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Patrícia Galvão Ferreira is a post-doctoral fellow with CIGI's ILRP. She holds an S.J.D. in law and development from the University of Toronto, which she earned concurrently with an interdisciplinary doctorate in the dynamics of global change from the Munk School of Global Affairs. She has an LL.B. from the Federal University of Bahia and an LL.M. from the University of Notre Dame.

A Brazilian national, Patrícia is a research associate at the Institute for Studies on Labor and Society in Rio de Janeiro. In 2013, she was a visiting scholar and Joaquim Nabuco Chair in Brazilian Studies at the Center for Latin American Studies at Stanford University and a visiting scholar at the FGV Law School in São Paulo.

Before earning her doctoral degree, Patrícia worked for nearly 20 years in the fields of human rights and international development. Her professional experience ranges from litigating major Brazilian human rights cases before international bodies as a lawyer for the Center for Justice and International Law to grant making with the Open Society Initiative in Southern Africa. Patrícia's broader research agenda investigates why governments, NGOs and corporations are choosing some forms of transnational regulation over potential alternatives in their quest to promote both national and international sustainable development objectives.

While at CIGI, Patrícia will research how evolving international law principles and transnational regulatory initiatives contribute to state compliance with the United Nations Framework Convention on Climate Change. A special focus will be on institutional mechanisms to promote compliance by emerging economies such as China, India and Brazil.

About the International Law Research Program

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Acronyms and Abbreviations

CDM	Clean Development Mechanism
COP	Conference of the Parties
GHGs	greenhouse gases
MDGs	Millennium Development Goals
NDCs	nationally determined contributions
REDD+	Reducing Emissions from Deforestation and Forest Degradation
SDGs	Sustainable Development Goals
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council

Executive Summary

The implementation of the Paris Agreement on climate change should follow a rights-centred approach, not only because negative climate change impacts can directly affect several human rights, but also because actions to address climate change may also provoke unintended human rights consequences. During the negotiations that led up to the signing of the Paris Agreement in December 2015, states included an explicit reference to human rights only in the preamble of the legal norm, negotiating other direct references to human rights out of operative provisions. The outcome of negotiations raised the question of whether states have missed an opportunity to positively and unquestionably secure a rights approach to climate action post-2020. Using a contextual analysis of other international law developments that occurred alongside the adoption of the Paris Agreement in 2015, especially the international agreement on the Sustainable Development Goals (SDGs), this paper argues that states have properly integrated a human rights dimension into key operative provisions of the Paris Agreement, albeit indirectly.

The first part of this paper describes how negotiations led human rights to feature only in the preamble of the Paris Agreement. The second part describes how states have integrated a human rights dimension into the concept of sustainable development under the SDGs. The third section describes how states have woven sustainable development references into several of the operative provisions of the Paris Agreement. The fourth part argues that an integrated interpretation of international law leads to the conclusion that human rights have been indirectly incorporated into key operative provisions of the Paris Agreement that reference sustainable development and discusses some of the implications for climate action.

Introduction

The existence of strong linkages between climate change and human rights and the need to ensure that states take human rights into consideration when planning policies to address climate change have become accepted wisdom in many academic and policy circles in the last decade.[1] Recent initiatives that emphasize these linkages include the report on the human rights obligations relating to climate change, prepared by John Knox, the United Nations Human Rights Council (UNHRC) special rapporteur on human rights and the environment;[2] the report, *Achieving Justice and Human Rights in an Era of Climate Disruption*, by the International Bar Association, Climate Change Justice and Human Rights Task Force;[3] the *Draft Declaration on Human Rights and Climate Change*, by the Global Network for the Study of Human Rights and the Environment;[4] the French *Declaration of Humankind Rights*, introduced by President Francois Hollande to the French Economic, Social and Environmental Council;[5] the *St. Julian's Declaration on Climate Justice*, created by the Commonwealth

1 Stephen Humphreys, ed, *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010); United Nations Environment Programme, *Climate Change and Human Rights* (2015) at 9–10 online: <apps.unep.org/redirect.php?file=/publications/pmtdocuments/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf>; Damilola Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge: Cambridge University Press, 2016); Oonagh Fitzgerald, "Climate Change Solidarity and Resolve: Post-Paris Strategy, Policy and Law To Translate Ambition into Action" CIGI, Commentary (27 November 2015), online: < https://www.cigionline.org/sites/default/files/commentary_oonagh.pdf>; *Human Rights and Climate Change*, Res 7/23, UNHRC, 7th Sess, UN Doc A/HRC/7/78 (2008) ; *Human Rights and Climate Change*, Res 10/4, UNHRC, 10th Sess, UN Doc A/HRC/10/L.11 (2009); *Human Rights and Climate Change*, Res 18/22, UNHRC, UN Doc A/HRC/18/L.26/Rev.1 (2011); *Human Rights and Climate Change*, Res 26/27, UNHRC, 26th Sess, UN Doc A/HRC/26/L.33/Rev.1 (2014); *Human Rights and Climate Change*, Res 29/15, UNHRC, 29th Sess, UN Doc A/HRC/29/L.21 (2015).

2 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment*, UNHRC, 31st Sess, UN Doc A/HRC/31/52 (2016).

