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Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach

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ADVANCING CLIMATE JUSTICE IN INTERNATIONAL LAW: AN EVALUATION OF THE UNITED NATIONS HUMAN RIGHTS-BASED APPROACH

Damilola S. Olawuyi

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ABSTRACT

The term “climate justice” has been traditionally deployed by scholars to emphasize the need for international law to provide legal solutions for direct and disproportionate impacts of climate change on human life and survival, particularly in vulnerable communities. However, with emerging patterns of human rights violations, massive land grabs, forced displacements, marginalization, exclusions, and governmental repressions resulting from climate change response measures and projects (particularly clean development mechanism (CDM), and REDD+ projects), climate justice has increasingly gained a more expansive connotation. Human rights violations and climate injustices resulting from climate change projects have resulted in calls for an international approach that ensures that countries mitigate sources of climate change and adapt to its effects in a manner that respects human rights.

The United Nations Human Rights-Based Approach (HRBA) has gained rapid ascendancy and mention in literatures as providing a normative framework for addressing these concerns. This paper evaluates the value, potentials, and paradoxes of the

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HRBA as a legal framework for mainstreaming human rights norms into the design, approval, finance, and implementation of climate change projects to avoid human rights impacts. The paper identifies and analyses three key paradoxes and questions that must be addressed to enhance the radical promise of this approach: (1) theoretical core question, (2) operationalization question, and (3) practical implementation question

INTRODUCTION

Climate change is arguably one of the most defining challenges of our time. With increased manifestations of extreme weather events such as Cyclone Pam in Vanuatu,¹ devastating floods in Nigeria,² droughts in South Sudan,³ and fatal heat waves across the United States,⁴ there is now increased consensus by the scientific community that climate change is here and that the continuous anthropogenic emission of greenhouse gases (GHG) is a principal cause.⁵ Questions and debates over the last decade have therefore focused on how international law may address the global impacts of changing climate, most

1. See *in Pictures: Cyclone Pam Hits Vanuatu*, BBC NEWS (Mar. 16, 2015), <http://www.bbc.com/news/world-asia-31901998>.

2. Since July 2012, devastating floods have affected thirty of Nigeria's thirty-six states, displacing more than two million people. See *in Pictures: Nigeria Under Water*, BBC NEWS (Nov. 28, 2012), <http://www.bbc.com/news/world-africa-20469249>.

3. See Eric Reeves, *South Sudan: Dams, Droughts, Desertification and Water Wars*, ALLAFRICA (July 1, 2013), <http://allafrica.com/stories/201307020667.html>.

4. Tory Dunnan & Karen Smith, *Record-Setting Heat Wave Turns Fatal in Southwest*, CNN (June 30, 2013), <http://www.cnn.com/2013/06/30/us/southwest-heat/>; see also DAVID R. FOWLER ET AL., HEAT-RELATED DEATHS AFTER AN EXTREME HEAT EVENT – FOUR STATES, 2012, AND UNITED STATES, 1999-2009 433 (2013), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6222a1.htm>.

5. Climate change is simply an increase in the average temperature of the atmosphere at a rate far from normal, caused by the anthropogenic emission of gases that trap the sun's heat in the atmosphere. Scientists have explained that these gases, called greenhouse gases (GHGs), are like blankets which absorb heat radiation that should escape to space, thereby heating the atmosphere at a rate far from normal. GHGs that contribute to global warming include carbon dioxide (CO₂), methane (CH₄), nitrous oxides, chlorofluorocarbons (CFCs), and halocarbons. According to scientific studies, the primary effect of these gases in the atmosphere is that they change the equilibrium between incoming radiation from the sun and outgoing radiation from the earth. By blocking some of the infrared radiation from the earth and radiating it back to the earth's surface, they warm the lower atmosphere and cool the upper atmosphere. This in turn increases moisture, which traps more infrared radiation. The effect of rising temperatures is to reduce the areas covered by snow and ice, thereby diminishing the amount of heat reflected back into space, and increasing absorption of solar radiation. See CRISPIN TICKELL, CLIMATIC CHANGE AND WORLD AFFAIRS 1-10 (Maryland: University Press of America Inc., 1986); see also GREENPEACE INT'L & EUROPEAN RENEWABLE ENERGY COUNCIL, *Energy [r]evolution: A Sustainable World Energy Outlook 9-12* (Jan. 2007), http://www.erec.org/fileadmin/erec_docs/Documents/Publications/energy_revolution.pdf.

especially its disproportionate environmental impacts, additional social strain, and the significant economic burden it would place on the rights of already vulnerable persons in low income countries of the world. Ever since 1991, when negotiations to formulate an international treaty on global climate protection began and resulted in the completion, by May 1992, of the United Nations Framework Convention on Climate Change (UNFCCC), scholars, pundits, and government negotiators have called for climate justice in combating climate change. Therefore, the history of the term “climate justice” is arguably as long as the history of debates and negotiations on climate change, itself.⁶

Climate justice has taken various meanings over the years. It has been frequently deployed by scholars to emphasize global justice in combating the problem of climate change, *i.e.*, the need for international law to provide binding legal obligations for countries to reduce the emission of greenhouse gases that cause climate change, while recognizing the different contributions and priorities of countries. As one public interest group commented:

The historical responsibility for the vast majority of greenhouse gas emissions lies with the industrialized countries of the Global North It is imperative that the North urgently shifts to a low carbon economy. At the same time, in order to avoid the damaging carbon intensive model of industrialization, countries of the Global South are entitled to resources and technology to make a transition to a low-carbon economy that does not continue to subject them to crushing poverty.⁷

The above comments evoke an idea of climate justice that is based on the principle of placing proportionate responsibilities for climate change solutions on countries in accordance with historical emission records. This understanding of climate justice is reflected in the Rio Declaration, the UNFCCC, and the Kyoto Protocol as the common but differentiated responsibility principle, which recognizes historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems.⁸

6. PATRICK BOND, *THE POLITICS OF CLIMATE JUSTICE: PARALYSIS ABOVE, MOVEMENT BELOW* 1-3 (2012), <http://ccs.ukzn.ac.za/files/climate%20justice%20%2027%20May%202011.pdf>.

7. *Climate Justice*, GLOBAL JUSTICE ECOLOGY PROJECT, http://globaljusticeecology.org/climate_justice.php (last visited Oct. 8, 2015).

