Centre for International
Sustainable Development Law

HUMAN RIGHTS AND THE ENVIRONMENT: KEY CHALLENGES & BEST PRACTICES

Edited by Sébastien Jodoin
& Yolanda Saito

Presented to the United Nations
Office of the High Commissioner for Human Rights

30 June 2011

ABOUT THE CENTRE FOR INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW

The Centre for International Sustainable Development Law (CISDL) aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development, and implementation of international sustainable development law. The CISDL is an independent legal research centre which has a collaborative relationship with the McGill University Faculty of Law in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. CISDL also has a partnership with Oxford University Faculty of Law, the Université de Montréal, Yale University and a network of developing country faculties of law. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme, and the United Nations Development Programme.

The CISDL has six legal research programmes led by jurists from developing and developed countries, and publishes books, articles, working papers and legal briefs in English, Spanish and French. With the International Law Association and the International Development Law Organization, under the auspices of the United Nations Commission on Sustainable Development, CISDL is the leader of a new Partnership, 'International Law for Sustainable Development' that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity on international law for sustainable development.

Contact Information:

Centre for International Sustainable Development Law
3664 Peel St.
Montreal, Quebec
H3A 1X1 Canada
Tel: 001 514 398 8918
Fax: 001 514 398 8197

TABLE OF CONTENTS

ABOUT THE EDITORS & CONTRIBUTORS **1**

1. INTRODUCTION **2**

2. KEY CHALLENGES AT THE INTERSECTION OF HUMAN RIGHTS AND THE ENVIRONMENT **4**

2.1 HUMAN RIGHTS AND CLIMATE CHANGE 4

2.1.1 Human Rights as Legal Support for Climate Action *4*

2.1.2 Human Rights as Legal Constraints on Climate Action *7*

2.1.3 Human Rights as Legal Guides for Climate Action *10*

2.2 ENVIRONMENTAL MIGRATION AND DISPLACEMENT 11

2.2.1 Internal Environmental Migration *12*

2.2.2 International Environmental Migration *13*

2.2.3 The Potential and Limitations of Human Rights for Addressing Environmental Migration *15*

3. BEST PRACTICES FOR INTEGRATING HUMAN RIGHTS INTO SUSTAINABLE DEVELOPMENT POLICIES **16**

3.1 RIGHTS-BASED APPROACHES TO CONSERVATION 16

3.1.1 The Emergence of Rights-Based Approaches to Conservation *16*

3.1.2 The Concept of Rights-Based Approaches to Conservation *17*

3.1.3 The Foundations of Rights-Based Approaches in International Law and Policy *18*

3.1.4 Operationalising Rights-Based Approaches to Conservation *21*

3.1.5 The Potential of Rights-Based Approaches to Conservation *22*

3.2 FOSTERING GREEN AND DECENT JOBS 24

3.2.1 Climate Change and Decent Jobs *25*

3.2.2 Short-Term Policy Measures for Green and Decent Jobs *28*

3.2.3 Long-Term Policy Measures for Green and Decent Jobs *30*

3.3 LEGAL EMPOWERMENT FOR SUSTAINABLE DEVELOPMENT 32

3.3.1 Background *33*

3.3.2 The Framework: 4 Rights-Based Pillars of Legal Empowerment *34*

3.3.3 The Plan for Implementation: Suggested Methodologies *36*

3.3.4 Best Practices for Legal Empowerment: Two Examples *37*

3.3.5 The Legal Empowerment for Sustainable Development Agenda *39*

4. CONCLUSIONS & RECOMMENDATIONS **40**

About the Editors & Contributors

Sébastien Jodoin is a Lead Counsel with the Centre for International Sustainable Development Law, the Director of the One Justice Project, an Associate Fellow with the McGill Centre for Human Rights and Legal Pluralism, and a Trudeau Scholar at the Yale School of Forestry & Environmental Studies.

Benoît Mayer is a Legal Research Fellow with the Centre for International Sustainable Development Law.

Patrick Reynaud is an Associate Fellow with the Centre for International Sustainable Development Law and a Program Specialist, Environment & Sustainable Development Law Programs, with the International Development Law Organisation.

Yolanda Saito is an Associate Fellow with the Centre for International Sustainable Development Law and the Legal Coordinator of the One Justice Project.

Sean Stephenson is an Associate Fellow with the Centre for International Sustainable Development Law.

1. INTRODUCTION

Sébastien Jodoin, CISDL Lead Counsel

Apart from the charge that human rights are anthropocentric and may therefore be in tension with environmental objectives, the prevailing view remains that human rights and the environment are mutually supportive areas of international law.[1]

From the perspective of international human rights law, a healthy environment is seen as a necessary pre-condition for human dignity and the exercise of a range of basic human rights and serious environmental damage may thus amount to violations of the rights to life, health, food, water, property, and culture.[2] This is most notably recognised in Principle 1 of the *Stockholm Declaration*, according to which "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".[3] More recently, the U.N. Human Rights Council has noted "that environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights."[4] Likewise, numerous decisions of human rights tribunals and bodies have identified, for instance, deforestation and expropriation of lands for logging as threatening the fundamental rights to life and culture of forest-dwelling and Indigenous communities.[5]

From the perspective of international environmental law, human rights can offer helpful tools and concepts for addressing environmental problems. According to a standard view in the literature, civil and political rights form "necessary preconditions for mobilizing around environmental issues and making effective claims to environmental protection" while economic, social, and cultural rights provide "substantive standards of human well-being" that may strengthen policy responses to environmental problems as a result.[6] The U.N. Human Rights Council has thus affirmed "that human rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking

---

[1] See, *e.g.*, Catherine Redgwell, "Life, The Universe and Everything: A Critique of Anthropocentric Rights," in Alan E. Boyle and Michael R. Anderson, eds., *Human rights approaches to environmental protection* (Oxford: Oxford University Press, 1996), 71; Conor Gearty, "Do human rights help or hinder environmental protection?" (2010) 1(1) Journal of Human Rights and the Environment 7.

[2] See Robin Churchill, "Environmental Rights in Existing Human Rights Treaties," in Boyle and Anderson, *supra* note 1, 89; Dinah L. Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals," in Romina Picolotti and Jorge Dabiel Taillant, eds., *Linking Human Rights and the Environment* (Tucson, Arizona: University of Arizona Press, 2008) 1.

[3] *Declaration on the Human Environment*, in Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, U.N. Doc. A/CONF.48/14/Rev. 1.

[4] *Human Rights and the Environment*, UNHRC Res. L.7, adopted 18 Mar. 2011, U.N. Doc. A/HRC/16/L.7.

[5] See *Yanomami Indians v. Brazil*, IACtHR Case 7615, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985), 1984-1985 Annual Report 24; *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

[6] Michael R. Anderson, "Human Rights Approaches to Environmental Protection: An Overview," in Boyle and Anderson, *supra* note 1, 1 at 5.

in the area of environmental protection, promoting policy coherence, legitimacy and sustainable outcomes".[7]

Yet, this fairly benign and straightforward view does not fully capture the more controversial and complicated points of connection between human rights and the environment. Conflicts frequently arise between the human rights and environmental agendas, as demonstrated by the history of top-down conservation efforts[8] and most recently, around concerns regarding the human rights impacts of REDD+ initiatives.[9] In addition, a number of environmental issues have emerged for which existing international human rights law simply has no clear or satisfying answers. Finally, when human rights are clearly applicable, they are often not fully applied or adequately operationalised in decision-making on environmental issues. For instance, while the principle of public participation appears in numerous multilateral environmental instruments[10] and agreements,[11] much work remains to ensure that participatory rights and safeguards are appropriately integrated into environmental programmes, policies, and projects.

This report examines some of the more complicated and forward-looking questions at the intersection of human rights and the environment. Section 2 discusses two key challenges which illustrate both the potential and limitations of human rights for environmental issues: climate change and environmental migration and displacement. Section 3 presents best practices for integrating human rights approaches into sustainable development policies including through rights-based approaches to conservation, integrative approaches to the right to work, and legal empowerment for sustainable development. The report concludes with some key recommendations for future research and policy-development in the fields of human right and the environment.

---

[7] UNHRC Res. L.7, *supra* note 4.

[8] See Naya Sharma Paudel, Somat Ghimire and Hemant Raj Ojha, "Human Rights – A Guiding Principle or an Obstacle for Conservation?" (2007) 15 IUCN Policy Matters 299 and other contributions in the same issue.

[9] See, *e.g.*, Tom Griffiths and Francesco Martone, "Seeing 'REDD'? Forests, climate change mitigation and the rights of indigenous peoples and local communities," Forest Peoples Programme, May 2009, available at: <http://www.rightsandresources.org/documents/files/doc_923.pdf>.

[10] *Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1 (1992), principle 10. See also *Agenda 21*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (1992), [*Agenda 21*] Preamble to Chapter 23 ("One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.")

[11] See, *e.g.*, *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, adopted 17 Jun. 1994, 1954 U.N.T.S. 3, entered into force 26 Dec. 1996, at art. 10(f); *United Nations Framework Convention on Climate Change*, adopted 9 May 1992, 1771 U.N.T.S. 107, entered into force 21 Mar. 1994, at art. 6(a)(iii).

2. KEY CHALLENGES AT THE INTERSECTION OF HUMAN RIGHTS AND THE ENVIRONMENT

This section discusses two key challenges that illustrate both the potential and limitations of international human rights law for addressing environmental issues: human rights and climate change (2.1) and environmental migration and displacement (2.2).

2.1 Human Rights and Climate Change

Sébastien Jodoin, CISDL Lead Counsel

Despite their potential, human rights standards and principles have yet to be fully integrated into international and national policy-making on climate change.[12] This section provides a brief overview of the different contributions that human rights can make to climate change policy-making by supporting, constraining, and guiding climate action.

2.1.1 Human Rights as Legal Support for Climate Action

By recognising the human rights impacts of climate change for vulnerable communities and individuals, international human rights law can provide legal justification for states to combat climate change and address its adverse effects for human populations.

It is widely recognised by states that climate change has had, and will have, a number of generally negative impacts on human rights.[13] The impacts of climate change raise the question of the responsibility that may arise in response to the human rights implications of climate change. There are two possible approaches, one founded on the liability of large emitters for the human rights impacts of climate change, the other founded on the shared responsibility of all states to contribute to the realization of human rights.

Of the two, the liability approach has garnered the most attention in international debates on climate change. A number of states and NGOs have argued that the projected impacts of climate change on a range of human rights provide a legal justification for large emitters to take action to address climate change. They argue that the human rights impacts of climate change oblige large emitters to mitigate the impacts of climate change on vulnerable communities by reducing their GHG emissions and to assist such communities in adapting to the effects of climate change by providing them with funding, cooperation, and assistance.

---

[12] See Sébastien Jodoin, "Lost in Translation: Human Rights in the Climate Change Negotiations," CISDL Legal Working Paper (January 2010), online: CISDL, <http://www.cisdl.org/pdf/working_papers_climate/Jodoin.pdf>; Sébastien 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), online: IDLO, <http://www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf>.

[13] See, *e.g.*, UNHRC Resolution 10/4, Preamble; Preamble to Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, advanced unedited version, adopted by the Conference of the parties to the UNFCCC, 16th Session, 4 December 2010 [Cancun LCA Outcome].

The high-water mark for this approach remains a claim launched in 2005 by a group of Inuit in the Canadian and Alaskan Arctic seeking compensation from the United States for alleged violations of their human rights resulting from climate change before the Inter-American Commission on Human Rights (IACHR).[14] Although the IACHR deemed the case inadmissible,[15] similar litigation has been or is in the course of being launched.[16]

However, there are good reasons to think a strong or exclusive focus on the potential of liability for the human rights impacts of climate change may not be good law, nor good policy. First of all, as underscored by the OHCHR, it is less than clear that the invocation of state responsibility for human rights violations arising from climate change finds strong support in existing international human rights law:

> Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.[17]

More importantly, an approach founded on human rights liability may undermine rather than strengthen the overall response of the international community to environmental harm and disasters. A focus on liability implicitly repudiates the notion that all states have a shared responsibility for realising human rights, whether or not they have contributed to the environmental problems that make the realisation of these rights more challenging. It may also be more equitable to emphasise a responsibility of all states for all environmental problem. Let us consider a scenario involving five tropical storms, of which four could be found to be linked to climate change. While the climatic liability approach would impose a responsibility to act upon large emitters to assist victims of four of these storms, the more general obligation of international cooperation in the realization of human rights would instead impose such a responsibility for victims of all five storms. It is surely better policy in the long run to focus on how strengthening the human rights regime as a whole could cover

---

[14] 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, submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, 7 December 2005, available at: http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf.

[15] In a letter dated November 16, 2006, the IACHR informed the petitioners that it would not consider the petition because the information it provided was not sufficient for making a determination. In March 2007 however, the IACHR did hold hearings with the petitioners to address matters raised by the petition without revisiting the issue of its admissibility.

[16] See Center for Climate Change Law, Columbia Law School, Climate Change Litigation Resources, available at: http://www.law.columbia.edu/centers/climatechange/resources.

[17] Office of 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," UN Doc. A/HRC/10/61, 15 January 2009, para. 70 ("OHCHR Report on Climate Change and Human Rights").

various forms of environmental harm rather than only those forms of harm which could be linked, with great difficulty legally and factually, to the responsibility of states.

