

THE INVISIBLE HAND WHICH STRANGLES: CARBON MARKETS FAIL TO ENSURE RESPECT FOR THE HUMAN DIGNITY OF INDIGENOUS PEOPLES

ABSTRACT

The effectiveness of forests as ‘carbon sinks’ makes forest conservation programmes the main target for generating ‘carbon credits’ which governments and companies can purchase to ‘offset’ their own emissions. However, the carbon markets which drive these forest conservation programmes often lack adequate procedural safeguards to respect the human rights of indigenous peoples which have resided on their lands for countless generations. This leads to instances of forced displacement and systemic exploitation of indigenous peoples, all while host governments reap the benefits of selling credits so that wealthy countries and companies can project a sustainable image of themselves. By reducing forests as mere commodities and disregarding the profound bond that indigenous peoples have with their ancestral lands, the operationalisation of carbon markets constitutes an affront to the human dignity of indigenous peoples.

I. INTRODUCTION

Carbon markets or emissions trading systems have seen an explosion in growth over the past few years as demonstrated by the surge in funding from governments and corporations.¹ In a nutshell, carbon markets allow companies and governments to trade carbon emissions by purchasing carbon credits, each credit equivalent to one tonne of CO₂, to ‘offset’ their own emissions.² These credits are generated by implementing projects that absorb carbon, such as forest conservation and renewable energy.³

However, the effectiveness of carbon markets as a tool for mitigating climate change has been heavily criticised as a greenwashing scheme which enables wealthy governments and companies to merely offset their emissions, instead of prioritising deep reduction of emissions from their own activities.⁴ This criticism aligns with research which indicates that existing climate mitigation scenarios continue to perpetuate colonial inequalities, placing a disproportionate burden on Global South countries to offset the high amount of energy consumption by wealthy countries.⁵

Another concerning aspect of carbon markets is how it has been linked to human rights violations. The lack of legal safeguards to respect and protect human rights in carbon markets have contributed to forced displacement of indigenous peoples from their lands and other systemic human rights violations. Indigenous communities and their lands have been

¹ Fred Pearce, ‘A Big New Forest Initiative Sparks Concerns of a ‘Carbon Heist’ (*YaleEnvironment360*, 28 October 2021) <<https://e360.yale.edu/features/a-big-new-forest-initiative-sparks-concerns-of-a-carbon-heist>> accessed 23 December 2022.

² ‘Carbon markets 101’ (Carbon Market Watch, June 2019) p 3.

³ Oliver Gordon, ‘The interwoven fortunes of carbon markets and indigenous communities’ (*Energy Monitor*, 16 November 2022) <<https://www.energymonitor.ai/policy/carbon-markets/the-interwoven-fortunes-of-carbon-markets-and-indigenous-communities/>> accessed 23 December 2022.

⁴ United Nations’ High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, ‘Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions’ (2022) p 19.

⁵ Jason Hickel and Aljoša Slameršak, ‘Existing climate mitigation scenarios perpetuate colonial inequalities’ [2022] 6(7) *Lancet Planet Health*, 2-3.

systematically exploited to allow governments to reap the benefits from the purchase of carbon credits generated by their forests.⁶

This essay argues that the current state and trajectory of carbon market mechanisms contributes to violations of human dignity of indigenous peoples. The second section explores the normative content of the principle of human dignity, dignity's functions in international law, and how dignity has been utilised to advance indigenous rights and climate justice. Applying the principle of human dignity, the third section provides detail on how carbon market mechanisms fail to respect the human dignity of indigenous peoples. Lastly, recommendations will be made on incorporating human rights standards in carbon markets to ensure that human dignity is respected.

