

Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes

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This paper focuses on the large potential for normative conflict between a developed State's obligations under the international climate change regime and the right to work under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The *Kyoto Protocol* obligates developed States to reduce their greenhouse gas emissions. The Copenhagen Accord builds on the *Kyoto Protocol* and sets the stage for a new large scale emissions reductions agreement. Article six of the *ICESCR* obligates developed States to respect, to protect and to fulfill the right to work while progressing towards full employment. For developed States to fulfill their present and future climate change obligations, large scale domestic emissions reductions will be necessary. These emission reductions will require green structural change in the economies of developed States; thus, new green jobs will emerge and older jobs will be lost. This change will necessarily have implications on the right to work. If developed States do not take a sufficiently broad approach to implementing their climate change obligations, a large potential for employment insecurity will develop among individuals who are adversely affected by green structural change. This insecurity is the cause of the potential normative conflict and is at the heart of the present analysis. In Canada there has been little detailed economic analysis and no legal scholarship on the effects of green structural change on employment. As Canada implements its emissions reductions, green jobs and employment security will be a topic of public discourse.

Dans cet article, on se penche sur le vaste potentiel de conflits normatifs existant entre les obligations auxquelles les pays développés sont tenus aux termes du régime international relatif aux changements climatiques et le droit de travailler en vertu du *Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC)*. Le *Protocole de Kyoto* oblige les États développés à réduire leurs émissions de gaz à effet de serre. L'Accord de Copenhague se fonde sur le *Protocole de Kyoto* tout en dressant le cadre pour un nouvel accord, ayant une vaste portée et force obligatoire, relatif aux réductions d'émissions de gaz à effet de serre. Aux termes de l'article six du *PIDESC*, les États développés sont tenus de respecter, de protéger et d'assurer le plein exercice de ce droit au travail tout en visant le plein emploi. Pour que les États développés puissent remplir leurs obligations accrues, aussi bien actuelles que futures, il faudra impérativement procéder à des réductions d'émissions de gaz à effet de serre sur une vaste échelle. Ces réductions d'émissions exigeront un changement structurel de nature écologique dans les économies des États développés; ainsi, il s'ensuivra l'émergence de nouveaux emplois « verts » tandis que les emplois traditionnels disparaîtront progressivement. Cet état de choses entraînera d'inévitables répercussions sur le droit au travail. Si les États développés n'adoptent pas une approche suffisamment générale pour mettre en œuvre leurs obligations relatives au changement climatique, on risque de voir surgir une insécurité d'emploi parmi les individus appelés à subir les conséquences négatives de ce changement structurel de nature écologique. Cette insécurité est la cause de l'éventuel conflit normatif, et elle est au cœur de cette analyse. Au Canada, rares sont les analyses économiques fouillées qui ont été menées sur cette question, et aucun chercheur en droit n'a encore publié de travaux universitaires au sujet des conséquences de ce changement structurel écologique sur l'emploi. Au fur et à mesure que le Canada réduira ses émissions de gaz, des emplois respectueux de l'environnement et, la sécurité d'emploi deviendront un sujet de débat public.

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I. INTRODUCTION

Throughout the twentieth century, the world witnessed the development of both the international human rights regime and the international climate change regime. The universally accepted international human rights regime was predominantly developed after World War II with the International Bill of Human Rights¹ and was followed by the Vienna Declaration, which stated that all human rights are indivisible, interdependent and interrelated.² The international climate change regime, although subject to numerous studies throughout the second half of the twentieth century, did not garner significant legal attention until the 1990s when the first truly global climate change initiative, the *United Nations Framework Convention on Climate Change*³ (*UNFCCC*), the precursor to the *Kyoto Protocol*,⁴ was adopted. The *UNFCCC* defined climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”⁵ This definition is reinforced in the *UNFCCC*'s preamble, which notes that “human activities have been substantially increasing the atmospheric concentrations of greenhouse

1 The International Bill of Human Rights is the informal title for the three core international human rights documents: the *Declaration of Human Rights*, which was adopted by the United Nations General Assembly, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*. Together, they establish the universally accepted human rights.

2 *Vienna Declaration and Programme of Action*, UNGAOR, 1993, UN Doc A/157/23, art. 5. While Sandra Fredman states that this declaration is “largely ... rhetorical ...,” she concludes that when analyzed through the viewpoint of a richer conception of freedoms, both civil and political rights, and economic, social and cultural rights, entail positive duties. Therefore, she states that rights cannot be coherently distinguished based upon their duties. See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 66-67. Similarly, Amartya Sen notes that the two categories of rights supplement and reinforce each other. See Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) at 37.

3 *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7 [UNFCCC].

4 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148 [Kyoto Protocol].

5 *Supra* note 3, art 1.

gases,” and that these increases will “enhance the natural greenhouse effect” resulting in “additional warming of the Earth’s surface and atmosphere [which] may adversely affect natural ecosystems and humankind.”⁶ Since the adoption of the *UNFCCC*, this general scientific consensus has been reaffirmed by the scientific community, most notably by the Intergovernmental Panel on Climate Change.⁷ The legal component of climate change is therefore captured by law as a human-made problem. Thus, the two regimes have developed separately in time and have generally remained distinct.

Despite the separate development of the international human rights and climate change regimes, their relationship has become increasingly interrelated and complex. Philippe Sands states that the two regimes have “developed in parallel, intersecting institutionally and substantively with increasing frequency.”⁸ This cross-cutting relationship of environmental protection has been developing for roughly 40 years. From the first principle of the Stockholm Declaration on the Human Environment,⁹ to the Draft Declaration of Principles on Human Rights and the Environment,¹⁰ to the 2005 resolution *Human Rights and the Environment as Part of Sustainable Development*, which “[c]alls upon States to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development...,”¹¹ the two regimes appear to be mutually reinforcing. Moreover, it is now accepted that a viable or healthy environment is a precursor to the fulfillment of all human rights; put differently, severe environmental harm can violate human rights.¹² This has been recognized in case law in Vice-President Weeramantry’s

6 *Ibid*, preamble.

7 The Intergovernmental Panel on Climate Change is an international group of eminent scientific experts on climate change. They were convened by the United Nations Environmental Programme and are widely recognized as the most authoritative body on climate change. See Robert T Watson, ed, *Climate Change 2001: Synthesis Report* (Cambridge: Cambridge University Press, 2001); Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report*, online: Intergovernmental Panel on Climate Change <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf>.

8 Philippe Sands, “Human Rights, Environment, and the López-Ostra Case: Context and Consequences” (1996) 6 *Eur HRL Rev* 597 at 599.

9 The first principle of the Stockholm Declaration states, “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations” (*Declaration of the United Nations Conference on the Human Environment*, UNGAOR, 1972, UN Doc A/48/14 Rev. 1).

10 Commission on Human Rights/Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, UNCHROR, 46th Sess., UN Doc E/CN.4/Sub.2/1994/9.

11 Office of the High Commissioner for Human Rights, *Human Rights and the Environment as Part of Sustainable Development*, UNOHCHROR, 2005, UN Doc E/CN.4/Res/2005/60 at 2 [emphasis omitted].

12 See generally Lynda Collins, “Are We There Yet? The Right to Environment in International and European Law” (2007) 3 *JSDLP* 119; Dinah Shelton, “Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?” (2006) 35:1 *Den J Int'l L & Pol'y* 129; Alan Boyle, “Human Rights or Environmental Rights? A Reassessment” (2007) 18:3 *Fordham Envtl L Rev* 471; John Lee, “The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law” (2000) 25:2 *Colum J Envtl L* 283; Sumudu Atapattu, “The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law” (2002) 16:1 *Tul Envtl LJ* 65.

separate opinion in the *Gabcikovo-Nagymaros Project* decision,¹³ the European Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights.¹⁴ It would be a mistake, however, to take this optimism too far.

