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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some cultures as Mother Earth’, thereby alluding to rights of nature that are legally protected in Bolivia and Ecuador.\textsuperscript{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)\textsuperscript{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.\textsuperscript{4}

I have addressed the advantages and limitations of using human rights to deal with climate change at length elsewhere.\textsuperscript{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.

\section*{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

\begin{itemize}
\item\textsuperscript{2} See n. 44 below.
\item\textsuperscript{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.
\end{itemize}
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, disputation, 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

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irreversible’. A wide range of human rights will be undermined. 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.

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’. 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. 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

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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).


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

SIDS ‘have large indigenous populations which rely upon biodiversity for both
sustenance and livelihoods’. 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’. Rising sea levels, saline
encroachment on water supplies, increased vector-borne diseases and food and water
scarcity are likely to displace their populations, and SIDS are likely to experience more
frequent extreme weather events that destroy infrastructure and livelihoods. 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. 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) 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’. The UNDRIP ‘recognizes indigenous peoples’

Hypatia, pp. 599–616, at 609.
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-
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
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
Atoll Island States and International Law: Climate Change Displacement and Sovereignty (Springer,
2014).
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.


30 UNFCCC, Preamble and Art. 8.


33 Ibid., ibid., para. 40.

34 Ibid., para. 51.
human rights. 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. The UN Human Rights Council has subsequently adopted several resolutions on human rights and climate change. 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.

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.

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

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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,
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. In Savarese’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’. 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.

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. 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.


47 A. Savarese, ‘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) 61(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.


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 fulfilment 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

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/11infnot.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 muddied 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.

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whereas damage is not. There are three types of loss and damage: avoided, unavoidable, and unavoidable. 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. 

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. 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’. 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’. 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

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64 Ibid.

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


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.\textsuperscript{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.\textsuperscript{71}

5. INDIGENOUS RIGHTS AND REDD+ \textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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.


\textsuperscript{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

77 Cancún Agreements, n. 31 above, Appendix 1, para. 2.
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. The Paris Agreement encourages the flow of forest-protection payments to course through mechanisms such as the Green Climate Fund.

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’. 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.

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 Nations demanded secure financing,
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 spiritualitу’.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.
substantial and growing literature that is critical of the lack of enforceability and verifiability of the safeguards. 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’. 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.’ 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. 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’. 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’. 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.

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
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


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.


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

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