

Reinvigorating the Clean Development Mechanism (CDM) Using the Human Rights-Based Approach to Development and the Principle of Sustainable Development as Toolboxes



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## **Introduction**

Climate change is one of the most delicate issues in the contemporary world. The effects of climate change have far reaching consequences on the very survival of mankind. And, its effects are mostly felt and experienced by the world's poor and incapables and by those sections of the society whose livelihood is utterly dependent on nature.

Being cognizant of the danger posed by a changing climate and a warming atmosphere, the international community has come up with regulatory toolboxes. The UNFCCC and the Kyoto protocol are the major instruments to same end. Nonetheless, the response measures adopted to counteract the climate change problem have brought about some critical concerns, particularly of human rights issues.

This is partly to be explained by the disciplinary path dependence argument and also the fact that the very orientation of the climate change legal regime is infused by market based approaches (economic justification) and environmental considerations per se.

As such, it is not surprising to see that measures adopted to ameliorate climate change problems and priorities have a clear human rights implication. This inherent feature of the climate change legal regime is further given an expression by the specific market-based instruments adopted under the Kyoto Protocol. In this regard, this paper will dwell on the Clean Development Mechanism (CDM), one of the implementation mechanisms of the protocol.

The fundamental reason in choosing the CDM from a human rights based perspective is, apart from other justifications discussed in the pertinent sections of the paper, related with the very orientation of the mechanism itself which is not designed to achieve climate change ends alone but also other 'co-benefits' principally of sustainable development, which is not the case with all the other flexibility mechanisms endorsed under the Kyoto Protocol.

The pragmatic scenario is indicating that, the CDM has failed to deliver development and sustainability benefits, which have got an expression by the ever-increasing human rights violation ensued by CDM projects.

In this regard, this paper has tried to address the following legal issues and thus are whether the CDM is inline with its sustainable development promise as enshrined under article 12 of the protocol? How sustainable development is, after all, understood in the CDM's context? What is the implication of the host countries exclusive sovereignty in determining sustainable development from a human rights context? And, how is the human rights based approach helpful for the CDM to achieve its sustainable development objective under article 12 of the Kyoto Protocol?

Keeping these as it may, in the CDM's context, human rights considerations and issues have become hot news in these days and this paper has taken such incidents as a pretext in reforming the CDM using the human rights based approach and the principle of sustainable development as tools.

Particularly, certain CDM projects like large hydroelectric power dam constructions are raising serious human rights violations of the local people. Apart from negating the voices and consents of the people concerned, the lack of a due participation and consultation on the entire process of the project implementation; failure to provide the local people with the appropriate compensation and even the mass killing and arrest of the opposers are some of the glaring and pervasive human rights violations witnessed in recent cases.

The *Aguán* Biogas project in Honduras and the *Barro Blanco* hydroelectric power generation dam construction in Panama are practically illuminating cases.

This paper is, therefore, arguing for adopting the human rights based approach to development and the notion of 'true' sustainable development in the basic structures and modus operandi of the CDM, which can minimize the human rights issues or implications raised by CDM projects.

In this respect, the paper has proposed two fundamental ways of integrating the HRBA in the CDMs working procedures: Conceiving the CDM as a development tool and using the structure of the CDM; particularly of the Environmental Impact Assessment provisions as a vital entry points to same end.

In regard to sustainable development, even though the content and criterion of same is something left for the wide discretion of the host countries in the CDMs context, making human rights an explicit common denominator and a “minimum threshold” requirement in the sustainable development determination of host countries can make the CDM projects and working procedures conscious of or alert for human rights considerations in both the project design and implementation phases.

This paper is organized in four chapters. Accordingly, chapter one is mandated to discuss the climate change legal regimes in a nutshell.

Chapter two, on the other hand, addresses how human rights issues are raised in the climate change legal regime. It has also pointed out how the climate change response measure raises human rights consideration in general and in the CDMs context in particular. The chapter also attempted to address whether the existing climate change response measures are adaptable for human rights based approach. If that is so, how to integrate it in the existing response measures are also dealt by proposing some modalities to same end.

Chapter three begins with a conceptual elaboration of the HRBA and then it goes down to explain how HRBA could be integrated in the CDM’s working procedures. It also discusses the notion of sustainable development in the CDM’s context. Among other things, it discusses the implication of host countries exclusive sovereignty in determining sustainable development in light with the very nature of human rights, which are perceived to be universal common goods.

Finally, chapter four will end the entire analysis by drawing plausible conclusions.

## Chapter One

### 1.1 The Climate Change Legal Regime

Climate change has been described as a defining issue of the twenty-first century and poses an unprecedented and as yet not fully understood threat to the global system upon which mankind depends.<sup>1</sup> And, with a view to address and arrest the process of climate change, states of the world using the United Nations system as an appropriate avenue, have come up with the UNFCCC and its Kyoto protocol.

The protocol in particular come up with an innovative and unique approach in implementing the content of the protocol –the flexibility mechanisms- so as to fulfill the main obligation imposed by the protocol- the quantified emissions reductions obligation enshrined under article 3 of the protocol. There, it is clearly stated that:

*Annex I parties shall reduce their CO2 emissions and ensure that their aggregate anthropogenic CO2 equivalent emissions of GHG listed in Annex A do not exceed their assigned amounts with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008-2012.*<sup>2</sup>

The following section will try to give a brief description of the UNFCCC and the Kyoto protocol.

#### 1.1.1 The UNFCCC

The UNFCCC was concluded in New York on May 1992 and it has currently 193 parties.<sup>3</sup> The basic objective of the convention as enshrined under article 2 is stabilization of greenhouse gas emissions ‘at a level that would prevent dangerous anthropogenic interference with the climate system.’<sup>4</sup>

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<sup>1</sup> Freestone (2005). pp1

<sup>2</sup> Kyoto Protocol (1997)

<sup>3</sup> Supra note 1,pp4

<sup>4</sup> UNFCCC (1992)



As can be seen from the wording of the convention, it is not the objective of the convention nor its related instruments to reverse greenhouse gas emissions but only to stabilize them at a level that would prevent dangerous interference with the climate system.<sup>5</sup> This has, however, been mentioned as an important limitation of the UNFCCC by David Freestone.<sup>6</sup>

A further limitation indicated is, the convention does not specify what the level of dangerous might be nor there is a statement, which demands an immediate achievement of such a stabilization objective.<sup>7</sup> There is only a statement that, such a stabilization objective shall be pursued ‘within a time frame sufficient to allow ecosystem to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner’.<sup>8</sup>

Under article 3 of the convention, the basic principles by which the whole Climate change regime shall be guided-by is enshrined and parties to the convention are expected to adhere to it taking their particular conditions and circumstances into consideration.

Sequentially stated, the principle of the common but differentiated responsibilities is stated under 3(1), the precautionary principle under article 3(3) and the principle of Sustainable Development under article 3(4). In fact, under article 3(1) the principle of inter-generational equity has also been mentioned which is one of the basic aspects of the principle of Sustainable Development.

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<sup>5</sup> Birnie (2009). pp358

<sup>6</sup> Supra 1, pp4

<sup>7</sup> Supra 5,pp358

<sup>8</sup> Ibid

In one-way or another, these principles have been replicated in the Kyoto protocol to the convention. This is a requirement by the convention that in an effort to achieve the objective of the convention and implementing its provisions, parties are expected to adhere to these principles. And since the Kyoto protocol is an implementation instrument of the convention, it is natural to expect the inclusion of these principles in the Kyoto protocol too.

### 1.1.2 Kyoto Protocol

At the third session of the Conference of Parties (COP) to the convention, 1997, adopted the Kyoto Protocol.<sup>9</sup> And, the silent features of the protocol which makes it unique among most other Multilateral Environmental Agreements (MEAs) is the fact that, it come up with, for the first time, a binding quantitative emissions reduction limitations-an obligation imposed on the developed parties to it.<sup>10</sup>

The other peculiar feature of the protocol is the three flexibility mechanisms as enshrined under article 6(Joint implementation), article 12(The CDM) and article 17(International Emissions Trading).<sup>11</sup> The section below delineates the basic aspect of all these Kyoto regulatory toolboxes.

Before that, it is important to note that, the development of these flexibility mechanisms can be traced back to the provisions of the UNFCCC which envisaged that parties could achieve reductions by acting jointly –article 4(2).<sup>12</sup>

Further, these mechanisms are premised under the principle of cost effectiveness albeit the fact that their implementation has to accord to the general principles of the UNFCCC under article 3 like Sustainable development and the Common but Differentiated Responsibilities (CBDR) as well as with the general principles of International law.<sup>13</sup>

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<sup>9</sup> Stowell(2005). pp26

<sup>10</sup> Supra 5,pp361

<sup>11</sup> Ibid

<sup>12</sup> Schrijver(2008) pp30

<sup>13</sup> Eriksen (2010).pp251

The mechanisms are also used as a supplemental to domestic action which is further buttressed by the statement of the Marrakech Accords in paragraph 7, under the Principles, Nature and Scope of the Mechanisms pursuant to Art.6, 12 and 17 of the Kyoto protocol, where it is stated that:

*The use of the mechanisms shall be **supplemental to domestic action** and that **domestic action shall thus constitute a significant element of the effort made by each party included in Annex I to meet its quantified Emissions Limitation and reduction commitment under article 3 , paragraph 1 of the Kyoto protocol***<sup>14</sup>

Thus, the inclusion of these mechanisms in the protocol is motivated by the fact of the case that, the stated emissions target under article 2 of the convention –reducing emissions for 6 GHG collectively to 5% below 1990 levels by the year 2008-2012 at a lower cost.<sup>15</sup> In other words, the Kyoto flexible mechanisms are intended to achieve two pillar objectives in a nutshell: lowering compliance costs and providing incentives for Sustainable development.<sup>16</sup>

In regard to the first objective, the idea is, the mechanisms are intended to drastically lower compliance costs for Kyoto parties in their endeavor to achieve the quantitative emissions reduction obligation as stated under article 3.<sup>17</sup> The second objective is based on the clear assumption that these flexibility mechanisms could provide an incentive to achieve Sustainable development.<sup>18</sup> Typical example is the CDM where one of its pillar objective is assisting the developing country parties in their national endeavor to achieve Sustainable development.

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<sup>14</sup> Marrakech Accords (2001)

<sup>15</sup> Faure (2003) pp, 25

<sup>16</sup> Voigt, (2009) pp71

<sup>17</sup> Ibid, pp71

<sup>18</sup> ibid

### 1.1.2.1 The Kyoto Mechanisms

Having said this much about the general issues surrounding the flexibility mechanisms, the section below is devoted to consider each of the flexibility mechanisms briefly.

#### 1.1.2.1.1 International Emissions Trading

International emissions trading as one of the flexibility mechanisms is subject to the modalities and procedures agreed at the Marrakech accords. The modalities as set out under the Marrakech Accords provides the principles, nature and scope of emissions trading and addresses issues relating to equity, fungibility and environmental integrity.

Nonetheless, it should be noted that, the phrase Emissions Trading is not entirely a correct naming because of the fact that emissions are not traded but emissions rights are.<sup>19</sup> Thus, some defines an emission right as the right to emit a certain quantity of a specified substance during a defined period of time.<sup>20</sup>

And, as the article defining International Emissions Trading, article 17 states, the mechanism is supplemental to domestic action for the purpose of meeting quantified emission limitation and reduction commitment under article 3 of the protocol.<sup>21</sup>

In short, it can be said that, under article 17 of the protocol a framework has been designed using which Annex I parties can participate in emissions trading for the purpose of achieving their quantified emissions reduction commitments under the protocol.<sup>22</sup>

This mechanism is available for Annex I parties who may otherwise not be in a position to meet their emissions reduction obligation using the other flexible mechanisms, like the Joint implementation or the CDM but who are able only to trade units in the form of assigned amount units(Issued to Kyoto parties into their

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<sup>19</sup> Supra note 1, pp403

<sup>20</sup> Ibid

<sup>21</sup> Supra note 2

<sup>22</sup> Supra note 5, pp367

national registry up to their assigned amount )CER –accrued from CDM projects and ERU-the tradable units accrued from Joint implementation projects or Assigned Amount Units or Removal Units which are issued to project participants in Joint implementation project activities.<sup>23</sup>

And, as with the case in the flexibility mechanisms in general, the emissions trading also exhibits the feature of cost-effectiveness and flexibility in meeting an environmental goal that allows Annex I parties to ‘take the lead’ in climate change mitigation.<sup>24</sup>

A further point is that, the mechanism seeks to integrate economic concerns as well as considerations of developmental inequalities and differentiated responsibilities into the achievement of the emissions limitations and reduction obligations of the Kyoto parties without the need to alter the environmental aim, a typical instance of the effort to implement the principle of sustainable development into practice.<sup>25</sup>

#### **1.1.2.1.2 Joint Implementation**

Article 6 of the Kyoto Protocol is the pertinent provision defining joint implementation. In fact, the article at stake builds directly on the wording of article 4(2)(b) of the UNFCCC, which mandates the idea that, Annex I countries may act individually or jointly to meet their emissions reduction objectives.<sup>26</sup> Article 6 allows any annex I country to transfer to or acquire from another Annex I country reductions of GHG emissions, described as Emissions Reductions Units (ERUs) which are the results of project activities.

The tradable unit under Joint implementation-ERUs- can be generated from any projects that reduce anthropogenic emissions of designated GHG gases or which enhances the anthropogenic removal by sinks. The mechanism is also subject to the requirement that, the specific projects under the mechanism shall be based upon the express approval of both parties to the protocol acting as transferor and transferee

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<sup>23</sup> Ibid

<sup>24</sup> Supra note 16, pp80

<sup>25</sup> Ibid

<sup>26</sup> Supra note 1, pp11

and also the emissions reductions achieved as a result of the project implementation shall demonstrate ‘Additionality’-a requirement that emissions reductions achieved would not materialize in the absence of the Joint implementation project.<sup>27</sup>

Finally, no state party can acquire ERUs if it is not itself in compliance with a number of other obligations under the protocol.<sup>28</sup>As common with the rest flexibility mechanisms, the requirement of supplimentality to domestic action for the purpose of meeting the obligation under article 3 is also applicable to Joint implementation (art. 6(1)(d).

