

SYMPOSIUM ARTICLE

Human Rights in the Paris Agreement: Too Little, Too Late?[†]

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Abstract

This article examines the impact of the Paris Agreement on the human rights of communities who are particularly vulnerable to the impacts of anthropogenic warming because of their geographical location, their spiritual and cultural connections with land and the wider environment, and their histories of colonialism, dispossession and other forms of exploitation. It focuses on two groups: forest dwellers, and inhabitants of small island developing states who are in danger of inundation as a result of rising sea levels. The Paris Agreement on climate change includes stand-alone articles on reducing emissions from deforestation and forest degradation (REDD+), and loss and damage. The main argument in this article is that the inclusion of human rights in the Preamble to the Paris Agreement is a step forward, but is incommensurate with the scale and urgency of climate change.

Keywords: Paris Agreement, Human rights, Climate justice, Indigenous peoples, Loss and damage, REDD+

1. INTRODUCTION

The Paris Agreement is the first binding multilateral climate agreement that refers to human rights. It does so in the Preamble but not in the operative part of the text.¹ It also contains stand-alone articles on reducing emissions from deforestation and forest degradation (REDD+) (Article 5) and loss and damage (Article 8), which indirectly affect the human rights, needs and interests of two groups most vulnerable to climatic harms: forest dwellers, and the inhabitants of small island developing states (SIDS), among whom are substantial numbers of indigenous peoples. The Preamble to the Paris Agreement additionally refers to the protection of ‘biodiversity, recognized by

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¹ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

some cultures as Mother Earth’, thereby alluding to rights of nature that are legally protected in Bolivia and Ecuador.² The Preamble thus contains different, but not incompatible, conceptions of human and environmental rights, yet does little to promote and protect either variant. As a consequence, it is argued that the Paris Agreement does not adequately address the magnitude of the threat posed by climate-related harm to human rights.

Developing countries had mixed success at the 21st Conference of the Parties (COP-21) to the United Nations Framework Convention on Climate Change (UNFCCC)³ in December 2015 in Paris (France). The mitigation target of 2 degrees Celsius (°C) in Article 2(1)(a) is not what the SIDS were hoping for, but the exhortation for states to aim for a target of 1.5°C is more ambitious than most observers expected. Ahead of COP-21, the SIDS launched a ‘1.5 to Stay Alive’ campaign.⁴

I have addressed the advantages and limitations of using human rights to deal with climate change at length elsewhere.⁵ Here, it will suffice to observe that human rights are an important but limited means of addressing the injustices caused by anthropogenic global warming. The article begins with a brief outline of the impacts of anthropogenic global warming on human rights. This is followed in Section 3 by a discussion of the preambular references in the Paris Agreement to human rights, climate change and Mother Earth, and the unexpected inclusion of the stand-alone articles on REDD+ and loss and damage. Section 4 discusses climate justice in relation to the loss and damage incurred by SIDS, and the need for organized relocation and resettlement to protect their rights – conspicuous by its absence from the Paris Agreement. Section 5 discusses the rights of forest dwellers through the prism of the safeguards in the REDD+ framework. The concluding section argues that the Paris Agreement is both a step forward and a missed opportunity.

2. CLIMATE CHANGE AND HUMAN RIGHTS

Climate change is a quintessential transboundary problem. Greenhouse gases (GHGs) do not respect borders and the harm they cause therefore threatens the human rights of people everywhere. Deforestation and the plight of SIDS are transboundary issues as well. Because tropical forests act as carbon sinks, the well-being of people

² See n. 44 below.

³ New York (US), 9 May 1992, in force 21 Mar. 1994, available at: http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

⁴ They relied on the Structured Expert Dialogue on the 2013–15 review of the long-term global temperature goal, which argued that the global consensus of limiting the increase in average global temperatures to 2°C was inadequate and would threaten the sustainability of both SIDS and low-lying coastal states such as Bangladesh and Vietnam: UNFCCC Secretariat, ‘Report on the Structured Expert Dialogue on the 2013–2015 Review’, available at: <http://unfccc.int/resource/docs/2015/sb/eng/inf01.pdf>.

⁵ S. Adelman, ‘Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse’, in S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010), pp. 159–79; S. Adelman, ‘Human Rights and Climate Change’, in G. Digiacomio (ed.), *Human Rights: Current Issues and Controversies* (University of Toronto Press, 2016), pp. 411–35.

living outside the countries in which they are located depends on their conservation. The displacement of the inhabitants of SIDS as a result of rising sea levels is a transboundary issue that requires a concerted international response to protect their rights.⁶ Climate-related displacement is likely to occur across the planet, and is a potential driver of conflict.⁷

Since human rights are distinguished from other rights on the basis of their universality, they would seem to be an appropriate means of dealing with climatic harm, but state practice indicates that sovereignty regularly takes precedence over rights. This is reflected in Article 13(3) Paris Agreement, which states that the contemplated new transparency framework to document member countries' compliance with their obligations under the Agreement must be 'implemented in a facilitative, non-intrusive, non-punitive manner, *respectful of national sovereignty*, and avoid placing undue burden on Parties'.⁸ As I argue below, powerful states in the UNFCCC sought to avert the risk that the Agreement might provide a basis for climate change litigation by omitting human rights from the operative part of the text.

Grear argues that human rights are neither intrinsically nor unambiguously positive or negative and that '[i]t is fair to say that human rights law, in both theory and practice, is riven with contradictions, disputations, rival framings and oppositional accounts, and that such critical instabilities render rights paradigms at best complex'.⁹ Despite their metamorphosis under neoliberalism from what Baxi calls their modern incarnation as individual rights in the Universal Declaration of Human Rights¹⁰ to their contemporary manifestation as trade-related, market-friendly human rights favourable to corporations, they remain a powerful language of ethics and resistance, and thus a means of addressing climatic harm and injustices.¹¹ In Grear's words, human rights are 'an *intrinsic* and indispensable element of any adequate response to climate crisis' and a precondition for climate justice.¹²

Human rights are increasingly threatened as the impacts of anthropogenic warming intensify. In 2014, the Intergovernmental Panel on Climate Change (IPCC) predicted that the impacts of climate change will be 'severe, pervasive and

⁶ See M.B. Gerrard & G.E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013).

⁷ T. Ide et al., 'The Climate-Conflict Nexus: Pathways, Regional Links, and Case Studies', in H.G. Brauch et al. (eds), *Handbook on Sustainability Transition and Sustainable Peace* (Springer, 2016), pp. 285–304.

⁸ Emphasis added. See S. Adelman, 'Cosmopolitan Sovereignty', in C. Bailliet & K. Franko Aas (eds), *Cosmopolitan Justice and its Discontents* (Routledge, 2011), pp. 11–28.

⁹ A. Grear, 'Human Rights, Property and the Search for "Worlds Other"' (2012) 3(2) *Journal of Human Rights and the Environment*, pp. 173–95, at 176.

¹⁰ Paris (France), 10 Dec. 1948, UN General Assembly Res. 217A (III), UN Doc. A/810, 71, available at: <http://www.un.org/en/universal-declaration-human-rights>.

¹¹ U. Baxi, *The Future of Human Rights* (Oxford University Press, 2006); Adelman (2016), n. 5 above.

