

# MARGINS AND SIDELINES: THE MARGINALISATION OF INDIGENOUS PERSPECTIVES IN INTERNATIONAL CLIMATE GOVERNANCE

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## ABSTRACT

This article examines how and why Indigenous peoples' perspectives are marginalised in intergovernmental climate negotiations and allied legal instruments. It employs critical whiteness studies as an analytical lens and argues that international legal responses to climate change are influenced by a hegemony of 'whiteness' and epistemic violence that excludes Indigenous peoples' perspectives and interests. The article argues that a human-rights based approach should be taken to substantively include Indigenous peoples' traditional knowledges and time-tested sustainable land management practices in the climate regime, considering that these knowledges and practices offer crucial ecological, economic and sustainable guidance at this critical historic juncture where humanity is perched on the precipice of irreversible, catastrophic climate change.

## I. INTRODUCTION

Climate change is an unprecedented global phenomenon that affects all species on Earth to varying degrees. Indigenous peoples are minimal contributors to climate change, yet are some of the most vulnerable to its impacts. This article is concerned with how climate change threatens the human rights of Indigenous peoples, including their rights to self-determination, cultural integrity and ecological autonomy. While an official definition of Indigenous peoples

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remains elusive for the United Nations (UN),<sup>2</sup> the most widely accepted understanding describes Indigenous communities, peoples and nations as those which have:

historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>3</sup>

More than 370 million people in over 70 countries identify as ‘Indigenous Peoples’,<sup>4</sup> roughly five per cent of the global population. They comprise an estimated 5000 distinct groupings of people and 4000 language groupings primarily located in developing countries.<sup>5</sup> Indigenous people are considerably more likely to be marginalised, disempowered, impoverished and vulnerable,<sup>6</sup> but Indigenous societies have survived far longer than industrial civilization. This is because Indigenous peoples are usually closely connected to the natural environments that provide the basis for their cultural identities, spiritual beliefs, social customs and languages.<sup>7</sup> In turn, Indigenous peoples often bear important roles in the ecosystem and land stewardship.<sup>8</sup>

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<sup>2</sup> DESA, ‘*The Concept of Indigenous Peoples*’ – Background Paper for the Workshop on Data Collection and Disaggregation for Indigenous Peoples, UN Doc: PFII/2004/WS.1/3 (19-21 January 2004).

<sup>3</sup> Jose Martinez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, 42<sup>nd</sup> sess, UN Doc E/CN.4/Sub.2/1986/7 (1986).

<sup>4</sup> “Indigenous” is capitalised throughout this article to denote a sign of respect by the authors for Traditional Owners and First Nations Peoples of colonised lands. ‘Indigeneity’ refers to the pluralistic worldviews of Indigenous peoples. The authors acknowledge that the term “Indigenous Peoples” constitutes a broad generalisation and acknowledge that homogenising Indigenous peoples is not ideal or necessarily an accurate depiction of *all* Indigenous peoples but adopt the term to connote the common experiences often, but not always, referential to, people who identify as Indigenous. Department of Economic and Social Affairs of the United Nations Secretariat (DESA), *Resource Kit on Indigenous peoples*, (2008) <[http://www.un.org/esa/socdev/unpfii/documents/resource\\_kit\\_indigenous\\_2008.pdf](http://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf)>; See also Shelton Davis, ‘Indigenous Peoples and Climate Change’ (2010) 1(1) *The International Indigenous Policy Journal* 3.

<sup>5</sup> *Ibid.*

<sup>6</sup> International Work Group for Indigenous Affairs (IWGIA), *Conference on Indigenous Peoples and Climate Change Meeting Report*, UN Doc E/C.19/2008/CRP (21 – 22 February 2008) [3] <[http://www.un.org/esa/socdev/unpfii/documents/E\\_C\\_19\\_2008\\_CRP3\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2008_CRP3_en.pdf)>.

<sup>7</sup> Erika M Zimmerman, ‘Valuing Traditional Ecological Knowledge - Incorporating Experience of Indigenous People’ (2005) 13 (3) *NYU Environmental Law Journal* 803, 807.

<sup>8</sup> The authors acknowledge this is a broad generalisation of those who identify as Indigenous peoples and recognise that not all Indigenous peoples see themselves as stewards. See generally, E Rania Rampersad, ‘Indigenous Adaptation to Climate Change: Preserving Sustainable Relationships through an Environmental Stewardship Claim & Trust Fund Remedy’ (2009) 21 *Georgetown International Environmental Law Review* 591, 614; Zimmerman (n 6) 807; HEM d’Escoto Brockmann, President of the 63rd Session of the United Nations General Assembly, *Report of the Indigenous Peoples’ Global Summit on Climate Change* (20-24 April 2009).

By gaining knowledge through relationships with the land, Indigenous peoples have developed strategies to cope with climate change.<sup>9</sup> Sustainable production and consumption systems, and their effective stewardship over the world's biodiversity,<sup>10</sup> enable many Indigenous communities to live carbon-neutral or carbon-negative lifestyles.<sup>11</sup> Moreover, Indigenous peoples are estimated to own, occupy, or manage between 22% and 65% of the world's land surface including approximately 11% of the world's forested lands.<sup>12</sup> This constitutes an extraordinary amount of sequestered carbon, estimated at some 312 billion tonnes.<sup>13</sup> The Indigenous lands of the Amazon Basin, the Mesoamerican region, the Democratic Republic of Congo and Indonesia are estimated to contain more than one-fifth of the carbon stored above ground across the globe.<sup>14</sup> Indigenous advocates claim strong credentials as effective protectors of such carbon sinks.<sup>15</sup>

Part 2 of this article outlines the significant challenges climate change presents for Indigenous peoples worldwide, acknowledging the incompatibility of many Indigenous worldviews with the recent history of environmental exploitation, and the exclusion of Indigenous participants from the dominant discourse of international climate governance. Part 3 argues, in line with critical whiteness theory, that the limited representation of Indigenous peoples in international climate governance is symptomatic of the colonial biases of the international legal system. Part 4 highlights Indigenous peoples' responses to this normative exclusion via self-determined organisation for action. Part 5 advocates a human rights-based approach to climate governance to operate in tandem with the Indigenous Platform. Ultimately, this article argues for increased inclusion of Indigenous peoples' perspectives in international climate negotiations along the lines of the United Nations Framework Convention on Climate Change (UNFCCC) Local Communities and Indigenous Peoples Platform established at COP23 in Bonn in 2017 (LCIP Platform).<sup>16</sup>

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<sup>9</sup> Victoria Tauli-Corpuz and Aqqaluk Lyngé, Special Rapporteurs, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and On Their Territories and Lands*, UN Doc E/C.19/2008/10 (19 March 2008) [5] <[http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2008\\_10.pdf](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2008_10.pdf)>.

<sup>10</sup> *Ibid* [17].

<sup>11</sup> *Ibid*.

<sup>12</sup> Ameyali Ramos-Castillo, Edwin J. Castellanos and Kirsty Galloway McLean, 'Indigenous Peoples, Local Communities and Climate Change Mitigation' (2017) 140 *Climatic Change* 1, 2.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> Mitch Paquette, 'Indigenous Rights Cut from Paris Agreement and Why It Concerns Us All', *IC* (Web Page, 13 January 2016) <<https://intercontinentalcry.org/indigenous-rights-cut-from-paris-agreement-why-it-concerns-us-all/>>.