#### **1.1.2.1.3 The Clean Development Mechanism (CDM)**

Article 12 of the Kyoto protocol is the legal basis for the functioning of the CDM. The article also indicated that, the CDM is one of the flexible mechanisms of the protocol having dual objectives/purposes in mind –emissions reductions and contribution to the Sustainable development aspiration of developing parties to the convention. As the CDM is the centerpieces of analysis of the paper, a lot discussion about this mechanism is available in chapter two and three of the paper.

##### **1.1.2.1.3.1 Materiality Standard and Level of Assurance in the CDM**

Decision-/CMP.7<sup>29</sup> introduced the concept of materiality standard and the level of assurance in the CDM. The decision specifically defines what type of information is considered as material information, who will determine the materiality or otherwise of the information and who is ,after all, eligible to produce the information for the pertinent body in charge of deciding materiality. What implication does the materiality or otherwise of the information provided will have in a nutshell?

Accordingly, it defines, under para 7, material information as ‘a piece of information the omission, misstatement or erroneous reporting of which could change a decision

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<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Draft Decision-/CMP.7

by the executive board of the clean development mechanism'. It also makes clear that, the project proponents are the one who will be producing the information.

And, under decision 6 of the same document, the Designated Operational Entity is invested with the power of verification of the information provided and it is requested to use 'a reasonable level of assurance' in assessing whether or not the information is material. Finally, it is the Executive board who will be making the decision-'to register or not the submitted project' or ' to issue or not the Certified Emissions Reductions claimed'.

The EB in its 56 meeting stated that, if the omission of an information is considered by the DOE as not material taking a suitable level of assurance, the DOE will accordingly subject the information to a lower level of scrutiny.<sup>30</sup>

The decision on materiality standard suggest that the concept will only be used by DOEs.<sup>31</sup> But, this has been commented as insufficient by the submissions of all stakeholders who considered it as inadequate to help in improving efficiency in the CDM system arguing that the concept is key in all relevant CDM processes to be utilized not only by DOEs but also CDM secretaries and EB during the review process.<sup>32</sup>

An additional point annexed to the Decision is that, the consideration of materiality has a different implication in a prescriptive<sup>33</sup> and non-prescriptive CDM standards<sup>34</sup>. Accordingly, if the CDM contains prescriptive requirement, the project proponents shall apply the requirements as provided in the standard and any discrepancy in the application of a prescriptive CDM requirements is ,thus, considered as material.

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<sup>30</sup> Standard on the use of Materiality in the CDM(2010)

<sup>31</sup> Nyaoro (2011)

<sup>32</sup> Ibid

<sup>33</sup> See appendix A

<sup>34</sup> see appendix B

The DOE shall verify the compliance with the requirements and the standard has to be followed whether non-compliance with it will not bring an overestimation of the GHG emission reduction of the project. But, either the project proponents or the DOE can request a revision of methodology or deviation from the standard alleging that non-compliance will not bring an overestimation of GHG emissions reduction.

Whereas, in non-prescriptive CDM, the project proponents shall use conservative approach with a view to mitigate the risk of material or non-material overestimation of GHG emissions reduction. And, the DOE shall use expert judgments in assessing whether the approach followed by the project proponents is conservative or should request the Executive board for clarification if it is in doubt.

Finally, the level of assurance in the CDM's context is a concept related to the materiality standard and defines the level of confidence of the DOE in project validation or verification conclusion that the emissions reductions claimed by a CDM project, in aggregate, is free from material errors, omissions or misstatements.<sup>35</sup>

### 1.1.3 Other Offset Standards?

Carbon offset markets exist both under the compliance and also the voluntary schemes.<sup>36</sup> While the compliance market is created and regulated by compulsory regional, national and international carbon reducing regimes like the Kyoto protocol and the EU emissions trading scheme, the voluntary market exists outside of the compliance market and enable companies and individuals to purchase carbon offsets voluntarily.<sup>37</sup>

These voluntary markets are regulated by voluntary carbon offset standards of various kinds. But for the purposes of this paper, the Gold Standard and the Climate, Community and Biodiversity standards are taken as a point of discussion albeit in a general terms.

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<sup>35</sup> Supra note 29

<sup>36</sup> Kollmuss (2008)

<sup>37</sup> Ibid



### 1.1.3.1 The Gold Standard

The Gold Standard principally builds upon the guidance given by the executive board of the CDM.<sup>38</sup> The standard is a set of best practices while preparing Project design documents, validation, monitoring and implementation of GS CDM and GS VER and it targets renewable energy and energy efficiency projects.<sup>39</sup>

The main components of the Gold Standard are three<sup>40</sup> and they are project eligibility or project type screen, which is basically based on a list of technologies comprising renewable energy and demand side energy and transition technologies. Accordingly, the Gold standard projects are restricted to renewable energy projects like solar thermal, wind, geothermal and small, low impact hydro projects; End use energy efficiency in various sectors like industrial, public, commercial, residential and agricultural and transportation sectors.

The other component is additionality screen which focused on ensuring that projects would not occur in the absence of the CDM and that projects will have lower emissions than would occur without the CDM.

The third main component is the sustainable development standard that will ensure that projects are evaluated against specific environmental, social and economic and technological criteria thereby ensuring the delivery of a net positive result for sustainable development.

This sustainable development aspect of the Gold standard is promoted further by screening techniques with a view to deliver real, true sustainable development benefits<sup>41</sup> and thus are; by insisting on best practice environmental impact assessment which basically is not triggered by project participants or the host country

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<sup>38</sup> The Gold Standard: Quality Standards for CDM and JI Projects (2002)

<sup>39</sup> The Gold Standard: Premium Quality Carbon Credits

<sup>40</sup> supra note 38

<sup>41</sup> Ibid

but rather by the local stakeholders their own motion. This is what makes the Gold standard different from the Marrakech accord's stipulation in regard to EIA.

The other is, by developing an explicit public consultation or participation procedures and by cross-checking projects against the 'sustainability matrix' which breaks aspects of sustainable development into pieces like environmental (water quality and quantity, air quality, biodiversity..), social(employment , livelihoods of the poor, human and institutional capacities...) and economic (access to energy services, technological self-reliance,...).

Then, projects will be assessed against each of the matrixes and a project demonstrating a net positive benefit in each identified categories will meet the gold standard and will be registered as Gold standard project proper. In fact, there is what is called scoring system in the Gold standard which ranges from negative 2 which indicates major negative impact, even if that is so in one of the identified categories (without possibility of mitigation) to positive 2 which indicates major positive impact in all identified categories.<sup>42</sup> In sum, it can be said that, the Gold standard is developed with a focus on bringing lasting social, economic and environmental benefits with a single stroke-abatment of GHG emissions.

#### **1.1.3.2 The Climate, Community and Biodiversity Standard**

It is a project design standard, offering rules and guidance for project design and development and hence to be applied on and during a project's design phase with a view to ensure a project design document having a real, local community and biodiversity benefits.<sup>43</sup> The standard can be used with other carbon accounting standards where the CCB can provide the basis for evaluating a project's social and environmental impacts and the former can enable verification and registration of quantified GHG or removals.<sup>44</sup>

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<sup>42</sup> The Gold Standard: Manual for CDM Project Developers (2006)

<sup>43</sup> Climate, Community and Biodiversity Alliance (CCBA)

<sup>44</sup> Climate, Community and Bio diversity , Project Design Standard (2008)

In this way, it enables investors to select carbon credit with additional benefits, while screening out projects with unacceptable social and environmental impacts.<sup>45</sup> The projects eligible to and the exclusive domains of the CCB standard are land based bio sequestration and mitigation projects.<sup>46</sup>

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<sup>45</sup> Ibid

<sup>46</sup> supra note 43

## Chapter Two

### 2.1 Climate Change Measures and Human Rights Issues: A Brief Overview

*There is virtually no aspect of our work that does not have a human rights dimension. Whether we are talking about Peace and Security, Development, Humanitarian Action , the struggle against Terrorism , Climate Change , none of these challenges can be addressed in isolation from human rights.*

*Ban Ki-moon, Secretary General of the United Nations*

#### 2.1.1 Introduction

The UNFCCC and Kyoto Protocol are the results of the international community for the urgency of the climate change problem albeit the fact that these legal response measures are under constant criticism for their effectiveness in addressing the issue at stake<sup>47</sup>.

Keeping these as it may, when one tends to see the position and interface of the climate change legal regime vis-à-vis other legal regime of the international legal system, human rights law as a case in point, things may turn out to be quite troublesome.

The thing is that, the climate change legal regime is premised on environmental and economic considerations without having much concern for human rights. As such, the climate change regime and its policy instruments, more specifically of the mitigation and adaptation strategies are designed in a way that they could be more effective in achieving those premises of the regime where they come from.

But, if the evolving climate change mitigation and adaptation efforts are to “do no harm” and if they are also to avoid human rights related backlash, then human rights must somehow be incorporated in the regime.<sup>48</sup>

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<sup>47</sup> Tauli-Corpuz(2008)

<sup>48</sup> Naomi (2010)

The main concern of the chapter at hand is to specifically show how such broad disciplinary distress has shown itself in the actual ground while the climate change regime is trying to achieve its foundational objective under article 2 of the UNFCCC:

*....stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system...*<sup>49</sup>

In this regard, under this chapter emphasis will be placed on the mitigation aspect of the climate change response measures taking the Clean Development Mechanism (CDM) as a point. A case indication of some CDM projects in Latin American countries and their human rights implication will also be part and parcel of same chapter.

The main argument of the chapter is that, it is not the CDM projects *per se* which is the target of criticism from a human rights violation vantage point rather it is the modality of implementing the particular project in question which raises human rights issues. In this regard, some sort of CDM projects like large hydroelectric power development and the attendant dam construction may have a far reaching human rights violations than other CDM projects since it is accompanied by displacement of people where the dam is decided to be constructed, which again has so many intricate human rights issues within it.

Few of the case indications examined in the chapter are also illuminative of same phenomenon. Thus, the writer of the paper is fundamentally arguing that the modus operandi of the CDM shall be informed by human rights-based approach so that it could squarely fits with international human rights standards and principles thereby ensuring the respect of human rights of the local people where the particular CDM project is being implemented.

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<sup>49</sup> Supra note 4

Further, it is argued that, it is only when CDM projects and their working procedure is infused by human rights concerns that it could really achieve its sustainable development objective apart from its supplementary role for Annex I parties to the Kyoto protocol in achieving their emissions reduction obligation.

In fact, it is this compatibility of the CDM with international human rights principles and standards by what the writer of the paper is calling the notion of “True” sustainable development, a development endeavor that ensures the human rights of the particular community where projects are being implemented.

### **2.1.2 How Climate Change Response Measures Raises Human Rights Issues?**

It is clear that, climate change is downgrading the full realization and respect of the broad array of internationally protected human rights including the right to health, life, food, water, shelter, property rights and rights associated with livelihoods and culture, with migration, resettlement and with personal security in times and crisis of conflict.<sup>50</sup>

More worse is the case that, the most devastating effect of climate change are being felt and experienced by those sections of the society who are dubbed as the downtrodden and most disadvantaged sections of the society whose rights protection is already at stake.<sup>51</sup> These clearly tell us that, in one way or another climate change and human rights legal regimes have a point of intersection.

Nonetheless, this point of contact is at odds with the fact that, both the human rights and climate change regimes are in state of mutual distress which is partly explained by the reason of disciplinary path dependence, the prime reason for same.<sup>52</sup>

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<sup>50</sup> International Council on Human Rights Policy (2008).

<sup>51</sup> Ibid

<sup>52</sup> Ibid

In this regard, while environmental and economic considerations have been at the center of the climate change legal regime, human rights have been sidelined to a greater degree.<sup>53</sup>

Various literatures documented that inadequate mitigation and adaptation strategies like inadequate participation of local communities or disrespect of the due process and access to justice rights of the displaced can lead to human rights violations.<sup>54</sup>

In other words, it has become clear that, certain climate change response measures affects the realization of fundamental human rights or compromises the capacity of countries to realize the different fundamental human rights enshrined under international human rights law.<sup>55</sup> Thus, human rights issues arises in both the mitigation and adaptation policy measures of the climate change regime as the sections below indicates.<sup>56</sup>

If we take the CDM, for instance, it is a supplemental mechanism for the developed countries to achieve their emissions reduction obligation under the Kyoto protocol and it is also a means to fulfill convention obligation and the sustainable development endeavor of the developing countries.<sup>57</sup>

It is, however, devoid of a framework that would ensure that CDM projects are given priority based on, apart from their compatibility with the “vital safeguards” like Additionality and the sustainable development objective of developing countries, their contribution for human rights protection of the poor and marginalized sections of the society and in fact also the environment as a whole<sup>58</sup>.

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<sup>53</sup> Humphreys(2010). pp 200-206

<sup>54</sup> United Nations Human Rights Council, Office of the High Commissioner for Human Rights. (2010.)

<sup>55</sup> McInerney-Lankford, (2009)

<sup>56</sup> Supra note 53 , pp 184

<sup>57</sup> Supra note 2, article 12 (2)

<sup>58</sup> Supra note 53,pp 190

This assertion is further buttressed when one tends to see the Marrakech Accords under paragraph 37 and 40 (c) where none of the validation requirements and verification checklist have a human rights dimension in the entire Validation Process<sup>59</sup> of a given CDM project.

The argument here is that, even though certain CDM projects are quite climate friendly, their net effect and contribution neither for the environment nor to the societal progression and development may be quite negative and may significantly hamper the realization of human rights<sup>60</sup>.

In fact, it is the nature of the climate change response measures in general and the CDM in particular that they are market based mechanisms from the very inception being agreed upon under the Kyoto protocol and implemented by Annex I countries.<sup>61</sup>

As such, all the flexibility mechanism in the Kyoto protocol are premised under the principle of cost effectiveness in achieving emissions reduction obligation of the developed contracting parties.<sup>62</sup>

However, this over and exaggerated emphasis on emissions reductions greatly impacted and sidelined most fundamental of all other concerns: the impact of climate change measures on human rights.