¹² A. Grear, 'Towards "Climate Justice"? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy' (2014) 5 Special Edition *Journal of Human Rights and the Environment*, pp. 103–33, at 105 (emphasis in original). See R. Lyster, *Climate Justice and Disaster Law* (Cambridge University Press, 2016), who uses Amartya Sen's capabilities approach in relation to climate justice.

irreversible'.¹³ A wide range of human rights will be undermined.¹⁴ The right to life, a precondition for all other human rights, is threatened by systemic risks from extreme weather events resulting in severe infrastructural damage to electricity, water supplies, and health and emergency services. Injuries, diseases, and fatalities will be caused by more intense heatwaves and forest fires. Malnutrition will result from diminished food production. The right to health will be undermined by increased risks from food-, water-, and vector-borne diseases. Ecosystems face heightened risks of abrupt and irreversible change that undermines food and water security, and triggers new poverty traps. The right to food will be threatened as food security is undermined. Rural livelihoods and incomes will be harmed by insufficient access to water for drinking, irrigation and sanitation, resulting in reduced agricultural productivity. The IPCC predicts that hundreds of millions of people will be displaced by land loss from coastal and inland flooding, with increased risks of death, injury, severe ill-health, and disrupted livelihoods in low-lying coastal zones and SIDS as a result of rising sea levels and storm surges.¹⁵

Krakoff observes that there is no authoritative definition of indigenous peoples, but they are nonetheless distinguishable from other minority groups: 'First, indigenous peoples assert associational structures that link religious, cultural and economic ties to ancestral lands and resources. Second, indigenous communities adopt the term "peoples" to reflect core concerns with group identity and accompanying communal and collective self-determination'.¹⁶

Indigenous peoples are especially vulnerable to the impacts of anthropogenic warming because of their geographical locations, their spiritual and cultural connections with land and the wider environment, their histories of colonial exploitation and dispossession, the irreversibility of climate harm, and their relatively low adaptive capacities.¹⁷ Deforestation threatens livelihoods and the rights to subsistence, food, water, health and life. It intensifies the loss of traditional territories and undermines the access to, use and ownership of land and natural resources by

¹³ Intergovernmental Panel on Climate Change (IPCC), *Climate Science 2013: The Physical Science Basis* (Cambridge University Press, 2013), p. 14. See also Adelman (2016), n. 5 above, and O. Quirico & M. Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016).

¹⁴ Unless otherwise stated, the facts in this paragraph are derived from M.L. Parry et al., *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007).

¹⁵ C.B. Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), Technical Summary, pp. 35–94.

¹⁶ S. Krakoff, 'Indigenous Peoples and Climate Change', in D.A. Faure & M. Peeters (eds), *Climate Change Law, Vol. 1* (Edward Elgar, 2016), pp. 627–36, at 628.

¹⁷ R.S. Abate & E.A. Kronk, 'Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples', in R.S. Abate & E.A. Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013), pp. 3–18; J.N. Nkem et al., 'Profiling Climate Change Vulnerability of Forest Indigenous Communities in the Congo Basin' (2013) 18(5) *Mitigation and Adaptation Strategies for Global Change*, pp. 513–33; S. Bentley & M. Bourke, 'Facing Reality: Indigenous Communities and Climate Change' (2014) 42(3) *Interaction*, pp. 22–7.

indigenous and local communities.¹⁸ Since the impacts of climate change are gendered, indigenous women are particularly vulnerable to climate harm.¹⁹

SIDS 'have large indigenous populations which rely upon biodiversity for both sustenance and livelihoods'.²⁰ Small islands, 'whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise, and extreme events'.²¹ Rising sea levels, saline encroachment on water supplies, increased vector-borne diseases and food and water scarcity are likely to displace their populations,²² and SIDS are likely to experience more frequent extreme weather events that destroy infrastructure and livelihoods.²³ Their populations' rights to life, health, culture and property are endangered by climate change, as is their right to self-determination, which is tied in principle to territory and statehood.²⁴ Above all, inhabitants of SIDS require a human right to the land beneath their feet or, failing that, a right to unforced relocation and resettlement.

Indigenous peoples and SIDS bear little responsibility for climate change but are among those referred to in the Paris Agreement as 'particularly vulnerable' because of their limited resources and low adaptive capacities. For example, the Preamble recognizes 'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change'.

The Preamble to the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁵ affirms that 'indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'.²⁶ The UNDRIP 'recognizes indigenous peoples'

¹⁸ A. Savaresi, 'REDD+ and Human Rights: Addressing Synergies Between International Regimes' (2013) 18(3) *Ecology and Society*, p. 5, available at: <http://dx.doi.org/10.5751/ES-05549-180305>.

¹⁹ K.P. Whyte, 'Indigenous Women, Climate Change Impacts, and Collective Action' (2014) 29(3) *Hypatia*, pp. 599–616, at 609.

²⁰ E.J. Techera, 'Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific' (2010) 61(2) *Journal of Legal Pluralism*, pp. 171–204, at 172 (noting that a majority of SIDS inhabitants continue to live at least partially traditional lifestyles).

²¹ Parry et al., n. 14 above, p. 689; Field et al., n. 15 above, Summary for Policymakers, p. 15. SIDS are rated as highly vulnerable in the Notre Dame Global Adaptation Index: Country Rankings (2015), *ND-GAIN*, available at: <http://index.gain.org/ranking/vulnerability>.

²² Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Climate Change in the Pacific: Scientific Assessments and New Research. Vol. 2: Country Reports* (National Library of Australia, 2011), p. 2.

²³ J. Barnett & J. Campbell, *Climate Change and Small Island States: Power, Knowledge, and the South Pacific* (Routledge, 2010), p. 12.

²⁴ Some writers are considering whether SIDS will be able to exercise de-territorialized sovereignty through governments-in-exile after relocating to states willing to accept them: J. Kittel, 'Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2014) 2014(4) *Michigan State Law Review*, pp. 1207–50; L. Yamamoto & M. Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer, 2014).

²⁵ UN General Assembly, Resolution adopted 13 Sept. 2007, UN Doc. A/RES/61/295, 2 Oct. 2007, available at: <http://www.refworld.org/docid/471355a82.html>.

²⁶ *Ibid.*

rights to self-determination, culture and property, including the right to resist forced relocation or assimilation'.²⁷

Indigenous peoples have played a leading role in attempts to link human rights and climate change. The most well-known example perhaps is the 2005 Inuit petition to the Inter-American Commission on Human Rights.²⁸ Indigenous groups in the Brazilian Amazon have been fighting large energy projects with questionable sustainability, such as the Belo Monte dam in Brazil, for more than three decades. They were hoping that the outcome of the Paris negotiations would contain unambiguous language to protect human rights.²⁹ The Alliance of Small Island States (AOSIS) was established in 1990 to represent SIDS in the UNFCCC and has become a key player in climate negotiations, gaining seats in Convention bodies and highlighting the vulnerability of SIDS in the text of the UNFCCC.³⁰

Although the UNFCCC entered into force in 1994, human rights had not been mentioned prior to the Cancún Agreements in 2011.³¹ It was not until 2008 that the United Nations (UN) Human Rights Council requested the Office of the High Commissioner for Human Rights (OHCHR) to report on the impacts of climate change on human rights.³² The resultant report noted that climate change has implications for the right of indigenous peoples to self-determination, including their right not to be deprived of their own means of subsistence.³³ It found the traditional livelihoods and cultural identity of indigenous peoples living on marginal lands and in fragile ecosystems to be particularly at risk.³⁴ Adopting an overly legalistic approach, the OHCHR concluded that although climate change *threatens* a broad array of human rights, it does not necessarily *violate* them – an interpretation that enables historically high emitters to evade responsibility for the impacts of their activities on

²⁷ Krakoff, n. 16 above, p. 633. These provisions are in Arts 3, 8, 10 and 26 UNDRIP, which was adopted by the UN General Assembly and is therefore not legally binding.

²⁸ Inuit Circumpolar Council Canada, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 7 Dec. 2005, available at: <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>. The Commission had previously recognized the link between the right to life and environmental degradation in a case brought by the Yanomami community of the Amazon against the Brazilian government: *Case of Yanomami Indians*, Judgment, 1985, Case 7615 (Brazil), Inter-AmCtHR, OEA/Ser.L/V/II.66 doc. 10 rev. 1, available at: <http://www.cidh.org/annualrep/84.85eng/brazil7615.htm>.

