipt by the Executive Board of the request for registration, unless a Party involved in the project activity or at least three members of the Executive Board request a review of the proposed CDM project activity'. See CDM Modalities & Procedures, FCCC/KP/CMP/2005/8/Add1.

form of a petition. To make the panel accessible to the less educated peasants in many developing countries, a handwritten petition or report should be sufficient to trigger a review process.

Rules on admisisbility of petition should also be widened and simplified. A simplified procedure would be able to admit a petition whenever the following three requirements are met. An individual or NGO alleges that:

(a) A project or action would cause actual or threatened injury or human rights violations to the public. This would make it possible for key stakeholders, which includes NGOs to be able to file a petition even if they suffer no direct or actual injury;

(b) The injury or violation is traceable to the project or action. Linking the project to a public harm or human rights violations would satisfy this condition. For example, emission reduction projects that displace citizens or lead to loss of life, arable land or loss of income. Once complainants can establish that violations can be traced to an emission reduction project, it should create sufficient grounds for the public complaint branch to investigate and penalise the parties involved.

(c) The injury is avoidable or redressable by the intervention of the project review panel. This third condition would establish the importance of a complaint. It must be shown that the intervention of the public complaint branch would assist in preventing or redressing the violations. This would require the complainants to demonstrate that the project is one that is carried out under the climate change regimes and how the complaint branch can assist either by redress or prevention.

Redress would be the best remedy if the project had already been completed. In such cases, the public complaint branch could apply consequences that can redress or mitigate the harm suffered by the public, for example by requesting the party to pay compensation or to ensure resettlement where necessary or face the risk of losing emission reduction credits obtained as a result of such a project. For an on-going project, complainants can request for the project to be stopped by the complaint branch to prevent any likely impact on human rights or environmental issues. The panel can then compel the parties to stop the project pending a comprehensive investigation on the scale and magnitude of human rights violations involved and how the violations can be prevented.

Most of these tasks would be to deal with petitions and complaints regarding any impact. To establish these claims, there is a need for proper investigation; this would include visiting countries where projects are initiated to investigate the claims. Currently, Expert Review Teams (ERTs) are constituted periodically to visit countries and verify their emission reduction claims or reports.[1078] The mandates of constituted ERTs can either be expanded to serve as the investigative or fact finding arm of the Kyoto Protocol; or better still the project review panel could occasionally mandate an inspection committee made up of its own members to investigate claims brought before it and to produce a comprehensive report on which the panel could base its decisions. The committee would serve as an ad-hoc investigative organ of the review panel and would be charged with producing a comprehensive report on its findings. The purpose of the investigation is to establish the facts and determine whether the complaint has merit.

[1078] Expert Review Teams are constituted by the UNFCCC Secretariat to check annual inventories and to make sure they are complete, accurate and conform to the Guidelines under Article 8 of the the Kyoto Protocol. Members of Expert Review Teams are selected by the Secretariat from experts nominated by Parties. However they currently perform only technical functions, which is the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention.

For the inspection committee to function effectively, part of its terms of reference would be to hold consultations, public hearings and meetings with directly affected people and general members of the affected community. There would also be the need to visit project sites and to speak with as many interested NGOs on the field who have vital information. The report of the inspection committee should indicate the relevant facts and of steps taken to conduct the investigation; a conclusion showing the committee`s findings on whether the Bank has complied with relevant policies and procedures; and the recommendations of the committee to the project review panel.

The team's report would form the basis for a decision by the project review panel on whether or not to proceed with the registration of a project. This comprehensive process would make it possible to exclude projects that violate human rights, environmental and social standards prior to their registration. It represents a preventive and anticipatory approach that makes use of human rights safeguards to avoid the sources of some of the problems facing current CDM projects. This dispute resolution mechanism could also help to avoid litigation arising from environmental projects as it provides an opportunity for concerns to be addressed at an early stage before they escalate. This could prevent violations and litigation.

However, since this process focuses on review prior to registration, a question that arises is, what of projects that satisfy all the requirements and were registered but subsequently turned out to violate some of the minimum legal threshold, i.e. what remedy would be available for victims in the case of projects that violate the legal threshold post-registration or on the long term.

Arguably, the compliance committee of the Kyoto Protocol (which is currently vested with powers to facilitate and enforce compliance with the Protocol and its rules) could be reformed to take up such post-registration compliance issues.

3.4 Reformed Compliance Committee

The Kyoto Protocol establishes a compliance mechanism to facilitate, promote and enforce compliance with the commitments under the Protocol and under its subsequent accords and rules.[1079] The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch.[1080] The facilitative branch provides advice and assistance to parties to promote their compliance and implementation of the Protocol. It provides parties with guidelines, information on new technologies and procedures on how to attain emission reduction targets. It also provides 'early warning' of potential non-compliance with emissions targets, methodological and reporting commitments relating to greenhouse gas inventories. The enforcement branch is responsible for determining the consequences for parties not meeting their commitments.[1081] The enforcement branch is responsible for determining whether a party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanism. It is simply the 'watch dog' for non-compliance. It is also

[1079] For an excellent discussion of the nature of Kyoto Protocol's Compliance Regime and its future outlook, see L Rajamani, M Doelle and J Brunnée (eds) *Promoting Compliance in an Evolving Climate Regime* (CUP 2011). See particularly, R Lefeber and S Oberthuer, 'Key Features of the Kyoto Protocol's Compliance System' in L Rajamani, M Doelle & J Brunnée (eds) *Promoting Compliance in an Evolving Climate Regime* (CUP 2011).

[1080] See UNFCCC, 'An Introduction to the Kyoto Protocol Compliance Committee', <http://unfccc.int/kyoto_protocol/compliance/items/3024.php> accessed 21 April 2012.

[1081] Both branches are composed of 10 members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, and two each from Annex I and non-Annex I Parties. ibid.

vested with oversight functions for ensuring that parties comply with the methodological requirements and procedures of the CDM.[1082]

As comprehensive as the Kyoto Protocol's compliance mechanism is-in fact one of the most comprehensive and rigorous systems of compliance for a multilateral environmental agreement – the mandate of the enforcement branch does not extend to addressing human rights issues arising from the Kyoto Protocol.[1083] It is only vested with powers to detect non-compliance with emission reduction targets and to determine consequences for such non-compliance. As such issues relating to how policy measures aimed at achieving emission reductions affect human rights fall outside the mandate and expertise of the enforcement or facilitative branches of the compliance committee. This is not surprising considering the fact that the Kyoto agreement itself does not mention human rights, neither does it place any obligation on parties to minimize an adverse human rights impact resulting from the implementation of measures taken to mitigate or adapt to the climate change impact (response measures).[1084]

Also, the enforcement branch only considers non-compliance issues amongst parties. As such private individuals cannot approach the enforcement branch for issues related to pollution or displacements and resettlements. The Kyoto Protocol as a whole does not recognise individuals. Most of its dispute resolution mechanisms are only accessible by parties and are designed to

[1082] See Para. 5 of CDM Rules.
[1083] See J Brunnée, 'Climate Change and Compliance and Enforcement Processes', *in* R Rayfuse & S Scott eds., *International Law in the Era of Climate Change* (Edward Elgar 2012) chapter 1; see also N Goeteyn & F Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance' (2011) Chinese Journal of International Law 791–826; O Yoshida, 'Procedural Aspects of the International Legal Regime for Climate Change: Early Operation of the Kyoto Protocol's Compliance System' (2011) 4(1) Journal of East Asia & International Law 41–61.
[1084] The Kyoto Protocol and the FCCC only mandate parties to avoid the social and environmental impacts of policy measures aimed at combating climate change. See UNFCCC, Art 4(1) (h); Kyoto Protocol Article 2 (3), Article 3 (14).

resolve disputes between parties.[1085] Unlike the Aarhus Convention, the Kyoto Protocol does not provide any formal complaint mechanism for private individuals and NGOs whose interests or rights are violated.[1086] This void closes the door on private individuals from accessing the COP, the enforcement branch or the UNFCCC Secretariat.

Human rights issues arising from projects that have already been registered by the EB could be brought under the jurisdiction of the compliance mechanisms of the Kyoto Protocol. Currently the CDM rules vests the compliance committee with oversight functions for ensuring that parties comply with the methodological requirements and procedures of the CDM.[1087] The Rules provide the compliance committee a statutory power to serve as the compliance watchdog for CDM projects, to ensure that all the parties comply with procedures of the CDM. The Committee is also vested with powers to determine consequences for non-compliance with procedures or commitments.[1088] As such, if the CDM Rules are amended as proposed in this thesis to include the need to demonstrate compliance with the legal threshold, the compliance committee could effectively become the appellate body where non-compliance with the legal threshold post

[1085] For example Article 14 of the United Nations Framework Convention on Climate Change (UNFCCC) provides that:

> In the event of a dispute between any two or more parties concerning the interpretation or application of the Convention, the parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

[1086] C Streck & J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) (19 (2) Eur J Int Law 409-442.

[1087] See Para 5 of the CDM Modalities & Procedures.

[1088] Both branches are composed of 10 members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, and two each from Annex I and non-Annex I Parties. The Committee also meets in a plenary composed of members of both branches, and a bureau, made up of the chairperson and vice-chairperson of each branch, supports its work. Decisions of the plenary and the facilitative branch may be taken by a three-quarters majority, while decisions of the enforcement branch require, in addition, a double majority of both Annex I and non-Annex I Parties. In the enforcement branch, questions of implementation will be resolved within approximately 35 weeks from receipt by the branch of the question of implementation. In time-sensitive requests, including those relating to eligibility to participate in the mechanisms, the expedited procedures involving shorter periods will apply. Apart from the three-week deadline given to complete its preliminary examination, no fixed deadlines are provided for the facilitative branch.

project registration could be reported or addressed. The compliance committee could also serve as a monitoring group that would ensure that after registration and approval, the execution of projects are in line with approved standards and do not create unanticipated problems. [1089]

However, the compliance committee as it stands might not be able to perform these functions without some form of reform to its mandate and an expansion of its power to serve as a public complaints body under the climate change regimes. Two options are proposed and discussed here: the expansion of the mandate of the enforcement branch of the compliance committee, and the establishment of a new public complaint branch (PCB) under the committee.

A) New look enforcement branch

One way of addressing human rights issues arising from CDM projects or other mitigation projects is to expand the scope and mandate of the compliance committee's enforcement branch to deal with such issues. This could be by expanding the mandate of the current enforcement branch to include powers to monitor and consider human rights issues or violations arising from projects designed by Parties to achieve emission reduction objectives under the Kyoto Protocol. By adding the powers to monitor and evaluate the adverse human rights, environmental and social impact of a project, the enforcement branch of the compliance committee would be able to prescribe consequences for parties that adopt far reaching and unsustainable policy measures to meet their emission reduction obligations.

The advantage of this approach is that it would minimize the costs of mainstreaming human rights into the set up of the compliance committee. The use of existing institutions is one way to

[1089] CDM Modalities & Procedures, para. 53.

avoid the exorbitant costs in terms of structure and resources as it builds on existing capacities and resources. Since the enforcement branch is already accustomed to the process of reviewing compliance, the task of assessing human rights compliance could be straightforward and perhaps easier for the members of the enforcement branch who would only be called upon to exert influence over some of the current resources, facilities and best practices.

However, since the current enforcement branch does not consider human rights issues, its membership does not include human rights experts. This would therefore raise the need to re-structure and re-constitute the enforcement branch to include human rights experts. To ensure that human rights and human rights instruments are understood, internalized, implemented, and enforced by the enforcement branch, there is a need to recruit individuals from the human rights epistemic communities, i.e. people with training and expertise in human rights law.

It is also pertinent for the compliance committee to define comprehensive methodologies or criteria for measuring if and to what extent a project is in compliance with the approved procedures and standards. This could be achieved through the use of qualitative data such as surveys, questionnaires and findings of the inspection panels, as supplements to quantitative data generated from the implementation of the discussed threshold, to determine whether a project complies with international human rights and environmental standards and to estimate to what extent it does or fails to do so.

Equally important is the need to ensure that the monitoring process is participatory, *i.e.* it should be set up to provide the opportunity for stakeholders to comment and give feedback on the

noticeable impact of a project and to report any inconsistency or deviation from the terms of the consent issued to proponents of a project during the pre-registration consultation or project design stages. Currently, the compliance committee is not structured or empowered to receive complaints or communications from individuals.[1090] This approach, which does not provide any opportunity for stakeholders to provide feedbacks, or report violations by a project or policy measure, would need to be reformed. Stakeholders who are affected by a policy measure or project are the most credible sources of information when it comes to the environmental or human rights threats they suffer.[1091] By providing them with an opportunity to bring attention to the existence of such threats, the compliance committee can serve as a true 'watch dog' for non-compliance. It would be better placed to perform its overseeing functions in ensuring that parties comply with approved methodological requirements and procedures of the CDM. This emphasises the need for a public complaint mechanism to be introduced into the compliance committee through which stakeholders can have the space and chance to report violations and non-compliance with approved methodologies and procedures.

B) Creation of a new branch: The Public Complaints Branch

Another approach would be to establish a third branch for the compliance committee: a 'public complaints branch'. The drive for accountability under international law has attained a momentum that has led several organizations to establish feedback units or a branch through which public petitions and protests could be received or dealt with. For example, virtually all

[1090] See Rules of Procedure of the Compliance Committee of the Kyoto Protocol <http://unfccc.int/kyoto_protocol/compliance/background/items/3026.php> accessed 21 April 2012.

[1091] As noted in Principle 10 of the Rio Declaration:

> …Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

international human rights treaties establish individual complaint procedures that allow private citizens to bring an action at an international forum for human rights abuses.[1092] Other international organizations have also established the Office of the Compliance Advisor or an Ombudsperson to receive complaints and cooments from the public.[1093] Such is the reform that is needed for the compliance committee of the Kyoto Protocol.

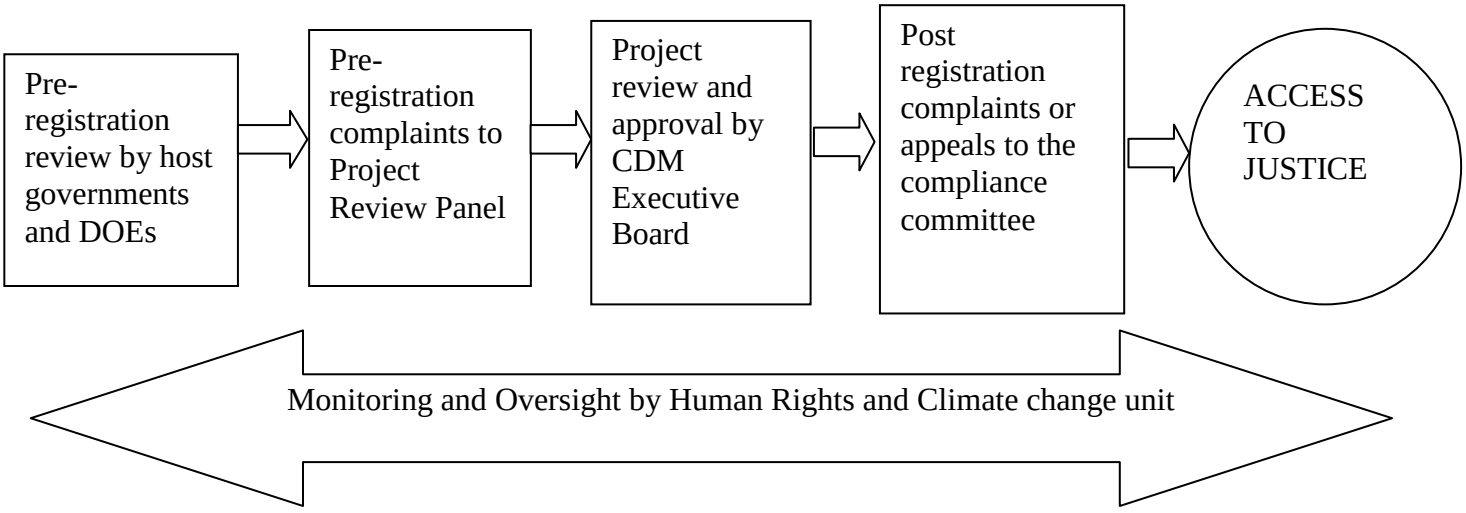
A public complaints branch could serve as a sort of an 'appellate body' where post-registration issues arising from projects could be raised by stakeholders. The PCB could be established as a specialized branch responsible for receiving and reviewing claims by individuals, private entities and NGOs against policy measures adopted by states for meeting their obligations if such measures produce a negative impact on human rights or social and environmental concerns. Human rights issues arising from projects that have already been registered by the EB, could be brought under the jurisdiction of the PCB in line with the CDM rules. These rules vest the compliance committee with overseeing functions for ensuring that parties comply with the methodological requirements and procedures of the CDM.[1094] A public complaint branch would create a public space or forum through which individuals can access climate change regimes and provide opinion, comments or complaints about policy measures and on-going projects that violate international law standards. This would offer individuals the opportunity to hold their governments directly accountable for adverse policy measures before an international

[1092] At the UN level, individual complaint mechanisms are found under eight conventions. See chapter two above.
[1093] See for example the International Finance Corporation's Compliance Advisor Ombudsman (CAO) an independent recourse mechanism for projects supported by the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA)-the private sector lending arms of the World Bank Group. The CAO was established in 1999 to address the concerns of individuals or communities affected by IFC/MIGA funded projects, to enhance the social and environmental outcomes of IFC/MIGA projects; and to foster greater public accountability of IFC and MIGA. See The Compliance Advisor Ombudsman (CAO) < http://www.cao-ombudsman.org> accessed 23 April 2013.
[1094] See Para 5 of CDM Rules.

supervisory body. The PCB would also determine the appropriate remedies and consequences for non-compliance with approved project procedures or methodologies.

To function effectively, the PCB like the two already existing braches of the compliance committee would have to be appropriately staffed and provided the space, resources and structures to function as a stand-alone branch of the compliance committee. Since the PCB would be considering human rights issues and petitions it is pertinent for its members to include international human rights experts and individuals who have experience and training in human rights compliance and enforcements.

Table 6.4 Project Review Process



4. Conclusion

The growing recognition that responses to climate change must address complex and fundamental causes of inequality and human rights violations have led to a meteoric rise in calls for a rights based approach to the planning, approval and execution of climate change mitigation projects. These inequalities and violations include: lack of consultation in decision-making,

discrimination and inequality; non disclosures of vital project information and the absence of grievance and feedback mechanisms through which stakeholders could seek and obtain redress. Despite the rapid ascendancy of the rights based approach as a preventive and transformative approach to climate change mitigation and adaptation, the methodological requirements for integrating this approach into international climate change regimes have not been considered in great detail. This chapter has addressed this lack of a clear operational guideline or framework that could serve as a template for the requirements and processes for mainstreaming human right norms into extant climate change regimes. Here I have shown that two complementary types of reforms are required: legal and institutional reforms. Here I have discussed a six-part legal threshold, in addition to the 'web' of institutionalisation necessary to translate the idea of human rights mainstreaming from theory to practice.

The legal and institutional frameworks identified in this chapter could assist in achieving a rights-based climate change regime where the rights of stakeholders are considered in the design and execution of policy measures or projects aimed at combating climate change. In the next chapter, I examine the procedural requirements that must be met and the practical challenges that must be overcome to move these ideas from theory to practice.

CHAPTER SEVEN

MAKING MAINSTREAMING WORK: REFLECTIONS ON PRACTICAL POTENTIALS AND CHALLENGES

1. Introduction

Proponents of the human rights mainstream paradigm have not devoted sufficient attention to the relationships between its theoretical importance and the practical implications. Laying down a theoretical framework is one thing, understanding its practical implications, possible real life limitations and the requisite steps for moving the concepts from the realm of theory to practice is another. In this chapter, I examine the legal and practical potentials, the required processes and challenges that may arise in carrying through the type of reforms proposed in this thesis. This chapter shows that to ensure the recognition of the suggested legal and institutional frameworks in the design and implementation of post-2012 market mechanisms, there is a need to adopt a step-by-step approach. This approach would include two complimentary steps: the reform or expansion of the scope of the current climate change regimes and the adoption of an additional Protocol or Accord on climate change and human rights.

2. Towards a two-step approach for mainstreaming human right norms into climate change regimes: Current outlook and possible outcomes

This section discusses the possible options or scenarios under which the human rights based framework proposed in this thesis could be practically mainstreamed into current and emerging climate change agreements. As Parties continue to negotiate the future of current international climate change regimes, there is a need to examine how the legal and institutional reforms proposed here could be implemented under any of the possible negotiation outcomes. Here I

discuss a step-by-step approach through which human rights principles can be integrated into extant and emerging intenational climate change agreements.

Current Outlook

Generally, in the period between 2005 to 2012, Parties to the Framework Convention on Climate Change (the Convention) and the Kyoto Protocol (the KP), engaged in two- track negotiations- the Ad-Hoc Working Group on the Kyoto Protocol (AWG-KP); and another under the Convention, known as the Ad-Hoc Working Group on Long-Term Cooperative Action Under the Convention (AWG-LCA). The aim was to amend one or both the Kyoto Protocol and the Convention; or to agree on a new protocol or other legal instrument.[1095] This two-track negotiation process continued until the 17th session of the Conference of the Parties to the UN Convention on Climate Change (COP-17) in Durban. In Durban, Parties agreed to merge the two tracks into one single negotiation track by establishing an Ad Hoc Working Group on a Durban Platform for Enhanced Action (AWG-DP).

The AWG-DP has the mandate to develop 'a protocol, another legal instrument or an agreed legal outcome with legal force under the Convention applicable to all Parties'.[1096] The AWG-DP was required to start its work 'as a matter of urgency' in the first half of 2012 and to complete it no later than 2015, in order for Parties to be able to adopt this protocol, legal instrument or legal

[1095] See The Bali Road Map, UNFCCC, 'A Brief Overview of Decisions' available at <http://unfccc.int/documentation/decisions/items/2964.php> assessed 22 January 2013. For an excellent and detailed overview, see D Bodansky, 'Legal Form of a New Climate Agreement: Avenues and Options' (April 2009) <http://www.c2es.org/docUploads/legal-form-of-new-climate-agreement-paper.pdf> accessed 12 March 2013.

[1096] See Para. 2, UNFCCC, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, FCCC, CP/2011/L.10. See also United Nations Framework Convention on Climate Change. *Conference of the Parties: Seventeenth Session: Durban*. United Nations, 2011. <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf> assessed 23 January 2013; T Hill, 'UN Climate Change Conference Durban: Outcomes and Future of the Kyoto Protocol' (2011) 7 Macquarie Journal of International and Comparative 92–98.

outcome at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.[1097] At the COP 18 in Doha, the formal closure of the dual negotiation tracks was formally endorsed, meaning that Parties can now focus attention on negotiating a new 2015 agreement under one track-the Durban Platform for Enhanced Action (the 'Durban Platform'). Similarly in Doha, it was agreed that that the second commitment period under the Kyoto Protocol would run from 1 January 2013 until the end of 2020 (2013-2020). Already the European Union, Australia, Switzerland and Norway have agreed to join the second commitment period and have taken on fresh targets (the 'KP2 parties').[1098] Even though commentators have criticised the second comitment period as meaningless specifically because most of the KP2 parties only contribute 15 percent of global emissions, while countries such as Russia, New Zealand and Japan, including abstainee countries such as Canada, United States have refused to take on fresh targets.[1099]

One significant achievement of the Doha Conference however is that it served as the transitional platform that ensures the continuity of the Kyoto Protocol and its mechanisms without any gaps. It retains the legal basis through which countries can continue to implement their commitments, as negotiations continue on the design of a new legally binding agreement in 2015 based on the Durban Platform timetable.[1100] Parties also agreed to restrict the eligibilites of the non-KP2. (e.g.

