

“FIRST, DO NO HARM”: HUMAN RIGHTS AND EFFORTS TO COMBAT CLIMATE CHANGE

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I. INTRODUCTION

A dam is built in China, displacing hundreds of people and drying up the livelihoods of farmers and fisherfolk downstream;¹ another dam project in Panama leads to a complaint in the Inter-American human rights system for displacement and police brutality.² Both projects proponents expect to generate extra revenue from selling carbon credits on world markets. A forest planting project in which a Norwegian power company leased lands to plant trees in order to continue to emit carbon at home leads to the displacement of 8,000 people in Uganda.³ Villagers, dispossessed by land grabs aimed at setting up palm oil plantations to supply the European biofuels market, clash with police and demand labor rights.⁴ A waste-to-energy project in Thailand leads to diminished food yields and increased exposure to hazardous silica dust.⁵ A number of indigenous peoples' organizations declare that carbon trading risks their further marginalization and call for any efforts at climate-related forest preservation to be subject to the provisions of the UN Declaration on the Rights of Indigenous Peoples.⁶

What do these events have in common? They are all examples of ways in which the emerging climate change treaty regime, and its domestic implementation, are creating unanticipated human rights problems. Of course, it is commonplace to recognize that the impacts of climate change will fall heaviest on the most vulnerable people, worsening their ability to enjoy a wide range of rights. It is also true that a failure to adequately mitigate carbon emissions and to adapt to inevitable changes in the climate will further exacerbate these impacts on rights. But in a number of places, the climate

¹ Joe McDonald & Charles J. Hanley, *China Dams Reveal Flaw in Climate-Change Weapon*, HUFFINGTON POST, Jan. 25, 2009, http://www.huffingtonpost.com/2009/01/25/china-dams-reveal-flaws-i_n_160692.html.

² Cultural Survival, *Dam Nation*, http://www.culturalsurvival.org/current-projects/%5Bfield_program-raw%5D/dam-nation (last visited May 22, 2010).

³ Heidi Bachram, *Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases*, CAPITALISM NATURE SOCIALISM, Dec. 2004, at 5, 12.

⁴ James Painter, *Losing Land to Palm Oil in Kalimantan*, BBC NEWS, Aug. 3, 2007, <http://news.bbc.co.uk/2/hi/6927890.stm>.

⁵ Tamra Gilbertson, *How Sustainable are Small-Scale Biomass Factories? A Case Study from Thailand*, in UPSETTING THE OFFSET: THE POLITICAL ECONOMY OF CARBON MARKETS 57 (Steffen Böhm & Siddhartha Dabhi eds., 2009).

⁶ See, e.g., Statement of International Indigenous Peoples Forum on Climate Change, Sept. 27, 2009, available at http://www.forestpeoples.org/documents/forest_issues/iipfcc_policy_sept09_eng.pdf (declaring that indigenous peoples' rights must be respected in addressing the climate crisis).

change regime’s single-minded focus on carbon reduction itself has unintended negative consequences. These may include violations of the rights of farmers or forest peoples, especially indigenous peoples, massive involuntary displacement, or evictions as certain lands become more valuable. The climate change regime may also create undesirable indirect human rights impacts, affecting food, water, and energy security, and further impoverishing those that are already poor. Resistance to eviction or resource loss is likely to lead to violations of civil and political rights and to increased conflict. As these impacts become more widely recognized, a number of possible responses have emerged. This Article briefly considers the ways in which the climate change treaty regime (and its national implementation strategies) could impact human rights and in some cases itself cause human rights violations, and then looks at a range of potential mechanisms for dealing with those impacts.⁷

Not all impacts of climate change on human rights constitute human rights violations. It may be difficult to characterize *causing* climate change as itself a violation since it is not clear that, until recently, states either knew or should have known of the dangers of unrestricted greenhouse gas emissions. However, the deliberate climate change policies of governments moving forward, even if merely negligent rather than intentional, that result in violations can be considered violations of state responsibility to respect, protect, and fulfill rights.⁸

These are not the only possible areas of concern: adaptation, especially the movement of large numbers of people, and agriculture also create significant impacts, but this Article will leave them for another day. This Article considers three areas where the current and emerging climate change treaty regime is particularly problematic: flexibility mechanisms, especially the Clean Development Mechanism; biofuels and energy; and forest preservation, known as Reducing Emissions from Deforestation and Degradation (REDD). This Article then turns to three possible ways of building human rights considerations into the climate change regime, with their respective advantages and drawbacks. The Article concludes with some thoughts about harmonizing overlapping international legal regimes more generally.

⁷ There are a number of changes to the climate change treaty regime that would indirectly affect the enjoyment of human rights, such as the ways in which emissions reductions are allocated, the centrality of market mechanisms, and technology transfer or financing schemes. These larger themes are beyond the scope of this Article.

⁸ See *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79, available at <http://www.unhcr.org/refworld/docid/3f2650b54.html> (finding that the Turkish government failed to protect individuals that lived near a garbage dump).