<sup>16</sup> See, J Cerda, 'Local Communities and Indigenous Peoples Platform at UNFCCC – COP23', (DGM Global).

## II. A CHANGING CLIMATE OF CHALLENGES

Despite their relatively small ecological footprints, Indigenous peoples are disproportionately affected by climate change.<sup>17</sup> Communities are more likely to be adversely affected in terms of meteorological and geographical impacts and from human rights abuses flowing from market-based mitigation and adaptation strategies.<sup>18</sup> The meteorological and geographical impacts of climate change relevant to Indigenous peoples include ice-melt, rising sea levels and increasing erosion of coastal territories, drought, desertification, loss of vegetation, increasing intensity of natural disasters, species extinction, the spread of vector-borne diseases and adverse effects on agriculture and subsistence farming, which in turn endanger food security.<sup>19</sup> Indigenous peoples are more susceptible to these impacts as they generally live on lands particularly vulnerable to climate change, such as polar regions and small low-lying islands subject to thawing and sea level rise respectively; depend directly on their lands and waters for basic needs (shelter, food, medicines, etc.) and their cultural and spiritual identities; and experience poverty and social exclusion that heightens other vulnerabilities.<sup>20</sup> Worldwide, Indigenous peoples have already experienced reduced rainfall, severe drought, higher temperatures and increased wind speeds.<sup>21</sup> These have caused insect infestation and consequent

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<sup>17</sup> See, United Nations University, 'Indigenous peoples Hardest Hit by Climate Change Describe Impacts', *Science Daily* (Web Page, 2 June 2008) <<https://www.sciencedaily.com/releases/2008/04/080402120515.htm>>; Josh Merrill, 'Climate Change and Its Effect on Indigenous Peoples of the Southwest' (2013) 38 (1) *American Indian Law Review* 225, 226; United Nations Development Programme (UNDP), *Human Development Report 2007/2008, 'Fighting Climate Change: Human Solidarity in A Divided World'* (Report, 2007) 77 <<http://hdr.undp.org/en/reports/global/hdr2007-2008/>>; International Work Group for Indigenous Affairs (IWGIA), *Conference on Indigenous Peoples and Climate Change Meeting Report*, 7<sup>th</sup> sess, UN Doc. E/C.19/2008/CRP (10 March 2008) 3 <[http://www.un.org/esa/socdev/unpfii/documents/E\\_C\\_19\\_2008\\_CRP3\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2008_CRP3_en.pdf)>; Friends of the Earth International (FOEI), 'Introduction - Voices from Communities Affected by Climate Change' (November 2007) 3 <<http://www.foei.org/wp-content/uploads/2015/03/climate-testimonies-EN.pdf>>.

<sup>18</sup> Ramos-Castillo (n 11) 1-4; Randall S Abate and Elizabeth A Kronk, *Commonality among unique Indigenous communities: an introduction to climate change and its impacts on Indigenous peoples Climate Change and Indigenous peoples: The Search for Legal Remedies* (Edward Elgar Publishing, 2013), 8 -10: Permanent Forum on Indigenous Issues, 'International Expert Group Meeting on Indigenous Peoples and Climate Change', *United Nations* (Web Page, 2008, no longer available).

<sup>19</sup> Friends of the Earth International (FOEI) (n 16); Rampersad (n 7) 592.

<sup>20</sup> Ramos-Castillo (n 11) 2.

<sup>21</sup> E.g. the Yanomami people of the Amazon rainforest, the Tl'z'at'en and Gitga'at peoples in North America, Indigenous peoples in Kenya and communities in southern Africa.

destruction of food supplies;<sup>22</sup> threats to food and water supplies;<sup>23</sup> and vegetation loss, resulting in cattle and goat farming failure for communities in southern Africa.

Additionally, measures to mitigate and adapt to climate change being implemented by non-Indigenous peoples may adversely affect Indigenous peoples, for example through forced land acquisitions for renewable energy carbon market offset developments, such as forestry plantations or palm oil plantations for biofuel production.<sup>24</sup> The 2009 Department of Economic and Social Affairs (DESA) report on the State of the World's Indigenous peoples emphasises that:

Indigenous peoples face systemic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters; Indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life.<sup>25</sup>

Whilst the proposed operation of the market-based mechanisms championed by the UNFCCC might appear innocuous in legal and economic theory, in reality their implementation by way of the emergent global carbon market is also having significant adverse impacts on the rights of Indigenous peoples worldwide. Programs such as the UN's Reducing Emissions from Deforestation and Degradation (REDD+) program<sup>26</sup> may unfortunately perpetuate the marginalisation of Indigenous peoples in global climate regulation. REDD+ has been criticised for a range of deleterious impacts on Indigenous peoples. A 2013 UN Report found that REDD+ programs caused violations of customary land rights, increased the political marginalisation of Indigenous peoples, denied their right to participate in financial benefits, limited participation by failing to provide

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<sup>22</sup> For the Tl'zat'en and Gitga'at peoples in North America: Christina Nilsson, 'Climate change from an Indigenous perspective: key issues and challenges' (2008) 1(2) *Indigenous Affairs* 9, 9-15 <<https://www.ecolex.org/details/literature/climate-change-from-an-indigenous-perspective-key-issues-and-challenges-ana-082722/>>.

<sup>23</sup> For the Indigenous peoples in Kenya: Human Rights Watch, 'There is No Time Left Climate Change, Environmental Threats, and Human Rights in Turkana County, Kenya', (Web Brochure, 2014) <[https://www.hrw.org/sites/default/files/report\\_pdf/kenya1015\\_brochure\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya1015_brochure_web.pdf)>.

<sup>24</sup> *Ibid.*

<sup>25</sup> DESA, Division of Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues (UNPFII), *State of the World's Indigenous Peoples*, (2009) <[http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf)>.

<sup>26</sup> UN-REDD Programme, 'Home' (Web Page, 2019) <<https://www.un-redd.org/>>.

appropriate information, imposed exploitative carbon contracts, directed money to fraudulent participants, decreased local food production, caused loss of livelihood, threatened food security, and increased tensions between Indigenous groups and governments.<sup>27</sup>

Other severe adverse impacts on Indigenous peoples include widespread human rights violations, such as forced evictions and relocations from traditional lands and ancestral territories. Indigenous peoples experience harm through denial of land rights, culture, religion, housing, family, political participation, and the exacerbation of environmental degradation of traditional lands to accommodate carbon offset projects, such as mega plantations of forests for biofuels.<sup>28</sup> The terms ‘carbon violence’ and ‘carbon colonialism’ are gaining currency in reference to the range of structural, social, political, economic, and cultural harms caused by carbon market activities.<sup>29</sup> The UN Office of the High Representative for the Least Developed Countries has acknowledged that, while adaptation strategies are essential to address the risks posed by climate change impacts for especially vulnerable populations, many such strategies are designed to benefit national interests but risk harming Indigenous and poor populations.<sup>30</sup> Further, the Office of the High Commissioner of Human Rights has noted the threats that climate change poses to the rights of Indigenous peoples to self-determination and free, prior, and informed consent.<sup>31</sup>

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<sup>27</sup> United Nations Permanent Forum on Indigenous Issues (UNPFII), *Indigenous People’s Rights and Safeguards in Projects related to Reducing Emissions from Deforestation and Forest Degradation (REDD+)*, 12th sess, UN Doc: E/C.19/2013/7 (20-31 May 2013).