Of course, the strategic and political benefits of a focus on liability are obvious in many ways. And yet, it is not at all clear that focusing on liability has been a very productive way of ensuring progress in the climate change negotiations. Not surprisingly, the largest emitters among industrialised countries and the emerging economies have vehemently opposed recognition of or references to this sort of liability. As a result, for a long time, many of these states resisted any references to human rights being included in the texts negotiated under the UNFCCC and *Kyoto Protocol*.

International human rights law does however provide another legal justification for an international response to climate change that is not founded on notions of liability, namely the existing obligations of states to respect, protect, and fulfil rights enshrined in the *International Covenant on Economic, Social and Cultural Rights*,[18] including through the provision of international funding, assistance, and cooperation by developed countries for the fulfilment of human rights in developing countries. As the Committee on Economic, Social and Cultural Rights has stated, "in accordance with Articles 55 and 56 of the *Charter of the United Nations*, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States."[19]

This approach entails that developing countries should comply with the minimum core obligations under each human right, take deliberate, concrete and targeted measures available to them to move as expeditiously and effectively as possible towards the full realization of rights, and guarantee non-discrimination in access to these rights in spite of the impacts and consequences of climate change. With respect to developed states, they remain under the obligation to provide cooperation to assist developing countries in the implementation of economic, social and cultural rights in light of these same impacts and consequences.[20] This obligation is surely a more helpful way of addressing issues of responsibility and equity in the climate change regime than more problematic conceptions of human rights liability for climate change. Being grounded in existing international human rights law, it has the potential to be more acceptable to developed countries as a basis for cooperation on climate change (with the exception of the United States, which is not a party to the *ICESCR*). More importantly, it strengthens rather than undermines the notion that all states have a shared responsibility for realising human rights irrespective of any notion of liability; in other words, this approach provides a basis for taking action in respect of all five tropical storms mentioned in the example above.

As such, obligations to fulfil all human rights for all, including through international assistance and cooperation, may provide a more constructive legal justification for the international response to climate change than notions of liability. The same can be said when

---

[18] *International Covenant on Economic, Social and Cultural Rights*, adopted 16 Dec. 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 Jan. 1976 [*ICESCR*].

[19] CESCR, General Comment no 3, 14 December 1990, U.N. Doc. E/1991/23, para. 14.

[20] OHCHR Report on Climate Change and Human Rights, paras 75-77 and 84-86.

the issue of legal justification is examined at the national level – international human rights law imposes upon all states the obligation to take action to combat climate change to lessen its impacts on the human rights of vulnerable groups, populations, and individuals. In general, analysing the ways in which human rights may support climate action illustrates the broader complexities of the intersection between human rights and the environment and the limitations of the prevailing violation / responsibility paradigm.

2.1.2 Human Rights as Legal Constraints on Climate Action

The application of international human rights law should also aim to ensure that international and national policy on climate change is consistent with human rights obligations and principles, thereby avoiding conflicts between these two areas of law and minimizing the risks that responses to climate change could lead to human rights violations. Regrettably, the central importance of ensuring that responses to climate change are supported by and consistent with existing human rights obligations and principles has not always featured prominently in the current climate change negotiations. However, the Cancun Agreements may signal a turning point in this regard. It most notably emphasizes "that Parties should, in all climate change-related actions, fully respect human rights."[21]

To the extent that one of the priority concerns of human rights has always been the protection of individual rights in the face of governmental action, it is only natural that state responses to climate change, which often involve major policy changes and large projects with impacts on the life, safety, and free movement of individuals, will attract the scrutiny of human rights. Four examples can be given of areas where human rights may impose legal constraints on climate action at the national level.

First, in relocating individuals vulnerable to the effects of climate change, states are obliged to abide by the safeguards set out in the prohibition on forced evictions in international human rights law. As such, in situations where evictions are justified, the Committee on Economic, Social and Cultural Rights has specified that states must ensure that they are carried out in a manner warranted by a law which is compatible with applicable human rights standards, including the following procedural protections:

> (a) an opportunity for genuine consultation with those affected;
> (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
> (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
> (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
> (e) all persons carrying out the eviction to be properly identified;
> (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
> (g) provision of legal remedies; and
> (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[22]

[21] I. Shared Vision on Long-Term Cooperative Action, Cancun LCA Outcome, para. 8.
[22] CESCR, General Comment no 7, 20 May 1997, U.N. Doc. E/1998/22, para. 15.

Given the existing challenges that many developing and developed states face in respecting the right to housing and the prohibition against forced evictions, the possibility that programmes of relocation and resettlement may lead to human rights violations is significant.

Second, in seeking to protect forests from deforestation and degradation under the mechanism known as REDD+. REDD+ is a nascent international mechanism that would provide developing countries with positive incentives, though public and/or private sources of international funding, for reducing emissions from deforestation and forest degradation and for ensuring the conservation, sustainable management, and enhancement of forests and forest carbon stocks.[23] While potential benefits for Indigenous and local communities from the economic opportunities generated by REDD+ do exist, there is also considerable apprehension that REDD+ activities may fail to adequately respect, protect and fulfil the rights of local communities, in particular those of Indigenous peoples, that have rights to forested territories, live near or in forests, or depend on their resources.[24] Accordingly, the Conference of the Parties in Cancun adopted the two following safeguards that should be respected in the implementation of REDD+ activities:

> (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 United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;
> (d) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities, in actions referred to in paragraphs 70 and 72 of this decision;[25]

However, these safeguards are neither precise, nor strong enough to protect the rights of local and Indigenous communities in the implementation of REDD+ initiatives and REDD+ readiness processes have already begun to raise significant human rights conerns. For instance, according to Freudenthal, Nnah, and Kenrick, the REDD+ readiness process in Cameroon has failed to consult and engage with local communities and has, as a result, erroneously emphasised the role of localized activities in forest loss such as agriculture and fuel wood collection rather than industrial logging and mining. There are concerns that this could lead REDD+ measures in Cameroun to focus on changing the way in which forest-dependent communities use forests rather than targeting the activities of the logging and

---

[23] For an overview of the emerging REDD+ regime, see Arild Angelsen, ed., *Realising REDD+. National Strategy and Policy Options* (Bogor, Indonesia: CIFOR, 2009).

[24] See, *e.g.*, Tom Griffiths and Francesco Martone, "Seeing 'REDD'? Forests, climate change mitigation and the rights of indigenous peoples and local communities," Forest Peoples Programme, May 2009, available at: <http://www.rightsandresources.org/documents/files/doc_923.pdf>; Frances Seymour, "Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs," in Stephen Humphreys, ed., *Human Rights and Climate Change* (Cambridge, UK: Cambridge University Press, 2010) 207.

[25] Annex I: Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, Cancun LCA Outcome, para. 2.

mining industry, leading to negative impacts on local livelihoods as well as likely failures in reducing deforestation.[26]

Third, in constructing hydroelectric dams, states must address the serious human rights impacts relating to the forced displacement or relocation of local and Indigenous communities and the subsequent loss of land, access to food and water, and means of subsistence. While the Committee on Economic, Social, and Cultural Rights has called upon international agencies to "scrupulously avoid involvement in projects which [...] involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation,"[27] there are serious concerns that international mechanisms, most notably through the clean development mechanisms (CDM) set up by the Kyoto Protocol, have supported and will continue to support the construction of large hydroelectric dams where proper human rights safeguards have not been implemented. The CDM standards as well as recourse to the standards of the World Commission on Dams have not allayed these concerns.[28]

Finally, in setting standards and establishing programmes for the use and development of biofuels, states must address the implications of biofuels for the right to food. This has encouraged a shift in agricultural production from growing food to growing biofuels, contributing to a reduction in land use dedicated to growing food and a global rise in food commodity prices. Although both of these trends may have benefits for farmers in developing countries, they have had negative impacts on the right to adequate food and freedom from hunger.[29] The human rights implications of biofuels require that a number of steps be taken by developed and developing states, including a possible moratorium on the development of biofuels, an end to subsidies for biofuel development, the establishment of regulatory structures to protect against negative impacts and to provide safety nets for those who are negatively affected, and a host of measures to improve food security in developing countries.[30]

These four issues highlight the significant probabilities that many policy responses adopted in the fight against climate change may in of themselves lead to human rights violations or have significant implications for the enjoyment of human rights. Although the necessity of responding to climate change is urgent and serious, it should not be used as a justification for violating binding obligations in international human rights law.[31] More broadly, this

---

[26] Emmanuel Feudenthal, Samuel Nnah, and Justin Kenrick, "REDD and Rights in Cameroon. A Review of the treatment of indigenous peoples and local communities in policies and projects," (Forest Peoples Programme, 2011) at 5-6.

[27] Committee on Economic, Social, and Cultural Rights, General Comment No. 2, UN Doc. E/1990/23 (1990), para. 6.

[28] N. Roht-Arriaza, 'Human Rights in the Climate Change Regime,' (2010) (1)(2) Journal of Human Rights and the Environment 211 at 215-219.

[29] Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN Doc A/HRC/10/61, para. 66.

[30] A. Eide, *The Right to Food and the Impact of Liquid Biofuels (Agrofuels),* Right to Food Studies (Rome, Italy: FAO, 2009), at 46-51.

[31] Human rights treaties do set out conditions under which limitations can be imposed by States on the exercise of some human rights in exceptional circumstances. Generally, such limitations will be allowed provided that they are determined by law and necessary in a democratic society to ensure respect for the rights and freedoms of others or to meet the just requirements of public order, public health or morals, national security or public

discussion of possible conflicts between human rights and climate change demonstrates the challenges of integrating human rights obligations, standards, and principles into the design of solutions for addressing climate change.

2.1.3 Human Rights as Legal Guides for Climate Action

Although this has received little attention in the climate change negotiations, human rights can also enhance the effectiveness of responses to climate change. As pointed out by the OHCHR, "human rights standards and principles should inform and strengthen policy measures in the area of climate change."[32] Two examples of such mutually productive policy solutions are provided below.

First, human rights, particularly participatory rights, can do much to strengthen the design and the application of climate actions in so much as their effectiveness will often depend on the consent and cooperation of individuals and communities. As emphasized by the OHCHR, a human rights framework "underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives" and "stresses the importance of accountability mechanisms in the implementation of measures and policies in the area of climate change," requiring "access to administrative and judicial remedies in cases of human rights violations."[33] In particular, by providing meaningful opportunities for the participation and empowerment of individuals and communities in climate mechanisms and programmes, policy-makers can provide legitimacy, stability and security to projects and initiatives, thereby avoiding delays and other difficulties caused by the conflict and litigation that often results from less collaborative approaches.

Second, human rights can serve as guidelines and benchmarks in developing adaptation policies and programmes. In particular, economic, social and cultural rights can provide key indicators for identifying the ways in which climate change will affect the health, safety and livelihood of individuals and the means of enhancing the resilience of a community adapting to these effects. For example, the right to housing could be instrumental in assisting states in strengthening existing housing options or providing alternative housing for vulnerable individuals and communities. As such, any policies addressing housing issues would need to take into account the broad notion of the adequacy of housing set out by the Committee on Economic, Social and Cultural Rights.

---

safety. In such cases, these limitations must be prescribed by law; address a specific legitimate purpose allowed by international law; and be demonstrably necessary and proportionate (See, *e.g.*, ICESCR, Article 4). Human rights treaties also provide that derogation (temporary suspension) from human rights is allowed "in time of public emergency of which threatens the life of the nation and the existence of which is officially proclaimed." (See, e.g., *International Covenant on Civil and Political Rights,* adopted 16 Dec. 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976 [*ICCPR*], Article 4(1)). Such derogations must be strictly required by the exigencies of the situation, must not be inconsistent with other obligations under international law and may not be discriminatory. In addition, there are a number of rights from which derogation is never allowed: the rights to be free from arbitrary deprivation of life; torture and other ill-treatment; slavery; imprisonment for debt; retroactive penalty; non-recognition of the law; and infringement of freedom of thought, conscience, and religion: See, *e.g.*, United Nations Economic and Social Council UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex (1985). U.N. Doc. E/CN.4/1985/4.

[32] OHCHR Report on Climate Change and Human Rights, para. 95.

[33] *Ibid.*, paras 81-83.

Table 1. The Notion of Adequacy of Housing[34]	
Legal security of tenure	"Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."
Availability of services, materials, facilities and infrastructure	"An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;"
Affordability	"Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised."
Habitability	"Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well."
Accessibility	"Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources."
Location	"Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. (…) Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants"
Cultural adequacy	"The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured."

These examples demonstrate that human rights do not simply warn policy-makers about policy measures that might violate human rights, they also point them towards good policy measures that focus on the realization of rights and the empowerment of rights-holders and build on our shared, global responsibility for human rights. Unfortunately, policy discussions at the intersection of human rights and the environment rarely consider the possibilities for win-win scenarios of this sort.