While human rights bodies have begun interpreting human rights as encompassing a healthy environment, progress has been slow.¹⁵ Moreover, at present, the right to a healthy environment is not a universal human right.¹⁶ The true nature of the relationship between the two regimes is clearly characterized in the Office of the United Nations High Commissioner for Human Rights 2009 report on the relationship between climate change and human rights.¹⁷ This report concluded that a clear legal tension exists between the two regimes. Climate change is a global threat to human rights in all countries through its direct effects on resources such as food and water, its general effects on health and life, and its indirect effects on response measures. Consequently, without a sufficiently broad approach to the implementation of states' climate change obligations, the necessary evaluative scrutiny on human rights may be neglected. Such a narrow focus can create a large potential for normative conflict between the two regimes.

This paper will focus on the large potential for normative conflict between a developed state's obligations under the international climate change regime—more specifically under the *UNFCCC*, the *Kyoto Protocol* and the Copenhagen Accord—and article 6 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The *Kyoto Protocol* obligates developed states to reduce their greenhouse gas emissions. The Copenhagen Accord builds upon the *Kyoto Protocol*, while setting the stage for a

13 In Vice-President Weeramantry's separate opinion in the *Gabcikovo-Nagymaros Project* decision, he seminally stated that "[t]he protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself" (*Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 88 at 91).

14 See e.g. *López-Ostra v Spain* (1994), 46 ECHR (Ser A) 303, 20 EHRR 277 [*López-Ostra*]; *Yanomami Indians v Brazil* (1985), Inter-Am Comm HR, No 12/85, Annual Report of the Inter-American Commission on Human Rights: 1984-85, OEA/Ser.L/V/II.66/doc.10 Rev. 1 [*Yanomami*]; *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2002), OAU Doc ACHPR/COMM/A044/1 [*Ogoniland*]. In *López-Ostra*, the European Court of Human Rights held that severe environmental harm may breach the right to private life. In this case, the appellant claimed that her right to private life had been infringed upon as she suffered health problems caused by the fumes of a waste treatment plant that operated in her town. By balancing the town's economic well-being and the appellant's enjoyment of her right, the Court determined that a violation of the appellant's right had occurred. Similarly, the Inter-American Commission on Human Rights recognized a link between human rights and the environment in *Yanomami*. In this case, the government of Brazil constructed a highway through Yanomami territory and authorized the exploitation of the territory's resources. This led to an influx of non-indigenous people who brought contagious diseases that went untreated. Here, the Commission found that the government of Brazil had infringed upon the Yanomami's right to life, liberty and personal security. Lastly, in *Ogoniland*, the African Commission on Human and Peoples' Rights stated that "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and ... development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health" (*ibid* at para 51).

15 Sam Adelman, "Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse" in Stephen Humphreys, ed, *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010) 159 at 171.

16 See Collins, *supra* note 12; Shelton, *supra* note 12; Boyle, *supra* note 12; Lec, *supra* note 12.

17 *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UNOHCHROR, 2009, UN Doc A/HRC/10/61.

new binding agreement for large-scale emissions reductions. Article 6 of the *ICESCR* obligates developed states to respect, protect and fulfil the right to work while progressing towards full employment. Large-scale domestic emissions reductions will be necessary for developed states to fulfil their present and future climate change obligations. These emissions reductions will require a “green structural change” in the economies of developed states. Thus, new green jobs will emerge and older jobs will be lost. This will necessarily have implications on the right to work. If developed states do not take a sufficiently broad approach to implementing their climate change obligations, a large potential for employment insecurity will develop among individuals who are adversely affected by green structural change. This insecurity is the cause of the potential normative conflict and is at the heart of the present analysis. The normative conflict potential between these obligations was recognized by Juan Somavia, the Director of the International Labour Organization (ILO) in 2007, when launching the Green Jobs Initiative,¹⁸ a joint initiative with the United Nations Environment Programme and other United Nations agencies to “realize the potential for green jobs and a positive labour market transition in the face of climate change.”¹⁹ The large potential for normative conflict, however, may be reconciled.

Part II of the paper will focus on developed states’ obligations under the international climate change regime and the right to work. Part III will focus on normative conflict and how the strictly legal approach overlooks the potential for conflict between these regimes. Part IV will focus on identifying the employment insecurity of certain groups and individuals who lose their jobs as a result of green structural change through a progressive legal approach. Part V will focus on reconciling the potential for conflict between the two regimes by integrating a human rights approach into the climate change framework.

II. STATE OBLIGATIONS AND TWO REGIMES OF PROTECTION

A. The Starting Point: The *UNFCCC*

The *UNFCCC*, which was adopted in 1992, is the heart of international climate change law; it defines the ultimate objective of the framework convention, provides

18 “Climate change and the world of work: ILO Director-General outlines ILO role in new ‘Green Jobs Initiative’” *ILO Online* (24 September 2007), online: International Labour Organization <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang--en/WCMS_084092/index.htm>.

19 “Green Jobs: Facts and Figures” *ILO Online* (September 2008) at 2, online: International Labour Organization <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_098484.pdf>.

several guiding principles and includes a “Commitments” section detailing state obligations.²⁰

The ultimate objective of the *UNFCCC* is to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”²¹ To achieve this objective, states have agreed on several guiding principles that lay the foundation for the state obligations enumerated in the *UNFCCC*, the *Kyoto Protocol*, the Copenhagen Accord and any future agreements adopted within the context of the *UNFCCC*. Notably, the *UNFCCC* recognizes the common but differentiated responsibilities principle, the precautionary principle and the concept of sustainable development.²² These principles, however, are used to guide the overall interpretation and implementation of the *UNFCCC*, and the subsequent adoption and implementation of national policies and measures.

State obligations to mitigate and adapt to climate change are set out in article 4 (the “Commitments” section). While referencing the year 1990 as a base year for emission levels, article 4 obligates developed states to adopt national policies limiting their levels of domestic emissions to mitigate climate change.²³ Read together, however, articles 4(2)(a) and (b) fail to define a clear timeline for the realization of this objective. This significantly reduces the exigencies of the *UNFCCC*. Thus, while states successfully agreed upon an objective, a set of guiding principles and some general commitments, no significant state obligations emerged from the *UNFCCC*.²⁴

B. The *Kyoto Protocol* and Beyond

The *Kyoto Protocol* was adopted at the Conference of the Parties (COP) at its 3rd session in December of 1997. However, the full extent of a developed state’s legal obligations with respect to the protocol’s implementation was not determined until the adoption of the Marrakesh Accords at COP at its 7th session in 2001.

Article 3(1) of the *Kyoto Protocol* lays down the basic obligations for developed states: they are to reduce their overall greenhouse gas emissions listed in Annex A of the protocol by at least five percent below 1990 levels during the commitment period of 2008 to 2012.²⁵ To attain this objective, each developed state agreed to a specified percentage by which they would lower their greenhouse gas emissions. One

20 This article is not intended to take a comprehensive look at the *UNFCCC*, the *Kyoto Protocol*, the Copenhagen Accord or any of the Conferences of the Parties. It will simply summarize the principal obligations of developed states as stated in the *UNFCCC*, the *Kyoto Protocol* and the Copenhagen Accord. More specifically, it will analyze the state obligations in the *UNFCCC*, the *Kyoto Protocol* and the Copenhagen Accord that, if fulfilled, will require a structural change in the economies of developed states. For general information on the *UNFCCC* and the *Kyoto Protocol*, see Philippe Sands, *Principles of International Environmental Law*, 2d ed (Cambridge: Cambridge University Press, 2005); Patricia Birnie & Alan Boyle, *International Law and the Environment*, 2d ed (Oxford: Oxford University Press, 2002); Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Thomson Carswell, 2005).

21 *Supra* note 3, art 2.

22 *Ibid*, art 3.

23 *Ibid*, arts 4(2)(a)-(b).

24 Birnie & Boyle, *supra* note 20 at 526; Sands, *supra* note 20 (“[t]he most that can reasonably be said of these provisions is that they establish soft targets and timetables with many loopholes...” at 365).

