

v. 7 • n. 12 • Jun. 2010  
Biannual

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**SUR - International Journal On Human Rights** is a biannual journal published in English, Portuguese and Spanish by Conectas Human Rights. It is available on the Internet at <<http://www.surjournal.org>>

SUR is covered by the following abstracting and indexing services: IBSS (International Bibliography of the Social Sciences); DOAJ (Directory of Open Access Journals); Scielo and SSRN (Social Science Research Network). In addition, SUR is also available at the following commercial databases: EBSCO and HEInOnline. SUR has been rated A1 and B1, in Colombia and in Brazil (Qualis), respectively.

SUR. Revista Internacional de Direitos Humanos / Sur – Rede Universitária de Direitos Humanos – v.1, n.1, jan.2004 – São Paulo, 2004 - .

Semestral

ISSN 1806-6445

Edições em Inglês, Português e Espanhol.

1. Direitos Humanos 2. ONU I. Rede Universitária de Direitos Humanos

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# PRESENTATION



It is a great pleasure for us to present the 12 issue of the Sur Journal. As previously announced, this edition is the beginning of our collaboration with **Carlos Chagas Foundation (FCC)** that will support the Sur Journal in 2010 and 2011. We would like to thank FCC for this support, which has guaranteed the maintenance of the printed version of the Journal.

This issue of Sur Journal is edited in collaboration with Amnesty International.\* On the occasion of the UN High-level Summit on the Millennium Development Goals (MDGs) in September 2010, this issue of Sur Journal focuses on the MDGs framework in relation to human rights standards. We are thankful to Salil Shetty, Amnesty International Secretary General, who prepared an introduction to this discussion. The first article of the dossier, also by Amnesty International, **Combating Exclusion: Why Human Rights Are Essential for the MDGs**, stresses the importance of ensuring that all efforts towards fulfilling all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability must be at the heart of all efforts to meet the MDGs.

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\* **Disclaimer.** With the exception of the foreword and 'Combating exclusion: Why human rights are essential for the MDGs', the opinions expressed in this collection of articles are those of the authors and do not necessarily reflect Amnesty International policy.

**Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals**, by Victoria Tauli-Corpuz, examines the relationship of the MDGs with the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples.

Alicia Ely Yamin, in **Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations**, examines how accountability for fulfilling the right to maternal health should be understood if we seek to transform the discourse of rights into practical health policy and programming.

Still addressing the issue of MDGs, Sarah Zaidi, in **Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?**, explores how MDGs fit within an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated with the right to health.

This issue also features an article by Marcos A. Orellana on the relationship between climate change and the MDGs, looking into linkages between climate change, the right to development and international cooperation, in **Climate Change and The Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism**.

We hope that this issue of the Sur Journal will call the attention of human rights activists, civil society organisations and academics to the relevance of the MDGs for the human rights agenda. The articles included in this edition of the Sur Journal show not only a critique of the MDGs from a human rights perspective, but also several positive proposals on how to integrate human rights into the MDGs.

Two articles discuss the impact of corporations on human rights. The first, by Lindiwe Knutson (**Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?**), analyses several cases brought before U.S. courts that have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. The article examines the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York.

The second article, by David Bilchitz (**The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**), seeks to analyze the John Ruggie framework in light of international human rights law and argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should

not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realization of such rights.

There are two more articles in this issue. The article by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, examines the functioning of the Inter-American System of Human Rights Protection in, **The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions**. The article presents the results of a quantitative study focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR).

Finally, Richard Bourne's paper, **The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association**, discusses how membership rules for the Commonwealth became crucial in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens.

We would like to thank Amnesty International's team for its contribution. Their timely input in the selection and edition of articles has been vital.

The editors.

# FOREWORD



Amnesty International's recently released report, *Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya* (July 2010) documents how women and girls living in informal settlements are particularly affected by lack of adequate access to sanitation facilities for toilets and bathing. Many of the women told Amnesty International that they have experienced different forms of physical, sexual and psychological violence, and live under the ever-present threat of violence. The lack of effective policing and due diligence by the government to prevent, investigate or punish gender-based violence and provide an effective remedy to women and girls results in a situation where violence goes largely unpunished.

We also recorded testimonies from a high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. Women's experiences show that lack of adequate access to sanitation facilities and the lack of public security services significantly

contribute to the incidence and persistence of gender-based violence.

Yet, Kenya has committed to the international Millennium Development Goal (MDG) target on sanitation to reduce by half, between 1990 and 2015, the proportion of people without sustainable access to basic sanitation. The country adopted water and sanitation policies that aim to fulfill MDG targets and also the rights to water and sanitation. These policies do reflect many human rights principles. But our research shows that there are still key gaps between Kenya's MDG policies and ensuring consistency with Kenya's international human rights obligations. It also starkly illustrates how the MDG policies of governments cannot ignore gender-based violence or the specific barriers faced by women and girls living in informal settlements in accessing even basic levels of sanitation.

This is why the discussion in this issue of *Sur - International Journal on Human Rights* is so important and timely. These concerns are not unique to Kenya and around the world there are examples

illustrating how MDG efforts are most effective when they address underlying human rights issues and are truly targeted at groups facing discrimination and marginalization.

In September 2010, UN Member States will meet to agree an action plan to ensure the realization of the MDGs by 2015. With only five years left to go, it is more important now than ever that human rights are put at the centre of this action plan, in order to make the MDG framework effective for the billions striving to free themselves from poverty and to claim their rights.

The articles in this issue focus on a range of issues related to the MDGs. They illustrate the gap between the current MDG targets and existing requirements under international human rights law. They also briefly outline some of the essential elements that must be incorporated into any revised or new global framework to address poverty after 2015. I hope it will contribute to discussions on the relationship between human rights and the MDGs and be a useful resource for human

rights practitioners and others who are concerned with these issues.

Another great challenge facing governments across the world is human rights abuses committed by or in complicity with corporations. Two articles in this issue address some of the challenges as well as opportunities related to human rights in the context of corporate activities.

The issue also includes two general articles, which examine the role of the Inter-American System of Human Rights and the Commonwealth of Nations in the promotion and protection of human rights.

I had the privilege of speaking at the International Human Rights Colloquium, organized by Conectas, in 2004 and of contributing to the second issue of the SUR journal. I am extremely pleased to have the chance to collaborate again with Conectas and that they agreed to produce this edition of SUR jointly with Amnesty International.

We would like to thank them for giving us this opportunity and also thank all the authors who have contributed to this issue.

I hope you enjoy reading it.

Salil Shetty  
Amnesty International  
Secretary General



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## ABSTRACT

This paper explores the linkages between human rights and the MDGs, international cooperation regarding climate change, and the Clean Development Mechanism (CDM). The paper uses criteria of the right to development to analyze CDM. CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. The CDM is thus directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change. In addition, a focus on the CDM also raises issues concerning investments and resource flows, technology transfer, environmental integrity, and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the attainment of the MDGs.

Original in English.

Submitted in March 2010. Accepted in July 2010.

## KEYWORDS

MDGs – International cooperation – Climate change – Clean Development Mechanism



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This paper is available in digital format at [www.surjournal.org](http://www.surjournal.org).