2.2 Environmental Migration and Displacement

Benoît Mayer, CISDL Legal Research Fellow

Environmental migration is one of the major human rights issues linked to environmental change. The phenomenon is multiform. Environmental migrants may be temporarily displaced by a natural disaster (e.g. flooding, hurricane), or permanently relocated because of an alteration of environmental conditions that can be the consequence of slow-onset phenomena (e.g. sea level rise, land degradation, desertification), or they may even follow seasonal and circular patterns of migration. The decision to migrate can be taken by individuals or, collectively, by entire communities. Migration may precede or follow an environmental change, and the latter can be sudden or progressive. The diversity of

[34] CESCR, General Comment no 7, 20 May 1997, U.N. Doc. E/1998/22, para. 8.

environmental migrations was reflected in the language of the Cancun Agreements, that called UNFCCC parties to adopt "[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels."[35] Yet, as will be argued later, this provision is only a first step and will certainly not suffice to protect environmental migrants' fundamental rights.

Furthermore, "environmental migrants" may or may not be aware that their migration is (indirectly) induced by environmental change. Therefore, recognizing environmental inducement in specific case of migration may be difficult or impossible: in most cases, migration is caused by a conjunction of economic, social and environmental factors, amongst which environmental change plays an important but not exclusive and rarely direct role. An operational definition of "environmental migrants" may be impossible to adopt. As a consequence of these difficulties in defining "environmental migrants," but also of scientific uncertainties as to the social consequences of environmental change in particular places, the literature has not yet agreed on any precise estimation of the scope of actual or expected environmental migration. Nonetheless, most authors agree that the order of magnitude would be of a few hundreds of millions of persons displaced by 2050.[36] In addition, it is also generally accepted that most environmental migrants will stay within the border of their own states: only a small proportion of environmental migrants would be *international* migrants.

2.2.1 Internal Environmental Migration

The human rights of environmental migrants may be jeopardized by policies hostile to, or not sufficiently supportive of their migration. Forced to stay at their place of origins, environmental migrants may suffer infringements to several of their first generation internationally recognized human rights (the right to life, the freedom from inhuman or degrading treatment, the right to liberty of movement and the freedom to choose one's residence), but also second generation rights (right to an adequate standard of living, including adequate food, clothing and housing; right to the highest attainable standard of physical and mental health; and right to culture, work and education) and developing third generation rights (right to a healthy environment, right to natural resources and right to social and economic development).

At the place of destination, actual migrants may also suffer diverse infringement to their rights if the responsible public authorities do not carry out sufficiently ambitious policies to prevent discrimination and ensure migrants' assimilation into their new society. In other words, states have positive obligations to engage in specific actions in support of incoming environmental migrants as a way to guarantee that they have equal opportunity to enjoy their fundamental rights. The rights at issue in the place of destination include, in particular, freedom from discrimination in the enjoyment of civil and political as well as economic, social and cultural rights, right to a family life (including family reunification), cultural rights (of minority groups among environmental migrants), right to social assistance and collective rights such as the right to self-determination. Positive obligations should include in

[35] COP Decision 1/CP.16, art. 14(f).

[36] See *e.g.* Interview of Norman Myers by Christian Aid (14 March 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (2007), available at <http://www.christianaid.org.uk/Images/human-tide.pdf>, at 48.

particular, if need be, a right to linguistic education, to professional training and to psycho-social support.

International standards on internally displaced persons do apply to at least some internal environmental migrants. In particular, the definition provided in the Guiding Principles on Internal Displacement includes persons or groups of persons displaced by "natural or man-made disasters."[37] However, the Guiding Principles are not binding, and they do not include environmental migrants fleeing slow onset environmental change. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), not yet entered into force, would be a binding regional instrument but it still fails to protect environmental migrants fleeing slow onset environmental change. Lastly, instruments on the protection of internally displaced persons are probably not specific enough as they do not indicate what specific policies states should follow regarding environmental migration, for instance through preventive rather than purely reactive displacement programs.

2.2.2 International Environmental Migration

Beyond affecting a large range of rights in different ways, environmental migrations challenge the state-centeredness of the international human rights legal system. International human rights law assumes that states are willing and able to protect human rights within their jurisdiction. Only states ratify international human rights conventions, and only states have clearly established international human rights obligations. Moreover, most international human rights instruments clearly indicate that the international human rights obligations of a given state are limited to the "individuals within its territory and subject to its jurisdiction."[38] Jurisdiction was itself interpreted as signifying effective control over a territory.[39] Although the International Covenant on Economic, Social and Cultural Rights does not include any explicit territorial limitation of states' international human rights obligations but rather demands that states "take steps, individually and through international assistance and co-operation,"[40] it rapidly appeared that states are only responsible to protect the rights of individuals within their territory or under their jurisdiction.[41]

Because international human rights law extensively relies on the individual obligation of states to protect the human rights of the individuals within their territory, environmental migrants may not be protected when a state happens to be either unwilling, or unable to offer such a protection. Three scenarios can be identified whereby the international human rights obligations of a state do not offer an adequate protection to environmental migrants within its jurisdiction.

A first scenario, whereby a state is unwilling to protect environmental migrants within its jurisdiction, is not specific to environmental migration. International law may actually deal with this scenario. In certain circumstances, internal environmental migrants that are

---

[37] Guiding Principles on Internal Displacement, Commission on Human Rights, 54th Session, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), scope and purpose, para. 2.
[38] International Covenant on Civil and Political Rights, art. 2.1.
[39] CCPR, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.13 (March 29, 2004), para. 10.
[40] International Covenant on Economic, Social and Cultural Rights, art. 2.1.
[41] CESCR, General Comment No. 1 : Reporting by States parties, UN Doc. E/1989/22 (24 February 1989).

persecuted by their own state may qualify as political refugees for the purpose of the 1951 Geneva Convention and, thus, benefit from a form of international protection of individuals. In other circumstances, the developing doctrine of a responsibility to protect may call for a "timely and decisive response" of the international community.[42]

The second scenario is more specific to environmental migration. In this scenario, a state is unable to protect environmental migrants within its territory under the control of the state as the whole jurisdiction is a place of out-migration. In other words, there is no "heaven" for environmental migrants within the state's territory. This scenario is unlikely to concern large countries, but it may concern, on the long term, low lying small island developing states such as the Maldives, Tuvalu and Kiribati. As the whole territory of these insular nations may become uninhabitable due to sea level rise, international migration may be the only option left to affected populations. This scenario reveals a crucial gap of international human rights law, whereby an action of the international community needs to be adopted. However, while the scenario is obviously of a compelling humanitarian importance, its exceptional character must be kept in mind. The Convention relating to the Status of Stateless Persons may not apply as long as the state is recognized (i.e., as long as it has a territory, a population and a government), even though most of its territory may become uninhabitable, or at least not safely inhabitable long before it formally disappears.

A third scenario is both specific to environmental migration and very representative in terms of number of environmental migrants. In this scenario, a state is unable to protect environmental migrants within its jurisdiction as it does not possess enough territorial resources to provide all internal environmental migrants with a decent place of destination. This scenario concerns for instance Bangladesh, where large regions are becoming uninhabitable due to sea level rise and more extreme and more frequent climate events, while the whole country is already densely populated. Several factors may influence the capacity of a state to provide its internal environmental migrants with an adequate resettlement: the size of the country and the number of internal environmental migrants, but also the quantity of environmental resources available in potential places of destination, the demographical growth and the level of development. Furthermore, an adequate resettlement should be defined in a culturally sensitive manner: an adequate resettlement should enable displaced persons to maintain their economic activities and cultural identity, as far as possible.

The second and third scenarios may lead to an increase of international migration. If no international regime on environmental migration is adopted and if states do not engage into migration-friendly policies on their own, the environmental migrants of the second and third scenarios will be forced to illegally cross international borders. Some states may follow policies that are clearly hostile to international environmental migration – for example, India built a 4,000 km long fence of barbed wire along its border with Bangladesh as a way to try and impede illegal migrants. On the other hand, unilateral migration concessions would result in a few states bearing most of the "burden" of international environmental migration with no international support.

[42] Report of the Secretary General, Implementing the Responsibility to Protect, UN Doc. A/63/677 (12 January 2009), para. 49.

2.2.3 The Potential and Limitations of Human Rights for Addressing Environmental Migration

The challenge of environmental migration clearly illustrates the limited ability of existing international human rights law to address the complex question of environmental migration. Two legal gaps can be identified, regarding respectively, internal and international environmental migration. Both situations are relatively different and should be clearly distinguished from a normative perspective.

Domestic policies related to internal environmental migration should be encouraged and guided by international soft-law instruments similar to the Guiding Principles on Internal Displacement, but dealing more specifically with the protection needs of environmental migrants. For instance, early and sustainable migration policies should be encouraged, and internal environmental migrants should not only be protected as individuals, but also as members of communities.

In addition, international law should establish an international regime ensuring that environmental migrants can cross international borders when their state of origin is unable to provide them with an adequate protection (second and third scenarios). Here also, the protection should be specific, and not merely a copy of an existing regime (such as the Geneva Convention Relating to the Status of Refugees), and should encourage early and sustainable migration policies and protect collective rights.

Recent articles have argued that a treaty is neither necessary nor sufficient to establish an international protection of environmental migrants.[43] It is not necessary because soft law instruments may already establish relevant universal guiding principles – that indeed, may have greater authority than a watered-down, little-ratified new treaty. Furthermore, a treaty, even if it could be widely ratified, would not be sufficient especially to deal with international environmental migrants: only bilateral or regional negotiations can adopt the very specific arrangements that can lead to an adequate and early resettlement of the population of an entire region in the territory of one or several other states.

These gaps in existing international human rights law and the need for new legal instruments to address environmental migration do not mean that human rights are irrelevant however. Rather, the development of solutions to the problem of environmental migration must build upon existing human rights norms, standards, and principles. The legal protection of environmental migrants should be achieved with a full cooperation of actors at different levels, and in particular at the national, regional and international levels. National authorities should strive to deal with internal migrants in a manner that respects individual and collective rights, including through early and sustainable migration programs. Regional negotiations should strive to find agreeable arrangements for international cross-border displacement, migration or resettlement. At the global level, international organizations should encourage and guide states to adequately deal with internal migrants at the national level and to engage in regional negotiations, while setting authoritative global goals.

---

[43] Jane McAdam, "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23 International Journal of Refugee Law 2; Benoît Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22:3 Colorado Journal of International Environmental Law and Policy (forthcoming), *available at* <http://ssrn.com/abstract=1755622>.

3. Best Practices for Integrating Human Rights into Sustainable Development Policies

This section presents a collection of best-practices for integrating human rights into sustainable development policies, including a rights-based approaches to conservation (3.1), an integrative approach for fostering green and decent jobs (3.2); and legal empowerment for sustainable development (3.3).

3.1 Rights-based Approaches to Conservation

Sébastien Jodoin, CISDL Lead Counsel

3.1.1 The Emergence of Rights-Based Approaches to Conservation

In the mid-1990s, the United Nations and a number of major development actors committed to integrating human rights into their development programming and activities.[44] Among other things, this resulted in the widespread adoption of a framework known as rights-based approaches (RBAs) to development. Although there are many definitions of RBAs, a recent review concludes that the various formulations adopted by development agencies and specialists share three common elements: "1) framing problems as rights, linked to international, national or customary standards; 2) emphasizing capacity and agency of rights-holders; and 3) engaging and holding duty-bearers accountable for meeting their obligations."[45]

In essence, RBAs to development are founded on the notion that poverty is a human rights issue and that responses to poverty can benefit from engagement with the substantive and procedural aspects of human rights norms and principles. RBAs thus entail a shift away from the development field's traditional top-down framework that focuses on responding to the needs of a given population through project and service delivery. In its place, RBAs propose instead a bottom-up framework focused on realising human rights and abiding by corresponding obligations through programming that emphasizes capacity-building, empowerment, and policy change.[46]

Natural resource conservation and management is another field where RBAs are increasingly gaining favour among practitioners and organisations. Most notably, at its fourth session in 2008, the World Conservation Congress adopted a resolution in which it called on governmental and non-governmental actors "to develop and/or work towards application of rights-based approaches, to ensure respect for, and where possible further fulfilment of

---

[44] Chris Jochnick and Paulina Garzon, "Rights-Based Approaches to Development. An Overview of the Field," paper prepared for CARE and Oxfam-America, 2002, at 6-10.

[45] CARE and Oxfam America, *Rights-Based Approaches. Learning Project* (Oxford, UK: Oxfam, 2007) at 27. See also United Nations Development Programme, *The Human Rights-based Approach to Development Cooperation: Towards a Common Understanding among the UN Agencies* (2003), available at: http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf.

[46] Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, U.N. Doc. HR/PUB/06/12 at paras 18-20. CARE and Oxfam America, *supra* note 45 at 19.

human rights, tenure and resource access rights, and/or customary rights of indigenous peoples and local communities in conservation policies, programmes, projects and related activities".[47] RBAs are now part of the programme of activities of the International Union for the Conservation of Nature (IUCN), which has supported policy research on RBAs to conservation,[48] including case studies that examine existing conservation projects through the lens of RBAs.[49]

3.1.2 The Concept of Rights-Based Approaches to Conservation

RBAs to conservation entail the integration of "rights, norms, standards, and principles in policy, planning, implementation, and evaluation to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible."[50] RBAs primarily draw upon the framework developed for the protection of human rights under international law, including the two international covenants establishing binding obligations for states in the areas of civil and political rights and economic, social, and cultural rights as well as the range of declarations and conventions that focus on specific human rights issues such as torture or racial discrimination[51] as well as on the human rights of specific groups such as women, children, and Indigenous peoples.[52]

RBAs to conservation can also include consideration of relevant human rights instruments at the regional and national levels as well as customary rights and statutory rights. These regional, national and local standards implement as well as supplement applicable international human rights law.[53] Although the specific scope of relevant human rights norms, standards, and principles in the implementation of RBAs varies on the basis of the applicable law and the specific context to which they are applied, there are a number of elements that are common to all RBAs. Two such elements include the principles of non-discrimination[54] and the principle of public participation and access to justice,[55] which form basic elements of all RBAs.