25 *Kyoto Protocol*, *supra* note 4, art 3(1), Annex A.

of the protocol's most innovative solutions was the inclusion of flexible measures. These measures were solidified in articles 6, 12 and 17 of the *Kyoto Protocol* as credit transfers, carbon trading and the Clean Development Mechanism. Flexible measures allow for the inclusion of joint and cooperative initiatives towards a developed state's specified domestic emissions reductions. However, the measures do not allow states to derogate from, or buy their way out of, domestic climate change mitigation measures.²⁶ In sum, the *Kyoto Protocol* was successful in imposing concrete emissions reduction obligations on developed states.

While the recently concluded Copenhagen Accord did not fulfil the Bali Action Plan's aim of binding "deep cuts in global emissions" for developed states, the door was left open for a post-2012 binding emissions reductions agreement. At paragraph 2, state parties "agree[d] that deep cuts in global emissions are required ... to hold the increase in global temperature below 2 degrees Celsius"²⁷ At paragraph 4, Annex I Parties committed to "implement[ing] individually or jointly the quantified economy-wide emissions targets for 2020...."²⁸ These targets are intended to further the emissions reductions initiated by the *Kyoto Protocol*. Thus, while the Copenhagen Accord did not end with large-scale binding emissions reductions, states clearly acknowledged the need for such reductions.

For indications of the scale of the emissions reductions in future binding agreements, one can look outside the UNFCCC to other international instruments. For example, the G8's 2009 Declaration on "Responsible Leadership for a Sustainable Future" reaffirmed its 2008 Hokkaido Toyako Summit Leaders Declaration goal of "achieving at least 50 % reduction of global emissions by 2050."²⁹ The 2009 Declaration further detailed developed states' commitments to emissions reductions, proposing "a goal of developed countries reducing emissions of greenhouse gases in aggregate by 80% or more by 2050 compared to 1990 or more recent years."³⁰ Thus, the trend for future binding climate change agreements is to contain large-scale emissions reductions for developed states.

26 *Ibid*, arts 4, 6, 12, 17; *Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001*, UNFCCCOR, 7th Sess, UN Doc FCCC/CP/2001/13/Add.2, (2002).

27 *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, UNFCCCOR, 15th Sess, UN Doc FCCC/CP/2009/11/Add.1, (2010) 5 at para 2.

28 *Ibid* at para 4.

29 More specifically, the 2008 declaration goal focused on "the contributions from all major economies, [which is] consistent with the principle of common but differentiated responsibilities and respective capabilities." G8, "G8 Hokkaido Toyako Summit Leaders Declaration" (8 July 2008) at para 23, online: Ministry of Foreign Affairs of Japan <http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714_en.html>. See also G8, "G8 Leaders Declaration: Responsible Leadership for a Sustainable Future" (8 July 2009) at para 65, online: G8 Summit 2009 <http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final.0.pdf>.

30 *Ibid*.

C. State Obligations and the Right to Work Under the *ICESCR*

Article 2 defines the parameters of state obligations under the *ICESCR*.³¹ To fulfil their obligations, states must take steps to achieve “the full realization” of the rights enumerated in the *ICESCR* “to the maximum of [their] available resources”³² This obligation is interpreted as immediately taking effect on all states;³³ however, the implementation of this obligation is dependent on the availability of a state’s resources. As such, the status of different rights enumerated in the *ICESCR* varies among states.³⁴ Alston and Quinn note that these obligations can be conceived as hybrid obligations; that is, obligations that are at the same time obligations of conduct and obligations of result.³⁵ However, all states, notwithstanding their available resources, must fulfil the core minimum obligations of all of the rights enumerated in the *ICESCR*.³⁶

To determine the substantive elements of a state’s obligations, the Committee on Economic, Social and Cultural Rights (the Committee) has adopted the tripartite typology to respect, protect and fulfil the *ICESCR*’s enumerated rights.³⁷ Based on these obligations, the *Limburg Principles* and the *Maastricht Guidelines* were developed to outline the commonly interpreted forms of violations of the *ICESCR*. A state will violate its obligations under the *ICESCR* if it fails to meet the core minimum obligations of an enumerated right, if it unjustly limits a right or if it retards the realization of a right.³⁸ A state will also violate its obligations through action or omission if it fails to respect, protect or fulfil any of the rights contained in the *ICESCR*. This includes fulfilling the

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- 31 Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, UNCESCR, 5th Sess, UN Doc E/1991/23, (1990) at para 1, online: UNHCR Refworld <<http://www.unhcr.org/refworld/pdfid/4538838e10.pdf>> [mimeo] [*General Comment No. 3*].
- 32 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 2(1), Can TS 1976 No 46 (entered into force 3 January 1976) [*ICESCR*].
- 33 *Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights (“Limburg Principles”)*, UNCHR, 43d Sess, UN Doc E/CN.4/1987/17 at para 16, online: UNHCR Refworld <<http://www.unhcr.org/refworld/pdfid/48abd5790.pdf>> [mimeo] [*Limburg Principles*].
- 34 *General Comment No. 3, supra note 31*; Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (New York: Clarendon Press, 1995) at 106. As the present analysis focuses solely on the obligations of developed states, it is assumed that all of these states have the resources necessary to fulfil their Covenant obligations. See Craven, *ibid*.
- 35 Philip Alston & Gerard Quinn, “The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights” (1987) 9:1 Hum Rts Q 156 at 185. “They are obligations of result in the sense that states must match their performance with their objective capabilities. They are loose obligations of conduct in the sense that states are obliged to take active, though largely unspecified, steps toward their satisfaction. This hybrid mixture of obligation types is due to the fact that the concept of ‘progressive achievement’ mandates the existence of an ongoing process of development the adequacy of which is loosely controlled by norms deduced from a state’s objective capabilities” (*ibid*). See also *General Comment No. 3, supra note 31*.
- 36 *General Comment No. 3, supra note 31* at para 10; Committee on Economic, Social and Cultural Rights, *The Right to Work: General Comment No. 18 (Art. 6 of the Covenant)*, UNCESCR, 35th Sess, UN Doc E/C.12/GC/18, (2006) at para 31, online: UNHCR Refworld <<http://www.unhcr.org/refworld/pdfid/4415453b4.pdf>> [mimeo] [*The Right to Work*].
- 37 Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series 18 (Antwerp: Intersentia, 2003) at 196-97, 201.
- 38 *Limburg Principles, supra note 33* at para 72.

core minimum obligations of all enumerated rights.³⁹ Moreover, violations may also occur through a state policy, which deliberately contravenes or ignores the rights enumerated in the *ICESCR*, “or fails to achieve the required standard of conduct or result.”⁴⁰ Lastly, as the *ICESCR* is a treaty, any interpretation issues stemming from the *ICESCR* are subject to the laws of treaty interpretation.⁴¹

Finally, when implementing the *ICESCR*, states have a great deal of discretion in choosing the methods used to fulfil their obligations.⁴² While the *ICESCR* specifically notes that legislative measures are preferred, the term “all appropriate means” has been interpreted to include “administrative, judicial, economic, social and educational measures.”⁴³ Thus, methods other than legislative measures may be utilized by states to fully realize the rights contained in the *ICESCR*. It should be noted that measures that are retrogressive in nature are not permitted, except for when they are taken for the purpose of improving the situation with respect to “the totality of the rights” in the *ICESCR*, or when the status of a right deteriorates as a result of an inevitable circumstance.⁴⁴

D. Respecting, Protecting and Fulfilling the Right to Work

The right to work encompasses all types of work and protects a worker’s fundamental rights, which include, among other protections, the right to decent work.⁴⁵ Decent work is particularly important to the present analysis and may be analyzed through the ILO’s *Decent Work Agenda*. Decent work defines the basic conditions of freedom, equity, security and human dignity, through which the exercise of all work should be carried out.⁴⁶ The implications of the *Decent Work Agenda* on the right to work in the context of the present analysis will be further discussed in Part IV.B; however, it is first necessary to define the exercise of work.

The Committee defines the exercise of work, in all its forms and at all levels, as work that is available, accessible, acceptable and of good quality. The Committee defines availability of work as the provision of specialized state services to assist and support individuals in identifying and finding employment. Work accessibility is defined as the freedom from discrimination when accessing and maintaining employment; physical accessibility to employment; and the right to seek, obtain and

39 International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (26 January 1997) at paras 6, 9, 15, online: UNHCR Refworld <<http://www.unhcr.org/refworld/docid/48abd5730.html>>.