<sup>28</sup> *Ibid* v-viii.

<sup>29</sup> See for example, Kristen Lyons, Carol Richards and Peter Westoby, ‘The Darker Side of Green: Plantation Forestry and Carbon Violence in Uganda: The Case of Green Resources’ Forestry-Based Carbon Markets’, *The Oakland Institute* (Web Page, November 2014)

<[https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Report\\_DarkerSideofGreen\\_hirez.pdf](https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Report_DarkerSideofGreen_hirez.pdf)>.

<sup>30</sup> United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), ‘The Impact of Climate Change on The Development Prospects of The Least Developed Countries and Small Island Developing States’ (Web Page, 2009) <<http://unohrlls.org/custom-content/uploads/2013/11/The-Impact-of-Climate-Change-on-The-Development-Prospects-of-the-Least-Developed-Countries-and-Small-Island-Developing-States1.pdf>>.

<sup>31</sup> International Work Group for Indigenous Affairs, Tebtebba, Foundation, Saami Council and RAIPON, Statement to the Human Rights Council, ‘Joint Indigenous peoples and NGO Statement on the occasion of the presentation of the Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights’, *Piplinks* (Web Page, 12 March 2008)

<<http://int.piplinks.org/joint-indigenous-peoples-and-ngo-statement-relationship-between-climate-change-and-human-rights.html>>; See also The Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Human Rights and Climate Change’, *United Nations Human Rights* (Web Page, 2014)

<<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>> The OHCHR adds, ‘Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.’

Evidently, Indigenous peoples are disproportionately affected by climate change, due to location and displacement, but also political exclusion which renders Indigenous populations with limited capacity to participate in international climate change negotiations.

Indigenous peoples raised early alarms on climate change, for example, when Inuit peoples witnessed thawing of permafrost and melting glaciers in the early 1970s.<sup>32</sup> This pre-dated the international community calling for climate action. Victoria Tauli-Corpuz, currently the UN Special Rapporteur on the Rights of Indigenous peoples, has stated:

We, Indigenous peoples, have long observed and adapted to the climatic changes in our communities for tens of thousands of years. Because of our sustainable lifestyles and our struggles against deforestation and against oil and gas extraction, we have significantly contributed in keeping gigatonnes of carbon dioxide and other greenhouse gases under the ground and in the trees.<sup>33</sup>

Furthermore, Indigenous advocacy groups cite climate change as evidence of the failure of the Western 'development' model<sup>34</sup> and the *Declaration of the First International Forum of Indigenous peoples on Climate Change* recognises Indigenous peoples have been aware of the adverse impacts of Western 'development' models for a long time.<sup>35</sup>

Western epistemologies which founded capitalism and industrial development arose out of the Enlightenment in the forge of dualistic reductionism which 'divided the human subject from his [sic] environment. Mind/body, self/other, human/nature ... and each of these dyads produced ontological positions that placed each in opposition.'<sup>36</sup> Dating back to Descartes, Western thinking has been historically conceptualised as an entrenchment in dualistic notions and competitive opposition, where the primary subject is seen as superior to the secondary

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<sup>32</sup> H E M d'Escoto Brockmann, 'UN Welcome Opening Statement - Indigenous Global Summit', (Web Page, accessed 20 April 2009, site no longer available).

<sup>33</sup> Victoria Tauli-Corpuz, Raymond de Chavez, Eleonor Baldo-Soriano, Helen Magata, Christine Golocan, Marilbeth V. Bugtong, Leah Enkiwe-Abayao and Joji Carino, *Guide on Climate Change and Indigenous Peoples* (Tebtebba, 2<sup>nd</sup> ed, 2009) v <<http://www.tebtebba.org/index.php/content/160-2nd-edition-of-guide-on-climate-change-and-indigenous-peoples-now-released>>. Tebtebba is an Indigenous Peoples' organization born out of the need for heightened advocacy to have the rights of Indigenous Peoples recognized, respected and protected worldwide. Tauli-Corpuz was previously the Executive Director of Tebtebba.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Declaration of the First International Forum of Indigenous People on Climate Change*, Lyon- France, opened for signature September 4-6 2000 <[http://www.treatycouncil.org/new\\_page\\_5211.htm](http://www.treatycouncil.org/new_page_5211.htm)>.

<sup>36</sup> Sonia Tascon, *Refugees and the coloniality of power: border-crossers of postcolonial whiteness* (Aboriginal; Studies Press, Canberra, 2004) 247-248.

object.<sup>37</sup> Thus, mind was superior to body, human to nature and so on, such that ‘man’ could ‘thus render ourselves the lords and possessors of nature.’<sup>38</sup> Such an outlook enabled the rampant exploitation of the Earth’s resources for human profit.

Several critical frameworks expose and counter the development model and reveal its widespread and devastating social and ecological impacts. The false and limited conceptualisation of humanity and the environment as a dualism has been critiqued in the literature on ecofeminism,<sup>39</sup> deep ecology,<sup>40</sup> Earth jurisprudence,<sup>41</sup> post-coloniality,<sup>42</sup> and decoloniality.<sup>43</sup> These writers aim to supplant Western-*ism* with a range of subversive social theories focused on pluralism or the harmonious co-existence of people and the planet.<sup>44</sup> Pluralism is intrinsic to the ‘cosmovisions’ of Indigenous peoples around the world.<sup>45</sup> The dualistic reductionism of Western science and the individualistic origins of colonial, legal and governance systems, which enabled a capitalist free market system to flourish, contrast sharply with Indigenous peoples’ more pluralistic epistemological frameworks and ecocentric ways of knowing and being.<sup>46</sup>

Many Indigenous peoples traditionally identify *with* the land, being in and a part of the land, whereas colonialists have historically seen themselves as separate from, above and in *possession of* the land.<sup>47</sup> Traditional knowledge of Indigenous peoples is ‘based on

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<sup>37</sup> René Descartes, ‘Discourse on Method’ (2002) 34(1) *The Harvard Classics* 1909–14 <[www.bartleby.com/34/1/](http://www.bartleby.com/34/1/)>.

<sup>38</sup> *Ibid*, Part IV.

<sup>39</sup> See for example, Maria Mies and Vandana Shiva, *Ecofeminism*, (Halifax: Fernwood Publications, 1993); Val Plumwood, *Feminism and the Mastery of Nature*, (London: Routledge, 1993).