II. THE INTERWOVEN THREADS OF HUMAN DIGNITY, INDIGENOUS RIGHTS AND CLIMATE JUSTICE

Schachter equates the expression of human dignity in international law as an 'respect for the intrinsic worth of a person', equating dignity with the Kantian injunction to treat every human being as an end, not as a means.⁷ This definition emphasises respect for the worth of all persons and for their individual choices, meaning that the coercive rule of one or the few over the many is incompatible with a due respect for the dignity of the person.⁸ Respect for intrinsic worth is also reflected in McCrudden's elucidation of human dignity, which provides that:

Every human being possesses an intrinsic worth [...] that this intrinsic worth should be recognised and respected by others, and [that] some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.⁹

Reference to the works of scholars has been made since human dignity has not been expressly defined in any international legal instruments. Despite this lack of definition, human dignity has been explicitly or implicitly recognised in constitutional and international documents and has become the premier value underpinning modern international law. Le Moli describes the principle of human dignity as serving two main functions in international law: an axiological and an auxiliary function.¹⁰ The axiological function of human dignity constitutes the *raison d'être* for rules within the international legal order.¹¹ In this way it is able to serve as a source of international law capable of exerting an influence over the formation of conventional and customary rules.¹² This function is not limited to international human rights law or the laws of

⁶ Levi S Romero, 'My Community Doesn't Exist Just to Absolve You of Your Climate Sins' (*The New York Times*, 1 December 2022) <<https://www.nytimes.com/2022/12/01/opinion/environment/carbon-credits-markets-climate-change.html>> accessed 22 December 2022.

⁷ Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77(4) *The American Journal of International Law* 848, 849.

⁸ *Ibid.*, 850.

⁹ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 679.

¹⁰ Ginevra Le Moli, 'The Principle of Human Dignity in international Law' in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Koninklijke Brill NV 2019) 364.

¹¹ *Ibid.*

¹² *Ibid.*, 365.

war, but to the entire regime of international law, as human dignity appears in all areas of international law as a fundamental general principle which grounds treaty provisions and customary law obligations. For example, Principle 1 of the Stockholm Declaration expressly provides that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹³

Human dignity's second, auxiliary function, acts as an interpretative guide to clarify ambiguities when primary sources of law are unclear or inadequate.¹⁴ This function has been particularly useful when broadening the interpretation of international human rights instruments to guarantee the effective protection of rights in various circumstances. This is demonstrated by the Human Rights Committee when interpreting Article 6 of the ICCPR on the right to life.¹⁵ In its General Comment No. 36, the Human Rights Committee provides that the right to life shall be interpreted broadly to encompass the entitlement of individuals to enjoy a life with dignity.¹⁶ This interpretation implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.¹⁷ The Committee expressly provides that these 'general conditions' include the deprivation of indigenous peoples' land, territories and resources.¹⁸

This function of human dignity has also been utilised by domestic courts to advance environmental and climate justice. Analysing environmental litigation decisions around the world, Daly and May describe that dignity is useful as it provides a vocabulary for foregrounding the damage *to people* of environmental and climate harms, and dignity draws attention to how environmental harms affect all of the essential aspects of a person's life.¹⁹ Taken together, environmental and climate litigants can use human dignity as a tool to emphasise how adverse environmental conditions impact people's ability to live *as people of worth*.²⁰ This was demonstrated by the Supreme Court of Nepal in the case of *Pro Public v. Godavari Marble Industries Pvt. Ltd.*, which concerned the adverse environmental impacts of a marble mine.²¹ The Supreme Court ordered mining operations to be discontinued and

¹³ Declaration of the United Nations Conference on the Human Environment, UNGA Res 2994 (XXVII) (15 December 1972) principle 1.

¹⁴ Le Moli (n 10) 365.

¹⁵ UN Human Rights Committee, 'General comment no. 36, Article 6 (Right to Life)' (2019) UN Doc CCPR/C/GC/35; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6(1).

¹⁶ *Ibid*, para 3.

¹⁷ *Ibid*, para 26.

¹⁸ *Ibid*.

¹⁹ Erin Daly and James R. May, 'Environmental Dignity Rights' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2019) 330.

²⁰ *Ibid*.