[1097] ibid.
[1098] See Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its eighth session, held in Doha from 26 November to 8 December 2012. FCCC/KP/CMP/2012/13/Add.1.
[1099] See J Morgan, 'Reflections on COP 18 in Doha: Negotiators Made Only Incremental Progress' (December 14 2012) <http://insights.wri.org/news/2012/12/reflections-cop-18-doha-negotiators-made-only-incremental-progress> accessed 25 January 2013.
[1100] It is also expected that under the second commitment period, Parties would revisit and review their exisitng emission reduction commitments by 2014 at the latest, following the release of the Fifth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC). See Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its Eighth session, held in Doha from 26 November to 8 December 2012, FCCC/KP/CMP/2012/13/Add.1.

Canada, Japan, Russia, New Zealand) to take part in the flexible mechnisms such as CDM project activities. Under the Doha decisions, although non-KP2 parties can 'participate' in CDM projects, they cannot 'transfer' or 'acquire' the resulting units; only KP2 Parties can trade such units. The extents to which the exclusionary rules will impact the future of the CDM as a whole are yet to be fully understood. Consequently, while the Doha Conference significantly moves the Kyoto Protocol forward, it does so with a smaller group of countries than under the first period, also the future of international climate change regimes continue to remain uncertain.

Possible Outcomes

There are three possible outcomes or scenarios under which the AWG-DP could achieve its mandate of developing 'a protocol, another legal instrument or an agreed legal outcome with legal force under the Convention applicable to all Parties'. These three possible outcomes also represent the likely in-routes through which the reforms proposed in this thesis could be reflected in emerging climate change regimes under the current negotiation track. The first is to amend one of the agreements or both of the agreements to reflect new obligations and commitments. The second is to establish a new legally binding protocol under the Convention to replace the Kyoto Protocol; while the third is to explore both outcomes: amend the Convention and the Kyoto Protocol and then establish another legal instrument in form of an additional protocol or an Accord that expatiates on some of the newly incoporated obligations under the Convention.[1101] For example an additional protocol on human rights and climate change.

[1101] In Doha, the differences between an outcome with 'legal force' and an outcome that is 'legally binding' were intensely debated. For example, India pushed for the inclusion of a flexible outcome with legal force, which might be in form of a COP decision, modalities and guidelines or the creation of a new Accord that builds on the Kyoto Protocol and runs side by side with it. India, alongside other developing countries, made the point that COP/MOP decisions, such as the 'Marrakech Accords' that operationalized the Kyoto Protocol's market mechanisms, have in practice had all the force of law, even if many consider them to be non-binding. The United States also supported

In this section, I discuss the latter approach as a two-step approach and arguably the better approach through which human rights principles can be better reflected in climate change regimes. This two-step approach includes two complimentary steps: the rights based reform or expansion of the scope of the Convention and the Kyoto Protocol and the adoption of an Additional Protocol that includes human rights obligations. Here, I discuss the legal processes involved under each of the steps. Whatever the route the COP and the KP CMP decide to follow, this two-step approach could provide guidance on how to amend current climate change agreements to include human rights provisions or the procedures for adopting a new or additional protocol that addresses the linkages between human rights and climate change.

2.1 Rights based reform of existing regimes

The first scenario includes amending the Convention and the Kyoto Protocol, and/or their Annexes to establish clear recognitions of the linkages between human rights and climate change. Article 7.2 of the Convention gives the COP general authority to periodically review the implementation of the Convention and any related legal instruments, examine the obligations of the parties in light of the objective of the Convention and to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.[1102] The COP has

---

the Indian approach and called for the adoption of Cancun type pledges, which was successful in securing the participation of more than 90 countries, in part because these pledges are non-binding. On the other hand, the European Union expressly argued for a legally binding agreement in form of a Protocol. The final deal in Doha was struck with the addition of a third option and as a result of a compromise between the European Union (which was keen to see the form of a legally binding agreement as parallel in form as possible to the Kyoto Protocol) and India (which has consistently resisted calls for a new legally binding agreement). Following a break in the formal negotiations, the language of 'an outcome with legal force' was endorsed by India and the EU as a third option or outcome for the AWG-DP. See J Morgan, 'Reflections on COP 18 in Doha: Negotiators Made Only Incremental Progress' (December 14 2012) <http://insights.wri.org/news/2012/12/reflections-cop-18-doha-negotiators-made-only-incremental-progress> accessed 25 January 2013.

[1102] See United Nations Framework Convention on Climate Change (Adopted 09 May 1992, in force 21 March 1994) 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992); see

powers to examine the Parties' commitments in light of the Convention's objective, new scientific findings and experience gained in implementing climate change policies and to facilitate the coordination of measures adopted by Parties to address climate change and its effects. This general provision provides the COP with broad powers to recommend additional actions and to adopt new rules for the implementation of existing commitments under the Convention. This provision would empower the COP to suggest additional efforts that could correct the problems and lessons learnt in implementing climate change obligations under the Convention. It could be the basis for the COP to review the implementation of climate change mitigation measures and to make the decisions necessary to promote the effective implementation of the Convention. However, incoporating additional commitments such as human rights commitments into the Convention could require: amendments to the Convention under the procedure set out in Article 15; amendments to the Annexes under the procedure set out in Article 16 of the UNFCCC; amendments to the Kyoto protocol under Article 20(1) of the KP; or amendments to the KP Annexes.

1. The Convention

A. Amending the Convention

A first option is to amend the Convention to incorporate human rights language and to specifically identify the linkages between human rights and climate change. Pursuant to Article 15 of the Convention, any Party may propose amendments to the Convention. The COP may then adopt the amendment by at least a three-quarters majority vote of the Parties present and voting. The Convention does not specify or impose any substantive limitations on what might be

---

also F Yamin, & J Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004)

adopted as an amendment. Thus, an amendment could specify new commitments, change or vary existing commitments, or establish new institutions or procedures. Procedurally, the UNFCCC Secretariat communicates the text of the proposed amendment to the Parties, to signatories and the Depositary i.e. the United Nations Secretary-General at least six months before the meeting at which it is proposed for adoption. Amendments to the Convention may only be adopted at an ordinary session of the COP (as opposed to an extraordinary session that may be convened in accordance with Article 7.5 of the Convention). Once adopted, the amendment is communicated by the Secretariat to the Depositary, which then circulates it to all Parties. The amendment enters into force 90 days after the Depositary has received the necessary number of ratification instruments.

This amendment procedure in Article 15 can be triggered by any of the Parties to the Convention to request for the integration of human rights principles into the Convention. For example, Nigeria being a party to the Convention could evoke the provisions of this Article to put forward a comprehensive proposal requesting a reform of the Convention along the lines decribed in this thesis.[1103] A support by three-quarters majority vote of the Parties could lead to the adoption of the human rights reforms as part of the Convention.

Once in force, an amendment binds only those parties that have accepted it, and applies only as between those parties. The pre-existing terms of the Convention continue to apply with respect to parties that do not accept an amendment. In effect, each successive amendment to the UNFCCC

[1103] Nigeria is a party to both the Convention and the Kyoto Protocol. Nigeria signed the Convention on 13 June 1992 and then ratified it on 29 August 1994; Nigeria also ratified the Kyoto Protocol on 10 December 2004. See UNFCCC, 'Ratification Status, Nigeria' <http://maindb.unfccc.int/public/country.pl?country=NG> assessed 30 January 2013.

could create a new set of agreements between States that ratified the amendment. To prevent problems related to different states being bound by different obligations, the COP could bundle several proposals into a single amendment that parties must ratify as a whole. In effect, a good approach is to include the proposal for a right-based reform of the Convention as a defining element of future climate change commitments. It is worthy to note that pursuant to Article 24 of the Convention, no reservations may be made to the Convention (or to the Protocol). As such, a detailed amendment proposal that includes human rights reforms as part of the other improvements to the Convention would once adopted by a three-quarters majority vote become part of the Convention. Questions on the likelihood of securing a majority vote for a right-based reform are considered in later parts of this chapter.

B Adopting, Amending and reviewing Annexes

Another option is to amend current Annexes to include human rights obligations. According to Article 16 of the Convention, Annexes are an integral part of the Convention. Currently, the Convention contains only two annexes that list Annex I and II parties. The COP may adopt new annexes or amend existing annexes by a three-quarters majority vote. Article 16 restricts the content of annexes to 'lists, forms, and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character'. Arguably, procedural or administrative rules that describe a list of human rights items to look out for in a mitigation action or project can be included in an Annex to the Convention. An additional Annex that establishes a human right impact assessment procedure and project review rules could also be included as part of the Convention pursuant to the provisions of Article 16.

This amendment procedure could also be evoked to propose an additional Annex that contains a comprehensive list of prohibited mitigation activities or projects; or a list that itemises mitigation activities and projects that must only proceed with a public disclosure program or public consulation and prior informed consents. A list of prohibited mitigation activities could include activities that violate human rights or that do not meet the human right threshold described earlier.

Similarly, Article 14 empowers the COP to establish dispute resolution procedures and mechanisms in an Annex. Article 14 (2) provides that the COP would adopt procedures on arbitration under the Convention in an annex on arbitration. Article 14 (7) also provides that additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation. These provisions empower the COP to include an additional annex on dispute resolution procedures. Even though Article 14 relates to settlement of disputes between Parties, it could be amended under the procedures set out above to include settlement of disputes arising from individuals or members of the public. Article 14 could be expanded to make provisions for a public complaint mechanism that would be responsible for resolving any complaint by any member of the public concerning the interpretation or application of the Convention. The administrative rules and procedures for this Panel could then be highlighted in an Annex on public complaints and grievance resolution. This Annex would set out the procedures for resolving any issue related to the implementation or application of the Convention.To have any impact on addressing some of the concerns discussed this thesis, such procedure must be accessible to the public and should not be restricted only to Parties.

In contrast to amendments to the Convention, new annexes and amendments to annexes do not need to be ratified, they come into force automatically, except in the case whereby Parties lodge written objections.[1104] For all other Parties, a new annex or an amendment to an annex enters into force six months after the date of the communication by the Depositary to these Parties. The annex or amendment becomes binding on Parties that withdraw a previous notification of non-acceptance on the ninetieth day after the Depositary has received the notification of withdrawal.

2. The Kyoto Protocol

Article 9 of the Kyoto Protocol empowers the Conference of the Parties serving as the meeting of the Parties to this Protocol (CMP) to periodically review the Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information. Such reviews are to be coordinated with amendments to the Protocol and the Convention. This supports our earlier premise that amendments to both agremeents would most likely go hand in hand.

Similarly, Article 13 (4) requires the CMP to keep under regular review, the implementation of the Protocol, to assess the progress towards achieving the objective of the Convention and to make decisions necessary to promote the effective implementation of the Protocol. Paragraph A

[1104] Article 4.2(f) called on the COP to review the lists in Annexes I and II not later than 31 December 1998 and amend them as appropriate, with the approval of the Party concerned. In line with this, Annex I was amended at COP 3 in 1997, by consensus, to add the names of Croatia, Liechtenstein, Monaco and Slovenia, and to replace Czechoslovakia with the Czech Republic and Slovakia (decision 4/CP.3). The amendment came into force on 13 August 1998. Annex II was amended at COP 7 to delete the name of Turkey from Annex II (decision 26/CP.7). COP 7 also invited the Parties to recognize the special circumstances of Turkey. This amendment entered into force on 28 June 2002. Turkey became a Party on 24 May 2004. In accordance with Article 4.2(g), any non-Annex I Party may notify the Depositary that it intends to be bound by the commitments contained in Article 4.2(a) and (b) relating to the mitigation of climate change (see chapter 11.B). Kazakhstan took such action in 2000.

tasks the CMP with asssessing the implementation of this Protocol by the Parties, the overall effects of the measures taken pursuant to this Protocol, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved. This paragraph provides a potential basis for the CMP to examine how climate change measures under the KP are producing social effects, which includes human rights impacts such as massive disclocation from homes and loss of subsistence. Paragraph B also tasks the CMP to periodically examine the obligations of the Parties under this Protocol, giving due consideration to the experience gained in its implementation and the evolution of scientific and technological knowledge. This paragraph would also provide a basis for the CMP to consider how to address current implementation experiences and challenges on measures adopted by the Parties to address climate change and their effects on the overall effectiveness of the Convention. Paragraph J also empowers the CMP to implement decisions from the COP. These provisions could provide the basis for the CMP to set up the legal frameworks and institutions necessary to implement the COP 16 decison in Cancun, which provides that Parties should in all climate change actions respect human rights.

It should be noted however that the COP in Bali agreed that Article 9 review shall not lead to new commitments for any Party.[1105] Additional or new commitments must be expressly stated in an amendment to the KP; or amendment to any of its annexes; or through a new protocol. Consequently, the reforms proposed in this thesis would arguably have to be reflected in an

[1105] See United Nations Framework Convention on Climate Change, 'Part Two: Action taken by the Conference of the Parties at its Thirteenth Session in Bali, 2008', <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> accessed 12 Janaury 2013; see also United Nations Development Program, 'The Bali Action Plan: Key Issues in the Climate Negotiations' (2008). <http://content.undp.org/go/cms-service/stream/asset/?asset_id=2512309> accessed 12 January 2013.

amendment to the KP or fully elaborated in an additional protocol to the Convention. This perhaps also explains why amending the KP or any of its annexes or adopting a new protocol are the main options currently being explored by negotiators under the Durban Mandate. We would now explore the legal requirements for amending the Protocol and for adopting a new protocol.

A. Amending the Kyoto Protocol

The requirements for amending the Kyoto Protocol are set forth in Article 20 of the Protocol and are essentially the same with the Convention. Article 20 establishes the requirement of a three-quarters affirmative vote for any amendment to the KP. Under Article 20 (1), 'any Party may propose amendments to this Protocol'. Amendments to the Protocol are to be adopted at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. The Kyoto Protocol does not specify any substantive limits on what might be agreed by means of an amendment. Thus, an amendment might modify any aspect of the Protocol, including which parties are subject to commitments, the nature of commitments, or a review of the CDM Rules.

Recently, Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol in accordance with these procedures at the COP meeting held in Doha, Qatar. Though not yet on force, the Doha Amendment to the Kyoto Protocol establishes a second commitment period (Kyoto 2), which will run from 2013 to 2020. Parties equally proposed new emission reduction pledges for Kyoto 2. The Doha Amendment also reviewed the CDM requirements by stipulating that only countries that take on a Kyoto 2 target will be allowed to claim emission credits through the CDM. Pursuant to Article 21, paragraph 7 and Article 20, paragraph 4, the Doha Amendment is subject to acceptance by Parties to the Kyoto Protocol. In accordance with Article

20, paragraph 4, the amendment will enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to the Kyoto Protocol.[1106]

As negotiations continue over the next years, it is expected that Parties would evoke the amendment procedures in Articles 20 and 21 of the Kyoto Protocol more frequently. As such, considering the level of public outcry and backlash national authorities in Nigeria, Panama and Honduras for example, have received from the public on registered CDM projects, this Article could be the basis for negotiators from these countries to propose a review of the CDM Rules and a modification of Article 12 of the Kyoto Protocol which establishes the CDM. For example, Nigeria as a party to the Kyoto Protocol, could propose a comprehensive amendment as described in this thesis, that demands a human rights review of the Kyoto Protocol to integrate human rights principles into the rules, procedures and governance structures for approving CDM projects. It could also be the basis to demand for the adoption of some of the comprehensive reforms suggested by the CDM Policy Dialogue.

B. Amendment of Protocol Annexes

Another option is to include human rights requirements as an additional Annex to the Kyoto Protocol. Article 21 of the KP provides that annexes to the Protocol shall form an integral part thereof. It also provides that any additional annexes shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character. Currently Annex A contains a list of GHGs and their sectors while

[1106] See UNFCCC, Doha Amendment to the Kyoto Protocol (Adopted 8 December 2012, Not Yet in Force) C.N.718.2012.TREATIES-XXVII.7.c.

Annex B contains the list of Quantified emission limitation or reduction commitment of each of the Parties to the KP.

The provisions for amending annexes to the Protocol are the same as for amending annexes to the Convention. Article 21(2) of the KP provides that 'any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol'. With the exception of amendments to Annex B of which according to Article 21.7, may be adopted only with the written consent of the party concerned, Article 21, paragraph 3, of the Kyoto Protocol provides that 'annexes to this Protocol and amendments to annexes to this Protocol shall be adopted by consensus at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol'. However, if all efforts at consensus have been exhausted, and no agreement reached, the annex or amendment to an annex would as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

This amendment procedure could be evoked to propose an additional Annex that contains a comprehensive list of prohibited mitigation activities or projects; or a list that itemises mitigation activities and projects that must only proceed with a public disclosure program or public consulation and prior informed consents. A list of prohibited mitigation activities could include activities that violate human rights or that do not meet the human right threshold described earlier. This approach has been adopted in a number of multilateral environmental agreements. For example, the Annexes to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, provide comprehensive lists of chemicals subject to prior informed consent procedure and a list of

information disclosure requirements in its Annexes; same for the Montreal Protocol on Substances that Deplete the Ozone Layer which provides a list of controlled substances.[1107]

An additional Annex to the Kyoto Protocol could also establish a list of mitigation projects or activities that are prohibited or that could only proceed with a human rights impact assessment, a public disclosure program and a free prior informed consent of the affected communities. Notably too, Article 19 of the KP provides that the dispute resolution principles in the Convention shall apply *mutatis mutandis* to the Protocol. This would mean that if the dispute resolution provisions in the Convention are amended through an additional annnex on public complaints and dispute resolution, it would be applicable to the KP.

2.2 Additional Accord or Protocol on human rights and climate change

A second option under the Durban Mandate is the adoption of a new protocol or an Additonal Accord or Modalities. Article 17 provides the legal basis for adopting a new protocol under the Convention to complement the Kyoto Protocol (for example an Additional protocol) or a new protocol that replaces the Kyoto Protocol. As a follow up and a second step to mainstreaming human rights language into existing climate change regimes, there is a need to invoke the provisions of Article 17 to adopt an additional protocol that sets out the modalities for enforcing the linkages between climate change and human rights. This new protocol or agreement could build on the Kyoto Protocol by incorporating parts or all of the Kyoto Protocol by reference, rather than starting over from scratch.

[1107] Montreal Protocol on Substances that Deplete the Ozone Layer (Adopted 16 September 1987, Effective 1 January, 1989); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Adopted September 10 1998, Effective 24 February 2004).

According to Article 17, the Conference of the Parties may, at any ordinary session, adopt protocols to the Convention. Pursuant to the COP Rules of Procedure, the adoption of a Protocol would require consensus and each party shall have one vote. However, if all efforts to reach a consensus have been exhausted and no agreement has been reached, the decision would as a last resort be taken by a three-fourths majority votes of the Parties voting and present.[1108] So far, these procedures have been employed once, and this was the process that led to the Kyoto Protocol. By decision 1/CP.3 of 11 December 1997, COP 3 adopted the Kyoto Protocol unanimously and it entered into force on 16 February 2005, in accordance with Article 25.1 of the Kyoto Protocol, which set out the date for the protocol's entry into force.

Another approach is for the COP to adopt Decisions, or set of Rules that expatiate on the human rights requirements that must be met by mitigation projects. Decisions are adopted at COP meetings, which according to Rule 4.1 of the COP Rules of Procedure are to be held once every year. Unlike a decision to adopt a protocol, which requires at least a three-quarter majority, a COP decision requires only a two-third majority vote. This technically improves the chances of reaching the requisite majority vote for a COP Decision when compared to that of a Protocol. This aside, the history of international climate change negotiations shows that unlike the process for adopting a new Protocol which could be long and herculean, it is arguably easier to reach the consensus required for flexible commitments and changes in form of a COP Decision, revisions to the CDM Rules, adoption of new modalities and guidelines or the creation of a new Accord that builds on the Kyoto Protocol and runs side by side with it.[1109]

[1108] See Rule 42 (1) (b), Conference of the Parties, Rules of Procedure, FCCC/CP/1996/2.

[1109] There are ongoing debates on whether COP Decisions are legally binding under international law. I align with the views that the authority for a COP to adopt legally binding decisions would depend on the powers given to a COP in the enabling treaty. As our previous discussions show, the COP to the Convention and the CMP to the

For example, at the Doha meeting, India and a group of other developing countries opposed the adoption of a 'legally binding agreement' and instead clamoured for an 'outcome with legal force', in form of a COP decision, modalities and guidelines or the creation of a new Accord that builds on the Kyoto Protocol and runs side by side with it.[1110] Most COP/CMP meetings culminate in Decisions, that clarify and specify rules for the practical and effective implementation of aspects of the Convention and the Protocol. For example the Marakech Accord was adopted at COP 7 as a set of decisons and rules for the implementation of the CDM amongst other things. Similarly at the COP 16 in Cancun, the COP adopted a Decision, which included for the very first time, a recognition of the linkages between human rights and climate change by stating that 'Parties should in all climate change actions respect human rights'. This shows that a COP Decision could be a practicable in-route for recognising how climate change mitigation projects affect human rights. The COP could in another Decision build on its Cancun Decision by establishing detailed guidelines, rules and modalities on how parties can respect human rights in climate change action. The question of 'how' as answered by this thesis could form the crux of such Additional Decision, Rules or Modalities.

Kyoto Protocol are given the authority to elaborate modalities and procedures and to establish rules that determine how important mechanisms would operate. It was in exercise of this power that the Marrakesh Accord, which spells out the CDM Rules, was adopted. These powers are contained in several articles and they grant the COP/CMP explicit authorities to establish Rules on how obligations in both agreements are to be implemented. This is the source of the legal force of COP Decisions. Arguably, the COP/CMP could evoke the oversight powers in the Convention and the Protocol to establish Rules or a Decision on how Parties can implement the Convention and the Kyoto Protocol to avoid adverse social and environmental impacts. See Art. 12 (7), Art. 4 (1), 4 (2); 4(8), 7 (2), 7 (3), 8 (2) (g);4(1)(a), 4(2)(c) and (d), 4(8), 7(2), 7(3), 8(2)(g), 9 (3), 11(1), 11(3), 11(4), 12(5), 12(6), 12(8), 12(9), 13, 14(2)(b) and 14(7) of the Convention; and Articles 2(1)(b), 2(2), 2(3), 3(4), 3(5), 3(9), 3(14), 5(1), 5(2), 5(3), 6(2), 7(3), 7(4), 8(1), 8(2), 8(4), 8(6), 9(1), 12(3)(b), 12(4), 12(5), 12(8), 13(4), 13(5), 13(6), 17 and 18 of the Kyoto Protocol. See generally, J Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 Leiden Journal of International Law 32.