# CLIMATE CHANGE AND THE MILLENNIUM DEVELOPMENT GOALS: THE RIGHT TO DEVELOPMENT, INTERNATIONAL COOPERATION AND THE CLEAN DEVELOPMENT MECHANISM<sup>1</sup>

Marcos A. Orellana

## 1 Introduction

Greenhouse gas (GHG) emissions from anthropogenic sources, primarily fossil fuel use, have increased dramatically, causing an increase in Earth's average temperature. The Intergovernmental Panel on Climate Change, in its Fourth Assessment Report (2007), raised its estimate of warming in this century to a possible range between 2.4°C to 6.4°C (IPCC, 2007). The impacts of this unprecedented warming – *e.g.*, increased floods and drought, rising sea levels, spread of deadly diseases such as malaria and dengue fever, increasing numbers of violent storms – threaten to be more severe and imminent than previously believed.

The impacts of climate change have direct implications for the efforts of the international community in achieving the Millennium Development Goals (MDGs). At the same time, as the UN Secretary-General has observed, the MDGs should also contribute to the capacities needed to tackle climate change by providing opportunities for broader improvements in economies, governance, institutions and intergenerational relations and responsibilities (UNITED NATIONS, 2010a, para. 37). Capturing these opportunities, however, will require “a global new deal capable of raising investment levels and channeling resources towards massive investment in renewable energy, and building resilience with respect to unavoidable climate changes.” (UNITED NATIONS, 2010a, para. 39) In this regard, the Clean Development Mechanism (CDM) established by the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) is an example of a mechanism deployed to raising investments and channeling resources into the Global South.

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*Notes to this text start on page 168.*

The relationship between climate change and the MDGs involves both threats and opportunities and works in both directions, with each impacting the other in positive and negative ways (UNITED NATIONS, 2009a). The UN Development Programme (UNDP) has analyzed the ways in which climate change affects the MDGs, concluding that climate change threatens to exacerbate current challenges to the achievement of the MDGs.<sup>2</sup> In this regard, major issues of concern for MDGs resulting from climate change include population displacement, forced migration, conflict and security risks, food insecurity, and the human rights impacts of climate change response measures (ORELLANA; KOTHARI; CHAUDHRY, 2010).

More particularly, climate change impacts have obvious repercussions on MDG 7 regarding environmental sustainability, including with respect to access to safe drinking water and basic sanitation, as well as biodiversity loss. Climate change impacts on agricultural production and water availability are also relevant for MDG 1 regarding extreme poverty (GELBSPAN, 2010) and hunger eradication (COLUMBIA LAW SCHOOL, 2009). MDG 2 regarding universal primary education is affected given the potential destruction of schools and other infrastructure, as well as pressures on family livelihoods that may keep children from school. MDG 3 regarding gender equality is affected by the increased degradation of natural resources upon which women are particularly dependant. MDGs 4, 5 and 6 regarding child mortality, maternal health, and combating malaria, HIV and other diseases are affected by increased vulnerability to poor health due to reduced food and water security, in addition to the spread of water-borne, vector-borne and air-borne diseases. Finally, MDG 8 regarding global partnerships and technology transfer also directly concerns climate change and the CDM, as examined by the High Level Task Force on the Implementation of the Right to Development (HLTF).<sup>3</sup>

Against this background, this paper explores the linkages between human rights and the MDGs, international cooperation regarding climate change, and the CDM. The paper uses criteria of the right to development to analyze CDM. CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. The CDM is thus directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change. In addition, a focus on the CDM also raises issues concerning investments and resource flows, technology transfer, environmental integrity, and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the attainment of the MDGs.

## 2 Human Rights & Climate Change

Climate change impacts, and measures taken to mitigate or adapt to it, are already seriously affecting individuals, communities, and peoples.<sup>4</sup> At the extreme, climate change and mitigation and adaptation measures threaten to destroy the cultures of

individuals and peoples around the world, render their lands uninhabitable, and deprive them of their means of subsistence. Particularly vulnerable to the physical impacts of climate change are peoples whose way of life is inextricably tied to nature, and low-lying coastal or island nations that lack the economic resources necessary to adapt to severe changes.

Increased attention to the human dimension of climate change, including in the current negotiations, can improve the likelihood that climate change-related measures respect human rights. Accordingly, understanding and addressing the human consequences of climate change lies at the very heart of the climate change challenge. Moreover, linking the climate change negotiations and structures to existing human rights norms enables States to use indicators and mechanisms anchored in the well established human rights system to address the challenges posed by the changing climate and response measures.

The UN Human Rights Council has affirmed that climate change “poses an immediate and far-reaching threat” for the “full enjoyment of human rights.” (UNITED NATIONS, 2008b, 2009c). The Office of the High Commissioner on Human Rights (OHCHR), in its March 2009 study on climate change and human rights, concluded that “global warming will potentially have implications for the full range of human rights”, and particularly the rights to life, adequate food, water, health, adequate housing, and the right to self-determination (UNITED NATIONS, 2009d). Moreover, the study found that most at risk are the rights of already vulnerable peoples, such as indigenous peoples, minorities, women, children, the elderly, persons with disabilities, and other groups especially dependent on the physical environment.

The linkages between climate change and human rights are thus beyond dispute. The challenge now lies in introducing a rights-based approach to the negotiation and implementation of an effective and equitable solution to climate change. In this light, this paper uses the criteria of right to development to examine the CDM, including its institutional design and project cycle, with a view to drawing out linkages between climate change and the realization of the MDGs.

## *2.1 The right to development*

The Declaration on the Right to Development (DRD), adopted by the UN General Assembly in 1986, was the first instrument that formally recognized the right to development.<sup>5</sup> Before the DRD, the UN Charter,<sup>6</sup> the International Covenant on Civil and Political Rights<sup>7</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>8</sup> (ICESCR), had already acknowledged the close relationship between development and human rights. During the 1990s, this linkage was affirmed in world summits, including the 1992 Earth Summit in Rio de Janeiro,<sup>9</sup> the 1993 World Conference on Human Rights in Vienna,<sup>10</sup> and the 2000 UN Millennium Declaration, which led to the MDGs (UNITED NATIONS, 2000a). Despite the recognition of the linkages between development and human rights, however, the right to development remains one of the most controversial rights, often along North-South divides.

According to the DRD, the right to development is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” (UNITED NATIONS, 1986, Art. 1(1)). The Independent Expert on the Right to Development commented that the “process of development” should be carried out on the basis of a rights-based approach, in accordance with international human rights standards, such as transparency, participation, non-discrimination, and accountability.<sup>11</sup> Closely connected to this process is the “partnership approach” to development, based on shared responsibilities and mutual commitments between industrialized and developing countries and international organizations (PIRON, 2002).

Certain core elements of the right to development acquire special importance in the climate change context, namely: respect for all human rights, equity, and international cooperation. First, the DRD places the human person at the center of development, and provides that the development process must respect all human rights and fundamental freedoms, and contribute to the realization of rights for all (UNITED NATIONS, 1986, at Preamble, para. 12, Art. 1, 2(1), 6). Also, the realization of the right to development may not justify violations of other human rights.<sup>12</sup> This is the basis for a human rights-based approach to development,<sup>13</sup> which is particularly relevant in the climate change context (ORELLANA, 2009).