8. The Rio Declaration states: “In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sus-

Climate justice has also been canvassed as the need for international law to provide legal frameworks that address the direct impacts of climate change such as droughts, flooding, energy security, water scarcity, food scarcity, poverty, unemployment, most especially recognizing current circumstances of poor and small island states who bear a disproportionate burden from the impacts of climate change, and the need to protect their human rights. For example, the 2013 Declaration on Climate Justice spearheaded by Mary Robinson, one of the foremost commentators on climate justice, notes that:

The economic and social costs of climate impacts on people, their rights, their homes, their food security and the ecosystems on which they depend cannot be ignored any longer. Nor can we overlook the injustice faced by the poorest and most vulnerable who bear a disproportionate burden from the impacts of climate change.⁹

The above comments reflect notions of climate justice underpinned by the need to protect poor and vulnerable communities of the world from facing further pressures and threats to their survival and sustenance due to climate change. This understanding of climate justice is the foundation and anchor for proposals to include funding and compensation mechanisms as parts of the international climate change regime to ensure global burden sharing in combating climate change.¹⁰

tainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. See also U.N. Framework Convention on Climate Change art. 3(1), May 9, 1992, 1771 U.N.T.S. 107, <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC] (stating that parties should act to protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”).

9. MARY ROBINSON FOUNDATION CLIMATE JUSTICE, DECLARATION ON CLIMATE JUSTICE 1 (2013), <http://www.mrfcj.org/our-work/equity-and-climate-justice/declaration-climate-justice.html>.

10. UNFCCC article 4 identifies least developed countries and small island states as being the most vulnerable to the adverse effects of climate change. UNFCCC article 4 provides: “The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.” UNFCCC article 5 also provides that the developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to developing country Parties, to enable them to implement the provisions of the Convention. UNFCCC, *supra* note 8, at arts. 4-5. For an excellent discussion of the idea of climate compensation for developing countries, see Maxine Burkett, *Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States*, 13 SANTA CLARA J. INT’L L. 81 (2015); see also Damilola S. Olawuyi, *Proposal for a Climate Compensation Mech-*

Most recently, however, the term climate justice has increasingly taken a more expansive connotation. Recent findings show that policy measures and projects aimed at mitigating climate change are in turn producing even more serious human rights concerns, especially in developing countries.¹¹ These human rights issues include: mass displacement of citizens from their homes to allow for climate change mitigation projects; lack of participation by citizens in project planning and implementation; siting and concentration of projects in poor and vulnerable communities; lack of governmental accountability on projects; and, the absence of review and complaint mechanisms for victims to obtain redress for these problems.¹²

For example, a number of clean development mechanism (CDM) and REDD+ projects have been criticized for resulting in the violation of fundamental human rights in developing countries.¹³

anism for Small Island States: Response to Maxine Burkett, 13 SANTA CLARA J. INT'L L. 133 (2015).

11. See generally Naomi Roht-Arriaza, *Human Rights in the Climate Change Regime* 1(2) J. HUM. RTS. & ENV'T 211 (2010) (identifying areas where current climate change regimes may cause human rights violations in local communities, including some projects under the Clean Development Mechanism, large hydropower and biomass projects, use of biofuels, choices on energy and adaptation, and REDD+ projects); see also David M. Driesen, *Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol*, 83 IND. L.J. 21 (2008); Axel Michaelowa & K. Umamaheswaran, *Additionality and Sustainable Development Issues Regarding CDM Projects in Energy Efficiency Sector 4* (Hamburg Inst. of Int'l. Economics, HWWA Discussion Paper No. 346, 2006) (noting that, to avoid fictitious emission reductions that could jeopardize the environmental integrity of the Kyoto Protocol, the additions of CDM projects has to be checked); U.N. DEVEL. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008 vii (2007) (noting that the short and medium-term costs and benefits of climate change actions must be uniformly distributed); WORLD HEALTH ORGANIZATION, CLIMATE CHANGE AND HUMAN HEALTH – RISKS AND RESPONSES 237-60 (A.J. McMichael et al. eds., 2003); Michael J. Sandel, *It's Immoral to Buy the Right to Pollute*, N.Y. TIMES (Dec. 15, 1997), <http://www.nytimes.com/1997/12/15/opinion/it-s-immoral-to-buy-the-right-to-pollute.html>; Tim Jackson et al., *The Language of Flexibility and the Flexibility of Language*, 10 INT'L J. ENV'T & POLLUTION 462 (1998); Ian Rowlands, *The Kyoto Protocol's 'Clean Development Mechanism': A Sustainability Assessment*, 22 Third World Quarterly 795 (2001); MEINHARD DOELLE, FROM HOT AIR TO ACTION? CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2005); INT'L COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 12-14 (2008).

12. Frances Seymour, *Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs*, in HUMAN RIGHTS AND CLIMATE CHANGE 207 (Stephen Humphreys ed., 2010); Sébastien Jodoin, *From Copenhagen to Cancun: A Changing Climate for Human Rights in the UNFCCC?*, A CISDL LEGAL BRIEF (Jan. 10, 2011), http://www.preventionweb.net/files/17552_fromcopenhagencancun20110110.pdf.

13. See TOM GRIFFITHS, SEEING 'REDD'? FORESTS, CLIMATE CHANGE MITIGATION AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 19-26 (May 2009), http://www.rightsandresources.org/documents/files/doc_923.pdf. See generally Ernestine E. Meijer, *The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice*, 39 N.Y.U.

These projects tend to be located in developing countries with the poorest and the most vulnerable citizens. In addition, there are concerns related to pollution caused by the transfer of outdated and inefficient technologies for emission credits.¹⁴

An example that dominated international discussions is the case of the Aguan biogas CDM project in Honduras, which was heavily criticized internationally for its gross human rights violations.¹⁵ According to a report of the international human rights mission, submitted to the Inter-American Commission on Human Rights, the local project developer Grupo Dinant is alleged to have been at the center of violent conflicts with local people, who were deprived of their land by the project; about twenty-three peasants have also been killed.¹⁶ A coalition of over seventy international human rights groups called on the United Kingdom to withdraw sponsorship for the project and for the CDM Executive Board not to approve or register the project.¹⁷ Despite these protests, the CDM Board approved this project. The Board argued, as in many cases, that it has no mandate to investigate human rights abuses and that any matter related to the

J. INT'L L. & POL. 873 (2007); see also Jack Santa Barbara, *The False Promise of Biofuels*, THE INT'L FORUM ON GLOBALIZATION & THE INST. FOR POL'Y STUD. (2007), <http://ifg.org/v2/wp-content/uploads/2014/05/biofuels.pdf>.

14. See generally *The Disastrous Local and Global Impacts of Tropical Biofuel Production*, ENERGY TRIBUNE (Mar. 6, 2007), <http://www.energytribune.com/24063/the-disastrous-local-and-global-impacts-of-tropical-biofuel-production#sthash.GP7G2vDt.dpbs>; see also *Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits*, CARBON TRADE WATCH (Mar. 29, 2006), http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36.

15. See *Human Rights Violations Linked to CDM Biogas Project in Honduras*, BIOMASS HUB (2011), <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/> (last visited Oct. 8, 2015); see also Press Release, Clean Dev. Mechanism, United Nations under Pressure to Denounce Human Rights Abuses in Carbon Offsetting Scheme (Apr. 18, 2011), <http://www.cdm-watch.org/?p=1872>.