[1110] On the other hand, the European Union expressly argued for a legally binding agreement in form of a Protocol. The EU expressed the view that the UNFCCC COP does not have the authority to adopt legally binding decisions and that there is a need for a legally binding outcome in form of a protocol or agreement. See J Morgan, 'Reflections on COP 18 in Doha: Negotiators Made Only Incremental Progress' (December 14 2012) <http://insights.wri.org/news/2012/12/reflections-cop-18-doha-negotiators-made-only-incremental-progress> accessed 25 January 2013.

A COP Decision or an additional Accord or Rules could establish procedures and guidelines for incoporating human rights principles into climate change mitigation measures. It would provide in concrete terms, rights based modalities for project approval and the human rights conditions that must be met before projects can be approved. This Protocol would establish and reflect the minimum human rights thresholds that must be met for project approval and registration. It is recommended that the six-part legal threshold proposed in Chapter Six should be enshrined and elaborated in an additional protocol on human rights and climate change. The Protocol would set out modalities that contain this threshold and provide clear guidelines on the human rights, social and environmental standards that projects are required to meet before they could be approved, registered and recognised for the purpose of gaining emission credits under the flexible mechanisms. A clear legal threshold at the international level could also spur reform at the national level as it could serve as guidance on what policymakers should look out for to design balanced and rights based policy responses and climate change mitigation projects.

Furthermore, Article 7(2) (i) of the Convention empowers the COP to establish such subsidiary bodies as are deemed necessary for the implementation of the Convention.[1111] Article 13 (4) of the KP equally empowers the CMP to establish such subsidiary bodies as are deemed necessary for the implementation of the Protocol. The COP and the CMP could evoke these powers to

[1111] The COP has previously evoked these powers to establish bodies to undertake specific tasks. These bodies report back to the COP when they complete their work. For example COP 1 established two ad hoc groups: the Ad hoc Group on the Berlin Mandate (AGBM) and the Ad hoc Group on Article 13 (AG13) (1/CP.1 and 20/CP.1). Other specialized bodies with limited memberships have been established to address specific areas, namely: the Expert Group on Technology Transfer (EGTT), the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (Consultative Group of Experts, or CGE); and the Least Developed Countries Expert Group (LEG). Other constituted bodies include the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) which are two permanent subsidiary bodies established under the Convention and also serve the CMP; the Clean Development Mechanism (CDM) Executive Board; a Supervisory Committee to verify emission reduction units (ERUs) that are to be transferred and acquired according to Article 6 of the Kyoto Protocol and the Compliance Committee. See UNFCCC Bodies, <http://unfccc.int/bodies/items/6241.php> accessed 12 January 2013.

review and consider the human rights issues that currently threaten the effective implementation of the Convention and the Protocol and also hinder the realisation of the sustainable development objectives of both agreements. The COP and the CMP could also exercise these powers by establishing appropriate governance structures, committees and bodies that would bring together and address the critical linkages between human rights and climate change measures and projects, particularly an institution that would oversee and ensure that international responses and policy measures aimed at combating climate change would not have human rights consequences.

Generally, a new Accord or protocol could be the basis to grant the UNFCCC secretariat and the CDM Executive Board the powers and mandate to consider human rights issues and enforce this threshold. I have identified and discussed four complementary institutional reforms that are required to move the idea of human rights mainstreaming within the context of international climate change regimes from theory to practice. They are: the creation of a specific human rights and climate change unit (HRCU) within the UNFCCC secretariat to be responsible for the overall mainstreaming strategy; the expansion of the terms of reference and powers of the CDM Executive Board; empowering the enforcement branch of the compliance committee to ensure that after registration, the execution of projects are in line with approved standards and do not create unanticipated problems; and the setting up of a public complaint branch of the compliance committee that could hear appeals by stakeholders who may be adversely affected.

The institutional framework identified would provide an opportunity for citizens to hold project proponents accountable for human rights violations. Through public complaints bodies, the

framework proposed provides the public with the opportunity to demand transparency and accountability from project proponents that sponsor and benefit from projects that result in human rights violations. It establishes and institutionalizes procedures and processes that allow the public to demand for a review of projects that could have human rights consequences. It would also provide an opportunity for individuals to demand a post registration reappraisal of projects if they produce unanticipated human rights consequences.

This institutional framework also mirrors a shift away from top-down planning towards more participatory forms of development and recognition for stakeholders in climate change mitigation. Adopting an additional protocol that lays down and recognises these institutional reforms would provide opportunities and platforms for stakeholders to bring their complaints about a project, before an international supervisory body at each stage of project planning and execution i.e. prior and post registration. By mobilizing and empowering institutions it would enable individuals, communities and NGOs to have a voice in the process of approving climate change projects; such that the current pervasive culture of approving emission reduction projects without adequate attention to their impacts on human rights could be addressed in a balanced and transparent way.

3. Practical Barriers to Action

What the last section has done is to lay out the legal scenarios, requirements and procedures for making amendments or changes to both the Convention and the KP. The two-step approach provides options through which Parties could propose the intergation and recogntion of human rights principles under both agreements. A practical question is whether countries would agree to support such right-based reform of climate change agreements. Three practical challenges that

might limit the success of any effort aimed at evoking a right-based reform or amendments under both agreements are examined in this section.

A. Political Will

To initiate action under any of the amendment scenarios described above, the first step would be for one of the Parties to individually or as part of a group propose an amendment. This raises the question whether countries will generally agree to bind themselves or vote in support of a right based reform that could holistically empower a large section of the public to block mitigation projects, to demand accountability, to request project information and to even challenge project decisions before international supervisory bodies. This is the question whether such a proposal will not be seen as an attempt to grant the public a cudgel with which to beat the state into submission, or to empower NGOs to habitually oppose governmental projects. These concerns are in fact reasonable, particularly the fear that NGOs and interest groups could capture and frustrate mitigation projects and plans through the proposed right-based processes. However, an evolved understanding of the basis and value of the proposals in this thesis could arguably alleviate these concerns. Primarily, it is important to undertand that the HRBA does not necessarily introduce new obligations that many States do not already have under several international human rights treaties. The rights-based framework proposed here builds on existing human rights obligations under international law, which virtually all the Parties to the climate change regimes already agreed to protect, respect and fulfil.[1112] As such, the legal framework

[1112] There are 166 parties to the ICCPR, 160 to the ICESCR. Majority of these parties have signed the UN Framework Convention on Climate Change and the Kyoto Protocol. See L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22(3) Journal of Environmental Law 391.

proposed here would not grant new or revolutionary rights that NGOs and the public do not already possess.

What this legal framework would do is to provide an opportunity for countries to incorporate these already existing obligations and considerations while planning and designing climate change mitigation projects, in order to prevent violations and tensions. Through the framework proposed here, parties could meet their obligations under both human rights instruments and climate change regimes. It would allow States to respect, protect and fulfil human rights whilst meeting their climate change obligations. The changes proposed would provide an avenue to package a collection of international obligations under both human rights treaties and climate chnage regimes into one toolkit to enhance implementation. Similarly, it would provide an avenue to draw upon human rights obligations to underpin and inform the design and execution of emission reduction goals provided in climate change agreements. This evolved understanding of the reforms proposed would foster a balanced recognition of why it is important to incorporate human rights obligations with climate change mitigation programs and projects. It would also provide an opportunity for governments to work with stakeholders to anticipate, address and prevent human rights problems that mitigation projects could generate, such that projects do not necessarily have to result in petitions, protests, and violence.

A second aspect of the political will question is whether any of the developing countries that count on financial and economic benefits from project-based mechanisms such as the CDM would have the political will to challenge the current rules and require for a more right-based carbon market. A reverse side of the question is whether any of the industrialized countries that

are arguably beneficiaries of the *status quo*, would be vote in support of a reform that could substantially alter the current market trends to make project approvals more streamlined and process-based. Taking a very close look at current CDM trends, there are very few reasons to be optimistic about this happening. Currently, many developing countries are in a competitive struggle to attract as many CDM projects as possible, including by lowering sustainability standards so as to attract CDM opportunities. This accounts for why national authorities at times often look away from human rights complaints or even collude to seize communal lands without compensation, suppress protests using military personel and even kill prostesting citizens. Project proponents from industrialized countries have equally looked away from these incidents as shown with the Panama, Honduras and Nigerian examples. The question then is whether negotiators from these countries could be trusted to push for reforms to the current business-as-usual models.

The answer to this could to a large extent depend on the level of awareness that is created at the national level on the need for action. Considering the nature of problems generated by mitigation projects, particularly the disclocations of people from ancestral lands and homes, it is important to raise awareness on why these reforms to extant approval processes are not only important, but also required. International diplomacy has been largely influenced by the abilities of Non Governmental Organisations (NGOs) and environmental interest groups to raise awareness and to put pressure on national governments, to effect change or reform at the interntional level. [1113]

[1113] Although NGOs are formally only observers at a number of United Nations conferences including climate change conferences, with no right to vote and with restricted access to the corridors, plenary sessions and some contact groups; many scholars agree that NGOs still make a great difference in global environmental politics. NGOs and interests groups have played active roles in putting pressures on international gatekeepeers to support environmental negotiation processes. One frequently cited example is how Environmental NGOs (ENGOs) contributed to drafting UNFCCC at the Rio Earth Summit in 1992 by participating in government delegations, lobbying, building public pressure and contributing to content and structure of the negotiation text. The influence

As Sterk rightly notes, international politics do not happen in a vacuum; the positions countries take internationally are determined mainly by their domestic political situations.[1114] As such, progress in reforming current international climate negotiations to make them more rights-based would be enhanced if pro-climate advocacy coalitions can be brought together in the key countries and across borders to demand for change. The fear of possible backlash from the press or environmental NGOs could elevate the need for negotiators to push for reforms. With an intensive awareness drive by NGOs and interest groups, particularly NGOs in developed countries, there could be increased pressure on negotiators, policy makers and international gatekeepers to support amendments aimed at addressing the human rights impacts of climate change measures and projects on communities in developing countries. Such awareness drives have enormous potentials to culminate in the eventual right based reform and amendment of key

---

and roles of NGOs in international law making can therefore not be sidelined. NGOs such as Green Peace International, Amnesty International, Down to Earth Group, Earth Right and Earth Justice can play extensive roles in creating international awareness on the need to address the human rights impacts of climate change mitigation schemes. For example Green Peace international and Down to Earth Group have already launched a series of projects that higlight these concerns. If a stakeholders or government in a developing country say Nigeria can develop a detailed amendment proposal based on some of the ideas discussed in this thesis and seek the support of these NGOs on the importance of protecting the respect for human rights in climate change actions, a coordinated awareness drive would be generated that could result in widespread support for countries to integrate human rights principles into climate change regimes. See K Rietig, 'Public Pressure versus Lobbying – How do Environmental NGOs Matter Most in Climate Negotiations? (Centre for Climate Change Economics and Policy Working Paper No. 79 2011); M Betsill, 'Environmental NGOs and the Kyoto Protocol Negotiations: 1995 to 1997. In M Betsill and E Correll (eds.), *NGO Diplomacy: The Influence of Nongovernmental Organization in International Environmental Agreements* (MIT Press 2008); M Betsill & E Corell,'NGO Influence in International Environmental Negotiations: A Framework for Analysis' (2001) 1 (4) Global Environmental Politics 65-85; C Carpenter, 'Business, Green Groups and the Media: The Role of Non-governmental Organizations in the Climate Change Debate' (2001) 77(2) International Affairs 313-28; E Corell & M Betsill, 'A Comparative Look at NGO Influence in International Environmental Negotiations: Desertification and Climate Change', (2001) 1 (4) Global Environmental Politics 86-107.B Arts, *The Political Influence of Global NGOs. Case Studies on the Climate and Biodiversity Conventions* (International Books 1998); K Raustiala, 'Nonstate Actors in the Global Climate Regime', in U Luterbacher, & D Sprinz, (eds.), *International Relations and Global Climate Change* (MIT Press 2001); S Oberthür, *et al. Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience* (Ecologic. 2002); S Andresen & L Gulbrandsen 'The Roles of NGOs in Promoting Climate Compliance' in J Hovi, O Stokke, & G Ulfstein *Implementing the Climate Regime: International Compliance* (Earthscan 2005) 169.

[1114] W Sterk,'House Cleaning in Doha: UN Climate Summit Delivers Second Life for Kyoto but no Deal to Revive Carbon Market' (2013) Carbon Mechanisms Review 10. Where the author argues that international negotiations can rarely take decisions that have not been previously prepared nationally, and that the current situation is that most key countries have no appetite to undergo the fundamental economic and ecologic transformation that is necessary to revive carbon markets under current climate change regimes.

provisions of both agreements to make them more right based, transparent and efficient. They might also culminate in integrating some of the human rights reforms and governance structures proposed in this thesis in a new or additional protocol under the Durban Mandate.

B. Negotiation Blocks and Alignments

Getting a Party to spearhead the amendment process by submitting a proposal is one task, obtaining the requisite majority vote to push through the proposal is yet another question.[1115] This is the question whether enough political support could be generated within the Conference of the Parties (COP) to allow such a right-based reform proposal to secure the required majority votes. Over the years, the COP has been criticized for its 'managerialism' approach in dealing with concrete legal issues.[1116] The COP has in fact been described as a threat to accountability and the rule of law.[1117] This is because reforms such as the one proposed by this thesis could be snuffed out in a second by the solidarity and support from countries and negotiation blocs with similar economic and political interests and ties that might consider such a reform as inimical to the growth of carbon markets.[1118]

[1115] Guzman describes this as the problem of getting to 'yes' in international law. See A Guzman, 'Against Consent' (2012) 52 (4) Virginia Journal of International Law 1-2.

[1116] See A Nollkaemper, J Wouters and N Hachez, 'Accountability and the Rule of Law at International Level' (Leuven Centre for Global Governance Studies, Policy Brief No 8 2009); J Wouters, A Marx and N Hachez, 'Managerial Accountability in International Organizations – Comparative Perspectives' (Leuven Centre for Global Governance Studies, Policy Brief No. 3, January 2008).

[1117] A Nollkaemper, J Wouters and N Hachez, 'Accountability and the Rule of Law at International Level' (Leuven Centre for Global Governance Studies, Policy Brief No 8 2009); ibid. See also A Guzman, 'Against Consent' (2012) 52 (4) Virginia Journal of International Law 1-2.

[1118] There are two main negotiation groups within the COP: developing countries and developed countries. Within these groups there are further negotiation blocks. These blocks and groups take important decisions on whether to support a proposal or not. The decisions by the influential blocks often determine how far a proposal can make it within the COP. *Developing countries:* (G77 and China), which comprises all developing countries that are members of the climate change convention (Africa, Association of Small Island States (AOSIS), Latin American countries, The Arab Group, Asia-Pacific Group, Least Developed countries and Brazil, South Africa, India, and China (BASIC) Group). Generally they argue for legally binding emission reduction commitments for industrialized countries, market mechanisms, substantial international financial, capacity-building and technological support. Specifically, the *Alliance of Small Island States* argue for action as strong and swift as possible, due to their extreme

A good example is how the comprehensive proposal submitted by Tuvalu at the COP 15 in Copenhagen, which called for the adoption of a legally binding Copenhagen Protocol, was snuffed out. More surprising was the process that led to the adoption of the Copenhagen Accord by a small group of powerful developing countries-The Friend of the Chair Group- despite the fact that there was no consensus as required by the COP Rules of Procedure.[1119] The question therefore is whether a transformative proposal such as this would pass through the eye of the COP needle in the face of these alignments and intrigues.

---

vulnerability to sea level rise, while the BASIC group are GHG emitters that advocate that developed countries should allow developing countries 'equitable space for development' unencumbered by emission reduction obligations. *Developed countries:* (*EU block* (27 member countries), *Environmental Integrity Group* (Mexico, the Republic of Korea and Switzerland), *Umbrella Group/JUSSCANZ* (Japan, United States, Switzerland, Canada, Australia, New Zealand, Iceland, Norway, the Russian Federation, Ukraine and the US). While the EU advocates a strong global agreement with stringent economy-wide emissions reductions, substantial financial support, and robust compliance mechanisms; the Umbrella Group clamours for a legally binding treaty with market mechanisms and with emission reduction commitments for large emitters including BASIC countries such as India and China. See UNFCCC, Regional Groups and Negotiating Blocks < http://unfccc.int/cop6/parties/regiogroup.html> accessed 12 May 2012.

[1119] While it was widely reported that the AWG-LCA Chair in Plenary, Michael Zammit-Cutajar dismissively remarked about the Tuvalu proposal that 'Tonight when I go to bed, I will take the proposal with me for bedtime reading', the Friends of the Chair Group was able to provoke more than a bed time reading for its proposal. The Group was created on the last day of the conference and consisted of 25 countries, including the United States, United Kingdom, Sweden, Spain, Saudi Arabia, Russia, Norway, Mexico, the Maldives, Lesotho, South Africa, Bangladesh, Algeria, Denmark, Germany, France, India, Ethiopia, Colombia, Korea, China, and Brazil. Led by US President, Barrack Obama, the group involved mostly Heads of State. The end product from the Friends of the Chair Group was a two-page document labelled as the Copenhagen Accord. In the document, reference to 'legally binding' outcome of future climate negotiations was dropped and replaced with allowing countries to determine their own national emission targets and policy actions. It however pledged substantial financial commitments by industrialized countries for 30 billion dollars for 2010–2012 and long-term finance of 100 billion dollars per year by 2020. What followed was a chain of rejections by Tuvalu, Nicaragua, Bolivia, Cuba, Venezuela, Sudan, Pakistan, and Saudi Arabia. *Bolivia:* 'We say this emphatically and as clearly as possible: we are seeing actions in a dictatorial way, and this is not the way a world should discuss the future of humanity and the planet'. *Cuba:* What you call… 'a group of representative leaders' is a gross violation of sovereign equality that is enshrined in the Charter of the United Nations and a mechanism that would impose decisions on the international community…' However, support came from delegates from the African Union, the Maldives, the European Union, the United States, Australia, Japan, Russia, Norway, the Philippines, Bangladesh, Singapore, Barbados, and Belize. The African Union arguably accepted the Accord because of the huge financial commitment involved. In the end the COP took note of the Copenhagen Accord and included it as part of its outcome document. Currently about 115 countries have formally endorsed the Accord. The Copenhagen events show how economic strength, powerful alignments, financial promises and managerialism could easily dictate the directions of future climate change negotiations and agreements. See R Dimitrov, 'Inside UN Climate Change Negotiations: The Copenhagen Conference' (2010) 27 (6) Review of Policy Research.

The answer would depend on whether the proposal to mainstream human rights norms into climate change agreements is understood as important to address some of the human rights problems that currently bedevil the CDM (as documented by the CDM Policy Dialogue); retain support for the Kyoto Protocol and its market mechanisms; and consolidate on progress made in efforts to combat climate change; or whether it would be read and interpreted yet another attempt to smuggle human rights language into international climate change agreements through the back door. The former reading is arguably the better and sustainable one. The legal and institutional frameworks that have been proposed in this thesis, provide a mutually reinforcing pillar through which human rights principles could be reflected in climate change mitigation actions and projects. This way, many human rights infringements arising from mitigation projects may be avoided and prevented in the first place.

While the intrigues and convolutions that have trailed ongoing negotiations supply evidence on how herculean a task it is to navigate through amendment procedures under current climate change regimes, one could also point to the measure of success recorded at Doha to show that some level of consensus is achievable, even if it is at the last hour.[1120] As such, there are reasons to believe that developing countries affected by the human rights impacts of climate change projects could build a consensus that might culminate in the right based reform or amendment of either or both climate change agreements. For example, the Nigerian delegation to the Doha Conference successfully spearheaded efforts to enlist the support of other African countries in the developing country block (G77 and China) to push for the operationalisation of a green climate fund, the approval of new financing and technologies required to accelerate green

[1120] See the Doha Amendment to the Kyoto Protocol, UNFCCC, Doha Amendment to the Kyoto Protocol (Adopted 8 December 2012, Not Yet in Force) C.N.718.2012.TREATIES-XXVII.7.c.

transition in developing countires and a recommendation that the COP should take note of the findings of the CDM Policy Dialogue and to implement it.[1121] Through such negotiation blocks, developing countries, (especially African countries and the Alliance of Small Island States) that have often clamoured for a reform of the CDM and have been the most affected by its human rights impacts, could present a formidable front to push for the rights based amendment of the Convention and the KP. To achieve the majority votes required to push through such amendment, there might be need to enlist the support of negotiators from countries in the developed country blocks. With a well-communicated proposal, perhaps the support of some developed countries could also be enlisted.

C. Unresolved Dilemmas and Uncertainties

A major challenge to a rights-based reform of current climate change regimes is the current uncertainties surrounding the Kyoto Protocol and the future of climate change regimes in general.[1122] While Parties seem to agree on the need for new emission reduction commitments, long term finance, and technology transfer, deep ideological disgreements and contentions remain on the historical responsiblity for climate change actions, REDD+ mechanisms, the place of human rights in climate change negotiations and the governance of climate finance. Even among the negotiation blocks and groups, there are differrent ideological divisions. For example, while the eyes of the African Union remains fixed on financial and technological transfers and

[1121] Even though the Nigerian delegates were arguably more interested in the CDM Policy Dialogue's recommendations on the need for more funding and the equitable distribution of CDM projects to African countries. See EnvironewsNigeria, 'Nigerian Climate Negotiators talk Tough', <http://www.environewsnigeria.com/tag/climate-change-negotiation/> accessed 12 January 2013; See also 'Developing Countries Firm up Common Doha Climate Talks Position' (All African News, October 30 2012).

[1122] See S Karcher and T Forth, 'Carbon Markets: Which Way Forward: Essentials on Cooperation with Developing Countries' (2013) Carbon Mechanisms Review 4-6, where the authors suggest that the ability to form a consensus in designing the future outlook of carbon markets has reached its limits as far as the climate change negotiations are concerned.

benefits through climate finance and the CDM, the OASIS Group has argued for human rights recognitions in emerging regimes to ensure the survival of small island states.[1123] This fundamental conflict of values remains an inhibiting factor to consensus building within the climate change multilateral decision-making process. As such while some countries argue for firm and binding commitments, including a reform of CDM mechanisms to make it more transparent, some argue that excluding projects with high emission potentials and opportunities for funding, on human right grounds runs counter to the ultimate objective of the Convention which according to Article 2 of the Convention, is 'the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. The argument is that any legal instrument that helps to address climate change would be consistent with this objective, while any proposal that could hinder or limit the abilities of countries to address climate change and to harness climate change funding runs counter to the ultimate objective of the Convention. These differing standpoints continue to cast doubts on the future outlook of climate change regimes. They also underscore the bleak prospects of attaining the required consensus required to include human rights language into the climate change agreements. These unresolved dilemmas and ideological differences have often inhibited the reform processes required to truly address some of the threats posed by climate change through the consensus-based processes of the COP. They also underscore the growing concerns on the limits of international institutions to effectively respond

[1123] For example during the debates on the Copenhagen Accord, while the African Union was quick to support the Copenhagen Accord, Negotiators from Tuvalu submitted that:

> ...There is no guarantee that the Kyoto Protocol will continue into the next commitment period in this text …And we see there is money put before us. Can I suggest, in biblical terms, it looks like we are being offered 30 pieces of silver to betray our people and our future. Mr President, our future is not for sale. I regret to inform you that Tuvalu cannot accept this document.