²⁹ 'What the Paris Climate Agreement Means for Indigenous Rights and Hydroelectric Dams', *EcoWatch*, 14 Dec. 2015, available at: <http://ecowatch.com/2015/12/14/indigenous-rights-cop21>.

³⁰ UNFCCC, Preamble and Art. 8.

³¹ UNFCCC Secretariat, Decision 1/CP.16, 'The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, available at: <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>. The Agreements note UN Human Rights Council Resolution 10/4 and emphasize that '[p]arties should, in all climate change related actions, fully respect human rights': *ibid.*, p. 4, para. I.8.

³² UN Human Rights Council, Resolution 7/23, 'Human Rights and Climate Change', 28 Mar. 2008. See Office of the United Nations High Commissioner for Human Rights (OHCHR), Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 Jan. 2009, available at: <http://www.refworld.org/docid/498811532.html>.

³³ OHCHR, *ibid.*, para. 40.

³⁴ *Ibid.*, para. 51.

human rights.³⁵ More positively, the report contends that human rights law creates duties with extraterritorial application on states in relation to climate change, including an obligation of international cooperation.³⁶ The UN Human Rights Council has subsequently adopted several resolutions on human rights and climate change.³⁷ The stage was thus set for COP-21, in Paris, to place human rights at the heart of the climate regime, an expectation that was dashed in the final text of the Paris Agreement.

3. HUMAN RIGHTS IN THE PARIS AGREEMENT

The Paris Agreement is the first legally binding multilateral climate instrument that refers to human rights. Although climate change constitutes a planetary emergency, this is confined to a single reference in the Preamble:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.³⁸

Almost immediately thereafter, the Preamble notes:

the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of ‘climate justice’, when taking action to address climate change.³⁹

The first clause calls for an anthropocentric approach that respects and promotes human rights, whereas the second holds out the promise of an ecocentric approach. It alludes to the rights of Mother Earth which, along with climate justice, are recognized to be important albeit – as the Preamble somewhat patronizingly puts it – only for

³⁵ UN Human Rights Council, Draft Report of the Human Rights Council on its Tenth Session, UN Doc. A/HRC/10/L.11, 12 May 2009, pp. 13 and 15, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.L.11.pdf> (emphases added).

³⁶ See J.H. Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33(2) *Harvard Environmental Law Review*, pp. 477–98; D. Bell, ‘Does Anthropogenic Climate Change Violate Human Rights?’ (2011) 14(2) *Critical Review of International Social and Political Philosophy*, pp. 99–124.

³⁷ Human Rights Council Resolution 18/22, ‘Human Rights and Climate Change’, UN Doc. A/HRC/RES/18/22, 17 Oct. 2011, available at: <http://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf>; Human Rights Council Resolution 26/27, ‘Human Rights and Climate Change’, UN Doc. A/HRC/26/L/33/Rev.1, 23 June 2014, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/061/94/PDF/G1406194.pdf?OpenElement>; Human Rights Council Resolution 29/15, ‘Human Rights and Climate Change’, UN Doc. A/HRC/29/L.21, 30 June 2015, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G15/137/48/PDF/G1513748.pdf?OpenElement>.

³⁸ Note the use of ‘should’ rather than ‘shall’, indicating the relatively low priority accorded to human rights. The preamble to a treaty does not create rights or obligations by itself, but may contribute to the emergence of a customary norm: see International Law Commission, ‘Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur’, Doc. A/CN.4.672 (2014), para. 76(f).

³⁹ Paris Agreement, n. 1 above, Preamble.

‘some’. These perspectives are not intrinsically incompatible, but their juxtaposition does not promote a coherent conception of rights.⁴⁰

The reference to Mother Earth does not embrace the full economic, legal and political implications of Andean cosmovisions and epistemologies such as *buen vivir* (roughly, ‘living well’) that prioritize the rights of Mother Earth (*Pachamama*).⁴¹ *Buen vivir* disputes the notion that rights can be adequately protected by Eurocentric and anthropocentric approaches that fetishize endless economic growth, extractive development, neoliberalism, possessive individualism, and hubristic faith in technology.⁴² In contrast, *buen vivir* propounds an ecocentric conception of development which acknowledges that human well-being is contingent upon communal life in harmony with nature, and is consistent with principles of reciprocity, complementarity, relationality, and solidarity. It does not accept the separation between nature and society that characterizes Eurocentric thinking because nature is an essential and constitutive element of social life to be valued for itself rather than as natural capital.⁴³ The Constitution of Ecuador grants rights to *Pachamama*, and *buen vivir* is a guiding ethical principle of Bolivia’s Constitution.⁴⁴

The 2010 People’s Agreement on the Rights of Mother Earth⁴⁵ describes climate change as an ecological and economic crisis caused by a patriarchal and hierarchical model of civilization based on the submission of human beings and the destruction of nature. It condemns worldviews that privilege ‘a logic of competition, progress and limitless growth’ in a regime of production and consumption that seeks profit without limits, separates human beings from nature, and imposes a logic of domination and the commodification of everything including ‘water, earth, the human genome,

⁴⁰ See A. Thompson, ‘Anthropocentrism: Humanity as Peril and Promise’, in S.M. Gardiner & A. Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017).

⁴¹ It is not apparent why climate justice is not important to all countries or why some states might have objected to a universal formulation. Bolivia and Ecuador objected to this formulation: International Institute for Sustainable Development (IISD), ‘Summary of the Paris Climate Change Conference: 29 November–13 December 2015’ (2015) 12(663) *Earth Negotiations Bulletin*, pp. 1–47, at 12; E. Gudynas, ‘Debates on Development and Its Alternatives in Latin America: A Brief Heterodox Guide’, in *Beyond Development: Alternative Visions from Latin America* (Transnational Institute/Rosa Luxemburg Foundation, 2013), pp. 15–39; L.I. Prádanos & L.E. Figueroa Helland, ‘How to Listen to Pachamama’s Testimonio: Lessons from Indigenous Voices’ (2015) 39(2) *Studies in 20th and 21st Century Literature*, Article 9, available at: <http://dx.doi.org/10.4148/2334-4415.1841>. Para. 136 of the Paris Decision (UNFCCC Secretariat, Decision 1/CP.21, ‘Adoption of the Paris Agreement’, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016, available at: <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>) establishes a knowledge exchange platform on traditional knowledge and Art. 7 (on adaptation) Paris Agreement (n. 1 above) refers to ecosystems, livelihoods and traditional knowledge.

⁴² S. Adelman, ‘Epistemologies of Mastery’, in A. Grear & L. Kozé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), pp. 9–27.

⁴³ E. Gudynas, ‘Buen Vivir: Today’s Tomorrow’ (2011) 54(4) *Development*, pp. 441–7; U. Villalba, ‘Buen Vivir vs Development: A Paradigm Shift in the Andes?’ (2013) 34(8) *Third World Quarterly*, pp. 1427–42.

⁴⁴ The Ecuadorian Constitution guarantees the rights of *buen vivir* (Arts 12–34) and grants rights to nature (Arts 71–74): Constitución Política de la República del Ecuador, 20 Oct. 2008. In Bolivia, *buen vivir* informs the 2009 Constitution, which does not grant rights to nature. However, *Pachamama* is protected under the Law of the Rights of Mother Earth (Law 071 of the Plurinational State) passed by the Plurinational Legislative Assembly on 21 Dec. 2010.

⁴⁵ People’s Agreement of Cochabamba, 24 Apr. 2010, adopted at the World People’s Conference on Climate Change and the Rights of Mother Earth, available at: <https://pwccc.wordpress.com/support>.

ancestral cultures, biodiversity, justice, ethics, the rights of peoples, and life itself'. Human rights and the rights of Mother Earth are regarded as complementary. The People's Agreement calls upon 'states to recognize, respect and guarantee the effective implementation of international human rights standards and the rights of indigenous peoples', including 'full and effective implementation of the right to consultation, participation and prior, free and informed consent of indigenous peoples in all negotiation processes, and in the design and implementation of measures related to climate change'. It demands protection for individuals and communities displaced by climate change.

