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

Damilola S. Olawuyi

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PART I

Carbon projects and human rights: introductory context and principles

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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 book is to examine and analyse the impacts of climate change mitigation projects on human rights; that is, the potential infringement of fundamental human rights by projects undertaken to cut the emission of greenhouse gases (GHGs) that contribute to climate change ('carbon projects').² Drawing examples from CDM and REDD+ projects, this book discusses the need to mainstream human rights safeguards into the design, approval, finance and implementation of carbon projects to avoid human rights impacts and risks. It also takes a wider look at how lessons learnt from the implementation of CDM and REDD+ projects could inform thoughts on the value of, and requirements for, mainstreaming human rights principles into the design of project-based mechanisms and into the international climate change regime in general. This book examines 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 the design, approval, finance and implementation of carbon projects.³

¹ See the United Nations Human Rights Mainstreaming Portal, hrbportal.org/the-un-and-hrba, accessed 12 January 2015.

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', *Climatic Change*, 45(1) (2000), 233–251.

³ The HRBA in this book specifically refers to the framework proposed by the United Nations, which encourages all entities of the UN system to mainstream human rights

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Questions unpacked and examined in this book are as follows: Firstly, are there sufficient legal supports for claims that carbon projects currently threaten or could threaten the protection and fulfilment of fundamental human rights under international law? Secondly, are there legal and theoretical justifications for emerging proposals on the need to integrate and mainstream human rights standards into the international climate change regime? Specifically, what are the theoretical prospects and problems associated with the emerging 'human rights mainstream paradigm' under international law? Thirdly, could the HRBA be applied as a framework for mainstreaming human rights standards into project design, approval, finance and implementation procedures under the international climate change regime? What is the basis, value and novelty of the HRBA as a human rights mainstreaming approach as compared to traditional human rights mainstreaming approaches? Fourthly, what are the practical and normative implications, problems and paradoxes of mainstreaming human rights norms into the international climate change regime? And finally, what are the legal and institutional strategies and reforms needed to overcome these practical problems?

This chapter provides factual context and background on the linkages between carbon projects and human rights. It begins with an evaluation and review of pertinent human rights questions and challenges that have trailed the implementation of carbon projects under the international climate change regime. It then examines how these challenges have resulted in increased calls for an approach that recognizes the cross-cutting synergies between human rights and carbon projects. This chapter will also lay out the scope and structure of the book.

norms into their areas of activities. The implementation of the HRBA across national and regional levels includes enacting laws and policies that would recognize the rights of citizens to demand participation, information, protection and justice in environmental issues and the duty of states and non-state actors to protect, respect and fulfill the provisions of such laws. At 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) www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf, accessed 12 October 2015.

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1.1 Climate change, carbon finance and human rights: background and factual context

Climate change is perhaps one of the greatest concerns facing our present generation.⁴ Each of the last three decades has been successively warmer than any preceding decade 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 GHGs are a cause; that if left unchecked, climate change may lead to: extreme weather events such as droughts and flooding; food scarcity, 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 an abnormal rate, 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 (CO₂), methane (CH₄), nitrous oxides, chlorofluorocarbons (CFCs) and halocarbons. J. Houghton, *Global Warming: The Complete Briefing*, 4th edn (Cambridge: Cambridge University Press, 2009); See also United Nations, 'Glossary of Climate Change Acronyms and Jargon', unfccc.int/siteinfo/glossary.html, accessed 08 October 2014; J. Von Doussa, 'Climate Change: Catastrophic Impacts and Human Rights' (2007), www.humanrights.gov.au/about/media/speeches/speeches_president/2007/20071211_Climate_Change.html, accessed 10 October 2014.

⁵ This is according to the Intergovernmental Panel on Climate Change (IPCC) – a body of over 2,000 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 includes 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), 'Summary for Policymakers', in T.F. Stocker, D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex, and P.M. Midgley (eds.), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2013) 5–7. See also IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Contribution of the Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 232–275.

⁶ J. Hansen, 'Defusing the Global Warming Time Bomb', *Scientific American*, 3 (2004), 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* (Washington, DC: John Hopkins University,

It was in order to avert these disasters that the global community agreed to the Kyoto Protocol in 1997.⁷ The Kyoto Protocol gained recognition as one of the most important global agreements of the late twentieth century, not only for fixing 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 presented industrialized countries with 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 tonne of carbon dioxide equivalent (CO₂ eq.) in developed countries, the same reduction can be accomplished in developing countries at US\$15 per tonne of CO₂ eq.⁹ The mechanisms are therefore designed to deliver cheap emission reductions to the investing country and sustainable development gains to the host country. According to the United Nations, through carbon projects, a country could: attract capital for infrastructural development that could assist in a shift to a more prosperous but less carbon-intensive

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, ‘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 thirty-eight industrialized countries and eleven countries in Central and Eastern Europe to return their emissions of GHGs to an average of approximately 5.2 per cent 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, UN Doc FCCC/CP/1997/L.7/add.1, 37 ILM 22 (1998) [*Kyoto Protocol*].