3 International Bar Association, Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (London, International Bar Association, 2014), online: <www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

4 Global Network for the Study of Human Rights and the Environment, *Draft Declaration on Human Rights and Climate Change* (2015), online: <gnhre.org/gnhre-draft-declaration/draft-declaration-on-human-rights-and-climate-change-2/>.

5 *Declaration of Humankind Rights* (2015), online: <droitshumanite.fr/DU/?lang=en>.

Forum of National Human Rights Institutions;[6] as well as the *Oslo Principles on Global Climate Change Obligations*, prepared by an expert group.[7]

The compelling consensus on the linkages between climate change and human rights led a group of state and non-state actors to advocate for a rights-centred approach for global climate action during negotiations leading up to the adoption of the Paris Agreement[8] in December 2015. The idea was to include explicit human rights references into operative provisions of the legal agreement that would drive climate action under the United Nations Framework Convention on Climate Change (UNFCCC)[9] post-2020. When 196 states ultimately adopted the Paris Agreement, however, they opted to mention human rights only in the preamble of the treaty, instead of incorporating explicit human rights language into its key operative provisions. The outcome of negotiations raised the question of whether states have missed an opportunity to positively and unquestionably secure a rights approach to climate action post-2020. This conclusion would be warranted only if the Paris Agreement is seen in isolation from other relevant concurrent developments in international law. However, the Vienna Convention on the Law of Treaties[10] requires the Paris Agreement to be interpreted in harmony with other relevant legal arrangements between parties.

In September 2015, two months before the UNFCCC 21st Conference of the Parties (COP21) in Paris, more than 150 states agreed to a global agenda to promote 17 SDGs between 2015 and 2030.[11] On this occasion, states adopted a human rights-centred approach to sustainable development when they explicitly agreed that the SDGs "seek to realize the human rights of all, including achieving gender equality and the empowerment of all women and girls";[12] when they integrated human rights into many of the individual SDGs; and when they included SDG 16 regarding access to justice, access to information and access to non-discriminatory laws and policies. Several of the operative provisions of the Paris Agreement, including article 2 (purpose of the agreement), article 4 (mitigation), article 6 (cooperative approaches) and article 7 (adaptation), have incorporated explicit references to sustainable development. The implementation of any operative provision that references sustainable development should therefore include a rights approach, as incorporated in the SDGs.

The importance of ensuring that the implementation of key operative provisions of the Paris Agreement follows a rights-centred approach cannot be understated. Climate change negative impacts are universal, yet they tend to disproportionately affect individuals, communities and countries that are already vulnerable, that have least contributed to the problem and that have the least capacity to cope. The impacts of climate change can directly affect several human rights, including the rights to life and health and of access to food and water. There are growing indications that climate change can also further strain some developing countries' already weak capacity to uphold their human rights obligations. Paradoxically, actions to address climate change based on the Paris Agreement may also provoke unintended human rights consequences (such as large-scale hydro or biofuel energy projects displacing local communities and affecting food security), if not implemented with appropriate safeguards.

The incorporation of human rights into the SDGs and, indirectly, into key operative provisions of the Paris Agreement has important policy implications at the national and international levels. For example, in October 2016, the Government of Canada tabled the Federal Sustainable Development Strategy for Canada 2016-2019 in Parliament, a strategy that includes "Effective Action on Climate Change" as one

6 Commonwealth Forum of National Human Rights Institutions, *St. Julian's Declaration on Climate Justice* (25 November 2015), online: <thecommonwealth.org/sites/default/files/news-items/documents/2015%2520CFNHRI%2520St%2520Julian%2520Declaration%2520FINAL.pdf>.

7 *Oslo Principles on Global Climate Change Obligations* (1 March 2015), online: <globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>.

8 Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L9 [Paris Agreement].

9 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994).

10 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(1) [Vienna Convention].

11 *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) [*Transforming Our World*].

12 *Ibid* at Preamble.

of its goals.[13] Canada is also currently undertaking nationwide discussions with the provinces and non-state stakeholders as part of the process to create a pan-Canadian framework for clean growth and climate change[14] that will inform Canada's nationally determined contributions (NDCs) to the Paris Agreement.[15] Canada's new sustainable development strategy should explicitly adopt a rights approach to all priority SDGs in Canada, including the goal on climate, while the pan-Canadian framework that will be the basis of Canada's NDCs should incorporate an explicit sustainability perspective that includes human rights considerations.

At the international level, states organized under the UNFCCC Ad Hoc Working Group on the Paris Agreement have begun negotiations to operationalize the mechanisms to facilitate climate action that are included in the operative provisions of the Paris Agreement.[16] Many of these mechanisms, including a market-based mechanism under article 6 that will either substitute for or function alongside the Kyoto Protocol's Clean Development Mechanism (CDM),[17] explicitly include a sustainable development approach. These mechanisms will incorporate explicit human rights safeguards and considerations to bring them in line with the sustainability requirements of the operative provisions of the Paris Agreement. In order to adopt a rights approach, parties can build on the experience of the Reducing Emissions from Deforestation and Forest Degradation (REDD+)[18] mechanism, which incorporated social safeguards.[19]

Paris Agreement: Human Rights Included in Preamble, Not in Operative Provisions

Prior to COP21 in Paris, representatives of leading international and civil society organizations advocated for the inclusion of explicit or strong human rights references in the legal instrument to guide climate action in the post-2020 global climate regime.[20] The Inter-American Commission on Human Rights issued a press release stating that "to ensure that it has a real impact, the new climate accord should make reference to the respect, guarantee, promotion and fulfillment of human rights, *both in the preamble and in the operative part*."[21] Mary Robinson, president of the Mary Robinson Foundation for Climate Justice and, since May 2016, the UN Secretary-General special envoy on climate change, argued that human rights should be enshrined in the legally binding sections of the Paris Agreement.[22] In a 2014 open letter to the parties of the UNFCCC, the

13 Canada, *Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada 2016-2019* (Gatineau: Environment and Climate Change Canada, 2016), online: <www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130_FSDS_Eng_FINAL.pdf> [*Achieving a Sustainable Future*].