16. For comprehensive detail of human rights violations by this project, see Letter from Almuth Ernsting et al. to CDM Executive Board (Jan. 4, 2011), http://carbonmarketwatch.org/wp-content/uploads/2012/07/unsolicited_letter_cdmproject_application_3197_honduras.pdf. See also *Open Letter to UK: UK Government Must Withdraw Authorization for Aguan and Lean CDM Projects Linked to Assassinations and Other Human Rights Abuses in Honduras*, CARBON MARKET WATCH (Feb. 14, 2011), <http://www.cdm-watch.org/?p=1648> [hereinafter *Open Letter to UK*].

17. *Open Letter to UK*, *supra* note 16. As a response to protests by several international human rights groups, German public development bank DEG (Deutsche Entwicklungsgesellschaft) declared that it will not pay out an already approved loan of \$20 million USD for the project. Similarly, EDF Trading, a wholly owned subsidiary of Electricité de France SA, and one of the biggest CDM investors, pulled out from a contract to buy carbon credits from the project. See Mathew Carr, *German Bank Won't Lend to CO2 Project, CDM Watch Says*, BLOOMBERG BUS. (Apr. 18, 2011), <http://www.bloomberg.com/news/2011-04-18/german-bank-won-t-lend-to-honduran-co2-project-cdm-watch-says.html>.

sustainable development of a CDM project or its human rights impacts are determined by the government that hosts the project.¹⁸ That the CDM Board is not empowered to address human rights complaints emanating from the execution of CDM projects presents a huge challenge to human rights protection in developing countries where CDM projects are sited.¹⁹

These gaps and the high incidents of human rights violations resulting from CDM projects have increased the calls for a more transparent, accountable, and human rights-based approach to climate change mitigation in general.²⁰ Emerging debates on climate justice, therefore, recognize the growing indirect impacts of climate change mitigation and adaptation efforts on human rights and examine how international law could provide legal frameworks to address such indirect impacts on human rights. This expansive view of climate justice is well captured by the 2014 Report of the International Bar Association, which defines climate justice as follows:

To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects *in a manner that respects human rights*.²¹

The report by the IBA is one of the most comprehensive efforts to expand understanding of climate justice to include combating climate change in a manner that respects human rights. It builds on prior efforts that have recognized these growing concerns on the impacts of emission reduction projects in fundamental human rights. For example, the Conference of Parties to the UNFCCC (COP 16) in Cancun, released a decision stating that “Parties should, in all climate change-

18. See SYNTHESIS REPORT OF THE CALL FOR INPUT ON THE CDM POLICY DIALOGUE 4-5 (2012), http://www.cdmpolicydialogue.org/public_input/SYNTHESIS%20REPORT.pdf.

19. Roht-Arriaza, *supra* note 11; see also Damilola Olawuyi, *Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives*, 2(2) NORDIC ENVTL. L.J. 33-52 (2012).

20. Roht-Arriaza, *supra* note 11; see also Damilola Olawuyi, *Aguan Biogas Project and the Government of the United Kingdom: Legal and International Human Rights Assessment*, 4 QUEEN MARY L.J. 37 (2013).

21. *Achieving Justice and Human Rights in an Era of Climate Disruption*, INT'L BAR ASS'N (July 2014), file://sbs2k8/RedirectedFolders/accintern/My%20Documents/Downloads/Climate%20Change%20Justice%20and%20Human%20Rights%20Report%20FULL.pdf (emphasis added).

related actions, fully respect human rights.”²² Similarly, in September 2011, the Human Rights Council adopted Resolution 18/22, its third resolution on “human rights and climate change.”²³ This resolution affirmed that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.

Despite these recognitions and declarations however, scholars have yet to agree on how legal frameworks can incorporate human rights issues in the design, approval, finance, and implementation of climate change projects to address injustices and human rights impacts.²⁴

The United Nations Human Rights-Based Approach (HRBA) has gained increased mention in literatures over the last decade as providing a viable normative framework for addressing these concerns.²⁵ The HRBA, as advocated by the United Nations, places emphasis on addressing and mitigating human rights impacts of development projects.²⁶ The aim of the HRBA is to ensure that projects or

22. 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, Draft Decision -/CP.16, (Dec. 4, 2010), http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf.

23. Human Rights Council Res. 18/22, U.N. Doc. A/HRC/RES/18/22 (Oct. 17, 2011), <http://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf>.

24. Recent scholarly works on climate change and human rights have focused on approaches aimed at recognizing climate change as a human rights issue. Different approaches have been suggested, ranging from the introduction of a new substantive human right on climate change, to the re-interpretation of existing human rights to provide for climate justice. These suggestions, just like that of a substantive human right to environment, have been deeply debated and widely contested. This paper will not consider these debates or approaches. It is argued that it is more likely to get the support of countries for a market-based instrument like the Kyoto Protocol than a human rights instrument. As such, a better approach is one that examines how existing market approaches can be strengthened using human right norms, and not to abandon them.

25. See THOMAS GREIBER ET AL., CONSERVATION WITH JUSTICE: A RIGHTS-BASED APPROACH 3 (2009), https://cmsdata.iucn.org/downloads/eplp_071.pdf; Chilenye Nwapi, *A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria*, 54 J. AFR. L. 184, 206-11 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2493214; Jakob Kirkemann Boesen & Hans-Otto Sano, *The Implications and Value Added of a Rights-Based Approach*, in DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS 45 (Bård-Anders Andreassen & Stephen P. Marks eds., 2010); REBECA MACIAS, PUBLIC PARTICIPATION IN ENERGY AND NATURAL RESOURCES DEVELOPMENT: A THEORY AND CRITERIA FOR EVALUATION 10-11 (2010); Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y 43, 50-54 (2004).

26. Clarence J. Dias, *Understanding the UN Common Understanding on a Human Rights-Based Approach to Development Programming*, in HUMAN RIGHTS AND DEVELOPMENT: LAW, POLICY AND GOVERNANCE 5-7 (C. Raj Kumar & D.K. Srivastava eds., 2006); see

policies intended to advance environmental protection and development do not result in adverse human rights consequences.²⁷ A rights-based approach recognizes the interdependence of human rights and the integrity of the natural environment; it also provides normative procedural frameworks for addressing systemic and structural injustices, social exclusions, and human rights repressions in the development of climate change solutions.²⁸ The HRBA has therefore been discussed as the new wonder drug of equal opportunities and as a policy framework that allows for the merger and acquisition of human rights and development in international law.²⁹

Despite optimism in literatures about the radical promise of the HRBA, it is not without pitfalls. A number of scholars have expressed pessimism about the practicality of applying the HRBA to address problems of exclusions and human rights violations in the design, approval, finance, and implementation of climate change projects.³⁰ The criticisms towards this approach in general are mainly three-fold: 1) its theoretical core, 2) problems in its operationalization, and 3) negative consequences of its operationalization. This paper analyses these three main pitfalls.

