



REVIEWING *the views*

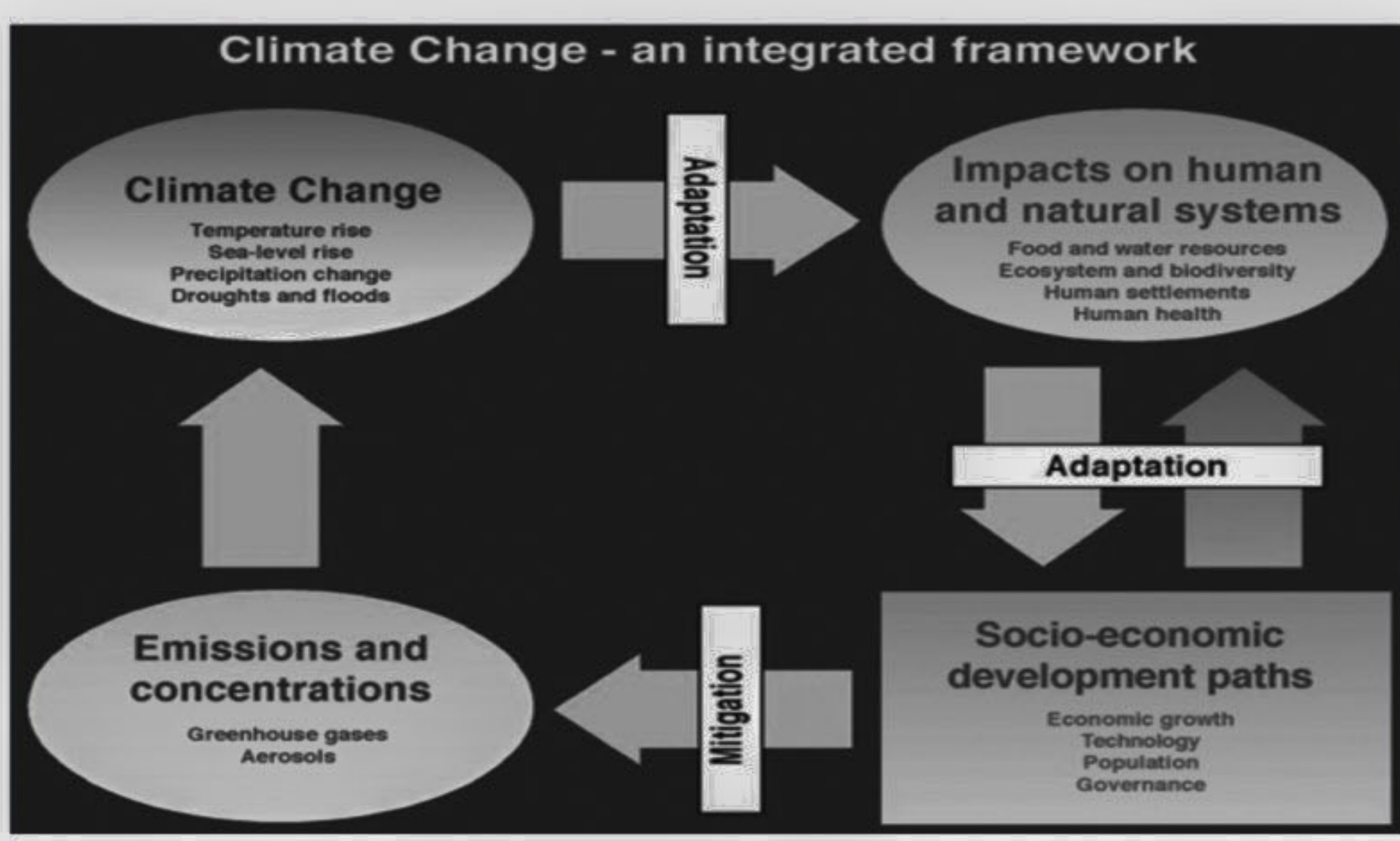
Climate change and precautionary principle

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CLIMATE change is considered as a global risk whose consequences can prove to be catastrophic. The precautionary principle is regarded as a tool against the possible catastrophic impacts of climate change. In the era of globalization where everyone can relate everything to everything else, risks can be characterized by modernization, or else development as their cause and damage as their side effect. Global risks e.g. climate change are not limited to certain time and place.