40 *Ibid* at para 11.

41 Alston & Quinn, *supra* note 35 at 160. The authors briefly discuss the relevant principles of treaty interpretation, mainly articles 31-33 of the *Vienna Convention on the Law of Treaties*, with respect to the Covenant (*ibid* at 160-64).

42 *General Comment No. 3, supra* note 31 at para 4; *Limburg Principles, supra* note 33 at para 20; Craven, *supra* note 34 at 125.

43 *Limburg Principles, supra* note 33 at paras 17-18. See also *General Comment No. 3, supra* note 31 at paras 3-5, 7.

44 *Ibid* at para 9; Craven, *supra* note 34 at 131-32.

45 *The Right to Work, supra* note 36 at paras 6-7.

46 International Labour Organization, “Report of the Director-General: Decent Work” (June 1999), online: International Labour Organization <<http://www.ilo.org/public/english/standards/reim/ilc/ilc87/rep-i.htm>> [*Decent Work Agenda*].

impart information on the means of accessing employment. Lastly, acceptability and quality of work are defined as the right to just and favourable work conditions.⁴⁷

On the basis of this definition of the exercise of work, a state's obligations and consequently the violations of those obligations, may be defined. The obligation to respect the right to work includes the prohibition of forced labour and the cessation of denying equal access to decent work for all persons. Siegel states that this includes taking a comprehensive approach to social and economic policy, which with respect to the right to work, includes employment opportunity and security.⁴⁸ Consequently, the obligation to respect the right to work will be violated if a state does not take a comprehensive approach to employment policy. The obligation to protect ensures equal access to work and training. This obligation will be violated if a state does not take all necessary measures to safeguard persons from third-party violations of the right to work.⁴⁹ Lastly, the obligation to fulfil requires a state to adopt a national policy on the right to work aimed at stimulating economic growth and development, while overcoming unemployment and underemployment to achieve full employment.⁵⁰ While such a policy does not need to *guarantee* work for every person who is available and willing to work, states must take concrete steps to implement policies aimed at ensuring work for all who are available and seeking work.⁵¹ A state will violate the obligation to fulfil if it fails to take all necessary measures to ensure the realization of the right to work.⁵²

In sum, developed states are obligated to take a comprehensive approach towards employment policy, taking into account all necessary measures to ensure the right to work, which includes work-related security.

III. CLIMATE CHANGE, WORK AND THE LEGAL ANALYSIS

Based on a developed state's obligations under the *ICESCR*'s right to work and the international climate change regime, it seems, on its face, that there is no cause for normative conflict between the two regimes. From a strictly legal perspective, a state may fulfil its climate change obligations while at the same time respecting, protecting and fulfilling the right to work. However, this approach does not take an adequately broad view of the context in which a developed state's climate change obligations will be implemented—a view which is crucial to identifying the large potential for normative conflict between a developed state's obligations in the two regimes. The

47 *The Right to Work*, *supra* note 36 at para 12.

48 Richard Lewis Siegel, "The Right to Work: Core Minimum Obligations" in Audrey Chapman & Sage Russell, eds, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002) 21 at 34.

49 *The Right to Work*, *supra* note 36 at para 35.

50 *Ibid* at paras 19, 23-28; Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (New York: St. Martin's Press, 1999) at 131-32 [Standing, *Global Labour Flexibility*] (it is generally agreed upon that a state has achieved full employment when three percent or less of its population is unemployed); Craven, *supra* note 34 at 206.

51 *The Right to Work*, *supra* note 36 at para 19; Craven, *supra* note 34 at 204.

52 *The Right to Work*, *supra* note 36 at para 36.

following legal analysis will highlight this flaw by defining normative conflict, and applying that definition to the obligations in both regimes of protection.

A. Normative Conflict Defined

Normative conflict is defined as the impossibility of complying with or reconciling all of the requirements of two norms. This implies that two norms are mutually exclusive, and that compliance with one norm means non-compliance with the other.⁵³ The causes of normative conflict generally fall into four categories.

The first cause of normative conflict occurs when the same act is subject to different types of norms. Here, a normative conflict will occur if two different types of norms (for example, an obligatory norm and a prohibitive norm) regulate the same act. Using Sadat-Akhavi's example, if a first norm states that a receiving state shall exempt diplomatic agents from indirect taxes and a second norm states that a receiving state shall *not* exempt diplomatic agents from indirect taxes, then the two norms will conflict. The second cause of normative conflict occurs when one norm requires an act while another norm requires a contrary act (an act that is to be performed at the same time that contradicts the first act). In this case, the time requirement is the main factor of the normative conflict. For example, if a first norm states that prisoners of war suffering from disease shall be treated in their camps and a second norm states that prisoners of war suffering from disease shall be treated in civilian hospitals, then both norms cannot be fulfilled.⁵⁴ The suffering prisoners cannot be treated in their camps and at a civilian hospital at the same time; thus the two norms conflict. The third cause of normative conflict occurs when one norm prohibits a necessary precondition of another norm. Here, a conflict arises where one norm requires an act, while another norm prohibits a necessary precondition of that act. For example, if a first norm states that State A shall render assistance to anyone in Territory X and a second norm states that State A is not allowed in Territory X, then State A would not be able to comply with both norms, as the second norm prohibits State A from fulfilling the first. Lastly, the fourth cause of conflict occurs when one norm prohibits a necessary consequence of another. In this case, normative conflict arises when one norm requires an act, while another norm prohibits a necessary consequence of that act. For example, if a first norm requires State A to replace existing rails with new ones in Territory X and a second norm requires State A to not disrupt the transport of goods on the existing railway in Territory X, then the two norms conflict. Based on these four causes of normative conflict, it is evident that in order to assess normative conflict, it is necessary to understand fully the actions and consequences that are required by norms. In the present analysis, it is therefore necessary to consider the actions and consequences of the obligations required by the two regimes of protection.

53 Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden, NL: Martinus Nijhoff, 2003) at 5.

54 *Ibid* at 8 (all examples of the causes of conflict can be found at 8-10).

B. The UNFCCC, Kyoto, Copenhagen and the Right to Work: Conflicting Norms?

A developed state's obligations, under both the climate change regime and the right to work, require various actions which have a number of consequences.

The principal obligation for developed states under the climate change regime is domestic emissions reductions. The *Kyoto Protocol* requires developed states to reduce their greenhouse gas emissions by an overall average of five percent below that of 1990 levels, with each developed state committing to national reduction targets. The Copenhagen Accord committed state parties to the *Kyoto Protocol* to strengthen their emissions reductions while underlining the need for a binding large-scale emissions reductions agreement. While states have discretion in the methods they can use to implement their climate change obligations, the general consensus is that developed states will have to focus on the energy and industrial sectors, the major polluters, when administering their domestic emissions reductions. The focus on the energy and industrial sectors as a source of large-scale emissions reductions has been noted in a number of reports,⁵⁵ and has been witnessed in state practice in Germany and the United Kingdom.⁵⁶ For example, a 2005 study found that in nine selected developed countries, 56.9 percent of total employment was in carbon-intensive sectors.⁵⁷ Another study came to a similar conclusion in finding that 80 percent of greenhouse gas emissions in the European Union are emitted by the energy sector.⁵⁸ A change in a developed state's energy and industrial sectors can therefore be considered as a necessary consequence to fulfilling a developed state's climate change obligations. This change will be long-term as developed states use newer and greener technologies