<sup>40</sup> See for example, John Seed, Joanna Macy, Pat Fleming and Arne Naess, *Thinking Like a Mountain: Toward a Council of All Beings*, (Philadelphia: New Society Press, 1988); Thomas Berry, *The Dream of the Earth*, (San Francisco: Sierra Club Books; 1988); J Macy, *World as Lover; World as Self*, (Parallax Press, 1991); G Sessions (ed.), *Deep Ecology for the Twenty-First Century*, (Shambhala Publications, 1994); Thomas Berry, *The Great Work: Our Way Into the Future*, (New York: Harmony/Bell Tower, 1999).

<sup>41</sup> See for example, Cormac Cullinan, *Wild Law – Governing People for Earth* (Cape Town: Siber Ink, 2002).

<sup>42</sup> Referring here to postcolonial literature which is the literature of all countries that were colonised and includes a broad array of Indigenous writers and academics, some referred to in this article. See also, Bill Ashcroft, Gareth Griffiths, and Helen Tiffin (eds), *The Post-Colonial Studies Reader*, (New York: Routledge, 1995).

<sup>43</sup> See for example, Walter D. Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options (Latin America Otherwise)*, (Durham & London: Duke University Press Books, 2011).

<sup>44</sup> Eduardo Gudynas, ‘Buen Vivir: Today’s tomorrow’ (2011) 54(4) *Development* 441, 443; Oliver Balch, ‘Buen Vivir: the social philosophy inspiring movements in South America’, *The Guardian online*, (4 February 2013) <<https://www.theguardian.com/sustainable-business/blog/buen-vivir-philosophy-south-america-eduardo-gudynas>>.

<sup>45</sup> *Ibid*.

<sup>46</sup> Cullinan (n 40).

<sup>47</sup> Aileen Moreton-Robinson, ‘Whiteness, Epistemology and Indigenous Representation’ in Aileen Moreton-Robinson (Ed.), *Whitening Race: Essays in Social and Cultural Criticism* (Canberra, Aboriginal Studies Press, 2004), 75, 87.

observations, interactions, and systematic feedback from the natural world. It includes... a manner of living in balance... with all things. It... [has] rules that provide an ethical system for human behaviour to sustain ecosystems for the generations that will follow.<sup>48</sup>

The acute contrast with environmentally exploitative capitalism, that reduces non-human nature to resources to be extracted and consumed, is exemplified in a resurgent worldview termed *sumak kawsay*,<sup>49</sup> which is inspiring social movements throughout Latin America.<sup>50</sup> Such worldviews are rooted in the Indigenous cosmological outlook of the Quechua peoples of the Andes and other Indigenous belief systems across the Americas, and seek the dissolution of the Nature-Society dualism.<sup>51</sup> Gudynas describes the philosophy as follows:

It is a plural concept with two main entry points. On the one hand, it includes critical reactions to classical Western development theory. On the other hand, it refers to alternatives to development emerging from indigenous traditions, and in this sense the concept explores possibilities beyond the modern Eurocentric tradition.<sup>52</sup>

*Sumak kawsay* subverts the individualistic and dualistic notions of consumer capitalism by promoting harmony between human beings and between human beings and nature, and the elevation of the rights of the collective and community over those of the individual.<sup>53</sup> Through the lens of *sumak kawsay*, humans are seen as stewards of the Earth, rather than owners of private property.<sup>54</sup> The 2009 Asian Summit on Climate Change and Indigenous Peoples acknowledged wealth accumulation and overconsumption ‘destroys harmony with nature’ and ‘promotes violence against nature and... human beings... [and] erosion of cultural practices and values of Indigenous peoples.’<sup>55</sup> Consequently, the Summit identified the incompatibility

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<sup>48</sup> Carol Raish, *Lessons for Restoration in the Traditions of Stewardship: Sustainable Land Management in Northern New Mexico*, in *Restoring Nature: Perspectives from the Social Sciences and Humanities* (Island Press, Washington D.C., 2000) 283.

<sup>49</sup> Also known by other names as there is no single Andean cosmovision. In Spanish, the worldview is known as Buen Vivir which means Good/Well Living.

<sup>50</sup> Gudynas (n 43).

<sup>51</sup> Ibid 443; Balch (n 43).

<sup>52</sup> Gudynas (n 43) 441.

<sup>53</sup> Balch (n 43).

<sup>54</sup> Ibid.

<sup>55</sup> Asian Summit on Climate Change and Indigenous Peoples, ‘Workshop Groups D: Indigenous Peoples’ Self-Determined Development and Climate Change’, (Presentation, 24-27 February 2009) <<http://www.tebtebba.org/index.php/all-resources/category/58-workshops?download=191:climate-change-and-indigenous-peoples-self-determined-development>>.

between Indigenous peoples' long-term sustainable 'ontological relationships to country'<sup>56</sup> and the dominant Western (neo)colonial-capitalist paradigm of short-term exploitative materialism.

The Declaration of the First International Forum of Indigenous People on Climate Change highlighted the dismissal of Indigenous peoples' knowledge by various Western scientists as 'sentimental and superstitious' and accused them of being 'an obstacle to development.'<sup>57</sup> However, the Declaration continued: 'Paradoxically, those that previously turned deaf ears to our warnings, now are dismayed because their own model of "development" endangers our Mother Earth.'<sup>58</sup>

The past three decades have seen an explosion of attempts to address climate change. However, these attempts have generally been poorly informed by Indigenous peoples' perspectives. The normative international legal discourse addressing climate change formally began at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, also known as the 'Rio Earth Summit'. The parties drafted the UNFCCC, which established the overall framework for intergovernmental efforts to address anthropogenic climate change.<sup>59</sup> The UNFCCC placed the primary onus on developed countries to take the lead in combating climate change, in line with the principle of common but differentiated responsibilities.<sup>60</sup> The UNFCCC also acknowledged the need to give full consideration to the needs of developing country parties, particularly those especially vulnerable to climate impacts.<sup>61</sup>

However, in 2008, at COP9 in Bonn, the United Nations Permanent Forum on Indigenous Issues (UNPFII) stated that Indigenous peoples' participation in the UNFCCC remained 'very inadequate...'<sup>62</sup> and that it was 'very difficult to get their perspectives integrated in the final

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<sup>56</sup> A Moreton-Robinson, 'I still call Australia home; belonging; place; indigeneity and whiteness in a post-colonising society' (Conference Paper, Critical Contexts and Crucial Conversations: Whiteness and Race Symposium, Coolangatta, Qld, 3-5 April 2002) quoted in Jane Haggis, 'Thoughts on a politics of whiteness in a (never quite post) colonial country: abolitionism, essentialism and incommensurability' in Moreton-Robinson (Ed.) *Whitening Race: Essays in Social and Cultural Criticism* (Canberra, Aboriginal Studies Press, 2004), 48, 54.

<sup>57</sup> *Declaration of the First International Forum of Indigenous People on Climate Change* (n 34).

<sup>58</sup> *Ibid.*

<sup>59</sup> United Nations General Assembly (UNGA), *United Nations Framework Convention on Climate Change (UNFCCC)*, GA Dec 48/189, UN Doc A/RES/48/189 (20 January 1994, adopted 21 December 1993) <<http://www.refworld.org/docid/3b00f2770.html>>; *United Nations Framework Convention on Climate Change*, 'Background on the UNFCCC: The international response to climate change' <[http://unfccc.int/essential\\_background/items/6031.php](http://unfccc.int/essential_background/items/6031.php)>.