Thus, a complete shift of paradigm both in terms of designing and implementing the post Kyoto climate change legal regime is a matter of necessity in line with human rights considerations. This is so because, after all climate change response measures and more specifically of the mitigation measures are not only about cutting down

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<sup>59</sup> See Appendix C

<sup>60</sup> Ibid,

<sup>61</sup> Tauli-Corpuz, (2009)

<sup>62</sup> Ibid



GHG emissions but is also equally and most importantly about equity, social justice and human rights and of course sustainability.<sup>63</sup>

On a similar token, the United Nations Economic and Social Council in its permanent forum on Indigenous Peoples Issues clearly affirmed and/or reiterated that, climate change mitigation and adaptation strategies should take note of not only the economic dimension of climate change but also the perspective of human rights, equity and environmental justice needs.<sup>64</sup>

The basic concern here is that, even though the UNFCCC aims to mitigate GHG emissions and to adapt populations to their changed climates, the mitigation and adaptation policies are found to be creating or further exacerbating the human rights concerns albeit unintentionally.<sup>65</sup>

Quite dismaying, however, is the fact that, there is no coordinated and concerted effort to address the human rights concerns ensued by the climate change response measures and the potential for harm through the available mechanisms under the existing human rights systems.<sup>66</sup>

Nonetheless, at present the relevancy of the fundamental human rights as enshrined under international human rights being the driving force for cooperation and integration on climate change and as an obligation in informing the response measures with human rights issues, is clearly acknowledged and reaffirmed by the UNFCCC, the Kyoto Protocol and the recent Cancun Agreement.<sup>67</sup>

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<sup>63</sup> Ibid

<sup>64</sup> Tauli-Corpuz,. (2008)

<sup>65</sup> Loftus-Farren (2011).

<sup>66</sup> Ibid

<sup>67</sup> Ibid

The Cancun agreements in particular makes a frequent reference to the relevancy of taking note of human rights considerations in all climate change related action. Typical instances are under paragraph 5 of the COP decisions 1/CP16, which recognizes that:

*...climate change represents an urgent potentially irreversible threat to human societies and....to be urgently addressed by all parties*<sup>68</sup>

Further, under paragraph 7, the agreement reiterates Resolution10/4 of the Human Rights Council on Human Rights and Climate Change which basically recognizes the adverse effect of climate change –direct and indirectly- for the realization of human rights and the fact that its impact is most acutely be felt by the already vulnerable and discriminated sections of the society owing to sex, age, race, geography, indigenous, minority status or disability.<sup>69</sup>

A much more explicit statement is under the Shared Vision for Long-Term Cooperative Action part of the same agreement under part I Decision 8 which emphasized that “parties should in all climate change related actions, fully respect human rights”.<sup>70</sup>

This very general statement can be interpreted as , member states of the UNFCCC and also the Kyoto protocol , should be aware of the detrimental side of their climate change related actions on human beings and rights so that a precautionary or preventative measures could be taken ahead.

Interpreting this assertion in the CDM’s context, it can be argued that the executive board has an obligation to ensure that human rights are respected and the board can use the “do no harm safeguards”-the 11 safeguarding principles derived from the

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<sup>68</sup> Decisions 1/CP16

Millennium Development Goals- in discharging its obligation and to ensure that CDM projects do not cause negative impacts<sup>71</sup>, including human rights.

Equally important is, the COP decision in the Bali Action Plan, COP. Dec. 1/CP.13, under Dec.1(b)(vi) makes clear that the “Economic and Social consequences of response measures”, particularly of the mitigation measures, shall be taken into consideration.<sup>72</sup>

This again clearly calls for climate change response measures to be conscious of non-climate change related ends like the impacts of the measures on human rights and economic activities.

In the context of UNFCCC, under article 4 , para 8, there is a clear statement that the economic and social consequence of response strategies to be taken into account. On a similar vein, the Kyoto protocol under article 2(3) it indicated that adverse effects on the social, environmental and economic activities of the parties needs to be minimized. The same kind of annotation is made under article 3 (14) of the protocol.

Nevertheless, it is broadly recognized and accepted that rights-sensitive development policies are more sustainable than those that do not consider rights enjoyment<sup>73</sup>.

This is so because, it is only those development programmes and endeavors which have been informed and infused by human rights concerns that have been dubbed as sustainable, effective and efficient than those which are devoid of same concern<sup>74</sup>.

The same is affirmed by the Human Rights Council Resolution 10/4 which states that:

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<sup>71</sup> CDM Executive Board (EB65): Report on Sustainable Development Co-benefits and negative Impacts of CDM Project Activities.

<sup>72</sup> The Bali Action Plan (2007)

<sup>73</sup> Ibid

<sup>74</sup> Supra note 16, PP40

*Human rights obligations and commitments have the potential to inform and strengthen international and national policy making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcome*<sup>75</sup>

This is further buttressed by the statement made by the Office of the United Nations High Commissioner for Human Rights (OHCHR) which underscores that:

*Principles and standards derived from International human rights treaties should guide all policies and programming in all sectors and in all phases of the process*<sup>76</sup>

Being all these as it may, climate change response measures are not entirely antithesis to human rights considerations but the above analysis is simply to indicate that, it is observable for these response measures in undermining the fundamental human rights of individuals<sup>77</sup>. Typical circumstances to same end are, though it is true that mitigation measures could help in cutting down Green House Gas (GHG) emissions and also global warming, they are also bringing unprecedented human catastrophe<sup>78</sup>.

In this regard, some CDM projects particularly of hydropower projects, which are believed to constitute the lion share of the technology package in the CDM, quite unfortunately, there is little international supervision of these projects under the CDM-where Permit applicants need only apply their own respective national sustainable development standards to their CDM projects.<sup>79</sup>

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<sup>75</sup> Human Rights Council Resolution 10/4 on Human Rights and Climate Change

<sup>76</sup> Supra note 53

<sup>77</sup> Blazogiannaki(2009)

<sup>78</sup> Supra note 65

<sup>79</sup> Ibid

As a result of same problem, it has become a common experience to see that the projects divert river water resources from the reach of the entire community and causing health problems, which comes from construction dusts, a decreased amount in the marine population and the loss of flood plain agricultural capacity, which in turn result in displacement of the population for fear of land submergence.

Adaptation policies as the other facet of the climate change response measures have also resulted in quite unintended human rights concerns.

One of the dire consequences is, relocating coastal communities or entire small island states affected by rising sea levels and the flooding of low-lying area which may also raise a host of human rights concerns.<sup>80</sup> In this regard, it is clear that relocation may accelerate existing cultural, economic and political stresses on dislocated individuals, as well as on the communities into which they resettle.

It could result in loss of livelihood, resource shortages and social tensions. Further, tensions may be amplified when the displacement, be it cross border or internal, brings different communities into contact thereby resulting in competition with other over land, food, water and other resources which can potentially lead into violence.

Even though relocation of people may be viable option in some instances and may be necessary to avoid present harms and mitigate future happenings, the process of doing so must consider a broad array of human rights implications for the displaced population.<sup>81</sup>

The main point to be noted here is that, the negative impacts which climate change mitigation and adaptation policies may have on the effective enjoyment and

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<sup>80</sup> Protecting People and the Planet (2009)

<sup>81</sup> Ibid

realization of human rights have received the least of least consideration in the development of policy frameworks in the climate change regime.<sup>82</sup>

The problems mentioned above are , therefore, the results of the lack of an inclusive and comprehensive focus on human rights impacts of climate change policies; but tackling these problem at a grass root level demands an integration of a human rights based approach on both policy conceptualization and implementation phases.<sup>83</sup>

### **2.1.3 Are The Existing Climate Change Response Measures Adaptable For Human Rights Concerns?**

Even though it is argued that the climate change legal regime is premised on environmental and economic considerations, the existing regime has a number of important entry points which can enable us to consider human rights thereby to ensure the legitimacy of the climate change law and at the same time measures taken to ameliorate same problem do not have any repercussion on the enjoyment of fundamental human rights and freedoms.<sup>84</sup>

In this regard, it is argued that, human development, which puts human rights and environmental concerns at its heart of analysis, shall take the primacy rather than economic and environmental consideration, which pre-dominated the regime since its inception.<sup>85</sup>

In the Bali Action Plan, for instance, while discussing the impact of climate change on the human population, a call has been made for an improved mitigation measures with a particular demand for the climate change response measures to consider economic and social consequences during their design and implementation.<sup>86</sup>

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<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Supra note53, pp183

<sup>85</sup> Ibid, pp203

<sup>86</sup> Supra note 72

Further buttressing the centrality of human rights in the design and implementation of climate change response measures is the attention paid to it in both the 15<sup>th</sup> and 16<sup>th</sup> COP meeting held in Copenhagen and Cancun respectively.<sup>87</sup>

Most importantly, the UNFCCC stipulates under the preamble - '*global warming is adversely affecting humankind and responses to climate change should be coordinated with social and economic development with a view to avoid adverse impacts on developing countries*', and also under article 1, "*Adverse effects of climate change means ...climate change which have significant deleterious effects on...human health and welfare*".

Similarly, the Kyoto protocol under article 2(3) also recognized and urged states to consider and take human rights as a justification and motivation for climate change negotiation and cooperation and even as matter of duty to take note of them in shaping the climate change response measures.<sup>88</sup>

Besides, article 10 (d) of the same protocol talks about reducing the adverse effects of climate change and '*... the economic and social consequences of various response strategies...*'. And, also under article 3 (14) parties to the protocol have the obligation to '*...minimize adverse social, environmental and economic impacts*' while discharging their quantified emissions reduction obligation under sub (1) of the same article.

On a similar token, at COP-16 in Cancun, the Ad Hoc Working Group on Long-term Cooperative Action under the Convention also explicitly acknowledged the connection between human rights and climate change.<sup>89</sup>

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<sup>87</sup> Ibid

<sup>88</sup> Supra note 65

<sup>89</sup> Ibid

The point here is, therefore, the centrality of human rights concerns in the climate change legal regime has been upheld by the relevant COP decisions and legal regimes.

The implication is that, as long as there is robust commitment and clear volition on behalf of the international community to inculcate them while conceptualizing, framing and finally implementing the response measures, it is possible for the climate change response measures to adapt to same concern. What is left is taking human rights seriously in the policy design and implementation of the climate change response measures, nothing more is in need indeed.

## **2.2 How Human Rights Concerns Could Be Integrated In The Existing Climate Change Response Measures?**

The notion of integration as a concept has got its foothold in International law in the discourse of sustainable development and it is in fact one of the most innovative of all principles under international law.<sup>90</sup> Accordingly, it recognizes the interplay between the pursuit of poverty eradication and development, environmental protection and the respect for human rights and the integrated manner in which all these objectives in these areas are to be tackled.<sup>91</sup>

The principle apart from being referred to in the Stockholm declaration by requesting states to adopt an integrated approach to their development with a view to ensure that their development endeavor is compatible with the need to protect and improve the human environment for their population benefit, it has also got a wide endorsement in the climate change regime –under the preamble of the UNFCCC-:

*...responses to climate change should be coordinated with **social and economic development**...*<sup>92</sup>

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<sup>90</sup> Supra note 13, pp203

<sup>91</sup> Ibid, pp204

<sup>92</sup> Supra note 4



Nevertheless, integration as such is more can easily be achieved within institutions while a more nuanced achievement to sustainable development can be demonstrated if the integration is between institutions.<sup>93</sup>

In the context at hand, the latter assertion clearly supports the fact that, a real integration between the human rights and the climate change legal regime, more particularly in the response measures context is feasible. This is so because, as discussed above, after all the climate change legal regime is not an absolutely closed regime for human rights concerns even though its genesis is devoid of same.

For instance, the flexibility mechanisms though premised on market based mechanism, its constituents like the CDM have elements which has to do with human rights and human rights-based approach.

In this regard, current CDM modalities and procedures contain some elements and instruments that help promote rights based approach like disclosure of environmental assessments and channels for public participation even though it is expected to adopt the rights based approach to effectively ensure that its operations really contribute for sustainable development apart from realizing fundamental human rights.<sup>94</sup>

Typical instance is in the Marrakech Accords under Annex B regarding Project Design Document where EIA has been mentioned as one of the elements that needs to appear a given PDD (Para. 2(e)). And, the provision states the need for documentation on the analysis of EIA, and in cases when the environmental impacts of the project is found to be significant by the determination of the project participant or the host country, then a conclusions and all references to support documentation of an EIA that has been undertaken in accordance with the procedures prescribed by the host country is needed.

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<sup>93</sup> Segger (2005) pp,280

<sup>94</sup> Greiber (2009)

Very surprisingly, the provision is silent regarding the substance and processes of EIA in the CDM nor there is a threshold requirement indicating the level of ‘significancy’. Only that under paragraph (g) stakeholders comments and how due account of that should taken is stated.

A close reading of the provision rather indicates, as in the case with sustainable development, EIA is also something to be conducted if the host country has a law to that end and its sole discretion to have or not to have it.

This is however not a healthy phenomenon taking into account the fact that, at least conducting EIA in a trans-boundary context is a customary obligation(having a binding effect irrespective of treaty commitments) imposed up on all states as indicated in the *Pulp Mills Case*.<sup>95</sup>

In fact, the court recognized in the case that, each state has the right to determine in its domestic legislation or in the appropriate Authorization process of the specific content of the EIA required in each case having regard to the nature and magnitude of the proposed development and also its likely adverse impacts on the environment further underscoring the need to exercise a due diligence in conducting the assessment.

But, this does not mean that each state has the sole discretion to determine the content of an EIA rather International law demands as a minimum an EIA to assess the possible impacts of the project on the people, property and environment of other states to be affected.<sup>96</sup>

Nevertheless, if properly defined and utilized in the CDM modalities and procedures it is a significant entry point for HRBA in the CDM.

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<sup>95</sup> Boyle(2010)

<sup>96</sup> Ibid

But, the muteness of the CDM Modalities and Procedures for the situation that the host country does not have any laws on environmental impact assessment can rightly be considered as a significant legal lacuna in the proper sense of the term.

In such instances, recourse to the working standard of the Gold Standard has to be considered, which recognizes stakeholders' own initiation of environmental impact assessment in the absence of a law in the host country regulating EIA.

Still CDM project stakeholders including UNFCCC accredited NGO's have a say on the project validation phase of the CDM as per para.40(c) of the same accord.

And, the Marrakech Accord (Dec.3/CMP.1) has defined 'stakeholders' as 'the public or any individual, groups or communities affected or likely to be affected by the proposed CDM project activities'. The stakeholders' participation takes different forms and means depending on the timing when the consultation is called for.

For instance when it is on the first time meeting when preparing the project design document a "live" meeting with the local communities using their local language is important, and the invitation means including letters (having non technical summary of the project using the local language), church and school postings (using local languages and being non technical)<sup>97</sup> in places where radio and television is not accessible will ensure gathering the required critical mass of stakeholders participation thereby ensuing impartiality of the entire process.