Like the People's Agreement, the ultimate significance of the Paris Agreement may be normative. Cassotta argues that the Paris Agreement is effectively unenforceable even though it is 'legally binding', and contains no mechanisms to ensure implementation.⁴⁶ In Savaresi's view, the Agreement is formally binding but 'the scope of states' obligations will clearly depend on the interpretation of the language in each provision'.⁴⁷ As Bodansky points out, the effectiveness of an international regime depends upon the ambition of its commitments, the level of state participation and the degree to which the parties comply.⁴⁸

Ultimately, negotiators at COP-21 crossed their collective fingers, placed their faith in voluntarism and hoped that naming and shaming will be enough to save people and the planet – a tactic upon which campaigners have long had to rely to pressurize states that violate human rights. The decision of the United States (US) Trump administration to effectively withdraw from the Agreement demonstrates its voluntary nature. Trump's approval of the Keystone XL and Dakota Access oil pipelines means that the US is effectively a rogue state on climate change, which the international community will have to consider sanctioning as well as naming and shaming.⁴⁹ At the same time, the international isolation of the Trump administration on climate change, and efforts by cities and states in the US to reduce emissions, demonstrate the normative power of the Agreement.⁵⁰

⁴⁶ S. Cassotta, 'The Paris Agreement in Logic of Multi-Regulatory Governance: A Step Forward to a New Concept of "Global Progressive Adaptive-Mitigation"?' (2016) 25(6) *European Energy and Environmental Law Review*, pp. 196–212, at 196. See also R. Falkner 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92(5) *International Affairs*, pp. 1107–25.

⁴⁷ A. Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34(1) *Journal of Energy & Natural Resources Law*, pp. 16–26, at 19–20. S. Oberthür & R. Bodle, 'Legal Form and Nature of the Paris Outcome' (2016) 6(1–2) *Climate Law*, pp. 40–57, at 40 (arguing that the Agreement 'constitutes an international treaty whose prescriptive and precise legal obligations are primarily procedural and focused on "nationally determined contributions" (on mitigation) and the core transparency framework. Many other less precise and prescriptive obligations and provisions, including a number of rather programmatic statements, are best understood as establishing a political narrative that aims to guide the implementation and future evolution of the Agreement'). The form and enforceability of the Paris Agreement were dictated in part by the fact that there was little likelihood that a more conventional treaty would be ratified by a Republican-dominated US Congress.

⁴⁸ D. Bodansky, 'The Legal Character of the Paris Agreement: A Primer' (2016) 25(2) *Review of European, Comparative & International Environmental Law*, pp. 142–50.

⁴⁹ S. Holland & V. Volcovici, 'Trump Clears Way for Controversial Oil Pipelines', *Reuters*, 24 Jan. 2017, available at: <http://www.reuters.com/article/us-usa-trump-pipeline-idUSKBN15820N>.

⁵⁰ 'The Fight against Climate Change: Four Cities Leading the Way in the Trump Era', *The Guardian*, 12 Jun. 2017, available at: <https://www.theguardian.com/cities/2017/jun/12/climate-change-trump-new-york-city-san-francisco-houston-miami>.

Ahead of the Paris negotiations, the UN special procedures mandate holders issued a statement urging ‘States to make sure that human rights are at the core of climate change governance ... And we renew our call on State parties to maintain language in the 2015 climate agreement that provides that the parties *shall*, in all climate change related actions, respect, protect, promote and fulfil human rights for all’.⁵¹

In the run-up to COP-21, the UN Human Rights Council emphasized the need for all states to enhance international dialogue and cooperation to address the adverse impacts of climate change on the enjoyment of human rights, including the right to development.⁵² In February 2015, 18 countries adopted the Geneva Pledge on Human Rights in Climate Action,⁵³ a non-binding and voluntary pledge that emphasizes the importance of addressing the human rights implications of climate change and their central significance in climate responses. They pledged to promote cooperation between their representatives in the Human Rights Council and at the UNFCCC, and to facilitate the exchange of knowledge and best practices. Similarly, the Global Network on Human Rights and the Environment (GNHRE) issued a Draft Declaration on Human Rights and Climate Change with the aim of alerting the negotiators to the interdependence of human rights and climate change.⁵⁴ The Declaration states that ‘human rights and a profound commitment to climate justice are interdependent and indivisible’, and that all ‘human beings, animals and living systems have the right to a secure, healthy and ecologically sound Earth system’.⁵⁵

A draft of the Paris Agreement referred to human rights in Article 2 as well as in the Preamble. Draft Article 2 called upon states to provide ‘... respect, protection, promotion and fulfillment of human rights for all, including indigenous peoples, including the right to health and sustainable development, [including the right of people under occupation] and to ensure gender equality and the full and equal participation of women, [and intergenerational equity]’.⁵⁶ Saudi Arabia, the US and

⁵¹ UN OHCHR, Joint Statement by UN Special Procedures on the Occasion of World Environment Day (5 June 2015) on Climate Change and Human Rights, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> (emphasis added).

⁵² ‘Understanding Human Rights and Climate Change’, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, available at: <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

⁵³ Initiated by Costa Rica, this is a non-binding, voluntary pledge that stresses the importance of addressing the human rights implications of climate change and that human rights should inform climate responses, available at: http://www.forestpeoples.org/sites/fpp/files/news/2015/02/Annex_Geneva%20Pledge.pdf.

⁵⁴ Available at: <http://gnhre.org/gnhre-draft-declaration>. The Declaration has subsequently been finalized and is available at: <http://gnhre.org/declaration-human-rights-climate-change>. See K. Davies et al., ‘The Declaration on Human Rights and Climate Change’: Towards a New Legal Tool for Policy Change’ (2017) 8(2) *Journal of Human Rights and the Environment*, pp. 217–53.

⁵⁵ GNRHE Draft Declaration, *ibid.*, Principles 1–5.

⁵⁶ Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP Contact Group, edited version of 6 Nov. 2015, re-issued 10 Nov. 2015, available at: <https://unfccc.int/resource/docs/2015/adp2/eng/11fnnot.pdf>. The brackets in provisional Art. 2 indicated that the text was subject to further negotiation. Provisional Art. 2 read: ‘[This Agreement shall be implemented on the basis of equity and science, in [full] accordance with the principles of equity and common but differentiated responsibilities and respective capabilities], in the light of national circumstances] [the principles and provisions of the

Norway explicitly objected to any reference to human rights in the operative part of the Agreement, and several Member States of the European Union (EU) expressed non-public objections.⁵⁷

Human rights would have had greater weight if the wording in the draft had been retained, although some writers have argued that it is important that the temperature targets in the article were not muddled by the inclusion of human rights obligations. Mayer argues that ‘the non-inclusion of a reference to human rights in article 2 of the Paris Agreement reflects a welcome orientation towards a more climate-centred climate regime – one which does not attempt to solve all the issues of our time while addressing the most difficult one’.⁵⁸ The single reference to human rights does little to facilitate the justiciability of human rights or to put them at the core of the UNFCCC. It may be argued, however, that the Paris Agreement indirectly promotes human rights through the inclusion of articles on REDD+ and loss and damage. The following sections examine whether Article 5 reinforces the safeguards of the rights of indigenous forest dwellers in the REDD+ framework and whether protection of the human rights of SIDS citizens is enhanced by Article 8.