14 *Vancouver Declaration on Clean Growth and Climate Change* (3 March 2016), online: Canadian Intergovernmental Conference Secretariat <www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=2401> [*Vancouver Declaration*].

15 Paris Agreement, *supra* note 8, art 4.

16 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Negotiating Text,* 2nd Sess, UN Doc FCCC/ADP/2015/1 (February 2015), online: UNFCCC <unfccc.int/resource/docs/2015/adp2/eng/01.pdf> [*Negotiating Text*].

17 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (1998) (entered into force 16 February 2005), online: CDM <cdm.unfccc.int/>.

18 UNFCCC, REDD+ Web Platform, online: <redd.unfccc.int/>.

19 Annalisa Savaresi, "REDD+ and Human Rights: Addressing Synergies between International Regimes" (2013) 18:3 Ecology & Soc'y 5 at 3 [REDD+ and Human Rights]; See also Christina Voigt, ed, *Research Handbook on REDD+ and International Law* (Cheltenham, UK: Edgar Elgar, 2016).

20 Basil Ugochukwu, "Climate Change and Human Rights: How? Where? When?" CIGI, CIGI Papers No. 82, 27 November 2015, online: <https://www.cigionline.org/publications/climate-change-and-human-rights-how-where-when>; Annalisa Savaresi & Jacques Hartman, "Human Rights in the 2015 Agreement" (2015), online: Legal Response Initiative Briefing Paper <legalresponseinitiative.org/legaladvice/human-rights-in-the-2015-agreement/> [Legal Response].

21 Organization of American States, Inter-American Commission on Human Rights, Press Release, 140, "IACHR Expresses Concern Regarding Effects of Climate Change on Human Rights" (2 December 2015), online: <www.oas.org/en/iachr/media_center/PReleases/2015/140.asp> [emphasis added].

22 Megan Rowling, "Keep Human Rights in UN Deal to Secure Climate Justice: Robinson", *Reuters* (8 December 2015), online: <www.reuters.com/article/us-climatechange-summit-rights-idUSKBN0TR29J20151208>.

special procedures mandate-holders of the UNHRC recommended that states "*shall*, in all climate change-related actions, respect, protect, promote and fulfill human rights for all."[23] Several other leading civil society organizations emphasized the importance of incorporating human rights language in both the preamble as well as the operative provisions of the Paris Agreement.[24]

The efforts bore some fruit. The Paris Agreement is the first multilateral environmental agreement to include an explicit reference to human rights in its preamble. Neither the UNFCCC nor the Kyoto Protocol, for example, made reference to human rights in their preambles. The Paris Agreement preamble reads as follows: "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."[25]

Although the inclusion of an explicit reference to human rights in the preamble is welcome, the explicit incorporation of human rights references in operative provisions would offer stronger guarantees.[26] There is debate in international law regarding the normative force of treaty preambles and even about their role in treaty interpretation.[27] On the one hand, international law expressly allows for substantive preambles that create obligations.[28] On the other hand, in practice, preambles are most often considered as sources and evidence of a treaty's object and purpose, and as filling gaps or supplementing operative provisions, without creating substantive obligations.[29] It all depends on the *travaux préparatoires* and the interpretation of the treaty.[30] The definition of the nature of the human rights reference in the preamble of the Paris Agreement could generate long academic debates. Annalisa Savaresi and Jacques Hartman, writing before the signing of the Paris Agreement, argued that the preambular reference to human rights in the Paris Agreement would "merely draw Parties' attention to obligations they have already undertaken under the human rights treaties they ratified...and to relevant customary norms and domestic laws."[31]

According to Savaresi and Hartman, references to human rights in operative provisions, on the other hand, would link climate change obligations to existing human rights commitments in the case of states that have ratified international human rights instruments.[32] Depending on the way the operative provision is written, a reference to human rights could even create new obligations for those states that have not ratified human rights instruments.[33] The *travaux préparatoires* does not shed any clarity as to the reasons why states decided to include human rights only in the preamble and outside of operative provisions during the political bargaining that led to the Paris Agreement.[34]

States have long disagreed about how human rights should feature in the legal instruments of the Paris Agreement, if at all. This has not prevented states from agreeing to the inclusion of specific human rights references in non-binding decisions taken during COPs prior to

23 Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change (17 October 2014), *A New Climate Change Agreement Must Include Human Rights Protection for All*, online: <www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf> [emphasis added] [Human Rights Protection for All].