Similarly when the call is made by the DOE as per article 40 (c) of the Marrakech accord , a non technical summary of how initial stakeholders consultation is taken into account and how the project is not detrimental to the local communities lives and livelihoods needs to be stated using the local languages.

The point is, this aspect of the CDM projects validation and registration process while taking note of the voice of the stakeholders is something to be complimented

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<sup>97</sup> Supra note 72

with the HRBA, which also advocates for active participation, particularly of those to be impacted by a certain decision.

Though there is no explicit mentioning in the article regarding social impact assessments, an extended and holistic interpretation (Article 31 (3) (c) of the Vienna convention) of the Marrakech Accords provision regarding EIA lead us to see the prospect of the human and or social dimension of the impact of the proposed project.

The big flaw of the provisions, particularly of the environmental impact assessment provision, however is, its heavy reliance on the determination of the project participants and the host country only while making the assessment of the potential environmental implication of the proposed CDM project. Here, the project developer or the host country will conduct the environmental impact assessment in accordance with procedures as determined by the host party (Annex to Decision17/CP7, para, 37 (c)) and appendix B (2 (e)) of the Marrakech Accords)

However, it is those who are really facing the brunt of the negative spillover effect of the proposed project-the local stakeholders- who should also have a say in determining the significant environmental impact or otherwise of the proposed project.

Here, it is not being argued that the two actors mentioned in the provision-the project participants and the host country-have a less role to play to same end but it is rather being argued that, a real valuation of the impact of the proposed project would have been made if the local stakeholders are also determinant agents of the proposed project's environmental impacts.

It should not also be forgotten that, sometimes the interest and position of the state as a representative of its people and the people *per se* may not always coincide. And, the same is true with project participants who could also have various intentions behind the scene.

Indeed, stakeholders participation is not absolutely zero in the CDM rather from the very beginning public participation in the CDM's decision-making is limited and so is the types and number of stakeholders too.<sup>98</sup>

And, it is in recognition of this state of fact that some people are arguing that, participation of diverse stakeholders in the CDM project cycle is an important element in maintaining transparency in decision making, and that the Executive board and the COP/MOP to introduce a mechanism to come up with specific guidance on an ex-post validation comment period and public consultation for comments before a Letter of Approval is issued by the Designated National Authorities, a mechanism already inbuilt in the voluntary market mechanisms like the Plan Vivo and the Climate, Community and Biodiversity standards.<sup>99</sup>

Being these as it may, the integration of the human rights concerns in the climate change response measures can take various forms where the writer of the paper has proposed three dimensions to same end: Legal (Compulsory), Institutional and Policy (Non-binding) dimensions of Integration.

Factually, it could be argued that integration works in both sides. None the less, it would be easier at this time if the integration process is approached from the human rights to climate change regime as the latter is only evolving and have not yet finished its 'evolutionary' stage compared to the matured and well established international human rights law.

### **2.2.1 Legal Integration**

From the very beginning, most parties to the core human rights instruments are also found to be member states to the climate change legal regime under the Kyoto protocol and the UNFCCC.<sup>100</sup> As such, state parties to both regimes can be compelled

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<sup>98</sup> Supra note 31

<sup>99</sup> Ibid

<sup>100</sup> Rajamani (2010)

to treat the problem of climate change not only as a global problem *per se* but also as a major human rights issue and concern.<sup>101</sup>

Thus, apart from the clear obligation they have in relation with identifying the human rights that are at risk of violation by climate change and to take intervention measures to same effect, they are also duty bound to inform the climate change response measures and policies in a way that it could be more alert and suitable for the progressive and effective realization of internationally protected human rights and freedoms.<sup>102</sup>

Further, with a view to ensure consistency of obligation which states have assumed under international law, particularly of the human rights regime, they need to make their climate change policies and measures more compatible and palatable with the former in the post Kyoto climate change legal regime.<sup>103</sup>

### 2.2.2 Policy Integration

The policy integration of human rights concerns to the climate change response measures is dictated by the strong statement made by the Office of the High Commissioner for Human Rights, which underscored that:

*Principles and standards derived from International Human rights should guide all policies and programming in all sectors and in all phases of progress*<sup>104</sup>

The human rights council particularly indicated the extent to which human rights obligations and commitments have a role in informing and strengthening the national and international policy making in the sphere of climate change by highlighting the imperative role of HRBA in the climate change response measures.<sup>105</sup> Furthermore, it is indicated that, the strategies for mitigation and adaptation must take the

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<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Supra note 54

<sup>105</sup> Ibid

dimension of human rights, equity and environmental justice apart from the ecological dimensions of climate change.<sup>106</sup>

The need to integrate and hence bring into a sharp focus of the human rights dimension in the mitigation and adaptation strategies to address climate change have also been underscored by the then deputy High Commissioner for Human Rights, Mrs. Kyungwha Kong, at the Bali Action Plan in 2007.<sup>107</sup>

### 2.2.3 Institutional Integration

Mainstreaming human rights considerations in the existing institutional arrangements and mechanisms of the climate change legal regime is clearly argued for.<sup>108</sup> In this regard, within the climate change legal regime that could take on the mandate to link the climate change and human rights concerns is the SBSTA (owing to its principal role in assessing the scientific, technical and socio-economic aspects of mitigation of climate change<sup>109</sup>) and SBI, and in the CDM's context, the Executive Board can be mandated to same end.<sup>110</sup>

The Executive Board have a decisive role to play particularly by making recommendations on further modalities and procedures for the CDM to the COP/MOP.<sup>111</sup>

A further institutional integration is, UNFCCC bodies can produce technical papers that could identify existing or potential problems relating to climate change and human rights or they can organize workshop, produce paper or they can call for an

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<sup>106</sup> Supra note 55

<sup>107</sup> Supra note 67

<sup>108</sup> Orellana. (2011)

<sup>109</sup> SBSTA-36 (2012)

<sup>110</sup> Ibid

<sup>111</sup> Supra note 14, para. 5

expert meeting to discuss the integration aspect of climate change and human rights apart from requiring the UNFCCC bodies to consider human rights dimension in their climate change negotiation including coordinating common approaches or responses to address climate change and human rights in close collaboration with other international bodies like the OHCHR.<sup>112</sup>

Also, the coordinating mechanisms of the United Nations, ie, CEB (United Nations system Chief Executive Board) and IASC (The UN Inter-Agency Standing Committee), also plays a great role in the institutional integration process of climate change and human rights issues.

The former has taken on climate change as one of its main thematic concern and its primary goal is supporting existing mandates relating to climate change (Technology transfer, Financing mitigation and adaptation action, capacity building and in cross cutting issues like the social dimension of climate change) as well as providing institutional architecture carrying through a ‘post-2012’ global agreement under the UNFCCC.<sup>113</sup>

IASC has also created a task force with mandates like inputting into the UNFCCC process (providing technical and expert assistance to negotiators at the UNFCCC, educational activities) and providing guidance to the IASC on integrating climate risk management into agency work by developing relevant guidelines and tools.<sup>114</sup>

A concerted work of these bodies in the mainstreaming of human rights in the climate change institutional architecture plays a great role in bridging the actual and potential gaps between the climate change and human rights regimes.

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<sup>112</sup>Ibid

<sup>113</sup> International Council on Human Rights Policy (2011)

<sup>114</sup> Ibid



## 2.3. Human Rights Concerns in the CDM's Context

### 2.3.1 How The CDM Raises Fundamental Human Rights Issues?

Climate change is manifesting itself in various ways including rising sea level, increasing temperatures, extreme weather events, droughts and cyclones, receding coastlines, melting permafrost and changes in precipitation pattern which all have a direct impact on human population and their livelihood; on the other hand, the climate change response measures intended to avert these phenomenon of the climate change problem are found to be profoundly affecting the livelihood, living conditions and cultures of the indigenous people and the local communities where these policy measures are intended to be operationalized.<sup>115</sup>

The mitigation measures, in particular, have certainly human rights impacts.<sup>116</sup> For instance, some CDM projects like large hydroelectric dams, waste-to-energy and afforestation projects are problematic from human rights point of view.<sup>117</sup>

Recent practical case is also the *Bajo Aguán* Biogas CDM project in Honduras which is found to be linked with serious human rights violation where 32 people were killed in *Bajo Aguán* between January 2010 and June 2011 in disputes with three major palm-oil producers<sup>118</sup>

In this case, the Project developer *Grupo Dinant* is alleged to have been at the center of violent conflicts with the local people, who were deprived of their land during the building of the palm-oil plantation. Nevertheless, despite a huge uproar against the project, the CDM Executive Board has approved the project as qualified for Certified Emissions Reductions (CERs) credits.<sup>119</sup>

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<sup>115</sup> Supra note 80

<sup>116</sup> Ibid

<sup>117</sup> Supra note 47

<sup>118</sup> Honduras: Human Rights Violations in Bajo Aguan , International Fact Finding Mission Report (2011)

<sup>119</sup> Executive Board of the Clean Development Mechanism 62 Meeting Report

To every once in a while, the CDM executive board recently announced that, albeit a well-documented human rights violations issues related with *Bajo Aguán* Biogas CDM project, it lacks the logistics to make a field investigation of the matter and hence “cannot verify human rights issues”.<sup>120</sup> As such, it proclaimed that, “could not withdraw registration for Honduras’ Dinant Corporation”<sup>121</sup> More facts about this case is found in Appendix D of this paper.

Similarly, the *Barro Blanco* project- a hydroelectric power plant in the district of *Tole* in the province of *Chiriqui*, Panama, also raised a serious human rights violations issues.<sup>122</sup> On this project apart from the concern on the additionality of the project, a serious concern and criticism was raised on the lack of adequate public consultation and human rights abuses involving the company *GENISA* against the *Ngobe* indigenous peoples.<sup>123</sup> The project is registered as a CDM project on the 26<sup>th</sup> of Jan.2011.<sup>124</sup>

As has been said above, the mitigation measures are market-driven. None the less, the non-market consideration have not been given the due attention, particularly the human rights-based approach to development and the ecosystem approach which can be of great help in the design and implementation of mitigation measures are totally side lined.<sup>125</sup> In the CDM’s context, there is no requirement to consider human rights in the sustainable development determination by the host countries.<sup>126</sup>

It is true that, the host country of the particular CDM project are the one to determine to what extent the particular CDM project can contribute for its sustainable

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<sup>120</sup>CDM Registers Facusse’s Dinant Corp., cannot verify Human Rights Issues’

<sup>121</sup> Ibid

<sup>122</sup> CDM Watch (2011)

<sup>123</sup> Ibid

<sup>124</sup> CDM Project 3237: Barro Blanco Hydroelectric Power Plant Project

<sup>125</sup> Supra note 64

<sup>126</sup> Orellana, (2010)

development endeavor and that is the sovereign prerogative of the state.<sup>127</sup> And, this takes us to the inevitable conclusion that, it is up to the host country to determine to what extent it could consider, if at all, human rights in its determination of a particular project's contribution for its sustainable development objective, a matter quite contradictory to the very idea of human rights as a universal concern and the very notion of sustainable development which has the dimension of human rights from the outset.<sup>128</sup>

Even though CDM projects like fuel switching, growing trees in deforested areas and solar panels in rural villages which enables access to electricity, have a vital importance in an effort to combat human induced climate change problem including promoting Sustainable development in developing countries, the potential to pose a serious threat to the substantive rights, like the right to life, health and food and procedural rights, like the right to participate in decision makings, of various sections of the society is enormous<sup>129</sup>. And, that is what the aforementioned recent practical cases are telling us.

Development projects are often implemented without securing the Prior Informed Consents (PIC) of the local communities to be affected by the planned development projects, resulting in displacement and collateral environmental damages; and at times even implemented without conducting EIA (even if the host country laws demands) where CDM as a specific development project also shares same feature and even with a more rights violation as it is believed that CDM projects will grow in the future.<sup>130</sup>

As such, the fact that CDM projects involve the displacement of communities from their lands and territories and results in other human rights impacts including the

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<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Supra note 108

<sup>130</sup> Ibid

denial of the PIC of indigenous peoples and other local communities for relocation or the plantation of a renewable energy industry or for any other climate related actions which have a direct or indirect implications are significant human rights issues and impacts on the latter population.<sup>131</sup>

Illuminating of this phenomenon is also the human rights violations being recorded in the indigenous territories in Panama as analyzed by Mary Finley-Brook and Curtis Thomas in their recent case study articles, *Treatment of Displaced Indigenous Populations in two large Hydro Projects in Panama(2010)*<sup>132</sup> and *Renewable Energy and Human rights Violations: Illustrative Cases from Indigenous Territories in Panama(2011.)*<sup>133</sup>

The authors clearly showed to what extent the indigenous people living in *Naso* and *Ngobe* community have experienced the serious and continual human rights violation as a result of the *Chan 75* and *Bonyic Dams* construction for hydro electric power generation which aims to qualify for Carbon Credit under the CDM.<sup>134</sup>

The right to free, prior and informed consent is textually expressed only in the UN Declaration on the rights of Indigenous peoples, and all the other developments within the International law of human rights is the non-binding commentaries of UN treaty bodies such as the committee on economic, social and cultural rights, the committee of experts on the application of conventions and recommendations in the interpretation of ILO convention and the committee on the elimination of racial discrimination.<sup>135</sup>

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<sup>131</sup> Supra note 64

<sup>132</sup> Mary(2010).

<sup>133</sup> Mary(2011)

<sup>134</sup> Ibid

<sup>135</sup> Ward (2011)

And, all these developments have a limited impact in developing a customary international law but it can safely be said that as state practice is vital in developing customary international law, all these human rights instruments and mechanisms can continue to challenge with a view to guide state practice thereby the formation of a customary right to free, prior and informed consent.<sup>136</sup>

There is, thus, no an existing customary international legal principle of indigenous peoples to PIC, but only of a minimal norm developing towards requiring consultations in good faith.