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* (Cambridge: Cambridge University Press, 2005), 25.

⁹ See F. Ackerman, ‘Financing the Climate Mitigation and Adaptation Measures in Developing Countries’ (2009), sei-us.org/Publications_PDF/SEI-WorkingPaperUS-0910.pdf, accessed 02 June 2015. See also United Nations Framework Convention on Climate Change, ‘Investment and Financial Flows to Address Climate Change: An Update’ (2008) FCCC/TP/2008/7.

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economy; foster the active participation of 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 define investment priorities in projects that meet sustainable development goals.¹⁰ Specifically, project-based emission reduction measures 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.¹¹ Project-based mitigation efforts therefore provide significant social and economic benefits for poorer societies. The magnitude of financial flows to major developing countries generated by the GHG allowance trading market could be substantial, rising from approximately US\$10 billion to over US\$100 billion per year in future decades.¹²

The CDM has been particularly important over the last decade because it is the only Kyoto mechanism that allows project investments in developing countries.¹³ It allows developing countries to host emission reduction projects sponsored by industrialized countries. The CDM was designed to assist developing countries in achieving sustainable

¹⁰ United Nations Environmental Programme, *CDM Information and Guide Book* (3rd Edition, Roskilde: UNEP 2011) 14; 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', *Energy Policy*, 36 (2008), 2819–2830.

¹¹ Olsen and Fenhann, *ibid.*

¹² See J. Wiener, 'Global Environmental Regulation: Instrument Choice in Legal Context', *Yale Law Journal*, 108 (1999), 677, 691–692, also the 2012 Report of the UNFCCC, 'The Benefits of the Clean Development Mechanism 2012', cdm.unfccc.int/about/dev_ben/ABC_2012.pdf, accessed 12 January 2015.

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 and joint implementation; however, this book focuses on the CDM because it has attracted the most protests and court cases. Secondly, it is also the only mechanism with global coverage as it allows for collaborative project development between any developed country and a developing country party to the Protocol. This global reach has generated more concerns, especially in developing countries. Despite the focus on the CDM however, proposals in this book could be applied to address human rights issues in project-based mechanisms in general.

development by boosting their economies and by promoting environmentally friendly investment from governments and businesses of industrialized countries. CDM projects have provided enormous opportunities for developing countries to reach 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 reduced dependence on fossil fuels.¹⁴ Estimates indicate that average foreign investments in participating developing countries through the CDM could be as high as US\$4752 million annually.¹⁵

Studies show that over the past decade, the CDM alone has helped nations to mitigate approximately one billion tonnes of GHGs while saving developed countries a total of US\$3.6 billion in mitigation costs.¹⁶ With over 7,597 registered CDM projects in over eighty countries, the CDM has mobilized more than US\$215.4 billion in investments in developing countries, thereby providing opportunities for socio-economic growth and poverty alleviation in many developing countries.¹⁷

However, implementations of project-based mechanisms under the Kyoto Protocol have been fraught with challenges.¹⁸ For example, the

¹⁴ C. Figueres, *Establishing National Authorities for the CDM: A Guide for Developing Countries* (Washington DC: International Institute for Sustainable Development, 2004), 21. See also D. Behn, 'Linking Climate Change Mitigation and Poverty Reduction: Using Kyoto's Clean Development Mechanism to Promote Energy Development on the African Continent', in Y. Le Bouthillier *et al.* (eds.), *Poverty Alleviation and Environmental Law* (Cheltenham, UK: Edward Elgar, 2012), chp. 13.

¹⁵ See the 2012 Report of the UNFCCC, 'The Benefits of the Clean Development Mechanism 2012', (n 12).

¹⁶ See Benefits of the Clean Development Mechanism, *ibid.* According to the report, the total investment in registered or soon-to-be-registered CDM projects as of June 2012 is estimated at US\$ 215.4 billion. Investments in projects that are known to be operating is US\$ 92.2 billion. The annual investment peaked in 2008 at US\$ 13.9 billion (operating projects) and US\$ 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 US\$ 9.5 billion and possibly as much as US\$ 13.5 billion.

¹⁷ See Behn, 'Linking Climate Change Mitigation and Poverty Reduction', (n 14), chp. 13; also UNEP/ Danish Technical University, CDM/JI Pipeline Analysis and Database, www.cdmpipeline.org, accessed 08 February 2015.