Second, the right to development requires that considerations of equity and justice determine the whole structure of the development process. For example, poverty has to be eradicated and the structure of production has to be adjusted through development policy (SENGUPTA, 2002, p. 837, 849). In this connection, the UNFCCC recognizes equity as one of the central principles that must guide the Parties’ actions to achieve its objective and implement its provisions (UNITED NATIONS, 1992b, Art. 3).

## *2.2 International Cooperation and Assistance*

Development assistance both technical and financial, has an important role to play in supporting countries to achieve the MDGs. The UN Secretary-General’s report on progress in achieving the MDGs observes that the switch to low greenhouse gas emitting, high-growth pathways to meet the development and climate challenges is both necessary and feasible, but will require much greater international support and solidarity (UNITED NATIONS, 2010, p. 38).

The UN Charter and several treaties recognize the role of international co-operation and assistance in achieving universal respect for human rights.<sup>14</sup> UN treaty monitoring bodies have also emphasized the role of international co-operation and assistance in the realization of economic, social and cultural rights.

Similarly, the Declaration on the Right to Development (DRD) identifies international cooperation as a key element to assist developing countries to secure the enjoyment of basic human rights (SALOMON, 2007, p. 3-6). In this light, the OHCHR analytical study on climate change and human rights concluded that

measures to address climate change should be informed and strengthened by international human rights standards and principles, and noted that climate change is a truly global problem that can only be effectively addressed through international cooperation, as climate change disproportionately affects poorer countries with the weakest capacity to protect their populations (UNITED NATIONS, 2009d).

### 3 International Cooperation and Climate Change

To respond to growing scientific concern, the international community under the auspices of the United Nations has come together to tackle the climate change problem. Its efforts have led to the development of the UNFCCC and the Kyoto Protocol, as well as a number of financial arrangements to address the costs associated with climate change.

#### 3.1 *The UN Framework Convention on Climate Change*

The UNFCCC was signed and adopted in the 1992 Rio Conference on Environment and Development, and entered into force in 1994. The UNFCCC acknowledges that the global nature of climate change calls for the widest possible cooperation by all countries.<sup>15</sup> The ultimate objective of the UNFCCC is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>16</sup>

Development considerations, and by implication the MDGs, play a central role in the design and implementation of the UNFCCC. Already the preamble of the UNFCCC affirms that “responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter” (UNITED NATIONS, 1992b, Preamble). More significantly, the ultimate objective of the Convention should be achieved within a time-frame sufficient, *inter alia*, “to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner” (UNITED NATIONS, 1992b, Art. 2). Furthermore, the UNFCCC articulates the principle of “common but differentiated responsibilities and respective capabilities”, which underscores that industrialized countries are to “take the lead in combating climate change.” (UNITED NATIONS, 1992b, Art. 3-4).

Evaluating the effectiveness of international cooperation in addressing climate change is a complex undertaking. From one perspective, the fact that States have negotiated and are implementing two major international treaties on the topic, namely the UNFCCC and the Kyoto Protocol, in addition to undertaking a significant negotiating effort over the past several years to define the post-Kyoto climate framework, would suggest that they have clearly sought to cooperate. From another angle, if the duty to cooperate requires effective solutions to the climate change problem, then the fact that the actual and impending consequences of climate change are increasing in intensity due to the failure to arrive at a binding agreement providing for effective mitigation, adaptation and other climate measures could be regarded as a failure of States to effectively cooperate.

### *3.2 The Kyoto Protocol*

In line with the objective and principles of the UNFCCC, the Kyoto Protocol was finalized in 1997 and entered into force in 2005.<sup>17</sup> Under the Protocol, 37 industrialized countries and countries in transition to a market economy, plus the European Community, made legally binding commitments to reduce their overall emissions of the six-major GHGs<sup>18</sup> by at least 5% below 1990 levels in the commitment period 2008-2012. As the emission reduction targets of the Protocol expire in 2012, what happens next remains unknown and is subject to ongoing international negotiations.

The fifteenth Conference of the Parties to the UNFCCC (COP 15) and the fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) took place in Copenhagen, Denmark, December 7 to 18, 2009. Despite two years of intense negotiations, the Parties were unable to reach agreement on all the issues (BODANSKY, 2010, p. 230). Instead, the main outcomes from the negotiations include a number of COP decisions that, *inter alia*, have mandated negotiations to continue, and the Copenhagen Accord,<sup>19</sup> a non-binding agreement drafted by certain heads of State. However, the fact that the COP took “note” of the Copenhagen Accord rather than “adopting” it introduces significant ambiguity regarding its legal status and implementation.

The Kyoto Protocol’s CDM has provided a mode of cooperation between industrialized and developing countries. However, the CDM still needs to be improved in order to secure a rights-based approach to development while promoting sustainable development in developing countries.

### *3.3 Financial Arrangements for Climate Change*

The costs associated with climate change, both in respect of mitigation of GHGs and of adaptation to a changing climate, pose a severe challenge to the international community. Developing countries in particular generally lack the resources to address this new environmental and social threat. Consequently, developing countries are especially vulnerable to climate change, since their budget is stretched to meet basic needs, such as access to food, water, and housing.

International cooperation in the form of financial assistance acquires critical relevance in light of the development challenges and vulnerabilities aggravated by climate change, especially in developing countries. While, financial arrangements for climate change are numerous and dispersed,<sup>20</sup> efforts by the international community to address the costs associated with climate change have fallen short of what is necessary to ensure that progress towards achieving the MDGs is not undermined by climate change.

The UNFCCC and the Kyoto Protocol have established mechanisms to channel financial assistance to developing countries. The UNFCCC assigns the Global Environment Facility as the operating entity of its financial mechanism on an on-going basis, subject to review every four years. The Kyoto Protocol establishes two main financial arrangements.<sup>21</sup> First is the operation of the market

mechanisms, including the CDM, creating economic incentives for the reduction of emissions of the six-major GHGs. Second is the specific Adaptation Fund to assist developing countries to adapt to the adverse effects of climate change.<sup>22</sup> The Adaptation Fund is replenished through, *inter alia*, contributions from the CDM.

This cursory overview of international cooperation and the climate change regime shows the CDM's relevance to encouraging investment and technology transfer to developing countries. Similarly, the CDM provides financial resources for the Adaptation Fund, which is critical in building community resilience in developing countries. These features already highlight the CDM's significance in the interface between climate change and the MDGs. Concerns, however, have been raised as to the CDM's environmental integrity, its ability to ensure respect for human rights, as well as its actual contribution to sustainable development. In light of its importance, the CDM is analyzed in further detail next.

## 4 The Clean Development Mechanism (CDM)

The CDM, created under the Kyoto Protocol to the UNFCCC, was designed to achieve cost-effective emissions reduction and promote sustainable development in developing countries. It does so by encouraging investments in developing countries that achieve emission reductions additional to what would otherwise have occurred. CDM projects have so far generated more than 365 million Certified Emission Reductions (CERs) and are anticipated to generate more than 2.9 billion CERs within the first commitment period of the Kyoto Protocol (2008-2012). The CDM has passed more than 2000 projects registered (UNITED NATIONS, 2010b).

This section first provides a brief background on the CDM and its structure. It then analyzes the CDM's requirements, scope, and actors. The last part addresses certain criticisms that have been leveled to the CDM, concluding with an analysis of options for its improvement.