II. HUMAN RIGHTS PROBLEMS IN THE UNFCCC TREATY REGIME

A. Flexibility or Market-based Mechanisms in the Kyoto Protocol

The Kyoto Protocol requires all developed (known as Annex I) countries to reduce their emissions of GHGs by a specified amount, generally calculated from a 1990 baseline.⁹ In order to reduce the cost (and increase the political palatability) of these reductions, the Protocol includes four “flexibility” mechanisms, designed to allow emissions reductions to be taken at the lowest possible cost. Three relate to trading among Annex I countries (Article 17 emissions trading, joint implementation, and Article 4 “bubbles”).¹⁰ The fourth, the Clean Development Mechanism (CDM), outlined in Article 12 of the Protocol, allows Annex I countries, or their private enterprises, to fund activities in non Annex I countries that lead to emissions reductions, which can then be certified as Certified Emissions Reductions (CERs).¹¹ These can be counted against the Annex I country’s emissions reduction requirements.¹² Non-Annex I countries under the Protocol have no limits on GHG emissions.¹³ Since a ton of carbon reduced anywhere in the world has the same overall effect on climate change, the drafters of the Protocol reasoned that allowing certain kinds of carbon trading schemes would allow reductions to be taken in the least expensive manner (by picking the “low-hanging fruit”). Thus, carbon emitters that can reduce their emissions more than is required under their cap can trade with those having difficulty meeting the requirements.

The most controversial mechanism has been the CDM, which was based on the idea that installing new capacity in developing (especially rapidly developing) countries will generally be cheaper than retrofitting or reducing emissions from established sources in developed countries. CDM credits could, ideally, serve as a source of revenue for developing countries to fund “leap-frogging” over current carbon-intensive technologies and accelerate development. The use of CDM credits would also reduce the costs for developed country industry to comply with “cap-and-trade” schemes at home, thus enhancing the political feasibility of implementing such schemes. Article 12 of the Protocol specifies:

⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 2–3, *opened for signature* Mar. 16, 1998, 2303 U.N.T.S. 148 [hereinafter *Kyoto Protocol*], available at http://unfccc.int/kyoto_protocol/items/2830.php.

¹⁰ *Id.* arts. 4, 17.

¹¹ *Id.* art. 12.

¹² *Id.*

¹³ *Id.*

The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.¹⁴

CDM projects are proposed by private developers, approved by the states where the project will be located and where any resulting CERs will be used, verified for compliance with CDM rules by private third-parties, and then approved by the CDM Executive Board.¹⁵ CERs can be awarded only after a further verification that the project is actually in operation as proposed.

As of 2009, there were 1,860 registered CDM projects in fifty-eight countries,¹⁶ with the bulk in China and India.

In addition, almost 400 requests for registration are currently being considered and approximately 2,900 further project activities are in the process of being validated by DOEs. The number of registered projects for which CERs have been issued has increased by 32[%], [and] some 335 million CERs . . . hav[e] been generated . . .¹⁷

Only 6% of requests for registration are rejected.¹⁸ By 2012, the CDM is expected to produce 1.5 billion CERs, worth approximately \$30 billion.¹⁹

Some CDM projects, including large hydroelectric dams, waste-to-energy, and afforestation projects, have been particularly problematic from a human rights standpoint. As of May 2, 2010, 1,414 hydro projects were registered or seeking registration under the CDM, of which 685 were considered large

¹⁴ *Id.*

¹⁵ UNFCCC, CDM Project Activity Cycle, <http://cdm.unfccc.int/Projects/pac/index.html> (last visited June 26, 2010).

¹⁶ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Copenhagen, Den., Dec. 7–18, 2009, *Annual Report of the Executive Board of the Clean Development Mechanism*, ¶ 10, U.N. Doc. FCCC/KP/CMP/2009/16 (Nov. 4, 2009), available at <http://unfccc.int/resource/docs/2009/cmp5/eng/16.pdf>.

¹⁷ *Id.*

¹⁸ *Id.* ¶ 19.

¹⁹ INT’L RIVERS NETWORK, RIP-OFFSETS: THE FAILURE OF THE KYOTO PROTOCOL’S CLEAN DEVELOPMENT MECHANISM 2 (2008), available at http://www.internationalrivers.org/files/CDM_factsheet_lowe-rez.pdf.

projects (i.e., with installed capacity greater than 15 MW).²⁰ Almost 65% of these large projects are in China, a country known for forced displacement and resulting violations of civil rights as well as lack of redress as a result of earlier dam projects.²¹ In addition to forced displacement, some of the more controversial CDM dam projects have impacted the livelihood of fisherfolk and farmers deprived of downstream water flows, and the civil rights of protesters opposing the projects.

While all CDM projects are supposed to contribute to “sustainable development” and to be subject to environmental impact assessments, both of these provisions are wholly dependent on national law and are not explored in any detail during the validation process. Similarly, requirements that local stakeholders be allowed to comment, and that comments be reported, usually result in pro forma requests for comments that ignore local opposition to a given project.²² Safeguards put in place in the European Union (EU) to ensure that all CERs purchased from large hydro projects meet the standards of the World Commission on Dams are hobbled by the fact that the same verifiers are responsible for certifying both WCD and CDM compliance.²³ A review of the CDM mechanism at COP-15 led to proposals to discount certain CERs and to stress projects with co-benefits, however no final decisions were reached.²⁴

²⁰ Int'l Rivers Network, Spreadsheet of Hydro Projects in the CDM Project Pipeline (May 2, 2010), available at <http://www.internationalrivers.org/node/1785> (spreadsheet updated on a monthly basis).

²¹ *Id.* For information on human rights problems with previous Chinese large hydro projects, see INT'L RIVERS NETWORK, HUMAN RIGHTS DAMMED OFF AT THREE GORGES: AN INVESTIGATION OF RESETTLEMENT AND HUMAN RIGHTS PROBLEMS IN THE THREE GORGES DAM PROJECT (2003), available at <http://www.internationalrivers.org/files/3gcolor.pdf>, and Peter Bosshard, *China Dams the World*, 26 WORLD POLICY J. 43 (2009).

