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# NATURAL JUSTICE

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## THE BINDING NATURE OF THE 2015 PARIS AGREEMENT & OUTCOMES FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

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## **Abstract**

*This paper will briefly assess the scope of the Paris Agreement outcomes under a legal perspective, with a particular focus on its innovations for indigenous people and local communities. In order to evaluate this issue, the most relevant outcomes of the Agreement will be preliminarily summarized, specifically distinguishing provisions which have a binding nature from those which just encourage parties to commit themselves or even represent hortatory or aspirational statements.<sup>1</sup> To this aim, on the one hand, the wording of the provisions will be taken in consideration - and in particular, the distinction between “shall” and “should”, which in the UN language separates pure duties from mere encouragements. On the other hand, the overall “justiciability” of provisions will be evaluated, i.e. the existence of a sufficiently determined content so as to be able to assert if a Party is complying with it or not.*

*In the light of this analysis, the reflections of the Agreement on indigenous peoples and local communities will be highlighted.*

### **§1. Main Outcomes of the 2015 Paris Agreement: Binding or not?<sup>2</sup>**

**Preamble** – Two are the remarkable novelties in the preambular text: the reference to the concerns of indigenous peoples and local communities (see *infra*, §2) and the evolution of the principle of Common but Differentiated Responsibilities (CBDR). Indeed, the phrase “*noting that the largest share of historical global emissions of greenhouse gases has originated in developed countries*” was removed from the final draft. This suggests a stronger stress on the “*respective capabilities*” of each country to tackle Climate Change according to the technical and financial means at their disposal in their specific national circumstances. However, the principle of CBDR is still present, although its role is controversial.<sup>3</sup>

**The Purpose (Art. 2)** – Three are the main goals. Parties aim at (Art. 2):

- *Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;*
- *Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;*

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<sup>1</sup> The distinction reflects the fundamental bipartition of International legal norms in “hard law” or “soft law” according to their binding nature. While the first fully binds the Contracting Parties to a specific obligation subject to judicial review, the latter’s binding nature is non-existent or very weak. Parties may be interested in resorting to soft law for its flexibility – it avoids an immediate commitment – its political impact on the civil society and its long-term development – often soft law is used to indicate the first step or the overarching principles of binding norms which are to be progressively developed over a long period of time. On this very complex – but fundamental - subject, see K. W. Abbott & D. Snidal, *Hard and Soft Law in International Governance*, International Organization 54, 2000, 421-456.

<sup>2</sup> There are several summaries on the outcomes of the Paris Agreement. See – among others – G. Gigounas, A. Gunst & S. Webb, “*The UNFCCC Paris Agreement: Impressions from the Negotiating Table for the Energy Sector – and 10 Key Points About what Comes Next*”, 2015; full text available at: <https://www.dlapiper.com/it/italy/insights/publications/2015/12/the-unfccc-paris-agreement/>.

<sup>3</sup> Simon Hillier & Tom Stuart, “*The Penultimate Draft*”, full text available at: <http://paristext2015.com/2015/12/the-ministers-second-and-final-draft/>.

- *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*

In the subsequent Articles, there follow provisions to substantiate such overarching goals.

**Mitigation (Art. 4)** – *“In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science”.*

The verb “to aim” indicates that this is just a goal, with no legal value. Even the word “rapid” seems blurry, but the relation with the “best available science” could potentially lead to a determination of the required actions.

The “bottom-up” approach does not mean that the Parties’ commitment is entirely left to their discretion. This emerges from Art. 4(2): *“Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”.*

This provision is a mix of binding and non-binding commitments: on the one hand, the preparation, communication and maintenance of successive intended nationally determined contributions (INDCs) is a duty, though Parties only “intend” to achieve them; on the other hand, the pursuit of domestic mitigation measures is compulsory, but achieving the objectives of such contributions remains an “aim”.

In conclusion, it follows from all the foregoing that - notwithstanding a certain discretion on the way to determine the emission target (the following paragraph vaguely refers to the “highest possible ambition”) - in any event not submitting an emission target or submitting it without undertaking actions to put it into practice would be a legal breach of the agreement.