---

[47] World Conservation Congress, *Resolution 4.056 Rights-based Approaches to Conservation*, 4th Session, Barcelona, Spain, 5-14 October 2008, at para. 1(a).

[48] Thomas Greiber, ed., *Conservation with Justice* (IUCN Environmental Law and Policy Paper No. 71, 2009); Jessica Campese, Terry Sunderland, Thomas Greiber, and Gonzalo Oviedo, eds., *Rights-based approaches: Exploring issues and opportunities for conservation* (Bogor, Indonesia: CIFOR and IUCN, 2009).

[49] IUCN, *IUCN Rights-Based Approaches to Conservation Portal,* available at: <www.rights-based-approach.org>.

[50] Campese, *supra* note 47 at 1.

[51] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 Dec. 1984, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85, entered into force 26 Jun. 1987; *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 Dec. 1965, UNGA Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force 4 Jan. 1969.

[52] *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 1 Dec. 1979, UNGA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sep. 1981; *Convention on the Rights of the Child*, adopted 20 Nov. 1989, UNGA Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 Sep. 1990; *U.N. Declaration on the Rights of Indigenous Peoples*, U.N. Human Rights Council Resolution 2006/2, 13 September 2007, U.N. Doc. A/RES/61/295 [*UNDRIP*].

[53] Dinah L. Shelton, "A Rights-based Approach to Conservation," in Greiber, *supra* note 48, 5 7-9; Jessica Campese, "Rights-based approaches to conservation: An overview of concepts and questions," in Campese *et al.*, *supra* note 48, 1 fn. 1 and 2-3.

[54] *ICCPR*, art. 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons

RBAs focus on identifying rights-holders and duty-bearers in a given context and emphasise the legal obligation of relevant actors to respect, protect, and fulfil human rights.[56] Rights-holders include individuals, local communities, and Indigenous peoples.[57] Duty-bearers are states first and foremost as they bear the primary responsibility for the implementation of human rights obligations in both national and international law. For states acting in the conservation context, RBAs may in fact represent a means of abiding by binding human rights obligations. At the same time, a range of legal and policy approaches have emerged to pressure non-state actors, including international organizations, transnational corporations, and non-governmental organisations, to improve their human rights performance.[58] For these non-state actors operating in the conservation field, RBAs provide a framework for voluntarily committing to, and implementing, relevant human rights standards and obligations.

Although RBAs are grounded in a particular normative framework, they can be deployed as analytical and operational tools.[59] At the analytical level, RBAs use human rights norms, standards, and principles to understand and assess the context, process, and outcomes of conservation initiatives. At the operational level, RBAs draw on human rights norms, standards, and principles to guide the design, planning, and implementation of conservation decision-making and management processes, including the provision of accountability and remedies to provide access to justice to rights-holders.[60] As a result, RBAs to conservation seek to ensure that both the processes and the outcomes of conservation initiatives effectively respect, protect, and fulfil human rights taking into account "basic principles of non-discrimination, concern for the most vulnerable and marginalized groups, participation and empowerment, and accountability."[61]

3.1.3 The Foundations of Rights-Based Approaches in International Law and Policy

The concept of RBAs to conservation draws on two broad converging trends in international law and policy relating to the relationship between human rights and the environment and the practice of community-based conservation and management.

---

equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other eopinion, national or social origin, property, birth or other status."

[55] This principle is discussed in further detail below in section 2.2.

[56] The obligation to respect obliges an actor to refrain from interfering with the enjoyment of a right. The obligation to protect obliges an actor to prevent a third party from interfering with the enjoyment of a right. The obligation to fulfil obliges an actor to undertake positive measures to ensure that rights are realised. See Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions* (Geneva, Switzerland: OHCHR, 2005) at 15-20.

[57] *UNDRIP*, art. 18: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

[58] See August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors," in Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37.

[59] Laure-Hélène Piron and Francis Watkins, "DFID Human Rights Review: A review of how DFID has integrated human rights into its work," (London: Overseas Development Institute, 2004), available at: <http://www.odi.org.uk/RIGHTS/Publications/DFIDRightsReview07.04.pdf79-81>, at 79-81.

[60] See Campese, *supra* note 53 at 10. See also Jessica Campese, Terry Sunderland, Thomas Greiber and Gonzalo Oviedo, "What have we learned and where do we go from here?" in Campese *et al.*, *supra* note 48, 287 at 304.

[61] Shelton, *supra* note 53 at 24.

To begin with, RBAs build upon the recognition of a number of critical linkages between human rights and the environment.[62] RBAs to conservation bring together different strands of the legal and policy interface between human rights and the environment. As Campese explains, conservation can assist in the realisation of rights by securing access to land, ecosystem services, and natural resources that are necessary precursors for such rights as the rights to health, an adequate standard of living, food, and water.[63] In addition, human rights are meant to "offer a strong standard with which to understand and assess the social implications of conservation practice."[64] In other words, as Shelton explains, RBAs to conservation combine an "awareness that environmental quality is a prerequisite to ensuring the enjoyment of a host of internationally and domestically guaranteed legal rights" with "a similar awareness that respect for such rights can lead to better conservation."[65]

At the same time, the concept of RBAs also originates in the recognition that conservation efforts have often had, and continue to have, negative impacts on human rights, entailing economic or physical displacement, destruction of means of subsistence, disruption of cultural practices, arbitrary arrests and detention, and excessive use of force.[66] RBAs to conservation thus seek to provide a productive way of maximising the synergies between human rights and conservation while also avoiding or managing the conflicts that often arise between these two fields in practice through an emphasis on empowerment and participation.[67] Yet, as is argued below, RBAs go further than existing participatory approaches in environmental governance in employing the concept of rights as a means for guaranteeing and structuring processes of participation and engagement.

RBAs to conservation are also sometimes seen as an evolution of community-based conservation and management.[68] The concept of community-based conservation and management emerged in the mid-1980s after decades of top-down and centralized conservation practices. These earlier practices were often developed in opposition to the

---

[62] There is a voluminous literature on the relationship between human rights and environment. See, *e.g.*, Dinah L. Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stanford Journal of International Law 103; Barry Hill, Steve Wolfson, Nicholas Targ, "Human Rights and the Environment: A Synopsis and Some Predictions" (2004) 16 Georgetown International Environmental Law Review 359; Alan Boyle, "Human Rights and the Environment," (2008) 18 Fordham Environmental Law Review 471.

[63] Campese, *supra* note 53 at 7.

[64] *Ibid.* at 13.

[65] Shelton, *supra* note 53 at 5.

[66] Campese, *supra* note 53 at 7; Michael Cernea, "Re-examining 'displacement': A redefinition of concepts in development and conservation policies" (2006) 36(1) Social Change 8; Naya Sharma Paudel, Somat Ghimire and Hemant Raj Ojha, "Human Rights – A Guiding Principle or an Obstacle for Conservation?" (2007) 15 IUCN Policy Matters 299 and other contributions in the same issue.

[67] On both synergies and conflicts between human rights and conservation in practice, see generally Karin Svadlenak-Gomez, "Human rights and conservation: Integrating human rights in conservation programming" (TransLinks (WCS) No. 48, 2007).

[68] See, *e.g.*, Peter Laban, Fidaa Haddad and Buthaina Mizyed, "Enhancing rights and local level accountability in water management in the Middle East: Conceptual framework and case studies from Palestine and Jordan," in Campese *et al.*, *supra* note 48, 97; Wendy Crane, Trevor Sandwith, Eleanor McGregor and Amanda Younge, "Where conservation and community coincide: A human rights approach to conservation and development in the Cape Floristic Region, South Africa," in Campese *et al.*, *supra* note 48, 141.

interests of local communities and sought their coercion, often unsuccessfully, into unpopular conservation schemes and programmes.[69]

Contrary to the assumptions of earlier conservationists, a new generation of scholars and practitioners began to argue that communities were well placed to manage common resources through self-organised rules and institutions constraining individuals from engaging in unsustainable patterns of resource use.[70] This was most notably manifested in the emergence of community forestry practices, which "turned existing perceptions upside down – from forest department as protection and people as destroyers of forests, to the opposite, namely communities as forest protectors and forest officials as responsible for degradation through their promotion of commercial interests."[71]

Although RBAs share many of the assumptions of community-based approaches regarding the value of participation for environmental governance, RBAs possess a distinctive focus on human rights as standards for institutional analysis and design. To begin with, this normative focus on human rights and human dignity provides a different basis for seeking local community involvement and participation than the instrumental reasons that motivate community-based management practices. Indeed, this normative, rather than instrumental, focus on human rights is seen as a critical strength of RBAs. As Campese explains,

> [Instrumental] approaches have sometimes been criticised on the grounds that they engage with people only at a superficial level, and that conservation costs and benefits are not evenly distributed within and across communities, as powerful differentials can lead to elite capture. Additionally, where collaborative approaches have proven too costly or difficult, conservation organisations have sometimes moved back towards more overtly protectionist and exclusionary models. Finally, approaches that exclude local people can sometimes be effective in achieving conservation outcomes. For all of these reasons, instrumental approaches *alone* may be insufficient to guarantee that people's wellbeing is secured. By addressing human wellbeing as a matter of *obligation*, and addressing the rights not only of communities, but also of individuals and vulnerable groups within communities, RBAs can, in principle, better ensure that basic human rights are respected.[72]

Further, RBAs can apply to a broad variety of contexts and structures as they are not wed to a particular community unit or level of analysis.[73] They do not necessarily involve decentralization or devolution of power or authority to the community level although models of shared or community governance may indeed be a "way to bring rights holders and duty bearers together in transparent processes in which they can understand the claims and duties at stake, and negotiate fair outcomes."[74] Most importantly, unlike community-

---

[69] Nicholas Menzies, *Our Forest, Your Ecosystem, Their Timber. Communities, Conservation and the State in Community-Based Forest Management* (New York: Columbia University Press, 2007); Nancy L. Peluso, "Coercing Conservation? The Politics of State Resource Control," (1993) 32 Global Environmental Change 199.

[70] See Craig Johnson and Timothy Forsyth, "In the Eyes of the State: Negotiating a "Rights-Based Approach" to Forest Conservation in Thailand," (2002) 30 World Development 1591 at 1593. See also Michael Wells and Katrina Brandon, *People and Parks: Linking Protected Area Management with Local Communities* (Washington DC.: The World Bank, WWF and USAID, 1992).

[71] Bina Agarwal, *Gender and Green Governance* (Oxford: Oxford University Press, 2010) at 78-79.

[72] Campese, *supra* note 53 at 13 [references omitted].

[73] *Ibid.* at 21.

[74] *Ibid.* at 12.

based management practices, RBAs focus on individuals as well as communities and do not therefore ignore differences and inequalities within communities.[75]

Finally, the focus of RBAs on relations of obligation between rights-holders and duty-holders entails that they target power dynamics and asymmetries beyond those present at the local level, thereby addressing a particular weakness of community-based approaches.[76] Indeed, through its emphasis on human rights, participation, and accountability, RBAs can form the basis for improving decision-making processes and addressing failings in the quality of governance and rule of law structures. Accordingly, as Campese concludes, "the substantive and procedural aspects of inclusive RBAs can be far more comprehensive than a more general 'participatory' or 'pro-poor' approach."[77]

3.1.4 Operationalising Rights-Based Approaches to Conservation

RBAs thus provide normative, analytical, and operational frameworks to be applied in context-specific ways taking into account the applicable law and the specific rights and duties of relevant actors. Campese points out that there is therefore no set blueprint for implementing RBAs to conservation as they "can be carried out at multiple scales and contexts and through various legal instruments, policies, programming approaches, methods and tools."[78]

Shelton has nonetheless developed a concrete, step-wise operational framework for implementing RBAs to conservation initiatives, which is presented in table 2 below. Shelton's step-wise framework would enable conservation authorities and actors to implement an RBA to a conservation programme or project. It focuses on the role, responsibility, and burdens of duty-holders to respect the procedural and substantive rights of local and Indigenous communities and can easily be incorporated into laws, policies, and codes of conduct guiding the decision-making of conservation actors.[79]

Table 2. A Step-Wise Framework for Implementing an RBA to conservation[80]

1. Undertake a situation analysis
1.1 Identification of actions, stakeholders and respective roles;
1.2 Identification of applicable legal rights, claims, and duties;
1.3 Identification of potential impacts of the proposed activity or project;
1.4 Identification of potential conflict resolution mechanism.

2. Provide information
2.1 Compile, publish and otherwise disseminate information in an understandable and easily accessible way;
2.2 Disseminate general information regarding the action;
2.3 Disseminate specific information regarding legal rights, claims and duties of potentially affected persons.