The development of human society is still based upon the exploitation of earth's natural resources aiming to sustain more sophisticated and comfortable ways of living and even greater numbers of people. In the name of economic and social development humanity is unreasonably using the planets' natural resources without taking into account neither the possible harm that may be caused to nature nor its capacity to replace the exhausted resources for the shake of future generations.

(This figure from the 2001 IPCC Report reveals the impact of socioeconomic development to the environment and human beings and it also introduces adaptation and mitigation as a way through which the negative impacts of climate change can be constrained)



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ceives as such, politics and international law have provided us with a counterbalance to the negative impacts of climate change: sustainable development. Nevertheless no international treaties, such as the Convention on Biodiversity or the Rio/ Copenhagen Declaration, aiming to encounter certain problems of climate change, can define sustainable development as a direct legal obligation of the states.

When cost-benefit analysis cannot provide us with clear mitigation measures against a threat, the precautionary principle allows us to take action when scientific uncertainty about the implications of a risk exists. In the case of risk assessment the precautionary principle emerges as a counterbalance to the decision-making process that is based on the sound science. The precautionary principle is not a legally binding principle. Yet, its inclusion in numerous Conventions and in the New Delhi Declaration (2002) reveals the trend and universal support for its adoption and implementation and its appreciation as part of customary international law and in particular as one of the principles of the emerging international environmental law.

The precautionary principle does not have a universally accepted definition and its interpretation and implementation is based on the context of the treaty where it can be found. Yet, its interpretation is mainly based on the Rio Declaration (1992:15<sup>th</sup> principle) where it is stated that "in order to protect the environment, the

precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The Convention on Climate Change (1992) and the Preamble of the Convention on Biodiversity can also provide us with the basic elements of the principle.

The Johannesburg Summit reveals the development of the notion of the precautionary principle since 1992 and provides us with the best analytical framework for its interpretation. Based on its definition as the 15th principle of the Rio Declaration, the Plan of Implementation of the World Summit on Sustainable Development (2002) states that as a means of implementation of the treaty the states-members will "improve policy and decision-making at all levels through, inter alia, improved collaboration between natural and social scientists, and between scientists and policy makers, including through urgent actions at all levels to (...) promote and improve science-based decision-making and reaffirm the precautionary approach". As obvious in the case of chemicals and hazardous waste, the triggering of the precautionary principle can take place when significant adverse effects to human health and the environment that need to be reduced are concerned.

However, it is rather important that in the case of the Johannesburg

Summit in both section of means of implementation and section of changing unsustainable patterns of consumption and production, precaution is not replacing the science based-decision making processes but it complements them. The precautionary principle operates as a supplementary process aiming to fill the gap whenever full scientific certainty about the cause and possible impacts of an environmental risk is unavailable and when those impacts cannot be neglected. Additionally, lack of scientific knowledge cannot justify any delay in any action aiming to the protection of the environment from any further damage. In the case though, where scientific uncertainty about the cause and effects of a threat does not exist, then preventative measures take place. The difference between precaution and prevention is that while preventative measures can be both precautionary and non-precautionary, precautionary measures can only be preventative.

In addition, climate change is not an issue whose solution lies only in one state's action. International cooperation is a prerequisite for efficiently addressing climate change. Each state should adopt the most suitable policy for both achieving its own developmental goals and combating climate change. However, for international cooperation to take place, both the developed and the developing countries have to be equally prepared. Yet, at the present time, most of the developing countries do not have the capacity to

adapt to climate change even if several developing countries have incorporated the precautionary principle to their domestic legal systems as a legal tool.

Even if the USA and Japan succeeded in the constitution of the term precautionary principle rather than precautionary principle and even if the adoption of the precautionary principle did not include the biodiversity conservation, during the negotiations of the WSSD, the clarification of the scope of the principle in terms of its supplementary role and the clarification of its utility and need in terms of the protection for example of the human health against chemicals and hazardous waste was revealed. The provision for the aid of the developing countries is a rather innovative provision since for the first time the role of the developing countries in sustainable development was recognized and their own needs were taken into account for their adaptation to climate change.