### 4.1 Background

Under the Kyoto Protocol, industrialized Annex I Parties<sup>23</sup> must reduce their GHG net emissions by an average of 5% below 1990 levels over a five-year reporting period, 2008-2012 (UNITED NATIONS, 1997, Art. 3(1)). The CDM is one of the three market-based mechanisms created by the Kyoto Protocol to assist industrialized country Parties to meet their emissions reduction target (UNITED NATIONS, 1997, Art. 12).<sup>24</sup> Under the CDM, Annex I Parties (or private entities from those countries) may fund activities in non-Annex I Parties that result in CERs. Industrialized countries are then able to apply CERs toward their emissions targets.

The CDM has a two-fold purpose. First, it aims at promoting sustainable development in developing countries. Accordingly, the CDM is expected to lead to investments into the developing world and to the transfer of environmentally safe and sound technology (UNITED NATIONS, 2001). Second, the CDM is critical to addressing GHG mitigation by assisting industrialized countries in achieving compliance with their quantified emission reduction commitments under the Kyoto

Protocol. In this context, the main rationale behind the CDM is cost effectiveness, which means that CDM projects will take place where GHG emissions reductions are cheaper (VAN ASSELT; GUPTA, 2009, p. 311, 331).

#### *4.2 Basic Requirements of a CDM project*

Under Kyoto Protocol Article 5, CDM projects have to fulfill three basic requirements:<sup>25</sup>

- a) Voluntary participation by each Party.*<sup>26</sup> Written approval of voluntary participation is a requirement for validation (UNITED NATIONS, 2005b, Annex, para. 40).
- b) Real, measurable, and long-term mitigation of climate change.* CDM projects must lead to real, measurable reductions in GHG emissions, or lead to the measurable absorption (or “sequestration”) of GHGs in a developing country (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003, p. 4-5). The “project boundary” defines the area within which emissions reductions occur.<sup>27</sup>
- c) Additionality.* The “additionality” element requires emission reductions that are additional to any that would occur in the absence of a certified project activity (UNITED NATIONS, 1997, Art. 12(5)). Stated differently, “additionality” requires that GHG emissions from a CDM project activity must be reduced below those levels that would have occurred in the absence of the project.<sup>28</sup> In fact, it must be shown that the project would not have been implemented without the CDM.

A CDM project should also contain a “sustainability” element. All CDM projects must contribute towards sustainable development in the host country and must also be implemented without any negative environmental impacts (UNITED NATIONS, 2001, para. 4). To ensure that these conditions are met, the host country determines whether the CDM project meets its sustainable development objectives, and also decides whether an environmental assessment of the project is required (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003). The prerogative of the host country to define sustainable development has not been devoid of question, however, given the linkage between human rights and development and the need for external accountability of the State with respect to human rights issues.

#### *4.3 Core Actors of the CDM*

CDM projects involve several participants (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003):

- a) Project Proponent.* This is the entity that develops and implements a CDM project.



- b) CER Purchaser.** This invests in the project and/or purchases the project's CERs.
- c) Stakeholders.** These include the public, or any individuals, groups or communities affected, or likely to be affected, by the proposed CDM project activities (UNITED NATIONS, 2001, Annex A (e)).
- d) Host Country.** This is the developing country in which the CDM project takes place. The host country approves the project prior to its implementation.
- e) Executive Board.** This supervises implementation of the CDM and reports to the COP/CMP. It is comprised of ten members representing Kyoto Protocol Parties (UNITED NATIONS, 2001, Annex C (5)). It also maintains the CDM registry for issuance of CERs, approves methodologies for measuring baselines and additionality, and accredits DOEs (UNITED NATIONS, 2001).
- f) Designated National Authority (DNA).** The DNA is established by the host country and decides whether the proposed CDM is consistent with the country's sustainable development goals. The DNA serves as a focal point for consideration and approval of CDM project proposals (UNITED NATIONS, 2005b, Annex, para. 29). The DNA accepts or rejects the CDM component of particular projects (UNITED NATIONS; ENERGY AND ENVIRONMENT GROUP; BDP, 2003, p. 26).
- g) Designated Operational Entities (DOEs).** DOEs are accredited by the CDM Executive Board as such (UNITED NATIONS, 2005b, Annex G; WOLD; HUNTER; POWERS, 2009, p. 234). They have varying responsibilities during different stages of the CDM project cycle, including: reviewing and assessing the Project Design Document (PDD); certifying the projects proposed methodology for measuring emissions reductions; validating project proposals; and verifying the emissions reductions resulting from the project that could be considered for issuance of CERs. There are two DOEs involved in the CDM process. The first DOE prepares a validation report evaluating the PDD against the CDM requirements, which it submits to the Executive Board for registration (NIGOFF, 2006, p. 249, 257-258).<sup>29</sup> The second DOE verifies and certifies the emissions reductions, and then provides a report to the Executive Board for CER issuance.

#### *4.4 Stages in the CDM Project Cycle*

Several steps must be undertaken to obtain CERs (STRECK; LIN, 2008, p. 409):

- a) Design and formulation of the proposed project-by-project participants.** Project proponents submit a PDD to the host country's DNA. The PDD should include the technical and financial details of the project, including: proposed baseline methodology for calculating emissions reductions; project's estimated operational life time; description of the additionality requirements; documentation of environmental impacts; stakeholder comments; sources of

funding; and a monitoring plan (UNITED NATIONS, 2005b, Annex B; WOLD; HUNTER; POWERS, 2009, p. 14).

- b) **Approval by the DNA.** The DNA approves the development of the proposed CDM project. The DNA also confirms whether a CDM project activity will contribute to the sustainable development of the host State.
- c) **Validation.** The project design, expressed in the PDD, must be evaluated by the first DOE against the requirements of the CDM. Validation also includes assurance that the host country agrees to the following: that the project contributes to sustainable development; that any required environmental assessment has been carried out; and that there has been adequate opportunity for public comment on the project.
- d) **Registration.** The validated project must be formally accepted and registered by the Executive Board, based on the recommendations from the first DOE.
- e) **Verification.** Once the CDM project is underway, the monitored emissions reductions that result from it must be reviewed periodically by the second DOE.
- f) **Issuance of certification.** Upon written assurance provided by the second DOE, the CDM Executive Board issues the CERs. The CERs are then assigned to the Annex I country where the CER purchaser is located.

#### 4.5 Project Types

Current CDM statistics (January, 2010)<sup>30</sup> show more than 2000 registered CDM projects, of which large-scale projects represent 55.43% and small-scale projects represent 44.57%.<sup>31</sup> Most CDM projects involve energy industries (renewable and non-renewable sources), energy efficiency, waste handling and disposal, agriculture, manufacturing industries, fugitive emissions from fuels (solid, oil and gas), chemical industries, afforestation and reforestation, mining production, among others.<sup>32</sup> China, India, Brazil, Mexico, and Malaysia are the major countries hosting CDM projects, accounting for approximate 80% of the total number of projects (UNITED NATIONS, 2008c).