This paper evaluates the value, potentials, and paradoxes of adopting the HRBA as a framework for mainstreaming human rights norms into project design, approval, finance, and implementation procedures under extant and emerging global climate change regimes. It

also U.N. HIGH COMM'R FOR HUMAN RIGHTS, CLAIMING THE MILLENNIUM DEVELOPMENT GOALS: A HUMAN RIGHTS APPROACH at 7-14, UN/HR/PUB/08/3 (2008), http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf.

27. See *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, HRBA PORTAL, <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (last visited Oct. 8, 2015) [hereinafter HRBA PORTAL].

28. *Id.*

29. See R. Chambers et al., *The Rise of Rights: Rights-Based Approaches to International Development*, 17 IDS POLY BRIEFING (2003), <http://www.ids.ac.uk/files/Pb17.pdf>; Raymond C. Offenheiser & Susan H. Holcombe, *Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective*, 32 NON PROFIT & VOLUNTARY SECTOR Q. 268, 300 (2003), <http://nvs.sagepub.com/content/32/2/268.full.pdfhtml>; Siobhan McInerney-Lankford, *Human Rights and Climate Change: Perspectives on the Value Added of Human Rights Law*, 37 YALE J. OF INT'L L. (2012), <http://opiniojuris.org/2012/06/27/human-rights-and-climate-change-perspectives-on-the-value-added-of-human-rights-law/>.

30. See E. Morgera, *No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law*, in CLIMATE CHANGE AND THE LAW: A GLOBAL PERSPECTIVE (E. Hollo et al. eds., 2012); see also C. Gearty, *Do Human Rights Help or Hinder Environmental Protection?*, 1 J. OF HUM. RTS. & THE ENV'T 7, 7-22 (2010); M. Koskieniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47 (2010).

raises questions that must be considered if the HRBA is to live up to its radical promise as a policy framework for climate injustice occasioned by climate change projects. Section one of this paper examines the nature and scope of the HRBA, and section two unpacks key principles and elements of the HRBA, including a discussion on the potential problems and paradoxes of the HRBA.

I. THE UNITED NATIONS HUMAN RIGHTS-BASED APPROACH

A human rights based approach (HRBA) has been defined as a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.³¹ HRBAs seek to identify and address root causes of inequalities, social exclusions, and human rights violations that impede the efficacies of development programs and policies. HRBAs proceed on the notion that traditional approaches that relegate human rights to the background in planning processes are counterproductive, ineffective, unsustainable, and often contentious. Under an HRBA, human rights do not come to the table when there is a protest or problem; human rights are treated as parts of the rule of the game of development and planning. HRBAs help to promote the sustainability of development policy or project by empowering people themselves—especially the most marginalized—to participate in policy formulation and hold accountable those who have a duty to act.

Ever since the UN Secretary General launched the *UN Programme for Reform* in 1997, calling on all entities of the UN to mainstream human rights norms into their respective mandates and activities,³² the idea of integrating human rights principles into development efforts have gained significant recognition and popularity from

31. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION 15 (2006), <http://www.ohchr.org/Documents/Publications/FAQen.pdf> [hereinafter FAQs ON A HUMAN RIGHTS-BASED APPROACH].

32. See Rep. of the Secretary-General, 51st Sess., July 14, 1997, U.N. Doc. A/51/950 (1997). Also, the 1998 Report of the Secretary General to the UN Economic and Social Council recommended the (i) adoption of a “human rights-based approach” to activities carried out within the respective mandates of components of the United Nations system; (ii) development of programs/projects addressing specific human rights issues; and (iii) reorientation of existing programs as a means of focusing adequate attention on human rights concerns. See UNICEF, GUIDELINES FOR HUMAN RIGHTS-BASED PROGRAMMING APPROACH, EXECUTIVE DIRECTIVES (CF/EXD/1998-004) (1998), <http://www.unicefinemergencies.com/downloads/er-resource/docs/Human%20Rights%20Based%20Approach/Executive%20Director%20Guidelines%20for%20HRB%20Programming.pdf>; FAQs ON A HUMAN RIGHTS-BASED APPROACH, *supra* note 31, at 36.

UN agencies, the European Union, the World Bank, and national governments as a planning and programming framework.³³ From the early 2000s, human rights mainstreaming began to develop increasingly, but somehow haphazardly, by different international organizations, leading to a lack of coordination or common understanding on its meaning, scope, and content. For example, the idea of mainstreaming has generated tons of literature on the idea of gender mainstreaming. It has also been reflected in the work of gender equality agencies. The UNICEF has, since 1998, developed a comprehensive program on mainstreaming human rights into its work, same for the UNDP, which has delivered massive endorsements for the idea. However, the difference in the scope of activities of these agencies brought about a confusion of tongues on human rights mainstreaming.

To resolve this confusion of tongues, UN agencies came together in 2003 with a human rights-based approach framework. The *Common Understanding on HRBAs*, which spells out the meaning, nature, design, and essential attributes of a HRBA framework, was adopted.³⁴ It identifies the HRBA as a policy frame for mainstreaming human rights norms, standards, and principles into legislations, policies, and planning so as to ensure that citizens' interests are protected at all times. The *Common Understanding* spells out the basics of the HRBA and encourages agencies covered by UN operations to develop specialized standards tailored to cover their activities.³⁵

33. See GREIBER ET AL., *supra* note 25; ANDRÉ FRANKOVITS, UNESCO, THE HUMAN RIGHTS BASED APPROACH AND THE UNITED NATIONS SYSTEM (2006), <http://unesdoc.unesco.org/images/0014/001469/146999e.pdf>; Celestine Nyamu-Musembi & Andrea Cornwall, *What is the 'Rights-Based Approach' All About? Perspectives from International Development Agencies* 27-43 (IDS Working Paper 234, 2004), <http://www.ids.ac.uk/files/dmfile/Wp234.pdf>; KARIN SVADLENAC-GOMEZ, HUMAN RIGHTS AND CONSERVATION: INTEGRATING HUMAN RIGHTS IN CONSERVATION PROGRAMMING 48 (2007); Lisa VeneKlasen et al., *Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation* 3-5 (IDS Working Paper 235, 2004), <http://www.ids.ac.uk/ids/bookshop/wp/wp235.pdf>; JOACHIM THEIS, PROMOTING RIGHTS-BASED APPROACHES: EXPERIENCES AND IDEAS FROM ASIA AND THE PACIFIC 10 (2004), http://www.redenderechos.org/webdav/publico/01_sc_experiencias_.pdf; Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1031 (2001), <http://courses.arch.vt.edu/courses/wdunaway/gia5524/hamm01.pdf>; Gina E. Castillo & Marjolein Brouwer, *Reflections on Integrating a Rights-Based Approach in Environment and Development*, in POLICY MATTERS: CONSERVATION AND HUMAN RIGHTS 153 (2007), <http://cmsdata.iucn.org/downloads/pm15.pdf>.