²² See, e.g., Int'l Rivers Network, Comments to TÜV SÜD on Baba Multipurpose Hydroelectric Project (Ecuador) (Oct. 15, 2008), <http://www.internationalrivers.org/en/global-warming/carbon-trading-cdm/comments-t%C3%BCv-s%C3%BCd-baba-multipurpose-hydroelectric-project-ecuador> (outlining the lack of stakeholder consultations).

²³ See Council Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 Amending Directive 2003/87/EC Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, in Respect of the Kyoto Protocol's Project Mechanisms, 2004 O.J. (L 338) 18.

²⁴ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Copenhagen, Den., Dec. 7–18, 2009, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol*, Annex, at 33, U.N. Doc. FCCC/KP/AWG/2009/17 (Jan. 28, 2010).

B. Biofuels and Energy

As part of the effort to reduce emissions, Annex I states have included requirements in national law for increased use of renewable energy, including biofuels. For example, the EU's 2008 climate change policy requires that by 2020, at least 10% of transport fuel in all member states must come from renewables,²⁵ such as biofuels, hydrogen, "green" electricity and the like. U.S. legislation, passed by the House of Representatives in 2007, has fuel content requirements as well.²⁶

The human-rights related concerns regarding the production of biofuels center on their effect on food prices and availability and on their displacement of other land uses, especially forests, small-scale agriculture, and peat bogs.²⁷ Land conversion to biofuel production contributed to a spike in food prices in 2007, as crops previously used to feed livestock or people instead went into fuel production, thus lowering supply and increasing price.²⁸ While increased prices might benefit farmers, they harm consumers, especially in food-importing countries.²⁹ In this case most of the concern was with corn-based ethanol, largely produced by agro-industrial giants, or soy-based fuels.³⁰ "Second-generation" biofuels, generated from wastes like sugarcane bagasse, do not raise the same concern regarding direct competition between food and fuel uses.³¹ However, as discussed regarding CDM, the ability to create a lucrative alternative fuel source may provide the marginal benefit that encourages conversion to sugar, palm oil, and other large-scale crops, which require little permanent labor and may displace food for local consumption.³²

²⁵ EUROPA, The EU Climate and Energy Package, http://ec.europa.eu/environment/climat/climate_action.htm (last visited May 22, 2010). Admittedly, national biofuel subsidies and incentives do not respond solely to climate concerns, rather they respond to the need for energy security, local air pollution, and the economic health of corn and sugar producers and also influencers. Nonetheless, the need for renewable energy is a frequently cited justification for encouraging such fuels.

²⁶ Energy Independence and Security Act of 2007, 42 U.S.C.A. §§ 17021–17022 (West 2010).

²⁷ *Developed Countries' Demand for Biofuels Has Been 'Disastrous,'* GUARDIAN (U.K.), Aug. 17, 2009, <http://www.guardian.co.uk/environment/2009/aug/17/biofuels>.

²⁸ Donald Mitchell, *A Note on Rising Food Prices* (World Bank Policy Research, Working Paper No. 4682, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233058.

²⁹ *Id.* at 2.

³⁰ *Id.* at 3.

³¹ INT'L ENERGY AGENCY, FROM 1ST- TO 2ND-GENERATION BIOFUEL TECHNOLOGIES: AN OVERVIEW OF CURRENT INDUSTRY AND RD&D ACTIVITIES 5 (2008), available at http://www.iea.org/papers/2008/2nd_biofuel_Gen.pdf.

³² Liz Gooch, *Success of Palm Oil Brings Plantations Under Pressure to Preserve Habitats*, N.Y. TIMES, Sept. 17, 2009, at B4, available at <http://www.nytimes.com/2009/09/18/business/>

Large landowners, or those with access to sizeable amounts of capital, may be better positioned to benefit from such biofuel generating projects, while the poor may find themselves worse-off. The conversion to large scale palm-oil plantations may also put pressure on small farmers to sell out to large agribusiness concerns, better able to take advantage of world markets, thus accelerating the transformation of small farmers into landless laborers, with impacts on the right to an adequate standard of living. Moreover, the definition of what constitutes “waste” may be different for project developers versus local people who incorporate the use of a wide range of agricultural products into their livelihood.³³

Additional concerns relate to agricultural conversion. In Southeast Asia, conversion of forests and peat bogs to palm-oil plantations is particularly worrisome.³⁴ Forests provide a home as well as food and other services to many rural peoples, especially indigenous peoples. Peat bogs sequester carbon, and wetland peats also serve as habitat and storm breaks.³⁵ In March 2009, the Committee for the Elimination of Racial Discrimination (CERD) took the Indonesian government to task for failing to consult with and “ ‘secure the possession and ownership rights of local communities before proceeding further’ with the Kalimantan Border Oil Palm Megaproject.”³⁶

In Brazil, most of the biofuel-related deforestation has been indirect; as grazing land was converted to biofuels, new forest was felled to create more grazing land.³⁷ The net result has been an increase in burning-induced haze and

global/18palm.html.

³³ For example, in a rice-husk-to-energy CDM project in Thailand, the “waste” turned out to be an integral component of a natural fertilizer. The increased demand for the husks made them cost prohibitive for local farmers, who had to buy chemical fertilizers or do without. See Gilbertson, *supra* note 5.