4. LOSS AND DAMAGE AND SMALL ISLAND DEVELOPING STATES

Loss and damage refers to harm resulting from extreme sudden or slow-onset events caused by anthropogenic global warming which cannot be avoided through mitigation or adaptation, such as deforestation and rising sea levels. These impacts undermine the capacities of communities to cope despite adaptation measures. Loss and damage are the ‘negative effects of climate variability and climate change that people have not been able to cope with or adapt to’.⁵⁹ Damage refers to harm that can be quantified in monetary terms, whereas loss is a broader category which includes non-monetary harm and, presumably, violations of human rights.⁶⁰ Losses are sometimes distinguished from damage on the basis that they are irreversible

Convention], while ensuring the integrity and resilience of natural ecosystems, [the integrity of Mother Earth, the protection of health, a just transition of the workforce and creation of decent work and quality jobs in accordance with nationally defined development priorities] and the respect, protection, promotion and fulfillment of human rights for all, including indigenous peoples, including the right to health and sustainable development, [including the right of people under occupation] and to ensure gender equality and the full and equal participation of women, [and intergenerational equity].’]

⁵⁷ P. Tso, ‘How a Disagreement over Human Rights Language Almost Derailed the Climate Change Treaty’, *Upworthy*, 17 Dec. 2015, available at: <http://www.upworthy.com/how-a-disagreement-over-human-rights-language-almost-derailed-the-climate-change-treaty>.

⁵⁸ B. Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6(1–2) *Climate Law*, pp. 109–117, at 117.

⁵⁹ K. Warner et al., ‘Evidence from the Frontlines of Climate Change: Loss and Damage to Communities Despite Coping and Adaptation Loss and Damage in Vulnerable Countries Initiative – Policy Report’, Report No. 9, Nov. 2012, UN University Institute for Environment and Human Security (UNU-EHS), available at: <http://loss-and-damage.net/download/6815.pdf>.

⁶⁰ See K.E. McNamara et al., ‘The Complex Decision-Making of Climate-Induced Relocation: Adaptation and Loss and Damage’ (2016) *Climate Policy*, available at: <http://dx.doi.org/10.1080/14693062.2016.1248886>.

whereas damage is not. There are three types of loss and damage: avoided, unavoided, and unavoidable.⁶¹ The Warsaw International Mechanism for Loss and Damage (WIM) was established at COP-19, in Warsaw (Poland), in 2013, at the behest of developing countries particularly vulnerable to the adverse effects of climate change. Its main functions are:

- to enhance knowledge and understanding of comprehensive risk management approaches;
- to strengthen dialogue, coordination, coherence and synergies among relevant stakeholders; and
- to enhance action and support, including finance, technology and capacity building.⁶²

Developing countries had four main demands ahead of COP-21: to make the WIM permanent; to make displacement and migration action areas in the WIM work programme; and to secure financial resources for irrecoverable loss and damage.⁶³ Above all, they wanted the inclusion of unambiguous language recognizing the liability of developed countries for climate-related loss and damage and a concomitant obligation to pay compensation. Developed countries claimed they were not opposed to the concept of loss and damage in principle but were constrained by domestic political realities. The US Secretary of State at the time, John Kerry, said that the US favoured ‘framing it in a way that doesn’t create a legal remedy because Congress will never buy into an agreement that has something like that ... [and] the impact of it would be to kill the deal’.⁶⁴ Developing countries were equally insistent that omitting loss and damage entirely was unacceptable. Pa Ousman Jarju, chair of the Least Developed Countries group of 48 nations, said: ‘We do not foresee an outcome in Paris without Loss and Damage ... That is a red line for us’.⁶⁵ The compromise is Article 8, which is something of a pyrrhic victory for developing countries and does little to directly protect human rights. The article suggests that the WIM will be based upon risk management strategies and building resilience but it is

⁶¹ R. James et al., ‘Characterizing Loss and Damage from Climate Change’ (2014) 4(11) *Nature Climate Change*, pp. 938–9; W. Burns, ‘Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change’ (2016) 22(2) *ILSA Journal of Comparative & International Law*, pp. 415–33; E. Roberts & M. Pelling, ‘Climate Change-related Loss and Damage: Translating the Global Policy Agenda for National Policy Processes’ (2016) *Climate and Development*, pp. 1–14, Taylor & Francis Online, available at: <http://www.tandfonline.com/doi/full/10.1080/17565529.2016.1184608>.

⁶² UNFCCC Secretariat, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, available at: http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8134.php.

⁶³ S. Huq & R. De Souza, ‘Not Fully Lost and Damaged: How Loss and Damage Fared in the Paris Agreement’, Wilson Center, 22 Dec. 2015, available at: <https://www.wilsoncenter.org/article/not-fully-lost-and-damaged-how-loss-and-damage-fared-the-paris-agreement#sthash.6Fwm9e8R.dpuf>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* For a SIDS perspective on the negotiations, see I. Fry, ‘The Paris Agreement: An Insider’s Perspective – The Role of Small Island Developing States’ (2106) 46(2) *Environmental Policy and Law*, pp. 105–8.

unclear what this means in practice or how it relates to loss and damage arising from negative climatic impacts on human rights. The Paris Decision requests the Executive Committee of the WIM to establish a task force to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change, but the Paris Agreement does not mention relocation and resettlement – an omission that signifies a significant failure to protect the human rights of the citizens of SIDS.⁶⁶ There is an urgent need to protect the human rights of climate-displaced persons under international law, preferably within the UNFCCC.

Paragraph 52 of the Paris Decision reflects the agreement of the parties – reluctantly acceded to by developing countries – that Article 8 ‘does not involve or provide a basis for any liability or compensation’.⁶⁷ A draft of the Paris Agreement issued on 10 December 2015 included a reference to loss and damage ‘in a manner that does not involve or provide a basis for liability or compensation *nor prejudice existing rights under international law*’.⁶⁸ Had this wording been retained, it might have given greater weight to human rights in the operative part of the Agreement, something that developed countries were anxious to avoid. Burkett believes that paragraph 52 does not foreclose other avenues for liability and compensation under international law.⁶⁹ If compensation *without* liability were absolutely precluded, then the main demand of SIDS is effectively denied and loss and damage are likely to be treated as questions of adaptation and risk management. If so, the WIM will be a technocratic mechanism with little concern for human

⁶⁶ Decision 1/CP.21, n. 41 above, paras 49–51. Displacement was regarded as a key issue to be negotiated in Paris, with the G77 calling for the inclusion of a ‘climate change displacement coordination facility’ that could provide emergency relief, assist in providing organized migration and planned relocation, and pay compensation to climate displaced persons: UNFCCC Secretariat, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Working Document, Second Session, Part Ten, 31 Aug.–4 Sept. 2015, p. 5, available at: https://unfccc.int/files/bodies/application/pdf/adp2-10_4sep2015t0145_wd.pdf; and Draft Text on COP 21 Agenda Item 4(b) Durban Platform for Enhanced Action (Decision 1/CP.17) on the Adoption of a Protocol, Another Legal Instrument, or an Agreed Outcome with Legal Force under the Convention Applicable to All Parties, Version 2 of 10 Dec. 2015 at 21:00, p. 21, available at: <http://unfccc.int/resource/docs/2015/cop21/eng/da02.pdf>. The proposal was rejected after strong opposition, notably from Australia: O. Milman, ‘UN Drops Plan to Help Move Climate-Change Affected People’, *The Guardian*, 7 Oct. 2015, available at: <https://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people>. See also E. Calliari, ‘Special COP21: What Role for Climate Migrants in the Paris Agreement?’, *Climate Observer*, 9 Dec. 2015, available at: <http://climateobserver.org/special-cop21-what-role-for-climate-migrants-in-the-paris-agreement>.

⁶⁷ Decision 1/CP.21, n. 41 above, para. 52. The US and the EU were determined to pre-empt the possibility of claims of liability and compensation of the kind suggested by the *Urgenda* and *Klimaatzaak* cases: *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396; *VZW Klimaatzaak v. Kingdom of Belgium and Others*, available at: <http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al>.