Albeit the fact that, indigenous peoples have host of rights as enshrined under the declaration on the rights of indigenous people including the prescription that they have the right to control over any development activities being carried out in their territories, lands and resources and that affects them in one way or another<sup>137</sup>, the *Chan 75* and *Bonyic* hydroelectric power dam construction clearly goes against these rights and even the state agencies together with private firms conspired to dominate and oppress the local people.<sup>138</sup>

In the case study, it is even indicated that, being supported by the state, the project developers have used physical force to quell the opposition and to claim the exploitation or protection of the natural resources with the market value. In *Bonyic case*, for instance, construction has begun in spite of the *Naso* villagers are protesting.<sup>139</sup> In the same situation, in the *Chan 75* dam construction while villagers including the women and children were opposing, national police beat and arrested the protesters.<sup>140</sup>

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<sup>136</sup> Ibid

<sup>137</sup> Supra note 133

<sup>138</sup> Supra note 132

<sup>139</sup> Ibid

<sup>140</sup> Supra note 133

The Declaration on the Rights of Indigenous People, under the preamble part demanded that indigenous people's culture, traditional practices and knowledge shall be respected affirming the fact that it will contribute for their sustainable and equitable development and also proper management of the environment.<sup>141</sup> Thus, the experience on both the *Chan 75* and *Bonyic* case is a clear violation of Article 10 of the declaration which unequivocally state that:

*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return*<sup>142</sup>

At any rate, the HRBA approach is decisive because of the fact that, it requests policies and institutions chosen for achieving development to be based explicitly on the norms and values spelt out in the international human rights law.<sup>143</sup> It further demands that, the process of policy formulation apart from being participatory of the stakeholders, it should also ensure the progressive realization of rights as enshrined in international law.<sup>144</sup>

Evaluating the aforementioned case indications as depicted by the two authors and also the *Bajo Aguán* and the *Barro Blanco* CDM projects, the realities of the climate change regime in general and the CDM in particular indicates the fact that, it is below the standard and essential requirements of the HRBAD.

The implication is that, unless prompt reaction is made with a view to integrate the HRBAD in the policy design and implementation of the climate change response

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<sup>141</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007)

<sup>142</sup> Ibid

<sup>143</sup> Sengupta.(2005). pp112

<sup>144</sup> Ibid, pp113

measures in general, the potential of human rights violation will continue to the level where the anthropogenic climate change problem itself is impacting human rights of the various sections of the society in multifarious ways and unequal level.

Looking at the CDM from the sustainable development perspective also reveals the fact that, most CDM projects primary focus (both the proposed and approved one) to date has been, on the maximization of generating as much CER as possible than pursuing Sustainable Development.<sup>145</sup> Nonetheless, it is only when a certain climate measure is compatible with the basic requirement of Sustainable development that it can really be effective and efficient.<sup>146</sup>

In this regard, all the traditional pillars of sustainable development (economic, social and environmental dimensions) needs to be considered by a certain climate change measure if it has to be effective.<sup>147</sup> And, it is the simultaneous consideration of all these dimensions in the ‘normative continuum’ (from the negotiation to the final implementation and consideration by courts of law in its decision) what is required by the principle of integration, the principal element of the notion of sustainable development.<sup>148</sup>

But, if a measure happens to miss or ignore either of the dimensions of sustainable development, it would not be sustainable<sup>149</sup>. In fact, it should not be construed that any regime shall miss its primary and established objective, in the climate change mitigations context, reduction of GHGs emissions (primary sustainability criteria).<sup>150</sup> Nonetheless, all the subsidiary sustainability considerations and the extent of their

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<sup>145</sup> Supra note 16, pp 349

<sup>146</sup> Ibid

<sup>147</sup> Bugge,(2008)pp534

<sup>148</sup> Supra note 16, pp374

<sup>149</sup> Ibid, pp332

<sup>150</sup> ibid

considerations while designing and implementing policies to achieve the primary consideration is also all the most important emphasis.<sup>151</sup>

While these being the understanding of sustainable development in a nutshell, the notion is a bit abused if one tends to look at the CDM. Sustainable development in the CDM context is quite undefined and there is no a uniform understanding to same till to date. This is so because, the content and meaning is left to the host countries Designated National Authorities (DNA) prerogative.

But, what is being argued here is that, at least states needs to exercise their sovereign prerogative in determining the sustainability of a particular development endeavor in general and the CDM projects in particular within the broad framework and understanding of sustainable development in international law as elaborated above.

Besides, without prejudice to host states sovereignty in determining sustainable development criteria, with a view bring a benign climate change and sustainability outcomes, observing human rights and including it as one mandatory and permanent sustainability criteria of host states determination of sustainable development objective shall be made a matter of international obligation.

What should be noted is also the fact that, the “convergence” of human rights and climate change policy are mutually reinforcing and as such, human rights sensitive climate change policies can protect human rights and at same time human rights can promote more effective and sustainable climate change policies.<sup>152</sup>

And, that is why active consideration of human rights while issuing sustainable development criteria is a matter of necessity. Also, human rights are an international concern and even of *erga omnes* obligation<sup>153</sup>. Thus, any practice of the state which

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<sup>151</sup> Ibid

<sup>152</sup> Supra note 68

<sup>153</sup> Cassesse. (2005) pp12



goes against this international common good is devoid of any basis and lacks the legitimacy in the eyes of the international play zone. This fact by itself can also serve as the driving force for host countries to inculcate human rights considerations in their effort to develop sustainable development criterion.

Furthermore, the consideration of human rights is compatible with UNFCCC and it is one of the guiding principle as enshrined in article 3.1-the Common but Differentiated Responsibilities of states-to address climate change which allows governments to make advance based on relative resources.<sup>154</sup>The principle is also concomitant with states obligation under the ICESCR which mandates the progressive realization of economic, social and cultural rights with a further interesting point that both the UNFCCC and the ICESCR acknowledges wealthier states implicit commitment to support international cooperation and provide assistance to the less developed for the latter's to achieve international standards.<sup>155</sup>

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<sup>154</sup> *ibid*

<sup>155</sup> *ibid*

## Chapter Three

### 3.1 Reinvigorating the Clean Development Mechanism Using the Human Rights- Based Approach to Development (HRBAtd) and the Principle of Sustainable Development as Toolboxes.

#### 3.1.1 HRBAtd: Definitions and Attributes

The task of analyzing the HRBAtd in the context of climate change response measures demands beforehand a clear understanding of what HRBA means and how it is conceived or understood in the broad array of literatures invested to it.

In this regard, the underlying idea behind the notion of HRBAD is that, policies and institutions chosen for achieving development endeavors should be explicitly based on the norms and values spelt out in the International law on Human rights.<sup>156</sup>

In other words, HRBA is a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.<sup>157</sup> It seeks to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distribution of power that impede progress and weaken human rights.<sup>158</sup>

Under a human rights-based approach, plans, policies and programmes are designed in a system of rights and corresponding obligations established by international law.<sup>159</sup> As such, it specifically identifies the duty bearers and their corresponding obligation and that of the right holders together with the rights they are entitled to, with a view to strengthening the respective capacity of the right-holders to claim their rights and the duty holders to discharge it to the satisfaction of the former.<sup>160</sup>

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<sup>156</sup> Supra note 142 ,pp112

<sup>157</sup> United Nations Human Rights Council, Office of the High Commission for Human Rights (2010)

<sup>158</sup> Ibid

<sup>159</sup> Gready(2005), pp 60

<sup>160</sup> Ibid

This attribute of the HRBA helps to promote the sustainability of development, empowering the people themselves (rights holders), especially of the most marginalized to participate in policy formulation and hold accountable those who have a duty to act (the duty bearers).<sup>161</sup>

The notion also firmly advocates the idea that, principles and standards like universality, inalienability, indivisibility, interdependence, interrelatedness, equality, non-discrimination, participation, inclusion, accountability and the rule of law, which are derived from international human rights treaties-should guide *all development cooperation and programming in all sectors and in all phases of the programming process*.<sup>162</sup>

Development is not always about aggregate improvement in the living conditions of a countries population as shown by per capita growth nor the availability of a doctor per person but it is also about giving a special emphasis to those who fail to share from the aggregate improvement as a result of discrimination, be it explicit or implicit in its approach.<sup>163</sup>

Thus, HRBAD pays more attention to exclusion, discrimination, disparities and injustices and the causes to same thereby provides better protection to people from power exertion and can be used as a tool to challenge power.<sup>164</sup> In a nut shell, HRBAD is best described by its effort to integrate human rights principles and standards as derived from international human rights instruments and documents like non-discrimination and equality, participation and inclusion into the process of implementing development objectives.<sup>165</sup>

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<sup>161</sup> Ibid

<sup>162</sup> Andreassen (2010) pp51

<sup>163</sup> Ibid

<sup>164</sup> Supra note 159, pp 60

<sup>165</sup> Ibid, pp52

This being as it may, the analysis of the HRBA in the climate change response measures is triggered by the fact that, as climate change impacts can have significant implications for lives, livelihoods, homes and potentially for the human rights, the policies and operations of climate change can also equally lead to adverse human and social effects.<sup>166</sup>

And, it is this implication of the response measures in general and the CDM in particular that necessitated the writer of this paper to bring the human rights-based approach into sharp focus as one policy instrument in an effort to minimize the adverse effect of some CDM project activities of their human rights implication.

### **3.2 Why HRBA in the CDM?**

There are certain attributes, which makes the CDM different from the other implementation mechanisms of the Kyoto protocol.

In this regard, the basic understanding about the CDM is that, it is one of the important instruments in achieving the objective of the UNFCCC in general and the Kyoto protocol in particular. Article 12 of the Kyoto protocol defined CDM as a project based mechanism with the sole purpose of assisting the parties not included in Annex I in achieving sustainable development and those in the category of Annex I by helping as a subsidiary means in achieving their quantified emissions reductions obligations under article 3 of the protocol.

In fact, it is significant to ask which objective shall take precedence. The article does not indicate which one should take the priority let alone in times of “peace” but also in times of conflict which is the case in most instances. Finding the intention of the drafters of the particular article is quite a daunting task, which needs an independent investigation by itself.

But, the question is posed here for the basic reason that, in choosing the CDM from the human rights perspective, the main argument is that, the CDM is a “development tool”.

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166 Cameron(2010).

This prospect of the CDM as a development tool has further been emphasized by the Marrakech Accords under paragraph 8 of Modalities and Procedures for a CDM, which states that:

*CDM Project activities should lead to the transfer of environmentally safe and sound technology and know-how in addition to that required under article 4 paragraph 5 of the convention and article 10 of the Kyoto Protocol*<sup>167</sup>

On the other hand, there is a huge endorsement and acceptance by all UN bodies, as dictated by the UN high commissioner for human rights that, any development programmes being pursued by UN bodies shall be informed by human rights- based approach.<sup>168</sup>

As such, the CDM as a development tool and being pursued within the UN structure cannot be made an exception in this regard; rather it should be revisited and assisted by the human rights-based approach so that all the best qualities and attributes of a development programme which is infused by HRBA could also be tenable in the CDM's context.

For instance, Article 11(5) of the UNFCCC is preceded by a weak legal formulation or casual term “may” when it states that the developed parties may provide financial resources to the developing country parties in the implementation of the convention through bilateral, regional or multilateral channels. And, article 10 (c) of the Kyoto Protocol also formulated in a weak qualifying statement -“as appropriate” -in so far as financial and technological support to the developing parties to the protocol is concerned though the heading of the article is formulated in a mandatory casual term “shall”.

In any case, all the political wrangling and lack of real commitment to go for the actualization of the financial aid provisions witnessed in both the UNFCCC and the

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<sup>167</sup> Supra note 14

<sup>168</sup> Supra note 157

Kyoto protocol would have been minimized if not avoided if the HRBA is adopted as an integral part of the policy decision in the climate change regime.

This is so because, in a human rights-based approach to development, development assistance can no longer be based on charity or solidarity, but it will rather be a matter of national and international obligations.<sup>169</sup>

The other justification is related with the fact that, by integrating the human rights consideration in the modus operandi of the CDM, effect wise, it will be amounted to bridging the disciplinary path dependence between the human rights and climate change regime discussed above. Hence, it is with the intention to use the CDM as an ‘integration tool’.

Still a justification, may be of the principal one is the fact that, the climate change problem in general and the response measures in particular have witnessed direct and indirect human rights implications and such is made clear through the many ‘climate-human rights’ resolutions adopted by the UN human rights council, like resolution 7/23, Res. 10/4, and Res. 16/11.

In the CDM’s context, what is glaring is that, the very first intention in approving the CDM as one of the flexibility mechanisms in the Kyoto protocol was with a strong belief that offset projects should not only to provide cost effective emissions reduction for Annex I parties but also development benefits for the developing party nations; but practically the CDM has failed to deliver development and sustainability benefits under a constant rate.<sup>170</sup>

These have got a concrete expression as a result of the human rights violation ensued by some CDM projects like the case in Panama (*The Barro Blanco case*) and Honduras (*Bajo Aguan Biofuel plantation case*).

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<sup>169</sup> Supra note 159, pp 60

<sup>170</sup> Core Carbon Offset Research and Education

The other justification is, the CDM is the only flexibility mechanisms under the Kyoto protocol integrating both the developed and developing countries in the global effort to mitigate the adverse effect of climate change.

All the other flexibility mechanisms-Joint Implementation and the International Emissions Trading -are there to be operationalized between the developed countries and as such the paper preferred to consider the CDM as a case- in-point and in fact, also as a representative of the rest flexibility mechanisms under the protocol keeping the respective peculiarities of each of them.

### **3.3 How to Integrate the HRBA into the CDM's modus operandi?**

This section of the paper is intended to show how to integrate the HRBA into the CDM's context. Accordingly, two paradigms are proposed for same:

#### **3.3.1 The CDM as a Development Tool**

Looking at the CDM as a development tool will enable us to make the real integration of the HRBA in the CDM a less daunting task. This is so because, as has been mentioned above, as any development programme pursued by UN organs is expected to be informed by human rights based approach, and the CDM as a development tool being pursued by a UN body under the UNFCCC, it is a must that the human rights based approach shall be applied to it as a matter of policy coherence and decisions legitimacy.

In the practical application of the human rights-based approach to any development programmes and policies, Urban Jonson recommended 5 consecutive and interrelated steps and those steps shall be complied with if the HRBA have to practical.<sup>171</sup> This paper has taken those recommended steps into the efforts to integrate the HRBA into CDM's context.

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<sup>171</sup> Supra note 159 PP 53

According to him, the first step is the *causality analysis* using which it is possible to identify the immediate, underlying and basic causes of the problem and the list of rights that are either being violated or are at risk of violation apart from identifying the major causes of the violations.<sup>172</sup>

The causality analysis in the CDM's context will lead us to see the basic cause of the human rights violations and the rights at stake of violation. For instance, one of the rights which has been violated in the Panama's case is the right to a due consultation of the local people where the CDM project has been implemented.

