



Human Rights Law Clinic Papers 2022

In the Name of “Climate Change”: Human Rights Violations in Carbon Offsetting Projects

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ii - List of Legal Instruments

Cancún Climate Conference (COP16) Decision

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French Law on Duty of Vigilance (LOI no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre)

German Supply Chain Act (Lieferkettensorgfaltspflichtengesetz)

Glasgow Climate Conference (COP26) Decision

International Covenant on Civil and Political Rights

International Covenant on Economic, Social, and Cultural Rights

Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises

The Canada Not-for-Profit Corporations Act

The Paris Agreement

Third Draft of the UN Treaty on Business and Human Rights

United Nations Declaration on the Rights of Indigenous Peoples

United Nations Guiding Principles on Business and Human Rights

US Alien Tort Statute 28 USC § 1350

iii - List of Abbreviations

COP16	Cancún Climate Conference
COP26	Glasgow Climate Conference
EU	European Union
FPIC	Free, Prior, and Informed Consent
HRDD	Human Rights Due Diligence
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PA	Protected Area
REDD+ Framework	Reducing Emissions from Deforestation and Forest Degradation
UDHR	Universal Declaration of Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles for Business and Human Rights
WWF	World Wide Fund for Nature

1. Introduction and Background

Land and wildlife conservation projects have devastated and tormented the lives of indigenous peoples. With the support of governments in the Global South, Western conservation NGOs create protected areas (PAs) in natural areas that forcibly remove indigenous peoples from ancestral land where they have lived for generations. Once evicted, they face harassment from park rangers who will beat, torture, and murder anyone who steps back onto the land where they once were able to hunt freely, gather medicinal plants, and visit sacred sites.¹ Through their actions, conservation NGOs view tribal peoples as a nuisance, a threat to their own self-fulfilled motives and goals – reflecting a type of neo-colonial practice that values certain human beings (i.e. Western) over others.² Park rangers are often government employees, or army personnel.³ Conservation NGOs, such as the World Wide Fund for Nature (WWF), whilst not directly responsible for employing park rangers, have offered continued support by providing equipment and training to them.⁴ This type of backing demonstrates a clear involvement with the park rangers who violate human rights on PAs.

Conservation NGOs can gain funding through donations from individuals, philanthropists, corporations, and governments. Now in the context of the climate crisis, another way they can raise funds is by selling nature-based carbon credits from PAs they manage. The worry is that this new avenue of income will increase appetite for more protected areas, thus proliferating future human rights violations. In terms of value, a study by the International Emissions Trading Association and the University of Maryland forecasts that additional financing from carbon markets could exceed \$1

¹ Report of the Independent Panel of Experts, 'Embedding Human Rights in Nature Conservation: From Intent to Action' (WWF, 17 November 2020) 1 (hereinafter WWF Independent Report).

² Lara Domínguez and Colin Luoma, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 Land 1, 1.

³ For example, in Chitwan National Park in Nepal. See WWF Independent Report 8.

⁴ For example, in Dzanga Sangha Protected Area in the Central African Republic. See WWF Independent Report 6.

trillion (USD) by 2050.⁵ Needless to say, such estimates create extremely nerve-racking prospects for indigenous peoples – especially when this is coupled with targets to convert at least 30 percent of the globe into protected areas.⁶

This memorandum therefore deems it imperative to cut funding to conservation NGOs by lobbying governments and campaigning against the sale and purchase of carbon credits from PAs with reported human rights abuses.⁷ There are two key questions: (1) to what extent are conservation NGOs liable for the human rights abuses committed by the park rangers; and (2) to what extent could the markets and buyers of these nature-based carbon credits also be liable for the human rights abuses perpetrated? In addition to these two main questions, the human rights obligations of States when regulating the carbon credit trade shall also be outlined to provide Survival with material that they can use to lobby Western governments. To answer these questions, the memorandum shall focus on binding (i.e. enforceable) and non-binding (i.e. non-enforceable) legal doctrines and instruments.

1.1. Executive Summary

This memorandum makes four key findings: (1) Canada has allowed domestic tort claims for violations of human rights protected under customary international law – specifically, the use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.⁸ This means that Survival could sue a Canadian conservation NGO for violations of human rights against indigenous peoples within protected areas abroad, as long as the NGO had effective and operative control over the harms inflicted. (2) France and Germany have already enacted their own domestic

⁵ International Emissions Trading Association, 'Article 6 Can Generate up to \$1 Trillion a Year of Financial Flows to Achieve Paris Goals, Study Shows' (*IETA*, 26 October 2021) <<https://www.ieta.org/page-18192/11967121>> accessed 13 May 2022.

⁶ Minority Rights Group International, Rainforest Foundation UK, and Survival International, 'NGO concerns over the proposed 30% target for protected areas and absence of safeguards for Indigenous Peoples and local communities' (*Survival International*, 20 April 2021) <<https://assets.survivalinternational.org/documents/1972/en-fr-es-it-de-200928.pdf>> accessed 13 May 2022.