⁶⁸ Emphasis added. UNFCCC Secretariat, Draft Decision -/CP.21, ‘Draft Paris Agreement’, COP 21 Agenda Item 4(b), 10 Dec. 2015. See S. Adelman, ‘Climate Justice, Loss and Damage and Compensation for Small Island Developing States’ (2016) 7(1) *Journal of Human Rights and the Environment*, pp. 32–53. See also R. Lyster, ‘A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts’ (2015) 4(1) *Transnational Environmental Law*, pp. 125–51.

⁶⁹ M. Burkett, ‘Reading between the Red Lines: Loss and Damage and the Paris Outcome’ (2016) 6(1–2) *Climate Law*, pp. 118–29, at 127. See also Adelman, n. 68 above.

rights and climate justice.⁷⁰ This would appear to be the case on the evidence of the Marrakech Action Proclamation for Our Climate and Sustainable Development, which emerged from COP-22, in Marrakech (Morocco), and contains no references to human rights.⁷¹

5. INDIGENOUS RIGHTS AND REDD+⁷²

As much as 65% of the Earth's land is owned, managed or occupied by the world's 370 million indigenous peoples, most of whom are directly dependent for survival on forests, coral reefs and other ecosystems.⁷³ Protecting carbon sinks is an important form of mitigation because the human rights and livelihoods of these communities depend on the conservation of forests. The aim of the REDD regime is to mitigate climate change by reducing net emissions of GHGs through enhanced forest management in developing countries. Its underlying idea is that tropical forests are more valuable when they are conserved rather than destroyed, and that economic incentives in the form of carbon credits from 'result-based actions' will reduce deforestation and forest degradation in the global South.⁷⁴

The REDD framework was initially proposed as a mitigation strategy by Costa Rica and Papua New Guinea in 2005 at COP-11, in Montreal (Canada). In 2007, the

⁷⁰ Adelman, n. 68 above. See also Lyster, n. 68 above; and M.J. Mace & R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25(2) *Review of European Comparative and International Environmental Law*, pp. 197–214, at 197.

⁷¹ Marrakech Action Proclamation for Our Climate and Sustainable Development, available at: http://cop22.ma/wp-content/uploads/2016/11/marrakech_action_proclamation.pdf. State parties asked the WIM to establish a 'strategic workstream' to determine the level of financing required: UNFCCC Secretariat, Decision 3/CP.22, 'Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, UN Doc. FCCC/CP/2016/10/Add.1, 31 Jan. 2017, available at: <http://unfccc.int/resource/docs/2016/cop22/eng/10a01.pdf>. Estimates vary, but \$50 billion is considered to be close to the minimum required. The strategic workstream should identify how funds should be raised, including from fossil fuel and aviation companies. The WIM clearly needs more resources to address a wide range of issues, which include displacement and resettlement; loss and damage from slow-onset events; non-economic losses such as identity, culture and language; the implementation of insurance systems to deal with risk; and the provision of financial, technological and capacity-building support. In addition, developing countries demanded a review to establish whether the WIM is capable of fulfilling its mandate, but this was deferred until 2019: J. Richards, 'Marrakech: Modest Progress on Loss and Damage, but More on the Horizon', Heinrich Böll Stiftung, 25 Nov. 2016, available at: <https://www.boell.de/en/2016/11/25/marrakech-modest-progress-loss-and-damage-more-horizon>.

⁷² The '+' refers to conservation, sustainable management of forests, and enhancement of forest carbon stocks – effectively a carbon market for trees (see, e.g., http://unfccc.int/land_use_and_climate_change/redd/items/7377.php). For a brief history of REDD+ see L. Godden & M. Tehan, 'REDD+: Climate Justice and Indigenous and Local Community Rights in an Era of Climate Disruption' (2016) 34(1) *Journal of Energy & Natural Resources Law*, pp. 95–108; and S. Adelman, 'Tropical Forests and Climate Change: A Critique of Green Governmentality' (2015) 11(2) *International Journal of Law in Context*, pp. 195–212. See also S. Adelman, 'Tropical Forests, Climate Change and Neoliberal Environmental Governmentality', in C. Tan & J. Faundez (eds), *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar, 2017), pp. 186–207.

⁷³ Rights and Resources Initiative, 'Who Owns the World's Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights', Sept. 2015, available at: http://www.rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf. The World Bank estimates that forests contribute directly to the livelihoods of 90% of the 1.2 billion people living in abject poverty: The World Bank, *Sustaining Forests: A Development Strategy* (IBDR/The World Bank, 2004), p. 1, available at: <http://documents.worldbank.org/curated/en/424531468781760578/Sustaining-forests-a-development-strategy>.

⁷⁴ Godden & Tehan, n. 72 above.

Bali Action Plan called for policies and incentives to reduce emissions from deforestation and forest degradation in developing countries, and emphasized the role of conservation, sustainable management of forests and the enhancement of forest carbon stocks.⁷⁵ The Cancún Agreements outlined a list of environmental and social safeguards that should be ‘promoted and supported’ in REDD+ implementation.⁷⁶ These include ‘respect for the knowledge and rights of indigenous peoples and members of local communities’.⁷⁷ Parties to the UNFCCC have agreed seven safeguards, which include:

- transparent and effective national forest governance structures consistent with national legislation and sovereignty;
- respect for the knowledge and rights of indigenous peoples and members of local communities consistent with the UNDRIP;
- full and effective participation of relevant stakeholders, especially indigenous peoples and local communities; and
- the conservation of natural forests and biological diversity to address the risks of reversals and reduce the displacement of emissions.

The emphasis on a rights-based approach is a central element of the UN-REDD Programme, the Framework Document of which lists a ‘human-rights-based approach’ and ‘gender equity’ among its guiding principles.⁷⁸ Despite this, indigenous communities are not convinced that their rights and cultural ties to forests can be adequately recognized and protected under REDD+.⁷⁹

The Warsaw Framework for REDD+, which was established by the UNFCCC at COP-19 in 2013,⁸⁰ has been widely criticized as embodying a market-based and

⁷⁵ UNFCCC Secretariat, Decision 1/CP.13, ‘Bali Action Plan’, UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008, para. 1(b)(iii); see also UNFCCC Secretariat, Decision 2/CP.13, ‘Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action’, UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008.

⁷⁶ Cancún Agreements, n. 31 above, paras 68–79 and the Annex. On the safeguards, see A. Savaresi, ‘The Legal Status and Role of Safeguards’ and S. Jodoin, ‘The Human Rights of Indigenous Peoples and Forest-Dependent Communities in the Complex Legal Framework for REDD+’, both in C. Voigt (ed.), *Research Handbook on REDD+ and International Law* (Routledge, 2016), pp. 126–56 and pp. 157–85 respectively; B. Bodin, E. Väänänen & H. van Asselt, ‘The Legal Aspects of REDD+ Implementation: Translating the International Rules into Effective National Frameworks – Putting REDD+ Environmental Safeguards into Practice: Recommendations for Effective and Country-Specific Implementation’ (2015) 9(2) *Carbon and Climate Law Review*, pp. 168–82, at 168.

⁷⁷ Cancún Agreements, n. 31 above, Appendix 1, para. 2.

⁷⁸ Food and Agriculture Organization of the UN (FAO), UN Development Programme (UNDP) & UN Environment Programme (UNEP), UN-REDD Programme Framework Document, 20 June 2008, available at: <https://www.unredd.net/documents/foundation-documents-88/4-un-redd-programme-framework-document-20-june-2008-4.html>.

⁷⁹ Margarita Declaration on Climate Change, Margarita Island (Venezuela), 15–18 July 2014, available at: <http://www.redd-monitor.org/2014/08/08/the-margarita-declaration-on-climate-change-we-reject-the-implementation-of-false-solutions-to-climate-change-such-as-carbon-markets-and-other-forms-of-privatization-and-commodification-of-life>.