Indeed, the impacts of climate change cannot and shall not be effectively addressed unless a bottom-up approach is adopted, where the people themselves understand, recognize and adapt their every-day lives to the new environmental demands. The precautionary principle is considered as a policy tool. The emerging interaction and cooperation between the scientific, social, and political level of our society is aiming more and more to the adaptation in a more environmental-friendly way of living, where the link between social accountability and participatory democracy in terms of the adoption of the precautionary principle for the protection of the environment in the decision-making process, grows stronger and stronger. Indeed, the answer to climate change does not only lie to the enforcement of the precautionary principle. It also lies to the implementation of the other six principles of international law relating to sustainable development according to the New Delhi Declaration.

The prediction of all the results of a global risk is infeasible and scientific knowledge has proven several times to be inadequate. As a result, international cooperation, through the signature and ratification of international treaties and conventions has led to the establishment of the precautionary principle. This principle, along with other principles of international law, is now and thereafter used as the means against any possible impact of global risks that can harm severely and/or irreversibly either the environment or humanity itself.

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LAW opinion

The International Criminal Court: Justice and politics

JAMES A. GOLDSTON

IN its short life, the International Criminal Court (ICC) in The Hague has indicted fourteen persons, launched two trials, and provoked controversy across the globe. Kofi Annan hailed the court's birth in 2002 as "a great victory for justice and for world order." Muammar al-Qaddafi, Libya's president and chair of the African Union, branded the arrest-warrant issued to his Sudanese counterpart Omar al-Bashir an act of "first-world terrorism." John Bolton, before he became United States ambassador to the United Nations, famously called the ICC "a product of fuzzy-minded romanticism that is not just naive, but dangerous."

Much unease about the court boils down to one issue: how should its prosecutor decide, among thousands of crimes and perpetrators within his jurisdiction, which ones to charge? Prosecutorial discretion is a common method of triage in overcrowded legal systems. But it is unusually contentious at the ICC, given the epic scale of the crimes at issue (including geno-



cide and crimes against humanity), and the court's limited capacity (three courtrooms and no police force) to address them.

In order to make the court more than a pawn of the United Nations Security Council yet forestall "rogue" prosecutions, its governing statute grants the prosecutor substantial freedom to pursue cases on his own initiative, but subjects him to judicial review. As indictments have been issued against rebel leaders in the Congo and Uganda and government figures in Sudan, complaints have grown that, notwithstanding this careful balance, the court is targeting Africa or currying favour with individual states.

Much of this criticism represents the predictable reaction of those who have never reconciled themselves to the idea of legal accountability for mass murder. As such, it simply confirms that the court is doing its job. But other disenchanted voices - among civil society and victim communities especially - merit a response.

It is regrettable then, if understandable, that a number of court officials and NGO allies have thought it sufficient to proclaim that the role of the prosecutor is to "apply the law. Nothing more. Nothing less." Such formulations may sound principled and appealing, but they ring hollow to anyone familiar with the way courts function in practice. For the law and its institutions can never be entirely divorced from their surrounding environment.

The ICC's first trial of a former warlord in the Democratic Republic of Congo (DRC), Thomas Lubanga can illustrate the point. The friends of the court have been at pains to explain why a case arising from a war in which millions were killed and countless numbers raped should focus on the (comparatively) narrow matter of child-soldiers. Why not acknowledge that both the target and the nature of the indictment were convenient, even attractive, not only because conscripting child-soldiers is a heinous act worthy of sanction, but also because Lubanga was already in detention in the DRC, thus enabling the ICC to secure custody over its first defendant.

To take another example, inadequate attention historically accorded to crimes against women and children means that it would be appropriate for the prosecutor to highlight them in his charging strategy and case selection, as does an ongoing prosecution of widespread rape and related sexual violence in the Central African Republic.