⁷ Survival International, 'The Big Green Lie' (*Survival International*) <<https://www.survivalinternational.org/campaigns/biggreenlie>> accessed 13 May 2022.

⁸ *Nevsun Resources Ltd v Araya* [2020] SCC 5 [20] (*Nevsun*).

human rights due diligence (HRDD) laws,⁹ and since the publication of its proposed HRDD law in February 2022, the European Union (EU) is potentially soon to follow.¹⁰ For Survival, this means that NGOs, markets, and buyers of carbon credits can be penalised if it is found that they have failed to exercise proper HRDD within their carbon credit related operations. (3) There exists a rich variety of non-binding human rights instruments that set out guidelines for NGOs and businesses to follow, the Reducing Emissions from Deforestation and Forest Degradation (REDD+) framework in particular, provides specific safeguards for forest-based carbon credit activities.¹¹ This means that Survival has a useful set of documents at its disposal from which it can lobby Western governments to cut funding to conservation NGOs that are violating the rights of indigenous peoples. (4) There is currently a gap in enforceability within international law with no binding treaty on the human rights obligations of NGOs and businesses. However, there is a developing draft UN Treaty on Business and Human Rights. This means there are positive steps being taken to address this gap at the international level, and Survival should attempt to persuade drafters to include State obligations for extraterritorial violations inflicted upon indigenous peoples by NGOs and businesses, and subsequently advocate for its adoption and ratification when it becomes open for signature.

2. Liability for Human Rights Abuses Occurring in Protected Areas

This chapter shall discuss both binding and non-binding legal frameworks that could be used to attach liability to conservation NGOs and businesses for the human rights abuses inflicted on indigenous peoples by park rangers in PAs. Conservation NGOs have been singled out within the first part on binding liability, because they are more

⁹ LOI no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (hereinafter French Duty of Vigilance Law); Lieferkettensorgfaltspflichtengesetz (hereinafter German Supply Chain Act).

¹⁰ European Commission, Proposal for a Directive of the European Parliament of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022)<https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf> accessed 13 May 2022.

¹¹ United Nations Framework Convention on Climate Change (UNFCCC), Reducing Emissions from Deforestation and Forest Degradation (REDD+) Framework <<https://redd.unfccc.int/>> accessed 13 May 2022.

closely connected to the human rights abuses being perpetrated in PAs. Markets and buyers of carbon credits on the other hand are not because whilst they are still involved, they are further removed from the direct harms. The next chapter, however, shall include *all* actors in the carbon credit system, discussing how they could be liable for failure to exercise adequate HRDD.

The first part of this chapter shall focus on a binding legal doctrine that could attach liability to a conservation NGO for the human rights abuses themselves – specifically domestic tort claims for violations of international law existing in Canada and the US. Most of the jurisprudence in this area involves multinational enterprises, not NGOs. However, it is important to establish that most, if not all, NGOs have legal personality, meaning they can be sued under domestic law in the country they are registered. In Canada, for example, NGOs are subject to the same law as any natural person or enterprise, meaning they can be brought within the ambit of a domestic tort claim for a violation of human rights.¹² In sum, Canada currently offers greater prospects of success, whereas the US does not.

The second part will outline three human rights frameworks that place non-binding human rights duties on conservation NGOs and businesses. All three were made under the United Nations (UN) – they are REDD+, the UN Guiding Principles on Business and Human Rights (UNGPs),¹³ and the Universal Declaration of Human Rights (UDHR).¹⁴ These frameworks provide useful safeguards and principles that Survival can use in the course of their lobbying and campaigns against carbon credits from PAs.

2.1. Binding Law: Domestic Tort Claims Against Conservation NGOs in Canada and the US

In 2020 the Supreme Court of Canada handed down a landmark judgment that opens up the possibility for Canadian courts to hear domestic tort claims for violations of

¹² The Canada Not-for-Profit Corporations Act.

¹³ Guiding Principles on Business and Human Rights (UN Office of the High Commissioner for Human Rights 2011) (UNGPs).

¹⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

human rights protected under customary international law. The case was brought by Eritrean workers who alleged that they were punished, brutally beaten, and subjected to forced labour at the Bisha Mine in Eritrea – 60 percent owned by the Canadian company, Nevsun Resources.¹⁵ One of the most disturbing punishments carried out by the staff at the mine consisted of tying the workers' arms together behind the back, and the feet together at the ankles, and being left in the hot sun for an hour. After two appeals by Nevsun questioning the issue of jurisdiction, the Court decided that the case could be heard in Canada since the act of state doctrine – which means that a court will not inquire into the legality of acts conducted within a foreign state – is not part of Canadian law.¹⁶ However, the case was never heard on its merits or facts, since the parties eventually settled out of court for an undisclosed but significant amount. This means that *Nevsun* provides us with no exact guidance as to how Canadian judges are to interpret and test these novel types of claims for violations of human rights.