3. Ensure participation
3.1 Undertake consultations;

[75] Arun Agrawal and Clark Gibson, "Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation," (1999) 27 World Development 629 at 634-635.
[76] *Ibid.* at 640-641; see also Johnson and Forsyth, *supra* note 70.
[77] Campese, *supra* note 53 at 13.
[78] *Ibid.* at 10.
[79] Shelton, *supra* note 53 at 23-24.
[80] These elements in the table are drawn from *ibid.* at 25-35.

3.2 Seek and promote free and prior informed consent;
3.3 Provide and use conflict resolution mechanisms to secure rights.

4. Take reasoned decisions
4.1 Check for compatibility with rights and obligations at the international, national, and local levels;
4.2 Check that the decision-making has taken place with proper information and participation;
4.3 Include reasons for the decision;
4.4 Disseminate the decision to all relevant stakeholders.

5. Monitor and evaluate application of the RBA
5.1 Evaluate the application of the RBA through monitoring procedures;
5.2 Use indicators to assess the impacts of steps taken;
5.3 Compare impacts against pre-determined benchmarks;
5.4 Analyse whether actions are contributing to (positive or negative) unintended consequences;
5.5 Evaluate whether and how outcomes contribute to pre-defined objectives and where objectives are not being met, make efforts to understand why
5.6 Take account of new conditions that may affect conservation or rights;
5.7 Document the process and identify "lessons learned";
5.8 Ensure that monitoring is transparent, consistent, and participatory;
5.9 Draw on the whole evaluation and lessons learned to develop, collaboratively negotiate, and implement any further change to the policy, project, or activity;
5.10 Transparently report the experiences and draw on lessons learned to seek ways of expanding and strengthening the overall foundation of an RBA.

6. Enforce rights
6.1 Provide access to effective access to judicial and administrative proceedings, including access to redress and remedies. Remedies could include restoration, compensation, and criminal prosecution.

3.1.5 The Potential of Rights-Based Approaches to Conservation

The proponents of RBAs argue that they have a number of advantages that can enhance the overall effectiveness of conservation initiatives. First, RBAs are held to assist in the design and implementation of conservation initiatives by reframing conservation problems and solutions as human rights issues. RBAs can allow for "better choices" in the design and implementation of projects and programmes by providing conservationists with a better understanding of the human impacts of conservation programming.[81]

Second, RBAs can also provide "clearer criteria" for designing and implementing conservation programming and "identifying and balancing competing claims."[82] This speaks to both the normative clarity and the analytical flexibility provided by human rights. While human rights provide common understandings of specific standards, safeguards, and entitlements owed to individuals and communities, few human rights are absolute in their scope of application. Under international human rights law, states can limit the scope of certain human rights provided that such limitations are necessary to meet a legitimate objective and proportional to this objective.[83] In addition, the empowerment of individuals and groups through RBAs may be "the most useful and direct means of determining the

[81] Shelton, *supra* note 53 at 6.
[82] Campese, *supra* note 53 at 22.
[83] See *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1992, U.N. doc CCPR/C/70/D/547/1993, 16 November 2000 (where the Human Rights Committee struck a balance between the duty of New Zealanders to protect marine resources and the right of Indigenous communities to engage in cultural significant fishing activities).

right balance of environmental, social, and economic interests."[84] RBAs can provide an established methodology and practice for identifying the human rights issues at stake and adopting a proportionality analysis or an open and participatory process to achieve a fair balance between these various competing claims.[85]

Third, RBAs are believed to generate learning that extends beyond the specific project or initiative in which they may be implemented. RBAs can be used to improve existing frameworks for governing natural resources due to their emphasis on notions of transparency, procedural rights, rule of law, and accountability.[86] RBAs can also develop the capacity of local government officials and communities to use human rights not simply in the context of specific conservation projects to which they are applied, but in other projects as well.[87]

Finally, it is argued that both the procedural and substantive components of RBAs provide them with the potential to lend greater legitimacy to a conservation initiative. Procedurally, Shelton posits that "fairness in procedure is important to ensure the legitimacy and thus acceptance within society of all proposed projects and activities."[88] Substantively, Shelton claims that "from the perspective of affected persons, the RBA is likely to increase the legitimacy of proposed activities, programmes, and policies by integrating social concerns with conservation goals, drawing on a widely agreed upon set of norms specifying the rights and responsibilities of all actors."[89] As such, RBAs "establish a stronger foundation for acceptance, consensus and collaboration from all stakeholders by leveraging the human rights framework, which draws on widely recognised standards".[90]

All the posited effects of RBAs have the potential to enhance the effectiveness of conservation initiatives in important ways. Together, they provide the elements of what Young has termed the social practice perspective to regime effectiveness, approaching "regimes as arrangements that affect behaviour through non-utilitarian mechanisms like inducing actors to treat prescriptions as authoritative, enmeshing actors in communities that share a common discourse, or stimulating processes of social learning".[91]

Yet, these same strengths are also accompanied by a number of acknowledged challenges and limitations. The most important one is that RBAs depend on the status and scope of human rights in applicable national and international law. When states have limited obligations in this field or when they fail to take them seriously, the potential usefulness of RBAs may be greatly reduced.[92] In addition, RBAs may require the difficult accommodation of competing rights, claims, and interests within and across communities and their ability to

---

[84] Alan Boyle, "The Role of International Human Rights Law in the Protection of the Environment," in Boyle and Anderson, *supra* note 1, 43 at 64.
[85] Annalisa Savaresi, "A Rights-based Approach to Forest Conservation," in Greiber, *supra* note 48, 63 at 77.
[86] Campese, *supra* note 53 at 12.
[87] Campese *et al.*, supra note 60 at 300.
[88] Shelton, *supra* note 53 at 14.
[89] *Ibid.* at 6.
[90] Campese *et al.*, *supra* note 60 at 292.
[91] Oran R. Young, "Regime Effectiveness: Taking Stock," in in Oren Young and Mark Levy, eds., *The Effectiveness of International Environmental Regimes* (Cambridge, MA: MIT Press, 1999) 249 at 270.
[92] Shelton, *supra* note 53 at 7.

ensure consensus or legitimacy may be affected as a result.[93] Accommodating some of these claims may be all the more challenging given the limited normative focus of RBAs on existing human rights standards and principles.[94] Finally, the application of RBAs may be all the more challenging due to the difficulties involved in achieving broad legal and political reforms, addressing power inequities, and changing established social, economic, and cultural patterns and relations.[95] For all of the reasons, RBAs are seen as resource-intensive, lengthy, and complicated, requiring specialised expertise, training, and capacity-building.[96]

3.2 Fostering Green and Decent Jobs

Sean Stephenson, CISDL Associate Fellow

There is a large potential for normative conflict between a developed State's climate change obligations and the right to work. While the two regimes are not inherently incompatible, the necessary consequences of fulfilling a developed State's climate change obligations challenge the right to work. A State's response measures to climate change have a dual relationship with respect to the right to work. Response measures can support the right to work, and more generally all human rights, by addressing the pressing need to curb climate change - a need that supports all human rights. However, without proper foresight these response measures may lead the two regimes into conflict. While the green structural change required by a developed State's climate change obligations will create many jobs, some jobs will be lost. It is the insecurity caused by the jobs that will be lost which creates the large potential for normative conflict between the two regimes.

Where, in the event of green structural change, governments of developed States omit to put in place adequate protections for individuals and groups made vulnerable by the impact of a developed State's climate change obligations on employment, the right to work is violated. This is a situation of partial normative conflict; where in the majority of cases the right to work will be systematically violated. However, this normative conflict may be reconciled by putting in place adequate protection tailored to vulnerable individuals and groups, mitigating the negative employment effects of green structural change. When formulating these response measures a human rights approach will be crucial and should be included in all future national and international climate change legislation and agreements. Including such an approach into the climate change framework is consistent with the principle of integration and interrelationship, a guiding concept of the UNFCCC and one of the seven core principles of sustainable development identified by the International Law Association.[97] The human rights approach should be participatory and should institutionalize a framework

[93] Campese, *supra* note 53 at 22; Shelton, *supra* note 53 at 7; Campese *et al.*, *supra* note 60 at 301.
[94] Campese, *supra* note 53 at 24; Shelton, *supra* note 53 at 7.
[95] Campese *et al.*, *supra* note 60 at 297-299; Campese, *supra* note 53 at 22-23.
[96] Campese, *supra* note 53 at 23; Shelton, *supra* note 53 at 7.
[97] ILA, *New Dehli Declaration of Principles of International Law Relating to Sustainable Development*, ILA Resolution 3/2002, UN Doc. A/57/329, in ILA, Report of the Seventieth Conference, New Dehli (London: ILA 2002); Also see: Sebastien Jodoin "The Principle of Integration and Interrelationship in Relation to Social, Environmental and Social Objectives" in A. Usha *Environmental Law- Principles and Governance* (New York: Lefai University Press 2007).

for dialogue between all interested parties, from which concrete equitable steps forward can emerge.[98] There are response measures that may be taken in both the short term and the long term to avoid the normative conflict between the two sets of obligations.

3.2.1 Climate Change and Decent Jobs

While analyzing climate change through a progressive legal approach clearly identifies the effects of climate change as a work related-security imperative, the potential conflict in international law between developed State obligations under the climate change regime and the right to work is not self-evident. However, taking a closer look at developed State obligations under the right to work as interpreted through the International Labour Organization's (ILO) *decent work agenda*, conventions and recommendations, the large potential for normative conflict between the obligations of the two regimes becomes evident.[99]

Social protection is one of the ILO's decent work agenda's four core pillars.[100] Social protection includes work-related security as it promotes human dignity and security in the workplace.[101] Sufficient work-related security may therefore be seen as a key aspect to fulfilling the right to work. On social protection, Amartya Sen has noted that the effects of unemployment on human dignity can amount to a capability deprivation.[102] Similarly, while not making a direct reference to Sen, Guy Standing draws on the concept of relative deprivation with respect to work-related security, and notes that "insecurity is a form of injustice and a source of it."[103] Here, a close link can be drawn between decent work, or more specifically, social protections and human security. Both unemployment and the lack of work-related security can cause capability deprivations. Thus, for work to be decent work a sufficient amount of social protections must be provided. If States do not provide a sufficient amount of work-related protections, they will be infringing upon the right to work.

At present, social protection with respect to work-related security is being shaped by the concept of flexicurity.[104] Flexicurity, a concept originating in Europe, combines an appropriate social insurance model, sufficiently flexible work contracts and effective policies

---

[98] Ana Belén Sanchez, and Peter Poschen, "The social and decent work dimensions of a new Agreement on Climate Change: A Technical Brief" (June, 2009) International Labour Organization, Policy Integration Department at 19; *Employment and Labour Market Implications of Climate Change*, ILO Committee on Employment and Social Policy, 303rd Sess., GB.303/ESP/4 (November, 2008) at para. 15 [*Employment and Labour Market Implications of Climate Change*].

[99] The Covenant is a treaty and therefore, pursuant to the rules of treaty interpretation, it may be interpreted in light of both the ILO's decent work agenda, and the ILO's Conventions. See Philip Altson, and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic Social and Cultural Rights" (1987) 8 Human Rights Quarterly.

[100] The *decent work agenda* is composed of four interrelated pillars; the fundamental principles and rights at work and international labour standards, employment and income opportunities, social protection and social security, and social dialogue.

[101] Juan Somavia, *Perspectives on Decent Work: Statements made by the ILO Director-General* (Geneva: International Labour Office, 2000) at 14; See generally Guy Standing, "From People's Security Survey's to a Decent Work Index" (2002) vol. 141 International Labour Review at 441-443.

[102] Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) at 94 [Sen].

[103] Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (New York: St. Martin's Press Inc., 1999) at 38 [Standing, Global Labour Flexibility] .

[104] Peter Auer, "Security in Labour Markets: Combining Flexibility with Security for Decent Work" (2007) Economic and Labour Market Papers, International Labour Office at 2 [Auer].

to support labour market transitions and lifelong learning.[105] Flexicurity as work-related security is derived from employment security, combining flexible contractual arrangements, active employment security, effective labour market policies supporting transitions between jobs as well as unemployment and inactivity to jobs, lifelong learning helping people cope with change, transitions and employment, and modern social security systems.[106] Thus, flexicurity is a dynamic combination of private and State action whereby a State's obligations are to provide effective labour market policies supporting transitions to jobs, and social security systems.[107] It is within this framework that the social protections required by the *decent work agenda* must be implemented.

The ILO conventions and recommendations are another source that provides further support to the obligation to provide work-related security. More specifically, they provide insight into the content of the obligation to provide work-related security during structural change. Work-related security is dealt with in the ILO Convention No. 122, the Convention Concerning Employment Policy.[108] Article 1(1) of the Convention states that each State party shall pursue an active policy designed to promote full employment.[109] While both the Convention and Recommendation No. 122 infer that job security is the nature of the work-related security to be provided, since the adoption of the Convention work-related security has evolved from job security to employment security.[110]

With respect to structural change, article 8 of Recommendation No. 122 establishes that in the event of structural change "selective measures directly connected with the employment of individual workers or categories of workers" should be taken.[111] Article 13(1) goes further and states that, "measures should be planned and taken to prevent the emergence of unemployment or underemployment resulting from structural change.[112] As stated in article (13)(3)(b) of the Recommendation, the objectives of these supplementary measures should be "to protect from financial or other hardship, groups and individuals whose employment is affected by structural change."[113] The need for supplementary measures in the event of structural change is also noted in Recommendation No. 169 (1984), the Recommendation Concerning Employment Policy. Article 10 of this Recommendation states that member States should adopt policies to "facilitate [both the] adjustment to structural change at the global, sectoral and enterprise levels and the re-employment of workers who have lost their jobs as a result of structural and technological changes."[114] Thus, in the event of green structural change, the ILO Convention and Recommendations Concerning Employment Policy require States to take specific work-related security measures that are supplementary to the measures usually in place.