See R Dimitrov, 'Inside UN Climate Change Negotiations: The Copenhagen Conference' (2010) 27 (6) Review of Policy Research; see also A Averchenkova, *The Outcomes of Copenhagen: The Negotiations and the Accord* (United Nations Development Programme Climate Policy Series 2010).

to significant implementational concerns. These questions have in recent years prompted a growing shift away from the UN climate change processes to the possibilities of addressing climate change through national, bilateral and regional programs.

The lack of certainty on the outlook of the CDM post-2015 and whether the CDM would be reformed to correct accounting, measurement, monitoring, project review, transparency and accountability issues have also led to panic sale of emission reduction credits and the adoption of domestic emission reduction policies and alternative market approaches. At the Doha COP Meeting, none of the key recommendations of the CDM Policy Dialogue were adopted which further postpones the possibility of a significant reform of the CDM to the CMP 9 in Warsaw. This lack of certainty on the future outlook of the CDM and whether it would be significantly reformed make it difficult to project the chances of a right-based reform to current carbon markets and climate change regimes.

What is clear is that there is a need for the COP to act expeditiously to clarify the future outlook of the CDM, implement the recommendations of the CDM Policy Dialogue and more importantly reform the CDM governance structures as proposed in this thesis in order to restore market confidence.[1124] For example, there are evidence to show that these uncertainties have already started to affect market confidence. Currently, the price of CERs has fallen to an all time

[1124] Similarly at Doha it was decided that only parties with Quantified Emission Limitation or Reduction Objectives (QELRO) under the second commitment period are eligible to transfer and acquire Certified Emission Reductions (CERS) under the CDM. While this decision allows all Annex B Parties to continue to participate in CDM project activities, only those with second commitment period commitments can 'transfer and acquire' CERs. This raises the potential that countries not participating in the second commitment period such as Canada, Japan, Russia and New Zealand may be excluded from the CDM Market from 2015. It is yet unclear how a divided CDM market would function, and how it would affect the CDM participation rules and requirements.

low of €0.052 and traders suggest that it could fall even further to zero.[1125] The need to restore confidence in the CDM Market should be an impetus to spur action on reforming the CDM in line with the threshold discussed in this thesis. The process-based framework proposed here could enhance public confidence on the effectiveness and efficiency of the CDM.

Similarly, lessons on the implementational challenges of the CDM should inform thoughts on how to shape new and emerging market mechanisms to anticipate and avoid the human rights concerns that have trailed the CDM. In Doha, a workplan to establish a New Market Mechanism (NMM) was adopted. Rules on the modalities for the NMM were however not agreed upon making it uncertain what its outlook and scope would be. While some countries suggest that the NMM would complement the CDM and other market mechanisms, others suggest that it should in fact replace the CDM.[1126] Despite these uncertainties, what could be deduced from the NMM draft principles is that it is expected to function as a flexible framework that will be built upon sectoral emission reduction projects established and driven at the national level, while the COP will put in place oversight rules and structures to ensure accountability, additionality, accounting, and transparency. It would also require UNFCCC approval before credits generated under a NMM scheme could be issued, acquired and transferred. This means the NMM would place more responsibilities on national governments to develop buttom-up emission reduction projects

[1125] Renew Economy, 'Doha Dispatches: Carbon Market Creates Another Fine Mess' (6 December 2012) <www'reneweconomy.com.au/2012/doha-dispatches-carbon-market-collapse-creates-another-fine-mess-21440> accessed 12 January 2013.

[1126] Generally, current discussions suggest that the NMM is expected to operate side-by-side with other international market mechanisms including the CDM, however modalities on how it would effectively do so are far from settled. While most countries have the position that only credits which have been generated unter UN supervision should be counted towards targets undr NMM, counries such as Japan, New Zealand and the USA demand that countires hsould have maximum flexibility to create their own systems, and that the UN should only provide rules on transparency but should not have a project approval function. See AWG-LCA, ' Various Approaches for Mitigation including Opportunities for Using Markets to Enhance Cost Effectiveness of and to Promote Mitigation Actions, Bearing in Mind Different Circumstances of Developed and Developing Countries: Views on the New Market-Based Mechanism. FCCC/AWGLCA/2012/MISC.6/Add.6.

and schemes to generate credits that could be purchased by Annex 1 Parties to meet their emission reduction commitments during the second commitment period. If the human rights problems discussed here are not addressed and reflected in emerging rules for the NMM, it could leave wide open the possibilities that the current trends in which national governments play active roles in the repression of human rights, land grabs, displacement of citizens and concentration of projects in poor communities, may continue under the NMM portfolio.

To enhance the effectiveness of the NMM and other emerging market approaches, and to equip the COP with tools to play its expected oversight functions under the NMM, the legal framework discussed in this thesis should be considered as part of emerging rules and modalities for the NMM. Lessons from the current implementation of the CDM as discussed by this thesis should inform thoughts on how to structure the NMM to avoid similar concerns on lack of accountability, land grabs without compensation, governmental secrecy and lack of access to project information, lack of participation and the absence of project review mechanisms. Addressing these concerns in emerging mechanisms and regimes would significantly restore faith in carbon markets; it would also enhance their effectiveness to mitigate climate change in a transparent, accountable and rights-based way.

4. *Conclusion*

The COP in its Cancun Decisions already laid a foundation by recognizing that climate change mitigation actions and policies, if not properly designed could affect human rights. The Decision however did not provide detailed guidelines and mandatory rules on how Parties can and should do so. In the absence of detailed guidelines, what consititutes ‘respect for human rights in climate change actions’ remained obscured. This thesis has demonstrated that there is a need for

the COP to establish clear and mandatory guidelines on the threshold that must be met prior to the approval and registration of mitigation projects. The legal and institutional frameworks identified in this thesis provide answers to the query on how Parties could respect and protect human rights in all climate change actions and projects. This chapter has explored two complimentary approaches through which the COP could reflect these reforms in extant and emerging climate change regimes. If Parties could look beyond political considerations and alignments, and understand that these reforms would not only promote coherence between their respective climate change and human rights obligations; and that these reforms are in fact important to restore faith in carbon markets, prevent future resistance to viable mitigation projects, and also promote the integrity of international climate change regimes in general, then progress would be made in achieving a rights based climate change regime where the rights of host communities for mitigation projects are considered and reflected in the design and execution of such projects.

In the next and final chapter, I conclude the research with a summary of findings, recommendations and suggestions on areas for future research.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

1. Summary and Conclusion

This thesis set out to investigate the practicability of mainstreaming human rights principles into the approval and execution of emission reduction projects under extant and emerging climate change regimes. In this final chapter, I will review the research contributions of this thesis, as well as discuss directions for future research.

Most of the literatures on climate change and human rights have focused on the how climate change impacts such as sea level rise; flooding and extreme weather events could directly affect human rights in different parts of the world. However, recent findings show that policy measures and projects aimed at combating climate change are in turn producing even more serious human rights concerns, especially in developing countries. These human rights issues include: mass displacement of citizens from their homes to allow for climate change mitigation projects; lack of participation by citizens in project planning and implementation; citing and concentration of projects in poor and vulnerable communities; lack of governmental accountability on projects and the absence of review and complaint mechanisms for victims to obtain redress for these problems. These secondary human rights impacts of policy measures and projects aimed at mitigating climate change have not received sufficient attention in existing literature. This thesis has explored these secondary impacts of climate change on human rights.

This thesis has examined how climate change mitigation projects, particularly clean development mechanisms (CDM) projects are producing human rights consequences in developing countries.

This is a trend recognised by the Conference of the Parties (COP) at its 16th meeting in Cancun when it declared that 'Parties should, in all climate change related actions, fully respect human rights'; and by the CDM Policy Dialogue which called for the need to restructure the CDM Executive Board towards making it a more transparent, accountable and rights-based organisation.[1127] However, the COP has not provided adequate guidelines and frameworks on how Parties could effectively integrate human rights protection into measures and projects designed to combat climate change; and specifically how the CDM EB could better reflect human rights considerations in its project approval processes and procedures. This thesis has attempted to answer this question of 'how', *i.e* the legal and institutional frameworks required to integrate human rights principles into the execution of climate change mitigation projects.

I have discussed the need for a reform of current climate change regimes to address the growing trend of human rights violations and procedural impunity in the execution of climate change mitigation projects. I examined the theoretical basis and value of the human rights mainstream paradigm and also identified the legal justifications, basis and value of adopting the United Nations Human Rights Based Approach (HRBA) as a framework for mainstreaming human rights standards into project execution and approval under existing climate change regimes. Previous scholarly efforts have not devoted sufficient attention to examining the theoretical basis of the human rights mainstream paradigm, hence the charge that human rights mainstreaming is fuzzy, ambiguous, without legal foundation and would only devalue the human rights language. I

[1127] See Para. 8, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention which noted Resolution 10/4 of the United Nations Human Rights Council on human rights and climate change on the adverse direct and indirect effects of climate change on the effective enjoyment of human rights. See also CDM Policy Dialogue, 'Climate Change, Carbon Markets and the CDM: A Call to Action: Recommendations of the High Level Panel on the CDM Policy Dialogue' (2012) <http://www.cdmpolicydialogue.org/report/ues_en.pdf > accessed 10 January 2013.

have discussed how we could evoke the principle of systemic integration of international law; the inter-doctrinal legal transplant/ cross-fertilization theory, participatory development theory and the full belly thesis as legal and theoretical anchor for the human rights mainstream paradigm. These theoretical perspectives underpin the need for a holistic and mutually reinforcing approach based on integrating human rights obligations and institutions with climate change obligations and institutions to produce a coherent, anticipatory and participatory framework.

While linking climate change and human rights issues is not a revolutionary suggestion, the potentials and requirement for adopting the United Nations Human Rights Based Approach (HRBA) framework for mainstreaming human rights principles into international climate change regimes have not been sufficiently explored. One reason that has been identified for lack of action on a HRBA to climate change is the lack of precedence or operational guideline that will guide countries through such an approach.[1128] As such, despite the rapid ascendancy of the HRBA approach and its emergence as a holistic approach for linking human rights with broad issues of development, questions on the legal and institutional framework required to apply it to climate change regimes have not been considered in sufficient detail. This has been the main contribution of this thesis. This thesis has discussed the potentials and value of adopting the HRBA as a framework for integrating human rights obligations and standards into international climate change regimes, specifically to ensure that mitigation projects do not produce human rights consequences. First, I identified and elaborated on the normative contents and elements of a human rights based approach: information; participation; accountability; equality and non-

[1128] See D Shelton, 'Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change' in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2010) 91-126; G Castillo and M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (2007) IUCN, <http://cmsdata.iucn.org/downloads/pm15.pdf> accessed 12 October, 2010.

discrimination; and access to justice. I examined how these elements have been recognized and enshrined in core international human rights instruments. I also discussed the implementational/on-the-ground problems that a HRBA to climate change mitigation might face, specifically issues of resources, striking a coordination between human rights and epistemic communities, lack of required capacity and training gaps. To address these problems and to identify how the elements of a HRBA could be reflected in climate change regimes, in Chapter Six, I proposed a legal and institutional framework that could serve as an operational guideline or template on how a right-based approach could be successfully implemented under current and future climate change regimes.

The proposed legal reforms include the need to entrench and adopt minimum legal thresholds that must be met and demonstrated before projects are approved and registered. I have proposed a six-part legal threshold that should serve as the core content of a reformed rights based climate change regime. It includes: project eligibility screen, sustainable development screen, human rights impact assessment, stakeholder identification and consultation, information disclosure system and project review mechanism. These six emphasise the importance of an integrated assessment to identify the human rights, social and environmental impacts and risks of projects; the importance of effective community engagement and consultation with local communities on matters that directly affect them; and the need for proponents of a project to manage and disclose the human rights impact and the social and environmental performance of a project throughout its lifecycle.

Similarly, I discussed the nature of the institutional reforms necessary to spearhead such a legal reform process. I identified four complementary institutional reforms that would go a long way to shaping how the legal threshold would be operationalized and enforced, how progress would be monitored and evaluated, and what further action should be taken in case of unsatisfactory progress. They are: the creation of a specific human rights and climate change unit (HRCU) within the UNFCCC secretariat to be responsible for the overall mainstreaming strategy; the expansion of the terms of reference and powers of the CDM Executive Board; empowering the enforcement branch of the compliance committee to ensure that after registration, the execution of projects are in line with approved standards and do not create unanticipated problems; and the setting up of a public complaint branch of the compliance committee that could hear appeals by stakeholders who may be adversely affected. This institutional framework mirrors the shift away from top-down planning towards more participatory forms of development and recognition for stakeholders in climate change mitigation. It provides a window of opportunity and a platform for stakeholders to bring their complaints about a project, before an international supervisory body at every stage of project planning and execution *i.e.* prior to registration and post registration. It is argued here that mobilizing and empowering institutions would enable individuals, communities and NGOs to have a voice in the processes of approving climate change projects, the current pervasive culture of approving emission reduction projects without adequate attention to their potential impact on human rights could be addressed in a balanced and transparent way.

The framework discussed and developed in this thesis provides a preventive step-by-step process through which human rights are systematically integrated into project design and approval so as

to anticipate and avoid human rights abuses in the first instance. The legal and institutional frameworks proposed could also help reduce oppositions, protests and litigation arising from emission reduction projects as it allows citizens to take part in the processes and procedures for project approval and execution. By providing the public with an opportunity to highlight the environmental and human rights threats posed by projects, project proponents and national authorities can better anticipate and respond to these threats and take necessary precautions to avoid them. This would go a long way towards preventing violations, thereby reducing the need for litigation.

Finally, I examined practical limitations to such a proposal. One important question is whether policymakers at the national and international level would be able to muster enough political will and courage to change the existing business-as-usual models for a more rights based and transformative one. This thesis has demonstrated that these challenges though substantial are not insurmountable; neither do they call for intellectual surrender. I have emphasised the need for negotiators and national authorities to understand that these reforms are not only essential, but are also important to restore the integrity of carbon markets, address some of the human rights problems that currrently bedevil the CDM as documented by the CDM Policy Dialogue; retain support for the Kyoto Protocol and its market mechanisms; and consolidate on progress made in efforts to combat climate change. NGOs and interest groups have especially important roles to play in communicating and raising awareness on the importance of these right-based reforms to the protection of human rights and fundamental freedoms while addressing the problem of climate change. The legal and institutional frameworks proposed in this thesis provide a mutually reinforcing pillar through which human rights principles could be reflected in climate change

mitigation actions and projects. This way, human rights infringements arising from climate change projects may be anticipated and prevented in the first place.

2. Recommendations

As discussed, human right is not currently mentioned in either the Convention or the Kyoto Protocol. A first step in the mainstreaming process is for a Party to the KP or the Convention to propose comprehensive amendments under both agreements with a view to expand the scope of the regimes to bring human rights language into play through the recognition, integration and endorsements of a human rights based approach to climate change mitigation. Here we offer an outline of the essential contents of a detailed amendment proposal on how to mainstream human rights norms into extant climate change regimes.

A) Introducing human rights language

First there is the need for both agreements to clearly recognise that the direct and indirect linkages between climate change and human rights are real and concrete. Even though the United Nations Human Rights Council has already recognised these linkages in three recent resolutions, there is need for the climate change regimes themselves to codify these linkages in the emerging climate change regimes.[1129] That the UNFCCC and the Kyoto Protocol do not make any mention of the linkages between human rights and climate change could perhaps be traced to the fact that as at 1992 when the UNFCCC was adopted, these linkages were not at the fore; the same applied in 1997 when the Kyoto Protocol was adopted. However, there is now abundant evidence in the literature that climate change and human rights intersect, and that these intersections are not

[1129] See UNHCR Res 17/23 (2008) UN Doc E/CN.4/RES 2008; UNHCR Res 10/4 (2009) UN Doc E/CN.4/RES/2009; and UNHCR Res 18/22 (2011) UN Doc E/CN.4/RES 2011.

currently dealt with in sufficient detail under existing climate change regimes.[1130] There is the need for the COP to play its roles of reviewing the Convention in the light of newly available information on the impacts on climate change on human rights by reflecting the three resolutions of the United Nations Human Rights Council and codifying them in the Convention and the KP through an amendment pursuant to the above described procedures. Affirming these linkages in the context of COP negotiations and within climate change regimes is the first important step towards mainstreaming human rights standards.

A direct recognition of the human rights issues in climate change projects would bring human rights language into climate change regimes and provide a starting point for future conferences to build on. Without reforming extant climate change regimes to at first recognise that climate change intersects with human rights, there would be no foundation or basis for implementing a HRBA. There is a need to expressly mention these linkages in the Convention and the KP to underscore their importance and to place these issues at the forefront of future climate change efforts. Recognizing the linkages in the text of these climate change agreements could move the integration from theory to practice.

[1130] See E Meijer, 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 New York University Journal of International Law and Politics 873; ICHRP, *Climate Change and Human Rights: A Rough Guide* (International Council on Human Rights Policy, 2008) 12-14; F Seymour, 'Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs' in S Humphreys, ed., *Human Rights and Climate Change* (CUP 2010) 207; S Jodoin, 'From Copenhagen to Cancun: A Changing Climate for Human Rights in the UNFCCC?' CISDL & IDLO Sustainable Development Law on Climate Change Working Paper Series (January 2011) available at <http://www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_Changing ClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf> accessed 03 August, 2011.

Similarly, several articles in the Convention and the Kyoto Protocol currently provide that in their actions to achieve the objective of the Convention and to implement its provisions, the parties shall minimize any adverse economic, social and environmental impact resulting from the implementation of measures taken to mitigate or adapt to climate change (response measures).[1131] However, no mention is made of minimizing the adverse human rights impact of climate change response measures. Currently, the preamble to the Convention provides that 'responses to climate change should be coordinated with social and economic development in an integrated manner'. This preamble should be amended to include fundamental human rights. I suggest the following:

> responses to climate change should be coordinated with economic and social development, including the respect, protection and fulfilment of fundamental human rights in an integrated manner.

Other parts of both agreements should also be amended to encourage parties to minimize any adverse human rights impact resulting from projects or measures designed to mitigate climate change. The texts of the Convention and the Kyoto Protocol must clearly recognise that climate change poses both direct and indirect threats to the full enjoyment of human rights. They must also include provisions to the effect that responses to climate change should be coordinated with fundamental human rights in an integrated manner. Both agreements should be amended to include the human rights threshold identified in this thesis as guidelines on how to do so. The Convention and the KP must further recognise that steps required to address climate change would be environmentally, socially and economically most effective if they are interconnected in such a way that no sector is affected by policies or efforts aimed at combating climate change.

[1131] See UNFCCC, Art 4(1) (h); Kyoto Protocol Article 2 (3), Article 3 (14).

B) Focusing on the indirect effects of climate change

Secondly, though the effects of climate change on human rights would be mostly direct in nature, climate change would also have an indirect and gradual effect on human rights. Already well documented are direct effects such as how extreme weather may pose a threat to the right to life and other rights. This thesis has shown how actions and projects aimed at combating climate change may produce indirect effects on human rights. There is a need to reflect this reality in emerging climate change regimes. Since most of the current declarations that seek to link climate change and human rights focus on the direct impact, a starting point would be a recognition in the emerging climate change regimes that 'climate change mitigation measures and projects, if not properly designed could produce human rights consequences'. Adopting the framework proposed here as a guide, the Convention and the KP should then be amended to focus on how to address both the direct and indirect effects of climate change in a more balanced way as part of the holistic effort aimed at combating climate change.

C) Redefine vulnerability

As already discussed, many of the direct and indirect effects of climate change on human rights are often exacerbated by inherent societal and non-climatic factors such as discrimination, unequal power relationships, lack of transparency and accountability by governments, lack of adequate data and government secrecy, lack of access to formal education, poverty, social marginalization, exclusion from policy and decision-making institutions and processes and the lack of deliberative democracy. These are problems that are entrenched in the political norms of different countries with varying intensities, and thereby make the impact of climate change on human rights more pronounced in some jurisdictions than in others. For example, in many developing countries, women are not allowed to take part in important town hall meetings where

decisions on projects or policies are taken. Consequently in Doha, Parties agreed to achieve gender balance in all climate change programs and in UNFCCC and Kyoto Protocol bodies.[1132]

To implement this decisison, there is a need to amend the Convention and the KP to acknowledge that the causes of vulnerabilities extend beyond poverty and lack of infrastructures. Without international recognition of these skewed relations that worsen vulnerabilities, national approaches to climate change might continue to be shaped and patterned along the lines of these societal and non-climatic misgivings. The end result would be an uncoordinated, skewed and an ineffective global response to the problem of climate change. To prevent policies that discriminate based on status or gender, there is the need to establish and maintain an effective database for assessing risks on the basis of income, gender roles, and the constraints operating against their participation in decision-making processes. Climate change regimes can address the issue of discrimination by ensuring that official data is disaggregated, by religion, ethnicity, language, sex, migrant status, age and any other category of human rights concerns discussed. Policymakers would also incorporate proofing as part of the wider human rights – proofing of all programming. Gender proofing for example will help to assess the implications of any planned project on women, the representation afforded to them in decision-making and ways to protect their interests through policies, legislation and programmes.

A second discriminatory trend discussed is that in some countries, poor and low income neighbourhoods are targeted as potential locations for mitigation projects; this worsens the

[1132] See UNFCCC, Decisions Adopted by the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012 23/CP.18, Promoting Gender Balance and Improving the Participation of Women in UNFCCC Negotiations and in the Representation of Parties in Bodies Established Pursuant to the Convention or the Kyoto Protocol UNFCCC.

already poor standard of living in these communities making them even more vulnerable to the impact of climate change. This target selection and concentration of projects in poor communities must be addressed. The rights-based climate change regime proposed here would ensure that the vulnerabilities of the poor and minorities are identified and protected in policy measures and projects aimed at combating climate change. Implementing non-discriminatory policies would include laying down clear criteria for selecting project locations, conducting environmental impact assessment on the effects of a project at that location and providing public information on the outcome of the assessment. If the EIA shows that residents of the specific location would be affected by that project, then the project should be re-designed to avoid the impact or as a last option discontinued irrespective of the amount of emission reduction the project would generate.

To address discriminatory factors that worsen vulnerabilities, human rights standards and principles should inform and underpin policy measures aimed at combating climate change. The Convention and the KP should be amended to establish elaborate project requirements that would make it compulsory for project proponents to demonstrate that a particular section of the society is not disadvantaged by a project before it could be approved. This would be achieved by developing concrete risk assessment procedures to ensure better characterization of risk across populations, communities, or geographic areas. Measures would then be put in place to reduce high concentrations of risk among specific population groups. When making project decisions, project proponents should be required to demonstrate the distribution of projected risk. As part of the assessment, project proponents must identify individuals and groups that may be differentially or disproportionately affected by the project because of their status. Where groups

are identified as disadvantaged or vulnerable, project proponents must propose and implement measures so that no adverse impact falls disproportionately on them.