What we do know, however, are the grounds on which the judge at first instance accepted the Eritrean workers' claim. The judge at first instance based his decision on the fact that Nevsun exercised effective control over the Bisha Mine since it controlled a majority on the board, and its CEO was its Chair.¹⁷ The judge also noted the existence of operational control since Nevsun was involved in all aspects of the Bisha Mine operations, including exploration, development, extraction, processing and reclamation.¹⁸ The judge's findings made the Eritrean workers' case admissible and gave it prospects of success. In terms of human rights protected under customary international law, those recognised by the Court were the prohibition against forced labour; the prohibition against slavery; and the prohibition against cruel, inhuman, and degrading treatment.¹⁹ The Court recognised these rights as *jus cogens* norms – this means they cannot be derogated from.

¹⁵ *Nevsun* [11].

¹⁶ *ibid* [44].

¹⁷ *ibid* [17].

¹⁸ *ibid*.

¹⁹ *ibid* [101], [102], and [103].

For Survival, the first thing to establish is which of the protected human rights listed above would best fit the abuses occurring on the PAs, and would therefore engage a claim under Canadian law. The prohibition against torture or cruel, inhuman, and degrading treatment is the most appropriate since it corresponds to some of the most common types of abuse inflicted on indigenous peoples on PAs – specifically harassment, beatings, and torture.²⁰ Then, following the findings of the judge at first instance, Survival would have to establish and prove that an NGO based in Canada had both *effective* and *operative* control over the park rangers where the human rights abuses occurred. Effective control might be established through an NGO's managerial influence, or decision-making roles, such as deciding who shall be in charge of the park rangers, or deciding who shall be appointed as the director of a PA.²¹ Operative control, on the other hand, may be proven through an NGO managing the logistics, financing, equipment and training needs of park rangers.²² If, and once this is established, a lawsuit could be filed against a Canadian conservation NGO for violations of human rights occurring on PAs. It remains to be seen, however, how a judge would interpret the facts and ultimately determine a case of this kind, since *Nevsun* was never heard on its merits. Here, it is important to note that Survival would not be able to sue, for example, the main WWF headquarters in Switzerland via its Canada branch.

Around the same time that Canada opened its door to transnational human rights litigation, the US slammed its closed. Whilst the Alien Tort Statute (ATS)²³ in the US had previously been tested as a potential route for attaching liability to corporations

²⁰ These abuses have been reported in the Congo Basin against the Baka and Bayaka peoples. See Survival International, 'How will we survive? The destruction of Congo Basin tribes in the name of conservation' (Survival International 2017) 1.

²¹ For example, in Salonga National Park in the Democratic Republic of Congo, WWF appointed the park director. See WWF Independent Panel of Experts Report 5.

²² For example, in Dzanga Sangha Protected Area in Central African Republic, WWF manages the logistics, financing and training needs of park rangers. See WWF Independent Panel of Experts Report 6.

²³ Alien Tort Statute 28 USC § 1350.

for human rights violations abroad,²⁴ this no longer is an option. In *Nestlé v Doe*,²⁵ the US Supreme Court narrowed the scope even further for foreign nationals to file tort claims under the ATS for violations of international law. The facts involved individuals from West Africa who claimed that Nestlé aided and abetted child slavery by partnering with and purchasing cocoa from, the farms where human rights abuses occurred. The individuals argued that Nestlé, which had provided training, fertilizer, tools, and cash to the farms that allegedly enslaved the plaintiffs, ‘knew or should have known’ that the farms exploited enslaved children.²⁶ They argued that as Nestlé nevertheless continued to provide the farms with resources and did not use their economic leverage over the farms to eliminate child slavery, they should be held accountable for the modern slavery that allegedly took place. However, despite this, the Court decided that Nestlé’s corporate decision-making and the allegations of child slavery did not draw a ‘sufficient connection’ to sustain ATS jurisdiction.²⁷ For Survival, the outcome in *Nestlé* means it is very difficult to attach liability to corporations, let alone NGOs, for human rights abuses they are involved in abroad. For those reasons, Survival should not pursue litigation against US based conservation NGOs since the chances of success are extremely limited.

2.2. Non-Binding Frameworks: REDD+, UNGPs, and UDHR

Whilst there exists few options in domestic law to attach binding liability to conservation NGOs for human rights abuses occurring on PAs, there still remains a rich body of non-binding duties that are placed upon them. This part of the chapter shall describe and discuss three relevant frameworks that could apply to NGOs and also businesses – REDD+, the UNGPs, and the UDHR.

Most forest-based carbon credits follow the REDD+ framework, created by the United Nations Framework Convention on Climate Change (UNFCCC) to guide activities that reduce emissions from deforestation and forest degradation, as well as

²⁴ *Kiobel v Royal Dutch Petroleum Co* [2013] 569 S Ct 108.

²⁵ *Nestlé USA Inc v Doe* [2021] 141 S Ct 1931 (*Nestlé*).

²⁶ *Ibid*, Opinion of the Court at page 2.