34. See HRBA PORTAL, *supra* note 27.

35. The *Common Understanding* is based on three essential principles: 1) that all programmes of development co-operation, policies, and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments; 2) that human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development, cooperation, and pro-

According to the UN, the following elements are necessary, specific, and unique to a human rights-based approach:

- (a) Assessment and analysis in order to identify human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights;
- (b) Programmes assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations. They then develop strategies to build these capacities;
- (c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles; and
- (d) Programming is informed by the recommendations of international human rights bodies and mechanisms.³⁶

The HRBA advocates mainstreaming five inter-connected human rights norms and principles into decision-making. They are: 1) participation and inclusion; 2) access to information; 3) non-discrimination and equality; 4) empowerment and accountability; and 5) legality and access to justice (the “PANEL Principles”).³⁷ By implementing the PANEL principles in the design, approval, finance, and implementation of projects, policy makers could have better opportunities to anticipate and consider the overall impacts of a project on the public and then take steps to mitigate them.

Practically, what this approach means is that extant international climate change regimes would be reformed to establish project-approval guidelines that include elements of participation; accountability; equality and non-discrimination; access to information; and access to justice. It would provide a threshold that would require governments and project proponents to demonstrate that these elements have been complied with and guaranteed to citizens in project planning

programming in all sectors and in all phases of the programming process; and 3) that programmes contribute to the development of the capacities of duty-bearers to meet their obligations and of “rights-holders” to claim their rights. *Id.*

36. *Id.*

37. According to the United Nations, other elements of good programming practices that are also essential under an HRBA include: i) People are recognized as key actors in their own development, rather than passive recipients of commodities and services; (ii) Participation is both a means and a goal; (iii) Strategies are empowering, not disempowering; (iv) Both outcomes and processes are monitored and evaluated; (v) Analysis includes all stakeholders; (vi) Programmes focus on marginalized, disadvantaged, and excluded groups; (vii) The development process is locally owned; (viii) Programmes aim to reduce disparity; (ix) Both top-down and bottom-up approaches are used in synergy; (x) Situation analysis is used to identify immediate, underlying, and basic causes of development problems; (xi) Measurable goals and targets are important in programming; (xii) Strategic partnerships are developed and sustained; and (xiii) Programmes support accountability to all stakeholders. *See id.*

and execution. Any project that does not satisfy the elements would either be referred back or refused approval by supervisory bodies of climate change mitigation projects, for example CDM EB and DOEs.³⁸ It would also include establishing complaint mechanisms and procedures for stakeholders or private individuals whose human rights have been infringed to seek redress, to block the approval of such projects, or to seek the review of already approved projects.

The practical value of a human rights-based approach to climate change mitigation and adaptation is that projects designed to combat climate change are conceived, planned, and implemented with the main aim of protecting, respecting, and fulfilling human rights.³⁹ It integrates human rights safeguards into project plans and implementation.⁴⁰ This way, human rights principles are not only evoked when there is a protest or violation about a project, but are integrated into design and approval processes to ensure that projects that violate human rights are not approved or registered. The HRBA, therefore, represents a shift from a needs-based approach to an approach that requires governments and project proponents to consider the impact of a particular project on the enjoyment of existing human rights.⁴¹

Secondly, the HRBA is generally a less contentious approach for reinforcing legal intersections and linkages between human rights and environment.⁴² Attempts to codify substantive rights to environment have generally recorded little progress in international law due to several debates on its theoretical basis and practical underpinnings.⁴³ The

38. CDM EB stands for Clean Development Mechanism Executive Board and supervises the clean development mechanism of the Kyoto Protocol. See *Clean Development Mechanism (CDM)* UNITED NATIONS CONVENTION ON CLIMATE CHANGE, <http://cdm.unfccc.int/> (last visited Mar. 20, 2016). DOEs are *designated operational entities* under the UNFCCC. DOEs are independent auditors accredited by the CDM EB “to validate project proposals or verify whether implemented projects have achieved planned greenhouse gas emission reductions.” *Id.*

39. See Dinah Shelton, *Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change*, in HUMAN RIGHTS AND CLIMATE CHANGE 91-126 (Stephen Humphreys ed., 2010), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1230&context=faculty_publications; Castillo & Brouwer, *supra* note 33.

40. ANITA CHERIA ET AL., A HUMAN RIGHTS APPROACH TO DEVELOPMENT: RESOURCE BOOK 2-4 (2004).

41. *Id.*

42. See Dinah Shelton, *Whiplash and Backlash-Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT’L L. 11, 21, 29 (2015) (stating that a “rights-based approach” to environmental protection avoids many of the problems found in private litigation, as well as the limitations of environmental regulation and market-based incentives).

43. See Dinah Shelton, *Developing Substantive Environmental Rights*, 1 GEO. WASH. J. HUM. RTS. & ENV’T 89, 89-120 (2010); STEPHEN TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHT: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION-MAKERS TOWARDS THE EN-

HRBA avoids these debates by drawing on several existing rights instruments, conventions, and internationally agreed norms and standards that have been recognized and ratified by many countries.⁴⁴ The core elements of the PANEL principles are procedural human rights that have been endorsed and recognized in core human rights treaties and conventions. HRBA does not seek to create new rights or call for adoption of new principles. Rather, it outlines normative guidelines that would assist international regimes and national authorities to translate existing human rights goals and standards into practical and achievable results.⁴⁵

Thirdly, the HRBA provides a framework for addressing root causes of climate change injustices, human rights violations, and well-entrenched power imbalances that tend to exclude members of the public from playing active roles in climate change mitigation. The HRBA focuses on protecting, fulfilling, and realizing rights of excluded and marginalized populations, and those whose rights are at risk of being violated.⁴⁶ For example, the HRBA to climate change would place a focus on addressing project-planning approaches that target or concentrate large-scale mitigation and adaptation projects in vulnerable communities by ensuring that all people enjoy human rights irrespective of status or economic strengths. It would also provide opportunities for every segment of society to play active roles in regulatory approval processes leading to the implementation of climate change projects.⁴⁷ Through the HRBA, human rights could be harmonized and integrated into international climate change regimes so as to

VIRONMENT 2-15 (2009); M. Pallemarts, *The Human Right to the Healthy Environment as a Substantive Right*, in HUMAN RIGHTS AND THE ENVIRONMENT: COMPENDIUM OF INSTRUMENTS AND OTHER INTERNATIONAL TEXTS ON INDIVIDUAL AND COLLECTIVE RIGHTS RELATING TO THE ENVIRONMENT AND THE INTERNATIONAL AND EUROPEAN FRAMEWORK 11, 15 (Maguelonne Déjeant-Pons & Marc Pallemarts eds., 2002); Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65 (2002); James May, *Constitutionalizing Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113 (2006); Kaniye S.A. Ebeku, *Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited*, 16 REV. EUR. COMMUNITY & INT'L ENVTL. L. 312 (2007); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 305 (2000).