Moreover, Art. 3 affirms that *“the efforts of all Parties will represent a progression over time”*, which lays the foundations of the no-backsliding approach: Parties are therefore bound to scale-up their contributions over time.

Equally, some provisions contained in subsequent paragraphs of Art. 4 are given teeth:

- *“In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement”* (Art. 4(8));

- *“Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement...”* (Art. 4(9));

- *“Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement”* (Art. 4(13)).

The content of the obligations laid down by Art. 4(8) and (9) seems sufficiently determined because linked to Conference of the Parties (COP) decisions – developed or to be developed; at the same time, the notion of “complete accounting” in Art. 4(13) can be assessed by a compliance committee or a tribunal since parameters are clearly set forth, like the no double counting - although some other criteria are more difficult to assess (e.g. accuracy and transparency, environmental integrity, completeness and consistency).

Such provisions are therefore fully binding for the Parties.

**Adaptation (Art. 7)** – An overarching goal of enhancing adaptive capacity, strengthening resilience, and reducing vulnerability – within the framework of sustainable development - is laid down in Art. 7(1). Parties are encouraged to cooperate, supported also by UN organizations and agencies (Art. 7(8)), by sharing information, strengthening institutional arrangements, strengthening scientific knowledge on climate change, helping developing country parties identify adaptation needs and effective practices, and improving the effectiveness and durability of adaptation actions (Art. 7(7)).

(For reflections on indigenous peoples, see *infra*, §3).

Art. 7(9) provides that “*Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions [...]*”.

This provision is particularly emblematic of the “strategic ambiguity” which is noticeable between the lines of the whole Agreement: the utilization of “shall” together with “as appropriate” sounds like “States *must* develop plans and policies to substantiate adaptation, but *not really*”. Such an obligation – in any event – would not mean that countries must engage all in the same way, but only that the action taken is tailored to the specific national needs and circumstances. However, the wording of the provision suggests that the “appropriateness” is conceived at the discretion of States to commit to the development of national plans and policies, and not to the adjustment of the content of plans. Any serious attempt to realize adaptation necessarily requires the setting-up of long-sighted plans and policies. Without an obligation for States to do so, adaptation is not even conceivable.

**Loss and Damage (Art. 8)** – At the same time the Agreement takes into account that adaptation needs to be complemented with the mechanism of loss and damage in order to address those damages which cannot exclusively be dealt with by adaptation measures. The matter of whether or not to give teeth to this mechanism, i.e. the liability of States for loss and damage, was – as obvious – the most debated point of the negotiations on Art. 8. Developing countries strongly advocated to hold developed countries liable for the impacts from loss and damage so that countries suffering from loss and damage should be compensated. This encountered the firm opposition of developed countries. In some cases, this was not due to the hostility to the mechanism *per se*, but to the fact that such measure would have hampered the future ratification of the text.<sup>4</sup> As a result, the balance between the two positions was solved with the overall compromise of Art. 8, which does basically nothing but confirming the achievements of the Warsaw International Mechanism (WIM) agreed during COP19: - “*The Warsaw International*

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<sup>4</sup> US Secretary of State Kerry noted during the negotiations: “*We’re not against [loss and damage]. We’re in favour of 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 ... the impact of it would be to kill the deal*”.

*Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement” (Art. 8(2)). There follow some hortatory provisions about cooperation and enhancement of the system: the debate on the substantial functioning of the mechanism is postponed to next COP in Marrakesh (COP22).<sup>5</sup>*

**REDD+ (Art. 5)** - Two paragraphs refer to REDD+ in the Paris Agreement:

Art. 5(1) refers to the UNFCCC, stating that *“Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1(d), of the Convention, including forests”*.

Likewise, the following paragraph encourages parties to take action to implement the existing framework of several activities, such as those relating to “reducing emissions from deforestation and forest degradation - even though without mentioning the acronym of “REDD+”: *“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 (Art. 5(2)).*

In other words, money can be paid from one country to another based on the amount of extra carbon the receiving country keeps locked in forests in connection with measures that countries take to slow deforestation (“results-based payments”).

The “+” is determined by *“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”*.