Although the CDM does not have an explicit technology transfer mandate, it contributes to technology transfer by encouraging investments that use technologies currently not available in the host countries. According to a UNFCCC Secretariat report on technology transfer in CDM projects, technology transfer is more common for larger projects involving agriculture, energy efficiency, landfill gas, nitrogen dioxide (N<sub>2</sub>O), hydro-fluorcarbon (HFC) and wind projects (SERES, 2008). Also technology transfer is more common for projects that involve foreign participants. The report concludes that the technology transferred mostly originates (over 70%) from Japan, Germany, the USA, France, and Great Britain. Although technology transfer from Non-Annex I countries is less than 10% of all technology transfer, Brazil, China, India, South Korea and Chinese Taipei are the main sources

of equipment (94%) and knowledge (70%) transfers from Non-Annex I sources (SERES, 2008).

#### 4.6 Critiques of the CDM

Critiques of the CDM in the scholarly literature<sup>33</sup> concern, *inter alia*, governance practices, environmental integrity, and contribution to sustainable development (STRECK, 2009, p. 67).

- a) ***A rights-based approach (RBA) to CDM.*** The current CDM's emphasis on emissions reductions does not ensure that its projects minimize impacts deleterious to the rights of people or conservation (ORELLANA, 2009). Measures and projects adopted under the CDM can have direct and indirect impacts on human communities and livelihoods. For example, dam projects may involve displacement of communities and cause irreversible environmental impacts.
- b) ***No requirement of prior informed consent.*** The CDM requires only that affected communities be consulted, and not that they give their prior informed consent (or free, prior and informed consent in the case of indigenous and tribal peoples) (ORELLANA, 2009). This can result in a direct violation of human rights.
- c) ***Lack of equitable geographical distribution*** exists between developing countries that are eligible and those that are favored for project development. In other words, countries like China, India, and Brazil are receiving the lion's share of project investment, while African countries, for instance, are languishing.<sup>34</sup>
- d) ***Equity.*** Market systems, such as the CDM, seek technological solutions and efficiency. The unequitable distribution of access to technologies, however, reinforces power and wealth disparities (BURKETT, 2008, p. 169, 234; KASWAN, 2009, p. 48). In addition, market-based systems treat pollution as a commodity to be bought or sold, raising complex ethical issues (KASWAN, 2009, p. 50-51).
- e) ***Failure to promote sustainable development or green technology transfer.*** As a market mechanism, the CDM searches for the cheapest emissions reductions. In that regard, while the CDM has been effective in reducing mitigation costs, it has not been equally effective in contributing more broadly to sustainability (STRECK, 2009). The greatest amounts of CERs are being generated by projects with low or negligible contribution to sustainable development. For example, most of the non-renewable energy projects that are now flooding the carbon market do not score high on certain sustainable development indicators (VAN ASSELT; GUPTA, 2009, p. 350). Similarly, renewable energy, energy efficiency and transport project activities—smaller in scale and more diffuse by nature—are less competitive in the CDM market (BURKETT, 2008, p. 210-212).
- f) ***Lack of access to remedies and jurisdiction.*** There is no accountability mechanism at the CDM, such as the World Bank's Inspection Panel (CLARK;

FOX; TREAKLE, 2003). In addition, the CDM rules do not provide recourse to private parties to challenge Executive Board decisions. Instead, the Executive Board, as is the case with other international institutions, has immunity to enable it to exercise its functions or fulfill its purposes without the threat of litigation.<sup>35</sup>

- g) Lengthy CDM process.* The bureaucratic CDM process significantly slows an already strained project pipeline. The steps along the pipeline substantially increase the transaction costs of moving from the design and formulation of a project to issuance of CERs (BURKETT, 2008, p. 210). Moreover, the approval process is considered by some to be guided by political considerations rather than factual competence (STRECK, 2009, p. 71).
- h) Lack of transparency.* The lack of transparency is associated to DOEs' role in verifying emissions reductions, as DOEs are composed of private consultants (BURKETT, 2008, p. 236). In addition, lack of transparency relates to deficiencies of the regulatory process to guarantee the private sector's confidence in the CDM (STRECK, 2009, p. 71; STRECK; LIN, 2008).
- i) Additionality.* Most CDM projects are non-additional and therefore do not represent real emissions reductions. The additionality screening is criticized for being imprecise and subjective, as well as for being unable to prevent non-additional projects from entering the CDM (HAYA, 2009).
- j) Limited use.* The use of CDM is limited to reducing emissions on a single project-basis, and is not designed to address whole sectors of the economy.

Despite the criticisms, the CDM is mobilizing large amounts of funds from the private sector towards mitigation in developing countries. In addition, it can contribute to building institutional capacity and keeping developing countries engaged in the Kyoto Protocol's process. The CDM thus remains an important mechanism under the climate change regime for GHG mitigation and for promoting sustainable development and technology transfer. Therefore, one of the questions facing the climate change regime is how to reinvigorate and improve the CDM, including enhancing its effectiveness and ensuring its social and environmental integrity. In this sense, there is room for enhancing the CDM's role within the climate change regime, including post-2012.

#### *4.7 CMP 5 Decision relating to the CDM*

CMP 5 provided further guidance relating to the CDM, some elements of which are particularly important in informing an assessment of the CDM under criteria pertaining to the right to development. CMP 5 set in motion a process of study of baseline and monitoring methodologies and additionality to increase CDM projects in under-represented project activity types or regions (UNITED NATIONS, 2010c, para. 23, 25). This is relevant to increasing investments in projects that may

achieve significant sustainable development benefits and emissions reductions, as well as to channeling investments to more developing countries, including LDCs, instead of just a few.

CMP 5 also addressed the need for a wider distribution of CDM projects in developing countries. It adopted several measures to encourage CDM projects in countries with minor CDM participation, including a request to the Executive Board to use interest accrued within the Trust Fund for the CDM (and any voluntary contributions) to provide loans to countries with fewer than ten registered CDM projects to cover the costs of the development of PDDs, validation, and the first verification of project activities (UNITED NATIONS, 2010c, para. 47-50). In addition, CMP 5 took note of the work of the DNA Forum, given its potential contribution to achieving broader participation in the CDM, including through the sharing of information and experience, and encouraged the Executive Board to follow up on issues raised by the DNA Forum (UNITED NATIONS, 2010c, para. 44-45).

## 5 The CDM under Right to Development Criteria

Assessing the CDM under criteria pertaining to the right to development is helpful for evaluating proposals regarding CDM reform. The HLTf at its fifth session (2009) revised the right to development criteria and organized them under the three components of the right to development, namely: comprehensive human-centered development; enabling environment; and social justice and equity. In addition, the HLTf has identified operational clusters of criteria within each of these three components.

This section will focus on the following clusters of criteria, as defined by the HLTf: (1) human rights-based process and outcomes (criteria c, d & e); (2) sustainable development (criterion f); (3) international cooperation and assistance (criteria g, h, i & j); and (4) rule of law and governance (criteria l & m).

### *5.1 Human Rights-Based Process and Outcomes*

The right to development criteria concerning human rights-based process and outcomes calls for particular attention on the principles of equality, non-discrimination, participation, transparency, and accountability in the design of development strategies. With respect to the CDM, these criteria call for attention on the CDM's ability to define sustainable development objectives in an inclusive and participatory process, on the one hand, and on the CDM's ability to ensure that the rights of stakeholders are respected, on the other.