²⁷ *Ibid*, Opinion of Thomas J at page 5.

the sustainable management of forests and the conservation and enhancement of forest carbon stocks in developing countries.²⁸ The REDD+ framework explicitly imposes safeguards that should be adhered to when developing carbon credits within forests. The most relevant safeguard in relation to the rights of indigenous peoples states:

3. Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples²⁹

This means that all REDD+ carbon credit activities must, in order to be legitimate, respect the rights of indigenous peoples, in particular the principle of free, prior and informed consent (FPIC). Those involved in the development of REDD+ credits should be aware of FPIC and its normative value as a principle of international law.³⁰ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) should also be used as a framework to guide activities. Research has found that REDD+ credits are mainly being sold and verified in the US (see annex).³¹ Of great relevance is that major corporations such as Amazon, Unilever, Airbnb, and Nestlé, as part of the Lowering Emissions by Accelerating Forest finance (LEAF) coalition,³² have pledged

²⁸ United Nations Framework Convention on Climate Change (UNFCCC), 'What is REDD+?' (UNFCCC) <<https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd>> accessed 13 May 2022.

²⁹ UNFCCC, 'Safeguards' (UNFCCC) <<https://redd.unfccc.int/fact-sheets/safeguards.html>> accessed 13 May 2022.

³⁰ UN High Commissioner for Human Rights, 'Free, Prior and Informed Consent of Indigenous Peoples' (September 2013) <<https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>> accessed 13 May 2022.

³¹ These companies are Xpansiv; VERRA; REDD.plus; and Architecture for REDD+ Transactions.

³² The LEAF Coalition <<https://www.leafcoalition.org/>> accessed 13 May 2022.

\$1 billion of investment into REDD+ projects,³³ using the company Architecture for REDD+ Transactions to issue and verify the credits.³⁴ These projects will involve the signing of contracts or other arrangements between conservation NGOs, markets, verifiers, and other stakeholders. For Survival, this means that if any REDD+ project was found to be produced from a PA where the rights of indigenous peoples had been abused, or there was a situation where FPIC was disregarded or ignored, such contracts or arrangements can be considered illegal.³⁵

The next non-binding framework that shall be discussed is the UNGPs. This framework could very comfortably apply to conservation NGOs for the violations of human rights occurring on PAs, and also for markets who are involved in facilitating the sale and purchase of forest-based credits. Although the UNGPs are not legally binding, they provide valuable guidance for the implementation of human rights commitments. Whilst made with businesses in mind, they also apply to NGOs.³⁶ The key principle to be drawn from the UNGPs is that NGOs and businesses should avoid impacting the human rights of others and address adverse human rights impacts with which they are involved.³⁷ Guiding Principle 13 stipulates that conservation NGOs are required to:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

³³ Aurora Solá and Rhett A Butler, 'Governments, companies pledge \$1 billion for tropical forests' (*MONGABAY*, 23 April 2021) <<https://news.mongabay.com/2021/04/governments-companies-pledge-1-billion-for-tropical-forests/>> accessed 13 May 2022.

³⁴ Architecture for REDD+ Transactions <<https://www.artredd.org/>> accessed 13 May 2022.

³⁵ Beatriz Garcia and others, 'REDD+ and forest protection on indigenous lands in the Amazon' (2021) 30 *Review of European, Comparative & International Environmental Law* 207, 215.

³⁶ This was confirmed by Judge Navi Pillay, Professor John H Knox and Dr Kathy MacKinnon. See WWF Independent Panel of Experts Report 3.

³⁷ UNGP Guiding Principle 11.

Survival can use these principles as a guide from which to contrast the actual practices of conservation NGOs. For example, conservation NGOs such as WWF, by funding and equipping park rangers who murder, rape, and beat indigenous peoples in PAs,³⁸ could fall foul of Guiding Principle 13 by not seeking to prevent human rights impacts that are linked to their operations, '*even if they have not contributed to those impacts*'.

The responsibility of NGOs and businesses, to uphold human rights standards can also be found within the first and most influential document within international human rights law – the UDHR. This responsibility is found within the preamble of the UDHR. It states:

The General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all peoples and all nations, to the end that every individual and every *organ of society*, keeping this Declaration constantly in mind, shall strive... to promote respect for these rights and freedoms.³⁹

The phrase, '*organ of society*', can be interpreted to encompass businesses and NGOs because they provide services and perform functions beneficial to society. For Survival, the UDHR can be a useful tool to acknowledge the duty conservation NGOs have to promote respect for human rights. The UDHR holds great weight, not least because of its foundational history and universal reputation. It can, therefore, be a useful tool to lobby Western governments to cut funding and support to conservation NGOs that are involved in human rights abuses.

3. Liability for Failure to Exercise Human Rights Due Diligence

Human rights due diligence (HRDD) laws require companies to take effective measures to identify risks within their supply chains and prevent severe impacts on human rights. They are currently blossoming in Europe, unlike North America.

³⁸ This was reported in Salonga National Park in the Democratic Republic of Congo. See WWF Independent Panel of Experts Report 5.

³⁹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (emphasis added).