Several opinions inferred enthusiastic comments about the role given to REDD+ in the Paris Agreement. It was pointed out that the Agreement provides for forests for the first time in the history of climate negotiations and that the inclusion of REDD+’ “related guidance and decisions,” pushes the Agreement further than a simple acknowledgement of the key role of forests vis-à-vis the fight against climate change ”.<sup>6</sup>

However, it was rightly remarked that none of such provisions are legally binding; moreover, some other criticalities arise from the text.<sup>7</sup>

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<sup>5</sup> See [http://unfccc.int/adaptation/workstreams/loss\\_and\\_damage/items/8134.php](http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8134.php).

<sup>6</sup> This view is by Donald Lehr, a consultant to the REDD+ Safeguards Working Group, a coalition of civil society organizations. On this point, see M. Gaworecki, *“Inclusion Of REDD+ In Paris Climate Agreement Heralded As Major Step Forward On Deforestation”*, 2015; full text available at: <http://news.mongabay.com/2015/12/inclusion-of-redd-in-paris-climate-agreement-heralded-as-major-step-forward-on-deforestation/>.

<sup>7</sup> On this point, see the thorough analysis of C. Lang, *“COP21 Paris: REDD and Carbon Markets”*, full text available at: <http://www.redd-monitor.org/2015/12/15/cop21-paris-redd-and-carbon-markets/>. The author particularly

**Support (Artt. 9 & 10)** – The Paris Agreement’s provisions on “support” to developing countries are rather blurry. Finance is dealt with by Art. 9, whose paragraph 1 says that *“Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention”*. Though, what is the amount of those resources? For now – at best - it seems condemned to further negotiations and power relations. At least, developed countries are bound by some obligations on reporting: *“Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties”* (Art. 9(5)).

Those provisions have to be read in conjunction with paragraph 54 of the COP21 Decision: *“[...] prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries”*.

Therefore, there is a goal set, but Art. 9 says nothing about its quantification. The expression “wild west accounting” was used in this regard.<sup>8</sup> This enhances the confusion as regards the blurry distinction between developed and developing countries. Formally, the straight differentiation set out in the UNFCCC is still into force, although the text was agreed by 195 Parties – so, many more than with the Kyoto Protocol. As a result, Annex I countries are still “developed countries” and all the others are “developing countries”. However, compared to 1992, some countries still considered as developing countries have nevertheless been industrializing their economies and are better equipped to provide support than some developed countries. As a result, the absence of a binding mechanism means there is no compulsory financial contribution specified for individual countries, but also that the difference between countries is watered-down, and those which *really* need to be helped and those which *should* be the providers of such help are not explicitly identified.

Moreover, the impression is not only that the Paris Agreement does not meaningfully progress, but also takes a step back compared to previous COP arrangements. In particular, a comparison with what was agreed in Cancun COP16 shows that the Paris Agreement is even looser. In talking about public sector finance, it only refers to *“projected levels of public financial resources to be provided to developing country Parties”*, whereas at least at Cancun a baseline of USD 30 billion was agreed for the two-year period 2010-2012.<sup>9</sup>

A little more stringent seems the functioning of technology transfer: Art. 10(2) imposes to Parties, *“noting the importance of technology for the implementation of mitigation and adaptation actions under this Agreement and recognizing existing technology deployment and dissemination efforts”*, to *“strengthen cooperative action on technology development and transfer”*.

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emphasizes that the text does not differentiate between emissions from forests and emissions from fossil fuels and thus ends up treating them all in the same way.

<sup>8</sup> S. Borenstein & K. Ritter, *“Billions in Climate Aid Pledges Have ‘Wild West’ Accounting”*; full text available at: <http://bigstory.ap.org/article/e0954e5e32c246b6852bf9693ec4cc6b/billions-climate-aid-pledges-have-wild-west-accounting>

<sup>9</sup> Decision 1/CP.16 para. 95:” *[The COP] Takes note of the collective commitment by developed countries to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010–2012, with a balanced allocation between adaptation and mitigation; funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa”*.