---

[105] European Commission, *Employment in Europe 2006* (Luxemburg: Office for Official Publications of European Communities, 2006) at 75.

[106] *Ibid.* at 76**;** Auer, *supra* note 104 at 3.

[107] Auer, *Ibid.* at p. 4.

[108] *Convention No. 122 Convention Concerning Employment Policy,* 569 U.N.T.S. 65 (entered into force 15 July 1966).

[109] *Ibid.* at art. 1.

[110] See Convention No. 122, *Ibid.* at art. 1(2)(c); International Labour Organization, "Recommendation No. 122, Recommendation concerning Employment Policy" in *Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966* (Geneva: International Labour Office, 1966) at art. 1(2)(c).

[111] Recommendation No. 122, *ibid.* at art. 8.

[112] *Ibid.* at art. 13.

[113] *Ibid.*

[114] International Labour Organization, *Recommendation 169 Recommendation Concerning Employment Policy*, 70th Sess., Record of Proceedings (Geneva: International Labour Office, 1984) XVIII at art. 10.

In summary, as interpreted through the decent work agenda, ILO Convention No. 122, and Recommendations No. 122 and No. 169 under the right to work, developed States are obligated to provide work-related security. These protections should be comprehensive and in the event of green structural change, specific work-related security measures should be put in place targeting vulnerable workers. If developed States do not plan for structural change and do not put specific measures in place, in the event of a green structural change they may violate the right to work. Since few developed States have taken the effects of climate change on employment into account, the potential for normative conflict between the obligations of the two regimes is very large.[115]

Normative conflict is defined as the impossibility to comply or reconcile all of the requirements of two norms. This implies that two norms are mutually exclusive and that compliance with one norm means non-compliance with the other.[116] The causes of normative conflicts generally fall into four categories. The first cause of normative conflict is where the same act is subject to different types of norms. The second cause of normative conflict occurs when one norm requires an act while another norm requires a contrary act (an act that is to be performed at the same time that contradicts the first act). The third cause of normative conflict occurs where one norm prohibits a necessary precondition of another norm. Lastly, the fourth category of conflict occurs when one norm prohibits a necessary consequence of another.

The cause of the normative conflict in this case is clear. The conflict does not fall into the first category of normative conflict as the State obligations do not require the same act to be performed. Also, the two acts that are required to be performed are not contradictory. Thus, the obligations of the two regimes do not fall into the second category of conflict. Furthermore, neither of the obligations under the two regimes prohibits a necessary precondition of the other. Consequently, they do not fall under the third category of normative conflict. Finally, while the right to work does not explicitly prohibit the consequences of a developed State's climate change obligations, the right to work does require that developed States take supplementary measures targeted specifically at groups and individuals that are made vulnerable by developed State's climate change obligations. However, developed States rarely place the necessary amount of evaluative scrutiny on the effects of employment created by their climate change obligations. Consequently in the case of structural change, the specific measures required by the right to work are rarely put in place. This systematic omission to take into account the employment implications of a developed State's climate change obligations creates labour market insecurity. This violates the right to work and is a partial normative conflict; a conflict where two norms conflict with regard to some addresses, or in some times, or in some places.[117]

---

[115] European Trade Union Confederation, et al. "Climate Change and employment: Impact on employment in the European Union-25 of climate change and CO2 emission reduction measures by 2030" (2007) at 48; *Employment and labour market implications of climate change*, *supra* note 98 at para. 18 (a minimal amount of study has been completed on this issue).

[116] Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers: Leiden, 2003) at 5.

[117] *Ibid.* at 11.

3.2.2 Short-Term Policy Measures for Green and Decent Jobs

There are three steps that can be taken in the short term to avoid a normative conflict in the two regimes. First, as already provided for in the climate change framework, developed States must adopt a broader view on climate change; a view that takes the full effects of their climate change obligations into account. Secondly, once the full effects of climate change have been taken into consideration, the specific jobs and sectors that will be affected by climate change may be identified. Thirdly, once these jobs and areas have been identified, a participatory process should be put in place to create and implement specific measures targeted at the vulnerable groups.

The first step to reconciliation between the obligations in the two regimes is recognizing the full impact of climate change and a developed State's climate change obligations. The UNFCCC and the *Kyoto Protocol* both set out that all States should strive to take economic and social development into account while implementing their climate change obligations.[118] Articles 2(3) and 3(14) of the Kyoto Protocol explicitly state that developed States should consider the effects of implementing their climate change obligations on developing States, where many of the effects of climate change are exacerbated. These provisions underline the global implications of climate change and response measures. With respect to human rights, both the direct effects on the right to life, health, food and water caused by climate change as well as the effects of response measures such as the right to work should be taken into consideration by developed States.

However, the effects of green structural change on employment in developed States continues to be largely overlooked. The ILO's technical brief, published leading up to COP 15, states "in the climate debate employment only features marginally and is regarded as merely a "co-benefit" of mitigation measures."[119] In practice, this means that developed States should adopt a progressive legal approach when implementing their climate change obligations. A progressive legal approach will take into account the context in which a developed State's climate change obligations are implemented. This will provide a necessary understanding of the insecurities caused by a developed State's climate change obligations and the cause of the normative conflict will be able to be identified.

Secondly, once a developed State has adopted a progressive legal approach to climate change, the jobs and sectors made vulnerable as a result of green structural change should be identified. Such an analysis must be State-specific and should identify both the jobs that will grow and be stable in a green economy; while also identifying the jobs, and more specifically the skill sets, that are vulnerable to be lost or become obsolete.[120] This was noted in Bulgaria's submission to the High Commissioner for Human Rights' report on the relationship between climate change and human rights.[121] Germany, a world leader in this respect, has analyzed its expected green job growth, and is expecting significant job gains in

---

[118] See: UNFCCC, at art. 3(3), 4(1)(f); Kyoto Protocol, art. 2(3), 3(14), 10(d).
[119] Sanchez and Poschen, *supra* note 98 at.11.
[120] *Ibid.* at 20;
[121] Bulgaria, *Information of the Bulgarian Authorities on the Implementation of United Nations Human Rights Council Resolution 7/23 Human Rights and Climate Change* online: OHCHR.

geothermal energy, in solar energy, and biomass industries from 2006 to 2010.[122] However, Germany's analysis lacks scrutiny on the jobs that will be lost. Similar comments may be made about the recent Suzuki Report on greenhouse gas targets and policies for Canada.[123] Although it may be difficult to determine which jobs or skill sets will disappear, as jobs may be transformed through technological advances,[124] pinpointing the specific jobs and sectors that will win and lose as a result of green structural change will allow for effective transition policies and protections to be put in place.

This type of proactive analysis can also facilitate green structural change. Adaptation to climate change will require major advances in technology. Adopting these technological advances will also require major changes in the skills and technologies used by workers.[125] By anticipating future employment trends in green economies, labour force skill gaps and shortages may be avoided.[126] This was evidenced in Europe, Australia, and the United States in the renewable energy and environmental industries where shortages of skilled workers held back the implementation of these projects.[127] Thus, in analyzing future employment trends both a developed State's climate change obligations and the right to work may benefit.

Once the vulnerable jobs and sectors have been identified a dialogue between all interested parties will be essential for formulating a just transition.[128] It is through this aspect of the human rights approach from which States will be able to develop sophisticated protection mechanisms that ensure that all vulnerable individuals are protected. A strong participatory dialogue will inform the process through which response measures are formulated for a just transition in different States. These inputs will be crucial as the extent of green structural change will vary between States. As stated in the ILO's technical brief leading up to COP 15, "industry/employers and workers have in-depth understanding of the technical options, human resource requirements as well as of the economic and social implications of mitigation measures."[129] The Canadian Labour Congress has suggested several measures that may be taken. For example, workers should be compensated when it is no longer possible for them to work with the skill sets they have developed, and States should create specially designed re-employment policies for those who are affected.[130] In this regard, dialogue between the parties can also be used as a tool to assure affected workers that green structural

---

122 *Green jobs: towards decent work in sustainable, low-carbon world*, (Summary) (Geneva: UNEP, 2008) at p.8 [Green Jobs Summary].

123 Pembina Institute and David Suzuki Foundation, *Climate leadership, economic prosperity: Final Report on an Economic Study of Greenhouse Gas Targets and Policies for Canada* (2009) online: http://climate.pembina.org/pub/1909 .

124 *Employment and Labour market implications of Climate Changes*, *supra* note 98 at para.17.

125 *Decent Work for sustainable development- The challenge for Climate Change, ILO Working Party on the Social Dimensions of Globalization, 300th Sess.,* GB.300/WP/SDG/1 at para. 28.

126 Green Jobs Summary *supra* note 122 at 19.

127 *Ibid.*

128 Sanchez and Poschen, *supra* note 98 at 23; United Nations Environment Programme (UNEP), *Labour and the Environment: A Natural Synergy* (Nairobi, UNEP, 2007) at 91 [Labour and the Environment].

129 Sanchez and Poschen, *ibid.* at 24.

130 Canadian Labour Congress, *Just Transition for Workers During Environmental Change*, (position paper) (Ottawa, 2000) at 6.

change is not tantamount to insecurity.[131] Dialogue between all parties should occur on both an international and national level.

On an international level, a dialogue between States and other interested parties is beginning to develop. Notably, labour unions were recognized as official parties at COP 14 in Ponzan.[132] However, a much larger dialogue would be useful. In the short term, an international dialogue could be used to share knowledge, concerns, and best practices of the social dimension of climate change. [133] In this sense, international dialogue could aid States in creating domestic integrated climate change-employment measures.

On a national level, numerous States have institutionalized a dialogue between all affected parties when implementing their climate change policy and legislation. For example, Spain has legislated seven tripartite roundtables to ensure the participation of social partners in the reduction of greenhouse gases.[134] Germany can also be used as an example, where the Alliance for Work and the Environment, a joint initiative of unions, employers, governments, and environmental groups, to ensure a just transition into a greener economy.[135] These leader States can be examples for the majority of other developed States to follow. It is through these types of domestic approaches that integrated climate change-employment measures can be created for the short term.

3.2.3 Long-Term Policy Measures for Green and Decent Jobs

Based on current long-term trends, climate change is predicted to seriously disrupt economic and social activity.[136] Long-term reconciliation will require integrated climate change-employment policy goals and agreements. This was explicitly recognized in the objectives of the first Trade Union Assembly resolution which states that "policies for [a] just employment transition [should be introduced] as a central feature of environmental protection" and should "ensure that workers negatively affected by changes are provided with safe and decent employment alternatives."[137] More specifically, these long-term agreements should institutionalize dialogue between States, and engage with the private sector and civil society so that the jobs that will be lost and gained may be taken into consideration as green industries and sectors develop.

On the international level, as noted in the UNFCCC and the Bali Action Plan, a long-term agreement should take into account the social and economic context of States.[138] The ILO and the International Trade Union Confederation (ITUC) have stated that any future international climate change agreement should be based on equity and provide the

---

131 Sanchez and Poschen, *supra* note 98 at p.19.

132 "Labour Movement Gains Official Recognition at UN Climate Change Conference" *The International Trade Union Confederation Onlines* (December 2, 2008) online.

133 Sanchez and Poschen, *supra* note 98 at p.13.

134 *Employment and labour market implications of climate change*, *supra* note 98 at 9.

135 Labour and the Environment, *supra* note 128 at p.55.

136 *Employment and labour market implications of climate change*, *supra* note 98 at para 6.

137 UNEP, Trade Union Assembly on Labour and the Environment, *Final Resolution of the Trade Union Assembly at its first meeting*, UNEP/DPDL/TUALE/2 (26 January 2006) online at article 1(g).

138 UNFCCC, *supra* note 3 at art. 3(3); UNFCCC Conference of the Parties 13, *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007*, (Bali Action Plan) FCCC/CP/2007/6/Add.1 (Bali: 2-15 December, 2007) at art. 1(a).

framework for a just transition.[139] During the talks leading up to the Copenhagen Accord, the ITUC submitted a proposal for long-term cooperative action called the "Just Transition Framework." While the ITUC proposal was not ultimately included in the Accord, the Just Transition Framework does lay out a plan which would protect a worker's right to work during a green structural change. The ITUC submitted that the Just Transition Framework should include a commitment towards equity, the institutionalization of dialogue between affected parties, systematic country and regional analysis on the impacts of emission reduction on communities, and an upgrading of social protection systems which have to be adapted to the challenges posed by climate change.[140] More specifically, the ITUC suggested that these social protection systems should include insurance coverage, assistance for labour market reintegration, vocational training, the creation of alternative income-earning opportunities and local economic diversification. This is a strong proposal as it could obligate States to integrate climate change and employment objectives, or at least force the potential for normative conflict into the mainstream debate through an institutionalized dialogue. In any event, all future long term international agreements should integrate climate change-employment concerns, and institutionalize a forum for dialogue between all affected parties.