24 See Carbon Market Watch, Media Release, "Media Statement: Report highlights need for human rights in the Paris agreement" (10 December 2015), online: <carbonmarketwatch.org/media-statement-report-highlights-need-for-human-rights-in-the-paris-agreement/>; Human Rights Watch, "Human Rights in Climate Pact Under Fire: Norway, Saudis, US Blocking Strong Position" (7 December 2015), online: < https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire> [Human Rights Watch]; Center for International Environmental Law, News Release, "A Powerful Signal but a Weak Agreement in Paris: Global Movement for Climate Action Must Accelerate" (12 December 2015), online: <www.ciel.org/news/a-powerful-signal-but-a-weak-agreement-in-paris-global-movement-for-climate-action-must-accelerate/> [Global Movement].

25 Paris Agreement, *supra* note 8, Preamble.

26 See reactions in Phoenix Tso, "How a Disagreement over Human Rights Language Almost Derailed the Climate Change Treaty" (16 December 2015), *Upworthy*, online: <www.upworthy.com/how-a-disagreement-over-human-rights-language-almost-derailed-the-climate-change-treaty> [*Upworthy*]; Global Movement, *supra* note 24.

27 Max H Hulme, "Preambles in Treaty Interpretation" (2016) 164 U Pa L Rev 1282 at 1297.

28 *Ibid* at 1296.

29 *Ibid* at 1300.

30 *Ibid*.

31 Legal Response, *supra* note 20 at 2.

32 *Ibid* at 3.

33 *Ibid*.

34 Meinhard Doelle, "The Paris Agreement: Breakthrough or High Stakes Experiment?" (2016) 6:1-2 Climate L 1 at 7.

Paris. The 2010 Cancun Agreements resulting from COP16, for example, provided that parties should, in all climate-related actions, fully respect human rights.[35] Yet the Cancun Agreement is not legally binding, as the Paris Agreement is, and the words "to respect" depart from the stronger language that the special procedures mandate-holders of the UNHRC recommended UNFCCC parties to include in the Paris Agreement.[36]

Countries that are highly vulnerable to climate impacts were strong advocates for the inclusion of explicit human rights references in operative provisions in the Paris Agreement.[37] These include the Philippines, the Pacific Nations and Latin American countries such as Mexico, Guatemala and Costa Rica. Following the proposals of leading international organizations, such as the UNHRC and civil society groups, these states advocated for human rights to be included not only in the preamble, but also in the operative provision under article 2, which establishes the purpose of the Paris Agreement.[38] The draft text of the Paris Agreement that was presented to parties at the outset of COP21 included the following option for paragraph 2 of article 2: "2.2. This agreement [that aims to strengthen the global response to the threat of climate change] shall be implemented on the basis of equity and science and in accordance with the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, and on the basis of respect for human rights and the promotion of gender equality."[39]

Canada was the only developed country that strongly advocated for the inclusion of human rights references both in the preamble and in operative clauses of the Paris Agreement.[40] Civil society accounts of the Paris Agreement negotiations describe how two developed countries, the United States and Norway, joined by Saudi Arabia, firmly opposed the inclusion of human rights language in article 2.[41] According to Amnesty International (USA) and Human Rights Watch, "The United States has spoken in favour of human rights language but has opposed the reference to human rights in the purpose of the agreement, diminishing the importance of a central role of respect for human rights in the response to climate change."[42]

Why did the United States and Norway take this position against including explicit human rights references in article 2? Off-the-record conversations with US negotiators indicate that opposition to the inclusion of explicit human rights references in operative provisions was much more widespread than it first appeared to be and that the United States and Norway agreed to champion the position of other countries that remained in the shadows to avoid derailing the negotiations. Some states favoured a purely environmental agreement, in order not to divert attention from the main climate goals of reducing emissions and adapting to climate impacts. Others were concerned that including human rights language could be interpreted as tacitly opening the doors to legal liability mechanisms for human rights violations related to lack of climate action under the UNFCCC regime.[43]

An empirical study analyzing each state's position on this issue during negotiations would shed some welcome light. The fact is that, with many states opting to not take a public position in favour of keeping human rights in operative provisions, the stance of those opposing the inclusion was

35 UNFCCC, "*The Cancun Agreements: Outcome of the work of the Ad Hoc working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at it fifteenth session*", FCCC Dec 1/CMP.6, UNFCCC, 2011, UN Doc FCCC/KP/CMP/2010/12/Add.1, online: <unfccc.int/meetings/cancun_nov_2010/meeting/6266/php/view/decisions.php>.

36 Human Rights Protection for All, *supra* note 23.

37 *Upworthy*, *supra* note 26.

38 Human Rights Watch, *supra* note 24.

39 *Negotiating Text*, *supra* note 16.

40 Tyler Hamilton, "Five Key Points from the Paris Climate Accord", *The Toronto Star* (12 December 2015), online: <https://www.thestar.com/news/world/2015/12/12/big-climate-wins.html>; Shawn McCarthy, "Canada Presses for Recognition of Human, Indigenous Rights in Climate Deal", *The Globe and Mail* (10 December 2015), online: <www.theglobeandmail.com/news/world/canada-presses-for-recognition-of-human-indigenous-rights-in-climate-deal/article27680518/> [*Globe and Mail*]; Mychaylo Prystupa, "Trudeau Fights to Keep Indigenous Rights in Climate Deal", *National Observer* (7 December 2015), online: <www.nationalobserver.com/2015/12/07/news/trudeau-fights-keep-indigenous-rights-paris-climate-deal>.