Such obligations – apparently left to the complete discretion of the Parties – are however anchored to the functioning of the Technology Mechanism established under the UNFCCC (Art. 10(3)) and framed within the technology framework established by Art. 10(4) in order to provide “*overarching guidance for the work of the Technology Mechanism in promoting and facilitating enhanced action on technology development and transfer in order to support the implementation of this Agreement*”.

Albeit the Parties will play a decisive role in establishing their contributions vis-à-vis technology transfer, those frameworks will at least lead the Parties towards the most efficient way to contribute.

More generally, the scope of support – and in general differentiation between Parties – remains nevertheless ambiguous in the Agreement, especially with regard to its binding nature.

No legal obligation can arise from Art. 4(4), according to which “*developed country Parties shall continue taking the lead by undertaking economy-wide absolute emission reduction targets*”. Notwithstanding the wording (“shall”), the obligation lacks of any content given the absence of any criteria to determine the notion of “*economy-wide absolute emission reduction targets*”.

Thus differentiation, although recognized in theory, is poorly operationalized. Another proof of this gap can be seen in Art. 13 (14) concerning the establishment of a transparency framework: “*Support shall be provided to developing countries for the implementation of this Article*”.

Without any reference to define “support”, this provision – though worded with the strong form “shall” – is not “justiciable” at all. In other words, as rightly pointed out, no developing country could ever take legal action against a developed one on the basis of this provision.<sup>10</sup>

**Establishment of coordination and cooperation mechanisms.** The Paris Agreement establishes:

- A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development, on a voluntary basis (Art. 6(4)). This mechanism lays the foundations of a future carbon trade mechanism the functioning of which is still to be discussed;
- A framework for non-market approaches to sustainable development (Art. 6(9));
- A technology framework (Art. 10 (4); see *supra*);<sup>11</sup>
- A transparency framework for action and support, to provide clarity on support provided and received by relevant individual Parties (Art. 13(1)). The provision is completed by Art. 13(13): “*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall, at its first session, building on experience from the arrangements related to transparency under the Convention, and elaborating on the provisions in this Article, adopt common modalities, procedures and guidelines, as appropriate, for the transparency of action and support*”.

The actual content and functioning of those mechanisms is to be specified in future COP decisions.

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<sup>10</sup> Nathan Ross, *The Paris Agreement: A Tale of Two Interpretations*, 2015; full text available at: <http://paristext2015.com/2015/12/guest-editorial-nathan-ross/>.

<sup>11</sup> UNFCCC, “*Technology Mechanism - Enhancing Climate Technology Development And Transfer*”, UNFCCC papers, 2015.

**Report & Enforcement (Artt. 14, 15 & 24)** – All reports and communications from the Parties will be analyzed to track collective progress toward achieving the Agreement’s fundamental aims. This will happen by means of a “global stocktake”, whose first operationalization is only envisaged in 2023, and then every five years thereafter.

However – though only for the future – this obligation fully binds the Parties.

As regards to the compliance mechanism (Art. 15), it is entirely expert-based, facilitative, non-adversarial and non-punitive. This is definitely unsurprising as long as international relations are connoted by the overarching principle of national sovereignty and Parties would be even more reluctant to commit themselves in case of sanctions for non-compliance. There is a vivid discussion in international law about the possible approaches to deal with compliance.<sup>12</sup> However, it is settled that most of the time it is not about the lack of political will to do so, but about the lack of capacity and/or financial and technical resources needed by the Parties to comply.<sup>13</sup>

Finally, the Agreement provides a dispute settlement mechanism, recalling that of Art. 14 of the UNFCCC (Art. 24). Therefore, any Party can take legal action against another Party in case of breach of any of the obligations of the Agreement. However, dispute settlement mechanisms are basically never used in Multilateral Environmental Agreements (MEAs) mainly for diplomatic reasons. As a result, it just works as a deterrent.

**Entry into force (Art. 21)** – *“This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession”*, according to the constitutional institutions of the Contracting Parties (Art. 21).

During the negotiations, at some point it looked like the threshold would be set at 70% of emissions. Although this did not happen, only time will tell whether the lowering of the threshold is enough for the Agreement to enter soon into force.