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- 55 International Labour Office, Committee on Employment and Social Policy, *Employment and Labour Market Implications of Climate Change*, UNILO, 303d Sess, UN Doc GB.303/ESP/4, (2008) at para 7 [mimeo] [ILO, *Employment and Labour Market Implications*]; Ana Belén Sanchez & Peter Poschen, "The Social and Decent Work Dimensions of a New Agreement on Climate Change: A Technical Brief" (June 2009) at 8, online: ILO Policy Integration Department <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/briefingnote/wcms_107814.pdf>; United Nations Environment Programme, *Labour and the Environment: A Natural Synergy* (Nairobi: United Nations Environment Programme, 2007) at 47-48 [UNEP, *Labour and the Environment*]; OECD, Working Party on National Environmental Policy, *Environment and Employment: An Assessment*, Doc No ENV/EPOC/WPNEP(2003)11/FINAL (2004) at 73.
- 56 See Federal Republic of Germany, Report Under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, *Fourth National Report by the Government of the Federal Republic of Germany* (July 2006), online: United Nations Framework Convention on Climate Change <<http://unfccc.int/resource/docs/natc/gernc4.pdf>>; UK, Department for Environment, Food and Rural Affairs, *The UK's Fourth National Communication Under the United Nations Framework Convention on Climate Change* (May 2006), online: United Nations Framework Convention on Climate Change <<http://unfccc.int/resource/docs/natc/uknc4.pdf>>.
- 57 International Labour Organization, *World of Work Report 2009: The Global Jobs Crisis and Beyond* (Geneva: International Labour Organization, 2009) at 100, online: International Labour Organization <<http://www.ilo.org>>.
- 58 European Trade Union Confederation et al, *Climate Change and Employment: Impact on Employment in the European Union-25 of Climate Change and CO₂ Emission Reduction Measures by 2030* (Brussels: European Commission, 2007) at 45.

to mitigate and adapt to climate change.⁵⁹ In other words, climate change obligations require a green structural change in the economies of developed states.⁶⁰

The principal obligations under the right to work, namely to respect, protect and fulfil the right to work, require states to ensure, through a comprehensive employment policy aimed at achieving full employment, the exercise of work for all people available for and willing to work. With respect to the present analysis, this includes ensuring the right to work during green structural change—a change that will have a clear and definite effect on employment in the labour markets of developed states.⁶¹ Green structural change will affect the labour markets of states in four ways: some jobs will stay the same; some jobs will be adapted or refined to the new green economy; new jobs will be created; and some jobs will be lost.⁶² The general consensus is that green structural change will produce an equal or greater amount of employment opportunities in the labour markets of states.⁶³ From a strictly legal perspective, a developed state may go green while at the same time fulfilling its obligations under the right to work.

The obligation to respect the right to work would not be violated by a developed state's commitment to climate change obligations because those obligations may be implemented concurrently alongside a comprehensive employment policy. A comprehensive policy would ensure that during a transition into green economies, developed states would provide the exercise of work for all people available for and willing to work. Since an equal or greater number of jobs will be created in the new green economies of developed states, as long as those states provide the exercise of work to individuals who are available for and willing to work, a developed state's climate change obligations will not violate the right to work. Furthermore, the obligations to protect and to fulfil would not be violated as long as a state's policy is aimed at achieving full employment, and as long as it takes all of the necessary measures to ensure the right to work.

It is crucial at this point to note that the effects of green structural change on the labour market, namely, the creation of new green jobs and the loss of "old" jobs, will not infringe upon work-related security. Over the past 25 years, as a result of

59 ILO, *Employment and Labour Market Implications*, *supra* note 55 at para 16; United Nations Environment Programme, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World*, Executive Summary, (Washington, DC: Worldwatch Institute, 2008) at 15 [UNEP, *Green Jobs Executive Summary*]; UNEP, *Labour and the Environment*, *supra* note 55 at 6.

60 Article 13(2) of "Recommendation No. 122: Recommendation Concerning Employment Policy" defines structural change as "long-term and substantial change taking the form of shifts in demand, ... or of new techniques in production, or of changes in the size of the labour force." International Labour Organisation, "Recommendation No. 122: Recommendation Concerning Employment Policy" in *Conventions and Recommendations: Adopted by the International Labour Conference, 1919-1966* (Geneva: International Labour Office, 1966) 1100 at 1102-03 [ILO, "Recommendation No. 122"].

61 ETUC et al, *supra* note 58 at 37; ILO, *Employment and Labour Market Implications*, *supra* note 55 at paras 10, 12-13; Sanchez & Poschen, *supra* note 55 at 11; UNEP, *Labour and the Environment*, *supra* note 55 at 6.

62 United Nations Environment Programme, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World*, Full Report, (Washington, DC: Worldwatch Institute, 2008) at 43 [UNEP, *Green Jobs Full Report*]. See also ILO, *Employment and Labour Market Implications*, *supra* note 55 at paras 16-22.

63 ETUC et al, *supra* note 58 at 37; Sanchez & Poschen, *supra* note 55 at 11; OECD, Working Party on National Environment Policy, *supra* note 55 at 72-73. See also UNEP, *Green Jobs Full Report*, *supra* note 62 at 43-45.

the pressures of labour market flexibility, job security has evolved into employment security.⁶⁴ Work-related security is no longer attached to the performance of certain tasks that require certain skills, but has evolved to include “protection against arbitrary dismissal, and employment stability compatible with economic dynamism.”⁶⁵ Or put differently, employment security “guarantee[s] employment with the firm, but not on any particular job.”⁶⁶ In this new employment relationship, an employer no longer promises job security; however, an employer does promise the opportunity to acquire skills that will enhance either an employee’s prospects in the labour market or his or her employability security.⁶⁷ Thus, a worker’s acquired skills and job need not be considered when he or she is reemployed in the new green economy. As it is predicted that green structural change will produce an equal or greater number of jobs than those that will be lost, a developed state’s obligation with respect to employment security will solely be to facilitate a vulnerable worker’s transition between jobs by providing employment services.⁶⁸

From a strictly legal approach, a developed state’s climate change obligations and its obligations under the *ICESCR*’s right to work do not inherently conflict. The two sets of obligations do not regulate the same acts; thus they do not fit into the first category of conflict. A developed state’s climate change obligations require a green structural change, while the right to work does not require an act that is contrary to a green structural change. Thus, both acts can be performed at the same time. Moreover, no obligation in either of the two regimes prohibits a necessary precondition of the other. Lastly, no obligation in either of the two regimes prohibits a necessary consequence of the other. Thus, analyzed through a legal lens, there is no normative conflict between the obligations of the two regimes. A developed state can fulfill its obligations under both regimes.

IV. THE PROGRESSIVE LEGAL APPROACH AND STATE POLICY: AN INTERFACE FOR CONFLICT

While the legal approach finds no cause for normative conflict between the obligations of the two regimes, this approach is flawed. Like the majority of economic studies completed on green structural change, the legal approach lacks evaluative scrutiny on the effects of green structural change on employment. The legal focus does not take into account the economic and political context in which a developed

64 Peter Auer, “Security in Labour Markets: Combining Flexibility with Security for Decent Work” *Economic and Labour Market Papers* (2007) at 4, online: International Labour Office <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---analysis/documents/publication/wcms_113923.pdf>; Standing, *Global Labour Flexibility*, *supra* note 50 at 185; Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001) at 28.

65 Guy Standing, “From People’s Security Surveys to a Decent Work Index” (2002) 14:1 Int’l Lab Rev 441 at 442 [Standing, “People’s Security Surveys”].

66 Auer, *supra* note 64 at 4.

67 Katherine VW Stone, “Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time” (2006) 44 *Osgoode Hall LJ* 77 at 93.

68 Fredman, *supra* note 2 at 162-63.

state's obligations are implemented, and consequently overlooks the large potential for normative conflict between a developed state's obligations in the two regimes. However, this omission may be avoided. By analyzing the issue through a progressive legal approach, one may take into account the full effects of a developed state's climate change obligations. The progressive legal approach will highlight the large potential for employment insecurity caused by green structural change—an insecurity that violates the right to work.

A. State Policy and Green Structural Change

As stated above, green structural change in developed states will affect employment. While the effects of green structural change on employment will vary between states (as states have discretion in the measures they can use to mitigate climate change), the loss of certain jobs and the creation of other, new and different “green collar” jobs are inevitable. In general terms, jobs in research and development, in the manufacturing of new automotive and rail technologies and in the energy-efficient industry are predicted to grow and to be created, while jobs in energy-sensitive industries, extractive industries and road transport are predicted to be lost.⁶⁹ It is the jobs that will be lost that are of concern to the present analysis.