Their consent was not secured and no effective, full and meaningful participation was respected. Oppression in the form of Arrest against those who tend to oppose was the reaction in the case.

As such, apart from the substantive rights to life and liberty and freedom of expression and also their right to participate in a decision that will have an implication on their livelihood and development, the procedural rights as enshrined under so many global and regional environmental and human rights treaties has been relegated, like the right to participation under the Aarhus convention and in the UNFCCC too.

In this respect, in a specific project with profound impacts on indigenous and tribal people's lands and territories, such as certain large hydroelectric dams, the state has a duty to secure the free and prior informed consent (PIC) of those affected, according to their customs and traditions.<sup>173</sup>

This discussion needs to occur both prior and during the time the activity is conducted and the entire process needs to ensure clearly how the intended activity

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<sup>172</sup> Ibid

<sup>173</sup> Supra note 94



will benefit or harm them.<sup>174</sup> The project should also take into account cultural valuations of impacts or benefits and traditional modes of decision making.<sup>175</sup>

The right to Prior Informed Consent by indigenous and other local communities with respect to the use of natural resources that they reside in or upon which they depend for their livelihood is an emerging norm in the protection of the human rights of local communities.<sup>176</sup>

The Aarhus convention, for instance, under paragraph 9 of its preamble recognize that, in the field of environment, the improved access to information and public participation in decision making will enhance the quality and implementation of decisions, will contribute to public awareness of environmental issues and give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.<sup>177</sup>

Article 6 and its sub-articles of the UNFCCC also discuss the relevancy of public participation, access to information in addressing climate change and its effects.

In the human rights context the ICCPR and ICESCR also ensures same rights under various articles like common article 1(3) and 2(2) of both covenants. Also, though not binding, the declaration on the right to development of 1986 also ensures similar procedural rights to a greater degree like under article 1(1). The same is true in regard to Principle 10 of the Rio declaration.

The second step is the *pattern analysis*. The aim of this step is to clearly identify the key right holders (claimants) and the corresponding duty bearers.<sup>178</sup> For a certain right, there will always be a beneficiary and an identifiable duty bearer to the

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<sup>174</sup> Ibid

<sup>175</sup> Mehta (2000)

<sup>176</sup> Supra note 14

<sup>177</sup> Convention on Access to Information , Public Participation in Decision Making and Access to Justice in Environmental Matters (1998)

<sup>178</sup> Ibid

realization of the right in question. Interpreting this in the CDM's context will mean that, first we need to identify the key role occupants in the CDM's modus operandi.

In fact, the actors involved in the implementation of a given CDM project are so many. And, identifying the rights and obligations of each participating organs may become formidable as there are cases where non-party states and their companies are found to be participating in certain CDM projects<sup>179</sup>.

This is said because, it is a fundamental principle of public international law that, an international treaty or agreement will not impose obligations or confer rights upon a third party to a treaty or agreements unless, a) the third party gives its consent and b) the parties to the treaty or agreement agree that third party states may have rights or obligations under its provisions.<sup>180</sup>

At any rate, the rules under the Kyoto protocol are ambiguous with regard to the ability of non-party companies to participate in projects and emissions trading.<sup>181</sup> Although the protocol prevents non-party from directly participating in the flexible mechanisms, art. 6, 12 and 17 of the protocol, it does not address the issue of the ability of non-party companies to participate with the assistance of a party to the protocol.

It is rather left to the wide discretion of the national policies of parties to the Kyoto protocol and most importantly of the policies of the CDM executive Board and Joint implementation supervisory committee with regard to registering projects and developing rules of procedure for same.<sup>182</sup>

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<sup>179</sup> Supra note 1, pp250

<sup>180</sup> Vienna Convention On The Law Of Treaties (1969), Articles 34,35 and 36

<sup>181</sup> Supra note 1, pp250

<sup>182</sup> Ibid

The point is that, this sort of uncertainty has its own implication in exactly spelling out the rights and duties of the various stakeholders in the implementation of a given CDM project.

Never the less, at least the major decision-making organs can be identified and sensitized so that they can properly integrate the human rights based approach

One major decision making organ is the Executive Board which is established in the Marrakech Accords with a view to supervise the CDM and undertake mainly of regulatory function under the CDM. And, among its significant power includes, developing guidance to project participants and designated operational entities (DOEs) on the implementation of the CDM and Issuing Certified Emissions Reductions (CERs) as per the Marrakech Accords.<sup>183</sup>

And, one form of sensitizing the executive board so that it can ensure that human rights are not violated by CDM projects is by using the ‘Do no harm safeguards’, which are derived from the 11 Millennium Development Goals. In these regard, out of the 11 principles 8 of them have got a unanimous endorsement by 189 member states of the UN<sup>184</sup> which means that member states to the Kyoto protocol and the UNFCCC have an obligation to observe them in fulfilling their climate change related commitments and the board should be in a position to use them as a criteria of CDM projects eligibility for CER.

As per Urban Jonson’s recommendation the third phase in the actual implementation of the HRBA is the *Capacity Gap Analysis* where the main task is to identify the reasons why the duty bearers have failed to fulfill their obligations and why the rights holders have failed to exercise their rights.<sup>185</sup>

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<sup>183</sup> Supra note 14

<sup>184</sup> Supra note 72

<sup>185</sup> Supra note 159, pp53

In the context at hand, it is possible to investigate why the COP/MOP/ , the Executive board and all the way down to the DNA have failed to recognize and take into account the potential human rights implication of CDM projects even when an actual case is brought to their attention. Further, it is possible to posit why the public and the local people where the CDM project are being implemented have failed to exercise their rights effectively and what is lacking to same end.

Urban Jonson assumed some factors as a reason for the capacity Gap problem even though all those assumptions does not hold water in the CDM's context. The assumed factors are responsibility, motivation/commitment/, leadership, authority, access and control of resources and communication capability.

Of all these factors, communication capabilities can be used as one means of assessing the capacity Gap problem in the CDM context. The latter assumption takes the view that, the ability to communicate and to access to information and communication system is crucial for individuals and groups of individuals in their effort to claim their rights or meet their duties.

Interpreting this assumption in the CDM's context, it can be said that, the local communities where the CDM projects are to be implemented have either been precluded from having all the appropriate information of the detail of the project or it might be the case that, once they have got the information about the project activity and found it against their interest, repression in the form of arrest are the means utilized by local authorities as has been seen in the previous case indications.

The fourth step is the *Identification of Candidate Actions* with a view to reduce or close the capacity gaps identified in the third step while the final phase is the *Programme Design* where the identified candidate actions will be aggregated and prioritized for action.<sup>186</sup>

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<sup>186</sup>Ibid

The COP/MOP/ and also the EB as a decision making organs in the CDM's governing structure should address all the problems identified by the preceding steps by improving the guidelines and operational tools as stated in the Marrakech Accords.

In fact, amending all the operational guidelines and working procedures might be a complex task if not an impossible one but the COP/MOP and also the EB can come up with a directives or decision parts so that all the rest CDM participating organs can go for its practicality in their respective role.

### **3.3.2 The Structure of the CDM as a way out to Integrate HRBAtd**

The CDM as a project-based activity has working procedures and modalities, which have been detailed in the Marrakech Accords. Particularly, the public participation provisions in the CDM's process are noteworthy points here. There are opportunities for the public or stakeholders in the languages of the Marrakech accords, to express their consents in the CDM project validation and verification processes. One is when project proponents develops the Project design document and the other is when the DOE calls for Public inputs before validating the CDM project and forwarding it for the Executive Board for certification (40 (c) of Marrakech accords).

These two phases are an excellent opportunities for expression of concerns for the stakeholders and those NGOs who have been accredited by the UNFCCC to take part on such dialogues. The local stakeholders in particular have the best chance to express their concern that projects have a detrimental impact on their life and livelihoods even though its contribution to the GHG reduction is profound, and that they have not even been consulted in the entire process of the project design document if it was the case.

In fact, an improved version of stakeholders' involvement requirements both at a local and international level is clearly called for with a view to enhance reporting on Sustainable Development co-benefits, ensure fairness, transparency and fulfill the

right of individuals to public participation as enshrined under Rio principle 10 and the human rights regime.<sup>187</sup>

What should also be noted is that, participation of the full range of stakeholders including state representatives, international human rights bodies, indigenous peoples and civil society in international negotiations would make certain that all mitigation and adaptation policies incorporate international human rights standards and include the voice of the most vulnerable groups affected by climate change.<sup>188</sup>

The Cancun Agreement also recognized the need to engage a broad range of stakeholders at the global, regional, national, and local levels be they government including sub-national and local governments, private business or civil society, including youth and persons with disability and gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.<sup>189</sup>

It is further believed that “good process principles” such as those reflected in the Aarhus convention and environmental human rights jurisprudence like transparency, freedom of information, participation, non-discrimination and equality and accountability or redress which are in fact embedded in varying degrees within national, international and regional human rights laws, may contribute appreciably to the sustainability of climate change policy-making with at least implicit preventive dimensions.<sup>190</sup>

Lastly, the United Nations General Assembly, Human Rights 16<sup>th</sup> session under the report of the 2010 Social Forum, clearly demands that, human rights standards and

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<sup>187</sup> Supra note 71

<sup>188</sup> United Nations General Assembly, Report of the Social Forum (2010)

<sup>189</sup> COP Decision 1/CP16

<sup>190</sup> Supra note 187

principles should inform and strengthen policy measures in the area of climate change to ensure the effective participation of individuals and communities in all the relevant decision making processes affecting their lives, that accountability mechanisms were in place and that access to administrative and judicial remedies in cases of human rights violations was provided.<sup>191</sup>

### **3.4 The CDM and Sustainable Development**

The CDM is a market-based mechanism designed to achieve two-pillar objectives- sustainable development and emissions reductions. (Article 12 (2) of Kyoto Protocol. What is at odd, however, is the fact that, the article does not define what “sustainable development” means and the sustainability criteria in the CDM’s context.

Rather, the matter is left for the host country and to its sole prerogative to select what is most appropriate criteria for its sustainable development and even the sole arbiter of whether a given CDM project is responsive to the selected development priorities.<sup>192</sup>

The Marrakech Accords have also affirmed this state of fact in its preamble. The real question at stake is what are the parameters of sustainability in terms used by host countries in determining whether a certain CDM project meets the minimum threshold requirements set by the host country in question?

The provisions of article 3(4) of the UNFCCC indicates that, the policies and measures to protect the climate system should be tailored to the specific conditions of each party and should be integrated with national development programmes. Thus, the particular CDM project as a response measure to the anthropogenic climate problem needs to be compatible and palatable with the existing national development policies of the host country if it has to be considered as contributing for the sustainable development endeavor of the latter.<sup>193</sup>

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<sup>191</sup> Ibid

<sup>192</sup> Supra note 147, pp540

<sup>193</sup> Voigt (2008)

The problem with this approach, however, is that CDM repository countries/developing countries/ have different economic, political, social and development realities and priorities.<sup>194</sup> As such, it is not normal to expect one definition and uniform content of sustainable development across the board and even of a standard uniform practice to same end.

This rather makes the design of CDM and meeting of the eligibility requirements for sustainable development formidable.<sup>195</sup>

This “subjective approach” to sustainable development translates into curtailing and challenging the CDM<sup>196</sup> as a basic climate change response measure. In fact, during the negotiation of the Kyoto protocol attempt was made to come up with standard sustainability indicators, criteria or object for host countries but no consensus was reached and that is why the matter is left for the host country determination.<sup>197</sup>

The host countries have been found concerned much about their sovereignty and were not willing to accept externally determined sustainable development priorities imposed on them.<sup>198</sup>

But, at least they are expected to define their sustainable development criteria in a way that is compatible with the accepted definition of sustainability in the international play zone.<sup>199</sup>

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<sup>194</sup> Supra note 147, pp531

<sup>195</sup> Ibid

<sup>196</sup> Supra note 13 ,pp225

<sup>197</sup> Supra note 16, pp110

<sup>198</sup> Supra note 12, pp 32

<sup>199</sup> Supra note 147, pp255-256



### **3.5 Implication of Host Countries Sovereignty in Determining Sustainability of CDM Projects Vs Human Rights Concerns**

A grand statement to be noted is that, Sustainable Development and basic human rights are the two sides of the same coin<sup>200</sup>. Further, the notion of sustainable development is a multifaceted concept which is advocating for the integration of economic, social and environmental concerns, equity and justice between generations and within the present generation itself.<sup>201</sup> And, that is what we call it Intergenerational and Intra-generational justice proper.

The basic objective of sustainable development in this context is to strike a fair balance between the goals of short term economic development and long-term environmental and human rights protection.<sup>202</sup> In other words, it can be said that, sustainable development is a balancing act with supposedly unavoidable trade-offs.<sup>203</sup>

Keeping this fact as it is, in the context of the CDM, it is not an explicit requirement that human rights considerations be taken into account in relation to sustainable development determination.<sup>204</sup>

It is the host country who will determine whether and to what extent it considers human rights as an appropriate criterion for its Sustainable Development determination and this power of the state might be taken as an exercise of national

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<sup>200</sup> Lang, (1995) , pp43

<sup>201</sup> Supra note 147, pp 259

<sup>202</sup> Supra note 53,pp115

<sup>203</sup> Supra note 16,pp 40

<sup>204</sup> Orellana (2010)

sovereignty and it could in effect maximize once national policy space and autonomy.<sup>205</sup>

None the less, it has a huge repercussion and is in a diametrically opposite direction to the notion of human rights which are dubbed as a matter of international concern and also with the very notion of sustainable development itself which has implicated human rights, be it directly or indirectly.<sup>206</sup>

The basic argument of this paper is also the fact that, taking into account the *Erga Omnes* nature of human rights<sup>207</sup>, and their ‘lexical priority’<sup>208</sup> during the decision and implementation of various policies, human rights consideration be given equal footings with the rest considerations of host countries sustainable development determination indexes.