<sup>60</sup> UNGA, (n 58) Article 3.

<sup>61</sup> *Ibid.*

<sup>62</sup> Victoria Tauli-Corpuz, 'UNPFII Statement on Biodiversity and Climate Change', Agenda Item 4.5 (23 May 2008, CBD COP-9 Bonn, Germany) 1-2. <[http://www.un.org/esa/socdev/unpfii/documents/statement\\_vtc\\_2008\\_cop9\\_item4\\_5.doc](http://www.un.org/esa/socdev/unpfii/documents/statement_vtc_2008_cop9_item4_5.doc)>.

conclusions or the recommendations.’<sup>63</sup> At COP21, Indigenous leaders had a significant presence in the Green Zone, but found it difficult to access the exclusive UNFCCC delegates’ Blue Zone.<sup>64</sup> It took over twenty years for the Paris Agreement to the UNFCCC to expressly acknowledge the rights of Indigenous peoples and the value of Indigenous knowledges in developing responses.<sup>65</sup> The Paris Agreement also acknowledged loss and damage arising from climate change,<sup>66</sup> yet stopped short of providing compensation.<sup>67</sup>

Solidarity has naturally formed over the years between Small Island Developing States (SIDS) and Indigenous peoples’ interests in international climate negotiations. This alliance recently saw the launch of the Local Communities and Indigenous Peoples (LCIP) Platform which commentators claim was only possible because Fiji – an island nation with a large Indigenous population – held the UNFCCC presidency during COP23 and ‘passionately worked to make indigenous peoples and their rights central to the negotiations.’<sup>68</sup> The LCIP Platform is an achievement that has taken many years of lobbying by Indigenous peoples seeking to overcome exclusion by the UNFCCC. The Platform’s conception is crystallised by paragraph 135 of the decisions accompanying the Paris Agreement, which states that the COP:

Recognizes the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change and establishes a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner.<sup>69</sup>

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<sup>63</sup> Ibid 16.

<sup>64</sup> The ‘Blue Zone’ at COP events is the exclusive venue placed under the authority of the United Nations and only accessible to registered participants nominated by the Parties and admitted observer organizations. The ‘Green Zone’ is the civil society space, open to the wider public, where non-state actors like regions, cities and businesses and observer NGOs gather to show their work and commitment for climate action on the sidelines of the negotiations. See: World Wildlife Fund, ‘Climate action keeps building: in the “green zone” at COP 21’ (Blogpost, 7 December 2015) <<http://climate-energy.blogs.panda.org/2015/12/07/climate-action-keeps-building-in-the-green-zone-at-cop-21/>>.

<sup>65</sup> *Paris Agreement to the United Nations Framework Convention on Climate Change* (Paris, 22 April 2016; in force 4 November 2016) Preamble, art 7(5) (‘Paris Agreement’).

<sup>66</sup> Ibid art 8.

<sup>67</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session, Addendum – Part 2: Action Taken by the Conference of the Parties at its Twenty-First Session*, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) 52.

<sup>68</sup> Stella Paul, ‘COP23 Finally Provides a Platform for Indigenous People on Climate Talks’, International Press Syndicate, (Article, 20 November 2017) <<http://earthjournalism.net/stories/cop23-finally-provides-a-platform-for-indigenous-people-on-climate-talks>>.

<sup>69</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-Third Session, Addendum – Part 2: Action Taken by the Conference of the Parties at its Twenty-Third Session*, UN Doc FCCC/CP/2017/11/Add.1 (8 February 2018).

We will return to the LCIP Platform and related Indigenous-driven initiatives in Part 3, after examining what critical race and whiteness theory reveals about the historical exclusion of Indigenous perspectives from international climate governance.

### III. CRITICAL RACE AND WHITENESS STUDIES

Critical Race Theory (CRT) is an American jurisprudential movement that emerged ‘from the embers of the civil rights movement’<sup>70</sup> and aimed to confront ‘colour blind’ justice and ‘reveal the racialization of law.’<sup>71</sup> Critical Whiteness Studies (CWS) emerged in the late 1980s<sup>72</sup> with the aim of examining the social construction of ‘whiteness’ which is entwined with power and privilege.<sup>73</sup> CWS makes visible to contemporary ‘white’ societies ‘the racialised nature of power and privilege’<sup>74</sup> and the extent to which whiteness is ‘almost impossible to separate from racial dominance.’<sup>75</sup> CWS is a response to CRT because it focuses more on the ‘racialisers’ than the ‘racialised’.<sup>76</sup> CWS is not about skin colour but rather the discursive practices that, drawing on colonial legacies, ‘privilege and sustain global dominance of white imperial subjects.’<sup>77</sup> CWS reveals whiteness as establishing hegemony through discourse and having material effects in everyday life.<sup>78</sup> Aileen Moreton-Robinson describes ‘whiteness’ as reflecting the cultural space of the West, informed by imperialism and capitalism, and impacting on the formation of nationhood, class and empire.<sup>79</sup>

Notwithstanding criticisms that CWS homogenises white people’s experiences and that it is a form of ‘civilizational self-loathing’, adopting a nuanced understanding of CWS as a racially inquisitive and explorative analytical framework can clarify the forms of exclusion of Indigenous peoples’ perspectives from normative international climate governance.<sup>80</sup> A CWS

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<sup>70</sup> Nicole Watson, ‘Indigenous people in legal education: staring into a mirror without reflection’ (2004-2005) 6(8) *Indigenous Law Bulletin* 4.

<sup>71</sup> Aileen Moreton-Robinson, ‘The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision’ (2004) 3 (2) *Borderlands E-Journal* 1, 2  
<[http://www.borderlands.net.au/vol3no2\\_2004/moreton\\_possessive.htm](http://www.borderlands.net.au/vol3no2_2004/moreton_possessive.htm)>.

<sup>72</sup> Margaret Davies, *Asking the Law Question*, (Lawbook Co, 3rd ed, Sydney, 2008) 310.

<sup>73</sup> Haggis (n 36) 48.

<sup>74</sup> *Ibid.*

<sup>75</sup> Cath Ellis, Catriona Elder and Angela Pratt, ‘Whiteness in constructions of Australian nationhood: Indigenes, immigrants and governmentality’ cited in Aileen Moreton-Robinson (Ed.), *Whitening Race: Essays in Social and Cultural Criticism* (Canberra, Aboriginal Studies Press, 2004), 208, 209.

<sup>76</sup> Davies (n 71) 310.

<sup>77</sup> Moreton-Robinson (n 46) 78.

<sup>78</sup> *Ibid.* See also Elder et al (n 74).

<sup>79</sup> Moreton-Robinson (n 46) 78.