44. See U.N. Population Fund, *Core Concepts of a Human Rights Based Approach*, in A HUMAN RIGHTS-BASED APPROACH TO PROGRAMMING (2010), http://www.unfpa.org/sites/default/files/resource-pdf/hrba_manual_in%20full.pdf.

45. Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change*, 22 J. OF ENVTL. L. 391, 406 (2010).

46. FAQs ON A HUMAN RIGHTS-BASED APPROACH, *supra* note 31, at 37.

47. THEIS, *supra* note 33, at 2-10; Chambers et al., *supra* note 29.

give the public a legal basis to freely air their views about a project and to demand a review when such views are not taken into consideration in project design and implementation.⁴⁸

Furthermore, the HRBA provides a normative framework for reducing the fragmentation of obligations in international law that has resulted in overlap of climate change and human rights obligations.⁴⁹ The HRBA deemphasizes unnecessary and artificial bifurcations of rights that have often resulted in infringements of certain rights in order to uphold others. Through the HRBA, several climate change and human rights obligations could be harmonized and protected in a holistic and coherent manner. The PANEL principles of the HRBA, for example, emphasize the need to integrate and harmonize all human rights norms and obligations into the processes of planning and executing mitigation projects. By harmonizing human rights and climate change obligations, attempts to combat climate change would not result in human rights violations or injustices.

Generally, the HRBA represents a holistic policy framework that deploys procedural human rights norms and standards to ensure that climate change is combated with justice. The PANEL principles of the HRBA provide opportunities for countries to integrate human rights norms and principles into the design, approval, finance, and implementation of climate change projects to prevent human rights violations and injustices.

II. DEBATES ON THE HUMAN RIGHTS-BASED APPROACH

Despite the huge promise of the HRBA as a holistic policy framework for mainstreaming human rights safeguards into the international climate change regime, the HRBA is not without pitfalls. There are concerns about the practicality of applying the HRBA to address problems of exclusions and human rights violations in the

48. See HRBA PORTAL, *supra* note 27.

49. See Harro van Asselt, Francesco Sindico, & Michael Mehling, *Global Climate Change and the Fragmentation of International Law*, 30 L. & POL'Y 423 (2008); McInerney-Lankford, *supra* note 29; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of The Vienna Convention*, 54 INT'L. & COMP. L. Q. 279 (2005); see also Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et al. eds., 2009); Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT AND ARBITRATION 45-62 (Pierre-Marie Dupuy et al. eds., 2009); Sean Stephenson, *Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes*, 42 OTTAWA L. REV. 155, 180 (2010).

design, approval, finance, and implementation of climate change projects.⁵⁰ The criticisms towards this approach in general are mainly three-fold: 1) its theoretical core, 2) problems in its operationalization, and 3) practical implementation questions. This section analyses these three main pitfalls.

A. Theoretical Core Question

The evolution of the HRBA from essentially non-binding UN declarations, documents, and action plans, has led to the charge that the HRBA has a fuzzy core with less theoretical underpinnings.⁵¹ As some commentators have argued, “[t]he somewhat vague and non-specific character of the concept of mainstreaming has probably aided this rapid ascendancy; everyone understands the general idea but no one is sure what it requires in practice.”⁵²

Questions on the theoretical core of the HRBA first relate essentially to historical debates on the weight attached to resolutions and soft law instruments in international law.⁵³ Some have argued that soft law instruments, such as the *UN Common Understanding on the HRBA*, are not law because they do not create binding legal obligations.⁵⁴ This paper does not intend to delve extensively into these

50. See *supra* note 30 and accompanying text.

51. See Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMAN.: AN INT'L J. HUM. RTS., HUMANITARIANISM, & DEV., 47, 47 (2010), <http://muse.jhu.edu/journals/humanity/v001/1.1.koskenniemi.pdf>.

52. Fiona Beveridge & Sue Nott, *Mainstreaming: A Case for Optimism and Cynicism*, 10 FEMINIST LEGAL STUD. 299, 299 (2002); see also Koskenniemi, *supra* note 50; GERD OBERLEITNER, GLOBAL HUMAN RIGHTS INSTITUTIONS 45 (2007).

53. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174-75, 183-84 (2010) (defining soft law as those legal instruments that are not directly enforceable in courts and tribunals but nonetheless have an impact on international relations and, ultimately, international law. Broadly put, soft law instruments include resolutions and declarations of the United Nations and its organs, normative recommendations, declarations of principles, codes of conduct, codes of practice, Programmes of Action (PA), and other non-treaty obligations which do not create binding obligations, but often propose guidelines and rules of behavior which are important and useful for responding to emerging challenges. Soft law is often contrasted with hard law.); Catherine Redgwell, *International Soft Law and Globalization*, in REGULATING ENERGY AND NATURAL RESOURCES 89-107 (Barry Barton et al. eds., 2006); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L. Q. 901, 913 (1999); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 3 EUR. J. INT'L L. 499, 502 (1999), <http://www.ejil.org/pdfs/10/3/597.pdf>; DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 12 (2006); Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 422-25, 428-31 (1991).

54. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 85 (1991) (describing resolutions as “attempts to impose obligatory norms on dissenting minorities and to change radically the way in which international law is made”); see also ANNE PETERS

debates. Instead, it aligns itself with the view that even though UN policy documents are not international treaties and therefore do not have legally binding force, they have important legal functions and normative effects to the extent that they often elaborate and interpret norms.⁵⁵ Soft law instruments play significant roles in the development and evolution of international law.⁵⁶ This paper agrees with Higgins' observation that the passing of binding decisions by an international body is not the only way in which the development of the law occurs.⁵⁷ Legal consequences can also flow from acts which are not, in the formal sense, "binding."⁵⁸ Not only do soft law instruments provide flexible guidelines on how to tackle emerging concerns, they also provide a template on how international policies can be implemented and serve as forbearers to binding hard law instruments in the future.⁵⁹

The HRBA arguably provides normative interpretations and guidelines on how countries can implement and design climate change programs in a way that fulfills and protects international human rights obligations. As already highlighted above, the HRBA, as promoted by the UN, offers a full range of procedural steps and actions that could be taken in the design, approval, finance, and implementation of climate change projects to reinforce and integrate human rights of local communities.⁶⁰

A second aspect of the theoretical core question is the implementation and articulation by development agencies and organizations of HRBAs in diverse ways since the UN popularized them. This has made it difficult to consistently evaluate its practical efficiency and draw conclusions on progress in the climate change context. While the HRBA has been increasingly recognized in climate change contexts, its

& ISABELLA PAGOTTO, *SOFT LAW AS A NEW MODE OF GOVERNANCE: A LEGAL PERSPECTIVE* 4 (2006), https://ius.unibas.ch/uploads/publics/3940/20100219145119_4b7e9757829c2.pdf; Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL* 198 (Stephen Martin ed., 1994); FORSYTHE, *supra* note 52 (discussing the normative effects and importance of UN Resolutions and Declarations).