It is essential to be guided by "the law" and "the evidence". But in many situations doing so may not sufficiently narrow the range of possible charges or perpetrators. The prosecutor may have to consider other factors as well in deciding how to proceed. These might include the need to demonstrate the court's viability (for example, by charging at a level or in a manner that prevents states from simply ignoring the court's orders); its efficacy (by charging persons who may readily be apprehended); its efficiency (by limiting the number of charges, and thereby the length of trials); or its independence (in appropriate circumstances, by charging officials of governments which have referred situations to the court).

It would be wise and valuable in itself for the International Criminal Court to take such issues into account at this stage of its evolution. But it would also be of great practical benefit at a time when the ICC's very existence remains under challenge. More broadly, it would help the court and its underlying mission overcome the atmosphere of polarised discussion that still surrounds it, which does little to educate and inform.

If the ICC is eventually to command sustained public support, there must be an effort to move beyond platitudes in explaining the nuanced nature of the prosecutor's discretion: grounded in law and evidence, but of necessity considering issues of institutional strategy and policy while refraining from partisanship or bias.

The court's president, Judge Sang-Hyun Song, has rightly called the ICC "a judicial institution operating in a political world." That's no easy feat even in the best of circumstances. Speaking with greater candour about the prosecutor's role is one way we all can help.

James A. Goldston, Executive Director of the Open Society Justice Initiative. The article originally appeared in Open Democracy on January 13, 2010.

LAW interview

Vulnerable employment and poverty on the rise

Interview with ILO Chief of Employment Trends Unit

The economic crisis has had a major impact throughout the world on the level of employment as well as its quality. The ILO's annual report on "Global Employment Trends 2010" says the share of workers in vulnerable employment worldwide may have increased by more than 100 million in 2009, and with it global poverty. ILO Online spoke with Lawrence Jeffrey Johnson who directed the publication of the report.

ILO Online: How do you define 'vulnerable employment'?

Lawrence Jeff Johnson: We define workers in vulnerable employment as the sum of own-account workers and contributing family workers. They are less likely to have formal work arrangements, and are therefore more likely to lack decent working conditions, adequate social security and 'voice' through effective representation by trade unions and similar organizations. Vulnerable employment is often characterized by inadequate earnings, low productivity and difficult conditions of work that undermine workers' fundamental rights.

Why is it important to look at vulnerable employment as a separate category?

While monitoring unemployment provides a good starting point to assess the health of labour markets in developed economies, particularly in developing economies it is essential to consider decent work deficits among the employed. Before the onset of the current

economic crisis, there were large deficits reflected in high rates of vulnerable employment and working poverty in most of the developing world.

How did the global economic and social crisis affect vulnerable workers?

Before the economic crisis, the share of workers in vulnerable employment was on a downward trend in all regions, decreasing globally by around 4 percentage points between 1998 and 2008. Today, the total number of vulnerable workers worldwide is estimated at between 1.48 and 1.59 billion around half of the total global workforce. The number of workers in vulnerable employment may have increased by between 41.6 and 109.5 million from 2008 to 2009.

Are there differences between industrialized and developing countries in terms of the impact of the crisis on labour markets?

The impact varied across countries, depending on the national economic structure, the



level of integration in global markets, and labour market and social protection institutions, among other factors. In developed economies with strong social protection measures, workers who lose their jobs can move into unemployment, generally resulting in an overall decline in total employment. In many developing economies on the other hand, workers who lose their jobs do not have access to social protection schemes. Rather

than becoming unemployed, these workers often take up various forms of employment, working on their own accounts, or contributing to family businesses. This, in turn, results in an increase in the number of workers in vulnerable employment.

How does the rise in vulnerable employment relate to poverty?

In view of the impact of the economic crisis on vulnerable employment and labour productivity, the number of workers living with their families in poverty is likely to have increased as well. Estimates of the share of workers in extreme poverty suggest that, in the most extreme scenario, up to an additional 7.0 per cent of workers were at risk of falling into poverty between 2008 and 2009. This would translate into an additional 215 million workers, which is an alarming increase and would represent a setback of many years in reducing decent work deficits. At the USD 2 a day poverty line, it is estimated that up to 5.9 per cent of workers (185 million workers) were at risk of falling into poverty between 2008 and 2009.

Source: Global Employment Trends, January 2010, International Labour Office, Geneva, 2010.