²¹ *Pro Public and Others v. Godavari Marble Industries Pvt. Ltd. and Others* (2015) Nepal Supreme Court 068 – WO – 0082.

restoration of the natural environment, emphasising that the right to life with dignity may only be realised in a safe and healthy environment:

[It] should be understood that all rights necessary for living a dignified life as a human being are included in [Article 12(1) of the Interim Constitution]. Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers.²²

Further reflecting human dignity as the core value of international human rights law, Article 43 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that the rights recognised in the UNDRIP constitute the minimum standards for the survival and dignity of indigenous peoples.²³ Although the declaration is a non-binding instrument, it is now widely considered the most comprehensive international instrument on the rights of indigenous peoples.²⁴ Its provisions resemble the look and feel of a hard-law treaty, establishing a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and elaborating on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.²⁵

Another key international legal instrument which specifically addresses the protection of indigenous rights is ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO C169).²⁶ Article 2 of ILO C169 obligates States parties to develop, with the participation of indigenous peoples, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their *integrity*.²⁷

The core principle of indigenous rights is the right to free, prior and informed consent (FPIC). The obligation of States to respect the right to FPIC is contained within both the ILO C169 and the UNDRIP, with Article 10 of UNDRIP providing that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.²⁸

The principle of FPIC is recognised as integral to the preservation of indigenous culture and essential towards its survival, since projects that are built on indigenous lands most often have

²² Ibid, 46.

²³ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) (UNDRIP), art 43.

²⁴ 'United Nations Declaration on the Rights of Indigenous Peoples' (United Nations)

<<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 30 December 2022.

²⁵ Ibid; Jessie Hohmann and Marc Weller, 'Introduction' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 1.

²⁶ Indigenous and Tribal Peoples Convention (No. 169) (1989) (ILO C169).

²⁷ ILO C169, art 2.

²⁸ UNDRIP, art. 10.

far-reaching adverse environmental impacts which severely harm the indigenous way of life.²⁹ Indigenous peoples have a profoundly spiritual relationship with their land. It does not simply represent a possession or means of production, but their relationship with Mother Nature is basic to their existence and to all their beliefs, customs, traditions and culture.³⁰ This relationship reinforces the critical importance of adhering to the principle of FPIC, such that forced relocation and environmental degradation strikes at the very dignity of indigenous peoples.

Having established its significance in the fabric of international law, the formulation and implementation of international climate policies must be consistent with respect for human dignity. This is especially the case with carbon market mechanisms and mitigation strategies that rely on the use of land belonging to indigenous peoples.

III. CARBON MARKET MECHANISMS AS AN AFFRONT TO HUMAN DIGNITY

Forests play a significant role in the effort to prevent climate change, acting as ‘carbon sinks’ and absorbing vast amounts of carbon dioxide.³¹ However, rampant deforestation and forest degradation threatens the effectiveness of forests in fighting climate change, as trees that store carbon release this carbon into the atmosphere when they are destroyed.³² Some forests have even become a net *source* of carbon emissions due to clearing for plantations, uncontrolled fires and drainage of peat soils.³³

For this reason, forest conservation has been one of the main priorities in climate change policy. Article 5 of the Paris Agreement calls upon States parties to conserve and enhance carbon sinks, including forests.³⁴ The UN has established the Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD) to incentivise developing countries to reduce carbon emissions from deforestation and forest degradation.³⁵ The incentive comes in the form of ‘results-based payments for verified emissions reductions’ for developing countries that have successfully met certain requirements.³⁶ REDD and other carbon sequestration projects in forests also play a major role in carbon markets, where companies can purchase ‘credits’ based on how much carbon is being absorbed to offset their own emissions.³⁷

²⁹ James Anaya, ‘Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources’ (2005) 22(1) *Arizona Journal of International and Comparative Law* 7.

³⁰ José Cobo, ‘Study of the Problem of Discrimination Against Indigenous Populations Volume V: Conclusions, Proposals and Recommendations’ (1987) UN Doc E/CN.4/Sub.2/1986/7/Add.4, 39.

³¹ Nancy Harris and David Gibbs, ‘Forests Absorb Twice As Much Carbon As They Emit Each Year’ (*World Resources Institute*, 21 January 2021) <<https://www.wri.org/insights/forests-absorb-twice-much-carbon-they-emit-each-year>> accessed 30 December 2022.