While green structural change is predicted to create more jobs, these jobs will be different from the jobs that are lost. The new jobs will require new technology and new skills. It is here that the large potential for normative conflict between the obligations of the two regimes of protection becomes evident. A worker who loses his or her job and whose skill-set becomes obsolete as a result of a developed state's climate change obligations will likely be unemployable in a new green economy. Thus, while more jobs will be created, the workers who lose their jobs as a result of a green structural change will not be directly transferred into the new jobs that are created. This will create job insecurity for workers, which, as illustrated below, violates the right to work.

A progressive legal approach will take into account the context in which a developed state's climate change obligations are implemented. It becomes clear through using this approach that there is a large potential for normative conflict between a developed state's climate change obligations and the right to work. This potential lies at the interface of politics, economics and law. It is the policy decisions made by the governments of developed states to fulfil their climate change obligations and the subsequent effects that these decisions have on employment that create the large potential for labour market insecurity. It is this insecurity that is overlooked by a strictly legal approach. Thus, a progressive legal approach is essential for viewing the large potential for conflict.

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ETUC et al, *supra* note 58 at 169; Sanchez & Poschen, *supra* note 55 at 11; ILO, *Employment and Labour Market Implications*, *supra* note 55 at 6.

B. The Progressive Legal Approach and Normative Conflict

While analyzing climate change through a progressive legal approach clearly identifies the effects of climate change as a work-related security imperative, it is not self-evident in international law that there is a conflict between a developed state's obligations under the climate change regime and the right to work. However, taking a closer look at a developed state's obligations under the right to work as interpreted through the ILO's *Decent Work Agenda*, as well as its conventions and recommendations, the large potential for normative conflict between the obligations of the two regimes becomes evident.⁷⁰

With respect to the ILO's *Decent Work Agenda*, social protection is one of the agenda's four core pillars.⁷¹ Social protection includes work-related security, as it promotes human dignity and security in the workplace.⁷² Sufficient work-related security may therefore be seen as a key aspect of fulfilling the right to work. With regards to social protection, Amartya Sen has noted that the effects of unemployment on human dignity can amount to a capability deprivation.⁷³ Similarly, while not making a direct reference to Sen, Standing draws on the concept of relative deprivation with respect to work-related security and notes that "[i]nsecurity is a form of injustice and a source of it."⁷⁴ A link can be drawn between decent work, or more specifically social protection and human security. Both unemployment and the lack of work-related security can cause capability deprivations. Thus, for work to be decent work, a sufficient amount of social protection must be provided. If states do not provide a sufficient amount of work-related protection, they will be infringing upon the right to work.

At present, social protection with respect to work-related security is being shaped by the concept of flexicurity.⁷⁵ Flexicurity, a concept originating in Europe, combines "an appropriate social insurance model, sufficiently flexible work contracts with effective policies to support labour market transitions and lifelong learning."⁷⁶ Flexicurity as work-related security is derived from employment security, combining flexible contractual arrangements, active employment security, effective labour market policies supporting transitions between jobs, unemployment and inactivity, lifelong learning that helps people cope with change, transitions and unemployment

70 The Covenant is a treaty and therefore, pursuant to the rules of treaty interpretation, it may be interpreted in light of both the ILO's *Report on Decent Work*, and the ILO's conventions. See Alston & Quinn, *supra* note 35.

71 The ILO's *Report on Decent Work* is composed of four interrelated pillars: the fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue.

72 See generally Juan Somavia, *Perspectives on Decent Work: Statements by the ILO Director-General* (Geneva: International Labour Office, 2001) at 15; Standing, "People's Security Surveys", *supra* note 65 at 44-43.

73 *Supra* note 2 at 94.

74 Standing, *Global Labour Flexibility*, *supra* note 50 at 38.

75 See Auer, *supra* note 64 at 2.

76 European Commission, *Employment in Europe 2006* (Luxembourg: Office for Official Publications of the European Communities, 2006) at 75.

and modern social security systems.⁷⁷ Thus, flexicurity is a dynamic combination of private and state action whereby a state's obligations are to provide effective labour market policies supporting transitions to jobs and social security systems.⁷⁸ It is within this framework that the social protection required by the *Decent Work Agenda* must be implemented. The ILO conventions and recommendations provide further support to the obligation to provide work-related security. More specifically, they provide insight into the content of the obligation to provide work-related security during structural change.

Work-related security is dealt with in the ILO's *Convention (No. 122) Concerning Employment Policy*.⁷⁹ Article 1(1) states that each state party shall pursue an active policy designed to promote full employment.⁸⁰ While both the Convention and "Recommendation No. 122" infer that job security is the nature of the work-related security to be provided, since the adoption of the convention work-related security has evolved from job security to employment security.⁸¹

With respect to structural change, article 8(b) of "Recommendation No. 122" establishes that in the event of structural change "selective measures directly connected with the employment of individual workers or categories of workers" should be taken.⁸² Article 13(1) goes further and states that "[m]easures should be planned and taken to prevent the emergence and growth of unemployment or underemployment resulting from structural changes"⁸³ As stated in article (13)(3)(b) of "Recommendation No. 122", the objectives of these supplementary measures should be "to protect from financial or other hardship groups and individuals whose employment is affected by structural changes."⁸⁴ The need for supplementary measures in the event of structural change is also noted in "Recommendation No. 169: Recommendation Concerning Employment Policy, 1984". Article 10(a) of "Recommendation No. 169" states that member states should adopt policies to "facilitate [both the] adjustment to structural change at the global, sectoral and enterprise levels and the re-employment of workers who have lost their jobs as a result of structural and technological changes."⁸⁵ Thus, in the event of green structural change, the ILO convention and recommendations require states to take specific work-related security measures that are supplementary to the measures usually in place.

In summary, the right to work, as interpreted through the *Decent Work Agenda*, *Convention (No. 122)*, "Recommendation No. 122" and "Recommendation No. 169",

77 *Ibid* at 76; Auer, *supra* note 64 at 3.

78 *Ibid* at 4.

79 *Convention (No. 122) Concerning Employment Policy*, 13 July 1964, 569 UNTS 65 (entered into force 15 July 1966).

80 *Ibid*, art 1(1).

81 See *ibid*, art 1(2)(c); ILO, "Recommendation No. 122", *supra* note 60, art 1(2)(c).

82 *Ibid*, art 8(b).

83 *Ibid*, art 13(1).

84 *Ibid*, art 13(3)(b).

85 International Labour Organization, "Recommendation No. 169: Recommendation Concerning Employment Policy, 1984" in *Gender Equality and Decent Work: Selected ILO Conventions and Recommendations Promoting Gender Equality* (Austria: International Labour Organization, 2006) 78 at 79, art 10(a).

obligates developed states to provide work-related security. These protections should be comprehensive, and in the event of green structural change, specific work-related security measures should be put in place to assist vulnerable workers. If developed states do not plan for structural change and do not put specific measures in place, they may violate the right to work in the event of green structural change. Since few developed states have taken into account the effects of climate change on employment, the potential for normative conflict between the obligations of the two regimes is large.⁸⁶

If one takes this into account, the cause of the normative conflict is clear. The conflict does not fall into the first category of normative conflict, as the state obligations do not require the same act to be performed. Moreover, the two acts that are required to be performed are not contradictory; thus, the obligations of the two regimes do not fall into the second category of conflict. Furthermore, neither of the obligations under the two regimes prohibits a necessary precondition of the other. Consequently, they do not fall into the third category of normative conflict. Finally, while the right to work does not explicitly prohibit the consequences of developed states' climate change obligations, it does require that developed states take supplementary measures to assist groups and individuals that are made vulnerable by developed states' climate change obligations. However, developed states rarely place the necessary amount of evaluative scrutiny on the effects of their climate change obligations on employment. Consequently, the structural change-specific measures required by the right to work are rarely put in place. This systematic omission to take into account the employment implications of a developed state's climate change obligations creates labour market insecurity. This, in turn, violates the right to work and is a partial normative conflict; that is, a conflict where two norms conflict with regard to some addresses, or in some times or in some places.⁸⁷ Therefore, the obligations under the two regimes fall into the fourth category of normative conflict, since a necessary consequence of a developed state's climate change obligations violates the right to work.