41 Human Rights Watch, *supra* note 24; Purple S Romero, Rosalind Reeve & Tony Lavina, "Loud and Clear, Paris Agreement signals need to protect ecosystems and human rights", *Forest News* (18 February 2016), online: <blog.cifor.org/40161/loud-and-clear-paris-agreement-signals-need-to-protect-ecosystems-and-human-rights?fnl=en>.

42 Human Rights Watch, *supra* note 24.

43 Rowling, *supra* note 22.

favoured in practice.[44] Two days before the agreement was to be signed, even the reference to human rights in the preamble was still in dispute, although it would end up in the final preamble text, as mentioned above.[45] The Paris Agreement is designed to guide states' successive climate action plans from 2020 onwards. It is unlikely that, in the foreseeable future, there will be an opportunity to amend the Paris Agreement to include an explicit reference to human rights in its operative clauses. Therefore, it is important to understand the legal and normative implications of including human rights references indirectly in key operative clauses through explicit references to the rights-centered concept of sustainable development.

The Paris Agreement includes at least 15 explicit references to sustainable development in operative provisions. This paper argues that, as the concept of sustainable development now incorporates a human rights dimension, it follows that states are legally bound to take human rights into consideration in order to comply with the operative provisions of the Paris Agreement. The next section of this paper establishes how human rights have been fully integrated into the concept of sustainable development.

SDGs Have Incorporated Human Rights

States have increasingly included references to the principle of sustainable development in multilateral treaties related to environmental, social and economic issues.[46] The references to sustainable development serve to guide treaty interpretation, policy making at the national level and decisions by international and national tribunals.[47] There is however no hard academic or policy consensus on the exact definition of sustainable development.[48] Sustainable development has been variably conceived of as development that advances the interests of present generations, while preserving the interests of future generations (also known as intergenerational equity); development that preserves the ecosystem services needed for continued human life; and a principle that requires action promoting co-evolution of the economic, social and environmental dimensions of development.[49] The literature has lately proposed that sustainable development should be considered to include all three concepts.[50] Some states and actors have taken advantage of these concurrent conceptions of development to pick and choose which aspect of the definition best serves their interests in specific circumstances.

Although each of these three definitions appears vague and fluid, there has been growing consensus that the social dimension of sustainable development includes respect for internationally recognized human rights.[51] Philip Alston argues, for example, that the international human rights framework had already clearly featured in the Millennium Declaration, which world leaders signed in a special meeting in 2000.[52] On that occasion, 147 world leaders vowed to pursue an eight-point development agenda (also known as the Millennium Development Goals or MDGs), while committing to "spare no effort to promote... respect for all internationally recognized human rights."[53] However, none of the eight MDGs were specifically articulated in the language of human rights, and some commentators point

44 *Upworthy*, *supra* note 26.

45 *Globe and Mail*, *supra* note 40.

46 Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Leiden: Martinus Nijhoff, 2009) at 18. See also Philip Sands, *Principles of International Environmental Law* (Cambridge, UK: Cambridge University Press, 2003).

47 CISDL Concept Paper, "What is Sustainable Development Law?" (2005), online: <cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf>.

48 Ulrich Beyerlin, "Different Types of Norms in International Environmental Law: Policies, Principles and Rules" in Dan Bodansky, Jutta Brunee & Ellen Hey, eds, *Oxford Handbook of International Environmental Law* (Oxford, UK: Oxford University Press, 2007) [Different Types].

49 *Ibid*; Alan Boyle & David Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, UK: Oxford University Press, 1999) at 8.

50 Susan Baker, *Sustainable Development*, 2nd ed (London, UK: Routledge, 2016).

51 See e.g. Ellen Dorsey et al, "Falling Short of Our Goals: Transforming the Millennium Development Goals into Millennium Development Rights" (2010) 28:4 Nethl QHR 516. See also United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (Oxford, UK: Oxford University Press, 2000), online:<hdr.undp.org/en/content/human-development-report-2000>.

52 Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27:3 Hum Rts Q 755 at 757.

53 *United Nations Millennium Declaration*, GA Res 55/2, 55th Sess, UN Doc A/Res/55/2 (18 September 2000) at 6.

to the failure to fully integrate human rights as one crucial reason why the MDGs have not entirely delivered on their promise.[54]

By way of a reminder, the MDGs aimed to eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a global partnership for development. The lack of a rights-centred approach to the formulation of the MDGs, especially in relation to civil and political rights, left room for much criticism.[55] As a result, the MDG national reports included very few references to human rights terms and concepts.[56] There has also been limited convergence between the agendas and strategies from institutions and actors working on the MDGs and those working on human rights. To illustrate the lack of integration between the MDGs and the human rights frameworks, Alston employs an analogy: "[MDGs and human rights norms are] ships passing one another in the night, each with little awareness that the other is there, and with little if any sustained engagement with one another."[57]

Two months before the Paris Agreement, in September 2015, world leaders agreed to sail another ship. This ship is large enough to accommodate a significant part of the development and human rights cargoes that had previously navigated independently. That month, the leaders of more than 150 countries supported resolution 70/1 of the UN General Assembly, which establishes the 2030 Agenda for Sustainable Development.[58] Under this agenda, states have committed to work toward the national implementation of 17 SDGs and their accompanying 169 targets. One innovation of the SDGs was to increase policy coherence with the global climate regime by including goal 13: "to take urgent action to combat climate change and its impacts."[59] Goal 13 includes as targets some of the commitments states had agreed to under the UNFCCC regime before Paris.