³² *Ibid.*

³³ *Ibid.*

³⁴ Paris Agreement, art 5.

³⁵ ‘UN-REDD Programme Fact Sheet: About REDD+’ (*UN-REDD Programme*, 2016).

³⁶ *Ibid.*

³⁷ Gordon (n 3).

Indigenous peoples are key to ensuring the effective conservation of forests and maintaining their status as carbon sinks. Researchers have established that forests managed by indigenous peoples and other local communities often have lower deforestation rates than similar lands managed by others.³⁸ Despite this, many forest conservation programmes have failed to implement legal safeguards to ensure that the rights of indigenous peoples are respected. A recent study concluded by the Rights and Resources Initiative and McGill University reviewed status of the legal recognition of the rights of Indigenous Peoples, local communities, and Afro-descendant Peoples to the carbon in their lands and territories across 31 countries in Africa, Asia, and Latin America.³⁹ Key findings from this report indicate that only a few countries have established the necessary conditions for fair, effective, and transparent carbon or REDD+ transactions.⁴⁰ Even more worrying is that some countries have yet to legally recognise the ownership of indigenous peoples over their lands, which increases the likelihood of rights violations and land grabs.⁴¹ Another key finding uncovered in the report was the role of the voluntary carbon certification standards that are established to facilitate and monitor these carbon trading activities:

While many voluntary carbon certification standards include provisions relating to human rights and the recognition of communities' land tenure and resource rights, engagement and participation, benefit sharing, and channels for feedback and grievance redress, they largely fail to provide robust and effective mechanisms for monitoring, reporting, and verifying these elements.⁴²

Legal recognition of customary land and obtaining an official land document is critical as it provides indigenous peoples with land security, evidence of legal possession in court when challenges arise, and leverage in negotiations with outside investors.⁴³ The issue with the current mechanisms in place is that, by reducing forests to commodity that can be bought and sold, it can incentivise governments to disregard the rights of indigenous peoples and local communities to capture the benefits for themselves.⁴⁴ Without adequate procedural safeguards to respect FPIC and mechanisms for effective redress, the implementation of these nature-based solutions could actually perpetuate the inequalities which lead to the climate crisis and jeopardise the permanence of sequestered carbon.⁴⁵

A. Forced Displacement of the Sengwer Indigenous Peoples

³⁸ Peter Veit, '4 Ways Indigenous and Community Lands Can Reduce Emissions' (*World Resources Institute*, 25 March 2021) <<https://www.wri.org/insights/4-ways-indigenous-and-community-lands-can-reduce-emissions>> accessed 23 December 2022.

³⁹ Katherina Lofts and others, 'Status of Legal Recognition of Indigenous Peoples', Local Communities' and Afro-descendant Peoples' Rights to Carbon Stored in Tropical Lands and Forests' (*Rights and Resource Initiative*, 2021).

⁴⁰ *Ibid.*, 3.

⁴¹ *Ibid.*, 6.

⁴² *Ibid.*, 3.

⁴³ Veit (n 38).

⁴⁴ Giulia Parola, 'The dangerous rise of Land Grabbing through Climate Change Mitigation policies: the examples of biofuel and REDD+' (2020) 12(3) *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)* 565, 572-573.

⁴⁵ *Ibid.*, 11.

All the human rights risks involved with the commodification of forests were manifested in what can only be described as a disaster of REDD implementation which resulted in the massive evictions and forced relocation of the Sengwer indigenous peoples from Kenya's Embobut forest and Cherangany Hills. Since the mid-2000s, international donors have funded REDD+ and other forest conservation projects as part of carbon off-setting schemes in partnership with the Kenya Ministry of Environment and Forestry.⁴⁶ Having these projects overlap with the Embobut forest and Cherangany Hills carries an inherent human rights risk because from 2007 there have been almost yearly forced evictions of the Sengwer People by the KFS.⁴⁷ 2007 is also the year that the World Bank's Natural Resource Management Project started.⁴⁸