V. RECONCILIATION

While at present there is a large potential for normative conflict between a developed state's obligations under the two regimes of protection, this potential for conflict may be reconciled. As noted above, a developed state may avoid normative conflict by establishing work-related security measures targeted at affected workers in response to green structural change. These measures should provide workers in developed states with a just transition into green economies. When formulating these response measures, a human rights approach will be crucial and should be included in all future national and international climate change legislation and agreements. Including such an approach in the climate change framework is consistent with the principle of

86 See ETUC et al, *supra* note 58 at 48; ILO, *Employment and Labour Market Implications*, *supra* note 55 at para 18 (a minimal amount of study has been completed on this issue).

87 See Sadat-Akhavi, *supra* note 53 at 11.

integration and interrelationship, a guiding principle of the *UNFCCC* and one of its seven core principles of sustainable development, as identified by the International Law Association.⁸⁸ The human rights approach should be participatory and should institutionalize a framework for dialogue between all interested parties, from which concrete and equitable steps can emerge.⁸⁹ There are response measures that may be taken in both the short term and the long term to avoid the normative conflict between the two sets of obligations.

A. Short-Term Reconciliation

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

The first step to reconciliation between the obligations in the two regimes is recognizing the full impact of climate change and developed states' climate change obligations. The *UNFCCC* and the *Kyoto Protocol* provide that all states should strive to take economic and social development into account when implementing their climate change obligations.⁹⁰ Articles 2(3) and 3(14) of the *Kyoto Protocol* explicitly state that developed states should consider the effects of implementing their climate change obligations on developing states, where many of the effects of climate change are exacerbated. These provisions underline the global implications of both climate change and response measures. With respect to human rights, the direct effects of climate change on the rights to life, health, food and water, and the indirect effects on response measures, such as the right to work, should be taken into consideration by developed states.

As noted above, the effects of green structural change on employment in developed states continue to be largely overlooked.⁹¹ The ILO's technical brief, published leading up to COP 15, states "[i]n the climate debate employment only features marginally and is regarded as merely a 'co-benefit' of mitigation measures."⁹² In practice, this means that developed states should adopt a progressive legal approach

88 International Law Association, "ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002" in *International Environmental Agreements: Politics, Law and Economics*, 2d ed (The Netherlands: Kluwer Academic, 2002) 211. See also Sébastien Jodoin, "The Principle of Integration and Interrelationship in Relation to Social, Environmental and Social Objectives" in A Usha, ed, *Environmental Law: Principles and Governance* (Hyderabad, IN: Icfai University Press, 2007) 83.

89 ILO, *Employment and Labour Market Implications*, *supra* note 55 at para 15.

90 See *UNFCCC*, *supra* note 3, arts 3(3), 4(1)(f); *Kyoto Protocol*, *supra* note 4, arts 2(3), 3(14), 10(d).

91 See note 84.

92 Sanchez & Poschen, *supra* note 55 at 11.

when implementing their climate change obligations. A progressive legal approach will take into account the context in which a developed state's climate change obligations are implemented. This will provide a necessary understanding of the insecurities caused by a developed state's climate change obligations and will help to identify the cause of the normative conflict.

Second, once a developed state has adopted a progressive legal approach to climate change, the jobs and sectors made vulnerable as a result of green structural change should be identified. Such an analysis must be state-specific and should identify both the jobs that will grow and be stable in a green economy, and the jobs and more specifically the skill-sets that may be lost or become obsolete.⁹³ This was noted in Bulgaria's response to the UN High Commissioner for Human Rights' report on the relationship between climate change and human rights.⁹⁴ Germany, a world leader in this respect, has analyzed its expected green job growth and is expecting significant job gains in geothermal energy, solar energy and biomass industries from 2006 to 2010.⁹⁵ However, Germany's analysis lacks scrutiny on the jobs that will be lost. Similar comments may be made about the recent Suzuki Report on greenhouse gas targets and policies for Canada.⁹⁶ Although it may be difficult to determine which jobs or skill-sets will disappear, as jobs may be transformed through technological advances,⁹⁷ pinpointing the specific jobs and sectors that will win and lose as a result of green structural change will allow effective transition policies and protections to be put into place.

This type of proactive analysis can also facilitate green structural change. Adaptation to climate change will require major advances in technology. Adopting these technological advances will also require major changes in the skills and technologies used by workers.⁹⁸ By anticipating future employment trends in green economies, developed states may avoid labour force skill-gaps and shortages.⁹⁹ This was evidenced in Europe, Australia and the United States in the renewable energy and environmental industries, where shortages of skilled workers held back green structural change in these industries.¹⁰⁰ Thus, by analyzing future employment trends, a developed state's climate change obligations and the right to work may benefit.

93 *Ibid* at 20.

94 Bulgaria, *Information of the Bulgarian Authorities on the Implementation of United Nations Human Rights Council Resolution 7/23 "Human Rights and Climate Change"* (15 October 2008), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org>>.

95 See UNEP, *Green Jobs Executive Summary*, *supra* note 59 at 8.

96 Pembina Institute & David Suzuki Foundation, *Climate Leadership, Economic Prosperity: Final Report on an Economic Study of Greenhouse Gas Targets and Policies for Canada* (2009), online: The Pembina Institute <<http://pubs.pembina.org/reports/climate-leadership-report-en.pdf>>.

97 ILO, *Employment and Labour Market Implications*, *supra* note 55 at para 17.

98 International Labour Office Working Party on the Social Dimension of Globalization, *Decent Work for Sustainable Development – The Challenge of Climate Change*, UNILCO, 300th Sess, UN Doc GB.300/WP/SDG/1, (2007) at para 28 [mimeo].

99 UNEP, *Green Jobs Executive Summary*, *supra* note 59.

100 *Ibid*.

Once the vulnerable jobs and sectors have been identified, a dialogue between all interested parties will be essential for formulating a just transition.¹⁰¹ It is through this aspect of the human rights approach that states will be able to develop sophisticated protection mechanisms, which ensure that all vulnerable groups and individuals are protected. A strong participatory dialogue will inform the process through which response measures are formulated for a just transition in different states. These inputs will be crucial as the extent of green structural change will vary between states. As stated in the ILO's technical brief leading up to COP 15, "industry/employers and workers have an in-depth understanding of the technical options, human resource requirements as well as of the economic and social implications of mitigation measures."¹⁰² The Canadian Labour Congress has suggested several measures that may be taken. For example, workers should be compensated when it is no longer possible for them to work with the skill-sets that they have developed and states should create specially designed reemployment policies for those who are affected.¹⁰³ In this regard, dialogue between the parties can also be used as a tool to ensure that workers who are affected by green structural change are not susceptible to insecurity.¹⁰⁴ Dialogue between all parties should occur on both an international and a national level.

On an international level, a dialogue between states and other interested parties is beginning to develop. Notably, labour unions were recognized as official parties at COP 14 in Ponzan.¹⁰⁵ However, a much larger dialogue would be useful. In the short term, an international dialogue could be used to share knowledge, concerns and best practices of the social dimension of climate change.¹⁰⁶ In this sense, international dialogue could aid states in creating domestic integrated climate change employment measures.

On a national level, numerous states have institutionalized a dialogue between all affected parties when implementing their climate change policies and legislation. For example, Spain has legislated seven tripartite round tables to ensure the participation of social partners in the reduction of greenhouse gases.¹⁰⁷ Germany is another example: the Alliance for Work and the Environment, a joint initiative of unions, employers, governments and environmental groups, has been established to ensure a just transition into a greener economy.¹⁰⁸ These leader states can be an example for the majority of other developed states to follow. It is through these domestic approaches that integrated climate change employment measures can be created for the short term.

101 Sanchez & Poschen, *supra* note 55 at 23; UNEP, *Labour and the Environment*, *supra* note 55 at 91.

102 Sanchez & Poschen, *supra* note 55 at 24.

103 Canadian Labour Congress, *Just Transition for Workers During Environmental Change*, Position Paper, (Ottawa: Canadian Labour Congress, 2000) at 6.