55. See SCHACHTER, *supra* note 53; see also PETERS & PAGOTTO, *supra* note 53; FORSYTHE, *supra* note 52.

56. See generally *id.*

57. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 8-10 (1995).

58. See *id.* at 24.

59. See Timothy Meyer, *Soft Law as Delegation*, 32 *FORDHAM INT'L L.J.* 888, 891 (2009); see also Guzman & Meyer, *supra* note 52, at 171; Boyle, *supra* note 52, at 902; Hillgenberg, *supra* note 52; Roberto Andorno, *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics*, UNESCO (July 2007), <http://www.unesco.de/wissenschaft/bis-2009/invaluable-role-of-soft-law.html>.

60. See *supra* note 58 and accompanying text.

practical implication is yet to be fully articulated.⁶¹ As the IUCN rightly notes:

One reason for only limited implementation of an RBA in the conservation field is the current lack of an operational framework that would guide participants through such an approach. This gap is closely related to different interpretations of the concept among different actors and the absence of a common language that could be used to achieve consensus on what needs to be done and how. Thus further conceptual development and rigorous testing is required to determine how an RBA to conservation would look and how it could most effectively be applied. For this, it is important to start by creating a common understanding of affected people's rights and visualizing their vulnerabilities in different contexts.⁶²

While this problem of inconsistent application and elucidation of the HRBA to climate change is a significant drawback, it does not call for intellectual surrender. As negotiators deliberate on the future of the extant international climate change regime, there is an excellent opportunity to integrate the HRBA into the global climate change regime. Integrating the HRBA into the emerging climate change regime and clarifying its practical implementation will not only provide legal basis for implementing the HRBA in climate change context, but will also provide necessary operational frameworks on how progress will be measured.

B. Challenges of Operationalization

The HRBA has been criticized as impracticable and difficult to operationalize on the ground in local contexts.⁶³ For example, adopting the HRBA in the climate change context would require an expansion of the UNFCCC and the Kyoto Protocol to include human rights provisions, the enlargement of climate change governance structures to provide for a human rights assessment, and review of mitigation

61. See Dinah Shelton, *Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change*, in HUMAN RIGHTS AND CLIMATE CHANGE 91-125 (Stephen Humphreys ed., 2010), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1230&context=faculty_publications; Castillo & Brouwer, *supra* note 33.

62. GREIBER ET AL., *supra* note 25; McInerney-Lankford, *supra* note 29; Margreet Wewerinke & Curtis F.J. Doebbler, *Exploring the Legal Basis of a Human Rights Approach to Climate Change*, 10 CHINESE J. INT'L L. 141 (2011), <http://chinesejil.oxfordjournals.org/content/10/1/141.full.pdf+html>.

63. THEIS, *supra* note 33, at vii (stating that, while there is broad consensus on the foundations of a rights-based approach, there are no blueprints for how an organization should become rights-based); Hamm, *supra* note 33. See also SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 2-5 (2008) (emphasizing that realizing and enforcing human rights comes with considerable costs).

projects. These are radical transformations that could expand the scope of activities of an environmental entity into uncharted areas, such as interpreting human rights and making decisions on the human rights impacts of a project.⁶⁴ Some human rights advocates consider it dangerous to place the function of interpreting human rights in the hands of professional administrators.⁶⁵ For example, some consider the dangers of placing human rights review responsibilities in entities such as the UNFCCC Secretariat, CDM Executive Board, and Designated Operational Entities, which comprise mainly environmental practitioners.⁶⁶ As Taillant notes, this epistemic distinction is fueled by the tendency of actors to remain within the formal confines of their areas of mandate, i.e., of human rights institutions or within the negotiation circles of the UNFCCC process.⁶⁷

This problem of tasking environmental administrators to operationalize and administer human rights principles can be addressed by progressively staffing climate change institutions with qualified human rights experts who can assist with the human rights mainstreaming process. This, however, comes with high cost implications and raises further questions on whether international climate change regimes could leverage the high cost implications associated with such a radical reform process.⁶⁸ In the context of realizing rights, the International Covenant on Economic, Social and Cultural Rights, for instance, states that “appropriate” measures should be taken with “available resources (article 2)” and “in the context of the full use of the maximum available resources.” Due to limited resources and competing budget priorities, the rights based approach, which requires a radical transformation, may run into implementation problems.⁶⁹

Questions of operationalization can be addressed through pragmatic and innovative approaches that coordinate and integrate linkages with other existing UN agencies to avoid duplication and reduce costs. For example, to mainstream human rights norms into

64. Koskenniemi, *supra* note 50.

65. See Philip Alston, *Resisting the Merger and Acquisition of Human Rights By Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002).

66. Jorge Daniel Taillant, Presentation, *Forging Stronger Cooperation Between Human Rights and Climate Change Communities*, CENTER FOR HUMAN RIGHTS & ENV'T (2012), http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant_24Feb2012.pdf.

67. *Id.*

68. THEIS, *supra* note 33, at vii; Hamm, *supra* note 33; see also FREDMAN, *supra* note 62.

69. Christopher McCrudden, *Mainstreaming Human Rights*, 16 U. MICH. SCH. OF L. PUB. L. & LEGAL THEORY RES. PAPER SERIES, Paper No. 47, 7-8 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568642.

existing climate change regimes, there would be a need to leverage on the resources, facilities, and best practices of UN human rights bodies like the Office of the High Commissioner for Human Rights (OHCHR).⁷⁰ Human rights experts from the OHCHR could be consulted to better assist the UNFCCC in designing its human rights mainstreaming programs and governance structures. Such strong interagency linkages and partnerships would reduce the cost of mainstreaming and lead to enhanced systemic integration and coordination.