<sup>80</sup> See for example, Dagmar Rita Myslinska, ‘Contemporary First-Generation European-Americans: The Unbearable ‘Whiteness’ of Being’ (2014) 88 *Tulane Law Review* 559; Barbara Kay, ‘Blaming whiteness’, *National*

critique of climate governance regards the market-based mechanisms embedded in the Kyoto Protocol as ineffective. This is because they do not address the root cause of climate change<sup>81</sup> which, as identified by Indigenous advocacy groups, is the western development model.<sup>82</sup>

Through a CWS lens it becomes clear that the exclusion of Indigenous peoples from meaningful participation in the international legal order arises from its colonial core, with roots deep in the sovereign-centric nature of Westphalian imperialism. As Indigenous peoples typically exist as marginalised minorities within nation states rather than as sovereign entities, little space has existed for them in the international legal architecture. CWS exposes this as symptomatic of a deeper dysfunction of international law; being grounded in and perpetuating colonialism and 'whiteness'. Furthermore, Indigenous legal scholar Irene Watson characterises the postcolonial project of international law as promoting the 'illusion of recognition' of the rights of Indigenous peoples.<sup>83</sup>

The idea of international law as an imperial engine of exploitation has been developed by Third World Approaches to International Law (TWAIL), which asserts:

The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable and legitimate code of global governance... The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.<sup>84</sup>

Understanding the racialised nature of power and privilege through CWS realizes TWAIL's assertion of international law as an imperial engine. International law which was born out of colonialism and sovereign-centric discourse continues to privilege white 'sovereign' subjects

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*Post* (13 September 2006)

<<https://web.archive.org/web/20090520052049/http://www.barbarakay.ca/archive/20060913whitey.html>>.

<sup>81</sup> 'Commentary about the negotiations at the UNFCCC COP 13 conference in Bali 2007' (YouTube, 6 December 2007, AEDT) <<http://www.youtube.com/watch?v=rEFOzm0hOo8>>. The speaker, Victoria Tauli-Corpus, talks about 150 hydroelectric dams being built in India, uranium mines, geothermal generation and biofuel cropping where food crops which could be feeding the poor and being transformed into fuel for cars in developed rich countries. She calls these activities 'land grabs' under the guise of 'renewable energy solutions'.

<sup>82</sup> *Ibid.*

<sup>83</sup> Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Abington, Routledge, 2015).

<sup>84</sup> Makau Mutua and Antony Anghie, 'What is TWAIL', *Proceedings of the Annual Meeting* (American Society of International Law, Volume 94, 5-8 April 2000) 31.

whilst not recognizing the autonomy and voices of Indigenous people which are distinct from the 'sovereign' states they exist in. International law sustains the global dominance of colonisers. An exemplar of this is the international legal system's often non-binding nature, enabling states to comply with their obligations or not, without much concern for enforcement or effective sanction.<sup>85</sup> This attests not only to the privileging of colonisers, but also to the inability of the international legal system to effectively deal with transboundary problems such as climate change.

Further deficiencies exist in the creation of international law where state interests conflict, directly or indirectly, with those of non-state actors such as Indigenous peoples.<sup>86</sup> The assumption of a monolithic state 'voice' marginalizes other voices, unless a state chooses to champion a specific interest (such as Fiji championing Indigenous voices at COP23).<sup>87</sup> This has been defined as the 'universal metanarrative of nation' in which developed nation-states remain colonising entities and do not recognise the autonomy and/or sovereignty of Indigenous peoples.<sup>88</sup> According to Anghie, 'the colonial encounter, far from being peripheral to the making of international law, has been central to the formation of the discipline.'<sup>89</sup> International law has a direct connection with the colonial 'civilizing' mission which is inherent in 'the principal concepts and categories that govern our existence: ideas of modernity, progress, development.'<sup>90</sup> There thus remains a significant task of identifying and dispelling such inherent biases in order to construct an international legal system 'that fulfills its promise of advancing the cause of justice.'<sup>91</sup>

Utilising a CWS lens urges an analysis of the dimensions of power, and is indispensable to the deconstruction of (neo-) colonialism. Power finds its genesis in discourse, knowledge and in language, and thereby the logic underpinning colonialism explicates the power relationships existent in the world today.'<sup>92</sup> Michel Foucault highlighted the subjectivity of 'truth' and its inherent connection to power, such that discourse becomes a potent site of power and exclusion:

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<sup>85</sup> Spratt David and Sutton Phillip, *Climate Code Red – the case for emergency action* (Scribe, Carlton, 2008).

<sup>86</sup> Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases & Materials on International Law* (Oxford University Press, 4<sup>th</sup> ed, 2003) 23.

<sup>87</sup> *Ibid.*

<sup>88</sup> Tascon (n 35) 246.

<sup>89</sup> Dixon and McCorquodale (n 85) 17.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Tascon (n 35) 240.

Truth operates through exclusion, marginalization, and even prohibition of other competing truths ... [it is a] prodigious machinery designed to exclude<sup>93</sup>... [and]...discourse, authorises some to speak, some views to be taken seriously, while others are marginalised, derided, excluded and even prohibited.<sup>94</sup>

By integrating an analysis of power, poststructuralist scholars claim that the authority of law is not justified by its mystical claims to ‘reason’, ‘objectivity’, or ‘democracy’.<sup>95</sup> Rather, the authority of law is a ‘product of law’s appropriation of the power to define reality.’<sup>96</sup> This holds a particular resonance in relation to the international legal doctrine of *terra nullius*. For example, an extended notion of this doctrine was fraudulently invoked by the English to “settle” Australia.<sup>97</sup>

The exclusion of ‘other’ voices from the dominant discourse has been referred to as ‘epistemic violence’, the implied assertion that ‘other’ ways of knowing must be subaltern, subjugated and inadequate and therefore given no space in ‘official’ discourse.<sup>98</sup> It is unsurprising that the institutions and processes of international climate governance have perpetuated such epistemic violence through the exclusion of Indigenous peoples’ perspectives. CWS can shed light on why Indigenous people’s voices are excluded in the international legal system, exposing how international climate discourse reflects the colonial biases of the international legal system. In turn, including Indigenous people’s voices can open alternative pathways for future legal development. For instance, at the recent COP23 launch of the LCIP Platform, Gualinga of the Kichwas of Ecuador emphasised the ongoing need for inclusivity, noting that Indigenous peoples have solutions available, such as the ‘Living Forest’ proposal, yet have no opportunities to advocate for their implementation.<sup>99</sup> The history of exclusion of Indigenous peoples from the normative discourse has necessitated persistent creative, strategic and innovative responses which are considered in the following section.

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<sup>93</sup> Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock, London, 1970) 55.

<sup>94</sup> Alan Hunt and Gary Wickam, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, London, 1994) 8-9.

<sup>95</sup> See for example, Dianne Otto ‘Everything Is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law’ (1999) 5(1) *Australian Journal of Human Rights* 17 <<http://www.austlii.edu.au/au/journals/AUJHRights/1999/1.html>>.

<sup>96</sup> Davies (n 71) 362.

<sup>97</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>98</sup> G C Spivak, ‘Can the Subaltern Speak?’ cited in Ashcroft, Griffiths and Triffin (n 41) 24.

<sup>99</sup> Paul (n 67).