On the national level, many States have developed or are already considering long term plans. For example, France, the United Kingdom, Australia, and the State of California all have emissions reduction strategies until 2050.[141] However, due to the requisite long-term nature of these plans, almost all are susceptible to the political climate of each individual State. It is therefore difficult to consider solidified long-term commitments, as the political will may vary with every change in government. For example, Australia's Labour government has twice attempted to pass the *Carbon Pollution Reduction Scheme*, a carbon market bill, into law. However, the bill has been voted against twice in the Australian Senate and is now delayed until a post-2012 period.[142] Moreover, the current Australian Liberal/ National Coalition leader Tony Abbott has publically opposed such an initiative.[143] Thus, the future of that plan is unclear. In any event, numerous lawmakers from different States continue efforts to make long-term climate change plans. This may be considered a step the right direction, but perhaps not yet far enough since the above-mentioned emission reduction strategies do not take into account the effects of climate change on employment.

The 2009 *American Clean Energy and Security Act,* which was approved by the House of representatives but subsequently rejected by the Senate, stands as a national example of integrating climate change protections and the right to work.[144] This *Act* provides for

---

[139] *Employment and labour market implications of climate change*, *supra* note 98 at p.3**;** Sanchez and Poschen, *supra* note 98 at 19**;** International Trade Union Confederation , *Ad-Hoc Working Group on Long Term Cooperative Action under the Convention*, (submission by the ITUC to UNFCCC) (October, 2008) [ITUC].

[140] ITUC, *ibid.*

[141] Cameron Hepburn and Nicolas Stern, "A New Global Deal on Climate Change" (2008) 24 n°2 Summer (Oxford: Oxford Review of Economic Policy) at 267.

[142] Australia, Department of Climate Change and Energy Efficiency, *CPRS Progress*, (August 23, 2010) online: http://www.climatechange.gov.au/government/initiatives/cprs/cprs-progress.aspx.

[143] Matthew Franklin, "New Liberal Leader Tony Abbott to focus on battlers, economy" *News.com.au* (August 23, 2010) online: http://www.news.com.au/national/new-liberal-leader-tony-abbott-to-focus-on-battlers-economy/story-e6frfkvr-1225805944477.

[144] U.S., Bill S. 2454, *American Clean Energy and Security Act*, 111th Cong., 1st session 2009.

assistance in transitioning into green jobs, quality job training to for persons adversely affected by climate change, and a climate change adjustment allowance.[145] Taking these effects into account will be crucial to the political sustainability of effective long-term emission reductions in developed States.[146] Thus, on both a national and international level long-term planning should, through a human rights approach, work to integrate climate change and right to work obligations.

3.3 Legal Empowerment for Sustainable Development

Patrick Reynaud, CISDL Associate Fellow

The Commission for the Legal Empowerment of the Poor, chaired by Madeleine Albright and Hernando de Soto, released in 2008 a comprehensive Report on Legal Empowerment of the Poor (LEP).[147] The Commission was launched in 2005 by a group of developing and developed countries. Following the Report, the United Nations General Assembly acknowledged the importance of LEP in terms of its poverty eradication goals and initiatives.[148] An important emphasis of the LEP Commission Report is that over 4 billion people are "robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law."[149] LEP, conceptualized broadly in terms of access to justice, property rights, labor rights and business rights, can provide opportunities for those living in poverty to improve their quality of life and secure more sustainable development.

The following aims at explaining the importance of LEP in terms of sustainable development and the transition to a global green economy. Sustainable development stresses the integration and interdependence of the economic, social and environmental aspects of development. Fundamental to the sustainable development worldview is the notion that these three pillars of sustainable development do not, as is traditionally conceived, conflict and entail difficult choices and trade-offs. Rather, integrated sustainable development strategies recognize that development in one area will be unsustainable if it does not take into account progress and concerns from the other areas. Legal empowerment for sustainable development focuses on ensuring the integration and participation of the poor in setting the agenda and conducting sustainable development initiatives and reforms, at the international and national levels. The potential for LEP to contribute to sustainable development is significant. The following sections will present the basic framework and focus of legal empowerment for sustainable development, emphasizing the sustainable development aspects of the four LEP pillars. They will also present two concrete examples of LEP for sustainable development in practice, in the areas of HIV and climate finance.

---

[145] *Ibid.* at art. 426.
[146] *Employment and labour market implications of climate change, supra* note 98 at para. 8.
[147] "Making the Law Work for Everyone" Report of the Commission on Legal Empowerment of the Poor, Volume I, 2008.
[148] UNGA Resolution A/C.2/64/L.4/Rev.2, 3 December 2009.
[149] *Supra* note 147, at 1.

3.3.1 Background

At least 4 billion people worldwide are excluded from the rule of law. The Legal Empowerment of the Poor Commission's Report (LEP Report) calls attention to their concerns and interests. The LEP Report is careful to emphasize that these 4 billion people are far from a homogeneous or monolithic category.[150] For instance, their levels of income vary widely, and different strategies are required based on their characteristics. Nevertheless, they share the particular forms of vulnerability brought about by exclusion from the law. They often lack even a legal identity, and as noted in the LEP Report, they are bereft of legal security and protection "when it was needed the most."[151] The LEP Report concludes that "law-induced exclusion and poverty go hand in hand."[152] The law is often used as a tool against the poor by entrenched elites. Too often the law or the lack thereof acts as a barrier to the economic, social and political enhancement of poor.

The LEP Report focuses on the informal economy that persists and prevails in many developing countries, accounting for over one third of these domestic economies.[153] In the informal context, poor populations must live with insecurity and instability, for example with regard to the enforcement of contractual obligations or the security of property rights. Further, as noted in the LEP Report, economic actors that cannot use the law to their advantage "are in constant danger of joining the ranks of the very poor."[154] Yet these informal structures are created by the poor precisely to survive the deficiencies or absence of formal legal structures. The poor will often stay away from a legal system that takes too long, costs too much, and requires expertise that they lack.[155] As such, legal empowerment can entail learning from best practices in informal structures and bringing them to the transparency and official enforceability of the formal legal realm.

The concept of LEP is based on the Universal Declaration of Human Rights (UDHR) and its subsequent developments at the international level. Article 1 of the UDHR calls for a "radical agenda of legal empowerment"[156] that entails fundamental reforms. Indeed, "LEP is a bold vision, and its implementation is challenging."[157] LEP is a novel approach to confronting poverty, which hopes to yield significant improvements where market solutions and macroeconomic reforms have not necessarily lived up to expectations. The goal of LEP is that decisions on development will be those of the poor, and not of "reports such as this."[158] Overall, the LEP agenda emphasizes that the rich-poor divide makes our world desperately unstable. As the LEP Report makes clear, there is a pressing need to act now "or put at risk everything we cherish."[159]

LEP is a fundamental building block of sustainable development. Sustainable development must include the emergence of sustainable livelihoods for the poor, which entails reliance on

---

150 *Ibid* at 19.
151 *Ibid* at 13.
152 *Ibid*
153 *Ibid* at 15.
154 *Ibid* at 20.
155 *Ibid* at 34.
156 *Ibid* at 20.
157 *Ibid* at 79.
158 *Ibid* at 20.
159 *Ibid* at 22.

the LEP agenda.[160] The specific links between the four pillars of LEP and the promotion of sustainable development will be detailed in the next section. Overall, however, legal, economic and policy analyses of legal empowerment for sustainable development has only scratched the issues. Some aspects are already clear, such as the disproportionate reliance and vulnerability of the poor with regard to healthy ecosystems and the sustainable use of natural resources. LEP can both assist in preventing, for instance, unsustainable exploitation of resources, while also helping the poor to secure sustainable livelihoods. The poor depend the most on and are disproportionately vulnerable to the availability of natural resources for their income, subsistence and socio-economic resilience. Whereas the international approach to sustainable development once held poverty as responsible for increased pressure on environmental resources and economic growth as the solution to environmental degradation, the relationship could very well be the inverse.

Principles of sustainable development law, such as integration of environmental and social concerns into economic development planning, inter-generational and intra-generational equity, the sustainable use of natural resources, good governance, access to information, public participation and justice, and common but differentiated responsibilities, can assist in the design and implementation of global treaties and local regulations on sustainable development, and in the settlement of relevant disputes.[161] Legal empowerment can ensure that the poor are included in all aspects of sustainable development. For instance, as was argued in the 2002 Johannesburg World Summit on Sustainable Development process, and is becoming even clearer in the process leading to the 2012 UN Conference on sustainable development, the green economy entails specific concern and focus on development for the poor. If the transition to the green economy does not benefit the poor, it will not support sustainable development and will ultimately fail.

3.3.2 The Framework: 4 Rights-Based Pillars of Legal Empowerment

The four important pillars of LEP, according to the Commission's findings, focus on the legal accessibility of a fair and functional legal system, as well as important human rights. Empowering people to rise from poverty involves protecting and developing the essential tools that constitute reliable revenue streams: namely property, labor, and business. The LEP Report emphasizes that access to justice, property rights, labor rights and business rights are all human rights, and that these four pillars are essential in the overall bottom-up scheme of LEP. Indeed, LEP is about "giving a voice to the poor and teeth to their rights."[162] Participation in the elaboration of initiatives and ownership of rights by the poor are key to any successful LEP reforms.

---

[160] See G. Shabbir Cheema & V Popovski (eds), *Engaging Civil Society: Emerging Trends in Democratic Governance* (UNU Press, 2010); MC Cordonier Segger, M Gehring & A Newcombe, *Sustainable Development in World Investment Law* (Kluwer Law International, 2010); P Galizzi & A Herklotz (eds) *The Role of the Environment in Poverty Alleviation* (Fordham University Press, 2008) at Ch 4 on Legal Empowermernt; MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004); MC Cordonier Segger & Judge CG Weeramantry (eds), *Sustainable Justice* (Martinus Nijhoff, 2004); K Helmore & N Singh, *Sustainable Livelihoods: Building on the Wealth of the Poor* (Kumarian Press, 2001); N Singh and V Titi (eds), *Empowerment Towards Sustainability* (International Institute for Sustainable Development, 1995)

[161] International Law Association, 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, online: <http://www.ila-hq.org/en/committees/index.cfm/cid/25> *See also* MC Cordonier Segger & A Khalfan, *Sustainable Development Law, ibid.*

[162] *Ibid* at 31.

Access to Justice and the Rule of Law: This step is central to legal empowerment, and involves the reform of institutions to remove legal and administrative barriers. Public participation and access to information and justice, key principles of sustainable development, are particularly important if the poor are to gain a voice in preventing unsustainable development.[163] For instance, by ensuring that the poor are informed about unsound and destructive development projects, are aware of their potential impacts, and are able to participate in decision-making, with access to justice if commitments are broken, can allow for the consideration and implementation of sustainable alternatives, to the benefit of all.[164]

Property Rights: Secure access to property is increasingly recognized as being central to strategies to overcome poverty, according to the LEP Commission. Where ownership and user rights to land are not protected by the rule of law, property cannot be securitized in order to generate livelihoods. However, the relevance of property rights far exceeds their purely economic role. "Secure and accessible property rights provide a sense of identity, dignity, and belonging."[165] There is a growing body of evidence indicating that secure property rights have a key role in terms of food security, sustainable management of natural resources, environmental protection, construction of democracy, and prevention of conflict, while making important contributions to gender equality and the empowerment of minorities. Important themes have emerged regarding property rights and sustainable development, such as security of access to property (whether individual or collective) and forms of use and ownership of natural resources. As it is the poor that often depend on nature for the goods and services that they need to survive, LEP may be an essential element of any efforts to improve the way people value and sustainably manage nature, and natural resources.

Labour Rights: The majority of the world's poor attempt to survive through insecure and underpaid employment in the informal economy. Women especially are victims in conditions where the work environment is squalid and salaries are below a living wage. "A well designed system of labour rights should provide both protection and opportunity."[166] These regulations have to strike the important balance of providing decent work for the working poor without discouraging businesses from hiring legally. Overall, "labour is not a commodity" to be treated like other ingredients of the production process.[167] A contextualized "decent work agenda"[168] can operate in order to promote labour rights in different regions. Social dialogue in each area is the best manner to define the content of such an agenda. Also, voluntary codes of conduct and other elements of corporate social responsibility can encourage companies to improve their labour standards internationally. Such labour rights are particularly important in the context of the emerging green economy.

---

[163] MC Cordonier Segger, A Khalfan, M Gehring & M Toering, "Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation" RECIEL Vol. 12 No. 1, 2003, pp. 54-68.
[164] N Schrijver, *Development without Destruction* (Indiana University Press, 2010).
[165] *Ibid* at 34.
[166] *Ibid* at 36.
[167] *Ibid* at 52.
[168] *Ibid* at 68.

New studies by the United Nations Environment Program,[169] the International Labour Organization,[170] and the International Development Law Organization,[171] show that countries and companies where labour rights are respected, including where workers can be secure that appropriate environmental, health and safety standards will be provided for, are more likely to be able to secure greener and more sustainable employment.