The question of the definition of sustainable development objectives is left by CDM design in the hands of the host State. The host State's DNA will determine whether a proposed CDM projects contributes or not to its sustainable development. The CDM regards this determination as an expression of the sovereignty of the host State, and it does not provide for international scrutiny of it. Therefore, the CDM does not require that the DNA establish an open and participatory process

when defining sustainable development criteria, or when making determinations regarding the contribution of projects to sustainability.

The question of the CDM's ability to ensure that CDM projects respect the rights of stakeholders calls for analysis of the procedural safeguards in the CDM project cycle, in connection with the role of the Executive Board in that regard. Current CDM modalities and procedures already contain certain tools necessary to apply certain steps of a rights-based approach (RBA), although more could be done to ensure human rights protection (ORELLANA, 2009, p. 37-61). Similarly, it remains possible that the CDM Executive Board will exercise its authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In the exercise of this authority, the CDM Executive Board could conclude that no CERs shall be issued in connection with projects involving negative social and environmental spillovers, especially if such impacts involve infringements of rights.

An RBA to the CDM can be used to ensure that its future operations improve its contribution to sustainable development, including respect for human rights. An RBA will ensure that people's rights will not be affected by CDM projects, and will ensure environmental and procedural integrity. An RBA involves a series of steps oriented towards adequate consideration of the rights of individuals and communities that may be adversely affected by mitigation projects. In this respect, undertaking a situation analysis, providing adequate information on the project, and ensuring participation of rights-holders and other stakeholders are initial steps that enable early identification of the rights and interests that may be affected by the project. In addition, a process for taking reasoned decisions would ensure that adequate consideration is given to the rights at issue, which is central to avoid interference with protected rights as well as to balance competing rights where necessary. In addition, mechanisms for monitoring, evaluating, and adequate enforcement are important for operationalizing the RBA throughout the life of a project and for learning from the experience during implementation (ORELLANA, 2009).

## 5.2 Sustainable Development

The criteria concerning sustainable development call for an evaluation of, *inter alia*, the fair distribution of development benefits, both within and among countries. As noted above, the CDM is a market mechanism driven by investments in the cheapest opportunities for reducing emissions. Whether these projects also contribute to sustainable development raises two issues: the process and outcomes pertaining to the host State DNA's determination of sustainable development criteria and contributions; and the extent of participation of developing countries in the CDM (addressed below in connection with international cooperation and assistance).

In addition to the discussion above concerning a rights-based process to the determination of sustainable development criteria and contributions, the CDM does not explicitly require that human rights considerations be taken into account

in relation to sustainable development determinations. In the CDM's design, sustainable development determinations are the prerogative of the host State, which will thus determine whether and to what extent it considers human rights. While it could be argued that this design maximizes national policy space and autonomy, it is, however, in opposition to the notion that human rights issues are a matter of international concern, and that they are directly and indirectly implicated in sustainable development. In this regard, the right to development criterion concerning national policy space stresses that the determination of development policies should be conducted in a manner that is consistent with realizing all human rights (UNITED NATIONS, 2009b, Annex IV, Criterion (k)).

### *5.3 International Cooperation and Assistance*

The criteria concerning international cooperation and assistance call for an examination of, *inter alia*, to the extent of participation of developing countries in the CDM. In this respect, as noted above, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria stressing equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community. Moreover, this situation aggravates international inequities pertaining to financial flows and transfer of technology for GHG mitigation.

Accordingly, a more equitable geographical distribution of CDM projects, in numbers and volume of investments, would enhance the CDM's ability to contribute to the right to development. Similarly, the implementation of a sectoral CDM initiative, in addition to individual CDM projects, could enhance the ability of smaller developing countries to participate in the CDM. As noted above, CMP 5 has taken certain steps in this direction.

### *5.4 Rule of Law and Governance*

Regard to rule of law and governance as a cluster of right to development criteria calls for attention on the national and international institutions active in the CDM, including with respect to accountability, access to information, and effective measures for redress.

At the national level, the CDM can contribute to the host State's ability to establish institutional mechanisms to facilitate green investments and technology transfer. The creation of DNAs as a pre-requisite for CDM projects reflects the CDM's potential contribution to institutional improvement. To ensure that this contribution materializes, however, the CDM must establish adequate tools to ensure accountability of DNAs.

At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed. It has been noted that a grievance mechanism could allow the

CDM project to address and remedy situations before disputes aggravate or entrench opposing positions or result in violence. A grievance mechanism available to the various actors participating in the CDM could also lift the process to the level of an administrative procedure that meets due process standards, thereby enhancing good governance and the rule of law (STRECK; CHAGAS, 2007, p. 53, 61-62).

With respect to CDM governance, there are no mechanisms established for affected individuals to challenge Executive Board decisions. It has been suggested that CDM administrative procedure must meet international due process standards, enhance the predictability of its decisions, and promote private-sector confidence in the system. In this vein, it has been proposed that a review mechanism of the decisions of the Executive Board should be established, in order to give project participants and stakeholders the right to obtain review of Executive Board decisions (STRECK; CHAGAS, 2007). In this regard, CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work, including through, *inter alia*, publishing detailed explanations of and the rationale for decisions taken and enhancing its communications with project participants and stakeholders (UNITED NATIONS, 2010c, para. 6-15).

### *5.5 Improving Right to Development Criteria*

Improving right to development criteria with climate change in mind would not only contribute to the effectiveness of global partnerships (MDG 8), but would also contribute to reinvigorate the developmental dimensions of the climate change regime, thereby enabling progress toward the achievement of the MDGs generally.

For example, a new criterion could be added regarding the scientific basis for decision-making, *e.g.*, “adopt a science-based approach to decision-making, including application of the precautionary approach”. The 2002 Johannesburg World Summit on Sustainable Development (WSSD) endorsed a science-based approach to decision-making. Specifically, the WSSD Plan of Implementation establishes science-based decision-making as the preferred approach for making regulatory decisions (UNITED NATIONS, 2002b, para. 109). Moreover, as explicitly noted in the WSSD Plan of Implementation, a science-based approach to decision-making includes the application of the precautionary principle or approach, which states that the lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>36</sup>

The application of a science-based approach to decision-making is particularly important with respect to climate change. In order to evaluate the effectiveness of international arrangements established to channel international cooperation to address climate change, this criterion enables the utilization of scientific evidence. It thus avoids subjective evaluations of effectiveness by focusing on whether the measures established in the climate change regime are capable, on account of the scientific evidence, of achieving the objective of the UNFCCC (discussed above).<sup>37</sup>

Similarly, a new criterion could be added regarding common but differentiated responsibilities, *e.g.*, “recognize common but differentiated



responsibilities, in view of the different contributions to global environmental degradation". The principle of common but differentiated responsibilities (CBDR) is central to the climate change regime and affirms that all States have common responsibilities to protect the environment and promote sustainable development but with different burdens due to their different contributions to environmental degradation and to their varying financial and technological capabilities (HUNTER; ZALMAN; ZAELKE, 2002, p. 495).

The endorsement of CBDR as a criterion regarding the right to development allows for an evaluation of particular climate change arrangements that may be established. Further, this criterion re-affirms the central importance of the CBDR principle in the climate change regime, including with respect to its sustainable development dimension. This criterion could also reinvigorate the necessary financial and technological flows into developing countries, which has been identified by the UN Secretary-General as key elements of the global new deal required to address climate change and achieve the MDGs (UNITED NATIONS, 2010a).