The 2015 SDGs helped to clarify the current state practice regarding the concept of sustainable development, which had been excessively fragmented until then. In the preamble of the SDGs' UN resolution, states have expressly agreed that the definition of sustainable development encompasses all three concepts discussed earlier.[60] More relevant to this paper, states explicitly agreed that SDGs seek to realize the human rights of all, including achieving gender equality and the empowerment of all women and girls.[61] States also expressly agreed that sustainable development necessarily requires the balancing of three integrated and indivisible dimensions of development mentioned earlier: the economic, the social and the environmental dimensions.[62] States equally agreed that the eradication of poverty is an indispensable requirement for sustainable development.

The integration of human rights into the SDGs did not stop with the preamble. Human rights were integrated into the goals themselves. Like the MDGs, several SDGs focus on economic and social rights related to fighting poverty (goal 1), improving access to food and nutrition (goal 2), improving health (goal 3), fostering education (goal 4) and improving access to water and sanitation (goal 6). Granted, most of these goals are not new objectives for international development. However, the way they were conceptualized in the SDGs is clearly more holistic and in many respects better aligned with international human rights provisions than they were under the MDGs.[63]

A comparison between MDG 1 and SDG 1 helps to illustrate this point. Both goals seek to address poverty. MDG 1 aimed to "eradicate extreme poverty & hunger"[64] by pursuing three targets:

54 Dorsey et al, *supra* note 51 at 6.

55 Center for Human Rights and Global Justice, "Human Rights Perspectives on the Millennium Development Goals," Conference Report, 11 November 2003, NYU School of Law; C Barton & L Pendergast, "Seeking Accountability on Women's Human Rights: Women Debate the UN Millennium Development Goals" (New York: Women's International Coalition for Economic Justice, 2004).

56 Alston, *supra* note 52 at 792.

57 *Ibid* at 825.

58 *Transforming Our World*, *supra* note 11.

59 *Ibid* at 14.

60 *Ibid* at Preamble.

61 *Ibid*.

62 *Ibid*.

63 Steven LB Jensen, Allison Corkery & Kate Donald, *Realizing Rights Through the Sustainable Development Goals: The Role of National Human Rights Institutions* (2015) at 2, online: Center for Economic and Social Rights <www.cesr.org/downloads/NHRI_realizing_rights_sdgs.pdf>.

64 UN Millennium Development Goals, Goal 1, online: <www.un.org/millenniumgoals/poverty.shtml>.

halving the proportion of people earning less than $1.25 a day between 1990 and 2015; achieving full and productive employment and decent work for all, including women and young people; and halving the proportion of people suffering from hunger between 1990 and 2015. SDG 1 aims to "End poverty in all its forms everywhere."[65] To achieve this goal, states will strive to meet seven targets that are significantly more ambitious than the MDG 1 targets, including "to eradicate extreme poverty…measured by people living on less than $1.25 a day."[66] Target 4 of SDG 1 aims to "ensure [by 2030] that all men and women, in particular the poor and vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance."[67] The rights language is much stronger in the SDG. By establishing that all men and women should have access to basic services and to minimum economic resources, states are agreeing to approach poverty reduction from a rights-centred perspective.

The health-related goals also illustrate the stronger integration of human rights into the SDGs. The health-related MDGs aimed to combat HIV/AIDS, malaria and other diseases; to improve maternal health; and to reduce child mortality. These are all relevant goals, but they are still too distant from a concept of health as a universal right. SDG 3, on the other hand, aims to "ensure healthy lives and promote well-being for all at all ages,"[68] including a target to "achieve universal health coverage, including…access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all."[69] By striving to achieve universal health coverage, by whatever means, states are treating health as a right. One third illustration comes from comparing the goals on education. MDG 3 aimed to promote gender equality and empower women by "eliminat[ing] gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015."[70] In contrast, SDG 5 aims to "achieve gender equality and empower all women and girls" by, among other targets, "end[ing] all forms of discrimination against all women and girls" and "ensur[ing] universal access to sexual and reproductive health and reproductive rights."[71] Again, the language of SDG 5 shows greater coherence with international human rights norms.

In an important departure from the MDGs, the SDGs also include a specific goal regarding accountable and inclusive institutions and access to justice for all (goal 16). SDG 16 touches on important human rights standards and principles, for example, including targets on access to information and "protecting fundamental freedoms,"[72] participation in decision making, non-discriminatory laws and policies, and access to justice. The inclusion of such commitments provides a much-needed recognition of the crucial role that civil and political rights play in making sustainable and equitable development possible. Finally, SDG 10 covers other important human rights norms by focusing on reducing income inequality and all forms of discrimination. Other SDGs also include important language on equal and universal access (for example, to clean water and sanitation, to affordable energy, to economic opportunities) and tackling gender disparities — reflecting core principles of international human rights norms.

The significantly stronger integration of human rights norms into the SDGs has clear implications for how one should understand whether or not human rights were also integrated into operative clauses in the Paris Agreement. Since the texts of several operative clauses of the agreement include references to sustainable development, and since human rights can now be considered an important part of sustainable development, there is a sound basis on which to affirm that human rights should be seen as fully integrated into the binding parts of the Paris Agreement. It is worth reviewing some of the key operative clauses of the Paris Agreement in which sustainable development appears.

65 *Transforming Our World*, *supra* note 11 at 15.

66 *Ibid*.