³⁴ See Ian MacKinnon, *Palm Oil: The Biofuel of the Future Driving an Ecological Disaster Now*, GUARDIAN (U.K.), Apr. 4, 2007, at 23, available at <http://www.guardian.co.uk/environment/2007/apr/04/energy.indonesia> (discussing the impact of the rapid deforestation in Indonesia and Malaysia to plant palm crops).

³⁵ Wetlands International, Peatlands and CO2 Emissions, <http://www.wetlands.org/Whatwe do/PeatlandsandCO2emissions/tabid/837/Default.aspx> (last visited June 26, 2010). On carbon sequestration, see Richard Harris, *Bogs Watched for Warning Signs of Carbon Upset*, NPR, Aug. 25, 2004, available at <http://www.npr.org/templates/story/story.php?storyId=3871344>.

³⁶ Letter from Fatimata-Binta Victoire Dah, Chairperson of the Comm. for the Elimination of Racial Discrimination, to I. Gusti Agung Wesaka Puja, Ambassador and Deputy Permanent Representative, Permanent Mission of the Republic of Indon. to the United Nations Office at Geneva (Mar. 13, 2009), available at http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_response_mar09_eng.pdf.

³⁷ David M. Lapola et al., *Indirect Land-use Changes Can Overcome Carbon Savings from Biofuels in Brazil*, 107 PROC. NAT'L ACAD. SCI. 3388, 3388 (B.L. Turner ed., 2010).

the destruction of local biodiversity and of resources local people depended upon.³⁸

Thus, the demand for biofuels in developed countries fuels extensive human rights problems in the biofuel source countries.³⁹ The Office of the High Commissioner for Human Rights (OHCHR) and the Committee on Economic, Social and Cultural Rights (CESCR) have recognized this connection. The OHCHR wrote: “Whereas agro-fuel production could bring positive benefits for climate change and for farmers in developing countries, agro-fuels have also contributed to increasing the price of food commodities ‘because of the competition between food, feed and fuel for scarce arable land.’ ”⁴⁰ In 2008, CESCR urged states to implement strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger.⁴¹

Changes in energy generation toward “clean,” non-carbon intensive energy are key to the reductions that will be needed to stabilize the atmosphere. But the definition of what is meant by “clean,” and decisions on the benefits and drawbacks, even of renewables, have been largely absent from the discussions within the UN regime. For example, the choices among using centralized power grids to distribute energy from non-polluting sources, using distributed energy at the household level (like rooftop solar panels), or using small-scale community-based energy sources will have large impacts on the ability to ensure and promote rights, especially for the poor and for those who do not now have access to electricity. Large-scale energy grids may well be the most efficient way to bring energy to cities, but the pricing may be beyond most of the poor’s capacity and may delay rural electrification; some large-scale projects (like thermal solar or wind farms) may also have land use implications. It is easy to imagine, for example, the desert or grassland habitats of indigenous or nomadic people being appropriated as “empty” space for energy production.

³⁸ MacKinnon, *supra* note 34.

³⁹ The EU’s 2009 Renewable Energy Directive recognizes this reality to some extent, requiring that biofuels and bioliquids imported into the EU be sustainably produced in a way that does not impact primary forests, ecologically significant grasslands, or peat bogs, and calling for the creation of certification systems for sustainably produced biofuels and for monitoring of the indirect effects of renewable energy production on agriculture. Council Directive 2009/28/EC 2009 O.J. (L140) 16.

⁴⁰ The High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶ 66, delivered to the General Assembly, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) (quoting the Special Rapporteur on the right to food).

⁴¹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts., *Statement on the World Food Crisis*, ¶ 13, U.N. Doc. E/C.12/2008/1 (May 20, 2008).

Distributed energy on a household basis may provide a greater degree of energy security and independence, while local-level community energy projects may create more lasting jobs and spin-off benefits. It is not clear at this point which combination of alternatives is preferable, or even possible, in any given locale; the point is merely that the decisions made in the next few decades regarding the shape of energy distribution and generation will have human rights implications that need to be taken into account.

C. Forests and REDD

Deforestation and forest degradation are responsible for about 18% of global carbon emissions,⁴² while standing forests are carbon sinks. Maintaining standing forests does not come within the purview of CDM, but projects to afforest and reforest cleared land do play a small part (1%). Forests in Annex I countries may be affected by rules, known as LULUCF, dealing with afforestation, reforestation and other land use change.⁴³ In addition, states have been negotiating rules for developing countries to obtain credits for maintaining and enhancing standing forests. The 2007 Bali Action Plan calls for the parties to consider “[p]olicy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries [REDD]; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries [REDD+]”⁴⁴ Talks on REDD+ moved ahead at Copenhagen and pilot projects are proceeding. In anticipation of global and national legislation,

⁴² Reducing Emissions from Deforestation and Forest Degradation: An Options Assessment Report, <http://www.redd-oar.org/> (last visited June 26, 2010).

⁴³ Afforestation and reforestation projects may count against a country’s baseline emissions under the Kyoto Protocol, but avoided deforestation projects were not included because of worries about leakage (if some forest is off-limits, timber cutting may just move to other areas), permanence (forests can burn), and measurement and monitoring difficulties. Roger A. Sedjo & Brent Sohngen, *Carbon Credits for Avoided Deforestation 1* (Resources for the Future, Discussion Paper No. 07-47, 2007), available at <http://www.rff.org/documents/RFF-DP-07-47.pdf>.