At least, Art. 27 forbids to make any reservation to the Agreement. Indeed, reservations tend to ensure the broadest possible participation to the treaties. In this case reservations would be totally meaningless given the bottom-up approach of the Agreement and its very few binding rules. However, the no-reservation clause means that as long as a Party signs and ratifies, it is bound by the entire text with no exception.

## **§2. How Does the 2015 Paris Agreement Deal with Indigenous Peoples and Local Communities?**

As widely recognized, climate change poses challenges and risks to indigenous peoples, and it affects indigenous peoples in several ways, including destruction of, and negative impacts upon natural ecosystems, eroding of indigenous cultural practices, damages to agriculture and pastoral farming (e. g. disorganization of settlement patterns for pastoralists and wildlife and erratic rainfall patterns), and potentially increased social conflicts (increase of poverty and reduction of available

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<sup>12</sup> N. Goeteyn & F. Maes, *“Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?”*, in *“Chinese Journal of International Law”*, 2011, pp. 791-826.

<sup>13</sup> J. K. Cogan, *“Non-compliance and the International Rule of Law”*, in *“The Yale Journal of International Law”*, 2006, pp. 189-210.



resources).<sup>14</sup> Indigenous peoples, have however a rich history of adapting to changing environmental and social conditions and their indigenous knowledge is an important resource which can assist them to adapt to climate change.<sup>15</sup>

Generally speaking, the Paris Agreement concerns indigenous peoples the same way it concerns all the other recipients.

Specifically, it concerns them as a particularly vulnerable social group. Therefore, it dedicates two provisions to indigenous people's rights and local communities. Their wording appears very soft:

- 11<sup>th</sup> recital: *“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”*;
- Art. 7(5) – within the scope of adaptation - more or less in the same terms : *“Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate”*.

Those two provisions entail little for the development of policies to deal with indigenous peoples concerns. Unfortunately, not only are they not binding, but they are also outlined in a particular soft way, with the ambiguous rider "where appropriate". The question is: how should appropriateness be evaluated? With reference to the existence and degree of institutionalization of communities or just with regard to the political will to listen to their needs and modify the regulatory framework accordingly? The ambiguity appears deliberately conceived to give leeway to the Contracting Parties to decide *whether* to take indigenous peoples' concerns into consideration and not to use this discretion to decide *which* communities are to be consulted and by which criteria, nor *what* kind of local knowledge and for what purpose (e.g. academic, commercial, etc.).

There follows that the Agreement does not contain any binding obligations for governments vis-à-vis indigenous peoples.

In order for the Agreement to address directly indigenous peoples' concerns, it should – at least – have contained a provision such as the one proposed during the negotiations by some NGOs like, for example, Climate Action Network (CAN): *“All Parties shall, in all climate change related actions, respect, protect, promote, and fulfil human rights for all, including the rights of indigenous peoples;*

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<sup>14</sup> See, for an extensive analysis, IPACC, *“Climate Change And Indigenous People”*, 2015; UN Permanent Forum on Indigenous Issues, *“Climate Change And Indigenous Peoples”*, UN papers, 2008.

<sup>15</sup> W.N., Adger, J.M. Pulhin, J. Barnett, G.D. Dabelko, G.K. Hovelsrud, M. Levy, Ú. Oswald Spring, & C.H. Vogel, “Human Security”, in C. B. Field, V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.), *“Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects - Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change”* 2014, pp. 755-791.

*ensuring gender equality and the full and equal participation of women; ensuring intergenerational equity; ensuring a just transition of the workforce that creates decent work and quality jobs; ensuring food security; and ensuring the integrity and resilience of natural ecosystems”.*<sup>16</sup>

This would have involved binding the Contracting Parties, among other things, both on the substantial side and the procedural side.

On the substantial side:

- Detailed guidance on local stakeholder consultation, indicating in particular who must be consulted (at least: affected people), by what means and in what circumstances.
- Detailed guidance for sustainable development assessment and monitoring based on sustainable development indicators, including minimum standards for sustainable development and safeguards against negative social and environmental impacts.

On the procedural side:

- International-level communication channels and grievance mechanisms for people and communities regarding social and environmental impacts of climate change mitigation projects or actions;
- Guidance, including minimum standards, for establishing grievance and complaint procedures at the national level (see Carbon Market Watch, Human Rights Implications of Climate Change Mitigation Actions, 2015).