Whereas the domestic tort claims mentioned above, require an effective, and operative connection to the harms perpetrated, HRDD laws do not. They are laws specifically designed to pressurise companies, by way of sanctions and fines, into making their supply chains compliant with human rights norms. This memorandum, therefore, proposes that HRDD laws could attach liability not only to NGOs, but also to markets and buyers of carbon credits. Markets could be liable for failing to take proper measures to identify the human rights abuses attached to a forest-based carbon credit that they are verifying or advertising on their platforms. Companies that purchase these carbon credits could also be liable for failing to adequately check that they are human rights compliant. It is important to note, however, that it is extremely difficult across all jurisdictions to establish where the carbon credits are coming from, if they are attached to human rights abuses, and in particular who is buying them – this is due to the non-transparent nature of the carbon credit market system.⁴⁰

The first part of this chapter shall describe the current binding French, incoming German (taking effect on 1 January 2023), and recently published draft EU law. In terms of potential, the draft EU law offers the greatest prospects of attaching liability, but that is of course if it successfully passes through in its current state. The second part of this chapter shall describe the non-binding HRDD frameworks that exist under the UNGPs and OECD Guidelines for Multinational Enterprises (OECD Guidelines), ultimately discussing how they are useful for Survival when lobbying against NGOs and businesses involved in the development of forest-based carbon credits that are linked to human rights abuses in PAs.

3.1. Binding Law: France, Germany, and the European Union

In 2017, France became the first country to implement HRDD laws into their own domestic legal system. The French Duty of Vigilance Law imposes obligations on French businesses with over 5,000 employees. This means that, due to their smaller

⁴⁰ VERRA does provide access to some of its internal sales documents, however, these documents are heavily redacted and difficult to understand where a carbon credit is coming from, what type it is, and especially who is buying it.

employee size, the law will not apply to French conservation NGOs, or markets,⁴¹ but rather buyers of carbon credits. The law imposes an obligation on businesses to establish effective measures through the publication of an annual vigilance plan. The plan must identify risks and prevent severe impacts on human rights resulting from: (a) the companies own activities; (b) the activities of its subsidiaries it controls indirectly; and (c) its subcontractors and suppliers with whom the company does business with.⁴² A judge can order the company to pay a fine of €10 million for failing to exercise HRDD, basing the amount on the seriousness of the negligence, and the circumstances in which it was committed.⁴³ The most relevant measure that companies buying carbon credits could potentially fall foul of is by failing to identify and seek to prevent human rights impacts through *'its suppliers with whom the company does business with.'* If a company is buying carbon credits to achieve net-zero, then that is a business practice. A carbon credit seller can be deemed to be a supplier with whom a company does business with. For Survival, therefore, this means that large French companies with over 5,000 employees that are buying carbon credits must ensure that those credits are human rights compliant. Failing to do so could result in a fine of up to €10 million.

Binding HRDD frameworks now similarly exist in Germany. The German Supply Chain Act passed in June 2021 but will not come into force until January 2023. This new legislation is aimed at forcing large corporations to adhere to human rights standards in their entire supply chain. The scope of the law encompasses any company that has their central administration, principal place of business, administrative headquarters or simply a domestic branch in Germany.⁴⁴ The law in its first year will apply to companies with more than 3,000 employees, and then reduce to 1,000 employees the following year. Research has not identified a German conservation NGO that fits into this employee bracket. It could, however, cover the

⁴¹ We believe the largest carbon credit market company in France is Climate Seed, however, we are not certain how many employees they have. See Climate Seed <<https://climateseed.com/>> accessed 6 April 2022.

⁴² The French Duty of Vigilance Law, Article 1.

⁴³ *ibid.*

⁴⁴ German Supply Chain Act, Section 1(1).

largest carbon credit market in Europe, which is a German company called EEX.⁴⁵ Our research has also found that the German development bank KfW has funded the African Wildlife Trust,⁴⁶ a conservation NGO that manages Campo Ma'an, which is a PA with reported human rights abuses.⁴⁷ As KfW's principal place of business resides in Germany and has over 7,300 employees,⁴⁸ this memorandum believes that KfW could potentially breach HRDD laws when they come into force if human rights abuses are still currently taking place.

The exact HRDD obligations are set out in section three of the Act – they include establishing a risk assessment management system, employing a human rights officer, and performing regular human rights risk assessments. Senior management must seek information from the human rights officer about their work at least once a year.⁴⁹ The law obliges companies to fulfil their due diligence obligations in their supply chains in a manner that respects internationally recognised human rights and certain environmental standards.⁵⁰ According to the law, the supply chain refers to all products and services, starting from the extraction of raw materials to the delivery of those goods or services to the end user. Fines can range from €100,000 to €800,000 for the most severe violations. Alternatively, if the average annual turnover of a company exceeds €400 million euros, then the €800,000 fine is replaced by a fine of up to two percent of the average annual turnover.

Survival should pay attention to the developments of the carbon credit market company EEX, in particular if they are selling forest-based carbon credits that could be linked to human rights abuses in PAs. From January 2023, EEX will be required to

⁴⁵ EEX is launching its own voluntary carbon market services in 2022. It is a subsidiary of Deutsche Börse Group which has 6,775 employees. EEX itself employs 764 people.