⁴⁴ Conference of the Parties to the U.N. Framework Convention on Climate Change, Bali, Indon., Dec. 3–15, 2007, *Report of the Conference of the Parties*, ¶ 1, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008). REDD+ is being negotiated on the Long-Term Cooperative Action (AW-LCA) track of the talks. To prepare for inclusion of REDD+ in a future climate regime, UNDP, UNEP, and FAO created UN-REDD, a program that works with developing countries to inventory forest resources, create monitoring and verification protocols and develop plans to implement REDD+ at the national level. Twenty-two countries are now part of the program. UN-REDD Programme, About the Un-REDD Programme, <http://un-redd.org/AboutUNREDDProgramme/tabid/583/language/en-US/Default.aspx> (last visited June 26, 2010).

a huge market in voluntary forest carbon offsets has blossomed. That market was worth \$110 million in 2006,⁴⁵ although, influenced by the recession, it went down to some \$37 million in 2008.⁴⁶

Whenever forests are at issue, the human rights of the people who live in them, depend on them, or are threatened by their destruction are also at stake. The promise and peril of avoided deforestation payments has divided indigenous peoples and advocates. On the one hand, if there is no financial incentive to keep forests standing, they will almost surely be destroyed at accelerating rates. If local communities were designated the owners of "their" forest carbon, REDD+ could serve as a much-needed source of funding under local control and a means of preserving a way of life. On the other hand, if forests become more valuable as carbon-sequestering stands, and especially if developed countries and their industries can avoid reducing their own emissions by purchasing large quantities of forest offsets, land grabs could well be the result. This possibility is exacerbated by the uncertain land and usufruct rights of many indigenous and forest peoples. Without clear title and the ability to use and benefit from forests, indigenous people would again be pushed off newly valuable land.⁴⁷

Some features of the climate regime already create specific worries about REDD. The current definitions of "forest," "afforestation," and "reforestation" allow both continuing large-scale logging and the eventual replacement of native forest with plantations of quick-growing monoculture, to the detriment of local water supplies and agriculture.⁴⁸ "Forest degradation" and

⁴⁵ David Takacs, *Carbon into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 39, 60 (2009).

⁴⁶ Ecosystem Marketplace, *Forest Carbon Cheat Sheet: The Numbers*, http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=7470§ion=news_articles&eod=1 (last visited June 26, 2010).

⁴⁷ See Indigenous Peoples' Global Summit on Climate Change, Anchorage, Alaska, Apr. 20–24, 2009, *Anchorage Declaration* (Apr. 24, 2009), available at <http://www.indigenoussummit.com/servlet/content/declaration.html>.

⁴⁸ "Forest" is defined under the Marrakesh Accords as:

[A] minimum area of land of 0.05B1.0 hectares with tree crown cover (or equivalent stocking level) of more than 10–30[%] with trees with the potential to reach a minimum height of 2-5 metres at maturity *in situ* Young natural stands and all plantations which have yet to reach a crown density of 10–30[%] or tree height of 2–5 metres are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest.

Conference of the Parties on its Seventh Session, Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Report of the Conference of the Parties: Addendum*, ¶ 1(a), Annex, U.N. Doc.

“deforestation” might be interpreted to cover the traditional swidden agriculture practices of indigenous peoples, which can in fact be sustainable.⁴⁹

In addition to concerns about exclusion, land grabs, or lack of clear title to forest lands or to their carbon benefits, the overriding issue is that of voice and participation. Indigenous peoples have uniformly urged that any REDD+ proposal must conform to the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration).⁵⁰ Among the relevant provisions are requirements that “[s]tates . . . consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”⁵¹ The Declaration also recognizes indigenous peoples’ rights to their traditional lands, territories, and resources, to fair demarcation of their territories, to self-government, and to preserve indigenous knowledge.⁵² Despite widespread, although not unanimous, state support for the Declaration,⁵³ national laws continue to disenfranchise indigenous peoples. For example, the CERD communication mentioned above also noted that Indonesia’s 2008 “Regulation on Implementation Procedures for Reducing

FCCC/CP/2001/13/Add.1 (Jan. 21, 2002). In Copenhagen, the parties tentatively agreed to include a separate definition of plantation forestry and to not allow reforestation on lands converted after 1989 to count for credit-generating purposes. However, these are still draft decisions. Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Copenhagen, Den., Dec. 7–18, 2009, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol*, ¶ 1, Annex, U.N. Doc. FCCC/KP/AWG/2009/17 (Jan. 28, 2010).

⁴⁹ Moreover, if offsets under REDD follow the logic of CDM, they would be issued based on measurement of a “business as usual” baseline, and calculation of the difference between newly sequestered carbon compared to what would have happened had deforestation continued apace. That baseline methodology would favor logging concessions and large logging and cattle companies over reserves and other areas controlled by indigenous and forest peoples and communities, which have already reduced or eliminated logging and land-clearing on their lands. Even if REDD is not project based, differences among regions may create similar concerns over “additionality.”

⁵⁰ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁵¹ *Id.* art. 19.

⁵² *Id.* arts. 3–4, 13, 26, 29, 31.