## 6 Conclusion

Over the last decade, the UN has devoted substantial resources to promoting efforts to meet the Millennium Development Goals (MDGs). Given the direct impact of climate change on the ability of the international community to achieve the MDGs, this paper has looked into certain linkages between climate change, the right to development and the MDGs. In this light, international cooperation is critical both to tackling climate change and achieving the MDGs. The UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol stand out as the principal legal response by the international community to the climate change threat. They provide avenues through which international cooperation occurs, including with respect to financial and technology transfers.

The linkages between the right to development and climate change are reflected in both the UNFCCC and the Kyoto Protocol. The UNFCCC noted that the largest share of historical global emissions of GHGs has originated in industrialized countries and recognized that the share of global emissions originating in developing countries will grow to meet their social and development needs. The Kyoto Protocol set targets for greenhouse gas (GHG) emissions reductions for industrialized countries (Annex I Parties), and created three market mechanisms, including the Clean Development Mechanism (CDM), to reduce the costs of reducing emissions.

The CDM is unique in light of its two-fold objective: mitigating climate change and contributing to sustainable development. In this regard, the CDM reflects a climate change partnership whereby investments from the North are channeled to the South in order to capture opportunities for the reduction of GHG emissions where they may be most cost-effective. The CDM thus promotes financial flows and technology transfer into developing countries, which, as the UN Secretary-General has observed, are central to channeling resources towards

investment in renewable energy, and building resilience with respect to unavoidable climate changes.

When examined using right to development criteria, however, the CDM reveals certain weaknesses that limit its contribution to the implementation of the right to development. Key points include the following.

- *Criteria pertaining to human rights-based processes and outcomes* calls on the CDM to ensure that the host State's determination of whether a proposed CDM project contributes to sustainable development follows an inclusive and participatory process. In addition, human rights considerations should also be taken into account in relation to sustainable development determinations. Furthermore, CDM projects need to respect the rights of stakeholders, which call for strengthened procedural safeguards and Executive Board authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures. In this vein, a rights-based approach should be adopted to ensure that people's rights will not be negatively affected by CDM projects.
- *Criteria pertaining to sustainable development and international cooperation and assistance* call on the CDM to ensure the equitable participation of developing countries. Currently, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria that stress equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community.
- *Criteria pertaining to rule of law and governance* call on the national and international institutions active in the CDM to ensure access to information and transparency, public participation, accountability, and effective measures for redress. At the national level, the CDM lacks explicit tools to ensure accountability of Designated National Authority (DNAs), as this is an issue within the domain of the host State. At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed.

The fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) in December 2009 adopted certain decisions that begin to address some of these issues by providing further guidance relating to the CDM. CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work. CMP 5 also set in motion a process to increase CDM projects in under-represented project activity types or regions. Moreover, CMP 5 addressed the need for a wider distribution of CDM projects in developing countries, and adopted several measures to encourage CDM projects in countries with minor CDM participation.

More generally, given the linkages between the right to development, the

MDGs and climate change, the design and experience of the CDM in channeling investments and technology transfer to developing countries provides valuable lessons in structuring and improving global partnerships to address both climate change and sustainable development. In this regard, the CDM is directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change.

In the end, the linkages explored in this paper, coupled with the findings of the examination of the CDM under right to development criteria, evidence the need for a rights-based approach to climate change, in order to ensure that climate change mitigation and adaptation does not compromise efforts directed at implementing the right to development and achieving the MDGs, as well as to capture opportunities provided by the MDGs in enhancing capacities needed to tackle climate change.

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## NOTES

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1. This paper is based on a study presented to the High Level Task Force (HLTF) on the Implementation of the Right to Development. The author is indebted to the Right to Development Unit of the Office of the High Commissioner for Human Rights and the High Level Task Force on the Implementation of the Right to Development for their comments and support, as well as to Mr. Daniele Violetti of the UNFCCC Secretariat for his comments and review. The author is also indebted to the editors of *Sur* for their helpful editorial comments. The author would like to thank his colleagues at CIEL for their insightful comments, including Daniel Magraw, Stephen Porter and Sofia Plagakis. CIEL interns and fellows provided valuable research assistance, including Andrea Martinez and Alicia Handy, as well as Ana Paula Parente, CIEL's Louis B. Sohn Fellow in Human Rights and Environment. All errors and omissions remain the author's sole responsibility.

2. See UNDP, *Climate Change and the Millennium Development Goal*. Available at: <[http://www.undp.org/climatechange/cc\\_mdgs.shtml](http://www.undp.org/climatechange/cc_mdgs.shtml)>.

3. The High Level Task Force on the Implementation of the Right to Development (HLTF) was established by the Open-ended Working Group on the Right to Development (Working Group) created by the (former) Commission on Human Rights. See United Nations (2004, para. 9). The HLTF was convened to act as an advisory body to the Working Group and to render operational the terms of the Declaration on the Right to Development. See also United Nations (1998a, 1998b). The HLTF's mandate was to "examine the Clean Development Mechanism (...)" from a right to development perspective. See United Nations (2005a, 2008a, 2009b).

4. See generally, Center for International Environmental Law & Friedrich Ebert Stiftung (CIEL; FES, 2009). See also, Cameron (2009); Limon (2009); Global Humanitarian Forum (2009); International Council on Human Rights Policy (2008); Baer, Athanasiou and Kartha (2007).

5. The DRD [hereinafter DRD or Declaration] defines the meaning of development as "a comprehensive economic, social and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from." (UNITED NATIONS, 1986, Annex 41).

6. Charter of the United Nations (June 26, 1945), entered into force October 24, 1945, 59 Stat. 1031; TS 993; [hereinafter UN Charter] (UNITED

NATIONS, 1945, Preamble, Art. 55-56).

7. International Covenant on Civil and Political Rights (December 19, 1966), entered into force March 23, 1976 [hereinafter ICCPR] (UNITED NATIONS, 1966a).

8. International Covenant on Economic, Social and Cultural Rights (December 16, 1966), entered into force January 3, 1976 [hereinafter ICESCR] (UNITED NATIONS, 1966b).

9. "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." (UNITED NATIONS, 1992a, principle 3).

10. The Vienna Declaration sanctioned the right to development as an "integral part of fundamental human rights" (UNITED NATIONS, 1993, Art. 10). The Vienna Declaration reiterated the commitment contained on Article 56 of the UN Charter, which determines all States to cooperate with each other in ensuring development and eliminating obstacles to development (UNITED NATIONS, 1993, Art. 10-11).

11. Study on the current state of progress in the implementation of the right to development submitted by Mr. Arjun K. Sengupta, Independent Expert (SENGUPTA, 1999, para. 47).

12. "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." (UNITED NATIONS, 1993, para. 10).

13. See United Nations (2002a, para. 46). The Working Group, at its Sixth Session in 2005, recognized the "multi-faceted nature of the right to development [and] agreed that a rights-based approach to economic growth and development contributes to the realization of the right to development while it does not exhaust its implications and requirements at both the national and international levels." See United Nations (2005a). See also, Nwauche and Nwobike (2005).