⁴⁶ African Wildlife Foundation, 'KfW Visits Campo Ma'an Landscape in Cameroon' (*African Wildlife Foundation*, 26 February 2022) <<https://www.awf.org/pressroom/kfw-visits-campo-maan-landscape-cameroon>> accessed 13 May 2022.

⁴⁷ Rainforest Foundation UK, 'Mapping For Rights' <<http://rainforestparksandpeople.org/#openModal>> accessed 13 May 2022.

⁴⁸ KfW Bank, 'About KfW' <<https://www.kfw.de/About-KfW/>> accessed 13 May 2022.

⁴⁹ German Supply Chain Act Section 4(3).

⁵⁰ These include the International Labour Organisation's (ILO) conventions, the ICCPR, and the ICESCR.

identify any potential human rights abuses linked to the carbon credits that they are advertising on their platform. They shall also be required to employ a designated human rights officer whose duty it will be to check that carbon credits are human rights compliant. Failing to comply with the HRDD obligations can result in a fine. While this law is a positive development, it does not come without its drawbacks. One concern is that whilst a company can receive bad press for failure to exercise HRDD, fines issued could simply be absorbed by companies, and merely be seen as a business cost that does nothing to materially change a company's behaviour.

The anticipated draft EU Due Diligence Law would apply in all EU Member States, therefore, setting new additional standards in France and Germany. It is the most promising of the three frameworks because of its lower employee threshold. Two types of EU companies are covered: (a) those with more than 500 employees and an annual turnover in excess of €150 million; and (b) those with more than 250 employees and an annual turnover in excess of €40 million where at least half of that turnover is generated from high-impact sectors – such as textiles, agriculture and mineral extraction (this applies after two years of adoption). The draft law provides that organisations must identify – and then cease or mitigate – the potential and actual human rights impacts of their operations, subsidiaries and business relationships. Duties include integrating due diligence into policies, establishing and maintaining a complaints procedure, and publicly communicating on due diligence.⁵¹ Each Member State government will be responsible for setting the amount for fines in case of non-compliance. Victims will also have the opportunity to take legal action for damages that could have been avoided with appropriate due diligence measures. In contrast to the French and German laws, directors of EU companies must also take into account

⁵¹ European Commission, 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (*European Commission*, 23 February 2022)
<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 13 May 2022.

human rights when fulfilling their decision-making duties,⁵² failure of which could lead to breaches of their director's duties.⁵³

It is up to member states whether the draft EU law would apply to NGOs, since the EU has not traditionally interfered in the regulation and governance of charitable organisations.⁵⁴ French law suggests that NGOs would be covered by the law as it provides that they possess legal personality just like any profit-making company.⁵⁵ The same also applies in Germany where the law stipulates that non-profit organisations have legal personality,⁵⁶ meaning as long as they meet the employee threshold, NGOs will be subject to the draft EU law. Furthermore, the UNGPs provided inspiration for the draft EU law, and whilst they are not legally binding, they do give valuable guidance. Of greatest relevance is that former UN Special Rapporteur for the Environment and Human Rights, John Knox, has noted that although the UNGPs were originally drafted in the context of business enterprises, they also apply to non-state actors, such as NGOs and international conservation organisations.⁵⁷ This suggests that the draft EU law would also apply to NGOs.

Therefore, if the law is passed in its current state, conservation NGOs, markets, and buyers of carbon credits with over 500 employees based in a single EU Member State shall be required to carry out HRDD within their operations. Survival should take

⁵² Draft EU Due Diligence Law Article 25.

⁵³ Norton Rose Fulbright, 'European Commission tables long-awaited human rights and environment due diligence law' <<https://www.nortonrosefulbright.com/en-gb/knowledge/publications/5c62993b/european-commission-tables-long-awaited-human-rights-and-environment-due-diligence-law#2>> accessed 13 May 2022.

⁵⁴ Oonagh B Breen, 'EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society' (*International Center for Not-for-Profit Law*, June 2008) <<https://www.icnl.org/resources/research/ijnl/eu-regulation-of-charitable-organizations-the-politics-of-legally-enabling-civil-society>> accessed 13 May 2022.

⁵⁵ International Center for Not-for-Profit Law, 'Non-Profit Law in France' (*Council on Foundations*, January 2021) <<https://www.cof.org/content/nonprofit-law-france>> accessed 13 May 2022.

⁵⁶ Dr Andreas Richter and Dr Anna Katharina Gollan, 'Charitable Organizations in Germany: Overview' (*Thomson Reuters*, 1 March 2020) <[https://uk.practicallaw.thomsonreuters.com/3-632-5987?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-632-5987?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 13 May 2022.

⁵⁷ WWF Independent Panel of Experts Report 3.

advantage of the duty of organisations to publicly communicate on due diligence by asking NGOs, markets, and buyers how they are making sure that the carbon credits are not attached to human rights abuses. The potential breach of director's duties for failure to take into account human rights also offers Survival a good avenue to pressurise and question HRDD compliance at the highest level of these organisations.