⁵³ *Indigenous Rights Outlined by UN*, BBC NEWS, Sept. 13, 2007, <http://news.bbc.co.uk/2/hi/6993776.stm>. Australia, Canada, New Zealand, and the United States—all states with sizeable indigenous populations—voted against the Declaration. *Id.* Since then, Australia and New Zealand have accepted it, and the U.S. and Canada have announced that they are “reconsidering” their opposition. Posting of Juliette Terzieff to World Politics Review Blog, <http://www.worldpoliticsreview.com/blog/5450/holdouts-endorse-u-n-indigenous-rights-declaration> (Apr. 22, 2010).

Emissions from Deforestation and Forest Degradation” does not recognize any proprietary rights of indigenous peoples in forests.⁵⁴

III. INCORPORATING HUMAN RIGHTS CONCERNS INTO THE CLIMATE CHANGE REGIME

A. Linking Language in the Treaty Regime

If emerging climate change mitigation and adaptation efforts are to “do no harm,” and if they are to avoid a human rights-related backlash, then human rights must somehow be incorporated into the regime. One way to ensure more attention to human rights concerns is to insert human rights language into the text of the documents that emerge as successors to the Kyoto Protocol and any additional treaty texts. By explicitly referencing human rights in the treaty, states would be more likely to consider their existing human rights legal obligations when implementing relevant policies. Such language would serve as a “bridge” between the climate change regime and the corpus of international human rights law. A coalition of NGOs has called for exactly this result.⁵⁵

Certain parts of the current draft text lend themselves to the incorporation of human rights language. The “shared vision” text prepared by the Long-term Cooperative Action (LCA) working group was to set out the basic preambular goals of an agreement. The latest draft states:

Noting resolution 10/4 of the United Nations Human Rights Council on “Human rights and climate change”, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability⁵⁶

⁵⁴ See Letter from Fatimata-Binta Victoire Dah to I. Gusti Agung Wesaka Puja, *supra* note 36.

⁵⁵ Human Rights and Climate Change Working Group, Proposed Revisions to Maintain and Strengthen Human Rights Protections in the LCA Text (Dec. 9, 2009), http://unearthed.earthjustice.org/files/Human_Rights_LCA.pdf.

⁵⁶ U.N. Framework Convention on Climate Change [UNFCCC], Ad Hoc Working Group on the Long-Term Cooperative Action Under the Convention, *Text to Facilitate Negotiations Among Parties*, Bonn, Ger., June 1-11, 2010, Annex I, at 6, U.N. Doc. FCCC/AWGLCA/2010/6

The language is weak and non-operational, with “noting” signifying a noncommittal attitude toward the Human Rights Council’s efforts. Most importantly, nothing in the text creates any obligation to refer or pay attention to human rights, or in any way ties the climate regime to the protection and promotion of human rights.

The negotiated text on REDD+ is slightly better. After intense lobbying from indigenous groups and other NGOs, the relevant text reads:

The Conference of the Parties

....

2. *Further affirms* that when undertaking activities referred to in paragraph 3 below, the following safeguards should be [promoted] [and] [supported]:

....

(c) 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 General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;

(d) Full and effective participation of relevant stakeholders, including in particular indigenous peoples and local communities⁵⁷

The draft references the need for participation rights and notes that states are subject to other “relevant” international obligations. The text also “notes” the existence of UNDRIP, although without in any way committing states parties to follow its provisions in dealing with indigenous peoples. However, there is no reference to free, prior informed consent or to human rights, which had been central goals of the indigenous groups.

A third logical venue for incorporating human rights language into the text would be to add a section on “economic and social consequences of response measures.” The origins of this issue go back to the UN Framework Convention on Climate Change (UNFCCC), which in Article 4.8(h) requires state parties

(May 17, 2010).

⁵⁷ U.N. Framework Convention on Climate Change [UNFCCC], Ad Hoc Working Group on the Long-Term Cooperative Action Under the Convention, *Report of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention on its Eighth Session, Copenhagen, Den., Dec. 7–15, 2009, Annex I*, at 34–35, U.N. Doc. FCCC/AWGLCA/2009/17 (Feb. 5, 2010) [hereinafter *Report of AWGLCA*].

to consider the impacts of response measures on the economies of fossil-fuel exporting states.⁵⁸ The current language seems aimed at cushioning the economic effects of changes in energy provision on fossil-fuel producing states and others dependent on tourism and other such transport-intensive industries, and on avoiding trade restrictions on developing states.

There is no human rights language, although there are references to jobs and other issues. However, the current draft shows the potential for linkage to other international regimes. One of the developing countries concerns in the climate change negotiations is that developed countries will make their own mitigation requirements more politically palatable by imposing border taxes on imports from countries that have not mitigated their emissions to a similar degree. To discourage this result, developing countries have pushed hard for language on trade in this section of the negotiations. The proposed language, prohibiting measures that "constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade,"⁵⁹ mirrors language in Article 20 of the WTO agreement and presumably would be interpreted taking into account the interpretative practice within the WTO. A similar linkage to the interpretation of human rights treaties and general human rights law by the relevant expert or judicial bodies could be accomplished through parallel language on human rights in this section.

B. Private Standard-setting

At a project level, human rights standards could be imported into REDD, CDM, or other carbon offsets to create private standards to ensure that projects and programs comply with certain specified principles, standards, and indicators. The use of private standards in the environmental and labor rights arenas is by now well established.⁶⁰ Such standards, while nominally voluntary, can be given teeth through their adoption by third-party verifiers, investors, bankers, or regulators. Such voluntary standards have a number of

⁵⁸ See also Kyoto Protocol, *supra* note 9, arts. 2.3, 3.14.