It is indeed highly probable that none of these measures will be taken by virtue of the hortatory wording of the Agreement, which will leave everything to the discretion of governments.

It was rightly pointed out that “At the moment the rights of Indigenous Peoples all over the globe are being violated by green climate projects – such as hydropower dams – in the name of climate mitigation” (Eriel Deranger, member of the Athabasca Chipewyan First Nation) and that therefore “we cannot negotiate a climate agreement at this critical time without the recognition of the rights of Indigenous Peoples, who are on the front lines of the impacts of climate change and the innovators of solutions we need to stabilize our climate. For the benefit of all human beings, we are fighting for a meaningful outcome from these negotiations, and the rights of Indigenous Peoples MUST be included in Article 2.2 of the Paris Accord” (Tom Goldtooth, executive director of the Indigenous Environmental Network).

Unfortunately, Article 2.2 of the final draft of the Paris agreement does not mention at all indigenous people’s concerns within the criteria and the counterweights to be taken into account while pursuing the goals of the Convention. The final version of Article 2 only says that “*This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*”. In a previous draft, there appeared an additional rider, imposing special attention to indigenous peoples (“*including rights of indigenous peoples...*”).

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<sup>16</sup> See Climate Action Network, “*Integrating Human Right into the Paris Agreement - Final Position*”, 2015.

As remarked by Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, this inclusion would have been particularly significant because Article 2.2 outlines the “*basic principles which should guide the achievement of the purposes of the Agreement*”.<sup>17</sup>

On the other hand, seeing the glass half full, some achievements have been already attained:

- However weak it could appear, the double mention of indigenous people’s rights reveals a tendency of the climate regime, more and more addressed to the recognition of indigenous people’s rights. This is supposed to imply a limit to development and pure economic concerns in the name of a more incisive governmental action vis-à-vis the fight against climate change;
- There has been a direct recognition of the link between climate change and human rights;<sup>18</sup>
- Loss and Damage has been addressed and previous decisions – especially Decision 3/CP.18<sup>19</sup> - and will be further elaborated in 2016 at COP22 (Marrakesh).

REDD+ is still operational: it is important to underline that the above mentioned rules on REDD+ provided in the Paris Agreement should be interpreted in light of what established in Decision 1/CP.16, Appendix 1, para. 2(e), according to which “*When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported: [...] That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits [...] taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries, reflected in the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], as well as the International Mother Earth Day*”.

This statement is of crucial importance. Notwithstanding the fact that neither COP decisions<sup>20</sup> nor UNDRIP are generally considered non-binding in international law, the combination of the two marks at least a strong political will to pursue REDD+ taking into account indigenous peoples’ concerns. As rightly observed, the latter – despite its non-binding nature - has always played an authoritative role and a positive impact on the lives of Indigenous peoples globally.<sup>21</sup> As a result –

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<sup>17</sup> Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples “*Removing Rights for Indigenous Peoples places Forests, Climate Plan at Risk – Statement from Paris*”, 2015; full text available at: <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/106-statement-cop21>.

<sup>18</sup> UNEP, “*Climate Change and Human Rights*”, UNEP Publications, 2015.

<sup>19</sup> “*Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity*”.

<sup>20</sup> CAN International, “*COP Decisions: Binding or Not?*”, CAN Papers, 2009; full text available at: [http://www.climatenetwork.org/sites/default/files/COP\\_Decisions\\_CAN\\_legal\\_group\\_June\\_8\\_09.pdf](http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf).