In 2014, it was reported that over one thousand homes had been torched by the government's Kenya Forest Service (KFS) to forcibly evict the 15,000 strong Sengwer indigenous people from their ancestral homes in the Embobut forest and the Cherangany Hills.⁴⁹ Despite repeated calls by civil society, injunctions issued by a Kenyan Court, and the World Bank's own Inspection Panel finding that that the project's implementation violated several operational safeguard policies, the KFS continued to carry out evictions.⁵⁰ This lack of accountability and legal safeguarding resulted in another disaster in 2017 and 2018 when community representatives reported that armed KFS guards burned 341 houses and killed one Sengwer man.⁵¹

The plight of the Sengwer people represent the flaws of REDD and carbon market mechanisms, providing a harrowing example of the human rights violations which the programs may contribute towards. REDD has repeatedly come under fire by indigenous and human rights activists for possibly enabling large-scale land grabs of indigenous lands.⁵² The forced displacement of the Sengwer people is only one example of numerous others around the world where REDD projects have contributed to forest enclosures, militarisation, fraud, coercion, forced displacements and evictions.⁵³ This emphasises the need for effective legal safeguards that respect the inherent dignity of the indigenous peoples' and their right to FPIC.

B. Violation of Human Dignity

⁴⁶ Amnesty International, 'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya' (2018) 65.

⁴⁷ World Rainforest Movement, 'Forced Relocation of Sengwer People proves urgency of canceling REDD' (25 February 2014) <<https://www.wrm.org.uy/other-information/forced-relocation-of-sengwer-people-proves-urgency-of-canceling-redd>> accessed 28 December 2022.

⁴⁸ Ibid.

⁴⁹ Nafeez Ahmed, 'World Bank and UN carbon offset scheme 'complicit' in genocidal land grabs – NGOs' (*The Guardian*, 3 July 2014) <<https://www.theguardian.com/environment/earth-insight/2014/jul/03/world-bank-un-redd-genocide-land-carbon-grab-sengwer-kenya>> accessed 28 December 2022.

⁵⁰ Amnesty International (n 46) 44, 67.

⁵¹ Ibid, 5.

⁵² 'REDD+' (Carbon Trade Watch) <<http://www.carbontradewatch.org/issues/redd.html>> accessed 31 December 2022.

⁵³ Anne Larson and others, 'Land tenure and REDD+: The good, the bad and the ugly' (2013) 23(3) *Global Environmental Change* 678.

Instances of climate grabbing may increase in frequency in light of increasing investment in carbon market schemes. It is argued that this phenomenon of climate grabbing has reached a level of severity that it must be regarded as an affront to the human dignity of indigenous peoples. Using human dignity's auxiliary function to inform the interpretation of existing international human rights instruments, it can be seen that forcibly displacing indigenous peoples from their ancestral lands is incompatible with the principle of human dignity.

The right to life with dignity is violated when States deprive indigenous peoples of their land and natural resources.⁵⁴ This was reaffirmed by the Inter-American Court of Human Rights (IACtHR) in *Yakye Axa v Paraguay*, where the Court held that the State must protect and ensure the right to life by taking positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk.⁵⁵ Based on this interpretation, the IACtHR held that the forced displacement of members of the Yakye Axa Community from their lands place them in living conditions which were incompatible with their dignity.⁵⁶ Reference to human dignity within the normative contents of the right to life is especially important since the right is widely considered as a 'supreme right' that is the prerequisite for the enjoyment of all other human rights.⁵⁷

Another relevant right is the right to take part in cultural life as guaranteed in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁸ The full promotion of and respect for cultural rights has been deemed as essential for the maintenance of human dignity.⁵⁹ For indigenous peoples, their cultural values are inextricably linked with their ancestral lands.⁶⁰ Forced displacement and land degradation therefore threatens their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.⁶¹

Alternatively, climate grabbing constitutes an affront to human dignity as a self-standing principle. The common thread found within both Schachter and McCrudden's definitions of human dignity is respect for the intrinsic worth of a person, imposing the duty to treat every human being as an ends in themselves, not merely as a means. The act of climate grabbing treats indigenous peoples and the lands that they own merely as a means for governments and companies to offset their carbon emissions instead of taking the necessary steps to reduce their own emissions. Perpetrators disregard the intrinsic worth of the indigenous peoples and the cultural values linked to their lands that have been nurtured through countless generations,

⁵⁴ UN Human Rights Committee (n 15) para 26.