⁵⁹ Report of AWGLCA, *supra* note 57, at 40.

⁶⁰ See generally Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *ECOLOGICAL L.Q.* 479 (1995); HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE (John J. Kirton & Michael J. Trebilcock eds., 2004). For example, the ISO 14,000 series on environmental management systems, or SA 8,000 on labor standards are well recognized. Some of these standards result in certification, which brings a premium price for the products generated by the certified entity. Relevant examples include organic agriculture certification or the label of the Forest Stewardship Council.

advantages: they can be more quickly drafted and approved by a wide group of stakeholders; they can be tailored to specific sectors and industries; and they can transfer the cost of verification onto project proponents. They are aimed directly at private developers and carbon traders, not states, and are one of the few ways of holding such private actors accountable. Nonetheless, they can also be adopted by states and international organizations.

A number of private or private/public standards efforts are relevant to the human rights-sensitive aspects of climate change mitigation. The CDM Gold Standard⁶¹ certifies high-quality CDM credits (which fetch premium prices) through standards that include case-by-case consideration of large hydroelectric or palm oil biofuel projects.⁶² A Roundtable on Sustainable Palm Oil (RSPO) was formed in 2004 by a coalition of palm oil growers, distributors, financiers, large retail consumers, and environmental NGOs to create standards that include respect for land and labor rights. The quality and nature of forest carbon offsets is also subject to the Voluntary Carbon Standard (VCS), which is widely used by the World Bank as well as private carbon exchanges.⁶³ The Climate, Community, and Biodiversity Alliance (CCBA) seeks to “promote integrated solutions to land management around the world . . . [and] has developed voluntary standards to help design and identify land management activities that simultaneously minimize climate change, support sustainable development and conserve biodiversity.”⁶⁴ Its fourteen mandatory certification criteria require that environmental and social monitoring programs are in place, communities are appropriately involved in the design of the project, and there are no unresolved land tenure issues.⁶⁵

These private standard-setting exercises may be useful in creating clear benchmarks against which to measure whether projects are likely to create significant negative human rights impacts, and could be incorporated into national law, CDM, or REDD guidelines, or aid programs as well as private

⁶¹ THE GOLD STANDARD FOUNDATION, REQUIREMENTS (2008), available at http://www.cdmgoldstandard.org/fileadmin/editors/files/6_GS_technical_docs/GSv2/GVS2_Requirements.pdf.

⁶² THE GOLD STANDARD FOUNDATION, ANNEX C: GUIDANCE ON PROJECT TYPE ELIGIBILITY (2009), available at http://www.cdmgoldstandard.org/fileadmin/editors/files/6_GS_technical_docs/GSv2.1/Annex_C.pdf.

⁶³ See VOLUNTARY CARBON STANDARD, GUIDANCE FOR AGRICULTURE, FORESTRY AND OTHER LAND USE PROJECTS (2007), available at <http://www.v-c-s.org/docs/AFOLU%20Guidance%20Document.pdf>.

⁶⁴ Climate, Community & Biodiversity Alliance, <http://www.climate-standards.org/index.html> (last visited May 23, 2010).

⁶⁵ CLIMATE, CMTY. & BIODIVERSITY ALLIANCE, PROJECT DESIGN STANDARDS (2d ed. 2008), available at http://www.climate-standards.org/standards/pdf/ccb_standards_second_edition_december_2008.pdf.

offset transactions. However, there are a number of drawbacks to this approach. First, the standards are currently voluntary, so problematic projects can seek CERs or carbon offset credits without complying. Second, the same verifiers who provide third-party validation for CDM or REDD projects generally are also in charge of standards validation. There is a strong incentive on the part of these verifiers not to upset their future potential employers by denying certification. Third, the standards themselves are, for the most part, quite weak (although the CCBA standards are considerably more detailed and stringent), allowing almost all projects on a case-by-case basis, and requiring little in the way of community consent and participation beyond what CDM or REDD already requires.

C. Creating an Expert Body within the UNFCCC

A third option would be to create a body within the Framework Convention that could evaluate, advise on, and create guidelines for dealing with human rights issues that arise as a result of mitigation or adaptation measures. A recent paper proposes the creation of a human rights process within the UNFCCC that would serve to clarify existing human rights standards as applied to climate change policies, provide a forum for dialogue and information sharing, and provide technical support to vulnerable states.⁶⁶ Such a process would be consistent with the UN Secretary-General's call to mainstream human rights throughout the UN system.⁶⁷ Rather than simply link the climate change regime to the body of standards and treaty commitments adopted by states in the human rights arena, this option would develop an in-house expert capacity within the UNFCCC to use and apply these standards. There is ample precedent for such an effort. The parties to the UNFCCC have already created two subsidiary bodies: the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI).⁶⁸ A subsidiary body for human rights and social impacts could adopt much the same form. “As its name suggests, the SBSTA's task is to provide the Conference of the Parties (COP) with advice on scientific, technological and methodological matters.”⁶⁹ A parallel human rights body could advise the

⁶⁶ INT'L HUMAN RIGHTS LAW CLINIC ET AL., PROTECTING PEOPLE AND THE PLANET: A PROPOSAL TO ADDRESS THE HUMAN RIGHTS IMPACTS OF CLIMATE CHANGE POLICY (2009), available at http://www.law.berkeley.edu/files/IHRLC/Protecting_People_and_the_Planet.pdf.

⁶⁷ *Id.* at 3.

⁶⁸ UNFCCC, Convention Bodies, http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php (last visited May 23, 2010).

