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978-1-107-10551-5 - The Human Rights - Based Approach to Carbon Finance

Damilola S. Olawuyi

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THE HUMAN RIGHTS - BASED APPROACH TO CARBON FINANCE

This book explores the topical and contentious issue of the human rights risks associated with carbon projects, especially in developing countries. It outlines a human rights-based approach to carbon finance as a functional framework for mainstreaming human rights into the design, approval, finance and implementation of carbon projects. It also describes the nature and scope of carbon projects, available legal options for their financing and key human rights issues at stake in their planning and execution. Written in a user-friendly style, the proposal for a rights-based due-diligence framework through which human rights risks can be anticipated and addressed makes this book relevant to all stakeholders in carbon, energy and environmental investments and projects.

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THE HUMAN RIGHTS - BASED APPROACH TO CARBON FINANCE

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To the memory of my mother, Victoria Ebunlomo Olawuyi

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FOREWORD

This book is about the big issue in the transition to sustainability – the linking of equity with sustainability. No longer is it tolerable to focus only on environmental impact. Development must be approached and financed through the triple lens of environmental, social and economic sustainability.

The message is one which courts will have to increasingly address, whether they are enforcing laws which governments have enacted, enforcing European Union law against their domestic governments or, more innovatively, finding in general domestic principles a basis for ordering further governmental action.

The UK Supreme Court recently made a mandatory order that the secretary of state prepare new air quality plans under Article 23(1) of Directive 2008/50/EC in accordance with a defined timetable to lead to revised plans being submitted to the European Commission not later than 31 December 2015. This followed the United Kingdom's failure to reduce nitrogen dioxide levels to the levels prescribed by the Directive. A court in The Hague recently held that plans by the Dutch government to reduce greenhouse gas emissions by 2020 by only 14–17 per cent compared to 1990 levels were unlawful under the general law of tort, having regard to the scale of the threat posed by such emissions, and that the Dutch government should instead reduce emissions by at least 25 per cent by the end of 2020. Its reasoning was expressly inspired by general constitutional, international legal and human rights principles and by its conviction that, as an industrialized country, the Netherlands must contribute towards the solution of a worldwide problem.

The essential background to the present book is Dr Damilola S. Olawuyi's doctoral degree in energy and environmental law from the University of Oxford, United Kingdom, and his extensive international experience as an academic and legal practitioner. The work is an innovative and valuable study of the human rights implications of climate change and carbon projects. Its starting point, supported by examples, is

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that development projects can violate human rights – in some cases even though these may have been conceived and supported in order to reduce carbon emissions. His thesis is that, what is required under international and national law is an approach recognizing human rights considerations at the heart of any development project.

Dr Olawuyi supports the view that all human rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others: ‘without a belly full of food and other vital needs, human rights and fundamental freedoms become meaningless’.¹ But, at the same time, there needs to be ‘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, threaten social, economic and cultural rights’.²

The thread running through the book is human rights mainstreaming – the concept of embedding human rights norms in the design, finance and implementation of carbon projects, advocated by the United Nations for nearly twenty years (and echoed recently in the Pope’s encyclical ‘Laudato Si’ – Care of our common home’ addressed to ‘every person living on this planet’). Rather than an approach involving the recognition or expansion of substantive rights, Dr Damilola Olawuyi focuses on a procedural approach to the achievement of such integration – better access to information, wider public participation, greater attention to the needs to ensure equality and avoid discrimination, improved accountability and monitoring, always backed by access to justice.

The book discusses what this means in practical terms – an expanded role for bodies presently engaged in screening carbon projects, a requirement for a specific human rights impact assessment, review mechanisms, better governance and compliance and complaints committees.

Dr Damilola Olawuyi has written a clear, well-informed and well-documented work, in a field which should and does engage all of us evermore. If the world continues as it is, there may, as a commentator quoted in one footnote observes, come a time when the only habitable place is the Antarctic.³ This study will stimulate thinking not only about how to avoid that drastic infringement of all our human rights but about

¹ See Chapter 3, where Dr Olawuyi evaluates and reviews the full belly thesis.

² Dr Olawuyi discusses the potentials and paradoxes of mainstreaming human rights to climate governance in Chapter 4.