¹⁸ See generally N. Roht-Arriaza, 'Human Rights in the Climate Change Regime', *Journal of Human Rights and the Environment*, 1(2) (2010) (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 hydro-power and biomass projects, use of biofuels, choices on energy and adaptation, and

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CDM has been criticized for not delivering on its sustainable development promises.¹⁹ Furthermore, a number of CDM projects approved by the CDM Executive Board (CDM EB) have been criticized for resulting in the violation of fundamental human rights in developing countries.²⁰ It is estimated that climate change mitigation and adaptation projects already displace several million people a year.²¹ These tend to be the poorest and the most vulnerable citizens in developing countries where these projects

REDD+ projects); see also K. Umamaheswaran and A. Michaelowa, 'Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector' (2006) HWWA Discussion Paper 346; I. Rowlands, 'The Kyoto Protocol's Clean Development Mechanism: A Sustainability Assessment', *Third World Quarterly*, 22 (2001), 795.

¹⁹ See L. Schneider, 'Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement', a report prepared for the World Wildlife Fund (Berlin: Öko-Institut, 2007); C. Sutter, 'Does the Current Clean Development Mechanism Deliver Its Sustainable Development Claims' (2005) *HWWA Report* 1; R. Saner and A. Neiderberger, 'Hype or Reality: Can the CDM Trigger FDI?', *European Climate Platform*, 2 (2005), 12; B. Haya, *Damming the CDM: Why Big Hydro Is Ruining the Clean Development Mechanism* (Berkeley, CA: International Rivers Network, 2002) 1; H. Kolshus, 'Can the Clean Development Mechanism Attain Both Cost effectiveness and Sustainable Development Objectives?', CICERO Working Paper, 8 (2001), 1; Umamaheswaran and Michaelowa, 'Additionality and Sustainable Development Issues', *ibid.*

²⁰ See C. McDowell, 'Climate-Change Adaptation and Mitigation: Implications for Land Acquisition and Population Relocation', *Development and Policy Review*, 31(6) (2013), 677–679; T. Griffiths and F. Martone, 'Seeing "REDD"? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' (May 2009), www.rightsandresources.org/documents/files/doc_923.pdf, accessed 12 January 2015.

²¹ See M.A. Orellana, 'A Human Rights-Based Approach to Climate Change', in J. Parra (ed.), *The Human Rights-Based Approach: A Field of Action for Human Rights Education* (Cifedhop, 2012) 58, www.ciel.org/Publications/HR_Approach_Climate_2012.pdf, accessed 12 December 2015 (noting that 'a large-scale hydroelectric project in a developing country under the CDM could force local communities to relocate from their traditional lands and livelihoods resulting in infringement of their rights to self-determination, property and life'); also A. de Sherbinin *et al.*, 'Preparing for Resettlement Associated with Climate Change', *Science*, 334(6055) (2011), 456–457; R. Bronen, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine', *New York University Review of Law & Social Change*, 35 (2011), 357–407; K. Hoshour and 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* (Oxford: Oxford University Press, 2012); B. Mayer, 'International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework', *Colorado Journal of International Environmental Law and Policy*, 22 (2011), 357–416; J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford and Portland, OR: Hart Publishing Ltd, 2010); M. Couldrey and M. Herson (eds.), *Forced Migration Review: Climate Change and Displacements* (Oxford: Oxford Refugees Studies Center, 2008), 6.

are located.²² In addition, there are concerns related to pollution caused by the transfer of outdated and inefficient technologies for emission credits.²³ Other human rights concerns include lack of opportunities for participation by stakeholders in project planning and implementation,²⁴ siting 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 Furthermore, considering that many communities live in and are dependent on forests for their lives and livelihoods, there is great concern around potential negative impacts of REDD+ projects on traditional land rights.

Due to these problems, the credibility and integrity of project-based mechanisms under the Kyoto Protocol have come under intensive scrutiny.²⁶ Projects that carry significant potential for climate change

²² As the United Nations Human Rights Council recognized in its resolution 16/11, environmental damage is felt most acutely by those segments of the population already in vulnerable situations. See United Nations Human Rights Council, *Resolution adopted by the Human Rights Council 16/11, Human rights and the environment*, www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.11_en.pdf, accessed 12 December, 2015.

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 Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006), www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36, accessed 12 October 2014.

²⁴ See F. Seymour, 'Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs', in S. Humphreys, (ed.), *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 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), www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf, accessed 03 August 2014.

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 inuitcircumpolar.com/files/uploads/iccfiles/FINALPetitionICC.pdf, accessed 12 July 2014.

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', *Harvard Environmental Law Review*, 33(2) (2009), 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, www.oxfam.org.uk/resources/