⁶⁹ *Id.*

COP on the relevant human rights standards, seek ways to avoid human rights impacts from climate change policies, collate best practices, and study emerging issues.

Alternatively, the COP can create an expert group, composed of experts acting in their personal capacity. These too already exist within the UNFCCC structure; they are less formal, and therefore perhaps less politically difficult to create, than subsidiary bodies.

There has been some resistance to creating an explicit human rights link within the climate regime for a number of reasons. The current complexity of the regime makes it hard to advocate for adding yet another layer. Beyond that, the anthropocentric nature of human rights, the idea that rights constitute threshold or minimum requirements that constrain action independently of the economic or scientific tradeoffs, and a sense that evaluating human rights compliance will slow down a process of transformation that needs to move quickly, are all part of the hesitation in some quarters to see the climate negotiations be drawn into consideration of associated human rights issues. In addition, human rights-based limits can threaten potentially lucrative project opportunities, which creates a different source of opposition.

An alternative might focus instead on the existing system of human rights protection. This might include a special procedure on climate change within the Human Rights Council, consideration of climate change and the effects of climate policies as a cross-cutting issue by existing special procedure and special mandate holders, the elaboration of general comments by the respective expert bodies on the intersection of particular treaties with climate change response measures, and the like.⁷⁰

IV. CONCLUSIONS

Each of these proposals has its strengths and weaknesses. Perhaps the best answer, at least for now, is that all of these options should be explored. Private standards, even with the limitations described above, may be useful in curtailing the worst proposed projects, diffusing norms, and serving as a template for national-level regulations. They will surely be faster to put into operation than the other options, but also have the drawbacks of voluntariness and lack of stringency discussed above. Language in the climate change regime would set expectations, carry out norm-diffusion on human rights

⁷⁰ See CTR. FOR INT'L ENVTL. LAW & FRIEDRICH EBERT STIFTUNG, HUMAN RIGHTS AND CLIMATE CHANGE: PRACTICAL STEPS FOR IMPLEMENTATION (2009), available at http://hrbaportal.org/wp-content/files/1247489932_8_1_1_resfile.pdf.

throughout the UN system, and avoid overburdening an already complex treaty regime with the need to develop new expertise. However, without a way to operationally link the climate change and human rights regimes it is not clear how—and by whom—state compliance is to be monitored and enforced. Effective use of “linking language” might require a permanent rapporteur or special representative within the Human Rights Council to monitor and report on state practice, and a way of forwarding the rapporteur’s views to the relevant states and international organizations.⁷¹ It might also require, at a minimum, a deepening of the existing contacts between the UNFCCC Secretariat and the Office of the High Commissioner for Human Rights, and an expansion of those contacts to the CDM Executive Board and other UNFCCC-related entities. On the other hand, an in-house expert body might be better situated to deal with unexpected or emerging problems, and to balance the human rights consequences of inaction as well as action. To do so, it would need experts in human rights and development, and a way of reporting regularly to the COP. Either solution will require consideration of the best institutional home for these concerns.

The need to harmonize separate, but increasingly overlapping, international law regimes, is not unique to this area. Others, including the International Law Commission, have written extensively on the “relative normativity” problem of reconciling different horizontal yet overlapping areas of law.⁷² Another doctrinal solution is the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which states that in the process of treaty interpretation “[t]here shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties.”⁷³ Thus, any specific rules in the climate change treaty regime would have to be read subject to states existing or emerging human rights commitments, whether conventional or customary.

⁷¹ While the UN Human Rights Council has passed resolutions noting the effects of climate change on the enjoyment of human rights and has commissioned a study from the Office of the High Commissioner for Human Rights, it has not to date appointed a special rapporteur on the issue. See H.R.C. Res. 10/4, U.N. Doc. A/HRC/RES/10/4 (Mar. 25, 2009) (discussing concerns that climate change poses an immediate threat to people around the world); H.R.C. Res. 7/23, U.N. Doc. A/HRC/RES/10/4 (Mar. 28, 2008) (noting 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”).

⁷² See, e.g., Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) (discussing the effect of different overlapping regimes).

⁷³ Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

One example of a mechanism to deal with overlapping, and at times conflicting, legal norms is the Committee on Trade and Environment within the World Trade Organization. Created in 1994 out of a perceived need to harmonize the trade regime with the trade provisions of multilateral environmental agreements, the CTE allows for consideration of ongoing and emerging issues at the intersection of trade and environment, has stimulated observer status for representatives of the various treaty secretariats at each other's meetings, and has given the need to take both regimes into account a higher profile, perhaps reflected in the decisions of trade dispute resolution panels referencing relevant norms outside the trade regime as well as in the crafting of environmental agreements with trade provisions.⁷⁴ While not by any means a perfect solution, the CTE might be a model to consider within the climate change regime.

In the end, the overwhelming need to retool our energy and transportation systems and to adapt to existing and future changes in the climate may involve tradeoffs and some of those tradeoffs may violate rights. However, it is incumbent on all of us to make sure that the human rights impacts of the measures we take to respond to a changing climate do not systematically fall on the shoulders of those with the fewest rights and the greatest vulnerability, that we think about and avoid the possible negative social and rights-related consequences of proposed actions, and that we adequately inform, include, and if necessary compensate those who are potentially affected by specific climate change-related policies.

⁷⁴ World Trade Organization, Items on the CTE's Work Programme, http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm (last visited June 26, 2010).