67 *Ibid*.

68 *Ibid* at 16.

69 *Ibid*.

70 UN Millennium Development Goals, Goal 3, online: <www.un.org/millenniumgoals/gender.shtml>.

71 *Transforming Our World*, *supra* note 11 at 26.

72 *Ibid*.

Paris Agreement Includes Explicit Sustainable Development References in Operative Provisions

Specific international legal instruments (either hard or soft law ones), such as human rights treaties, trade agreements, the 2030 Agenda for Sustainable Development and the Paris Agreement, cannot be understood in isolation from each other and from the body of international law as a whole. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that the interpretation of a treaty shall take into consideration "any relevant rules of international law applicable in the relations between the parties."[73] The International Court of Justice has ruled that international treaties are to be interpreted and applied in harmony with the entire legal system prevailing at the time of the interpretation.[74] As states have agreed in September 2015 that sustainable development encompasses core human rights elements, references to sustainable development in the Paris Agreement should be understood as integrating the human rights dimension. To be clear, references to sustainable development were also found in the UNFCCC and the Kyoto Protocol; therefore, their inclusion in the Paris Agreement is not novel in this way. The point is that the SDGs, by giving a new normative meaning for sustainable development, which is rights centred, has allowed human rights to find expression in the operative provisions of the Paris Agreement that will guide climate action from 2020 onward.

The Paris Agreement makes at least 15 explicit references to sustainable development, including in operative clauses. This paper will highlight only a few of the most relevant. As mentioned above, human rights advocates have failed to secure explicit reference to human rights in article 2, which states the purpose of the Paris Agreement, including the new goals to hold the global average temperature to well below 2ºC above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5ºC. Yet, states agreed to the following language for this binding provision: "2(1) This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of *sustainable development* and efforts to eradicate poverty."[75]

"In the context of sustainable development"[76] should now be read to include elements of SDG 16, namely observing access to information, protection of fundamental freedoms, participation in decision making, non-discriminatory laws and policies and access to justice, as well as other human rights elements included in other SDGs. Parties also included an explicit reference to sustainable development in article 4, detailing states' individually self-determined mitigation contributions: "4(1) In order to achieve the long-term temperature goal set out in Article 2, Parties aim to [peak greenhouse gases (GHGs) emissions as soon as possible], and to undertake rapid [GHG] reductions…on the basis of equity, and in the context of *sustainable development* & efforts to eradicate poverty"[77]; and in article 7, in relation to adaptation measures: "7(1) Parties hereby establish the global goal on adaptation…with a view to contributing to *sustainable development*."[78]

In article 6, in which parties laid down the foundations for the cooperative mechanisms that will facilitate voluntary cooperation to achieve the objectives of the agreement (mechanisms that will include, for example, a market mechanism to substitute for or complement the CDM of the Kyoto Protocol), parties agreed to this formulation: "6(2) Parties shall, where engaging on a voluntary basis in cooperative approaches…promote *sustainable development* and ensure environmental integrity and transparency, including in governance."[79]

It is worth noting that article 6(4) has introduced the foundations for a mechanism, still to be fleshed out by parties in future negotiations, that aims to support mitigation action "while

73 Vienna Convention, *supra* note 10. Naomi Roht-Arriaza, "First, Do No Harm: Human Rights and Efforts to Combat Climate Change" (2010) 38:3 Ga J Intl & Comp L 593 at 606.

74 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 53.

75 Paris Agreement, *supra* note 8, art 2(1) [emphasis added].

76 *Ibid*.

77 *Ibid*, art 4(1) [emphasis added].

78 *Ibid*, art 7 [emphasis added].

79 *Ibid*, art 6 [emphasis added].

fostering sustainable development."[80] This means that this mechanism has to fully incorporate the human rights guarantees integrated into the SDGs. The same can be said about the framework for non-market approaches established in article 6(9) to promote "sustainable development [and poverty eradication]."[81]

As mentioned, there are also several other references to sustainable development, including in article 8 (loss and damage) and article 10 (technology transfer). What are the implications of the inclusion of sustainable development references in binding provisions of the Paris Agreement, when one considers that sustainable development now incorporates a human rights dimension? First of all, we can now affirm that human rights were incorporated in the binding core of the Paris Agreement, as well as in the preamble. This inclusion has a number of practical implications that will be discussed in the following section.

Implications

There is continued political pressure for states to adopt a human rights approach to the implementation of the Paris Agreement. Speaking at the event "Climate Justice: The Way Forward After Paris" at the Law Society of Upper Canada in Toronto, in July 2016, Mary Robinson advocated for the need to align the Paris Agreement with the other global normative consensus of 2015, the SDGs and the importance of a rights-centred approach to climate action.[82] In the last intersessional COP meeting of the UNFCCC that took place in Bonn, in March 2016, John Knox urged parties to amend the Paris Agreement to include explicit requirements for human rights safeguards for the market-based mechanism of article 6.[83] States did not seem open to such an amendment.[84] However, is the obligation to include social safeguards not already included in article 6, as it establishes that such mechanisms shall promote sustainable development? And should not the implementation of several of the operative provisions of the Paris Agreement legally be in conformity with a rights-centred concept of sustainable development? The answers should be affirmative in both cases.