⁵⁵ Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay* (2005) para 162.

⁵⁶ *Ibid*, para 168.

⁵⁷ *Ibid*, para 161; UN Human Rights Committee (n 15) para 2.

⁵⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 15(1)(a).

⁵⁹ UN Committee on Economic, Social and Cultural Rights, 'General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21, para 1.

⁶⁰ *Ibid*, para 36.

⁶¹ *Ibid*.

ultimately failing to address the fundamental causes of deforestation and degradation.⁶² Ensuring protection for human dignity requires carbon markets to respect the right to FPIC and provide legal recognition for indigenous peoples over their ancestral lands.

IV. PROTECTING HUMAN DIGNITY IN CARBON MARKET MECHANISMS

Article 6 of the Paris Agreement guides countries on how they can ‘pursue voluntary cooperation’ to meet their Nationally Determined Contributions (NDCs) and enable higher ambition in mitigation and adaptation actions.⁶³ Article 6(4) establishes the international carbon market mechanism overseen by the Supervisory Body, a body designated by the United Nations.⁶⁴ The development of the ‘rulebook’ regulating the implementation of this mechanism is critical as it can serve as a benchmark for other voluntary carbon market schemes, whether at the international, regional or national level.

COP26 in Glasgow marked a significant step in the implementation of Article 6 as State parties finally agreed to overarching rules governing offsets and cross-border cooperation.⁶⁵ However, one aspect was noticeably missing from the rulebook. Human rights.⁶⁶ The term ‘human rights’ was only mentioned once within the decision, merely stating that the Supervisory Body of the Article 6(4) mechanism shall establish the requirements and processes in relation to the eleventh preambular paragraph of the Paris Agreement.⁶⁷ The obligation to ensure respect for human rights, especially the rights of indigenous peoples, are excluded from crucial aspects of the mechanism, such as provisions regulating its design, requirements for authorisation and monitoring process.

COP27 presented an invaluable opportunity for negotiators to correct course and ensure the comprehensive integration of human rights principles into the Article 6(4) rulebook. Unfortunately, very little to no progress was made to achieve that. Recommendations submitted by the Supervisory Body failed to establish baseline human rights safeguards for carbon offsetting projects, leaving the enforcement of environmental and social protection laws as the national prerogative of the host State.⁶⁸ As we have seen with the case study of the Sengwer people, the lack of enforceable legal safeguards can enable governments to systemically violate the rights of indigenous peoples. The final decision by COP27 rejected the recommendations and sent them back to the Supervisory Body for further review.⁶⁹ Little hope is expected from

⁶² Parola (n 44) 573.

⁶³ Paris Agreement (adopted 12 December 2015) art 6.

⁶⁴ Paris Agreement, art 6(4).

⁶⁵ UNFCCC, ‘COP26 Reaches Consensus on Key Actions to Address Climate Change’ (13 November 2021) <<https://unfccc.int/news/cop26-reaches-consensus-on-key-actions-to-address-climate-change>> accessed 24 December 2022.

⁶⁶ Center for International Environmental Law, ‘Latest COP26 Draft Text Failing on Human Rights’ (12 November 2021) <<https://www.ciel.org/news/latest-cop26-draft-text-failing-on-human-rights/>> accessed 27 December 2022.

⁶⁷ Rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement (8 March 2022) UN Doc FCCC/PA/CMA/2021/10/Add.1, para 24(a)(9).

⁶⁸ Human Rights Watch, ‘COP27: Governments Should Reject Weak Carbon Market Rules’ (14 November 2022) <<https://www.hrw.org/news/2022/11/14/cop27-governments-should-reject-weak-carbon-market-rules>> accessed 27 December 2022.