D) Restore equity and fairness

It has been shown in this thesis that the current market mechanisms of the Kyoto Protocol are premised on inequality. For example, a number of CDM projects have concentrated in some developing countries leaving others out. Over eighty per cent of the current CDM projects are clustered in Asian countries, namely, India, China, and Indonesia, while Africa accounts for less than 2 per cent of the entire CDM project portfolio, the same as Latin American countries.[1133] This inequitable distribution has led to intense competitions amongst developing countries to host CDM projects. This lopsided contest at times even involves doing everything possible to secure the confidence of project proponents to invest in a country. This has led to a situation whereby national governments play active roles in the repression of human rights, land grabs, displacement of citizens and concentration of projects in poor communities.

There is a need to address these equality concerns in the Kyoto Protocol. A better regime is that which gives to each nation according to its needs and strengths and not one, which sidelines some countries or places harsh demands on national governments for participation. Without de-emphasising the competitive nature of the markets, countries might continue to adopt such extreme measures aimed at winning the patronage of project proponents at the expense of the human rights of local citizens and residents. In reforming current climate change regimes, there is the need to create a level playing field amongst countries. An approach would be to create

[1133] These Asian countries are now referred to as the CDM giants. For a breakdown of current CDM projects see The UNFCCC, 'Statistics of CDM Projects'
<http://cdm.unfccc.int/Statistics/Registration/AmountOfReductRegisteredProjP> accessed 20 March 2010.

more incentives for developed countries to invest in the least developed countries that are considered as the unattractive locations. For example, through the doubling of emission credits generated from projects carried out in least attractive countries. This could encourage developed countries to consider investing in these least attractive destinations. Another policy approach could be the provision of financial assistance to LDCs to reduce the risks of project investments in their countries. This could be through clean funds, low interest loans and development assistance that would allow LDCs to reduce their infrastructural gaps and be able to compete in attracting projects.

Table 8.1 Proposed Human Rights Recognition Paragraphs

> *Recognizing that* climate change-related impacts pose immediate and far-reaching threat to people and communities around the world and have adverse implications both direct and indirect, for the full 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 of indigenous peoples to the conservation and protection of the environment of their lands and resources, the right to self-determination, the right to safe drinking water and sanitation, and the right to subsistence,
>
> *Recognizing that* responses to climate change would be most effective if they are coordinated with social and economic development and the respect, protection and fulfilment of fundamental human rights in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries and indigenous communities for the achievement of sustained economic growth and the eradication of poverty,
>
> *Recalling* Council Resolution 7/23 of 28 March 2008 that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights, also Council Resolution 10/4 of 25 March 2009 that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights and Council Resolution 18/22 of 30 September 2011 that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.
>
> *Affirm that* Parties shall in all climate change-related actions, fully respect human rights and shall minimize adverse economic, social, environmental and human rights impact resulting from the implementation of measures taken to mitigate or adapt to climate change impacts.

This proposed draft builds on the preamble to the UNFCCC and the Kyoto Protocol by introducing human rights language into the texts.

E. Suggestion for Further Research

This thesis has developed a legal and institutional framework that could serve as a process-based guideline or template for mainstreaming human rights principles into project execution and approval procedures under international climate change regimes. However, even though the establishment of legal and institutional mechanisms for mainstreaming human rights into climate change mitigation is facilitated at the international level, strengthening democratic and accountability processes at the national level remains a pre-requisite for overall effectiveness. Arguably, human rights mainstreaming would be more effective if it takes root at all levels of decision-making, especially at the local levels, particularly for national mitigation projects or plans that are not executed within the scope of the Kyoto Protocol. For example, large hydroelectric power plant projects or biofuel projects executed under a national program. This is even more imperative with the proposed New Market Mechanisms (NMM), adopted at the Doha Conference. Considering that the NMM is expected to be domestically driven through national emission reduction projects, the importance of developing right-based frameworks that would guide countries to avoid human rights consequences while developing NMM projects at the national level, become very pressing.

There is therefore a need for further research on the extent to which the human rights based approach to mitigation could be embedded in the legal framework for climate change mitigation at the national level. Specifically, there is a need to consider the peculiarities, potentials and

paradoxes of adopting a human rights based approach to mitigation at the national level. What are the web of laws, regulations and policies that could be adopted at the national level to coordinate national mitigation plans with human rights laws and institutions, what national institutions, departments and ministries would foster the linkages between human rights and climate change communities, what are the potentials for success, and what are the practical limitations and challenges of adopting a right based approach to mitigation at the national level. Answers to these questions would further clarify how national governments can take ownership of the HRBA framework, and how national authorities could tailor the right-based threshold discussed in this thesis to guide national mitigation plans and policies.

BIBLIOGRAPHY

I. ARTICLES

Abbott K. and D Snidal, 'Hard and Soft Law in International Governance (2000) 54 Int'l Org 421–456.

Agrawal A and C Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27:4 World Development 629-639.

Allen F., et al, 'Niger Delta Niger Delta Oil Flares, Broken Laws, Pollution and Oppression', in Why the Carbon Trading Gamble and the Clean Development Mechanism Wont Save the Planet from Climate Change and How African Civil Society is Resisting (A Report by the University of KwaZulu Ntual Center for Civil Society and Dartmouth College Climate Justice Research Project April 2012). Chapter 4.

Alston P., 'Resisting the Merger And Acquisition Of Human Rights By Trade Law: A Reply To Petersmann' (2002) 13(8) EJIL 815.

Alston P., 'Conjuring Up Human Rights: A Proposal for Quality Control' (1984) 78. Am . J Int Law 615.

Aminzadeh C., 'A Moral Imperative: The Human Rights Implications of Climate Change' (2007) 30 Hastings International and Comparative Law Review 259.

Anderson M., 'Human Rights Approaches to Environmental Protection: An Overview' in *Human Rights Approaches to Environmental Protection* (OUP 1996) at 10-11.

Andorno R., 'The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics' (2010) 2 J. Legal Analysis 171.

Andorno R., 'The Precautionary Principle: A New Legal Standard for a Technological Age' (2004) 1 Journal of International Biotechnology Law 11–19.

Aryeh N., 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1

Ascoli S and K Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' (EUI Working Paper LAW No. 2007/02).

Atapattu S., 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 Tul. Envtl. L.J. 65;

Atsegbua L., 'Environmental Law and Practice in Nigeria-Commentaries' (2004) 4 I.U.L.J at 12.

Bacchi C and J. Eveline 'Mainstreaming and Neoliberalism: A Contested Relationship' (2004) 22(2) Journal of Public, Foreign and Global Policy 118

Bacchi C., 'Gender Mainstreaming: A New Vision, More of the Same, or Backlash?'(2001) 20(2) Dialogue: Academy of the Social Sciences 16-20.

Ball P., 'Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis' (2001) 18(3) Statistical Journal of the United Nations Economic Commission for Europe 163-174.

Baros M., 'A New Human Rights Culture and Deliberate Constitutionalisation' (2007) 5(1) Hertfordshire Law Journal 115.

Barton B., 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development'' in D Zillman, N Donald, A Lucas, & G Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources.* (OUP, 2002) 11.

Bayefsky A, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 Human Rights Quarterly 5.

Beasley C., 'Of Pollution and Poverty' (1990) 2 (4) Environmental Journal 38-45

Beveridge F., S Nott and K Stephen 'Mainstreaming and the Engendering of Policy Making: A Means to an End?'(2000) 7(3) Journal of European Public Policy 385-405.

Beveridge F., S. Nott, and K. Stephen, 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10(3) Feminist Legal Studies 299-311.

Bilder R, 'Rethinking International Human Rights: Some Basic Questions' 1969 WIS. L. REV. 1971-1973

Birkinshaw P., 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 Admin. L. Rev. 177, 179, 210

Boisson De Chazournes L., 'The World Bank Inspection Panel: About Participation and Dispute Settlement' in T Treves et Al (eds) Civil Society, International Courts and Compliance Bodies 9 Asser Press 2005) 187-203.

Bottriell K. and Cordonier Segger M., 'The Principle of Public Participation and Access to Information and Justice' (2005) CISDL 1.

Boyle A., 'Human Rights or Environmental Rights? A Reassessment' (2007) XVIII Fordham Environmental L Rev 471 at 497;

Boyle A., 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) International and Comparative Law Quarterly 901-913.

Boyle A., 'The Role of International Human Rights Law in the Protection of the Environment ' in A Boyle and M Anderson (eds.) *Human Right Approaches to Environmental Protection* (OUP, Oxford 1996) at 43.

Bradlow A., 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 Georgia J Int'l L 403, at 419;

Bradlow D., 'The World Bank, the IMF and Human Rights' (1996) 6 Transnat'l L. & Contemp. Probs. 47, 59;

Brandeis L., 'What Publicity Can do' in *Other People's Money* chapter 5, p. 92 (1932), first published in *Harper's Weekly,* December 20, 1913.

Bronen R., 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine' (2011) 35 New York University Review of Law & Social Change 357–407;

Brooks N., W Neil Adger, and P Mick Kelly, 'The Determinants of Vulnerability and Adaptive Capacity at the National Level and the Implications for Adaptation' (2005) 15(2) Global Environmental Change 151–163.

Brown Weiss E., 'Accountability and International Law: Reflections from Water Projects' A lecture delivered at the University of Oxford on 23 February, 2012.

Brown Weiss E., 'The World Bank Inspection Panel: Participation and Accountability' in S Kuyama & M Fowler (eds) *Envisioning Reform: Enhancing UN Accountability in the Twenty – First Century* (United Nations University Press 2009) 292.

Brown Weiss E., 'New Directions in International Environmental Law' Address Before the United Nations Congress on Public International Law (15 March 2001).

Brown Weiss E., 'On Being Accountable in a Kaleidoscopic World' (2011) 1 Asian J. Int'l L. 21–32;

Brown Weiss E., P Lallas and A Herken, 'The World Bank Inspection Panel: Participation and Accountability' in Kuyama and Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century* (United Nations University Press 2009) 271.

Bruneau R., 'Maximizing Benefits from the Clean Development Mechanism: Developing Country Supply of Carbon Sinks and Technological Transfer Projects' (2006) International Environmental Affairs at 6.

Brunnée, J.,'COPing with Consent: Law Making under Multilateral Environmental Agreements' (2002) Leiden Journal of International Law 15: 1–52.

Burger M., 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment' 28 Colum, J. Envtl. L. 371 (2003) 377.

Butegwa C., 'Enterprise Development and Poverty Reduction: The Case for a Rights-based Approach in Non-governmental Organizations and Business' (2005) ENDA 2.

Cameron E, “Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach”, 38 *Georgia Journal of International and Comparative Law* (2009-2010), 673, at 699,

Caney S., ‘Climate Change and Injustice: A Human Rights Perspective’ (2008) Journal of Global Ethics.

Caney S., ‘Cosmopolitan Justice, Responsibility and Global Climate Change’ (2005) 18 Leiden Journal of International Law 747–775;

Caney S., ‘Global Justice, Rights and Climate Change’ (2006)18(2) Canadian Journal of Law and Jurisprudence 255-278;

Carlson J., ‘Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order’ (2009) 18 (1) Transnational Law & Contemporary Problems 45-68.

Castillo G. and M Brouwer, ‘Reflections on Integrating a Rights Based Approach in Environment and Development’ (2007) IUCN, available at http://cmsdata.iucn.org/downloads/pm15.pdf (accessed 12 October, 2010).

Cavallaro J, ‘The Urban Poor: Problems of Access to Human Rights’ (2003) International Council on Human Rights Policy 12.

Charlesworth H, ‘Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations’ (2005) Harvard Human Rights Journal 18: 1-18.

Chen-Wishart M., ‘Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding’ (2013) 62(1) International and Comparative Law Quaterly.

Clark D., ‘The World Bank and Human Rights: The Need for Greater Accountability’ (2002) 15 Harvard Human Rights Journal 205-226.

Clark D., Resettlement: ‘The World Bank's Assault on the Poor’ (CIEL Brief May 2000);

Clark D., The Impact of the 2002 Submergence on Housing and Land Rights in the Narmada Valley (Habitat International Coalition 2003).

Clark T. and F Crepeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 Netherlands Quarterly on Human Rights, 389-390.

Coglianese C., ‘Citizen Participation in rule Making: Past, Present and Future’ (2006) 55 Duke L.J 943;

Cohen J. and N Uphoff, ‘Participation’s Place in Rural Development: Seeking Clarity through Specificity’ (1980) 8 World Development 214.

Cohen M., ‘Information as a Policy Instrument in Protecting the Environment: What Have We Learned?’ (2001) 31 Envtl.L.Rep. 104.

Cohen S., ‘Climate Change and Sustainable Development: Towards a Dialogue’ (1999) Global Environmental Change 341.

Collins L., ‘Environmental Rights for the Future? Intergenerational Equity in the EU’(2007)16(3), Rev. Eur. Community Int’l Envtl. L. 321;

Colquette K., K. Michele, and A, Elizabeth, H Robertson ‘Environmental Racism: The Causes, Consequences, and Commendations’ (1991) 5 (1) Tulane Environmental Law Journal 153- 207.

Cook K., ‘Environmental Rights as Human Rights’ (2002) 2 Eur. Hum. Rts. L. Rev. 196;

Cornwall A. and K Brock, What Do Buzzwords Do for Development Policy? A critical look at 'participation', 'empowerment' and 'poverty reduction' (2005) 26(7) Third World Quarterly;

Crossen T., ‘Multilateral Environmental Agreements and the Compliance Continuum’ (2003) Bepress Legal Series, Working Paper 36 available at <http://law.bepress.com/expresso/eps/36> (accessed 23 March, 2011).

Cullet P., ‘Definition of an Environmental Right in a Human Rights Context’ (1995) 13 Netherlands Q. Hum. Rts., 25.

Cullet, P., 'The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions' in: Humphreys, Stephen, (ed.), *Human Rights and Climate Change* (CUP 2010) 183-206.

Cullet, P., ‘Rethinking the Legal Regime for Climate Change: The Human Rights and Equity Imperative' In: Böhm, Steffen and Dabhi , Siddhartha, (eds.), *Upsetting the Offset – The Political Economy of Carbon Markets* (MayFly Books 2009) 292-306.

Cullet, P., 'Equity and Flexibility Mechanisms in the Climate Change Regime: Conceptual and Practical Issues' (1999) 8(2) Review of European Community and International Environmental Law 168-179.

Curran L, and M Anne Noone ‘Access to Justice: A New Approach using Human Rights Standards’ (2008) 15 (3) International Journal of the Legal Profession 195 – 229.

D’Amato A., ‘International Soft Law, Hard Law, and Coherence’ (2008) Northwestern Public Law Research Paper No. 08-01.

Damrosch L., ‘Enforcing International Law Through Non-Forcible Measures’ (1997) 269 *Recueil des Cours*

Darrow M., ‘Human Rights Accountability of the World Bank and IMF: Possibilities and Limits of Legal Analysis’ (2003) 12 Social & Legal Studies 133-144;

De Vos P., ‘Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution’ (1997) SA Journal on Human Rights vol. 13, 44;

Dembowski H., ‘Erratic Justice?’ in (2009) Development and Cooperation 122–123.

Depledge J, ‘Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History’ UNFCCC, <http://unfccc.int/resource/docs/tp/tp0200.pdf> accessed 19 January, 2011;

De Sherbinin A, et al, 'Preparing for Resettlement Associated with Climate Change' (2011) Science 334.6055, 456–457

Dietz T., ‘What is a Good Decision? Criteria for Environmental Decision Making’ (2003) 10(1) Human Ecology Review 33 at 35.
Doelle M., ‘Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to Take Climate Change Seriously’ (2004) 1(2) Macquarie Journal of International and Comparative Environmental Law 182.

Donnelly B and P Bishop, ‘Natural Law and Eco-centrism’ (2007) 19 Journal of Environmental Law 89.

Driesen D., ‘Sustainable Development and Market Liberalism’s Shotgun Wedding: Emissions Trading Under the Kyoto Protocol’ (2008) 83(1) Indiana Law Journal 21

Dryzek J., ‘Political and Ecological Communication’ (1995) 4 Environmental Politics 13.

Dupuy P., ‘Soft Law and the International Law of the Environment’ (1991) 12 Mich. J. Int’l L. 420–435.

Dworkin R., ‘It is Absurd to Calculate Human Rights according to a Cost Benefit Analysis’ The Guardian (26 May, 2006)<http://www.guardian.co.uk/commentisfree/2006/may/24/comment.politics> accessed 12 March, 2012

Ebbesson J., ‘Information, Participation and Access to Justice: the Model of the Aarhus Convention’ (2009) United Nations Expert Meeting, Back ground Paper No. 5

Ebbesson J., Participatory and Procedural Rights in Environmental Matters: State of Play, High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward Co-organized by UNEP and OHCHR Nairobi, 30 November-1 December 2009;

Ebeku K., ‘The Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited’ (2007) 16(3) Rev. Eur. Community & Int’l Envtl L. 312

Elder, ‘Legal Rights for Nature: The Wrong Answers to the Right Question’ (1984) 22 Osgoode Hall LJ 285

Elkins Z and B Simmons, ‘On Waves, Clusters, and Diffusion: A Conceptual Framework’ (2005)598 Annals Am. Acad. Pol. & Soc. Sci. 33.

Ewald W, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat' (1995) 143 *Penn. L. Rev.* 2111-2112.

Eyben R., ‘The Rise of Rights: Rights-Based Approaches to International Development’ (IDS Policy Briefing, Issue 17. IDS, 2005).

Fabra A., ‘Enforcing the Right to a Healthy Environment in Latin America’ (1994) 3(4) Rev. Eur. Community Int’l Envtl. L. 215;

Farber D., ‘The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World’ (2008) 2 Utah Law Review 377-397

Feinberg J., ‘The Nature and Value of Rights’ (1970) 4 J. Value Inquiry 24

Ferreira N, ‘The Expanding Realm of Human Rights’ (2008) 14 Res Publica 57.

Figueres C, Establishing National Authorities for the CDM (CSDA 2004) 21.

Figueres C., ‘Sectoral CDM: Opening the CDM to the Yet Unrealized Goal of Sustainable Development’ (2006) 2(1) McGill International Journal of Sustainable Development Law & Policy.

Fisher L, B Lange and E Scotford, 'Maturity and Methodology: Reflecting on How to Do Environmental Law Scholarship' (2009) Journal of Environmental Law 1-38.

Fitzmaurice M, ‘Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law.’ (2002) 2 Non-State Actors and International Law 12.

Fletcher G., ‘Comparative Law as a Subversive Discipline’, (1998) 46 Am. J. Comp. L., 683,

Foot S., ‘An Evaluation of the Present Clean Development Mechanism’ (2004) 16 (3) ELM 3*;*

Foster S., ‘Justice from the Ground Up: Distributive Inequities, Grassroots Resistance and the Transformative Politics of the Environmental Justice Movement’ (1998) 85 Cal. L. Rev. 775 at 812.

Francioni F., ‘International Human Rights in an Environmental Horizon’ (2010) 21(1) European Journal of International Law 55.

Francioni F., 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729, <http://ejil.oxfordjournals.org/cgi/reprint/20/3/729> accessed 02 April, 2011;

Funk W., ‘Bargaining towards the New Millennium: Regulatory Negotiation and the Subversion of Public Interests’ (1997) 46 Duke L. J 1356.

Furgal C. and J Seguin, ‘Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities’ (2006)114 Environmental Health Perspectives 1964-1968.

Garling M., ‘Enhancing Access to Human Rights: Draft Report’ International Council on Human Rights Policy (ICHRP 2003).

Gearty C., 'Do Human Rights Help or Hinder Environmental Protection?'(2010) 1 Journal of. Human Rights and the Environment 7-22.

George B and V Varghese, 'Human Rights in Tourism: Conceptualization and Stakeholder's Perspectives' (2009) < http://ejbo.jyu.fi/pdf/ejbo_vol12_no2_pages_40-48.pdf> accessed 24 March 2010.

George R., 'Natural Law' (2008) 31(1) Harvard Journal of Law and Public Policy 171-96.

George S., 'A Short History of Neoliberalism' (1999) , A Paper presented at a Conference on Economic Sovereignty in a Globalising World (Bangkok, 24-26 March 1999).

Gibson N., 'The Right to a Clean Environment' (1990) Sask L. Rev. 54; 847.

Giorgetta S., ' The Right to Live in a Healthy Environment' in N Schrijver and F Weis (eds) *International Law and Sustainable Development: Principles and Practice* (Martinus Nijhoff Publishers 2004).

Glennon M, 'Has International Law Failed the Elephant? (1990) 84 AJIL 8.

Golub S., 'Access to Human Rights: Obstacles and Issues' (2003) International Council on Human Rights Policy 3-5.

Golub S., 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) Carnegie Endowment for International Peace 2-3.

Goodland R, 'Free, Prior and Informed Consent and the World Bank Group' (2004) Sustainable Development Law & Policy 66.

Grubb M., 'The Economics of the Kyoto Protocol' (2003) 4 (3) World Economics 159.

Guangshen G.,*et al*, 'Clean Development Mechanism in China; Taking a Sustainable and Proactive Approach' (2004) Sino Sphere Journal 3.

Guzman A., 'International Common Law: The Soft Law of International Tribunals' (2009) 9 Chi. J. Int'l L. 515–535;

Haas P., 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46

Habermas J., 'Towards a Theory of Communicative Competence' (1970) 13 Inquiry 360;

Halstuk M. and B Chamberlin, 'The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To' (2006) 11 COMM. L. & POL'Y, 511

Hamm B, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005-31.

Hansen J, 'Defusing the Global Warming Time Bomb' (2004) 3 *Sci.Amer.* 68-77

Harlow C., 'Access to Justice as a Human Right,' in: P Alston *et al*. (ed) *The EU and Human Rights* (OUP 1999);

Harrington J., 'Climate Change, Human Rights and the Right to be Cold' (2007) 18 Fordham Environmental Law Review 513-535.

Hartz-Karp J and M Briand, Institutionalizing Deliberative Democracy (2009) 9 Journal of Public Affairs 127.

Harvey C., 'Talking about Human Rights' (2004) 5 E.H.R.L.R 500-516.

Harvey J., 'Review Essay: Gender, Refugee Law and the Politics of Interpretation' (2000) IJRL 12(680).

Hassan P., 'Environmental Rights as Part of Fundamental Rights: The Leadership of the Judiciary in Pakistan' (2003) IUCN/Ecopravo-Lviv/UNEP 'EECCA Region Judges Symposium', May 2003;

Hathaway O., 'Do Human Rights Treaties Make a Difference?' (2002) 11(8) Yale Law Journal.

Hayward T., 'Human Rights Versus Emissions Rights: Climate Justice and the Equitable Distribution of Ecological Space' (2007) 21(4) Ethics & International Affairs 431-450.

Heard A., 'Human Rights: Chimeras in Sheep Clothing?' (1997) available at http://www.sfu.ca/~aheard/intro.html (accessed 12 December, 2011).