Business Rights: The success of small and medium enterprises is a key ingredient of poverty reduction. Unfortunately, most of the world's poor entrepreneurs are forced to operate informally. This seriously impairs their ability to develop and finance their business, to reduce their level of personal liability to their creditors, and also increases their vulnerability, for example when faced with corrupt government officials. Better laws are required to regulate small businesses. Limited liability is a key concept, as "limited liability companies are amongst the most productivity enhancing legal institutions."[172] This structure encourages entrepreneurs to take bigger risks, which will yield higher returns. In many developing countries, poor quality of lawmaking created tangles of legislation that only serve to benefit corrupt officials. Heavy-handed regulations hinder the development of businesses in the formal sphere. There is a need for new efforts to design, adopt and implement effective law and policy measures to secure business rights for small and medium sized enterprises (SMEs), as part of the emerging green economy. As argued by the United Nations Environment Program,[173] the International Labour Organization,[174] and the International Development Law Organization,[175] the poor have an essential role to play in the global green economy. In the LEP Report, for instance, there is particular emphasis on the importance of ensuring that the benefits of carbon offsets are equitably shared. As reflected in the 2010 Cancun Agreements, these issues are central to both global and local REDD+ initiatives. Legal preparedness for the green economy means that the poor, especially entrepreneurs and SMEs among them, are able to access sustainable and socially responsible investment, fair trade opportunities, payment for ecosystem services, climate and other sustainable finance schemes,[176] in order to secure the benefits of participation in the global green economy.

3.3.3 The Plan for Implementation: Suggested Methodologies

The LEP Agenda involves not only a theoretical framework and an agenda of priorities to legally empower the poor. It is also a distinct and novel methodology for implementing sustainable development. The Commission suggests five conditions that, taken together, distinguish LEP from "traditional approaches to legal and institutional reform."[177] These characteristics are:

---

169 ILO / UNEP / IOE / ITUC, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* (UNEP/ILO/IOE/ITUC, 2008).
170 UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011).
171 IDLO, *Legal Preparedness for the Green Economy* (IDLO, 2011).
172 *Ibid* at 53.
173 ILO / UNEP / IOE / ITUC, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* (UNEP/ILO/IOE/ITUC, 2008).
174 UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011); See also P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (TEEB, 2010).
175 IDLO, *Legal Preparedness for the Green Economy* (IDLO, 2011).
176 *Ibid.*
177 *Ibid* at 76.

- **Bottom-up and pro-poor**: LEP is based on the needs of the poor and geared at empowerment.
- **Affordable:** in the sense that measures are within the means of the poor population involved.
- **Realistic:** endeavours need to be contextualised and take into account obstacles and opportunities.
- **Liberating:** the focus is more on removing legal barriers to empowerment than creating new legal schemes.
- **Risk-Aware:** potential harm as a side-effect of LEP measures should be minimised and monitored to allow compensatory mechanisms.

The development and implementation of LEP in any context will necessarily progress incrementally, and involve multiple initiatives at various levels. Gradually, LEP should establish "more open, inclusive and accountable systems across the political and economic spectrum."[178] LEP calls for courageous political leadership and innovative endeavours by government, civil society and the private sector to implement its bold vision. The Report encourages a pragmatic outlook on societal change. The idea is to take advantage of ripe political environments in order to promote the LEP agenda. Furthermore, LEP will necessarily be controversial. Vested interests will perceive LEP as a threat, and attempt to quash or minimize the impact of initiatives. The "most common mistakes are to underestimate the impediments to implementation and to not foresee unintended consequences for the poor."[179] Overall, the agenda for implementation of LEP aims at ensuring participation and input from the poor. Such an approach is coherent with sustainable development both in the process of development as well as sustainability of development initiatives. Ownership by stakeholders allows for a broader and more sustainable impact of development initiatives.

3.3.4 Best Practices for Legal Empowerment: Two Examples

3.3.4.1 Health, HIV & Legal Empowerment

Poverty and poor health go hand in hand. Without social insurance or other sources of support, a breadwinner who loses her health rapidly faces poverty, as does her family. Loss of income is compounded by treatment costs, forcing impossible choices. The global HIV epidemic is noted for striking people in their economically most productive years. Although HIV infection can usually be avoided, rational choices about safe behavior can be severely constrained by social, economic, legal and cultural forces. Discrimination against people living with HIV and groups perceived to be most at risk ('key populations') contributes to the spread and impact of HIV and AIDS. Hence international best practice now promotes measures to protect rights and ensure an enabling legal and policy environment as part of national HIV policy.[180] Positive legal frameworks must be supported by accessible legal services for people living with HIV and key populations. Skilled lawyers can improve outcomes for clients even when protective laws are absent or defective.[181] More research is needed on the public health impact of legal empowerment. Nonetheless, accessible legal

[178] *Ibid* at 75.
[179] *Ibid* at 76.
[180] International Guidelines on HIV/AIDS and Human Rights (UNAIDS & OHCHR, 2006)
[181] Toolkit: Scaling Up HIV-related Legal Services (IDLO, UNAIDS & UNDP, 2009)

services for people living with HIV can help keep individuals and families out of the poor health / poverty trap, thus contributing to the social and economic pillars of sustainable development.

3.3.4.2 Green Economy, Access to Climate Finance & Legal Empowerment

Poverty is a symptom of unhealthy natural ecosystems.[182] Most recently, the UN and others have recognized the immense importance of natural capital as a springboard for socio-economic development due to the services that ecosystems provide to human-well being, including the preconditions for agriculture, aquaculture, forestry and climate regulation themselves.[183] However, many ecosystems are nearing critical thresholds, beyond which their ability to provide such essential goods and services to the poor will be drastically reduced.[184]

The 'green economy' approach to sustainable development law and policy promotes a portfolio of economic instruments that increase the co-benefits of natural capital and poverty alleviation. It sees investment in natural capital as a critical economic asset for the poor.[185] Climate finance, for example, involves low-carbon and climate resilient pathways that are already being employed in Official Development Assistance for sustainable growth and disaster risk management;[186] foreign direct investment in renewable and efficient energy; and many other trade and investments in key sectors (energy, agriculture, transport, forests, tourism).[187] As committed in the 2010 Cancun Agreements on climate change, with pledges of $100 billion by 2020 towards climate finance, there is intense effort being placed on identifying and mobilizing public and private, bilateral and multilateral, and alternative funding sources.[188] This climate finance must reach the poor, or it will fail. Legal barriers to climate finance can be overcome using an LEP methodology for legal and institutional reform. With access to justice and the rule of law, formal institutions can guarantee stakeholder participation in environmental decision-making, rights of recourse and culturally sensitive practices. With property rights that clearly delineate land tenure and ownership of

---

[182] P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (TEEB, 2010).

[183] UN Conference of the Parties to the Convention on Biological Diversity, Update and Revision of the Strategic Plan for the Post-2010 Period Decision as Adopted (advance unedited version), Art. 8, online: http://www.cbd.int/.

[184] *Supra* note 35 at 9.

[185] *Supra* note 37.

[186] OECD, "Rio Makers: Climate finance bilateral ODA by donor, DAC Total," online: http://webnet.oecd.org/dcdgraphs/climatechange/.

[187] Examples of climate finance initiatives include the following: Guyana Skeldon Bagasse Cogeneration Project, online: http://wbcarbonfinance.org/Router.cfm?Page=Projport&ProjID=33533; Trinidad and Tobago Nariva Wetland Restoration, online: http://wbcarbonfinance.org/Router.cfm?Page=BioCF&FID=9708&ItemID=9708&ft=Projects&ProjID=9643; Vietnam UN-REDD+ Pilot Project, online: : http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=942&Itemid=53; Senegal; Improved Cookstoves in Fatick Region, online: https://gs1.apx.com/mymodule/ProjectDoc/EditProjectDoc.asp?id1=583; Senegal- Climate Change adaptation project in the areas of watershed management and water retention, online: http://gefonline.org/projectDetailsSQL.cfm?projID=4234; Membertou Mi'kmaw Nation and GrupoGuascor partnership, Anaia Global Renewable Energies, online: http://anaiaenergy.com; Tseil-Waututh Nation and Endurance Wind Power collaborative initiative for wind power, online: http://www.intertribaltimes.com/canada/b-c-first-nation-puts-2-million-behind-wind-power.

[188] UNFCCC, CP.16, "Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention" (29 Nov - 10 Dec 2010).

assets, the poor can contract directly with climate investors. With labour rights, increased green employment can ensure fair wages, safe working conditions and freedom of association. With business rights, small to medium size enterprises can access climate finance market mechanisms, credit advances, manage capital and transfer assets.[189] LEP is a key mechanism to ensure that climate finance results in sustainable development that reaches the poor.

3.3.5 The Legal Empowerment for Sustainable Development Agenda

Legal empowerment lies at the intersection of many of the chief challenges of our era. It cuts across the main international cooperation agendas: development, security, and human rights. Legal empowerment is indispensible to achieve global sustainability. Legal and judicial institutions must uphold the rule of law foundations for all citizens across all three interdependent and mutually reinforcing pillars of sustainable development: economic development, social development, and environmental protection.

Although the international community is increasingly recognizing the critical role legal and regulatory reform can play in achieving broader development objectives and there is extensive growth of international law in the form of treaties and international trading regimes to guide domestic legal orders, the legal empowerment aspects of sustainable development are often forgotten or considered as secondary rather than as foundational. Historically, when legal empowerment has been considered, development assistance has often favoured a prescriptive approach. The underlying assumption of this approach is that the introduction of pre-set institutions and processes can result in legal change and provide a platform upon which economic and social development can take place, leading eventually to the poor gaining access to their legal rights. This understanding has been criticized as overly rigid and static as well as inconsistent with the manner in which legal change actually occurs.

An alternative model has now emerged based on the findings of leading social scientific and historical studies of legal change, such as the LEP Commission Report. This new model shows legal change to be non-linear, long term and iterative. This view also recognizes that legal change is driven by societal demand that emerges on a rolling basis alongside the process of economic and social development. This model also implicates that, as a practical matter for sustainable development assistance purposes, legal empowerment is an incremental process, not one that occurs at once through a great leap forward. As such, legal empowerment for sustainable development involves many layers of legal institutions from global to national to local. Legal empowerment for sustainable development is essential as it ensures the integration and participation of the world poor in sustainable development and the transition to a global green economy.

[189] *Ibid.*

4. CONCLUSIONS & RECOMMENDATIONS

Sébastien Jodoin, CISDL Lead Counsel

This report has shown that human rights norms, standards, principles, and practices have important contributions to make to the development and application of international law and policy in the areas of human rights and sustainable development. Human rights can support, constrain, and guide measures undertaken to address environmental problems, particularly with respect to their implications for human dignity and welfare. Moreover, proactive methodologies and approaches, such as rights-based approaches, integrative policy measures, and legal empowerment, can generate mutually productive dynamics between human rights, environmental, and development objectives.

At the same time, the legal and policy interface between human rights and environment must also take into account the limited ability of existing international human rights law to provide solutions for addressing complex challenges such climate change and environmental migration. The traditional model of human rights violation / responsibility can only go so far in addressing the human rights impacts of global environmental change, environmental migration, or natural disasters. This does not mean that international human rights law is immaterial to addressing these new threats and challenges, but only that new solutions are needed that build upon existing human rights norms and principles.

In sum, this report includes the following three recommendations for states intergovernmental organisations, corporations, and civil society organisations with respect to the evolving relationship between human rights and the environment.

Recommendation no 1: States, intergovernmental organisations, corporations, and civil society organisations should seek to foster greater dialogue between the human rights regime and other international environmental regimes.
Despite considerable efforts at cross-fertilization and collaboration between policy-makers and practitioners, a significant gap remains between the human rights and environmental fields. The climate change negotiations have demonstrated a number of ways in which actors in either field differ about the significance and meaning of different human rights issues, principles, and language. Further initiatives are needed to stimulate policy learning between actors in both fields and generate productive policy dialogues.

Recommendation no 2: States, intergovernmental organisations, corporations, and civil society organisations should design new solutions and mechanisms for addressing environmental problems on the basis of existing international human rights law.
Problems such climate change and environmental migration require new solutions and mechanisms that are grounded in existing international human rights law. Such solutions must be built upon the shared responsibility of all states for the realization of human rights. They must also ensure full respect for the principles of equality and non-discrimination.

Finally, they must lead to the identification of creative practices that move beyond traditional responses to existing human rights problems, including through further engagement with scientific assessment methodologies, diplomatic practices, and expansive financial and humanitarian support.

Recommendation no 3: States, intergovernmental organisations, corporations, and civil society organisations should develop and implement innovative instruments and practices for avoiding and resolving conflicts between human rights and environmental objectives.

There is a growing recognition that environmental laws, policies, and mechanisms can be adopted or implemented in ways that violate human rights. To a greater extent, the objective of sustainable development suggests that environmental rights should be balanced against economic, social, and cultural rights. The picture becomes all the more murky when the circle of rights-holders and duty-bearers is expanded from local to global contexts of governance. Innovative instruments and practices, such as rights-based approaches, integrative policy measures, and legal empowerment programming, are needed to grapple with the challenges of reconciling conflicts between human rights and other objectives as well as between human rights as they apply to different facets of sustainable development.