By expanding the concept of sustainable development through the 2030 Agenda for Sustainable Development to include a strong rights approach, states ended up bringing human rights back to the core of the Paris Agreement. States that have not ratified relevant international human rights treaties can use the lack of explicit references to human rights in operative provisions to oppose possible attempts to create legal liability mechanisms for human rights violations within the climate regime. Arguably, it has never been the intention of advocates for a human rights approach to the Paris Agreement to impose human rights obligations through the UNFCCC on states that have not ratified international human rights treaties.

The argument proposed here has practical implications at the national level, and at the international level, for those states that have accepted international human rights obligations. At the national level, states should integrate human rights into their national strategies to adopt and implement climate action, according to the human rights obligations they have assumed in international treaties. These strategies will inform states' NDCs communicated to the Paris Agreement bodies. Research from the Mary Robinson Foundation revealed that before the Paris Agreement only 49 states had explicitly mentioned human rights in their communications to the UNFCCC on mitigation and adaptation climate actions.[85] Canada, for example, has so far not incorporated a human rights approach to climate action.[86] Unlike the MDGs, which were to be applied by developing countries only, the SDGs are universal in nature,

80 *Ibid*, art 6(4).

81 *Ibid*, art 6(9).

82 See www.lawsocietygazette.ca/news/the-impact-of-climate-change-on-human-rights/.

83 John H Knox, "Human Rights and Safeguards in the New Climate Mechanism Established in Article 6, paragraph 4 of the Paris Agreement" (3 May 2016), Letter to the Paris Agreement Subsidiary Body for Scientific and Technological Advice, online: <www.ohchr.org/Documents/Issues/Environment/Letter_to_SBSTA_UNFCCC_May2016.pdf>.

84 Justin Catanoso, "Climate negotiators focus on carbon credits, underplay human rights" (23 May 2016), Mongabay, online: <https://news.mongabay.com/2016/05/climate-negotiators-focus-carbon-credits-underplay-human-rights/>.

85 Mary Robinson Foundation—Climate Justice, "Incorporating Human Rights in Climate Action" (2014) Report, online: <www.mrfcj.org/pdf/2014-10-20-Incorporating-Human-Rights-into-Climate-Action.pdf>.

86 Ugochukwu, *supra* note 20 at 2.

applying to all countries — as much to Cameroon and Guatemala as to Canada or Norway.

This means that the sustainable development approach integrated into the Paris Agreement will go beyond guiding Canadian international cooperation efforts with developing countries to support climate action, to guiding how Canada will address its own climate challenges sustainably at home. And human rights norms should inform these efforts.[87] There should be explicit consideration for and references to human rights, for example, in both the Government of Canada's Federal Sustainable Development Strategy for Canada 2016-2019[88] and the pan-Canadian framework for clean growth and climate change,[89] currently under negotiation.

For Canada, this also means tackling the ongoing marginalization and inequalities faced by minority groups in Canadian society, and, in particular, by indigenous populations and women, and taking their interests into consideration when implementing mitigation and adaptation actions.[90] During COP21, Canada strongly supported the inclusion of language around human rights and, especially, indigenous peoples' rights in the Paris Agreement. This indicates at least a political will to adopt a human rights approach to climate action. The challenge is to translate this political gesture into actual implementation on the ground. What is clear is that the argument regarding the failure to integrate human rights into the Paris Agreement cannot be used to justify climate action that does not take human rights concerns fully and explicitly into account.

At the international level, the incorporation of human rights via sustainable development means that Canada and other developed countries have a legal responsibility to use human rights to inform their international assistance to other countries in realizing the SDGs and climate actions. There is therefore a need to redesign how Canada engages with developing countries and how international cooperation, including aid, can best support countries in realizing their sustainable development and climate change ambitions, under this rights-centred perspective. Further, under the Paris Agreement, the mechanisms that states will flesh out in future negotiations to facilitate implementation of climate action should include explicit and strong safeguards to avoid climate action that provokes unintended human rights violations. That includes mechanisms such as the Green Climate Fund[91] and the new market-based mechanism that will either substitute for or complement the Kyoto Protocol CDM included in article 6 of the Paris Agreement. Finally, there are strong arguments to advocate for the UNHRC to set up a mandate for a special rapporteur on climate change and human rights to give full effect to a rights-centred Paris Agreement.[92]

There is much work ahead to raise the ambition of states' proposed mitigation actions in order to bridge the emissions gap and keep temperatures within safe levels, to create adaptation plans to deal with the impacts that will not be avoided and to transition to clean economies and lifestyles. All these actions need to take human rights into consideration in order to be sustainable and fair to the most affected individuals, communities and countries.

87 Oonagh Fitzgerald & Basil Ugochukwu, "Implementing the Paris Agreement: The Relevance of Human Rights to Climate Action," CIGI, CIGI Conference Report, 6 June 2016, online: <https://www.cigionline.org/publications/implementing-paris-agreement-relevance-of-human-rights-climate-action>.

88 *Achieving a Sustainable Future*, *supra* note 13.

89 *Vancouver Declaration*, *supra* note 14.

90 Jensen, Corkery & Donald, *supra* note 63.

91 Green Climate Fund, online: www.greenclimate.fund/home.

92 "Calling for Human Rights Language in COP21 Paris Agreement" (10 December 2015), online: Franciscans International <http://franciscansinternational.org/Aktuelles.111.0.html?&L=2&tx_ttnews[tt_news]=504&cHash=8502f1727dd44851f9a8ec855ecd087f>.

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