⁸⁰ The ‘Warsaw Framework for REDD-plus’ (available at: http://unfccc.int/land_use_and_climate_change/redd/items/8180.php) is made up of 7 UNFCCC decisions.

neoliberal approach to environmental governance in which carbon emissions are commodified and monetized.⁸¹ The Paris Agreement encourages the flow of forest-protection payments to course through mechanisms such as the Green Climate Fund.⁸²

The inclusion of REDD+ in the Paris Agreement enhances its status within the UNFCCC. REDD+ should be understood in relation to Article 4.1, which calls for global GHG emissions to be reduced to zero in the second half of the century and for ‘a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’. The inclusion of Article 5 was unexpected and heralded as an historic breakthrough which possibly signals the end of reckless deforestation. The Article states that Parties *should* take action to conserve and enhance the sinks and reservoirs of GHGs referred to in Article 4.1(d) UNFCCC and calls for ‘adequate, predictable and sustainable financial resources’.⁸³

Parties are *encouraged to take action* to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.⁸⁴

The reference to ‘related guidance and decisions’ suggests that Article 5 is intended to produce substantive policies to conserve forests and is therefore more than a mere acknowledgement of the imperative to protect carbon sinks. Non-market approaches (‘joint mitigation and adaptation’) are given parity with results-based payments, and the importance of mitigation through results-based payments and alternative policy approaches is emphasized, but the article does not create new financial commitments, pledges or financing channels beyond the general provisions in Article 9. In contrast, paragraph 55 of the Paris Decision ‘*Recognizes* the importance of adequate and predictable financial resources, including for results-based payments ... and positive incentives for reducing emissions from deforestation and forest degradation’, and calls for support from ‘public and private, bilateral and multilateral sources, such as the Green Climate Fund, and alternative sources’.

Like loss and damage, the inclusion of REDD+ in a stand-alone article generated heated debate. The Coalition for Rainforest Nations⁸⁵ demanded secure financing,

⁸¹ R. Fletcher et al., ‘Questioning REDD+ and the Future of Market-Based Conservation’ (2016) 30(3) *Conservation Biology*, pp. 673–5; E. Turnhout et al., ‘Envisioning REDD+ in a Post-Paris Era: Between Evolving Expectations and Current Practice’ (2017) 8(1) *WIREs: Climate Change*, Wiley Online Library, available at: <http://onlinelibrary.wiley.com/doi/10.1002/wcc.425/full>.

⁸² Decision 1/CP.21, n. 41 above, para. 55.

⁸³ Emphasis added.

⁸⁴ Emphasis added.

⁸⁵ Coalition for Rainforest Nations, available at: <http://www.rainforestcoalition.org/AboutTheCoalition.aspx>.

while other countries – most notably Brazil, a long-standing opponent of its inclusion in any treaty – objected to any reference to the REDD regime on the basis that all previous decisions, including the safeguards discussed below, had been adopted in the Warsaw Framework for REDD+ in 2013.⁸⁶

On the first day of COP-21, Germany, Norway, and the United Kingdom (UK) pledged up to US\$5 billion in the five-year period to 2020 for REDD+ and indicated their willingness to provide US\$1 billion annually for REDD+ activities thereafter.⁸⁷ The funding envisaged in the Paris Agreement is insufficient to cover the needs of developing countries for adaptation, mitigation and loss and damage.⁸⁸ At current rates of deforestation, it is not impossible that rainforests will disappear entirely within a century.⁸⁹

Most countries supported the inclusion of explicit references to indigenous rights, with Canada, the Philippines, Mexico, and the members of the Independent Association of Latin America and the Caribbean (AILAC) strongly in favour, but there was disagreement about where these should appear.⁹⁰ The main concern of opponents was that including indigenous rights in the operative part of the Paris Agreement might create legal liabilities in domestic and regional tribunals. Victoria Tauli-Corpuz, the UN Special Rapporteur on the Rights of Indigenous Peoples, argues that the failure of the final text to protect indigenous peoples' rights is likely to fuel destruction of the forests and other ecosystems managed by such communities. She expresses concern that social conflict 'will erupt in the forests, should our peoples have no rights to defend themselves, [which] will exact tremendous economic harm, as our forests are our homes, our lives, our culture, and the heart of our spirituality'.⁹¹

REDD+ provokes conflicting opinions. A report by the Center for International Forestry Research (CIFOR) and the International Union for the Conservation of Nature (IUCN) lists the potential benefits that may flow from it,⁹² but there is a

⁸⁶ Warsaw Framework for REDD-Plus, n. 80 above.

⁸⁷ 'Colombia, Germany, Norway and the UK Announce Groundbreaking Partnership to Protect Colombia's Rainforest', 30 Nov. 2015, available at: <https://www.regjeringen.no/globalassets/departementent/kld/kos/colombia-joint-press-release-cop21-003.pdf>.

⁸⁸ W. Worley, 'Marrakesh Climate Conference: Campaigners React with "Extreme Disappointment" over Lack of Progress', *The Independent*, 19 Nov. 2016, available at: <http://www.independent.co.uk/environment/marrakech-climate-conference-cop-22-campaigners-extreme-disappointment-a7426426.html>.

⁸⁹ J. Vidal, 'We Are Destroying Rainforests So Quickly They May Be Gone in 100 Years', *The Guardian*, 23 Jan. 2017, available at: <https://www.theguardian.com/global-development-professionals-network/2017/jan/23/destroying-rainforests-quickly-gone-100-years-deforestation>.

⁹⁰ M. Bergen, 'Experts: Paris Agreement Falls Short on Indigenous Rights', *humanature*, 17 Dec. 2015, available at: <http://blog.conservation.org/2015/12/expert-paris-agreement-falls-short-on-indigenous-rights>.

⁹¹ V. Tauli-Corpuz, 'Removing Rights for Indigenous Peoples Places Forests, Climate Plan at Risk. Statement from Paris, COP21', 7 Dec. 2015, available at: <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/106-statement-cop21>.

⁹² K. Lawlor & D. Huberman, 'Reduced Emissions from Deforestation and Forest Degradation (REDD) and Human Rights', in J. Campese et al. (eds), *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR and IUCN, 2009), pp. 269–86. See also IUCN, 'Indigenous Peoples and Climate Change/REDD: An Overview of Current Discussions and Main Issues', Briefing Document, Mar. 2010, p. 9, available at: <https://portals.iucn.org/library/sites/library/files/documents/Rep-2010-022.pdf>; and P.K. Sena, M. Cunningham Kain & B. Xavier, 'Indigenous People's Rights and Safeguards in Projects Related to Reducing Emissions from Deforestation and Forest Degradation: Note by

substantial and growing literature that is critical of the lack of enforceability and verifiability of the safeguards.⁹³ Ribot and Larson argue that '[i]f REDD is to challenge business as usual and to benefit local populations, safeguard policies must not just protect rights, but must also establish, strengthen, and secure rights'.⁹⁴ Poudyal and his co-authors contend that the 'safeguards will be prone to failure unless those entitled to compensation are aware of their rights and enabled to seek redress where safeguards fail'.⁹⁵ A central criticism is that the safeguards provide inadequate protection against the emergence of land tenure systems that enable forests to be privatized, commodified and monetized. This is unsurprising because REDD+ is based upon green economy conceptions inimical to the interests of indigenous peoples.⁹⁶ Article 5 Paris Agreement has been condemned as nothing more than a trade agreement that 'promises to privatize, commodify and sell forested lands as carbon offsets in fraudulent schemes such as REDD+ projects. These offset schemes provide a financial laundering mechanism for developed countries to launder their carbon pollution on the backs of the global South'.⁹⁷ An earlier draft of the Paris Agreement called for respect for 'customary and sustainable land-use systems and the security of indigenous peoples' and local communities' land tenure'.⁹⁸ Its omission from the final version fails to address concerns that REDD+ does not adequately recognize and protect cultural ties to land and forest resources.⁹⁹

Article 5 Paris Agreement makes no mention of safeguards for indigenous forest dwellers, although it has been argued that the 'related guidance and decisions' in Article 5(2) refer to the safeguards in the Warsaw Framework 'designed to protect natural forests and their biodiversity as well as the rights of indigenous peoples and local communities. Most importantly, it includes a system to report on how those

the Secretariat', UN Economic and Social Council, Permanent Forum on Indigenous Issues, 12th session, Agenda Item 5, UN Doc. E/C.19/2013/7, 5 Feb. 2013.