104 Sanchez & Poschen, *supra* note 55 at 19.

International Trade Union Confederation, "Labour Movement Gains Official Recognition at UN Climate Change Conference" (8 December 2008), online: International Trade Union Confederation <<http://www.ituc-csi.org/labour-movement-gains-official.html?lang=en>>.

106 Sanchez & Poschen, *supra* note 55 at 23.

107 ILO, *Employment and Labour Market Implications*, *supra* note 55 at 9-10.

108 UNEP, *Labour and the Environment*, *supra* note 55 at 55.

B. Long-Term Reconciliation

Based on current long-term trends, climate change is predicted to seriously disrupt economic and social activity.¹⁰⁹ Long-term reconciliation will require integrated climate change employment policy goals and agreements. This was explicitly recognized in the objectives of the first Trade Union Assembly Resolution which states that “policies for [a] just employment transition [should be introduced] as a central feature of environmental protection” and should “ensure that workers negatively affected by changes are provided with safe and decent employment alternatives.”¹¹⁰ More specifically, these long-term agreements should institutionalize dialogue between states, and engage the private sector and civil society so that the jobs that will be lost and gained may be taken into consideration as green industries and sectors develop.

On the international level, as noted in the *UNFCCC* and the Bali Action Plan, a long-term agreement should take into account the social and economic contexts of states.¹¹¹ The ILO and the International Trade Union Confederation (ITUC) have stated that any future international climate change agreement should be based on equity and should provide the framework for a just transition.¹¹² During the talks leading up to the Copenhagen Accord, the ITUC submitted a proposal for long-term cooperative action called the “Just Transition Framework.”¹¹³ While the ITUC proposal was not included in the Accord, the Just Transition Framework does lay out a plan, which would protect a worker’s right to work during a green structural change. The ITUC submitted that the Just Transition Framework should include a commitment towards equity, the institutionalization of dialogue between affected parties, systematic national and regional analysis on the impacts of emissions reductions on communities, and an upgrading of social protection systems which have to be adapted to the challenges posed by climate change.¹¹⁴ More specifically, the ITUC suggested that these social protection systems should include insurance coverage, assistance for labour market reintegration, vocational training, the creation of alternative income-earning opportunities and local economic diversification.¹¹⁵ This is a strong proposal, as it could obligate states to integrate climate change and employment objectives, or at least force the potential for normative conflict into the mainstream debate through an

109 ILO, *Employment and Labour Market Implications*, *supra* note 55 at para 6.
110 United Nations Environment Programme, Trade Union Assembly on Labour and the Environment, *Final Resolution of the Trade Union Assembly at Its First Meeting*, UN Doc UNEP/DPDL/TUALE/2, (2006), art 1(g), online: United Nations Environment Programme <<http://unep.org>>.
111 *UNFCCC*, *supra* note 3, art 3(3); *Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007*, UNFCCCOR, 13th Sess, UN Doc FCCC/CP/2007/6/Add.1, (2008), art 1(a).
112 ILO, *Employment and Labour Market Implications*, *supra* note 55 at 3; Sanchez & Poschen, *supra* note 55 at 19; International Trade Union Confederation, *Ad-Hoc Working Group on Long-Term Cooperative Action Under the Convention* (October 2008), online: International Trade Union Confederation <<http://unfccc.int/resource/docs/2008/smsn/ngo/052.pdf>>.
113 *Ibid.*
114 *Ibid.*
115 *Ibid.*

institutionalized dialogue. In any event, all future long-term international agreements should integrate climate change employment concerns, and should institutionalize a forum for dialogue between all affected parties.

On the national level, many states have developed or are already considering long-term plans. For example, France, the United Kingdom, Australia and the State of California all have emissions reduction strategies until 2050.¹¹⁶ However, due to their long-term nature, almost all of these plans are susceptible to the political climates of each state. It is therefore difficult to consider solidified, long-term commitments as they may vary with every change in government. For example, Australia's Labour government has twice attempted to pass the *Carbon Pollution Reduction Scheme*, a carbon market bill, into law. However, the bill has been voted against twice in the Australian Senate and is now delayed until after 2012.¹¹⁷ Moreover, the current Australian Liberal/National coalition leader Tony Abbott has publicly opposed such an initiative.¹¹⁸ Thus, the future of that plan is unclear. In any event, the examples above provide proof that numerous lawmakers from different states are making long-term climate change plans. This may be considered a step in the right direction. However, the emissions reduction strategies mentioned above do not take into account the effects of climate change on employment.

While the *American Clean Energy and Security Act of 2009* faces an uphill battle to be passed into law in the US Senate this coming year, this bill may nevertheless be used as a national example of integrating climate change protections and the right to work.¹¹⁹ The Act provides for assistance transitioning into green jobs, quality job training for persons adversely affected by climate change and a climate change adjustment allowance.¹²⁰ Furthermore, taking these effects into account will be crucial to the political sustainability of effective long-term emissions reductions in developed states.¹²¹ Thus, on both a national and an international level, long-term planning should, through a human rights approach, work to integrate climate change and right to work obligations.

VI. CONCLUSION

In summary, there is a large potential for normative conflict between a developed state's climate change obligations and the right to work. While the two regimes are not inherently incompatible, the necessary consequences of fulfilling a developed

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- 116 Cameron Hepburn & Nicholas Stern, "A New Global Deal on Climate Change" (2008) 24:2 *Oxford Rev Econ Pol'y* 259 at 267.
- 117 Austl, Department of Climate Change and Energy Efficiency, *CPRS Progress* (2 July 2010), online: Australian Government, Department of Climate Change and Energy Efficiency <<http://www.climatechange.gov.au/government/initiatives/cprs/cprs-progress.aspx>>.
- 118 Matthew Franklin, "New Liberal leader Tony Abbott to focus on battlers, economy" *The Australian* (2 December 2009), online: News.com.au <<http://www.news.com.au/national/new-liberal-leader-tony-abbott-to-focus-on-battlers-economy/story-e6frkvr-1225805944477>>.
- 119 US, Bill HR 2454, *American Clean Energy and Security Act of 2009*, 111th Cong, 2009.
- 120 *Ibid.*, s 426.
- 121 *IL.O, Employment and Labour Market Implications*, *supra* note 55 at para 8.

state's climate change obligations challenge the right to work. A state's response measures to climate change have a dual relationship with respect to the right to work. Response measures support the right to work, and more generally all human rights, by addressing the pressing need to curb climate change, a need which supports all human rights. However, without proper foresight these response measures may lead the two regimes into conflict. While the green structural change required by developed states' climate change obligations will create many jobs, some jobs will be lost. It is the insecurity caused by the lost jobs, which creates the large potential for normative conflict between the two regimes. Where, in the event of green structural change, governments of developed states neglect to put in place adequate protections for groups and individuals made vulnerable by the impact of developed states' climate change obligations on employment, the right to work is violated. This is a situation of partial normative conflict, where, in the majority of cases, the right to work will be systematically violated. However, this normative conflict may be reconciled by putting in place adequate protection tailored to vulnerable groups and individuals, which mitigates the negative employment effects of green structural change.

In the short term, developed states need to adopt a progressive legal approach to reconcile the obligations of the two regimes. This will allow developed states to consider the context and full range of effects of their climate change obligations. Once a progressive approach on climate change has been adopted, states should make strategic assessments of their emissions reductions and pinpoint the jobs and sectors that will grow as well as those that will be lost. From there, states should develop integrated climate change employment agreements. These measures should be guided by a human rights approach on both a national and an international level. This process should promote the core concepts of the human rights approach, such as participation, equity and the institutionalization of human rights considerations. Long-term environmental plans should also integrate both climate change and human rights obligations using a human rights approach. These plans should obligate developed states to take the social dimension of climate change into consideration, and allow developed states to create effective long-term policies for a just transition. Thus, although at present there is a large potential for normative conflict between a developed state's climate change obligations and the right to work, with the proper understanding, planning and action, these obligations may be reconciled.