This assertion is further buttressed by the fact that, the legal regime which governs the CDM projects at the international level could certainly be improved should the relevant practice show that sustainable development criteria are taken very seriously and meaningfully within the framework of CDM projects, possibly by imposing on host countries some “minimum” sustainable development criteria to be respected across the board.<sup>209</sup>

In this regard, it is possible to argue that, imposing human rights as a common denominator in all host countries determination of sustainable development can be taken as a “minimum threshold” to be respected and applied across the board.

The assertion that states should be bound to apply human rights as a matter of international obligation in their sustainable development determination does not go

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<sup>205</sup> Ibid

<sup>206</sup> Ibid

<sup>207</sup> Supra note 153, pp185

<sup>208</sup> supra note 53, pp73

<sup>209</sup> Supra note 147 pp540

against the inherent understanding that states have sovereign rights and prerogative on their own natural resources and to choose and determine the appropriate development pathways in the way it fits their national economic, political, social and development priorities.

Though not binding the Rio declaration under article 2 has also affirmed this right. Such a right and prerogative should not, however, go against the basic and standard practices adopted at the international level.

At any rate, the traditional unfettered freedom of states and the widely held perception to same end has been abandoned at this time as a result of the development of some international concerns or issues of global concern- climate change and human rights a case in point.<sup>210</sup>

As such, the wide margin of appreciation given to the host country in determining Sustainable Development has a negative human rights implication. And, as long as states have accepted a set of fundamental human rights , it logically follow that, any programme of action to combat climate change should not itself violate these rights.<sup>211</sup>Therefore, it needs to be congruent.

Further, the principle of Sustainable Development is also a principle of justice, as a corrective to unsustainable and unjust practices and laws and it can be so as long as it could establish an equitable living condition in a trans-generational context.<sup>212</sup> Such equity cannot be achieved, however, without the due respect for human rights.<sup>213</sup>

Thus, a robust commitment towards mainstreaming human rights in the climate change response measures in general and CDM in particular is a matter of necessity. This is said because , apart from the justifications mentioned above, there is a pure

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<sup>210</sup> Supra note 153, pp12

<sup>211</sup> Supra note 53, pp89

<sup>212</sup> Supra note 16,pp53

<sup>213</sup> Supra note 53,pp114

argument that only those response measures that are based on Sustainable Development that will provide serious and long-term solutions to climate change.<sup>214</sup> Otherwise, a failure to properly integrate the principle of sustainable development and measures to prevent climate change might threaten elementary aspirations of human kind including the equitable governance structure and human security.<sup>215</sup>

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<sup>214</sup>Supra note 16,PP40

<sup>215</sup> Supra note 13, pp243

## Chapter Four

### 4.1 Conclusions

The Climate Change response measures in general and the mitigation aspect of same in particular are incurring serious human right violations.

In fact, it is in recognition of this phenomenon that, the CDM Executive Board has called for a public input in its EB61 Meeting, which lasts from June 3, 2011 up until 3 July 2011.<sup>216</sup> The call specifically requests on how to include co-benefits and negative impacts in the documentation of CDM project activities and what the role of the different actors and stakeholders could be in the entire process.<sup>217</sup>

And, various stakeholders have responded to the call delineating the various negative impacts ensued by CDM project activities including human rights implications in certain CDM repository countries. In this regard, the submission of the Wuppertal Institute is well illuminative of the human rights violations and infringements being implicated by CDM projects.<sup>218</sup> Further, in its 2011 Annual Report, the CDM Executive board stated that, it was confronted with the issue of human rights, specifically the rights of people affected or potentially affected by CDM projects.<sup>219</sup>

All these are telling the fact that, human rights issues are hot concerns to CDM projects. The stand of this paper is, by properly integrating the Human Rights-Based Approach to Development and “True” sustainable development, it is possible to mitigate, if not totally avoid, the human rights implication of CDM projects having a human rights backlash like large hydroelectric power dam constructions such as the *Boyano*, *Chan 1* and *Barro Blanco* dam in Panama and Biofuels plantations like the case of the *Aguan Biogas* CDM project in Honduras.

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<sup>216</sup> Supra note 119

<sup>217</sup> Ibid

<sup>218</sup> Wuppertal Institute for Climate Change, Environment and Energy (2011)

<sup>219</sup> Annual Report of the CDM Executive Board (2011)

The rules, modalities and procedures of the CDM are not closed in this regard. There are entry points indeed to entertain human rights in the CDM. The Environmental Impact Assessment and stakeholders participation provisions of the Marrakech Accords under paragraph 37, 40(c) and in the Annex B of the Accord are potential way outs to same end. Further, conceiving the CDM as a ‘development tool’ can enable us to apply the recommended steps in the practical application of human rights based approach in any development programmes and policies adopted and pursued by UN bodies.

On the other hand, the determination of sustainable development is the sole prerogative of the host country in the working formula of CDM, which is also affirmed by the Marrakech Accords itself, under paragraph 4, decision -/CP7. Nonetheless, the exercise of sovereignty is not unlimited and needs to be construed in light with the contemporary international law’s development and realities. Antonio Cassese argues that states freedom of action is not untrammelled in the contemporary international law’s development but subject to various international common goods, human rights as one case in point apart from other international concerns.

Above all, it is the rules of international law, particularly of the Vienna Convention under article 31(3)(C) that treaties shall be interpreted in addition to the context, any relevant rules of international law applicable in the relations between the parties needs to be taken into account.

Here, it is clear that, the modalities and procedures of the CDM enacted under the Marrakech Accords are binding requirements which parties to the Kyoto protocol and who voluntarily takes part into the CDM project activity is expected to comply with.

The COP and also the Executive Board are there with a clear mandate to enforce the prescriptions of the Accord including the Annexes attached to it. As a subsequent agreement under a treaty-Kyoto Protocol- in application and also interpretation, this

accord has an equal probative value and equally legally binding as per article 31 (3)(a) of the Vienna convention.

The latter article clearly says, in addition to the context “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions “shall also be taken into account”. Thus, the provisions governing the CDM modalities and procedures under the Marrakech Accords needs to be revisited and interpreted according to the development of international law in various fields including human rights law. In fact, human rights and its development pre-date the development of the climate change regime itself.

But, the vitality and common concern of human rights law will make it to take the lexical priority and to be taken into account in all policy measures adopted by states. In the climate change context, the UN Office of the High Commissioner for Human Rights makes clear that, climate change policy design and implementation should also take into account human rights. The same annotation is made by the recent Cancun agreement which tells us the fact that, it is very much important to respect human rights in all times and actions we take regarding climate change.

Furthermore, almost all parties to the Kyoto protocol are also parties to most international human rights treaties and as such they need to observe those commitments in their move towards fulfilling climate change related commitments. In this connection, it is also argued that the deliberate climate change measures of governments, which results in human rights violations can be considered as violations of state responsibility to respect, protect and fulfill.<sup>220</sup>

Thus, taking into account human rights as common concern of states and an *Erga Omnes* obligation for the international community, it shall be made a universal common denominator and applicable criteria for all host states in determining the

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220 Supra note 48

sustainability or otherwise of a given CDM project. It can be set as a “minimum threshold” for sustainable development in the CDM’s context.<sup>221</sup>

It should not also be forgotten that basic human rights and sustainable development are two sides of the same coin.

Lastly, Best Practice Benchmarking (BPB) from the voluntary market standards particularly from the Gold Standard and the Climate, Community and Biodiversity standards is very imperative with a view to deliver a benign and tangible climate change as well as sustainability co-benefits and outcomes.

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<sup>221</sup> Supra note 147, pp540



## **Bibliography**

### **Books**

1. Bård A. Andreassen and Stephen P. Marks (2010) *Development as a Human Right: Legal, Political and Economic Dimensions*. (2<sup>nd</sup> Ed.) (Intersentia).
2. Bugge, Hans Christian and Christina Voigt.(2008). *Sustainable Development in International and National Law*.(Europa Law Publishing)
3. Birnie, Patricia, Alan Boyle and Catherine Redgwell. (2009).*International Law and the Environment*. 2<sup>nd</sup> Ed. Oxford University Press
4. Cassese, Antonio. (2005) *International Law*. (2<sup>nd</sup> Ed). Oxford University Press
5. Eriksen, Christoffer C. and Marius Emberland.(2010). *The New International Law- An Anthology*. Martinus Nijhoff Publishers. (Vol. 36.) (Leiden/Boston)
6. Faure, Michael, Joyeeta Gupta and Andries Nentjes. (2003).*Climate Change and the Kyoto Protocol : The Role of Institutions and Instruments to Control Global Change*. Edward Elgar Publishing Limited (Cheltenham (UK); Northampton, MA, USA)
7. Freestone, David and Charlotte Streck. (2005).*Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work*.(Oxford University Press)
8. Humphreys, Stephen.(2010). *Human Rights and Climate Change*. Oxford University Press
9. Lang, Winfried (Ed). (1995)*Sustainable Development And International Law*. (Graham and Trotman /Martinus Nijhoff)
10. Gready, Paul and Jonathan Ensor. (2005)*Reinventing Development ? Translating Rights-Based Approach from Theory into Practice*.ZedBooks(London)

11. Schrijver, Nico . (2008)*The Evolution of Sustainable Development in International Law:Inception, Meaning and Status*. Martinus Nijhoff Publishers (Leiden/Boston)
12. Segger, Marie-Claire Cordonier and Judge C.G Weeramantry.(2005)*Sustaibable Justice:Reconciling Economic, Social and Environmental Law*. Martinus Nijhoff Publishers
13. Sengupta, Arjun, Archna Negi and Moushumi Basu.(2005) *Reflections on the Right to Development*. Sage Publications
14. Stowell, Deborah. (2005)*Climate Trading: Development of Green House Gas Markets*. (Palgrave MacMillan)
15. Voigt, Christina. (2009) *Sustainable Development As A Principle Of International Law:Resolving Conflicts Between Climate Measures And WTO Law*. Martinus Nijhoff Publishers,(Leiden/Boston)

### **Internet Sources**

1. Annual Report of the Executive Board of the CDM serving as meeting of the parties of the Kyoto Protocol. Available at: [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on March 22,2012)
2. Blazogiannaki, Maria. (2009).*Human Rights and Climate Change* .Available at: [http://www.coe.int/t/dg4/cultureheritage/nature/bern/climatechange/CC\\_tpvstinf%282009%2904.pdf](http://www.coe.int/t/dg4/cultureheritage/nature/bern/climatechange/CC_tpvstinf%282009%2904.pdf), (Accessed on September 14,2011)
3. BIOMASS HUB. Available at: <http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras>. Accessed on Nov. 15,2011 (Accessed on Nov. 15,2011)
4. Boyle, Alan.(2010) Developments in International Law of EIA and their relation to the Espoo Convention. Available at [http://www.unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar\\_Boyle.pdf](http://www.unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar_Boyle.pdf). (Accessed on April 15, 2012)

5. Cameron, Edward. (2010). *Human Rights and Climate Change: Moving From an Intrinsic To an Instrumental Approach*. Georgia Journal of International and Comparative Law, Volume 38, Number 3, 673. Available at: <http://lawlib.wlu.edu/CLJC/index.aspx?mainid=242&issuedate=2010-10-19&homepage=no> (Accessed on September. 13, 2011)
6. CDM Watch News for Civil Society and policy makers, No. 3, may, 2011. Available at: <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/05/CDM-Watch-Newsletter-3-May-2011.pdf> . (Accessed on Dec, 17, 2011)
7. CDM Watch , CDM Executive Board Call for Public inputs for sustainability Benefits. (2011) Available at: [http://cdm.unfccc.int/public\\_inputs/2011/sustainability\\_benefits/cfi/B0COJHMC6V3MPG10MDG0TEZFO2B11F](http://cdm.unfccc.int/public_inputs/2011/sustainability_benefits/cfi/B0COJHMC6V3MPG10MDG0TEZFO2B11F) Accessed on ( February 20,2012)
8. CDM Registers Facusse's Dinant Corp., cannot verify Human Rights Issues , available at [http://resistenciahonduras.net/index.php?option=com\\_content&view=article&id=3374:cdm-board-approves-loan-for-dinant-not-enough-evidence-on-human-rights&catid=101:news&Itemid=349](http://resistenciahonduras.net/index.php?option=com_content&view=article&id=3374:cdm-board-approves-loan-for-dinant-not-enough-evidence-on-human-rights&catid=101:news&Itemid=349) {Accessed on 12, Jan, 2012}
9. CDM Project 3237: Barro Blanco Hydroelectric Power. Available at: [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on January 5, 2012)
10. CDM Executive Board (EB65) (2011) Report on Sustainable Development Co-benefits and Negative Impacts of CDM Project Activities. Available at [http://cdm.unfccc.int/filestorage/Z/R/S/ZRSJLH6Q8VFADTGY19OW5P2N7XI04K/eb65\\_propan17.pdf?t=N3d8bTM2d2oyfDDfEr43ad\\_zpyNxvIFtFdT](http://cdm.unfccc.int/filestorage/Z/R/S/ZRSJLH6Q8VFADTGY19OW5P2N7XI04K/eb65_propan17.pdf?t=N3d8bTM2d2oyfDDfEr43ad_zpyNxvIFtFdT) (Accessed on February 12,2012)
11. Climate, Community, and Biodiversity Alliance. Available at: [www.climatestandards.org](http://www.climatestandards.org) (Accessed on March 28,2012)

12. Climate, Community and Biodiversity: Project Design Standards (2008). Available at: [http://www.climatestandards.org/standards/pdf/ccb\\_standards\\_second\\_edition\\_december\\_2008.pdf](http://www.climatestandards.org/standards/pdf/ccb_standards_second_edition_december_2008.pdf) (Accessed on March 25, 2012)
13. COP Decision 1/CP16: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention. Available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2> (Accessed on Oct.5,2011)
14. Core Carbon Offset Research and Education. Available at [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on February 29,2012)
15. Decisions 1/CP16, The Cancun Agreements :Outcome of the work of the ad hoc working group on long-term cooperative actions under the convention. Available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>, (Accessed on 29 Nov.2011)
16. Draft Decision =/CMP.7 Materiality Standard in the Clean Development Mechanism, Available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cmp7\\_cdm\\_.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cmp7_cdm_.pdf) (Accessed on March 3 ,2012)
17. Executive Board of the CDM 62 Meeting Report Available at [http://cdm.unfccc.int/filestorage/K/C/A/KCA6Z0IBDRWJ7EHP4SOFQXM5NGTL2U/eb62\\_repor.pdf?t=OWh8bTIzeHI4fDAr8qh8UGKCpAHF8Jd7lIXd](http://cdm.unfccc.int/filestorage/K/C/A/KCA6Z0IBDRWJ7EHP4SOFQXM5NGTL2U/eb62_repor.pdf?t=OWh8bTIzeHI4fDAr8qh8UGKCpAHF8Jd7lIXd) (Accessed on February 12,2012)
18. Greiber , Thomas, Melinda Janki, Marcos Orellana, Annalisa Savaresi, Dinah Shelton. (2009) *Conservation with Justice: A Rights-Based Approach.*, IUCN Environmental and Policy Paper No.71, IUCN, Gland, Switzerland. Available at: <http://data.iucn.org/dbtw-wpd/edocs/EPLP-071.pdf>, (Accessed on September 2, 2011)