³ See Chapter 1, note 6.

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a whole range of potential infringements which carbon projects threaten in our present everyday existence. The author's skill and initiative in researching and writing it are to be commended. It will be an important stimulus for governments, peoples, industrial, commercial and non-governmental organizations worldwide involved in or affected by carbon and other environmental projects.

*The Right Honourable the Lord Jonathan Hugh Mance
Justice of the Supreme Court of the United Kingdom
Chair, International Law Association*

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PREFACE AND ACKNOWLEDGEMENTS

Over the last decade, the effects of an unprecedented rise in global temperature caused by climate change, on the enjoyment of human rights, especially the right to life, have been subjects of intensive scholarly attention. Many literatures have been espoused on the need for governments, business enterprises and other key stakeholders to adopt policy measures aimed at combating climate change. However, recent findings show that climate change response measures and projects, particularly clean development mechanism (CDM) and multilateral REDD+ (Reducing Emissions from Deforestation and Forest Degradation together with forest conservation, sustainable forest management and enhancement of carbon stocks), are in turn producing, arguably, more serious human rights concerns. While the direct impacts of climate change on human rights have received enormous attention, issues relating to the secondary impacts of climate change responses and projects on human rights, have yet to receive a book-length, exhaustive and rigorous exposition and analysis. This book is an attempt to fill that gap.

This book examines the negative implications and impacts of projects designed to combat climate change ('carbon projects'), on the effective enjoyment of fundamental human rights. It reviews growing evidence that carbon projects currently produce serious human rights concerns, especially in developing countries. The main topics covered lay at the heart of contemporary debates on the impacts of climate change on human rights and larger debates on the need to recognize and reinforce the synergies between human rights and climate change in designing climate change responses.

The ten chapters of the book examine and discuss legal and institutional frameworks required to incorporate human rights norms and safeguards into the design, approval, finance and implementation of carbon projects, specifically the CDM, REDD+ and green climate funds, to address negative human rights impacts and consequences. Despite growing recognition that carbon projects may foster human rights violations, most especially the

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direct recognition by the 2010 Cancun climate conference that countries ‘should fully respect human rights in all climate change related actions’, legal and institutional frameworks required to anticipate, mitigate and prevent these human rights impacts of carbon projects have not been coherently developed and communicated.

Overall, the ultimate aim of the book is to answer the question of ‘how’, that is, how can the international climate change regime be organized to fully integrate and mainstream human rights safeguards and considerations into the design, approval, finance and implementation of carbon projects to protect the rights of affected peoples and communities? The book discusses the guiding principles of a human rights-based approach to carbon finance as a legal and institutional framework for mainstreaming human rights principles into the design, approval, finance and implementation of carbon projects. The book also takes a comprehensive, highly analytical approach to discuss how lessons learned from the implementation of select climate finance mechanisms, specifically CDM and REDD+, may inform thoughts on practical and institutional requirements for mainstreaming human rights principles into the international climate change regime in general.

This book is prepared in a user-friendly style to enhance its utility among its primary audience, namely environmental and human rights administrators, students, lawyers, bankers, auditors, government representatives, judges, analysts, pundits, international negotiators and policy leaders. It provides environmental and human rights stakeholders from all backgrounds with a toolkit and operational framework to understand, digest and appreciate the legal and institutional framework for reflecting human rights norms in climate actions and projects.

In examining these issues, this book takes a comparative approach that benefits immensely from the author’s research, professional and teaching experience acquired over the years while working on environmental issues in Nigeria, Kenya, Canada, Australia, India, China, United States, United Kingdom, Switzerland, Spain, Denmark, France and Italy. It offers discussions and analyses of concepts, instruments and principles on climate change and human rights, that are key to a rights-based approach to the design, approval, finance and implementation of carbon projects. A discussion of diverse institutions that could aid the systemic integration and stronger legal partnerships between human rights and climate change, under a rights-based approach, is also provided in the book.