Hemmati M, 'Gender Perspectives on Climate Change', Emerging Issues Panel, Commission on the Status of Women Fifty-second session New York, 25 February/7 March 2008;

Heyyer W., 'Human Rights and MNCs, Theory vs. Quantitative Evidence' (1996) 18 Hum. Rts. Q. 368;

Higenberg H., 'A Fresh Look at Soft Law' (1999) 3 European Journal of International Law 502

Hodkova I., 'Is there a Right to a Healthy Environment in the International Legal Order' (1991)7 CONN. J. INT. LAW 65;

Hohman J., 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18(2) Transnational Law & Contemporary Problems 296-316;

Horta K., 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 Harv. Hum. Rts. J. 227.

Howard R., 'The Full Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa' (1983) 5 Human Rights Quarterly 469.

Howse R., 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 EJIL 652.

Hunt M., 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 (1) Journal of Law and Society 90.

Husak, 'Why There Are No Human Rights' (1984) 10 Social Theory and Practice 125-141.

Jackson T., 'The Language of Flexibility and the Flexibility of Language' (1998) 10 International Journal of Environment and Pollution 3.

Jagwanth S., 'The Right to Information as a Leverage Right' in R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre 2002) 3-16;

Jodoin S, 'Lost in Translation: Human Rights in the Climate Change Negotiations' (January 2010) CISDL Legal Working Paper, available at <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf> (accessed 02 June, 2011).

Jodoin S., 'From Copenhagen to Cancun: A Changing Climate for Human Rights in the UNFCCC?' CISDL & IDLO Sustainable Development Law on Climate Change Working Paper Series (January 2011) available at <http://www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf>. (Accessed 03 August, 2011).

Jodoin S., 'Human Rights and the Environment: Key Challenges and Best Practices' (2011) CISDL Brief presented to the United Nations Office of the High Commissioner for Human Rights, 10-11. Available at < http://www.cisdl.org/publications/collaborative005.html> (accessed 03 August, 2011).

Johl A., & S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 (3) Ethics, Policy and Environment 300.

Jung M., 'Host Country Attractiveness for CDM non-sink projects', *Energy Policy* (2006): 2174;

Kahn- Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 Mod.L.Rev.1.

Kalas P. and A Herwig, 'Dispute Resolution under the Kyoto Protocol' (2000) 27 Ecology Law Quarterly 53-111.

Kanda H and C Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 Am. J. Comp. Law at 887.7

Kapoor I, 'The Devil's in the Theory: A Critical Appraisal of Robert Chambers' work on participatory development' (2002) 23:1 Third World Quarterly 107-117

Karkkainen B., 'Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm' (2001) 89 Geo. L. J. 257, 290.

Kas S., 'Integrated Justice: Human Rights, Climate Change, and Poverty' (2009)18(1) Transnational Law & Contemporary Problems 115- 138

Kelman S, 'What Price Incentives? Economists and the Environment' (2001) I. L.J 84-86;

Kennedy D., 'The International Human Rights Movement: Part of the Problem' (2001) European Human Rights Law Review 245-267

Keohane R., 'Global Governance and Democratic Accountability', in D. Held and M Koenig-Archibugi, eds, *Global Governance and Public Accountability* (Blackwell 2005) ,

Keohane R., 'Global Governance and Democratic Accountability' in D Held and M Koenig-

Khan I., 'Foreword: It's not just the economy, it's a human rights crisis' in *Amnesty International Human Rights Report 2009*. <http://report2009.amnesty.org/en/introduction> accessed 23 April 2012.

Kimura H., A Srinivasan and K Iyadomi, 'Clean Development Mechanism' in A Srinivasan *et al, Asian Aspirations for Climate Regime beyond 2012* (Institute for Global Environmental Strategies 2006) 36.

Kingsbury K. and Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemporary Problems 15.

Kinley D. and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 4 Va. J. Int'l L. 931.

Klaaren J., 'A Right to a Cell Phone? The Rightness of Access to Information' R Calland and A Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (Open Democracy Advice Centre, Cape Town 2002)17-26.

Klaus B., 'Human Rights and the Environment: Redefining Fundamental Principles' in B Gleeson and N Low, *Governing for the Environment: Global Problems, Ethics and Democracy* (Palgrave, Hampshire 2001);

Knox J, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 (2) Harvard Environmental Law Review 477-498.

Kok M., and H de Connick, 'Widening the Scope of Policies to Address Climate Change: Directions for Mainstreaming (2007) 10(7-8) Environmental Science & Policy 587-599.

Kolshus H., 'Can the Clean Development Mechanism attain both Cost effectiveness and Sustainable Development Objectives?' (2001) 8 CICERO Working Paper at 1.

Korten D., 'Rural Development Programming: The Learning Process Approach' in D.C. Korten and R. Klauss, eds., *People-Centered Development: Contributions toward Theory and Planning Framework* (Kumairan 1984) at 183-184.

Koskieniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity 47.

Kravchenko S., 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 Vermont Journal of Environmental Law 522.

Kuhn S., 'Expanding Public Participation is Essential to Environmental Justice and the Democratic Decision Making Process' (1999) 25(4) Ecology Law Quarterly 647.

Kumar C, 'Revisiting 'Community' in Community-Based Natural Resource Management' (2005) 40:3 Community Development Journal 275-285.

Lallas P., 'The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants` (POPs) (2001) 19 (1) UCLA Journal of Environmental Law and Policy 83-152.

Landman T., 'Measuring Human Rights: Principle, Practice, and Policy' in (2004) 26 Human Rights Quar*terly* 906;

Langlois A, 'The Elusive Ontology of Human Rights' (2004) 18(3) Global Society 245.

Lee J., 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law.' (2000) 25 Columbia Journal of Environmental Law 305.

Lee M, C Armeni, J De Cendra, S Chaytor, S Lock, M Maslin, C Redgwell Y Rydin, 'Public Participation and Climate Change Infrastructure' (2012) Journal of Environmental Law

Legrand P, 'Impossibility of Legal Transplants' (1997) 4 M.J.E.C.L. 111.

Legrand P., 'European Legal Systems are not Converging' (1996) International and Comparative Law Quaterly 79.

Legrand P., 'Impossibility of Legal Transplants' (1997) 4 M.J.E.C.L. 111. .

Leibj E, 'Can Direct Democracy Be Made Deliberative?' (2006) 54 Buffalo Law Review 903.

Lemmer J., 'Cleaning up Development: EIA in Two of the World's Largest and Most Rapidly Developing Countries' (2007) 19 Georgetown International Environmental Law Review 275;

Lewis B., 'Climate Change and Human Rights: Perspectives of Environmental and Indigenous Rights' (2008) 1(1) Journal of the Australasian Law Teachers Association 155.

Limon M., 'Human Rights and Climate Change: Constructing a Case for Political Action.' (2009) 33(2) Harvard Environmental Law Review 451

Macias R., 'Public Participation in Energy and Natural resources Development: A Theory and Criteria for Evaluation' (2010) CIRL 10.

Mclachlan, C., 'The Principle Of Systemic Integration and Article 31(3)(C) Of The Vienna Convention' (2005) 54 ICLQ 279.

MacKay F., "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's extractive Industries Review" (2004) Sustainable Development Law & Policy, Special Issue: Prior Informed Consent, summer 2004, pp. 43-65.

Manique J, 'Universal and Inalienable Human Rights: A Search for Foundations' (1990) 12 Human Rights Quarterly 465-485.

Marshall J., 'The Human Right to a Clean Environment, Phantom or Reality? The European Court of Human Rights and English Courts Perspectives on Balancing Rights in Environmental Cases' (2007) 76(2) Nordic J Intl. Law 103.

Martens M., 'Constitutional Right to a Healthy Environment in Belgium' (2007)16(3) Rev. Eur. Community & Int'l Envtl L. 287;

Matson J., 'The Common Law Abroad: English and Indigenous Laws in the British Commonwealth' (1993) 42 INT'L & COMP. L.Q. 753

Matsuo N., 'CDM in the Kyoto Negotiations' (2003) 8 Mitigation and Adaptation Strategies for Global Change

Mattei U., 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) Butterworth-Heinemann 3.

May J., 'Constitutionalizing Environmental Rights Worldwide' (2006) 23 Pace Envt. Law Rev. 113.

Mayer B., 'International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22 Colorado Journal of International Environmental Law and Policy 357–416.

McClymonds J., 'The Human Right to a Healthy Environment: An International Legal Perspective' (1992) 37 N.Y.L. Sch. L. Rev. 583;

McCrudden J., 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart, 2005), also available at <http://ssrn.com/abstract=568642> (accessed 12 January, 2011);

McCrudden J., 'Mainstreaming Human Rights' in C Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005), also available at <http://ssrn.com/abstract=568642>.

McCrudden J., 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998' in E McLaughlin and N Faris (eds), *Section 75 Equality Duty: An Operational Review* (2004).

McInerney-Lankford S., Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law (2012) 37 (2) Yale Journal of International Law

McInerney-Lankford S., 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) Harvard Environmental Law Review 431-437;

Mehta P., 'Internally-Displaced Persons and the Sardar Sarovar Project: A Case for Rehabilitative Reform in Rural Media' (2005) 20(3) American University International Law Review 613-647;

Meijer E. and J Werksman, 'Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201;

Meijer E., 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 New York University Journal of International Law and Politics 873.

Meyer T., 'Soft Law as Delegation' (2009) 32 Fordham Int'l L.J.888–942.

Meynen W and M Doornbos, 'Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?' (2004) 16(1) European Journal of Development Research 235.

Michaelowa A, & R Lazarus, 'Arguing the Point: Should Large-Scale Power Projects Have a Future under the CDM?' (2013) Carbon Mechanisms Review 14-15

Mohan G. and K Stokke, 'Participatory Development and Empowerment: The Dangers of Localism' (2000) 21:2 Third World Quarterly 247-268;

Monateri G, 'Everybody's Talking': The Future of Comparative Law', (1998) 21 Hastings Int'l & Comp. L. Rev., 825.

Montague P., 'When Rights Conflict' (2001) 7 Legal Theory 257.

Mtandawire T., 'Bringing Development Back In', Key note lecture at Dublin City University, 24 March 2006, online: Dublin City University, <http://www.dcu.ie/~cis/Mkandawire.html>accessed 12 March, 2011.

Mushkat R., 'Environmental Sustainability: A Perspective from the Asia-Pacific Region' (1993) 27 UBC L Rev 153 at 155.153.

Naidoo K, 'Remarks by the Executive Director, Green Peace International' February 2012) United Nations Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights 23-24 February 2012 , available at http://www.ohchr.org/Documents/Issues/ClimateChange/SpeechKumiNaidoo.pdf (assessed 12 April 2012).

Najama A., 'Climate Negotiations beyond Kyoto: Developing Countries Concerns and Interests' (2009) 3 Climate Policy 221–231

Nanwani S., 'Improving accountability at the Asian Development Bank' in Kuyama and Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century, (*United Nations University Press 2009) 271

Nguyen F., 'Emerging Features of a Rights-Based Development Policy of UN, Development Cooperation & NGO Agencies' (2002) Discussion paper, OHCHR Asia- Pacific Regional Office. http://www.un.or.th/ohchr/issues/rba/Pdf/discussrba.pdf accessed 12 December, 2010.

Nickel J., 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification'(1993) 18/1 Yale Journal of International Law 281.

Nollkaemper A., J Wouters and Nicolas Hachez, 'Accountability and the Rule of Law at International Level' < http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf> accessed 12 March, 2010.

Novek S., 'Electronic Revolution in Rule Making' (2004) 53 Emory L. J 434.

Nwapi C., 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) Journal of African Law 184-211.

Nyamu-Musembi C. and A Cornwall, 'What is the 'Rights-Based Approach' all about? Perspectives from International Development Agencies' (2004) IDS Working Paper 234, available at http://www.ids.ac.uk/ ids/bookshop/wp/wp234.pdf (accessed 02 March 2011);

Nyeyere J, Stablility and Change in Africa (1970) African Contemporary Records 30-31.

Obiora L., 'Toward an Auspicious Reconciliation of International and Comparative Analyses' (1998) 46 Am. J. Comp. L., 669,

Offenheiser R. and S Holcombe, *Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective* (2003) 32 Non Profit and Voluntary Sector Quarterly 286.

Olawuyi D, 'Addressing Inequality trends in Climate Change Mitigation Policy Measures and Projects: Reflections on Post 2012 Outlooks' (2013) Environmental Law and Practice Review.

Olawuyi D, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 2 (1) Nordic Environmental Law Journal.

Olawuyi, D., 'Adopting the Language of Rights for Environmental Protection: Legal and Theoretical Justifications' (2012) 3 (1) Canadian Journal of Globalization 35.

Olawuyi D, 'Legal Preparedness for Climate Change in Africa' in S Mason-Case, Liliana

del Villar, Damilola Olawuyi, and B Mayer, Compendium of Legal Best Practices on Climate Change Policy (International Development Law Organization, 2011).

Olawuyi D., 'From Kyoto to Copenhagen: Rethinking the Place of Flexible Mechanisms in the Kyoto Protocol's post 2012 Commitment Period' (2010) 6/1 Law, Environment and Development Journal 21.

Olawuyi D., 'Achieving Sustainable Development in Africa through the Clean Development Mechanism: Legal and Institutional Issues Considered' (2009) African Journal of Comparative International Law.

Olawuyi D.,'Beautifying Africa for the Clean Development Mechanism- Legal and Institutional Issues Considered' in B Richardson, Y Le Bouthillier, H McLeod- Kilmurray & St Wood (eds.), *Climate Change Law and Developing Countries: Legal and Policy Challenges for the World Community* (Edward Elgar Publishing, 2009).

Olawuyi D, 'A Human Rights Based Approach to Climate Change: Legal and Institutional Perspectives' a paper presented at the ECOST Climate Change Working Group on Human Rights, Climate Change and Migration held at the University of Utretch, Netherlands.

Olawuyi D, 'Conceptualizing Peace in a Changing Climate: Perspectives on a Human Rights Based Approach to Climate Change Mitigation and Adaptation' a Paper presented at the 2012, PeaceTalk Series, University of Calgary, Canada.http://www.ucalgary.ca/peacestudies/peacetalks

Olsen K. and J Fenhann 'Sustainable Development Benefits of Clean Development Mechanism Projects: A New Methodology for Sustainability Assessment Based on Text Analysis of the Project Design Documents submitted for validation' (2008) 36 Energy Policy 2819-2830.

Orucu E, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition'(2000) E.J. C.L 10.

Orucu E, 'Family trees for Legal Systems: Towards a Contemporary Approach' (2002) A paper presented at the Conference of Epistemology, Brussels, 9.

Osofsky H., 'Learning from Environmental Justice: A New Model for International Environmental Rights.' (2005) 24(1) Stanford Environmental Law Journal 91.

Padersen O, 'The Janus Head of Human Rights and Climate Change: Adaptation and Mitigation' (2011) 80 Nordic Journal of International Law 403

Paellemarts M., 'The Human Right to a Healthy Environment as a Substantive Right' in M Dejeant-Pons and M Paellemarts (eds), *Human Rights and the Environment* (Council of Europe, Strasbourg 2002) 11, 15;

Palmer A., 'An International Right to Environment: a New Generation?' (2006)15 Interights Bulletin 141.

Parsons A., ‘Human Rights and Climate Change: Shifting the Burden to the State?’ (2009) 9(2) Sustainable Development Law & Policy 22-23.

Perrault A., K Herbertson and O Lynch, ‘Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)’ (2007) 19 (3) Georgetown International Environmental Law Review 477.

Petersmann E. and E Ulrich, 'Human Rights and the Law of the World Trade Organization' (2003) Journal of World Trade 241-281.

Petersmann E., ‘Constitutionalism and WTO Law: From a State-Centered Approach towards a Human Rights Approach in International Economic Law’ in: D.L.M.Kennedy/J.D.Southwick (eds), The Political Economy of International Trade Law (CUP 2002) 32-67;

Petersmann E., ‘Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston’ (2002) 13 European Journal of International Law 845-851.

Petersmann E., ‘Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration (2002) 13 EJIL 641.

Petersmann E., 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law', (2000) 37 Common Market Law Review 1363-1382;

Petterson B., ‘Development-Induced Displacement: Internal Affair or International Human Rights Issue?’ (2002) 12 Forced Migration Review 19.

Pildes R., ‘Competitive, Deliberative and Rights Oriented Democracy (2004) 3 Elections L. J 685.

Plant R., ‘Social and Economic Rights Revisited’ (2003) 14 Kings College L. J 13.
Poiser J, ‘A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation’ (1996) 26 Envtl. L. 53 at 83.

Portney P., ‘Counting the Cost: The Growing Role of Economics in Environmental Decision Making’(1998) 2 ENVIRONMENT 14.

Posner E., ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ (2007) University of Pennsylvania Law Review 155: 1925-1945

Posner E., and C Sunstein ‘Climate Change Justice’ (2008) 96 Georgetown Law Journal 1565-1597.

Post H., ‘Further Clarification of the ‘Indirect’ Individual Right to a Healthy Environment’ (2000) Colum. J. Envt. 25.

Postiglione A., 'Human Rights and the Environment' (2010) 14(4) The International Journal of Human Rights, 524-541.

Quane H., 'Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous People' (2012) 25 Harvard Human Rights Journal.

Rajamani L., 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) Journal of Environmental Law 22:3;

Ramachandra K., 'Sardar Sarovar: An Experience Retained' (2006) 19 Harvard Human Rights Journal 275-281.

Redgwell C., 'Life, The Universe and Everything: A Critique of Anthropocentric Rights' in *Human Rights Approaches to Environmental Protection* (OUP, 1996) 86-87.

Redgwell C. , 'International Soft Law and Globalization', Ch. 5, pp. 89-107, in B. Barton, A. Lucas, A. Ronne and D. Zillman, eds., *Alternatives to Regulation in Energy and Natural Resources Law* (OUP 2006)

Redgwell C., 'Access to Environmental Justice', Ch. 5, pp. 153-175, in F. Francioni, ed., *Access to Justice as a Human Right* (The Collected Courses of the Academy of European Law, OUP 2007)

Redgwell C., 'International Environmental Law and Climate Change', in R Lyster and S Scott, eds., *International Law and Climate Change* (Edward Elgar, 2012) 166-204.

Reed M., 'Stakeholder Participation for Environmental Management: A Literature Review' (2008) 141 Biological Conservation 2417.

Reisman M., 'Hard Look at Soft Law' (1988) 82 AM. SOC'Y INT'L L. PROC. 371-77.

Rees W., 'Foreword: Global Change and the Social Construction of Human Rights' in L Westra, *Human Rights: The Common and the Collective* (UBC Press, 2011) xiv.

Rinceanu J., 'Enforcement Mechanisms in International Environmental Law: Quo Vadunt?'(2000) 15 J. Envtl. L. & Litig. 147

Rock E. and M Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law and Inter-doctrinal Legal Transplants' (2002) 96(2) Northwestern U. L Rev 651.

Rodenhoff V., 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11:3 RECIEL 344.

Roht-Arriaza N, 'First, Do No Harm': Human Rights and Efforts to Combat Climate Change' (2009-2010) 38 Georgia Journal of International and Comparative Law 593, 595

Rose-Ackerman S., 'Consensus versus Incentives: A Sceptical Look at Regulatory Negotiation' (1994) 43 Duke L.J 1211.

Rowe S., ‘Ecocentrism: The Chord that Harmonizes Humans and Earth’ (1994) The Trumpeter 11(2): 106-107.

Rowlands I., ‘The Kyoto Protocol’s Clean Development Mechanism: A Sustainability Assessment’ (2001) 22 Third World Quarterly 795.

Ruhl, J., 'The International Right to Equitable Climate Change Adaptation—Substance or Procedure?' (2012) 37 (2) Yale Law Journal.

Sacco R, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ (1991) 39 Am. J. Comp. L. 343.

Samuel J., ‘Public Advocacy and People-centred Advocacy: Mobilising for Social Change’ (2007) 17(4-5) Development in Practice.

Saner R. and A Neiderberger, ‘Hype or Reality: Can the CDM trigger FDI?’ (2005) 2 E.C.P 12

Scanlon J, *et al*, ‘Water as a Human Right?’ (2004) IUCN Environmental Law and Policy Paper No 51 at 10.

Schlesinger R, ‘The Past and Future of Comparative Law’, (1995) 43 Am. J. Comp. L., 477.

Scott S., ‘Is the Crisis of Climate Change a Crisis for International Law: is International Law too Democratic, too Capitalist and too Fearful to Cope with the Crisis of Climate Change?’ (2007) 14 Australian International Law Journal 31-44;

Seroa de Motta R., ‘Brazil: CDM Opportunities and Benefits’ in D Austin and P Faeth, Financing Sustainable Development with the Clean Development Mechanism(World Resource Institute 2000) 2-4.

Seymour F., ‘The World Bank and Environmental Sustainability’ *in Lending Credibility: New Mandates and Partnerships for the World Bank* 43, 43–44 (1996)

Shelton D, ‘Human Rights and Environment: Past, Present and Future Linkages and the Value

Shelton D., ‘Developing Substantive Environmental Rights’ (2010)1 Journal of Human Rights and the Environment, 89-120;

Shelton D., ‘Equitable Utilization of the Atmosphere: A Rights-based Approach to Climate Change’ in S Humphreys (ed.), *Human Rights and Climate Change* (CUP 2010) 91-126;

Shelton D., ‘Human Rights, Environmental Rights, and the Right to Environment’ (1991) 28 Stanford Journal of International Law, at 134.

Shelton D., ‘The UN Human Rights Committee’s Decisions’ (2005) Human Rights Dialogue: ‘Cultural Rights’, Carnegie Council for Ethics and International Affairs, <http://www.cceia.org/resources/publications/dialogue/2_12/section_3/5151.html> accessed 18 February, 2011.

Shelton D., 'The UN Human Rights Committee's Decisions' *Human Rights Dialogue: Cultural Rights* (2005) available at <http://www.cceia.org/resources/publications/dialogue/2_12/section_3/5151.html>.

Shelton D., "The Links Between International Human Rights and Environmental Protection", p.3, available at http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf.

Shelton D, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized'? (2006) 35 Denv J Int'l L & Pol'y 129.

Shestak J., 'The Philosophical Foundations of Human Rights' in J Symonides, *Human Rights Concepts and Standards* (Ashgate, 2000) 33-35.

Silayan A., 'Equitable Distribution of CDM Projects Among Developing Countries' *HWWAReport* 255 at 1.

Simma B., and T Kill, 'Harmonizing Investment Protection and International Human Rights:First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford, 2009) 678–707.

Smith B., I Burton, R Klein, and J Wandel, 'An Anatomy of Adaptation to Climate Change and Variability' (2000) 45(1) Climatic Change 233-51.

Smith R., 'Human Rights and Access to Justice' (2007)14(3) International Journal of the Legal Profession 261-262;

Sohn L., 'The New International Law: Protection of the Rights of Individual Rather than States (1982) 32(1) American University Law Review 1-64.

Sokona Y, 'The Clean Development Mechanism: What Prospects for Africa?' (2005) ENDA at 1.