⁹³ J. Dehm, 'Indigenous Peoples and REDD+ Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy?' (2016) 7(2) *Journal of Human Rights and the Environment*, pp. 170–217.

⁹⁴ J. Ribot & A.M. Larson, 'Reducing REDD Risks: Affirmative Policy on an Uneven Playing Field' (2012) 6(2) *International Journal of the Commons*, pp. 233–54.

⁹⁵ M. Poudyal et al., 'Can REDD+ Social Safeguards Reach the "Right" People? Lessons from Madagascar' (2016) 37 *Global Environmental Change*, pp. 31–42, at 31.

⁹⁶ A. Hall, *Forests and Climate Change: The Social Dimensions of REDD in Latin America* (Edward Elgar, 2012).

⁹⁷ Human rights attorney and Indigenous Environmental Network counsel Alberto Saldamando, quoted by M. Lukacs, 'Indigenous Activists Take to Seine River to Protest Axing of Rights from Paris Climate Pact', *The Guardian*, 7 Dec. 2015, available at: <http://www.theguardian.com/environment/true-north/2015/dec/07/indigenous-activists-take-to-seine-river-to-protest-axing-of-rights-from-paris-climate-pact>.

⁹⁸ UNFCCC Secretariat, 'Draft Paris Outcome', Ad Hoc Working Group on the Durban Platform for Enhanced Action, 2nd session, Agenda Item 3 Implementation of All the Elements of Decision 1/CP.17, UN Doc. FCCC/ADP/2015/L.6/Rev.1, 5 Dec. 2015, available at: <http://unfccc.int/resource/docs/2015/adp2/eng/106r01.pdf>. Land use was heavily debated during COP-21 but ultimately the word 'land' does not appear in the final text, primarily because of concerns about food security among developing countries that might flow from binding mitigation obligations covering agriculture.

⁹⁹ See the Anchorage Declaration, Indigenous Peoples' Global Summit on Climate Change, Anchorage, AK (US), 24 Apr. 2009, available at: unfccc.int/resource/docs/2009/smsn/ngo/168.pdf; and the Margarita Declaration on Climate Change, n. 79 above.

safeguards are addressed and respected'.¹⁰⁰ Safeguarding the interests and rights of forest dwellers is essential for the legitimacy of REDD+. Dehm argues that tenure reform and the requirement for free, prior and informed consent 'may not lead to the outcomes forest peoples and their advocates are seeking and ... instead operate to facilitate the greater disciplinary inclusion of forest peoples in the so-called "green economy"'.¹⁰¹

As with loss and damage, the omission of human rights from Article 5 constitutes a missed opportunity because protecting the needs and interests of forest dwellers benefits all of humanity.

6. CONCLUSION

The Paris Agreement is the first legally binding multilateral climate instrument that mentions human rights, but does so in the Preamble and not in the operative part of the text.¹⁰² It makes no mention of displaced persons whose human rights are increasingly threatened by climate change, and makes no provision for the relocation and resettlement of the inhabitants of SIDS. At some point, the international community will have to address climate-induced migration through the UNFCCC, international refugee law, international human rights law, or a combination of these.¹⁰³ Although the Paris Agreement contains a stand-alone article on reducing deforestation, it does little to safeguard the rights of communities that depend upon forests for their livelihoods. Nonetheless, Special Rapporteur John Knox argues:

In an important sense, the Paris Agreement signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations. *This is a real achievement and, in this respect as in many others, the Paris Agreement is worth celebrating.* In another sense, however, Paris is only the beginning. Now comes the difficult work of implementing and strengthening the commitments made there. In that effort, human rights norms will continue to be of fundamental importance.¹⁰⁴

Savaresi provides an alternative and possibly more accurate perspective in arguing that the Agreement 'provided a marginal victory for those advocating for building bridges between the climate regime and human rights law'.¹⁰⁵ Atapattu argues that

¹⁰⁰ Donald Lehr, consultant to the REDD+ Safeguards Working Group, quoted in 'Inclusion of REDD+ in Paris Climate Agreement Heralded as Major Step Forward on Deforestation', *Mongabay*, 14 Dec. 2105, available at: <https://news.mongabay.com/2015/12/inclusion-of-redd-in-paris-climate-agreement-heralded-as-major-step-forward-on-deforestation>.

¹⁰¹ Dehm, n. 93 above, p. 170.

¹⁰² The Cancún Agreements (n. 31 above) also refer to human rights, but are a series of non-binding decisions rather than a convention.

¹⁰³ R. Lyster, 'Protecting the Human Rights of Climate Displaced Persons: The Promise and Limits of the United Nations Framework Convention on Climate Change', in Gear & Kotzé, n. 42 above, pp. 423–48. Estimates of the numbers of people forced to migrate vary between 20 million and 200 million. On possible options, see S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016), pp. 155–75.

¹⁰⁴ UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', UN Doc. A/HRC/31/52, 1 Feb. 2016, para. 22 (emphasis added).

¹⁰⁵ Savaresi, n. 47 above, p. 24.

the removal of human rights from an earlier draft of Article 2 ‘does not affect states’ commitments under human rights law as they already have human rights obligations that they must fulfil when taking action on climate change’. However, it is difficult to avoid the conclusion that the legitimacy of the climate regime would have been greatly enhanced by a stronger commitment to human rights.¹⁰⁶

For better or worse, the Paris Agreement is the framework within which climate change will be addressed in the coming decades. COP-21 spurned the opportunity to promote climate justice in the Anthropocene by putting human rights at the centre of the climate regime. The Agreement does little to promote either human rights in general, indigenous peoples’ rights in particular, or the rights of nature. Instead, we shall have to rely on innovative, imaginative and insurgent attempts to protect human rights from climatic harms, such as the public trust cases in the US, and the petition against carbon majors for climate-related impacts that endanger lives, livelihoods and the human rights of present and future generations that is being considered by the Philippines Commission on Human Rights.¹⁰⁷ As Monbiot has described the Paris Agreement: ‘By comparison to what it could have been, it’s a miracle. By comparison to what it should have been, it’s a disaster’.¹⁰⁸

¹⁰⁶ S. Atapattu, ‘Climate Change, Human Rights, and COP 21: One Step Forward and Two Steps Back or Vice Versa?’ (2016) 17(2) *Georgetown Journal of International Affairs*, pp. 47–55, at 48. The general provisions of the UN Charter on the human rights obligations of states take precedence over the Paris Agreement: Charter of the United Nations, San Francisco, CA (US), 26 June 1945, in force 24 Oct. 1945, available at: <http://www.un.org/en/documents/charter>. Art. 103 of the Charter states that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. This is affirmed in Art. 1(3) Paris Agreement.

¹⁰⁷ Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, submitted by Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement on behalf of numerous other organizations and individuals, available at: <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf>. The Philippines Human Rights Commission announced its acceptance of the petition on the first day of COP-21.

¹⁰⁸ G. Monbiot, ‘Cop-Out’, 15 Dec. 2015, available at: <http://www.monbiot.com/2015/12/15/cop-out>.