It remains for me to register my profound gratitude to many helping hands, without whom the publication of this book would not have been

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possible. First and foremost, my thanks and appreciation go to God the Almighty for the successful publication of this book. Second, my profound gratitude goes to Dr Andrew Shacknove and Professor Alastair R Lucas Q.C., who supervised my doctoral thesis at the University of Oxford – the research work that culminated in the publication of this book. I am highly indebted to them for their scholarly guidance, mentoring and intellectual generosity in the course of my research. Furthermore, I owe a debt of gratitude to Professor Dapo Akande and Professor Edwin Peel for their constructive comments and encouragements during my academic voyage at Oxford. I am also indebted to Professor Catherine Redgwell and Professor Phillipe Cullet for providing insightful and helpful comments during my doctoral thesis examination. Their constructive criticisms and suggestions greatly enhanced the framing of this book.

I also appreciate the kind motivation and support of the president and founder of Afe Babalola University, Aare Afe Babalola, OFR, CON, SAN, FNIALS, FCI Arb., LLD, who has taken unparalleled personal interests in my professional development. Aare Afe Babalola's journey and global achievements provide reinforcing pillars and instructive pathways that one could only aspire to follow.

Furthermore, I am especially indebted to everyone at Norton Rose Fulbright Canada LLP, for their exceptional support and kind mentoring over the years. I would also like to extend a word of gratitude to Orijei Onuma and Omolola Olarinde for providing careful and thoughtful research assistance, and to my legal assistants, Calvin Jim, Curtis Snow, Moronkeji Kolawole and Tosin Adewunmi, who have all worked tirelessly for the success of this book.

Finally, I would like to thank my dear wife Oluwabunmi, and my twin girls, Titilayo and Oluwatoni for their love, dedication and inspiration. Thanks are also due to my exceptional students at the College of Law, Afe Babalola University, whose class contributions and brilliant ideas served as timely seeds that blossomed into this book. I thank you all for your support and kindness, and I commit this book to your scholastic minds.

I have endeavoured to state the position of the law as of 30 June 2015, although I have been able to take into account subsequent developments in one or two instances.

Damilola S. Olawuyi
Ado Ekiti, June 2015

ABBREVIATIONS

ACHR	American Convention on Human Rights
AfCHPR	African Charter on Human and Peoples Rights
ATCA	United States Aliens Torts Act
ATI	Access to Information
BAP	Bali Action Plan
CDM	Clean Development Mechanism
CDM EB	Executive Board of the Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CER	Certified Emissions Reductions
CERD	Convention on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFCs	Chlorofluorocarbons
CFU	Carbon Finance Unit
COP	Conference of the Parties
CSR	Corporate social responsibility
DfNS	Debt for Nature Swaps
DNA	Designated National Authority
DOE	Designated Operational Entity
ECHR	European Convention on Human Rights
EIA	Environmental Impact Assessment
EP	Equator Principles
ERPA	Emissions Reduction Purchase Agreement
ERU	Emission Reduction Unit
ET	Emissions Trading
FAO	Food and Agriculture Organization of the United Nations
FCPF	Forest Carbon Partnership Facility
FPIC	Free Prior Informed Consent
GCF	Green Climate Fund
GEF	Global Environment Facility
GHGs	Green House Gases
GWP	Global Warming Potential
HFCs	Hydrofluorocarbons

LIST OF ABBREVIATIONS

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HRBA	Human Rights-Based Approach
HRCU	Human Rights And Climate Change Unit
HRE	Human Rights Education
HRIA	Human Rights Impact Assessment
ICC	Inuit Circumpolar Conference
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
JI	Joint Implementation
KPCS	Kimberley Process Certification Scheme
LDC	Least Developed Countries
LDCF	Least Developed Country Fund
MOP	Meeting of the Parties
NGOs	Non Governmental Organizations
NIMBY	Not-in-My-Backyard
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
PCB	Public Complaints Branch
PDD	Project Design Document
PDT	Participation Development Theory
PFCs	Perfluorocarbons
PRTR	Protocol UNECE Kiev Protocol on Pollutant Release and Transfer Registers
REDD	Reducing Emissions from Deforestation and Forest Degradation
REDD+	REDD together with sustainable forest management and enhancement of carbon stocks
RTD	Right to Development
SCCF	Special Climate Change Fund
SF6	Sulphur Hexafluoride
UDHR	Universal Declaration of Human Rights
UNDG	United Nations Development Group
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme

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UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
WBIP	World Bank Inspection Panel
WWF	World Wildlife Fund