Soveroski M., 'Environment Rights versus Environmental Wrongs: Forum over Substance?' (2007) 16(3), Rev. Eur. Community Int'l Envtl. L. 261.

Spamann H., 'Contemporary Legal Transplants: Legal Families and the Diffusion of Law' (2009) BYU L. Review 1813.

Squires J, 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12(3) Social Politics: International Studies in Gender, State & Society 366-388;

Stallworthy M., 'Environmental Justice Imperatives for an Era of Climate Change' (2009) 36(1) Journal of Law and Society 55-74.

Steiger H., B Demel, H Fey and P Malanczuk, 'The Fundamental Right to a Decent Environment' in M Bothe (ed) *Trends in Environmental policy and Law* (IUCN 1980).

Stein E., 'Uses, Misuses and Nonuses of Comparative Law' (1977) Northwestern U. L. R

Stephenson, S 'Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes' (2010) 42 Ottawa Law Review 155–180.

Stone C., 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' 45 S. Cal. L. Rev. 450 (1972).

Sterk W.,'House Cleaning in Doha: UN Climate Summit Delivers Second Life for Kyoto but no Deal to Revive Carbon Market' (2013) Carbon Mechanisms Review 10.

Streck C. and J Lin, "Making Markets Work: A Review of CDM Performance and the Need for Reform" (2008) 9 (2) European Journal of International Law 409-42.

Sunstein C., 'Informational Regulation and Informational Standing: Akins and Beyond' (1999) 147 U.Pa.L.Rev 613, 625.

Sutter C., 'Does the Current Clean Development Mechanisms Deliver its Sustainable Development Claims' (2005) HWWA Report 1.

Tallant J, 'Forging Stronger Cooperation between Human Rights and Climate Change Communities' (February 2012) United Nations Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights 23-24 February 2012 – Palais des Nations, Salle XII – Geneva, Switzerland, available at http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant_24Feb2012.pdf (assessed 12 April 2012).

Terry G., 'No Climate Justice Without Gender Justice: An Overview of the Issues' (2009) Gender & Development, 17:1, 5-18;

Terry G., 'No Climate Justice without Gender Justice: An Overview of the Issues' (2009) Gender & Development, 17:1, 5-18

Terry G., *Climate Change and Gender Justice* (Oxfam 2009) 3.

Theis J., Promoting Rights-Based Approaches Experiences and Ideas from Asia and the Pacific(STC, 2004)

Thorne M., 'Establishing Environment As a Human Right'(1991) 19 Denv. J Int'l. & Pol'y 301.

Thorson D., What is Neoliberalism (2009) University of Oslo Working Paper Series available at http://folk.uio.no/daget/neoliberalism2.pdf (accessed 12 January 2011) ;

Tillinghast D., David R., 'Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial; but Could They Possibly Be Legally Binding?' (2006) 35 Tax Mgmt. Int'l. J. 580.

Tribe L., 'Ways Not to Think About Plastic Trees: New Foundations for Environmental Law' (1974)83:7 Yale L.J 1343.

Tsosie R, ‘Indigenous People and Environmental Justice: The Impact of Climate Change’ (2007) 78 University of Colorado Law Review 1625,

Turner S., ‘The Human Right to a Good Environment – The Sword in the Stone (2004) 4 Non St. Actors & Int’l L., 277;

Twinning W., ‘Diffusion of Law: A Global Perspective’ (2009) 49 J. Legal Pluralism 1.

Umamaheswaran K. and A Michaelowa ‘Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector’ (2006) HWWA Discussion Paper 346.

Van Asselt H, Francesco Sindico and Michael Mehling, “Global Climate Change and the Fragmentation of International Law”, 30 *Law and Policy* (2008), 423;

Von Doussa J., ‘Climate Change: Catastrophic Impacts and Human Rights.’ Australian Human Rights Commission, (2007), available at: <http://www.humanrights.gov.au/about/media/speeches/speeches_president/2007/20071211_Climate_Change.html> (accessed 10 October 2011).

Von Doussa J., ‘Human Rights and Climate Change: A Tragedy in the Making’ (2008) 31(3) The University of New South Wales Law Journal 953-964;

Waldron J., ‘A Rights Based Critique of Constitutional Rights’ (1993) 13(1) Oxford Journal of Legal Studies 18-51.

Watson A., ‘Aspects of Reception of Law’ (1996) 44 Am. J. Comp. Law 335.

Watson A., ‘Comparative Law and Legal Change’ (1978) Cambridge L.J. 318.

Watson A., ‘Legal Culture V Legal tradition’ paper presented at the Conference of Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, (October 24, 2002) 2.

Watson A., 'Legal Transplants and Law Reform' (1976) 92 Law Q. Rev 79, 81.

Weart S, The Discovery of Global Warming (2009) Available at http://www.physicists.net/history/climate/;(accessed 08 October, 2010);

Webbler T. and S Tuler, ‘Fairness and Competence in Citizen Participation: Theoretical reflections from a Case Study’(2000) 32(5) Administration & Society 570.

Weiner J, ‘Think Globally, Act Globally: The Limits of Local Climate Policies’ (2007) 155 U.PA. L.REV.1961

Weiner J., ‘Global Environmental Regulation: Instrument Choice in Legal Context’ (1999) 108 Yale L.J. 677 691-692.

Wewerinke, M, and Curtis F. J Doebbler. 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' 2011 (10) Chinese Journal of International Law 141–160.

Weiss E., 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993).81 GEO. L. J. 675-84, 702-10.

Young M, "Climate Change and Regime Interaction", 5 *Carbon and Climate Law Review* (2011), 147;

Zweigert K. and H. Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 3, 22.

II. BOOKS

Allison W., *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996).

Alston P., (ed), *Non State Actors and Human Rights* (OUP 2005)

Angelsen A., *et al*, *Reducing Emissions from Deforestation and Forest degradation: An Options Assessment Report* (Meridien Institute 2009) 3-4

Archibugi, ed, *Global Governance and Public Accountability* (Blackwell 2002) 130–159.

Aristotle, *Metaphysics*, Book VII, 4 (241B [1029b6-9]).

Arnold D., (ed.), *The Ethics of Global Climate Change* (CUP 2011) 292.

Atsegbua L., V Akpotaire and F. Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ababa Press 2004)32-33.

Attfield and Belsey(eds) *Philosophy and the Natural Environment* (CUP 1994) 11

Beatson J. and T. Tridimas (eds.), *New Directions in European Public Law* (Hart Publishing, 1998).

Behn R., Rethinking Democratic Accountability *(Brookings Institution Press 2001) 317.*

Bello E. and B. Ajibola, eds *Essays in Honour of Judge Taslim Olawale Elias, Volume I Contemporary* (Martinus Nijhoff 1992);

Berkes F., *Common Property Resources: Ecology and Community-Based Sustainable Development* (Belhaven Press 1989);

Besançon M., 'Good Governance Rankings: The Art of Measurement,' (2003) 36(2) World Peace Foundation Report

Bessette J., *How Democratic is the Constitution?*, (AEI Press.) 102–116.

Birnie P, A Boyle and C Redgwell, *International Law & the Environment* (3rd edition, OUP 2009).

Blackburn R., *Towards a Constitutional Bill of Rights for the United Kingdom* (Pinter 1999)

Blankenburg E and F Bruinsma, *Dutch Legal Culture* (2nd edition, Kluwer, 1994)

Bohman J and W Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (1997). 72-73;

Bratspeis R and R Miller, (eds.),*Progress in International Law*, (Martinus Nijhoff, 2008) 197–218;

Bruch C., (ed.) *New Public: The Globalization of Public Participation* (ELI 2002) 203.

Brunee J. and E Hey, (eds.) *The Oxford Handbook of International Environmental Law* (OUP 2007) 681, 688;

Bullard R., *Confronting Environmental Racism: Voices from the Grassroots* (South End Press 1993).

Bullard R., *Dumping in Dixie: Race, Class, and Environmental Quality* (3rd Edition, Westview Press 2002).

C Wraight, *Rousseau's The Social Contract: A Reader's Guide* (Continuum Books 2008).

Campbell J and O Pedersen (eds.), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2001) 288.

Campbell T, K Ewing and A Tomkins, (eds.), *Sceptical Essays on Human Rights* (OUP 2001)15-39.

Cane P., *The Anatomy of Tort Law* (Hart 1997) 181-6 and 201-4.

Chambers R., *Challenging the Professions: Frontiers for Rural Development* (Intermediate Technology Publications, 1993) [*Challenging the Professions*];

Chambers R., *Rural Appraisal: Rapid, Relaxed and Participatory* (Institute of Development Studies, 1992) at 28-29

Chambers R., *Whose Reality Counts? Putting the First Last* (Intermediate Technology Publications, 1997);

Christian Bugge H. and C Voigt, (eds), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008) 88.

Clapham A., *Human Rights Obligations of Non State Actors* (OUP 2006)

Clifford B., (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press 2009) 4-5.

Coleman J, *Markets, Morals and the Law* (CUP 1988).

Cordonier Segger M and A Khalfan, *Sustainable Development Law* (OUP 2004)1.

Couldrey M. and M Herson(eds.) *Forced Migration Review*: *Climate Change and Displacements* (Oxford Refugees Studies Center 2008)

Cranston M., *What are Human Rights?* (Taplinger Publishing Co 1973) 36.

Crawford J., (ed.), *The Rights of Peoples* (OUP 1988) 127

Crippa L and G Gordon, *International Law Principles for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors* (Indian Law Resource Centre 2012)

Cullinan C., *Wild Law A Manifesto for Earth Justice* (Green Books 2003)

Dahl R., *Democracy and its Critics* (Yale University Press 1989)

De Schutter O., *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 553.

Doelle M., *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell, 2005) 29;

Donnelly J, *Universal Human Rights in Theory and Practice* (Cornell University Press 1989) 17.

Dunne T., M Kurki and S Smith (eds.) *International Relations Theory: Discipline and Diversity* (OUP 2007) 116-132

Echeveria J. and J Kaplan, *Poisonous Procedural Reforms: In Defense of Environmental Right to Know* (Georgetown University 2002)

Eckersley R., *Environmentalism and Political Theory: Towards and Eco-centric Approach*

Eide A., 'The Sub-commission on Prevention of Discrimination and Protection of Minorities' in P Alston, *United Nations and Human Rights: A Critical Appraisal* (OUP 1992) 211.

Elster J., *Deliberative Democracy* (Cambridge Studies in the Theory of Democracy 1998).

Feinberg J., *The Rights of Animals and Future Generations*' in *Philosophy and Environmental Crisis*, ed. William Blackstone (University of Georgia Press 1974).

Finnis J, *Natural Law and Natural Rights* (OUP 1980) 280.

Fiskin J., 'When the People Speak Deliberative Democracy: The Majority Principle in Republican Government' in *How Democratic is the Constitution?* (AEI Press 2011) 102–116.

Fitzmaurice M., *Contemporary Issues in International Environmental Law* (Edward Elgar 2009) 170;

Fredman S., *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

Freeman J. and C Kolstad (eds), *Moving to Markets in Environmental Regulation, Lessons after Twenty Years of Experience* (OUP 2006) 5-10.

Freeman M., *Human Rights* (2nd edtn. Polity 2011) 82-84.

Freeman M., *Human rights: an interdisciplinary approach* (Polity Press 2011)11, 89.

Freestone D. and C Streck, (eds.) *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201.

Fung A. and E olin Wrights (eds) *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (The Real Utopias Project 2003).

George R., (ed.), *Natural Law Theory Contemporary Essays* (OUP 1994) 63.

Goodhart M., *Human Rights: Politics and Practice* (OUP 2009);

Government of Canada, *Restoring Accountability: Recommendations* (Public Services Canada, 2006) 8-9,

Gran G., *Development by People: Citizen Construction of a Just World* (Praeger 1983) at 154;

Gray J., *The Nature and Sources of the Law* 2nd Ed. (Beacon Press, 1963) 43

Greiber T., M Janki, M Orellana, A Savaresi-Hartmann and D Shelton, *Conservation with Justice: A Rights-Based Approach* (IUCN 2009) 5.

Griffin J., *On Human Rights* (OUP 2008).

Grubb M., *The Kyoto Protocol, A Guide and Assessment* (Earthscan 1999) 29.

Gutman A. and D Thompson, *Why Deliberative Democracy* (Princeton University Press 2004)

Gwam C, *Toxic Wastes and Human Rights* (AuthorHouse 2010) 105.

Habermas J, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Beacon Press 1984) 88-89.

Hamlin, A. and Pettit, P. (eds), *The Good Polity* (Blackwell 1989) 17–34.

Harvey D., *A Brief History of Neoliberalism* (OUP 2007) 2.

Haya B., *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism*

Hayward T., *Constitutional Environmental Rights* (OUP 2005).

Higgins R., *Problems and Process: International Law and How We Use It* (OUP 1994).

Houghton J., *Global Warming*: *The Complete Briefing*, (4th ed., CUP, 2009)

Humphreys S., (ed.), *Human Rights and Climate Change* (CUP 2010) 91-126, 207

Jacobs L., F Lomax Cook and M Carpini, *Talking Together: Public Deliberation and Political Participation in America* (University of Chicago Press 2009) 9;

Jagtenberg R., E. Örücü and A. De Roo (eds.), *Transfrontier Mobility of Law* (Kluwer Law International 1995), at p. 5.

Jagtenberg R., Erin Örücü and Annie J. de Roo (eds.), *Transfrontier Mobility of Law* 1, 14-16 (1995).

Jones M, *Textbook on Torts*, (OUP 2002) 1.

Kiss A., *Introduction to International Environmental Law* (2nd Edition UNITAR 2005) 6-7.

Korten D and R. Klauss, eds., *People-Centered Development: Contributions toward Theory and Planning Framework* (West Hartford 1984) at 183-184.

Korten D. and F Alfonso (eds), *Bureaucracy and the Poor: Closing the Gap* (Kumarian Press 1983) at 2;

Korten D., *When Corporations Rule the World* (Berrett-Koehler 2001).

Kuokkanen T, *International Law and the Environment* (Kluwer Law International 2002) xxi at 333

Kuper A., (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005).

Kuyama and Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (United Nations University Press 2009)5-8.

Locke J., *The Two Treatises of Civil Government* (Hollis ed, 1689.).

Mckean W., *Equality and Discrimination under International Law* (OUP 1983) 59.

Michel D., (ed.) *Climate Policy for the 21st Century: Meeting the Long-term Challenge of Global Warming* (Center for Transatlantic Relations, 2003)17-25.

Montesquieu B., *The Spirit of the Laws* (University of California Press 1977).

Nelken and Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 90.

Nickel J., *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987) 561-2.

Oakley P. and D Marsden, *Approaches to Participation in Rural Development* (International Labor Office, 1984) at 5-15;

Oberleitner G., *Global Human Rights Institutions* (Wiley 2007)

Olawuyi D, *Legal Aspects of Implementing the Clean Development Mechanism* (Lambert 2010).

Olawuyi D., *Legal and Policy Issues on Climate Change Adaptation in Developing Countries* **(**Lambert 2010).

Ortwin R., T Webler and P Wiedemann, eds, Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse (Kluwer 1995) 35;

Örücü E, E Attwooll, and S Coyle, (eds) *Studies in Legal Systems: Mixed and Mixing* (Kluwer Law International) 344.

Ostrom E., *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990).

Page E., *Climate Change, Justice and Future Generations* (Edward Elgar, 2006), 132-60.

Paul S., *Holding the State to Account: Citizen Monitoring in Action*, (Books for Change 2002).

Paulsson J., *Denial of Justice in International Law* (CUP 2005) 134

Percival R, M Schroeder and A Leape, *Environmental Regulation: Law, Science & Policy* (5th ed., Aspen, New York 2006) 534-535.

Plant R., *The Neoliberal State* (OUP 2009).

Rajamani L, et al (eds) Promoting Compliance in an Evolving Climate Regime (CUP 2011)
Renn O., T Webbler and O Wiedemann (eds), *Fairness and Competence in Citizens Participation: Evaluating Models for Environmental Discourse* (Kluwer, 1995) 47.

Richardson B. and S Woods (eds) *Environmental Law for Sustainability* (Hart 2006) 168.

Rogers W., *Winfield and Jolowicz on Torts* (15th Ed., Sweet& Maxwell 1998) 494.

Ross C., *The Leaderless Revolution: How Ordinary People Can Take Power and Change Politics in the 21st Century*. (Simon and Schuster 2011).

Rousseau J., *The Social Contract and Discourses*. (Everyman Publishers 1993).

Schrijver N, *The Evolution of Sustainable Development Law: Inception, Meaning and Status* (Martinus Nijhoff Publishers 2008) 1.

Seidman A. and Seidman R, *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (Macmillan 1994) at 44.

Shaw M., *International Law* (CUP 2008)

Shue H, 'Human Rights, Climate Change, and the Trillionth Ton' in Denis G. Arnold (ed.), *The Ethics of Global Climate Change* (CUP 2011).

Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (Review/Random House, 1975)

Skogly S., *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish 2001).

Sokona Y. (ed.), *CDM- What Prospects For Africa* (ENDA 2005) 1.

Stein J, *Resistance to Dam Nation: An Analysis of the Stance and Strategies of the Opposition Movement to the Chan-75 Hydroelectric Project in Bocas del Toro, Panama* (Wesleyan University 2008).

Steiner H., *An Essay on Rights* (Blackwell 1997) 59.

Steiner H., P Alston & R Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edtn, OUP 2008) 280.

Sunderland C., T Greiber and G Oviedo (eds) *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN, 2009);

Symonides J., *Human Rights Concepts and Standards* (Ashgate 2000) 75.

Theis J., 'Promoting Rights Based Approaches: Experiences and Ideas from Asia and the Pacific' (Keen Publishing 2004) 2-10.

Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP, Oxford 2007)75.

Thomson J., *The Realm of Rights* (Harvard University Press 1990).

Timmons R. and B Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy* (MIT Press 2007) 11.

Townshend-Smith r., *Discrimination Law: Text, Cases and Materials* (Routledge-Cavendish 1998)137.

Turner S., *A Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International 2009).

Uniacke S., *Permissible Killing* (CUP 1994) 196.

Van Hoecke M (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004).

Vanderheiden S., *Atmospheric Justice Political Theory of Climate Change* (OUP 2008) 192-202.

Wacks R., *Understanding Jurisprudence : An Introduction to Legal Theory* (OUP 2005) 15.

Waldron J, ed. *Theories of Rights* (OUP 1985) 153.

Waldron J., (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) 69.

Waldron J., 'Rights in Conflict' *in Liberal Rights* (CUP 1993).

Watson A., *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974) 22.

Welman C., *The Proliferation of Rights: Moral Progress or Empty Rhetoric* (Westview Press, 1999) 177-178.

Westra L., *Human Rights: The Commons and the Collective* (UBC Press 2011) xiv.

Yamin F. and J Depledge, *The International Climate Change Regime* (CUP, 2005) 25.

Zillman *et al., Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 81.

Zweigert K. and H. Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 3, 22.

III. WORKING PAPERS AND REPORTS

Amnesty International, 'Background Paper on Ghana' (Mimeo 1994).

Amnesty International, 'Panama dam flooding threatens indigenous families' 26 May 2011, available at: http://www.unhcr.org/refworld/docid/4ddf3cd32.html [accessed 12 December 2011]

Andreassen B., and H Otto Sano, 'Human Rights Based Approaches Indicators' (Norwegian Centre for Human Rights, 2004) 1.

Annual Report of the Inter-American Commission on Human Rights *1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter III.

Annual Reports of the UN Special Rapporteur on Summary and Arbitrary Executions UN-Doc. E/CN.4/1995/61.

ARTICLE 19, 'A Model Freedom of Information Law' (2001): http://www.article19.org/pdfs/standards/modelfoilaw.pdf;

ARTICLE 19, 'The Johannesburg Principles: Principles on National Security, Freedom of Expression and Access to Information' (1996): <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> accessed 12 May 2012.

ARTICLE 19, *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: 2000)< http://www.article19.org/pdfs/publications/freedom-of-information-truth-commissions.pdf> accessed 12 May 2012.

Atal Y & D. Ogen, eds., 'Poverty and Participation in Civil Society' (UNESCO, 1997)

Atal Y, 'Involving the Poor: The Many Question Marks' in Y. Atal & D. Ogen, eds., *Poverty and participation in civil society* (UNESCO, 1997);

Australian Human Rights Commission, 'Human Rights Based Approach' <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2011/20110413_rights_women.html> accessed 12 December, 2011.

Baer P, T Athanasiou, and S Kartha, 'The Right to Development in a Climate Constrained World: The Greenhouse Development Rights Framework' (Heinrich Böll Foundation 2007);

Bank Information Center, 'Local Groups say project will not end gas flaring, could exacerbate conflicts in the Niger Delta'<http://www.bicusa.org/en/Project.39.aspx> accessed 14 January, 2011.

Bank Information Center, 'World Bank Acknowledges Serous Flaws in West African Gas Pipeline' <http://www.bicusa.org/en/Article.3864.aspx> (accessed 13 January, 2011).

Barbara J, 'The False Promise of Biofuels' (San Francisco and Washington, DC: International Forum on Globalization and Institute for Policy Studies, September 2007);

Bartolome L *et al*., 'Displacement, Resettlement, Rehabilitation, Reparation and Development' prepared for the WCD, 2000;

BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (2011) <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> accessed 12 July, 2011.

Bynoe I & S Spencer, 'Mainstreaming Human Rights in Whitehall and Westminster' (IPPR, London, 1999).

Castillo G, & M Brouwer, 'Reflections on Integrating a Rights Based Approach in Environment and Development' (2007) in *Conservation and Human Rights*, CEESP/IUCN, available at http://cmsdata.iucn.org/downloads/pm15.pdf (accessed 15 May 2011);

CDM Policy Dialogue: **'**Background Paper by the Secretariat' (22 December 2011) 1, <http://www.cdmpolicydialogue.org/background/CDM_policy_background.pdf> accessed 10 May 2012.

CDM Watch, 'Petition to the CDM Executive Board on Aguan Gas project' (2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.>

Cheria A., and E Sriprapha Petcharamesree, 'A Human Rights Approach to Development: Resource Book' (ActionAid 2004) 2-4.

Clayton B. and S Bass, 'The Challenges of Environmental Mainstreaming' (IEED 2009)

Colchester M and F MacKay, 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent' (Forest Peoples Programme, 2004) 8-14.

Common Wealth, 'Human Rights and Climate Change: An Approach That Puts People in the Forefront of the Debate' Commonwealth Secretariat Discussion Paper 5 (July 2009);

Common Wealth, 'Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know', (London: 30-31 March 1999) Background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development.

Conant J, 'Massive UN-Supported African Palm Plantations Leading to Oppression, Kidnapping and Murder' available at <http://www.alternet.org/environment/149778/why_u.n.-backed_carbon_credit_schemes_may_be_fueling_land_grabs%2C_kidnappings_and_murder?page=entire> (accessed 12 April 2012).

Council of Europe, Recommendation 1883 (2009), Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment.