19. Honduras: Human Rights Violations in Bajo Aguan , International Fact Finding Mission Report (2011). Available at <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf> (Accessed on March 3, 2012)
  
20. International Council on Human Rights Policy (2008). *Climate Change and Human rights -A Rough Guide*, available at [http://www.ichrp.org/files/summaries/35/136\\_summary.pdf](http://www.ichrp.org/files/summaries/35/136_summary.pdf) (Accessed on August, 12, 2011)
  
21. International Council on Human Rights policy (2011). *Advancing the Human Rights and Climate Change Agenda at the United Nations: Possibilities and Challenges*, A supporting paper to the 2011 Report of the Panel on Human Dignity. Available at [http://www.ichrp.org/files/assets/397/2012\\_ICHRP\\_advancing\\_HR\\_and\\_CC.pdf](http://www.ichrp.org/files/assets/397/2012_ICHRP_advancing_HR_and_CC.pdf) (Accessed on February 3, 2012)
  
22. Kollmuss, Anja (SEI-US), Helge Zink (Tricorona ) and Clifford Polycarp (SEI-US)(2008). Making sense of the Voluntary Carbon Market: A comparison of Carbon offset Standards. Available at: [assets.panda.org/downloads/vcm\\_report\\_final.pdf](http://assets.panda.org/downloads/vcm_report_final.pdf) (Accessed on March 27, 2012)
  
23. Loftus-Farren, Zoe and Caitrin Mckiernan (2011). *Human Rights and Climate Change: Bridging the Divide*. Berkeley Journal of International Law Publicist Vol. 7. Available at: <http://bjil.typepad.com/publicist/vol-7-winter-2011/> (Accessed on August 22.2011)
  
24. Lyla Mehta And Maria Stankovitch, ”Operationalisation Of Free, Prior Informed Consent” Prepared For Thematic Review 1.2 : Dams, Indegeniuos people and Vulnerbale thinic minorities. Available at <http://www.adb.org/water/topics/dams/pdf/soc209.pdf> {accessed on December 24,2011}

25. Mary, Finely-Brook and Curtis Thomas.(2010).*Treatment of Displaced indigenous Populations in two large hydro projects in Panama*. Water Alternatives 3(2). Available at: [http://scholar.google.co.uk/scholar?as\\_q=Treatment+of+Displaced+Indigenous+Populations+in+Two+Large+Hydro+Projects+in+Panama](http://scholar.google.co.uk/scholar?as_q=Treatment+of+Displaced+Indigenous+Populations+in+Two+Large+Hydro+Projects+in+Panama) (Accessed on August 10, 2011)
26. Mary, Finely-Brook and Curtis, Thomas. (2011). *Renewable Energy and Human rights Violation: Illustrative Cases*. Annals of the Association of American Geographers 101(4) available at: <http://www.tandfonline.com/doi/pdf/10.1080/00045608.2011.568873> (Accessed on September 15, 2011)
27. McInerney-Lankford, Siobhan. (2009). *Climate Change and Human Rights: An Introduction to Legal Issues*. Harvard Environmental Law Review, Vol. 33. Available at: [http://www.law.harvard.edu/students/orgs/elr/vol33\\_2/McInerney-Lankford.pdf](http://www.law.harvard.edu/students/orgs/elr/vol33_2/McInerney-Lankford.pdf) (Accessed on August 9, 2011)
28. Mehta, Lyla and Maria Stankovitch (2000). *Operationalization of Free Prior Informed Consent: Dams, Indigenous People and Vulnerable Ethnic Minorities*. Institute of Development Studies, UK.
- Available at: <http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc209.pdf> (Accessed on March 15, 2012)
29. Naomi, Roht-Arriaza. (2010) "*First, Do No Harm*": *Human Rights And Efforts To Combat Climate Change*. Georgia Journal of International and Comparative Law, Volume 38, Number 3, 593. Available at: <http://lawlib.wlu.edu/CLJC/index.aspx?mainid=242&issuedate=2010-10-19&homepage=no> (Accessed on December 25,2011)
30. Nyaoro, Jackie and Bipasha Chatterjee.(2011) Briefing Paper ‘Governance of the Clean Development Mechanism (CDM)’. Study on the Integrity of the Clean Development Mechanism. Available at

[http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on February 15, 2012)

31. Office of the High Commissioner for Human Rights, Human Rights Council Resolution 10/4 on Human Rights and Climate Change. Available at: [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf) (Accessed on January 5, 2012)
32. Orellana and Johl. (2011). *Climate Change and Human Rights: A Primer*. Center For International Environmental Law. Available at [http://www.ciel.org/Publications/CC\\_HRE\\_23May11.pdf](http://www.ciel.org/Publications/CC_HRE_23May11.pdf) (Accessed on September 15, 2011)
33. Orellana, Marcos. (2010). *Climate Change and the Right to development and International Cooperation, Financial Arrangement and the CDM*. Available at [http://www.ciel.org/Publications/Climate\\_Development\\_Jan10.pdf](http://www.ciel.org/Publications/Climate_Development_Jan10.pdf), (Accessed on September 4, 2011)
34. Orellana, Marcos. (2010) *Climate Change and the Right to Development: International Cooperation, Financial Arrangements, and The Clean Development Mechanism*. A/HRC/15/WG.2/TF/CRP.3/Rev.1. Available at [http://www.ciel.org/Publications/Climate\\_Development\\_Jan10.pdf](http://www.ciel.org/Publications/Climate_Development_Jan10.pdf) (Accessed on September 3, 2011)
35. Protecting People and the Planet: A Proposal to Address the Human Rights Impacts of Climate Change Policy (2009). Available at [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on December 23, 2011)
36. Greiber, Thomas, Melinda Janki, Marcos Orellana , Annalisa Savaresi and Dinah Shelton(ed). (2009). *A Rights-Based Approach to Climate Change Mitigation.* Conservation with Justice-A Rights-Based Approach. IUCN Environmental Policy and Law Paper No.71. Available at [http://books.google.com.pk/books?id=zQB940v3MjkC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com.pk/books?id=zQB940v3MjkC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (Accessed on November, 17, 2011)

37. Rajamani, Lavanya. (2010) *The Increasing Currency and Relevance of Rights-Based perspective in the international Negotiation on Climate Change*. Journal of Environmental Law.(Oxford University Press). Available at <http://jel.oxfordjournals.org/content/22/3/391.full.pdf+html>, (Accessed on September 10,2011)
38. SBSTA-36 (2012) Available at [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on January 23, 2012)
39. Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani. (2011).*Human Rights and Climate Change: A Review Of The International Legal Dimension*. World Bank Study Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/04/25/000356161\\_20110425021031/Rendered/PDF/613080PUB0Huma158344B09780821387207.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/04/25/000356161_20110425021031/Rendered/PDF/613080PUB0Huma158344B09780821387207.pdf) (Accessed on September 5, 2011)
40. Standard on the use of Materiality in the CDM (2010). Available at <http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc209.pdf> (Accessed on March 10, 2012)
41. Tauli-Corpuz, Victoria and Aqqaluk Lyngé. (2008)*Impact of Climate change Mitigation measures on Indigenous Peoples and on their Territories and Lands*. (Accessed on August 17,2011) Available at: [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2008\\_10.pdf](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2008_10.pdf) {Accessed on October 13, 2011}
42. Tauli-Corpuz, Victoria, Eleonor Baldo-Soriano, Helen Magata, Christine Golocan,Maribeth V.Bugtong, Raymond De Chavez,Leah Enkiwe-Abayao and Joji Carino (2009).*Guide on Climate Change and Indigenous Peoples*. Tebtebba Foundation, 2<sup>nd</sup> Edi (accessed on August 15, 2011). Available at <http://www.ddrn.dk/filer/forum/File/Guide-on-CC-and-IPs%5B1%5D.pdf> {Accessed on January 3, 2012}



43. The Gold Standard Manual for CDM Project Developers (2006). Available at <http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc209.pdf> (Accessed on March 3, 2012)
44. The Gold Standard: Quality Standard for CDM and JI Project (2002) Available at [http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on March 2, 2012)
45. The Gold Standard: Quality Premium Carbon Credits. Available at <http://www.cdmgoldstandard.org/> (Accessed on March 21, 2012)
46. The Marrakech Accords (2001), Modalities and Procedures for a Clean Development Mechanism. Available at, [http://unfccc.int/cop7/documents/accords\\_draft.pdf](http://unfccc.int/cop7/documents/accords_draft.pdf) {Accessed on September 18,2011}
47. United Nations Human Rights, Office of the High Commissioner for Human Rights. (2010.) *Applying A Human Rights Based Approach to Climate Change Negotiations, Policies and Measures*. Available at: <http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> { Accessed on August 22. 2011}
48. United Nations General Assembly, Human Rights Council 16<sup>th</sup> Session, Report of the 2010 Social Forum, Geneva 4-6, (2010). Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-62.pdf> {accessed on Dec, 22, 2011}
49. United Nations Human Rights Council (HRC), Report of the Office of the High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights. U.N Doc A/HRC/10/61, (15, JAN.2009) available at [http://reliefweb.int/sites/reliefweb.int/files/resources/AE7A98AA86C6B9838525757D00677EC6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/AE7A98AA86C6B9838525757D00677EC6-Full_Report.pdf) {Accessed on January 9, 2012}
50. UN Human Rights Council, *Human Rights and the Environment :Resolution / adopted by the Human Rights Council, A/HRC/RES/16/11*, available at:

<http://www.unhcr.org/refworld/docid/4dc1189b2.html> {accessed 2 January 2012}

51. UNFCCC webpage. Available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/05/CDM-Watch-Newsletter-3-May-2011.pdf> {Accessed on October 12 ,2012}
52. UN Commission on Human Rights, *Human Rights Resolution 2005/60: Human Rights and the Environment as Part of Sustainable Development*, E/CN.4/RES/2005/60,  
  
Available at: <http://www.unhcr.org/refworld/docid/45377c759.html> {accessed 19 January 2012}
53. Voigt, Christina. (2008) “*Is The Clean Development Mechanism Sustainable? Some Critical Aspects.*” *Sustainable Development Law and Policy*. Vol. 8. I. 2 available at <http://www.stumbleupon.com/su/2PqImi/digitalcommons.wcl.american.edu/sdlp/vol8/iss2/6> {Accessed on December 26, 2011}
54. Ward, Tara (2011). The right to Free, prior an Informed consent: Indigenous People’s Participation Rights within International Law. *Northwestern Journal of International Human Rights*.  
[http://www.wwf.or.jp/activities/lib/pdf\\_climate/gold-standard/COP8\\_standards.pdf](http://www.wwf.or.jp/activities/lib/pdf_climate/gold-standard/COP8_standards.pdf) (Accessed on April 2,2012)
55. Wuppertal Institute for Climate Change, Environment and Energy. (2011). *Responses by Wuppertal Institute to the CDM Executive Board Call for Public Inputs on the Validation Process*. Available at [http://cdm.unfccc.int/public\\_inputs/2011/eb62\\_02/cfi/LQOSAXN7PUTR6T00LZKPXT6LP8RNFA](http://cdm.unfccc.int/public_inputs/2011/eb62_02/cfi/LQOSAXN7PUTR6T00LZKPXT6LP8RNFA). Accessed on Sept. 10,2011 {Accessed on Sept. 10,2011}

## **Laws**

1. United Nations Framework Convention on Climate Change (1992)
2. United Nations Declaration on the Rights of Indigenous Peoples. (2007)
3. The Vienna Convention On The Law Of Treaties (1969)
4. The Rio Declaration on Environment and Development, (1992).
5. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Revised 2011)
6. Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)



## Appendices

### A. Prescriptive CDM Standard

Wherever a CDM standard contains prescriptive requirements on how to conduct a CDM project activity, the requirements shall be applied by the project proponents as provided by the standard. The DOE, when using such a standard to assess a CDM project, shall verify whether the CDM project followed the prescriptive requirement.

### B. Non Prescriptive CDM Standards

Wherever a CDM standard provides non prescriptive requirements on how to conduct an activity of a CDM project, the risk of material as well as non-material overestimation of GHG emission reduction shall be mitigated by the project proponents taking a conservative approach..

C. Validation is the process of independent evaluation of a project activity by a designated operational entity against the requirements of the CDM as set out in Decision\_/CP7, Article 12 of the Marrakech Accords and on the basis of the project decision document (PDD)

### D. Facts regarding the *Bajo Aguan* CDM Project

The *Bajo Aguan* Project demanded funding under the clean development mechanism; the project is located in the Bajo Aguan region in Honduras and intends to reduce emissions by collecting biogas from methane emissions and replacing fossil fuels utilized for heat generations in a mill of a palm oil plantation of *Grupo Dinant's* subsidiary Exportadora del Atlantico.

None the less, the report of the international Human rights mission lead by FIAN confirms that as a result this project, between January 2010 and February 2011 23 peasants have been killed in the *Bajo Aguan* region and the problem was directed at a private security forces contracted by Dinant

Corporation. Various rights have been compromised including but not limited to the right to life and the right to personal integrity, to mention the few.

In this regard, the right to life which was recognized in major international covenants and declarations and which also obliges state parties to guarantee citizens, the situation is different in the *Bajo Aguan* region as per the report of the fact finding mission. It stated that the right is ignored where the Honduran government in collusion with private security companies have threatened the lives of the peasants living there. In the report, it is stated that the *Grupo Dinant's* deployed security firms are the prime actors in the scene.

Further, the mission report indicated that, the right to personal integrity in the *Bajo Aguan* region have been threatened in different ways including constant threats harassment through telephone calls, home and personal surveillance, kidnapping and torture and also sexual abuses.