C. *Practical Implementation Questions*

To promote climate justice through the HRBA, the starting point is for countries to amend current climate change instruments to reflect human rights. Currently, both the UNFCCC and the Kyoto Protocol (KP) do not contain human rights language. In order to incorporate the PANEL principles into the international legal regime on climate change, human rights must be expressly referenced, recognised, and integrated into project approval processes. Article 7.2 of the UNFCCC provides the COP with general authority to periodically review the implementation of the Convention and any related legal instruments, examine the obligations of the parties in light of the objective of the Convention, and to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.⁷¹ The COP has powers to examine the Parties' commitments in light of the Convention's objective, new scientific findings, and experience gained in implementing climate change policies, and to facilitate the coordination of measures adopted by Parties to address climate change and its effects. This general provision provides the COP with broad powers to recommend additional actions and to adopt new rules for the implementation of existing commitments under the Convention. This provision would empower the COP to suggest additional efforts that could correct the problems and lessons learned in implementing climate change obligations under the Convention. It could be the basis for the COP to review the implementation of climate change mitigation measures and to make the decisions necessary to promote the effective implementation of the Convention. However, incorporat-

70. *Id.*

71. See U.N. Framework Convention on Climate Change, Apr. 30-May 9, 1992, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (May 9, 1992), <http://unfccc.int/resource/docs/a/18p2a01.pdf>; see also FARHANA YAMIN & JOANNA DEPLEDGE, THE INTERNATIONAL CLIMATE CHANGE REGIME: A GUIDE TO RULES, INSTITUTIONS AND PROCEDURES 56-59 (2005).

ing additional commitments such as those for human rights into the Convention could require amendments to the Convention under the procedure set out in Article 15, amendments to the Annexes, under the procedure set out in Article 16 of the UNFCCC, amendments to the Kyoto Protocol under Article 20(1) of the KP, or amendments to the KP Annexes, all of which require significant political will and support from countries aligned with different negotiating blocks.⁷²

The question, therefore, is whether countries will generally agree to bind themselves or vote in support of a right-based reform that could holistically empower a large section of the public to block mitigation projects, demand accountability, request project information, and even challenge project decisions before international supervisory bodies. This is the question as to whether such a proposal will be seen as an attempt to grant the public a cudgel with which to beat the state into submission, or to empower NGOs to habitually oppose climate change projects. These concerns are in fact reasonable, particularly the fear that NGOs and interest groups could capture and frustrate mitigation projects and plans through the proposed right-based processes.⁷³

72. Guzman rightly describes this as the problem of getting to “yes” in international law. See Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747, 761 (2012). There are two main negotiation groups within the COP: developing countries and developed countries. Within these groups there are further negotiation blocks. These blocks and groups make important decisions on whether to support a proposal. The decisions by the influential blocks often determine how far a proposal can make it within the COP. **Developing countries:** (G77 and China), which comprise all developing countries that are members of the climate change convention (Africa, Association of Small Island States (AOSIS), Latin American countries, The Arab Group, Asia-Pacific Group, Least Developed countries, and Brazil, South Africa, India, and China (BASIC) Group). Generally, they argue for legally binding emission reduction commitments for industrialized countries, market mechanisms, substantial international financial capacity-building, and technological support. Specifically, the *Alliance of Small Island States* argue for action as strong and swift as possible, due to their extreme vulnerability to sea level rise, while the BASIC group is composed of GHG emitters that advocate that developed countries should allow developing countries “equitable space for development” unencumbered by emission reduction obligations. **Developed countries:** (*EU block* (27 member countries), *Environmental Integrity Group* (Mexico, the Republic of Korea, and Switzerland), *Umbrella Group/JUSSCANZ* (Japan, United States, Switzerland, Canada, Australia, New Zealand, Iceland, Norway, the Russian Federation, Ukraine, and the US). While the EU advocates for a strong global agreement with stringent economy-wide emissions reductions, substantial financial support, and robust compliance mechanisms, the Umbrella Group clamors for a legally binding treaty with market mechanisms and emission reduction commitments for large emitters, including BASIC countries such as India and China. See *Regional Groups and Negotiating Blocks*, UNFCCC, <http://unfccc.int/cop6/parties/regiogroup.html> (last visited Oct. 8, 2015).

73. See Maria Lee et al., *Public Participation and Climate Change Infrastructure*, 25 J. ENVTL. L. 33, 33 (2012) (discussing how untempered public participation might become a “simple bureaucratic hurdle, frustrating for all concerned.”). See also Maria Lee & Carolyn Abbot, *The Usual Suspects? Public Participation Under the Aarhus Convention*, 66 Mod. L.

However, an evolved understanding of the basis and value of the importance of the HRBA to climate change could arguably alleviate these concerns. Primarily, it is important to understand that the HRBA does not necessarily introduce new obligations that many States do not already have under several international human rights treaties. The rights-based framework builds on existing human rights obligations under international law, which virtually all the Parties to the climate change regimes have already agreed to protect, respect, and fulfill.⁷⁴ As such, the HRBA would not grant new or revolutionary rights that NGOs and the public do not already possess. It would only provide an opportunity for countries to incorporate already existing obligations and considerations while planning and designing climate change projects in order to prevent violations and tensions.

CONCLUSION

Despite emerging global consensus that achieving climate justice places a responsibility on countries to combat climate change in a manner that respects human rights, current global regimes on climate change provide little guidance on legal approaches for integrating human rights norms into the design, approval, finance, and implementation of climate change projects.

This paper has evaluated the potentials and paradoxes of adopting the HRBA as a policy frame for integrating human rights obligations and norms into existent international legal regimes on climate change. The HRBA emphasizes the integrating of human rights norms, such as participation, access to information, accountability, equality, and access to justice in project planning, to reduce injustices. The HRBA, therefore, provides an avenue to reduce incoherence, enhance systemic integration, and promote legal partnerships between human rights treaties and climate change regimes in the design and implementation of climate change projects.

REV. 80, 82-83 (2003); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71 (2000); Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. LEGAL STUD. 597 (2000); Julia Black, *Proceduralizing Regulation: Part II*, 21 OXFORD J. LEGAL STUD. 33 (2001).

74. There are 166 parties to the International Covenant on Civil and Political Rights (ICCPR) and 160 to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The majority of these parties have signed the UN Framework Convention on Climate Change and the Kyoto Protocol. See Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change*, 22 J. ENVTL. L. 391 (2010).

To ensure that HRBA moves from theory to practical integration and adoption in emerging international legal regimes on climate change, questions relating to its theoretical core, practical operationalization, and implementation that have been discussed in this paper must be carefully reviewed and addressed. There is a need for an evolved understanding of the importance of respecting, protecting, and fulfilling rights in climate change measures to avoid overlap. This is not only desirable, it is a fundamental requirement that can ensure that international human rights and climate change obligations are coherently and systemically integrated such that efforts to combat climate change do not result in human rights violations, repressions, and injustices. As negotiators design post-2015 international climate change regimes, there is a need to ensure that barriers to the implementation and adoption of the HRBA are holistically addressed in the emerging regimes to ensure that projects or measures that violate human rights or engender repressions and injustices are not approved or registered.