Council of Europe, Recommendation No. R(81)19 of the Committee of Ministers of the Council of Europe on Access to Information Held by Public Authorities, adopted 25 November 1981: http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)19.asp

Danish Institute for Human Rights, 'Applying a Rights Based Approach in Denmark' (Danish Institute for Human Rights 2007).

Danish Institute for Human Rights, 'The Human Rights Compliance Assessment' <http://www.humanrightsbusiness.org/040_hrca.htm> accessed 28 January, 2011.

Department for International Development, 'How to Note: A Practical Guide to Assessing and Monitoring Human Rights in Country Programmes' (DFID 2009).

Divan S, *International Environmental Law*, available at http://www.nls.ac.in/CEERA/ceerafeb04/html/documents/internationalenvtlawshyamdiwan.htm (accessed 12 January 2010).

Doornbusch R, and R Steenblik, 'Biofuels: Is the cure worse than the disease?' Background paper for OECD meeting in Paris 11-12 September 2007. SG/SD/RT (2007) 3.

Eide A., 'The Right to Food and the Impact of Liquid Biofuels' (FAO, 2008)18-20;

Environmental Rights Action/Friends of the Earth Nigeria, 'Gas flaring in Nigeria: a Human Rights, Environmental and Economic Monstrosity' (June 2005) <http://www.climatelaw.org/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf> accessed 12 February, 2011.

EPA Office of Information statement on goals: <www.epa.gov/oei/goals.htm> accessed September 19, 2011.

EPA, 'Addition of Reporting Elements; Toxic Chemical Reporting; Community Right-to-know'61 Fed. Reg. 51322 (1996).

FIAN, Human Rights Violation in Bajo Arguan (2011) <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf> accessed 02 August, 2011.

Filmozer A, 'CDM Projects Affect Human Rights' (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/> accessed 2 August, 2011.

Frankovits A., 'Human Rights Based Approach and the United Nations System'(2006) UNESCO, <http://unesdoc.unesco.org/images/0014/001469/146999e.pdf> accessed 14 October, 2010.

Frankovits A., 'Mainstreaming Human Rights, The Human Rights-Based Approach and the United Nations System' (UNESCO 2005).

Frankovits A, and Earle P, *Working Together, The Human Rights Based Approach to Development Cooperation in Sweden*, Parts 1 & 2 (SIDA and HRCA 2001).

Friends of River Narmada, *A Brief Introduction to the Narmada Issue available at* http://www.narmada.org/introduction.html (last visited Feb. 19, 2005);

Friis-Hansen E., and Helene Maria Kyed, 'Participation, Decentralization and Human Rights: A Review of Approaches for Strengthening Voice and Accountability in Local Governance' (World Bank 2009).

Gold Standard Foundation, *Gold Standard Eligibility Requirements*, <http://www.cdmgoldstandard.org/wp-content/uploads/2011/10/GSv2.1_Requirements-11.pdf> assessed 12 March 2012.

Green Peace International, 'Human Rights and the Climate Crisis: Acting Today to Prevent Tragedy Tomorrow' (2008) A Briefing Paper by Greenpeace, p 4.

Greiber T, M Janki, M Orellana, A Savaresi-Hartmann & D Shelton, *Conservation with Justice: A Rights-Based Approach* (IUCN, Gland 2009);

Griffiths T and F Martone, 'Seeing 'REDD'? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' Forest Peoples Programme, May 2009, <http://www.rightsandresources.org/documents/files/doc_923.pdf> accessed 12 January, 2011.

Haya B., *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism* (International Rivers Network 2002) 1

Hemmati M, 'Gender Perspectives on Climate Change', Emerging Issues Panel, Commission on the Status of Women Fifty-second session New York, 25 February/7 March 2008.

Holt-Giménez E, & I Kenfield, 'When Renewable Isn't Sustainable: Agrofuels and the Inconvenient Truths Behind the 2007 U.S. Energy Independence and Security Act Food First Policy Brief No. 13: Agrofuels' (Institute for Food and Development Policy, March 2008)

Home Office, 'The Human Rights Culture'. Available at http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/hrcult.htm

Hoshour K, & J Kalafut, 'A Growing Global Crisis: Development-Induced Displacement and Resettlement' (International Accountability Project, Issue Paper 2010);

Hunt P., 'Interim report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health' United Nations General Assembly, Fifty-eighth session, Agenda item 117 (c), 10 October 2003, United Nations General Assembly, paras. 14-29.

IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 available at http://www.worldbank.org/inspectionpanel (accessed 23 February 2012).

Inter-American Commission on Human Rights (IACHR), Hearings and other public events, 'Human Rights Situation in the Bajo Aguán' Honduras, Oct. 24, 2011.

IACHR, 2011 Annual Report, ch. IV, ¶¶ 297-302; IACHR, 2010, Country Report, Honduras, 118-121

International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide' (International Council on Human Rights Policy 2008)

International Finance Corporation, 'Performance Standards on Social and Environmental Sustainability' (30 April 2006) Performance Standard 1, Social and Environmental Assessment and Management Systems.

International Human Rights Network, 'Our Rights, Our Future Human Rights Based Approaches in Ireland: Principles, Policies and Practice' (Dublin 2005).

International Network on Displacement and Resettlement, 'A Global Human Rights and Development Challenge' <www.displacement.net> accessed 12 January, 2011.

International Rivers, 'CIEL Comments on the Chan 75 Large Hydropower Project' <http://www.internationalrivers.org/global-warming/the-cdm-kyotos-carbon-offsetting-scheme/ciel-comments-changuinola-1-chan-75-large-hyd> accessed 23 October, 2010.

International Rivers, Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project, Feb. 9, 2011; CDM Watch (now Carbon Market Watch),

IUCN, 'Gender Aspects of Climate Change' (2007) <www.iucn.org/en/news/archive/2007/03/7_gender_climate_change.pdf> accessed 12 April 2012.

IUCN, 'The Future of Sustainability – Re-thinking Environment and Development in the Twenty-first Century' Report of the IUCN Renowned Thinkers Meeting, 29–31 January 2006 (IUCN 2006). <msdata.iucn.org/downloads/iucn_future_of_sustanability.pdf.> accessed 12 September, 2011.

Kabeer N, 'Mainstreaming Gender in Social Protection for the Informal Economy' (Commonwealth 2008).

Kpodo K, 'Ghana Pipeline Gets First Nigerian Gas' <http://www.forbes.com/feeds/afx/2008/12/13/afx5817813.html> accessed 19 January 2011.

Lankford S., and H Sano, 'Human Rights Indicators in Development: An Introduction' (World Bank 2010)

Lopes C. and T. Theisohn, 'Ownership, Leadership, and Transformation: Can We Do Better For Capacity Development?' (UNDP, 2003)

Macchi M., 'Indigenous and Traditional Peoples and Climate Change' (International Union for Conservation of Nature, 2008)

Malhotra R. and N Fasel, (2005) 'Quantitative Human Rights Indicators: A survey of major initiatives', Background paper for the UN Expert Meeting on Human Rights Indicators, Turku.
McMichael A., (ed)., 'Climate Change and Human Health – Risks and Responses' (World Health Organization, 2003).

Mehta L, & M Stankovitch, 'Operationalization of Free Prior Informed Consent' (Institute of Development Studies UK).

Meta Management and Overseas Development Institute, 'Ideas and Experiences in Mainstreaming Environment and Water' (Netherlands Ministry of Foreign Affairs / Development Cooperation 2006).

Morse B., and T Berger, 'Sardar Sarovar: The Report of the Independent Review' (1992). <http://www.math.tifr.res.in/~vvaish/shared/data/SSA-WB-Review.pdf> assessed 12 March 2012.

Norwegian Agency for Development Cooperation(NORAD), 'Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment' (NORAD 2001).

Nyamu-Musembi C. and A Cornwall, 'What is the 'Rights-Based Approach' all about? Perspectives from International Development Agencies' (2004) IDS Working Paper 234, <http://www.ids.ac.uk/ ids/bookshop/wp/wp234.pdf> (accessed March 2010)

NZAID, 'Human Rights Mainstreaming' (New Zealand Agency for International Development, 2009) 4;

OECD, 'Public Sector Transparency and Accountability: Making it Happen' OECD (2002) 7.

OHCHR, 'Handbook on National Human Rights Plans of Action' 29 August 2002, UN Professional Training Series No. 10.

OHCHR, 'Climate Change Panel' <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Panel.aspx> accessed 25 March 2012.

OHCHR, 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' <http://www2.ohchr.org/english/issues/food/docs/20110701Draft_Guiding_Principles_on_HRIA.pdf> assessed 23 February 2012.

Olhoff A., 'CDM Sustainable Development Impacts' (UNEP Risoe Center on Energy, Climate and Sustainable Development, undated) 10.

One World Trust, '2006 Global Accountability Report: Holding Power to Account' (One World Trust 2005) 25-46.

One World Trust, '2011 Pathways to Accountability II, The Revised Global Accountability Framework'<http://oneworldtrust.org/publications/doc_download/470-pathways-to-accountability-ii >assessed 12 March 2012.

Oxfam International, 'Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy' Oxfam Briefing Paper 117 (Oxfam International, 2008).

Pajuste T, 'Mainstreaming Human Rights in the Context of the European Security and Defence Policy' (Erik Castre´n Institute, 2008)10.

Petition on the Human rights Violations by the Government of Panama directed against Ngöbe Indigenous Communities and Individuals in the Changuinola River Valley, Bocas del Toro.

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, by the Inuit people of the Arctic Regions of the United States and Canada, 7 December 2005 < http://inuitcircumpolar.com/files/uploads/iccfiles/ > accessed 12 May 2012.

Pillay N, 'Open Letter by the United Nations Human Rights Commissioner` (30 March 2012), <http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf> accessed 14 April 2012.

Pottinger L, 'The CDM's Hydro Hall of Shame, Bad Deal for the Planet: Why Carbon Offsets Aren't Working…And How to Create a Fair Global Climate Accord' (Dams, Rivers and People Report 2008, International Rivers, 2008)

Price B., 'Tamaqua Law is First in Nation to Recognize Rights of Nature, <http://www.celdf.org/PressReleases/TamaquaLawRecognizesRightsofNature/tabid/367/Default.aspx> accessed 23 March 2012.

Rangachari *et al*., 'Large Dams: India's Experience' in World Commission on Dams Case Study 214 (2000).

Robinson W, 'Risks and Rights: The Causes, Consequences, and Challenges of Development-induced Displacement' (The Brookings Institution-SAIS Project on Internal Displacement: Washington D.C., 2003) 3.

Robinson M, 'Comments at 2nd Interagency Workshop on Implementing a Rights-based Approach in the Context of UN Reform' (May 2003) <http://www.humanrights.se/upload/files/2/R%C3%A4ttighetsperspektivet/Common%20Understanding%20FN%202003.pdf> accessed 12 January, 2011.

Rozga D., 'Applying a Human Rights Based Approach to Programming: Experiences of UNICEF' (2001) <http://www.handicap-international.fr/bibliographie-handicap/3ApprocheDroit/OutilProgMEO/ApHRight.pdf> *accessed 12 October, 2010.*
Seppa¨nen S, *Possibilities and Challenges of the Human-Rights Based Approach to Development* (Erik Castre´n Institute 2005).

Sexual Rights are Fundamental and Universal Rights (A Declaration Adopted by the World Association of Sexual Health in Hong Kong at the 14th World Congress on Sexology, August 26, 1999), <http://www.assert.org.au/downloads/DecSexualRights.pdf> accessed 23 March, 2010.

Seymour F, C Maurer and R Quiroga, 'Environmental Mainstreaming: Applications in the Context of Modernization of the State, Social Development, Competitiveness, and Regional Integration' (Inter-American Development Bank 2005);

Shuckburgh E, Climate Change – Global Issues' University of Cambridge Climate Change Press Pack, (2008)<http://www.atm.damtp.cam.ac.uk/shuckburgh/general/Climate_Press_Pack.doc> accessed 10 December, 2011.

Soussan J, 'Making Mainstreaming Work' (SEI 2007) 2.

Schneider L., 'Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement' (Öko-Institut 2007).

Sunderland C., T Greiber and G Oviedo (eds) *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (Bogor, Indonesia: CIFOR and IUCN, 2009).

Svadlenak-Gomez K, 'Human Rights and Conservation: Integrating Human Rights in Conservation Programming' 48 (USAID 2007).

Swedish International Development Agency, Human Rights Based Approach 2012, <http://www.sida.se/English/Partners/Sida-Partnership-Forum/Sida-Partnership-Forum1/Courses-20111/Courses-Autumn-2011/RBA112/> accessed 12 December, 2012.

The Public's Right to Know, Principles on Freedom of Information Legislation' Article XIX. IAHCR, Annual Report 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106

The Response of the CDM Executive Board to the Petition, <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf > (accessed 02 August, 2011).

The West African Gas Pipeline Project, http://www-<static.shell.com/static/nga/downloads/pdfs/briefing_notes/wagp.pdf> (accessed 14 January, 2011).

United Nations, Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the *United Nations Permanent Forum on Indigenous Issues (*UNPFII) at its Fourth Session in 2005).

United Nations, Report of the Secretary-General, *Rio Declaration on Environment and Development: application and implementation, Commission on Sustainable Development*, UN Economic and Social Council, E/CN.17/1997/8, 10 February 1997, paras. 65-66

United Nations, Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000

United Nations, Report of the UN Secretary General's High-Level Panel on Threats, Challenges and Climate Change, 2004, available at http://www.un.org/secureworld/report.pdf (accessed 12 May 2012).

Van Weerelt P, 'The Application of a Human Rights-Based Approach to Development Programming, What is the Added Value?' (2000) <http://www.fao.org/righttofood/kc/downloads/vl/docs/212912.pdf> (accessed 12 October, 2011).

VeneKlasen I, 'Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation' (2004) IDS Working Paper 235, available at http://www.ids.ac.uk/ids/bookshop/wp/wp235.pdf. (accessed 12 March 2010).

Voluntary Guidelines to Support the Progressive Realization or the Right to Adequate Food in the Context of National Food Security, Adopted by the 127th Session of the FAO Council, November 2004

WAPCo, Company Profile, http://www.wagpco.com/index.php?option=com_content&view=article&id=46&Itemid=78&lang=en aaccessed 15 January, 2011).

Wapenhans W *et al*., 'World Bank, Report of the World Bank's Portfolio Management Task Force' (July, 1992)

Witness for Peace, 'A People Dammed: The Impact of the World Bank Chixoy Hydroelectric Project in Guatemala' <http://www.witnessforpeace.org/apd.html> accessed 23 March 2012.

World Bank Inspection Panel, http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html (accessed 23 March 2012).

World Bank, 'West African Gas Pipeline Project: Inspection Panel Report' <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InvRepApril25.pdf> (accessed 15 January, 2011).

World Bank, 'Participatory Monitoring and Evaluation (PME) in World Bank Operations: A Discussion Paper Taking Stock of Current and Emerging Practice' (The World Bank 2003).

World Bank, About us, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html> accessed 21 March 2012.

World Bank, 'Development and Climate Change: World Development Report 2010' (The World Bank, 2010);

World Bank, 'Environmental Matters' (World Bank Group, 2009).

World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993) <http://www.worldbank.org/inspectionpanel> accessed 23 February 2012.

World Bank, 'Mainstreaming Climate Change Adaptation in Irrigated Agriculture Project' (World Bank, 2008).

World Bank, 'The World Bank Participation Sourcebook' (The World Bank 1996) 3.

World Food Programme, 'Climate Change and the World's Hungry' <http://www.wfp.org/ENGLISH/?ModuleID=137&Key=2708> accessed 15 January, 2011.

World Health Organization, Statement to the 57th Session of the Commission on Human Rights in 2001, in 'The Right to Water'(WHO, 2003) at 21.

World Justice Project, 'Mainstreaming the Rule of Law' (2011) <http://worldjusticeproject.org/mainstreaming/> accessed 12 December, 2011.

IV. NEWSPAPERS

Adeyemo K., 'Nigerians Oppose Climate Development Projects' *The Tribune* (Ibadan, 12 September, 2010) 3.

Agence France-Presse, 'Protests over planned dam turn violent in Panama' Mar. 9, 2013.

All African News, 'Protests Mount against the West African Pipe line Project' <http://allafrica.com/stories/200411230238.html> accessed 19 January, 2011.

All African News, Whither with the West African Gas Pipeline Project <http://allafrica.com/stories/200910160755.html> (accessed 12 January, 2011).

BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (2011) available at <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> (accessed 12 July, 2011).

Bodenham P. and B Cubby, 'Carbon Cowboys: Amazonian tribes are facing new challenges as carbon credit dealers move into their forests' *Sydney Morning Herald* (23 July, 2011) <http://www.smh.com.au/environment/conservation/carbon-cowboys-20110722-1hssc.html> accessed 12 May 2012.

Carbon Offsetting Scheme (2011), <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/04/180411_PR_UN_under_Pressure_to_denounce_human_rights_abuses_in_carbon_offsetting_scheme.pdf> accessed 12 December, 2011.

Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010;

Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010.

CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> (accessed 23 July, 2011).

CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> (accessed 23 July, 2011).

CDM Watch, 'German Bank Won't Lend to Honduran CO_2 Project' (April, 2011), available at <*http://www.bloomberg.com/news/2011-04-18/german-bank-won-t-lend-to-honduran-co2-project-cdm-watch-says.html*> (accessed 01 August 2011).

CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' available at <*http://www.cdm-watch.org/?p=1648*> (accessed 02 August, 2011).

CDM Watch, 'Press Release: United Nations under Pressure to denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) available at <http://www.cdm-watch.org/?p=1872> (accessed 02 August, 2011).

CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (2011) available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.>;

CDM Watch, *Petition to the CDM Executive Board on Aguan Gas project* (2011) available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf.> (accessed 23 March 2012).

CDM Watch, United Nations Under Pressure to denounce Human Rights Abuses in

Climate Connections, 'Carbon Trade Group Backs Call to check Credits on Human Rights' available at <http://climate-connections.org/2011/04/18/carbon-trade-group-backs-call-to-check-credits-on-human-rights/> (accessed 02 August, 2011).

Climate Connections, 'Carbon Trade Group Backs Call to check Credits on Human Rights' available at <http://climate-connections.org/2011/04/18/carbon-trade-group-backs-call-to-check-credits-on-human-rights/> (accessed 02 August, 2011).

Dixon R, 'Kenyan Tribe Slowly Driven off its Ancestral Lands' *L.A. Times* (04 January 2010) <http://articles.latimes.com/2010/jan/04/world/la-fg-kenya-forest4-2010jan04> accessed 23April 2012.

Down to Earth Group, "Issues: Flexibility Mechanisms" *Down to Earth Magazine* (November 15, 2005).

Dworkin R., 'It is Absurd to Calculate Human Rights according to a Cost Benefit Analysis' The Guardian (26 May, 2006) <http://www.guardian.co.uk/commentisfree/2006/may/24/comment.politics> accessed 12 March, 2012.

FIAN, Human Rights Violation in Bajo Arguan (2011), available at http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf. (Accessed 02 August, 2011).

Forgarty D., 'Shell Bankrolls REDD Project in Nigeria' <http://climatevoices.wordpress.com/2010/09/07/shell-bankrolls-redd/> accessed 13 January, 2011.

Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' available at <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> (accessed 12 October, 2010).

Hassan T., 'Nigeria to become Full Member of REDD' <http://allafrica.com/stories/201010280686.html> accessed 12 January, 2011.

Idowu D., 'ERA condemns Nigeria's Kwale CDM Project' *Vanguard* (Lagos, 02 September, 2009).

Intercontinental Cry, "Panama: Police brutality signals impending storm over Barro Blanco hydroelectric project," Mar. 21, 2013 (Intercontinental Cry, Nagare Barro Blanco, Mar. 17, 2013).

Jiang H., 'Carbon-Trading Scheme Undermined by Chinese Projects' (Epoch Times 9 December 2009). http://www.theepochtimes.com/n2/world/carbon-trading-scheme-chinese-projects-26215.html (accessed 15 May 2012)

Lang C., 'REDD-Monitor, Injustice on the Carbon Frontier in Guaraqueçaba Brazil' (2009) <http://www.redd-monitor.org/2009/11/06/injustice-on-the-carbon-frontier-in-guaraquecaba-brazil/> accessed 23 April 2012.

Lean G., 'Global Warming could soon make Antarctica the only place to live, says Chief British Scientist' *The Independent on Sunday* (2 May, 2004).

Lucas P. and T Patzek, 'The Disastrous Local and Global Impacts of Tropical Biofuel Production' (March 2007) *Energy Tribune* 19.

Nwanunobi T., 'West African Gas Pipeline Will Supply 475 Cubic Ft of Gas Daily' *Leadership* <http://allafrica.com/stories/200804280704.html> aaccessed 13 January, 2011).

Ogidan S., 'Nigeria to Earn N 34.44 Billion yearly in Tree Planting' *Nigerian Compass* (14 February, 2011)

OMB Watch, *A Citizen's Platform for Our Environmental Right-To-Know* 36 (March 2001)

Onojiribholo F., 'Kwale Chief Laments Plight of Communities', (*Daily Independent* 16 August 2011).

Pal R., 'The Right to Information and Empowerment of the People' (October 2000) *PUCL Bulletin* <http://www.pucl.org/reports/National/information.htm> accessed 12 December, 2011.

Petroleum Africa, 'Nigerian Communities against WAGP'(2004) <http://www.petroleumafrica.com/en/newsarticle.php?NewsID=705&format=print&PHPSESSID=3ae610b622e0e182675e5a86f6552f90> (accessed 19 January, 2012).

Petroleum Africa, 'Nigerian Communities against WAGP'(2004) <http://www.petroleumafrica.com/en/newsarticle.php?NewsID=705&format=print&PHPSESSID=3ae610b622e0e182675e5a86f6552f90> (accessed 19 January, 2012)

Petroleum Africa, 'Nigerian Communities against WAGP'(2004) <http://www.petroleumafrica.com/en/newsarticle.php?NewsID=705&format=print&PHPSESSID=3ae610b622e0e182675e5a86f6552f90> (accessed 19 January, 2012)

Pianin E., 'EPA Reports Decline in Pollution' *The Washington Post* (May 24, 2002) 2.

Point Carbon, 'CDM Host Nations ask U.N. for Power to Ban Projects' available at http://www.pointcarbon.com/news/1.1802068 (accessed 30 March 2012).

Sandel M., 'It is Immoral to Buy the Right to Pollute' *N.Y.TIMES*, 15 Dec., 1997

SCOOP, Dont Sell Forests: Group Urge Nigerian Government <http://www.scoop.co.nz/stories/WO1008/S00467/dont-sell-forests-groups-urge-nigerian-govts.htm>;

Terra Daily, UN Criticizes displacements of Panama Dam Tribe, *Terra Daily* (2008) available at http://www.terradaily.com/reports/UN_criticises_displacement_of_Panama_dam_tribe_999.

This Day, 'Nigeria: Citizens See Climate Change as an Act of God', < http://allafrica.com/stories/200903120056.html> accessed 11 March, 2009

Vanguard 'Nigeria loses $150 billion to gas flare in 36 yrs' *Vanguard* (Lagos, July 12 2008) 3