3.2. Non-Binding Law: UNGPs and OECD Guidelines

The UNGPs was used as a source of inspiration for France and Germany when they drew up their own domestic HRDD frameworks. Due to its non-binding nature, the duties enshrined 'apply to *all* States and to *all* business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure,'⁵⁸ – meaning they apply to conservation NGOs, markets, and buyers of carbon credits. Guiding Principles 17 to 21 set out the due diligence process, which requires that businesses assess actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how these impacts are addressed.⁵⁹ Human rights risk assessments should be robust in nature and be initiated as soon as a business relationship is made.⁶⁰ The process to identify adverse human rights impacts should draw on human rights expertise and involve meaningful consultation with potentially affected groups.⁶¹ Furthermore, enterprises should employ the use of appropriate qualitative or quantitative indicators to track whether their human rights policies are being implemented effectively.⁶²

For Survival, this means that companies involved in the forest-based carbon credit system should have a robust set of guidelines from which they can build effective HRDD processes. Specifically, the duty to consult potentially affected groups is relevant and closely intertwined with the FPIC of indigenous peoples. Any clear lack of implementation of these HRDD guidelines, therefore, allows Survival to lobby

⁵⁸ UNGPs General Principles (Preamble).

⁵⁹ UNGPs Guiding Principle 17.

⁶⁰ UNGPs Guiding Principle 18.

⁶¹ UNGPs Guiding Principle 19.

⁶² UNGPs Guiding Principle 22.

governments for their proper implementation. Additionally, Survival can campaign against those companies that are willfully ignorant of them.

The other key non-binding HRDD framework is the OECD Guidelines for Multinational Enterprises. The OECD works to establish evidence-based international standards and find solutions to a range of social, economic, and environmental challenges. The OECD Guidelines were drafted in response to companies' failing human rights records. Much like the UNGPs above, the OECD Guidelines are non-binding but have normative value in the business sector.⁶³ Section 4 of the OECD Guidelines focuses on HRDD duties specifically. These duties ultimately follow the same standards outlined in the UNGPs above.⁶⁴ However, the OECD Guidelines also highlight the important need for enterprises to consider additional standards and recognise the unique vulnerability of indigenous peoples. It states:

...enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples⁶⁵

This excerpt is particularly relevant to Survival as it places an added emphasis on enterprises to recognise the need to identify and pay particular attention to the rights of indigenous peoples. It is a useful piece of non-binding law with which to remind those involved in the development of forest-based carbon credits to consult indigenous communities. It can also be used to persuade governments to cut funding to conservation NGOs that fall foul of doing that.

⁶³ John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) *The Brown Journal of World Affairs* 99, 121.

⁶⁴ OECD Guidelines 20.

⁶⁵ OECD Guidelines Section 4 at para 40.

4. Human Rights Obligations of Western States

In this section, the human rights obligations of Western States in relation to the regulation of carbon credit markets shall be described. Whilst most of the human rights abuses inflicted on indigenous peoples occur in the Global South, the flow of income that is directed to the perpetrators of these harms (i.e. conservation NGOs) originates overwhelmingly from the Global North. Our focus is on Western States, taking into consideration the extraterritorial nature of the harms that affect indigenous peoples.

4.1. Current Obligations: The Paris Agreement and COP

Every single Western State has ratified the Paris Agreement, a legally binding international treaty on climate change that sets out within Article 6 the 'rulebook' for trading carbon credits.⁶⁶ The preamble of the treaty outlines the intentions, motivations and considerations of the drafters.⁶⁷ Whilst the preamble does not directly give rise to enforceable rights and obligations, opposed to the main articles of the treaty, it may however influence the interpretation of the treaty within a Court. The preamble of the Paris Agreement expressly sets out that States, when addressing climate change, must respect the rights of indigenous peoples. It states:

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...⁶⁸

Western States, therefore, when taking action towards addressing climate change, should respect the rights of indigenous peoples – meaning they should not, at the very

⁶⁶ Paris Agreement Article 6.

⁶⁷ Makane Moïse Mbengue, 'Preamble' (*Oxford Public International Law*, September 2006) <[⁶⁸ Paris Agreement, eleventh preambular paragraph.](https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456#:~:text=A%20treaty's%20preamble%20defines%2C%20in,'Conscious%20of'%2C%20etc.> accessed 13 May 2022.</p></div><div data-bbox=)

least, fund and aid carbon trading projects that ignore the FPIC of indigenous peoples. For Survival, the preamble to the Paris Agreement is also a useful tool to persuade Western governments to create domestic laws that force conservation NGOs and other businesses involved to respect the rights of indigenous peoples when developing forest-based carbon credits.