#### IV. INDIGENOUS RESPONSES TO EXCLUSION

Despite the normative exclusion of Indigenous voices in international climate law, Indigenous peoples have responded to climate change and fought for inclusion in the international sphere. Since 2000, various Indigenous coalitions have adopted climate declarations outside the UNFCCC. The Indigenous Peoples Caucus at COP8 in New Delhi stated:

Our duty as Indigenous peoples to Mother Earth impels us to demand that we be provided adequate opportunity to participate fully and actively at all levels of local, national, regional and international decision-making processes and mechanisms in climate change.<sup>100</sup>

Throughout the UNFCCC's history the Indigenous peoples' lobby has consistently argued that 'it is vital that [we] are able to participate effectively in the current negotiations.'<sup>101</sup> The lobby has also called for the design and implementation of all climate change policies and mitigation programs at local, regional and national levels<sup>102</sup> to be guided by international laws enshrining the rights of Indigenous peoples.<sup>103</sup>

In 2007, after over two decades of negotiations, the UN General Assembly adopted the UNDRIP, which seeks to confirm the application of universal human rights to Indigenous people and communities. It broke new ground as the first UN declaration to be drafted by the rights-holders themselves.<sup>104</sup> The Declaration and the UNPFII are important steps towards the inclusion of Indigenous perspectives in international legal processes but much remains to be done. In 2008, the International Indigenous Peoples' Forum on Climate Change (IIPFCC) was established as the caucus for Indigenous peoples participating in the UNFCCC.<sup>105</sup> In 2009, Indigenous representatives from around the world met in Anchorage, Alaska and adopted the Anchorage Declaration, which recommends several actions to tackle climate change and

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<sup>100</sup> UNFCCC, '*Indigenous Peoples' Caucus, Indigenous' Peoples Caucus Statement on Climate Change*' COP8 (23 October – 1 November 2002) <<http://www.tebtebba.org/index.php/all-resources/category/80-ipfcc-meetings-2000-2004?download=373:indigenous-peoples-caucus-statement-on-climate-change-cop8>>.

<sup>101</sup> Tauli-Corpuz et al (n32) 138.

<sup>102</sup> Ibid 94.

<sup>103</sup> Namely, UNDRIP and International Labor Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169). Convention concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, (entered into force 05 Sep 1991) 76th ILC session.

<sup>104</sup> Amy Maguire, 'The UN Declaration on the Rights of Indigenous Peoples and Self-Determination in Australia: Using a Human Rights Approach to Promote Accountability' (2014) 12 *New Zealand Yearbook of International Law* 105.

<sup>105</sup> See International Indigenous Peoples Forum on Climate Change (IIPFCC) 'Chronology: LCIPP from Inception (COP21) to the 1st Meeting of the Facilitative Working Group' (2019) <<http://www.iipfcc.org/>>.

emphasises the importance of Indigenous involvement in decision-making.<sup>106</sup> In 2011, the UNPRII adopted by the UN Economic and Social Council (ECOSOC) called upon [the UNFCCC] ‘and States parties thereto to develop mechanisms to promote the participation of Indigenous peoples in all aspects of the international dialogue on climate change.’<sup>107</sup>

Through persistently and patiently working with NGOs with UNFCCC observer status over many years, Indigenous peoples have creatively negotiated their way from the margins and sidelines of the UNFCCC into the exclusive spaces of official discourse,<sup>108</sup> a journey that culminated in the establishment of the LCIP Platform. For example, in 2011, the Indigenous lobby formulated the Oaxaca Action Plan of Indigenous Peoples.<sup>109</sup> The plan proposed a strategy to address the exclusion of Indigenous peoples from COP17 in Durban to the World Conference on Indigenous peoples in 2014.<sup>110</sup> In a small but significant step forward for Indigenous inclusion, COP16 adopted the Cancun Agreement for Long Term Cooperative Action, which ‘noted’ the importance of human rights and the rights of Indigenous peoples.<sup>111</sup> Another symbolic victory was the inclusion of ‘the rights of indigenous peoples’ and ‘Mother Earth’ in the preambular paragraphs of the Paris Agreement and references to ‘traditional knowledge’ in article 7(5).<sup>112</sup> While this marks a significant toehold for Indigenous peoples in the normative international discourse, the Agreement failed to acknowledge Indigenous peoples’ rights in the operative text. This is in sharp contrast to the People’s Agreement issued by the World People’s Conference.<sup>113</sup>

In light of their historical marginalisation, small symbolic inroads for the recognition of Indigenous rights represent significant victories. They are the result of decades of persistent strategic advocacy on the periphery of the UNFCCC that paved the way for the LCIP Platform.

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<sup>106</sup> Indigenous Peoples Global Summit on Climate Change (n 55).

<sup>107</sup> UNPFII, Report on the tenth session) UN Doc E/2011/43-E/C.19/2011/14 (16-27 May 2011) <[http://www.un.org/esa/socdev/unpfii/documents/session\\_10\\_report\\_EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/session_10_report_EN.pdf)>.

<sup>108</sup> Paquette (n 14).

<sup>109</sup> *Oaxaca Action Plan of Indigenous Peoples: From Cancun to Durban and Beyond*, agreed 12 October 2011 (Oaxaca, Mexico)

<<http://www.forestpeoples.org/sites/fpp/files/news/2011/10/OaxacaActionPlanOctober2011Eng.pdf>>.

<sup>110</sup> Paquette (n 14).

<sup>111</sup> UNFCCC, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, UN Doc FCCC/CP/2010/7/Add.1

<<http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=4>>.

<sup>112</sup> Ibid.

<sup>113</sup> K Krug, ‘The World People’s Conference on Climate Change ends with Declaration for the Rights of Mother Earth in Cochabamba, Bolivia’, *Vancouver Observer* (6 May 2010)

<<https://www.vancouverobserver.com/blogs/world/2010/05/05/world-peoples-conference-climate-change-ends-declaration-rights-mother-earth>>. The World People’s Conference was a civil society event in reaction to the failures of the COP15 in Copenhagen to include civil society voices including Indigenous voices in negotiations.

History suggests that this pressure must be maintained to ensure increasing inclusion. Vigilance by Indigenous peoples concerning the implementation of the LCIP Platform is crucial, along with advocacy by interested States parties to the UNFCCC such as Fiji.

## V. HONOURING INDIGENOUS PERSPECTIVES IN CLIMATE GOVERNANCE

The 2008 Indigenous peoples Conference on Climate Change declared that the barrier to Indigenous peoples' coping and adaptation capacities 'is first and foremost the lack of recognition and promotion of their human rights.'<sup>114</sup> The UNPFII notes that the international climate regime has failed to give sufficient attention to non-market measures and has virtually ignored human rights-based and ecosystem approaches to mitigation.<sup>115</sup> To ensure that Indigenous peoples' rights are protected and respected, it is imperative that human rights and ecosystem approaches inform the climate regime. The first step in this regard is respect for sustainable production and consumption practiced by systems established by Indigenous peoples for millennia<sup>116</sup> through traditional practices such as rotational agriculture.<sup>117</sup>

Parties to the UNFCCC have the capacity and normative authority to shift the tone and nature of climate governance. By expressly recognizing the rights, traditional knowledge and ecological autonomy of Indigenous peoples, Articles 25 and 26 of UNDRIP provide a guiding framework for the implementation of climate change mitigation measures and the integration of traditional knowledges within mitigation strategies.<sup>118</sup> The UNFCCC should establish a permanent advisory body on the human rights impacts of climate change. The International Work Group for Indigenous Affairs has advocated the establishment of a fund to ensure the adequate representation of Indigenous people in the UNFCCC.<sup>119</sup> Such initiatives could helpfully reflect on the features of self-determined development outlined at the 2009 Asian Summit on Climate Change and Indigenous peoples:<sup>120</sup> Respect, control and management over their territories and resources; revitalization of cultural traditions and customs reflecting international human rights standards; protection and enhancement of traditional knowledges;

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<sup>114</sup> Ibid 6.