14. Article 2(1), ICESCR states that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (UNITED NATIONS, 1966b, emphasis added). The



importance of international assistance and co-operation to the realization of human rights is also reflected in other international and regional human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

15. In this vein, the duty to cooperate in the climate change context requires States to negotiate and implement international agreements under the auspices of the UNFCCC, which features the necessary membership and expertise. See Knox (2009, p. 163, 213).

16. United Nations Framework Convention on Climate Change (May 9, 1992) entered into force March 21, 1994 (UNITED NATIONS, 1992b, Art. 2).

17. See Kyoto Protocol to the United Nations Framework Convention on Climate Change (December 11, 1997), entered into force February 16, 2005 [hereinafter Kyoto Protocol] (UNITED NATIONS, 1997).

18. CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>.

19. COP 15 took "note of the Copenhagen Accord of 18 December 2009" (UNITED NATIONS, 2009e).

20. A number of international organizations are actively engaged in administering and/or operating climate change funds, including the UNDP, United Nations Environment Programme (UNEP), and the United Nations International Strategy for Disaster Reduction (UN-ISDR). Similarly, a number of multilateral development banks have set up dedicated funds to address climate change. Further, several industrialized countries have established climate change funds to assist climate change mitigation and adaption in the developing world.

21. See UNFCCC, **About Clean Development Mechanism (CDM)**, <<http://cdm.unfccc.int/about/index.html>>.

22. See UNFCCC, **Adaptation Fund**, <[http://unfccc.int/cooperation\\_and\\_support/financial\\_mechanism/adaptation\\_fund/items/3659.php](http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php)>. The Adaptation Fund Board supervises and manages the Adaptation Fund and has sixteen members and sixteen alternates who meet no less than twice a year. In December 2008, the Parties to the Kyoto Protocol established rules of procedure, priorities, policies, and guidelines for the Adaptation Fund.

23. Annex I Parties includes OECD member countries and countries undergoing the process of transition to a market economy.

24. The two other mechanisms are Joint Implementation and Emissions Trading. See United Nations (1997, Art. 6, 17).

25. Beyond these requirements, the Kyoto

Protocol provided almost no guidance for operation the CDM. To develop the necessary institutional framework to operate the CDM, the Parties have adopted a substantial body of Decisions at meetings of the Parties. See Wold, Hunter and Powers (2009, p. 233).

26. See, United Nations (2005b, Annex, para. 28): "Participation by Parties in a CDM project activity is voluntary."

27. See, Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001 [hereinafter Marrakesh Accords] (UNITED NATIONS, 2001, Annex G (52)).

28. "A CDM project activity is additional if anthropogenic emissions of GHG by sources are reduced below those that would have occurred in the absence of the registered CDM project activity". See United Nations (2001, Annex G (43)).

29. In small-scale projects the same designated operational entity can carry out both the validation (at project outset) and verification (during project operation), in order to avoid expenses of using two DOEs. See also United Nations, Energy and Environment Group and BDP (2003, p. 20-22).

30. See United Nations Framework Convention on Climate Change (UNFCCC), CDM-Home, <<http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScalePieChart.html>>.

31. The definition of small scale projects is provided by the COP/CMP as: (I) renewable energy project activities with a maximum output capacity equivalent of up to 15 megawatts; (II) energy efficiency improvement project activities which reduce energy consumption by up to the equivalent of 15 gigawatt hours per year; and (III) other project activities that both reduce anthropogenic emissions by sources and directly emit less than 15,000 kilotons of CO<sub>2</sub> equivalent per year. See Decision 17/CP.7 (UNITED NATIONS, 2001, para. 6(c), amended by 1/ CMP.2, para. 28). A project which is eligible to be considered as a small-scale CDM project activity can benefit from the simplified modalities and procedures. See Decision 4/CMP.1 (UNITED NATIONS, 2005c, Annex II).

32. See <<http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScopePieChart.html>>. The energy industries sector represents 60.31% of the total projects registered under the CDM.

33. This section is based on the scholarly debate. Moreover, the discussion does not purport to evaluate the merits of the various critiques.

34. According to the UN Environment Programme (UNEP), the number of CDM

projects that are being planned or have been registered across the African region is increasing. UNEP reports that a total of 112 CDM projects in Africa are at the stage of validation, requesting registration or have been registered. This is an increase from previous years, with 78 projects in 2008 and two in 2004. See UNEP (2009).

35. See Wold, Hunter and Powers (2009, p. 236), citing Ernestine E. Meijer (2007, p. 873). See also Streck and Lin (2008).

36. See United Nations (1992a, Principle 15). See also Convention on Biological Diversity (June 5, 1992), entered into force December 29, 1993 (UNITED NATIONS, 1992c); Cartagena

Protocol on Biosafety to the Convention on Biological Diversity (January 29, 2000), entered into force September 11, 2003 (UNITED NATIONS, 2000b).

37. In this connection, the Copenhagen Accord agrees that "deep cuts in global emissions are required according to science." (UNITED NATIONS, 2009e, para. 2); It further underlines that "to achieve the ultimate objective of the UNFCCC," and "recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius," the Parties shall enhance cooperative action to combat climate change.

## RESUMO

Este artigo explora ligações entre os direitos humanos e os Objetivos de Desenvolvimento do Milênio (ODMs), a cooperação internacional em mudança climática e o Mecanismo de Desenvolvimento Limpo (MDL). O artigo utiliza critérios do direito ao desenvolvimento para analisar o MDL. O MDL oferece um exemplo claro de parceria internacional entre o Sul global e o Norte industrializado para alcançar os objetivos duplos de promover o desenvolvimento sustentável e mitigar as mudanças climáticas. O MDL é, portanto, diretamente relevante para o ODM 7 relativo a parcerias globais e transferência de tecnologia, bem como para outros objetivos de desenvolvimento do milênio diretamente afetados pela mudança do clima. Ademais, o foco no MDL também levanta questões sobre investimentos e fluxos de recursos, transferência de tecnologia e integridade ambiental, bem como o significado e a operacionalização de uma abordagem do desenvolvimento baseada em direitos humanos, todos centrais para a mitigação efetiva e equitativa das mudanças climáticas e para a consecução dos ODMs.

## PALAVRAS-CHAVE

ODMs – Cooperação internacional – Mudança climática – Mecanismo de Desenvolvimento Limpo

## RESUMEN

El presente trabajo explora los vínculos entre los derechos humanos y los ODM, la cooperación internacional en materia de cambio climático y el Mecanismo de Desarrollo Limpio (MDL). Se usa el criterio del derecho al desarrollo para analizar el MDL. El MDL ofrece un claro ejemplo de una asociación internacional entre el Sur global y el Norte industrializado para alcanzar el doble objetivo de promover el desarrollo sostenible y mitigar el cambio climático. El MDL tiene, por lo tanto, una relevancia directa para el ODM 8 respecto de las asociaciones globales y la transferencia de tecnología, como así también para los demás ODM que se ven directamente afectados por el cambio climático. Asimismo, al analizar el MDL, surgen cuestiones relativas a las inversiones y el movimiento de recursos, la transferencia de tecnología, la integridad del medio ambiente, y el sentido y la operacionalización de un enfoque de desarrollo basado en los derechos, todas cuestiones centrales para una mitigación efectiva y equitativa del cambio climático y para el logro de los ODM.

## PALABRAS CLAVE

ODMs – Cooperación internacional – Cambio climático – Mecanismo de Desarrollo Limpio

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