<sup>21</sup> M. Davis, “*To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*”, in “*Australian International Law Journal*”, 2012, p. 32.

though only at a political level – the link between REDD+ and UNDRIP is likely to lead to an expansion of UNFCCC’s setting a new, further point of justification for future political action.<sup>22</sup>

At the same time, both REDD and the carbon trading system, to which – without explicitly mentioning it – Art. 6 actually refers by means of the expression “voluntary cooperation”, are a deep concern to many indigenous peoples for their potential negative impact on their livelihoods. After all, such systems of international offsetting do not provide a way to take a step forward vis-à-vis carbon economy but only represent “palliative” choices which hampers any up-stream radical solution to climate change. As a result, the system of “carbon credits” often determines that indigenous lands in other countries are purchased or utilized for such schemes, while simultaneously destroying indigenous homelands - which most of the time are not assisted in parallel by a suitable regulatory framework at national level to avoid such dire consequences. Only future developments will tell to what extent UNDRIP and – more generally – indigenous peoples’ concerns will be taken into account while building adequate safeguards at national and national level to cushion the harmful effects of international offsetting and indeed possible negative impacts of the proposed solutions to climate change contained in the Agreement

### §3. Conclusions

To sum up, the only binding obligations of States concern setting of emission reduction targets, developing the policies for meeting them, reporting their progress every five years starting in 2023, and finally scaling up their targets after each review. The rest is left – at best – to future discussions or – at worst – to the discretion of the Contracting Parties.

In the writer’s opinion, four short observations summarize the outcome of the Paris Agreement:

- It is true that “*by comparison to what it could have been, it’s a miracle. By comparison to what it should have been, it’s a disaster*”.<sup>23</sup> In other words, at least there are some binding obligations upon States to tackle climate change, but the solution to the problem remains at a vast distance.

- The UNFCCC is a “framework convention” by definition.<sup>24</sup> The Paris Agreement should not be so, though it gives this impression: too many things are just left to future negotiations or expressed in aspirational terms. Emblematic are the cases of REDD+ and loss and damage. After 24 years of debate, designing an agreement similar to a 1992 framework convention distances the civil society’s involvement and frustrates the credibility of climate negotiations.

- There is no mention at all of “fossil fuels” in the whole agreement. This shows that there is no true intention to shift towards renewable energies and – as a result – to modify any production/consumption pattern. It is highly probable that the “sustainable development” set as the overarching principle to refer to while implementing the Agreement will not be sustainable at all.

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<sup>22</sup> This is suggested by L. Wallbott, “*Indigenous Peoples in UN REDD+ Negotiations: “Importing Power” and Lobbying for Rights through Discursive Interplay Management*”, in “*Ecology & Society*”, 2014; full text available at: <http://www.ecologyandsociety.org/vol19/iss1/art21/#conclusions14>.

<sup>23</sup> G. Monbiot, *Grand Promises of Paris Climate Deal Undermined by Squalid Retrenchments*; see full text at: <http://www.theguardian.com/environment/georgemonbiot/2015/dec/12/paris-climate-deal-governments-fossil-fuels>.

<sup>24</sup> A framework convention is a type of legally-binding international treaty establishing general guidelines and principles for international governance on a particular issue. Separate, more detailed legal instruments can be attached to a framework convention to address specific aspects of an issue.

- Indigenous peoples and local communities are not given the attention that they would have deserved, but at least for the first time the specificity of their situation is explicitly recognized.

- At least – given that there are some binding provisions – this is sufficient to enhance climate change litigation. After last year’s leading case in the Netherlands,<sup>25</sup> the chances are that many other States will be sued by citizens and/or associations to assess whether they are adopting and implementing adequate laws and regulations to safeguard peoples’ rights.

As a result, States do not have a legal obligation to reach their intended goals at international level under the Paris Agreement, but they still have obligations to protect peoples’ rights guaranteed by their constitutions at national level: in the latter case, international law can be useful as a criterion to draw on by the Court to assess the adequacy of States’ action.

Likewise, thanks to the mention of traditional knowledge in the Agreement, such legal mechanism could potentially be able to absorb within the UNFCCC the whole international framework protecting intellectual property and traditional knowledge<sup>26</sup> and therefore be taken into account as a benchmark for national courts.

This – potentially – could be an important weapon for representatives of indigenous peoples and local communities to bypass the non-binding nature of the provisions of the Paris Agreement which directly concern them and enhance climate justice at national level.

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<sup>25</sup> See more on the case at: <http://www.urgenda.nl/en/climate-case/>.

<sup>26</sup> See more at: [http://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](http://www.wipo.int/pressroom/en/briefs/tk_ip.html).