<sup>115</sup> UNPFII, 'Impact of Climate Change Mitigation Measures on Indigenous Peoples and on their Territories and Lands' UN Doc E/C.19/2008/10 (19 March 2008) 15.

<sup>116</sup> Tauli-Corpuz and Lynge (n 8) 17.

<sup>117</sup> Ibid 18.

<sup>118</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, LXV (2007) UN GAOR.

<sup>119</sup> Ibid.

<sup>120</sup> Asian Summit on Climate Change and Indigenous Peoples, 'Report of the Summit' (24-27 February 2009, Bali, Indonesia), para 2.61.

<[http://www.indigenousclimate.org/index.php?option=com\\_docman&task=doc\\_download&gid=1&Itemid=&language=en](http://www.indigenousclimate.org/index.php?option=com_docman&task=doc_download&gid=1&Itemid=&language=en)>.

protection of intellectual, cultural, religious and spiritual property and redress for misappropriation of these; a balance between subsistence economies and the market economy; use and development of culturally appropriate technologies; and strengthening of adaptive capacities of Indigenous peoples to climate change.<sup>121</sup>

Some small-scale recent initiatives in Australia demonstrate the potential of blending Indigenous and non-Indigenous knowledges to counter climate change impacts.<sup>122</sup> For example, Australian savannah-burning programs are setting a standard of land management and carbon farming for the world.<sup>123</sup> Carbon farming allows farmers and other land managers to earn carbon credits by storing carbon or reducing GHG emissions on the land.<sup>124</sup> Savannah fires release GHGs, such as methane and nitrous oxide, into the air, which can be reduced by shifting burning from the late dry season towards the early dry season and reducing the area that is burnt each year.<sup>125</sup> Aboriginal Australians have traditionally used fire for land management purposes and contemporary savannah burning programs draw on traditional Aboriginal uses of fire for land management purposes.<sup>126</sup> These traditional technologies are now being adopted around the world<sup>127</sup> in countries such as Canada and Botswana.<sup>128</sup> The Aboriginal Carbon Fund, a not-for-profit company building a sustainable Aboriginal-managed carbon industry within a HRBA framework is just one example of Indigenous peoples leading the way in advancing a sustainable future and more substantive inclusivity for Indigenous peoples in climate mitigation.<sup>129</sup>

For the voices and experiences of Indigenous peoples' to be heard, new ideas, innovations and ideological spaces that acknowledge Indigeneity are required. Moreton-Robinson offers a solution of re-subjectification: '[I]n a postcolonial encounter, when the object speaks, her voice

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<sup>121</sup> Ibid.

<sup>122</sup> Australian Government, Department of the Environment and Energy, 'Carbon Farming Initiative (CFI) Savanna burning' (2014) <<http://www.environment.gov.au/climate-change/government/emissions-reduction-fund/cfi/publications/factsheet-savanna-burning>>.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> D Bowman, 'Aboriginal fire management – part of the solution to destructive bushfires', *The Conversation*, (23 February 2016) <<https://theconversation.com/aboriginal-fire-management-part-of-the-solution-to-destructive-bushfires-55032>>.

<sup>127</sup> M Slezak, 'The idea is coming of age: Indigenous Australians take carbon farming to Canada', *The Guardian* (23 July 2017) <<https://www.theguardian.com/australia-news/2017/jul/23/indigenous-australians-carbon-farming-canada>>.

<sup>128</sup> SBS News, 'Indigenous fire use spreads to Botswana', SBS News Online (15 November 2017) <<https://www.sbs.com.au/news/indigenous-fire-use-spreads-to-botswana>>.

<sup>129</sup> See Aboriginal Carbon Fund, 'The vision of the Aboriginal Carbon Foundation is to catalyse life-changing, community prosperity through carbon farming.' <<http://aboriginalcarbonfund.com.au/>>.

challenges the authority of the intellectual hegemony of ‘whiteness’ and offers resistance through alternative ways of being and knowing.’<sup>130</sup> Like feminist perspectives, Indigenous perspectives hold ‘the promise of a fundamental restructuring of traditional international law discourse and methodology to accommodate alternative world views.’<sup>131</sup> Token references to Indigenous peoples’ rights in treaty texts must be backed by the substantive implementation of a HRBA to climate change mitigation and adaptation. In terms of looking forward to developing new dialogical spaces and transcending existing limitations, in Foucault’s words:

We must not imagine a world of discourse divided between accepted discourse and excluded discourse; but as a multiplicity of discursive elements that can come into play in various strategies...Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.<sup>132</sup>

## VI. CONCLUSION

Confronting climate change and overhauling unsustainable models of Western industrial development is an urgent challenge for humanity. Significant change will not occur overnight and will require the persistent voices of the marginalised to be heard. Part of that urgent restructuring must entail the inclusion of Indigenous peoples’ perspectives in climate governance, to overcome the history of epistemic violence and hegemony of ‘whiteness’ in international law. The recently established LCIP Platform is a positive step towards substantive inclusion for Indigenous peoples in this context. However, its activities must be vigilantly observed to guard against its function being undermined by hollow gestures, tokenistic sentiments and the illusion of recognition.

According to the ecosystems approach to climate mitigation, as endorsed by the Indigenous group, Tebtebba, ‘decision-making and management of biodiversity are best carried out using the institutions and governance mechanisms most suited at the ecosystem-level, including a recognition of the central role of Indigenous peoples.’<sup>133</sup> In *Wild Law; A Manifesto for Earth Justice*, Cormac Cullinan writes:

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<sup>130</sup> Aileen Moreton-Robinson, ‘When the Object Speaks, A Postcolonial Encounter: anthropological representations and Aboriginal women’s self-presentations’ (1998) 19(3) *Discourse* 286.

<sup>131</sup> Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 *The American Journal of International Law* 613, 615, 644.

<sup>132</sup> Foucault (n 92) 100-101.

<sup>133</sup> *Ibid.*

[T]he dominant cultures of the 21st century could learn important principles and techniques from the systems of governance of ... indigenous peoples .... At a time like the present, when we are facing a governance crisis of terrifying proportions, we need all the inspiration we can get. It is ... fundamentally important that we seek to protect these societies and to learn from them. Not to do so would be extremely arrogant, foolish and criminally irresponsible.<sup>134</sup>

The increasing success of Indigenous peoples in influencing international climate discourse is largely attributable to their own concerted efforts. It is a matter of equity and human rights that Indigenous perspectives are included in responses to the borderless and unprecedented challenges posed by climate change.

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<sup>134</sup> Cullinan (n 40) 92-93.