⁶⁹ UNFCCC, ‘Guidance on the mechanism established by Article 6, paragraph 4, of the Paris Agreement’ (2022) Draft decision -/CMA.4, <https://unfccc.int/sites/default/files/resource/cma4_auv_14_PA6.4.pdf> para 9.

this ‘do-over’, considering that the body entrusted with reformulating the recommendations is the Supervisory Body again.⁷⁰ Moreover, the text of the decision makes no impact to persuade the Supervisory Body to align their recommendations with international human rights standards and respect for human dignity.

The Kunming-Montreal Global Biodiversity Framework (GBF) should serve as valuable inspiration for the Article 6 Mechanism rulebook and other proposed carbon market schemes, both at the national and international level. The GBF, adopted at the at the Fifteenth meeting of the Conference of Parties on the Convention of Biological Diversity, contains four goals and 23 action-oriented targets to preserve biodiversity.⁷¹ Although the GBF does not mention human dignity, the entire framework is grounded by human rights principles and respect for the rights of indigenous peoples. The preamble of the GBF emphasises the importance of enabling the right to participation in environmental decision-making and reaffirms the obligation of State parties to ‘ensure that the rights of indigenous peoples and local communities are respected and given effect to in the implementation of the Kunming-Montreal global biodiversity framework.’⁷² This human-rights based approach to conservation is further reflected in the targets established by the GBF. For example, Target 3 on reducing threats to biodiversity aims to:

Ensure and enable that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are *effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories* [...] ⁷³

Using the GBF as a model to guide the design of the Article 6(4) mechanism, States parties should agree on a rulebook which incorporates human rights standards and ensures respect for the rights of indigenous peoples over their lands. This means that any decision adopted over the design and implementation of the Article 6(4) mechanism must:

- a) Make explicit mention of the link between climate change and human rights, such as reaffirming the right to a clean, healthy and sustainable environment;
- b) Ensure respect for the rights of indigenous peoples. This includes, *inter alia*, requiring host States to provide indigenous peoples with legal recognition over their lands and respecting the right to FPIC; and
- c) Establish an effective grievance mechanism.

⁷⁰ Center for International Environmental Law, ‘Center for International Environmental Law Staff Respond to COP27 Developments’ (19 November 2022) <<https://www.ciel.org/news/center-for-international-environmental-law-staff-respond-to-cop27-developments/>> accessed 31 December 2022.

⁷¹ Latoya Abulu and Sahana Ghosh, ‘Nations adopt Kunming-Montreal Global Biodiversity Framework’ (*Mongabay*, 20 December 2022) <<https://news.mongabay.com/2022/12/nations-adopt-kunming-montreal-global-biodiversity-framework/>> accessed 22 December 2022.

⁷² Kunming-Montreal Global biodiversity framework (18 December 2022) UN Doc CBD/COP/15/L.25, p 2.

⁷³ *ibid*, p 9 (emphasis added).

V. CONCLUSION

While carbon markets may be a useful tool for countries and corporations to meet their climate targets, the current lack of comprehensive human rights safeguards enable human rights violations in the implementation of climate mitigation projects. Indigenous peoples which have depended on their lands for thousands of years are particularly affected by these projects. Despite mounting evidence that indigenous peoples as custodians of their lands are most effective at conserving forests to act as carbon sinks, governments and investors have failed to respect their rights. Reducing forests as commodities to be traded, without recognising and respecting the traditional values of the indigenous peoples who have inhabited the land for generations, fails to treat them in accordance with the principle of human dignity.

Moving forward, human rights standards must be integrated within the design and implementation of existing and future carbon market mechanisms. Falling short of achieving this will only heighten the risk of land grabbing and systemic violations of indigenous rights, jeopardising the effectiveness of carbon markets as tools to mitigate climate change. Real climate ambition may only be achieved by respecting the inherent dignity of indigenous peoples and giving them a seat at the table.