The UN celebrated the Glasgow Climate Agreement (COP26) for its direct and unprecedented engagement between indigenous peoples, local communities and governments.⁶⁹ The agreement produced a duty on States to acknowledge and recognise the important role of indigenous peoples in effective action on climate change. It states:

66. *Emphasizes* the important role of indigenous peoples' and local communities' culture and knowledge in effective action on climate change, and urges Parties to actively involve indigenous peoples and local communities in designing and implementing climate action and to engage with the second three-year workplan for implementing the functions of the Local Communities and Indigenous Peoples Platform, for 2022–2024⁷⁰

Whilst the word 'emphasizes' is not strictly an enabling clause, it can nevertheless add to the spirit of the text and could play an important role within a court. The Cancún Climate Agreement (COP16) equally emphasizes that States should, in all climate related acts, fully respect human rights.⁷¹

⁶⁹ UNFCCC, 'COP26 Strengthens Role of Indigenous Experts and Stewardship of Nature' (UNFCCC, 23 November 2021) <<https://unfccc.int/news/cop26-strengthens-role-of-indigenous-experts-and-stewardship-of-nature#:~:text=UN%20Climate%20Change%20News%2C%2023,Agreement%20commitments%20and%20reverse%20biodiversity>> accessed 13 May 2022.

⁷⁰ COP26 Agreement para 66.

⁷¹ COP16 Agreement para 8.

4.2. Emerging Obligations: Proposed Binding UN Treaty on Business and Human Rights

A framework of legally binding human rights standards for businesses is non-existent under international law. There is, however, a pending UN Treaty on Business and Human Rights that may reduce this shortcoming.⁷² The scope of this draft treaty is a potentially watershed moment for the enforcement of transnational business human rights standards. The draft treaty would, if ratified in its current condition, place upon States the positive obligation to follow the ‘protect, respect and remedy’ framework.⁷³ The framework rests upon three pillars: (1) the State duty to *protect* against human rights abuses by non-state actors; (2) the corporate responsibility to *respect* human rights and; (3) greater access by victims to an effective *remedy*, both judicial and non-judicial.⁷⁴ This means that States will be obligated to ensure that their domestic law provides for a comprehensive and adequate system of legal redress for victims of transnational corporate human rights abuses.⁷⁵ The treaty would be a legally binding instrument and therefore, far more effective for those attempting to gain restitution. States would also have to address the specific obstacles which women, vulnerable and marginalised people face in accessing judicial redress.⁷⁶

For Survival, this means that indigenous peoples that are acutely affected by human rights abuses in PAs would have to be given more generous assistance to access the justice system. It is important to highlight, however, that this treaty would

⁷² Third Draft of UN Treaty on Business and Human Rights. See UN Intergovernmental Working Group, ‘Third Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (*OHCHR*, 17 August 2021) <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 13 May 2022.

⁷³ Third Draft of UN Treaty on Business and Human Rights Article 2(2.1).

⁷⁴ UN Environment Plan Finance Initiative, ‘The UN Framework and Guiding Principles on Business and Human Rights’ (*UNEP Finance Initiative*) <<https://www.unepfi.org/humanrightstoolkit/framework.php#:~:text=The%20UN%20Framework%20and%20Guiding%20Principles%20on%20Business,diligence.%20...%204%20Implementing%20the%20Guiding%20Principles.%20>> accessed 13 May 2022.

⁷⁵ Third Draft of UN Treaty on Business and Human Rights Article 8 (8.1).

⁷⁶ Third Draft of UN Treaty on Business and Human Rights Article 7(1).

still be subject to ratification by States. This means if it is seen as too radical or progressive, then Western States can simply avoid being bound by it, therefore hindering the effective implementation of the norms. Despite this, this memorandum believes that Survival should lobby for the implementation of the draft in its current form, as well as persuading drafters to include specific protections for indigenous peoples.

5. Recommendations

1. Independent panel of experts to review the impact of forest-based carbon credits, in particular REDD+ credits, on human rights.
2. Article 6 of the Paris Agreement (i.e. the carbon credit rulebook) to expressly stipulate that carbon credit activities must respect the rights of indigenous peoples.
3. (a) NGOs to be expressly included within the ambit of the UN Treaty on Business and Human Rights.

(b) The UN Treaty on Business and Human Rights to include State obligations to prevent actors within the State committing extraterritorial violations of indigenous peoples' human rights.

6. Conclusion

In conclusion, this memorandum recognises a disappointing gap in enforceability for human rights abuses occurring on PAs that are attached to carbon credits. Despite this, there are ways, both binding and non-binding, to attach liability to the conservation NGOs, markets, and buyers of carbon credits. The first binding form of liability could be attached to a conservation NGO through a domestic tort claim within a Canadian court for the human rights abuses themselves. The second binding form of liability could be attached to conservation NGOs, markets, and buyers for failure to exercise HRDD requirements under French, German, and potentially EU law if and when it becomes adopted. There is also a rich body of non-binding legal frameworks

that Survival can refer to during the course of their lobbying and campaigns. In particular, the REDD+ framework offers strong safeguards for indigenous peoples. This memorandum finally reiterates the encouraging prospects that the draft UN Treaty on Business and Human Rights offers, and recommends that Survival advocates for the inclusion of protections for the rights of indigenous peoples within it.

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