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

Report Title: Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions?

Report Subtitle: Not If You Consider the 2016 SDGs

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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 change¹⁴ 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 its 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 Brunnee & 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.